Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Glenda Gail Feuge
(O.I. No. 6-10-40652-9),

Petitioner

v.

The Inspector General.

Docket No. C-11-209

Decision No. CR2381

Date: June 6, 2011

DECISION

Petitioner, Glenda Gail Feuge, asks review of the Inspector General's (I.G.'s) determination to exclude her for five years from participation in the Medicare, Medicaid, and all federal health care programs under section 1128(a)(4) of the Social Security Act (Act). For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner, and that statute mandates a minimum five-year exclusion.

I. Background

Petitioner is a certified medication nurse aide in the State of Texas, who pled guilty in state court to felony prescription fraud. I.G. Exs. 2, 5. The court accepted the plea, sentenced her to two years probation, and ordered her to pay a $500 fine and costs. I.G. Ex. 2.

In a letter dated December 30, 2010, the I.G. notified Petitioner that she was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years, because she had been convicted of a felony related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The letter explained that section 1128(a)(4) of the Act authorizes the exclusion. I.G. Ex. 1.

Petitioner timely appealed. Each party has submitted an initial brief (I.G. Br.; P. Br.).[1] The I.G. submitted six exhibits (I.G. Exs. 1-6), and Petitioner submitted what we have determined to be seven exhibits (P. Exs. 1-7).[2] The I.G. submitted a reply brief (I.G. Reply).

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[1] The I.G. initially filed a brief that identified someone other than Glenda Gail Feuge as Petitioner. This was obviously in error, and the I.G. substituted a revised brief that correctly identified the petitioner. Petitioner sent her brief and submissions to the I.G., but not to this office. The I.G. subsequently forwarded copies of the submissions to us.

[2] Petitioner did not mark her exhibits in accordance with my order and Civil Remedies Division procedures. Rather than returning the submissions to Petitioner, we have marked the documents as follows:

- P. Ex. 1 is a one-page statement from the Gillespie County Community Supervision and Corrections Department dated December 29, 2010;
- P. Ex. 2 is a one-page statement from Rex Dickerson, D.C. dated June 4, 2010;
- P. Ex. 3 consists of five pages of documents from the Hill Country Community MHMR Center Substance Abuse Services – a Certificate of Achievement dated December 15, 2010 (page 1); a discharge plan dated November 22, 2010 (pages 2-4); and a referral sheet from the Hill Country Community MHMR Center signed May 20, 2010 (page 5);
- P. Ex. 4 consists of eight pages of documents from the 216th Judicial District Community Supervision & Corrections Department – a checklist of requirements (page 1); instructions for community service dated May 20, 2010 (page 2); Payment Policy signed May 20, 2010 (page 3); Explanation of Probation signed May 20, 2010 (page 4); Consent of Disclosure and Authority to Release Information signed May 20, 2010 (page 5); Certification of Explanation of Terms and Conditions of Probation signed May 20, 2010 (page 6); Statement of Agreement signed May 20, 2010 (page 7), and Civil Rights and Gun Control Act signed May 20, 2010 (page 8);
- P. Ex. 5 is the first page of the district court's judgment (*see* I.G. Ex. 2 at 1);
- P. Ex. 6 are three statements made by Petitioner dated December 15, 2010 (pages 1-2), January 3, 2011 (page 3), and February 23, 2011 (page 4);
- P. Ex. 7 is a one-page Certificate of Completion of the Texas Drug Offender Education Program dated February 2, 2011.

In the absence of an objection, I admit into evidence I.G. Exs. 1-6 and P. Exs 1-7.

I directed the parties to indicate in their briefs whether an in-person hearing is necessary and, if so, to "describe the testimony it wishes to present, the names of the witnesses it would call, and a summary of each witnesses' proposed testimony." I specifically directed the parties to explain why the testimony would be relevant. Order and Schedule for Filing Briefs and Documentary Evidence, Attachment 1 (Informal Brief of Petitioner ¶ III) and Attachment 2 (Informal Brief of I.G. ¶ III) (February 4, 2011). The I.G. indicates that an in-person hearing is not necessary. Petitioner, on the other hand, contends that an in-person hearing is necessary, lists the witnesses she intends to call, and explains the purpose of their testimony. Petitioner's listed witnesses would: explain that, under Texas law, she has not been convicted of a felony; show that she has physical limitations; and show that she has completed the requirements of her probation, including a substance abuse program. P. Br. at 3.

