

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Eric Schirm, R.Ph.,  
(OI File No. 5-11-40819-9),

Petitioner,

v.

The Inspector General

Docket No. C-17-694

Decision No. CR4969

Date: November 16, 2017

**DECISION**

Petitioner, Eric Schirm, R.Ph., was indicted on three felony counts: grand theft; Medicaid fraud; and “falsification in a theft offense.” He pled guilty to misdemeanor falsification in a theft offense. Based on this, the Inspector General (IG) has excluded him for five years from participating in Medicare, Medicaid, and all federal health care programs, as authorized by section 1128(a)(1) of the Social Security Act (Act). Petitioner appeals the exclusion. For the reasons discussed below, I find that the IG properly excluded Petitioner Schirm and that the statute mandates a minimum five-year exclusion.

**Background**

In a letter dated April 28, 2017, the IG notified Petitioner that he was excluded from participating in Medicare, Medicaid, and all federal health care programs for a period of five years because he had been convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. The letter explained that section 1128(a)(1) of the Act authorizes the exclusion. IG Exhibit (IG Ex.) 1.

Petitioner timely requested review.

The IG submitted a written argument (IG Br.) and four exhibits (IG Exs. 1-4). Petitioner responded to the IG's brief (P. Br.), and the IG submitted a reply (IG Reply).

In the absence of any objections, I admit into evidence IG Exs. 1-4.

The parties agree that an in-person hearing is not necessary. IG Br. at 7; P. Br. at 3.

## **Discussion**

*Petitioner must be excluded from program participation for a minimum of five years because he was convicted of a criminal offense related to the delivery of an item or service under a state health care program. Act § 1128(a)(1).<sup>1</sup>*

Under section 1128(a)(1) of the Act, the Secretary of Health and Human Services must exclude an individual who has been convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. 42 C.F.R. § 1001.101(a).

On July 21, 2015, an Ohio grand jury indicted Petitioner Schirm on three felony counts, specifically:

- Grand theft; the indictment charges that Petitioner Schirm stole money (between \$7,500 and \$150,000) from the Ohio Medicaid program;
- Medicaid fraud; the indictment charges that Petitioner Schirm made false statements to the Ohio Medicaid program to obtain reimbursement from that program, stealing between \$1,000 and \$7,500;
- Falsification in a theft offense; the indictment charges that Petitioner Schirm made false statements for the purpose of committing theft.

IG Ex. 2.

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<sup>1</sup> I make this one finding of fact/conclusion of law.

On October 31, 2016, Petitioner Schirm entered an “Alford” plea to misdemeanor falsification in a theft, a lesser included offense to the felony charge. IG Ex. 3. The court accepted the plea and found him guilty of the charge. IG Exs. 3, 4. The court entered judgment on November 1, 2016. It sentenced Petitioner Schirm to six months in jail and ordered him to pay \$7,875.26 in restitution to the Ohio Department of Medicaid. IG Ex. 4 at 1.

Petitioner now argues that the IG may not rely on his Alford plea as the basis for his exclusion, pointing out that: 1) an Alford plea is not an admission of guilt; 2) the plea was used to avoid a potential sentence; 3) Petitioner did not admit any facts; and 4) an Alford plea cannot be used in any subsequent civil proceeding. P. Br. at 2.

The statute and regulations provide that a person is “convicted” when, “a plea of guilty or nolo contendere . . . has been accepted by the . . . court.” Act § 1128(i)(3). The Departmental Appeals Board has long held that an Alford plea is a guilty plea within the meaning of section 1128(i)(3). In the Board’s view, where, as here, the court has accepted an Alford plea as a guilty plea, that plea falls within the statutory definition of a “conviction.” *Michael S. Rudman, M.D.*, DAB No. 2171 at 6 (2008); *Johnnelle Johnson Bing*, DAB No. 2251 at 3 (2009); *Kim J. Rayborn*, DAB No. 2248 at 5-6 (2009).

Petitioner also points out that the charge of Medicaid fraud was dismissed and argues that the charge to which he pled – which does not mention the state health care program – was ultimately not related to the delivery of an item or service under the Medicaid program. The Departmental Appeals Board has long rejected efforts to limit section 1128 review to the bare elements of the offense on which the individual was convicted. *See Narendra M. Patel, M.D.* DAB No. 1736 at 7 (2000), *aff’d Patel v. Thompson*, 319 F.3d 1317 (11<sup>th</sup> Cir. 2003) (“We thus see nothing in section 1128(a)(2) that requires that the necessary elements of the criminal offense must mirror the elements of the exclusion authority, nor that all statutory elements required for an exclusion must be contained in the findings or record of the state criminal court.”); *Timothy Wayne Hensley*, DAB No. 2044 at 7 (2006); *Scott D. Augustine*, DAB No. 2043 at 6 (2006); *Lyle Kai, R.Ph.*, DAB No. 1979 at 5 (2005), *aff’d, Kai v. Leavitt*, No. 05-00514 BMK (D. Haw. July 17, 2006) (holding that an offense is “related to” the delivery of a healthcare item or service, if there is “a nexus or common sense connection” between the conduct giving rise to the offense and the delivery of a healthcare item or service); *Berton Siegel, D.O.*, DAB No 1467 at 5 (1994); *Carolyn Westin*, DAB No. 1381 (1993), *aff’d sub nom. Westin v. Shalala*, 845 F. Supp. 1446 (D. Kan. 1994).

Although the underlying facts here are sparse, there is no doubt that Petitioner’s “falsification in a theft offense” was related to Medicaid because the sentencing court ordered him to pay restitution to that program. This creates a direct connection between his crime and the state health care program. Thus, Petitioner Schirm was “convicted” within the meaning of section 1128(a)(1) and he is subject to exclusion.

