Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Kimberly Dawn Inman,

Petitioner,

v.

The Inspector General.

Docket No. C-17-175

Decision No. CR4896

Date: July 26, 2017

DECISION

The Inspector General (I.G.) of the U.S. Department of Health and Human Services excluded Petitioner, Kimberly Dawn Inman (Petitioner or Ms. Inman), from participation in Medicare, Medicaid, and all other federal health care programs for the minimum statutory period of five years as authorized by section 1128(a)(1) and section 1128(a)(4) of the Social Security Act (Act). *See* Act, § 1128(c)(3)(B); *see also* 42 U.S.C. § 1320a-7(a)(1), (4). Petitioner now challenges the exclusion. For the reasons stated below, I conclude that the I.G. had a basis for excluding Petitioner from program participation and that the five-year exclusion is mandated by law.

I. Background

Ms. Inman is an advanced nurse practitioner who owned a family medical clinic in Tennessee. I.G. Exhibit (Ex.) 2 at 2. On January 21, 2014, Petitioner was indicted on one count of unlawful distribution of a controlled substance in violation of Tenn. Code Ann. § 53-11-401(a)(1) (Count One), one count of TennCare[1] fraud in violation of Tenn. Code Ann. § 71-5-2601(a)(1)(A)(i) (Count Two), and two counts of criminal responsibility for the conduct of another in violation of Tenn. Code Ann. § 39-11-402

[1] TennCare is Tennessee's Medicaid program. *See* Tenn. Code Ann. § 71-5-2503.

(Counts Three and Four).[2] I.G. Ex. 3. On May 14, 2015, a jury found Petitioner guilty of TennCare fraud (Count Two) and one count of criminal responsibility for the conduct of another (Count Four).[3] P. Ex. 4. On November 3, 2015, the Criminal/Circuit Court of Decatur County, Tennessee (court) placed Petitioner on judicial diversion pursuant to Tenn. Code Ann. § 40-35-313 for Counts Two (one year's probation) and Four (two years' probation). I.G. Exs. 4, 5. The court ordered Petitioner to pay a $3,000 fine for Count Two and a $25,000 fine for Count Four. *Id*. The court dismissed Count Two of the indictment on March 13, 2017, and dismissed Count Four of the indictment on May 25, 2017. *See* P. Exs. 5, 6. Both convictions were expunged. *See* P. Exs. 7, 8.

In a letter dated November 30, 2016, the I.G. notified Petitioner that she was being excluded from Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years. I.G. Ex. 1 at 1. The I.G. cited sections 1128(a)(1) and 1128(a)(4) of the Act as authority for the exclusion. *Id.* Petitioner timely filed a request for hearing, and the case was assigned to me for hearing and decision.

On February 27, 2017, I convened a telephonic prehearing conference, the substance of which is summarized in my February 28, 2017 Order and Schedule for Filing Briefs and Documentary Evidence (Order). Among other things, I directed the parties to file short-form briefs, Order ¶ 7.b, and a copy of the short-form brief for Petitioner was enclosed with the Order. Pursuant to the Order, the I.G. filed a brief (I.G. Br.) and seven proposed exhibits (I.G. Exs. 1-7). In his brief, the I.G. moved for summary judgment. I.G. Br. at 7-8. Petitioner filed a response (P. Br.) and nine proposed exhibits (P. Exs. 1-9). The I.G. filed a reply brief (I.G. Reply). Neither party objected to the exhibits offered by the opposing party. Therefore, in the absence of objection, I admit I.G. Exs. 1-7 and P. Exs. 1-9 into the record.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary, and if so, to submit the testimony of any proposed witness as "written direct testimony in the form of an affidavit or declaration." Order ¶ 7.c.ii. I also explained that I would hold a hearing only if a party offered witness testimony that is relevant and non-cumulative and the opposing party requested cross-examination. *Id.* The I.G. indicated that an in-person hearing is not necessary and submitted no testimony from proposed witnesses. I.G. Br. at 7. Petitioner requested a hearing to present her own testimony. P. Br. at 4. However, Petitioner failed to submit her written direct testimony as required by my Order. Moreover, as explained more fully below, even if Petitioner had offered

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[2] On May 14, 2015, Petitioner was found not guilty of Count One and Count Three was dismissed. *See* I.G. Exs. 6, 7. There is an Order of Deferral (Judicial Diversion) for Count Three which was later corrected as dismissed. *See* P. Ex. 3; *see also* I.G. Ex. 7.

