

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Nenice Marie Andrews,
(OI File No. 9-13-40133-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-10

Decision No. CR3810

Date: April 23, 2015

DECISION

Petitioner, Nenice Marie Andrews, was a registered nurse and adult nurse practitioner licensed to practice in Oregon. She was convicted on two felony counts of tampering with drug records. 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 July 31, 2014, the I.G. advised Petitioner Andrews 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.) and eight exhibits (I.G. Exs. 1-8). Petitioner has submitted a brief (P. Br.) and one exhibit (P. Ex. 1), although, with her hearing request, she filed additional documents, including a September 19, 2014 letter to a state judge, with attachments. The I.G. filed a reply (I.G. Reply). In the absence of any objection, I admit into evidence I.G. Exs.1-8 and P. Ex. 1.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary, and, if so, to “describe the testimony that [it] wishes to present and provide the name of any witness and a summary of each witness proposed testimony.” I specifically directed the parties to explain why the testimony would be relevant. Order and Schedule for Filing Briefs at 3 ¶ 4); Informal Brief of Petitioner ¶ III (November 12, 2014). The I.G. indicates that an in-person hearing is not necessary. I.G. Br. at 14. Petitioner suggests that a hearing may be necessary, and that, if allowed to testify, she would explain the circumstances surrounding her conviction and the actions she took thereafter. P. Br. at 7-9. But I may not look behind the fact of Petitioner’s conviction, so such testimony would be irrelevant. *See* 42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000). Because I must exclude irrelevant or immaterial evidence, I must exclude the testimony that Petitioner proposes, and an in-person hearing would serve no purpose. 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.”

Here, Petitioner Andrews was unquestionably convicted of drug-related felonies, at least initially. On March 12, 2014, she pled guilty to two (of eleven) felony counts of tampering with drug records. Or. Rev. Stat. § 167.212. She specifically admitted that she made false statements in a prescription for controlled substances. I.G. Ex. 4; *see* I.G. Ex. 3. The state court accepted her plea and entered judgment against her on March 20, 2014. The court sentenced her to 18 months of formal probation and imposed \$400 in

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

ines. I.G. Ex. 5. As part of its judgment, the court held that, after successfully completing one year of probation, Petitioner could ask that her felony convictions be reduced to misdemeanors. I.G. Ex. 5 at 1.

Six months later – on September 19, 2014 – Petitioner represented to the court that she had “fully complied with all conditions” of her probation, had “paid the entire financial obligation,” and had completed chemical dependency treatment; she asked the court to reduce her felony convictions to misdemeanors before she completed a full year’s probation. She sought the expedited relief in an effort to avoid this mandatory exclusion. *See* I.G. Ex. 6 . In an order dated September 23, 2014, the court granted Petitioner’s request. I.G. Ex. 7.

Petitioner asserts that, because the court reduced her felony convictions to misdemeanors, she was not convicted of a felony and is not subject to a mandatory exclusion.

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 (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 I.G. 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 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, at 7-8.

Petitioner now argues that she was not convicted of a felony because her conviction was reduced before she completed the full term of her probation (even though she appears to have completed most of its terms). She points out that the state court deliberately changed the convictions so that she could avoid a mandatory exclusion. P. Br. at 5.

Whatever the state court's motivation, it does not have the authority to nullify the exclusion statute. Had the court vacated Petitioner's felony convictions because they were made in error, Petitioner would not be subject to a five-year exclusion. In *Jennifer L. Stack*, DAB CR3494 (2014), for example, the petitioner was not subject to exclusion based on her felony conviction because the state court vacated that conviction pursuant to a section of the Ohio statutes that allows a defendant to withdraw a guilty plea after sentencing if she shows an extraordinary and fundamental flaw in the original plea proceeding. In contrast, here, the sentencing court reduced Petitioner's conviction pursuant to a provision of the Oregon statutes that allows the court to "enter judgment of conviction for a Class A misdemeanor" when the defendant "*has successfully completed a sentence of probation*" and the court "believes that it would be unduly harsh to sentence the defendant for a felony." Or. Rev. Stat. § 161.705; I.G. Ex. 7. (Emphasis added).

In its judgment converting the felonies to misdemeanors, the court noted that the defendant had been convicted of felonies but requested "misdemeanor treatment" of those felonies. I.G. Ex. 7. The court emphasized that it stood by the original felony convictions: "I felt it was appropriate that she have that felony and that she have the motivation to earn the Court's consideration." I.G. Ex. 8 at 2-3. The court minimized the significance of its acting before the year had passed, noting that the one-year waiting period was "somewhat arbitrary," and had been imposed because a year afforded "most people" sufficient time to complete the terms of their probation. I.G. Ex. 8 at 2-4.

Petitioner was thus convicted of felonies, which, after she completed the primary conditions of her probation (paid the fines and completed a drug treatment program) were treated as misdemeanors. Her convictions fall squarely within the statutory and regulatory definitions of "conviction." 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).

