

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Lydia A. Aguilar,
(O.I. File No. H-16-4-0846-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-695

Decision No. CR4755

Date: December 8, 2016

DECISION

Petitioner, Lydia A. Aguilar, was a caregiver at a residential care facility for the elderly in the State of California. She pled no contest to failure to report abuse or neglect of an elder or dependent adult, in violation of state law, a misdemeanor. Based on this conviction, the Inspector General (IG) has excluded her for five years from participating in Medicare, Medicaid, and all federal health care programs, as authorized by section 1128(a)(2) of the Social Security Act (Act). Petitioner appeals the exclusion. For the reasons discussed below, I find that the IG properly excluded Petitioner Aguilar and that the statute mandates a minimum five-year exclusion.

Background

In a letter dated May 30, 2016, the IG notified Petitioner that she was excluded from participating in Medicare, Medicaid, and all federal health care programs for a period of five years because she had been convicted of a criminal offense related to the neglect or abuse of patients in connection with the delivery of a health care item or service. The letter explained that section 1128(a)(2) of the Act authorizes the exclusion. I.G. Ex. 1. Petitioner timely requested review.

Each party submitted a written argument (IG Br.; P. Br.). The IG submitted five proposed exhibits (IG Exs. 1-5). Petitioner submitted one proposed exhibit (P. Ex. 1). In the absence of any objections, I admit into evidence IG Exs. 1-5 and P. Ex. 1.

The parties agree that an in-person hearing is not necessary. IG Br. at 5; P. Br. at 2.

Discussion

*Petitioner must be excluded from program participation for a minimum of five years because she was convicted of a criminal offense related to the neglect or abuse of a patient in connection with the delivery of a health care item or service. Act § 1128(a)(2).*¹

Under section 1128(a)(2) of the Act, the Secretary of Health and Human Services must exclude an individual who has been convicted, under federal or state law, of “a criminal offense related to the neglect or abuse of a patient, in connection with the delivery of a health care item or service” 42 C.F.R. § 1001.101(b). The “delivery of a health care item or service” includes providing any item or service to an individual to meet his or her physical, mental, or emotional needs or well-being, whether or not reimbursed by Medicare, Medicaid, or any federal health care program. *Id.*

Here, in November and December 2014, Petitioner Aguilar was an assistant, working at a residential care facility for the elderly in Fairfield, California. As such she was required by state law to report the abuse or neglect of an elder or dependent adult. IG Ex. 4 at 2; IG Ex. 5 at 1. In June 2015, she was charged with one misdemeanor count of willfully and unlawfully failing to report the sexual assault of an elder or dependent adult. IG Ex. 4 at 2. (Cal. Welf. & Inst. Code § 15630(h)). Specifically, one of the facility workers repeatedly raped a resident; Petitioner Aguilar knew about it (and may even have been present when one of the rapes occurred), but did not report it. IG Ex. 4 at 2; IG Ex. 5 at 3.

On December 18, 2015, Petitioner Aguilar pled no contest in state court to the misdemeanor count. IG Ex. 2. The court found her guilty and sentenced her to complete a community care licensing program. IG Ex. 3.

Petitioner denies that she was convicted of a criminal offense because, after she completed her sentence, the court dismissed the case. P. Br. at 1-2; P. Ex. 1. Under the Act and regulations, a person is “convicted” when “a judgment of conviction has been

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

entered” regardless of whether that judgment has been (or could be) expunged or otherwise removed. Act § 1128(i)(1); 42 C.F.R. § 1001.2(a)(2). Individuals who participate in a “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 IG 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’s conviction falls squarely within the ambit of section 1128(a)(2). She was charged with delivering health care services to a vulnerable resident, was aware that one of her co-workers sexually assaulted that resident, but failed to report it as required by law. She is therefore subject to exclusion. An exclusion brought under section 1128(a)(2) must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2).

Conclusion

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

/s/
Carolyn Cozad Hughes
Administrative Law Judge