[3] Violations of both Tenn. Code Ann. § 39-11-402 (Criminal Responsibility) and Tenn. Code Ann. § 71-5-2601(a)(1)(A)(i) (TennCare Fraud) are felony offenses.

her written direct testimony, I would not find that it established the need for a hearing, as the issues on which she seeks to testify are not material to any issue before me. Therefore, I decline to convene a hearing and grant the I.G.'s motion for summary judgment.

II. Issues

The issues before me are:

> Whether summary judgment is appropriate; and
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> Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a) of the Act.

III. Jurisdiction

I have jurisdiction pursuant to section 1128(f) of the Act and to 42 C.F.R. § 1005.4.

IV. Discussion

A. Applicable Law

Section 1128(f) of the Act establishes Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services (the Secretary). *See* 42 U.S.C. § 1320a-7(f).

Pursuant to section 1128(a) of the Act, the Secretary must exclude from participation in any federal health care program any individual convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program or a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Act § 1128(a)(1), (4). Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act will be for a period of not less than five years. *See* 42 C.F.R. § 1001.102(a).

The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that is the basis for the exclusion. 42 C.F.R. §1001.2007(c), (d).

B. Findings of Fact, Conclusions of Law and Analysis

1. Summary judgment is appropriate.[4]

The I.G. moved for summary judgment asserting that there are no material facts in dispute and that, as a matter of law, Petitioner must be excluded pursuant to sections 1128(a)(1) and 1128(a)(4) of the Act. I.G. Br. at 7-8. Petitioner argues, in response, that she was not convicted of a criminal offense because the court did not accept the jury's guilty verdict, but placed Petitioner on judicial diversion pursuant to Tenn. Code Ann. § 40-35-313. P. Br. at 2. Petitioner also represents that the offenses for which she was placed on diversion have been expunged. *Id.* Petitioner argues further that the offenses for which she was placed on diversion were not related to the delivery of an item or service under a state health care program, nor were the offenses related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. P. Br. at 3. Petitioner requests to present testimony in support of these arguments. P. Br. at 4. However, Petitioner did not offer as an exhibit her written direct testimony as required by my prehearing order. *See* Order ¶ 7.c.ii.

The regulations permit an administrative law judge to resolve an exclusion case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12). Summary judgment is appropriate and no hearing is required when there is no disputed issue of material fact.[5] *Id.* To determine whether there are genuine issues of material fact that would require a hearing, the administrative law judge must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010). However, "[t]o defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact—a fact that, if proven, would affect the outcome of the case under governing law." *Id. (*citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

Here, the I.G. has met his burden to establish facts sufficient to prove that Petitioner was convicted of offenses for which exclusion is required. By contrast, Petitioner has not met her burden to show that there are material facts in dispute for which a hearing is required.

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[4] My findings of fact and conclusions of law are set forth in bold italic type.

[5] The Civil Remedies Division Procedures, at section 19(a) provide that "[m]atters presented to the [administrative law judge] for summary judgment will follow Rule 56 of the Federal Rules of Civil Procedure and federal case law . . . ." *See also Thelma Walley*, DAB No. 1367 (1992) (administrative law judge may look to the Federal Rules of Civil Procedure for guidance).

Instead, Petitioner has made arguments about the legal significance of the criminal proceedings to which she was subject in Tennessee. These are not disputes of *fact*, but are matters of law that may be disposed of without a hearing. Further, accepting as true for purposes of summary judgment Petitioner's assertions about the factual basis for her convictions, Petitioner has nevertheless not identified any disputed issue that requires a hearing. Instead, as explained more fully below, even if Petitioner's convictions depended upon the actions of a third party, this would not establish that the convictions were unrelated to the delivery of an item or service under a state health care program or were unrelated to the unlawful distribution or dispensing of a controlled substance as provided in sections 1128(a)(1) and 1128(a)(4) of the Act. For these reasons, summary judgment is appropriate and a hearing is not required.

2. Petitioner was convicted of a criminal offense as defined in subsections 1128(i)(2) and 1128(i)(4) of the Act.

Section 1128(i) of the Act provides that an individual is "convicted" of a criminal offense under the following circumstances:

> (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
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> (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
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> (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or
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> (4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

Act § 1128(i).