Whether Petitioner was convicted of a felony within the meaning of section 1128(a)(4) is a question of law, not fact. Her physical limitations and her having satisfied the requirements of her probation (which no one disputes) are simply irrelevant to the issue before me. By regulation, I must exclude irrelevant or immaterial evidence. 42 C.F.R. § 1005.17(c). I am therefore obligated to exclude the testimony that Petitioner proposes, so an in-person hearing would serve no purpose.

II. Issues

The sole issue before me is whether Petitioner was convicted of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, within the meaning of section 1128(a)(4) of the Act, thus providing a basis for her exclusion. Because an exclusion under section 1128(a)(4) must be for a minimum of five years, the reasonableness of the length of the exclusion is not an issue.

III. Discussion

> ***Petitioner must be excluded from program participation because she was convicted of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, within the meaning of section 1128(a)(4) of the Act.***[3]

Section 1128(a)(4) of the Act requires that any individual or entity convicted of a felony criminal offense "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance" be excluded from federal health care programs.

[3] I make this one finding of fact/conclusion of law.

In this case, Petitioner was a certified medication aide at a nursing home. She ordered the narcotic, Hydrocodone, from a pharmacy, ostensibly for facility residents. She used the names of residents who had not been prescribed the Hydrocodone, and she then diverted the drugs from the facility for her own personal use. I.G. Ex. 6 at 2. She was charged with, and pled guilty to, prescription fraud – she "intentionally and knowingly possess[ed] a controlled substance, to-wit Hydrocodone, by misrepresentation, fraud, forgery, deception and subterfuge, through the use of a fraudulent prescription form." I.G. Ex. 2 at 1-6. Prescription fraud, section 481.129(a) of the Texas Health and Safety Code, is a second degree felony if the drug involved is listed under Schedule I or II of the Texas Schedules of Controlled Substances. I.G. Ex. 3 at 2. Hydrocodone is listed under Schedule II. I.G. Ex. 4 at 7.

Thus, the court documents establish that Petitioner was convicted of a felony relating to the unlawful prescription or dispensing of a controlled substance, and she must be excluded from program participation.

Petitioner, however, maintains that she was not convicted of a felony because she participated in a deferred adjudication program. The Departmental Appeals Board (Board) has consistently rejected this, and similar arguments, and characterizes as "well established" the principle that the term "conviction" includes "diverted, deferred and expunged convictions regardless of whether state law treats such actions as a conviction." *Henry L. Gupton*, DAB No. 2058 at 8 (2007), and *Ruling on Reconsideration*, Ruling No. 2007-1(2007), *aff'd*, *Gupton v. Leavitt*, 575 F. Supp. 2d 874 (E.D. Tenn. 2008).

In *Gupton*, the Board explained why, in these I.G. proceedings, the federal definition of "conviction" must apply. *See* Act § 1128(i). That definition differs from many state criminal law definitions. For exclusion purposes, Congress deliberately defined "conviction" broadly to ensure that exclusions would not hinge on the state criminal justice policies. Quoting the legislative history, the Board explained:

> The rationale for the different meanings of "conviction" for state criminal law versus federal exclusion law purposes follows from the distinct goals involved. The goals of criminal law generally involve punishment and rehabilitation of the offender, possibly deterrence of future misconduct by the same or other persons, and various public policy goals. [footnote omitted] Exclusions imposed by the I.G., by contrast, are civil sanctions, designed to protect the beneficiaries of health care programs and the federal fisc, and are thus remedial in nature rather than primarily punitive or deterrent. . . . In the effort to protect both beneficiaries and funds, Congress could logically conclude that it was better to exclude providers whose involvement in the criminal system raised serious concerns about their integrity

> and trustworthiness, even if they were not subjected to criminal sanctions for reasons of state policy.

Gupton, DAB No. 2058 at 7-8. I agree with the Board's analysis and conclude that Petitioner was convicted within the meaning of the Act.

IV. Conclusion

For these reasons, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid and all federal health care programs, and the statute mandates a five-year minimum period of exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge