

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Derek Delamotte,
(OI File No.: H-16-42321-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-251

Decision No. CR4845

Date: May 10, 2017

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Derek Delamotte, from participating in Medicare, State Medicaid, and other federally funded health care programs for a minimum of five years.

I. Background

The I.G. excluded Petitioner based on his determination that Petitioner had been convicted of a criminal offense within the meaning of section 1128(a)(1) of the Social Security Act (Act).

The I.G. filed a brief and five proposed exhibits, identified as I.G. Ex. 1-I.G. Ex. 5, in support of his determination to exclude Petitioner. Additionally, the I.G. filed a reply brief. Petitioner filed a brief plus seven proposed exhibits, identified as P. Ex. 1-P. Ex. 7. Neither party offered the testimony of a witness.

I receive the parties' exhibits into the record and I decide the case based on their written submissions.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether Petitioner was "convicted" of a crime as that term is defined at section 1128(i) of the Act and whether the Act mandates a minimum exclusion of five years.

B. Findings of Fact and Conclusions of Law

The facts of this case are undisputed. A grand jury in Ohio indicted Petitioner on a count of felony theft from the Ohio Medicaid program. I.G. Ex. 2 at 1. Additionally, the grand jury indicted Petitioner for felony forgery of physicians' signatures. *Id.* at 2. On October 27, 2015, Petitioner pled guilty to the charges. I.G. Ex. 3. The sentencing court granted Petitioner a case disposition known under Ohio law as an "Intervention in Lieu of Conviction" (ILC). This disposition required Petitioner to satisfy specified conditions. *Id.* at 1-2. These conditions included the requirement that Petitioner pay restitution for his crimes. *Id.* at 4. The court stayed criminal proceedings against Petitioner pending completion of these conditions, stating:

The defendant has entered and the Court has accepted a guilty plea for the indictment. The Court will not make a finding of guilty during the period of intervention.

Id. at 2.

Petitioner subsequently completed the conditions of the ILC and the court dismissed the criminal charges against him. P. Ex. 2.

The crime of felony theft from the Ohio Medicaid program to which Petitioner pled guilty plainly consists of a crime for which section 1128(a)(1) of the Act mandates exclusion. Section 1128(a)(1) requires the exclusion of any individual who is convicted of a crime related to the delivery of an item or service under Medicare or a Medicaid program. Theft of funds from a Medicaid program directly relates to that program and to the items or services that the program delivers.

Petitioner doesn't dispute that his crime is program-related. Rather, he argues that he was not "convicted" of a crime as that term is defined by section 1128(i) of the Act. Essentially, he argues that he wasn't convicted of any crime because the court in Ohio dismissed the indictment against him after he successfully completed the ILC.

I find this defense to be without merit. Section 1128(i) defines “convicted” to include the precise circumstances of Petitioner’s case. “Convicted” includes:

[W]hen the individual . . . has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

Act, section 1128(i)(4). Here, Petitioner pled guilty to the felonies of which he was charged. The court, noting the circumstances of the case, established an ILC, withholding judgment of conviction pending Petitioner’s completion of the plan. That arrangement is a classic deferred adjudication or “other arrangement or program” as is defined by the Act.

Section 1128(a)(1) of the Act mandates exclusion of any individual convicted of a program-related crime. The I.G. has no discretion in determining whether to exclude Petitioner. Furthermore, the I.G. must exclude for at least five years any individual convicted of a section 1128(a)(1) crime. Act, section 1128(c)(3)(B).

Petitioner argues also that his case has special features that mitigate in his favor and for a reduced exclusion, citing findings that he suffered from a mental impairment at the time he committed his crimes. Mitigating factors, including reduced mental capacity may – under some circumstances – offset aggravating factors that militate in favor of increasing the length of exclusion beyond the five-year minimum. But, mitigating evidence, including reduced mental capacity, may never justify reducing the length of exclusion to a term that is less than the mandatory minimum of five years. Consequently, I find to be irrelevant Petitioner’s assertion that he suffered from mental impairment and that this serves as a mitigating factor.

/s/
Steve T. Kessel
Administrative Law Judge