The I.G. argues that Petitioner was "convicted" because her circumstances meet the statutory criteria specified in subsections 1128(i)(2) and (4). I.G. Br. at 3; I.G. Reply at 2. Petitioner disagrees. Petitioner argues first that the court declined to accept the jury's verdict. P. Br. at 2. Petitioner argues additionally that she has no record of conviction because her convictions were expunged after she completed the requirements for judicial diversion. *Id.* Petitioner's arguments are unavailing.

Petitioner's contention that the court declined to accept the jury's verdict misses the point. There is no requirement in either subsection 1128(i)(2) or 1128(i)(4) that the court "accept" the verdict.[6] Under subsection 1128(i)(2), a "finding of guilt" is sufficient. Here, it is undisputed that Petitioner "Was Found Guilty By: Jury Verdict" of both TennCare fraud and criminal responsibility. *See* P. Ex. 4. Moreover, Petitioner entered into judicial diversion pursuant to Tenn. Code Ann. § 40-35-313. *See* P. Br. at 2. To qualify for a deferred proceeding under that provision, an individual must be a "qualified defendant." *See* Tenn. Code Ann. § 40-35-313(a)(1)(A). A "qualified defendant" is a defendant who is "found guilty of . . . the offense for which deferral of further proceedings is sought[.]" Tenn. Code Ann. § 40-35-313(a)(1)(B)(i)(a). If Petitioner had not been found guilty, Petitioner would not have qualified for judicial diversion pursuant to Tenn. Code Ann. § 40-35-313. *See Debra K. McKenzie, M.D.*, DAB CR2921 at 4 (2013). I therefore conclude that the jury made a finding of guilt against Petitioner; accordingly she was "convicted" within the meaning of section 1128(i)(2) of the Act.

Petitioner's circumstances also meet the definition of "convicted" under section 1128(i)(4) of the Act because she participated in a "first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld." Act § 1128(i)(4). Petitioner does not dispute that she participated in judicial diversion pursuant to Tenn. Code Ann. § 40-35-313. P. Br. at 2. Judicial diversion pursuant to Tenn. Code Ann. § 40-35-313 represents a "deferred adjudication" in which the "judgment of conviction has been withheld" within the meaning of section 1128(i)(4).[7] *See Gupton v. Leavitt*, 575 F. Supp. 2d 874, 881-82 (E.D. Tenn. 2008); *see also McKenzie*, DAB CR2921 at 5. Therefore, Petitioner was convicted within the meaning of section 1128(i)(4) of the Act.

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[6] Section 1128(i)(3) of the Act requires that a court "accept" an individual's plea of guilty or nolo contendere, but Petitioner did not plead guilty or nolo contendere. Nor does the I.G. contend that Petitioner was convicted as defined in section 1128(i)(3).

[7] The state court judge placed Petitioner's case in judicial diversion by completing a pre-printed form styled "Order of Deferral." *See* P. Ex. 4. The printed form includes the following stock language: "the prosecution in this case is deferred pursuant to T.C.A. [§] 40-35-313, and the defendant is placed on probation." *Id.* There is some authority for the proposition that a "deferred prosecution" is not equivalent to a "deferred adjudication" and therefore is not a "conviction" for purposes of section 1128(i). *See Travers v. Shalala*, 20 F.3d 993, 997 (9th Cir. 1994). However, in spite of the language on the pre-printed form, judicial diversion pursuant to Tenn. Code Ann. § 40-35-313 is not a deferred prosecution. *See Gupton v. Leavitt*, 575 F. Supp. 2d 874, 881-82 (E.D. Tenn. 2008); *see also McKenzie*, DAB CR2921 at 5 ("[Tenn. Code Ann.] section 40-35-313 authorizes a court to defer 'proceedings' against a qualified defendant, rather than to defer the 'prosecution'; the word 'prosecution' does not appear in the statute").

Finally, the fact that the record of Petitioner's convictions has been expunged does not alter the conclusion that she was "convicted" within the meaning of section 1128(i). In *Gupton*, the federal district court agreed with the Departmental Appeals Board (DAB) that, in enacting section 1128(i), Congress intended "that all instances of conviction, even those removed from the individual's criminal record, are included in the definition of 'convicted.'" 575 F. Supp. 2d at 880. In support, the court quoted the House Committee Report: "'With respect to convictions that are 'expunged,' the Committee intends to include all instances of conviction which are removed from the criminal record of an individual for any reason other than the vacating of the conviction itself. . . .'" *Id.* (citing H.R. Rep. No. 727, 99th Cong., 2d Sess. 75, reprinted in 1986 U.S.C.C.A.N. 3607, 3665). The court went on to conclude: "[A] person who has a judgment of conviction entered against him or who enters a guilty plea, a nolo contendere plea, or participates in a judicial diversion program has been found guilty of an offense, . . . and it is the finding of guilt that triggers the exclusion from participation in the health care programs." 575 F. Supp. 2d at 881 (internal citation omitted). Accordingly, Petitioner was "convicted" as defined in subsections 1128(i)(2) and 1128(i)(4) regardless of whether the record of her convictions has been expunged. Further, as explained below, the offenses for which Petitioner was convicted mandate exclusion under section 1128(a) of the Act.

