Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Carla Elaine Schick,
(OI File No.: H-14-42712-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-1308

Decision No. CR4059

Date: July 22, 2015

DECISION

Petitioner, Carla Elaine Schick, is a registered nurse, licensed to practice in Indiana, who was convicted on one felony count of obtaining a controlled substance by fraud or deceit. Pursuant to section 1128(a)(4) of the Social Security Act (Act), the Inspector General (I.G.) has excluded her from participating in Medicare, Medicaid, and all federal health care programs for a period of five years. Petitioner appeals the exclusion.

For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner and that the statute mandates a minimum five-year exclusion.

Background

In a letter dated January 30, 2015, the I.G. advised Petitioner Schick that she was excluded from participating in Medicare, Medicaid, and all federal health care programs because she had been convicted of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. I.G. Ex. 1. Petitioner requested review.

The I.G. has submitted its brief (I.G. Br.), nine exhibits (I.G. Exs. 1-9), and a reply brief (I.G. Reply). Petitioner, who is appearing *pro se*, did not submit a brief but, in addition to her hearing request, filed seven one-page documents, which she did not mark, along with a one-page document, marked P. Ex. 8, in which she explains that she uploaded seven exhibits into evidence. The documents are quarterly compliance reports from the Indiana State Nursing Assistance Program, which show that she complied with her recovery monitoring agreement.

The I.G. objects to my admitting Petitioner's exhibits because they were not marked in accordance with Civil Remedies procedures and because they are irrelevant. That the documents were not properly marked is unfortunate but hardly justifies excluding them, particularly since the I.G. is not in any way prejudiced by that oversight. Each document is plainly identified with an exhibit number in the list of electronically-filed documents. However, I agree that the documents are irrelevant. I am required to exclude irrelevant or immaterial evidence. 42 C.F.R. § 1005.17(c).

I therefore admit into evidence I.G. Exs.1-9 and decline to admit Petitioner's exhibits.

I directed each party to indicate in its brief whether an in-person hearing would be 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 witness's proposed testimony. I also specifically directed the parties to explain why the testimony would be relevant. Order and Schedule for Filing Briefs at 2 ¶ 3 (April 2, 2015); Informal Brief of Petitioner at 2-3 ¶ III; Informal Brief of Inspector General at 3-4 ¶ III. The I.G. indicates that an in-person hearing is not necessary. I.G. Br. at 10. Petitioner did not respond to that question, but she does not contend that an in-person hearing is necessary, and she lists no potential witnesses. I therefore decide this case based on the written record.

Discussion

> ***Because Petitioner was convicted of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, she must be excluded from program participation for at least five years. Act § 1128(a)(4), (c)(3)(B).***[1]

Section 1128(a)(4) of the Act mandates that the Secretary of Health and Human Services exclude from program participation any individual or entity convicted of a felony criminal offense "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance."

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

Here, Petitioner Schick was unquestionably convicted of a drug-related felony, at least initially. On July 17, 2013, she pled guilty to one felony count of a two-count indictment and was convicted of obtaining a controlled substance by fraud or deceit, in violation of I.C. 35-48-4-14(c). I.G. Exs. 3, 4, 5. She admitted that she intentionally acquired possession of a controlled substance, Clonazepam, by forgery. I.G. Ex. 3.

The state court accepted her plea and entered judgment against her on the same day. The court sentenced her to 540 days with the Department of Corrections, with all but the time served (27 days in home detention) suspended, and 18 months of probation. I.G. Ex. 5. As part of its judgment, the court authorized her participation in Indiana's Alternative Misdemeanor Sentencing program, which allowed her to ask that her felony conviction be reduced to a misdemeanor after she successfully completed her period of probation. I.G. Ex. 5.

On January 9, 2015, Petitioner represented to the court that she had "successfully completed" all requirements of her probation and had not committed any subsequent criminal offenses. She asked the court to reduce her felony conviction to a misdemeanor. On January 14, 2015, the court granted Petitioner's request. I.G. Ex. 7.

Petitioner suggests that, because the court reduced her felony conviction to a misdemeanor, she was not convicted of a felony and is not subject to a mandatory exclusion. Hearing Request (February 13, 2015).

The statute and regulations provide that a person is "convicted" when "a judgment of conviction has been entered," regardless of whether that judgment has been expunged or otherwise removed. Act § 1128(i)(1); 42 C.F.R. § 1001.2(a)(2). Further, individuals who participate in "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 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).

Petitioner's conviction falls squarely within the statutory and regulatory definitions of "convicted." Because she was convicted of a felony criminal offense "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance," she is subject to exclusion. An exclusion brought under section 1128(a)(4) must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

Conclusion

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

/s/
Carolyn Cozad Hughes
Administrative Law Judge