

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Sammy W. Kidd
(OI File No. H-15-42958-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-286

Decision No. CR4608

Date: May 13, 2016

DECISION

Petitioner, Sammy W. Kidd, was a caregiver, working in Bernalillo County, New Mexico. He pled no contest to one felony count of Medicaid fraud. 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 Kidd and that the statute mandates a minimum five-year exclusion.

Background

In a letter dated December 31, 2015, 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 was 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 Ex. 1. Petitioner timely requested review.

Each party submitted a written argument (IG Br.; P. Br.). Petitioner submitted an additional submission, and the IG submitted a reply. The IG submitted five proposed exhibits (IG Exs. 1-5). Petitioner submitted four proposed exhibits (P. Exs. 1-4). The IG objects to my admitting P. Ex. 4, a January 15, 2016 letter from the New Mexico Department of Health advising that it had granted Petitioner Kidd an “Employment Clearance.” The IG argues that the state’s determination that Petitioner was “cleared” for employment as a caregiver is irrelevant to the issue presented here: whether the IG has properly excluded Petitioner from program participation. I agree and am required to exclude irrelevant evidence. 42 C.F.R. § 1005.17(c).

In the absence of any other objections, I admit into evidence IG Exs. 1-5 and P. Exs. 1-3.

The parties agree that an in-person hearing is not necessary. IG Br. at 5; P. Br. at 2.

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 Medicare or a state health care program, within the meaning of section 1128(a)(1).¹

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).

Here Petitioner Kidd provided in-home services to Medicaid beneficiaries in the State of New Mexico. IG Exs. 4, 5. He submitted claims to the state Medicaid program for services he did not provide, and, on August 26, 2015, pled “no contest” in state court to a felony charge of Medicaid fraud. IG Ex. 2. The court accepted his plea, and issued a “conditional discharge,” which deferred the proceedings for 18 months “without adjudication of guilt.” The court also sentenced Petitioner to 18 months supervised probation, ordered him to pay restitution of \$1,050, and explicitly excluded him from program participation pursuant to 42 C.F.R. § 1001.102. IG Ex. 3.²

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

² I am confused as to why this appeal is before me. As part of his plea, Petitioner Kidd acknowledged that he would be excluded from program participation and agreed that he would not contest the exclusion. IG Ex. 2 at 2. Then the sentencing court ordered that he be excluded. IG Ex. 3 at 5. But neither party has addressed the significance of those provisions of the plea agreement and court judgment.

Petitioner argues that he was not convicted because he completed his probation, paid restitution, and the charges were dismissed. P. Additional Submission; P. Exs. 1, 3.

Under the Act and regulations, a person is “convicted” when “a judgment of conviction has been entered” regardless of whether that judgment has been (or could be) expunged or otherwise removed. Act § 1128(i)(1); 42 C.F.R. § 1001.2(a)(2). Individuals who participate in a “deferred adjudication or other program or arrangement where judgment of conviction has been withheld” are also “convicted” within the meaning of the statute. Act § 1128(i)(4); 42 C.F.R. § 1001.2(d). Based on these provisions, the Departmental Appeals Board (Board) characterizes as “well established” the principle that a “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), *aff’d sub nom. Gupton v. Leavitt*, 575 F. Supp. 2d 874 (E.D. Tenn. 2008).

The Board explained why, in these IG proceedings, the federal definition of “conviction” must apply. 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 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.

Petitioner also complains that he received bad legal advice, having been told that his plea would not show up as a conviction.³ He points to a telephone conversation between his

³ Inasmuch as he signed a plea agreement stipulating that he would be excluded, Petitioner can hardly claim that he did not understand that he would be excluded based on his plea. IG Ex. 2 at 5.

father and his former employer and claims that the employer admitted that his payroll clerk committed the fraud. P. Additional Submission at 1-2. But the regulations explicitly preclude such a collateral attack on an underlying conviction.

When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it, either on substantive or procedural grounds, in this appeal.

42 C.F.R. § 1001.2007(d); *Donna Rogers*, DAB No. 2381 at 4-5 (2011); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Chander Kachoria, R.Ph.*, DAB No. 1380 at 8 (1993) (“There is no reason to ‘unnecessarily encumber the exclusion process’ with efforts to reexamine the fairness of state convictions.”) (citation omitted); *Young Moon, M.D.*, DAB CR1572 (2007).

Petitioner’s conviction thus falls squarely within the statutory and regulatory definition of “conviction,” and his conviction for Medicaid fraud is obviously related to the delivery of services under a state health care program. He is therefore subject to exclusion. An exclusion brought under section 1128(a)(1) must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

Conclusion

For these reasons, I conclude that the IG properly excluded Petitioner from participating in Medicare, Medicaid and all federal health care programs, and I sustain the five-year exclusion.

/s/

Carolyn Cozad Hughes
Administrative Law Judge