

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

James Atkinson,

Petitioner,

v.

The Inspector General.

Docket No. C-14-1071

Decision No. CR3341

Date: August 21, 2014

DECISION

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

I. Background

Petitioner requested a hearing to challenge the I.G.'s determination to exclude him. I established a briefing schedule. The I.G. filed a brief and exhibits that are identified as I.G. Ex. 1 – I.G. Ex. 6. Petitioner filed a response and exhibits that are identified as P. Ex. 1 – P. Ex. 6. The I.G. did not file a reply brief.¹ I receive the parties' exhibits into the record.

¹ The I.G. asserts that Petitioner's hearing request fails to state an argument that I have authority to adjudicate. However, Petitioner raises a justiciable issue, that being whether he was "convicted" of a crime.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether Petitioner was convicted of a crime.

B. Findings of Fact and Conclusions of Law

The I.G. excluded Petitioner under the authority of section 1128(a)(1) of the Social Security Act (Act). This section mandates the exclusion of any individual who is convicted of a criminal offense related to the delivery of an item or service under Medicare or a State health care program (Medicaid). The I.G. excluded Petitioner for at least five years, the minimum mandatory exclusion period for an individual who is convicted of an 1128(a)(1) crime. Act § 1128(c)(3)(B).

Petitioner does not deny that, if he was convicted of a crime, that crime is an offense falling within the reach of section 1128(a)(1). In fact, Petitioner was charged under New Mexico law with the crime of Medicaid fraud and he pled guilty to that crime. I.G. Ex. 3 at 1; I.G. Ex. 4 at 1. However, Petitioner asserts that, even if he pled guilty to the crime of Medicaid fraud, he was not “convicted” of that crime and, therefore, he argues, no basis exists to exclude him. I disagree. Petitioner was plainly “convicted” of a crime and, consequently, the I.G. must exclude him. Act §§ 1128(i)(3), (4)

The gravamen of Petitioner’s argument is that, as part of his plea, he entered into a “conditional discharge arrangement,” an arrangement that he characterizes as avoiding any finding of guilt and leaving him in a status equivalent to that of any individual who has not been convicted of a crime. However, the terms of Petitioner’s plea agreement make it plain that the agreement is more than a simple non-finding of guilt. Discharge of the criminal complaint against Petitioner hinged on his satisfactory completion of probation, payment of restitution, and additional requirements. The plea agreement included the following terms:

- Petitioner pled guilty to the crime of Medicaid fraud. I.G. Ex. 4 at 1.
- He was sentenced to a term of probation, to be discharged upon his payment of restitution in full. I.G. Ex. 4 at 1 – 2.
- He agreed that, if he violated his probation, he could be incarcerated. I.G. Ex. 4 at 2.
- He agreed to a five-year State exclusion from participating in Medicare, Medicaid, or other federal health care programs. I.G. Ex. 4 at 2.

- He agreed that his probation could be subject to modification in the event that he violated any of the terms and conditions that were imposed against him. I.G. Ex. 4 at 3.
- He acknowledged that his plea would have the effect of:

[T]riggering certain administrative exclusion actions by federal and/or state agencies . . . As a result I will be barred from employment by any facility or agency or as an individual, that is funded in whole or in part by any federally-funded healthcare program, or any licensed health care facility or agency.

I.G. Ex. 4 at 5.

Under section 1128 an individual is “convicted” of a crime when a plea of guilty or nolo contendere by that individual has been accepted by a federal, State, or local court. Act § 1128(i)(3). An individual also is “convicted” when he or she enters into participation in a first offender, deferred adjudication, or “other arrangement or program where judgment of conviction has been withheld.” Act § 1128(i)(4).

Petitioner’s agreement falls under both of these subsections. First, he pled guilty to a crime and a New Mexico court accepted that plea. Act § 1128(i)(3). That is made evident from Petitioner’s plea agreement. I.G. Ex. 4. It is also made evident by an Order of Conditional Discharge subsequently signed by a New Mexico State judge. I.G. Ex. 5 at 1 – 2. That order recites explicitly that Petitioner “entered into a plea of guilty to” the crime of Medicaid fraud. *Id.* at 1. The court accepted that plea conditioned on the various terms that it imposed against Petitioner. *Id.* at 1 – 2.

Second, the arrangement that Petitioner entered into was a “deferred adjudication” or “other arrangement or program where judgment of conviction has been withheld.” Act § 1128(i)(4). The Order of Conditional Discharge recites that, “without adjudication of guilt, further proceedings be deferred . . .” I.G. Ex. 5 at 1. That is precisely what is defined as a “deferred adjudication” arrangement or program by section 1128(i)(4).

Petitioner argues that he was not convicted of a crime because no finding of guilt was entered against him. Rather, all of the proceedings were dismissed upon Petitioner’s payment of restitution. But, the absence of a finding of guilt is no impediment to Petitioner being “convicted” within the meaning of the Act. The Act contemplates that there will be arrangements in which judgments of conviction are withheld or where criminal charges are dismissed upon successful completion of court-imposed requirements. Those arrangements are swept up in the broad definition of “convicted” set forth by subsections (i)(3) and (4).

Furthermore, it is more than obvious that Petitioner knew that the arrangement that he entered into would constitute a conviction under the Act and that it would subject him to civil remedies including exclusion. Indeed, Petitioner agreed to that precise outcome. I.G. Ex. 4 at 4.

Petitioner also attempts to draw a legal distinction between a court receiving and accepting a plea. He argues that when a court "receives" a plea it does not "accept" it if subsequently the court discharges the charges against the party entering the plea. This is a distinction without a difference under the Act, whatever fine lines may be drawn under New Mexico law. The common and ordinary definition of "accept" is to receive something.

<http://www.merriam-webster.com/dictionary/accept>

There is nothing to suggest that the Act uses the term in any way other than its ordinary sense or meaning. Consequently, Petitioner was "convicted," his arguments notwithstanding.

/s/
Steven T. Kessel
Administrative Law Judge