

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Tara Lyn Justin,
(OI File No. H-15-43513-9)

Petitioner,

v.

The Inspector General.

Docket No. C-16-555

Decision No. CR4689

Date: August 19, 2016

DECISION

I sustain the determination of the Inspector General to exclude Petitioner, Tara Lyn Justin, from participating in Medicare, State Medicaid, and all federally funded health care programs for a minimum of five years.

I. Background

Petitioner requested a hearing in order to challenge the I.G.'s exclusion determination. The I.G. filed a brief (I.G. Br.) in support of his determination, plus four proposed exhibits that are identified as I.G. Ex. 1 – I.G. Ex. 4. Petitioner filed a brief (P. Br.) in opposition. Neither the I.G. nor Petitioner asked for an in-person hearing. I.G. Br. at 5; P. Br. at 3. I receive into evidence I.G. Ex. 1 – I.G. Ex. 4 and decide the case based on the parties' written exchanges.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether Petitioner was convicted of a criminal offense as is defined by section 1128(a)(1) of the Social Security Act (Act), thereby mandating that she be excluded for at least five years.

B. Findings of Fact and Conclusions of Law

Section 1128(a)(1) of the Act mandates the exclusion of any individual who is convicted of a criminal offense relating to the delivery of an item or service under Medicare or a State Medicaid program. The minimum exclusion that must be imposed for a mandatory exclusion is five years. Act § 1128(c)(3)(B).

The facts of this case establish unequivocally that Petitioner was convicted of an offense within the meaning of section 1128(a)(1). Consequently, the law mandates that Petitioner must be excluded for at least five years.

Petitioner was charged originally with felony and misdemeanor crimes in the State of New York, specifically, with one felony count of falsifying business records and one misdemeanor count of theft. She was charged with intent to defraud and to steal property by making or causing false entries in her employer's business records. I.G. Ex. 2 at 1-2. More specifically, she was charged with making false entries in notes regarding the care that her employer, a home health agency, gave to a Medicaid beneficiary. Allegedly, Petitioner falsified records in order to make it appear that she made visits to the beneficiary's home to supervise the providing of care to that beneficiary when, in fact, she did not make those visits. I.G. Ex. 2 at 2. Petitioner eventually pled guilty to a reduced charge of disorderly conduct, in violation of New York penal law, and was sentenced to pay restitution. I.G. Ex. 3; I.G. Ex. 4 at 4-5, 7.

Petitioner plainly was convicted of an offense relating to the delivery of items or services reimbursable by the New York Medicaid program. Her crime was to defraud Medicaid into paying for services that Petitioner did not provide. As part of the disposition of her case, Petitioner paid restitution to the New York Medicaid Fraud Restitution Fund, a fact that in and of itself demonstrates that Petitioner's offense was related to the delivery of health care items and services. I.G. Ex. 3; I.G. Ex. 4 at 4-5. Thus, Petitioner's crime does not just "relate to" Medicaid items or services, but it consists of actual fraud against New York's program. Such fraud is the essence of a section 1128(a)(1) offense.

Petitioner argues, however, that she was not convicted of a "criminal offense." She contends that the offense that she pled guilty to is not a crime under New York law but is merely a "violation" within the meaning of that State's law. P. Br. at 1-2. But,

Petitioner's conviction is for a criminal offense within the meaning of section 1128(a)(1) of the Act no matter how the State of New York may label it. What controls in determining whether an individual is convicted of a criminal offense within the meaning of section 1128(a)(1) is federal and not State law. *Carolyn Westin*, DAB No. 1381 (1993), *aff'd*, *Westin v. Shalala*, 845 F. Supp. 1446 (D. Kan. 1994); *cf. U.S. v. Flores-Rodriguez*, 237 F.2d 405, 409-10 (2d Cir. 1956).

The offense of which Petitioner was convicted has all of the earmarks of a crime even if the State of New York calls it something else. She pled guilty to an offense that carries with it the potential of criminal penalties, including imprisonment. N.Y. Penal Law §§ 240.20; 70.15(4). "Violations" under New York law are considered "offenses." *In re W.*, 312 N.Y.S.2d 544, 546 (1970), *aff'd sub nom. W. v. D.*, 28 N.Y.2d 589 (1971). "An offense is in the nature of a crime and the same rules of law and procedure are to be followed as where the defendant is charged with a crime[.] They are tried like misdemeanors . . . and to them, as to offenses, there should be applicable the criminal-law rules of presumption of innocence and necessity of proof of guilt beyond a reasonable doubt." *People v. Marsh*, 260 N.Y.S.2d 893, 896 (1965) (citations and internal quotation marks omitted); *People v. Hildebrandt*, 308 N.Y. 397 (1955); *People v. Gilbert*, 12 N.Y.S.2d 632, 635 (1939). Indeed, the offense to which Petitioner pled guilty is codified as a penal violation under New York Law. She was charged and her case was docketed in a criminal court.

Petitioner argues that this case is distinguishable from the *Westin* decision because that case involved charges of patient abuse under section 1128(a)(2) of the Act whereas this one involves charges of fraud pursuant to section 1128(a)(1). That is a distinction without a difference. Both sections of the Act are sections that provide for mandatory exclusions based on criminal convictions for specified offenses. There is nothing in the Act or in its history that suggests that Congress intended that something that is a crime under section 1128(a)(2) might be something else under section 1128(a)(1).

/s/

Steven T. Kessel
Administrative Law Judge