

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jennifer Waldron Brown,
(OI File No. H-14-41174-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-145

Decision No. CR3887

Date: May 22, 2015

DECISION

Petitioner, Jennifer Waldron Brown, worked as a medical secretary in an Arizona physician's office. She was convicted on one felony count of solicitation to commit possession of a dangerous drug. Pursuant to section 1128(a)(3) of the Social Security Act (Act), the Inspector General (I.G.) has excluded her from participating in the Medicare, Medicaid, and all federal health care programs for a period of five years.

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 that, because she had been convicted of a felony offense related to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct in connection with the delivery of a health care item or service, the I.G. was excluding her from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. I.G. Ex. 1. Petitioner requested review.

The parties have submitted their written arguments (I.G. Br.; P. Br.), and replies (I.G. Reply; P. Reply). With his brief, the I.G. submitted eight exhibits (I.G. Exs. 1-8); Petitioner submitted two exhibits (P. Exs. 1-2). In the absence of any objections, I admit into evidence I.G. Exs. 1-8 and P. Exs. 1-2.

I directed the parties to indicate in their briefs 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 witnesses’ proposed testimony.”

I specifically directed the parties to explain why the testimony would be relevant. Order and Schedule for Filing Briefs and Documentary Evidence at 2 ¶ 3, Attachment 1 (Informal Brief of Petitioner ¶ III) and Attachment 2 (Informal Brief of I.G. ¶ III) (December 4, 2014). The I.G. indicates that an in-person hearing is not necessary. I.G. Br. at 9. Petitioner, on the other hand, indicates that an in-person hearing is necessary, but she lists no potential witnesses and does not explain what an in-person hearing would accomplish. P. Br. at 2-3. Because there are no witnesses to examine or cross-examine, I decline to schedule a hearing that would serve no purpose.

Discussion

Petitioner must be excluded from program participation for a minimum of five years because she was convicted of felony fraud in connection with the delivery of a health care item or service.¹

Section 1128(a)(3) provides that an individual or entity convicted of felony fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service must be excluded from participation in federal health care programs for a minimum of five years. *See* 42 C.F.R. § 1001.101(c).

While working in a physician’s office, Petitioner Brown called the pharmacy and placed prescription drug orders for herself, without the physician’s knowledge or authorization. I.G. Ex. 4. A Grand Jury indicted her on four felony counts: fraudulent schemes and artifices; acquisition of a dangerous drug by fraud (two counts); and taking the identity of another person. I.G. Ex. 5. She pled guilty to one felony count of solicitation to commit possession of a dangerous drug. I.G. Ex. 6. On March 7, 2014, the Arizona court entered judgment against her, sentenced her to six months’ probation, and ordered her to pay investigative costs to the Medicaid Fraud Control Unit. I.G. Ex. 2.

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

Petitioner's felony conviction was thus plainly related to fraud in connection with the delivery of a health care item (drugs). She "knowingly" obtained a dangerous drug "by fraud, deceit, misrepresentation or subterfuge." I.G. Ex. 5 at 2; *see* I.G. Ex. 2 at 1; I.G. Ex. 3 at 1; I.G. Ex. 4 at 3. She is therefore subject to exclusion.

Petitioner, however, points out that her conviction has been reduced to a misdemeanor and is pending dismissal by the Arizona court. P. Br. at 5-6; P. Reply at 2; *see* I.G. Ex. 7 (Petition for Early Termination of Probation). Apparently, Arizona law allows a court to reduce to a misdemeanor the felony conviction of a qualifying criminal defendant who has completed her probation. However, until the court enters an order designating the conviction a misdemeanor, it is "treated as a felony for all purposes. . . ." A.R.S. § 13-604(A).

Under the Act and regulations, 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 arrangement or program 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 was convicted of a felony, which, after she completed probation, was treated as a misdemeanor. Because her conviction falls squarely within the statutory and regulatory definition of “conviction,” she is subject to exclusion. An exclusion brought under section 1128(a)(3) 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 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