3. Petitioner must be excluded pursuant to section 1128(a)(1) of the Act because she was convicted of a criminal offense related to the delivery of an item or service under a state health care program.

An individual must be excluded from participation in any federal health care program if the individual was convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Act § 1128(a)(1). Petitioner was found guilty of TennCare fraud in violation of Tenn. Code Ann. § 71-5-2601(a)(1)(A)(i). P. Ex. 4 at 1. The term "state health care program" expressly includes Medicaid. *See* Act § 1128(h)(1); *see also* 42 C.F.R. § 1000.10. TennCare is Tennessee's Medicaid program and is therefore a state health care program. *See* Tenn. Code Ann. § 71-5-2503; *see also Gupton*, 575 F. Supp. 2d at 877.

Petitioner was indicted for and found guilty of violating Tenn. Code Ann. § 71-5-2601(a)(1)(A)(i), which provides:

> A person . . . commits an offense who knowingly obtains, or attempts to obtain, or aids or abets any person to obtain, by means of a willfully false statement, representation, . . . or by any other fraudulent means . . . medical assistance benefits or any assistance provided pursuant to any rule, regulation, procedure, or statute governing TennCare to which such person is not entitled, or of a greater value than that to which such person is authorized . . . .

Tenn. Code Ann. § 71-5-2601(a)(1)(A)(i); *see* I.G. Ex. 3 at 2. Thus, the statute under which Petitioner was convicted expressly relates to medical assistance benefits under TennCare. *See Debra McKenzie*, DAB CR2921 at 6 (finding that a conviction for TennCare fraud is related to the delivery of an item or service under a state health care program); *see also Benny Nathaniel Howard, III*, DAB CR1811 at 4 (2008).

Nevertheless, Petitioner argues that her conviction was not "related to the delivery of an item or service pursuant to 1128(a)(1)[.]" P. Br. at 3. Petitioner alleges that the TennCare fraud conviction "could be and[,] based upon the evidence provided at trial[,] was most likely a result of a nurse providing a prescription . . . without performing additional diagnostic test[s] to determine the validity of the symptoms." *Id.* In making this argument, Petitioner appears to contend that she did not personally engage in the conduct that led to her conviction. However, in finding Petitioner guilty of TennCare fraud in violation of Tenn. Code Ann. § 71-5-2601(a)(1)(A)(i), the jury must have concluded, at a minimum, that Petitioner aided or abetted the nurse in claiming reimbursement from TennCare for a visit during which the nurse prescribed medication without medical justification. Thus, even if Petitioner did not personally write the improper prescription or herself submit the claim to TennCare, there is a nexus or common sense connection between Petitioner's conviction and the delivery of an item or service under Medicaid, which is all that is required to satisfy section 1128(a)(1). *See, e.g., Berton Siegel, D.O.*, DAB No. 1467 at 5 (1994).

Moreover, it is not a defense that another person actually committed the crime for which Petitioner was convicted. For example, appellate panels of the DAB have concluded "that an offense could be related even if the individual did not personally engage in the scheme . . . ." *Scott D. Augustine*, DAB No. 2043 at 5-6 (2006) (citing *Lyle Kai, R.Ph.*, DAB No. 1979 (2005), *aff'd sub nom. Kai v. Leavitt*, Civ. No. 05-00514 (D. Haw. 2006)); *see also Ian C. Klein, D.P.M.*, DAB CR177 at 5, 7 (1992) (contention that petitioner "was not the party who actually committed the act" was "irrelevant"). Thus, there is a basis for exclusion if the individual's acts (or omissions) cause the individual to be convicted of an offense and the offense is related to the delivery of an item or service under the Medicare or Medicaid program. *Dewayne Franzen*, DAB No. 1165 (1990).

In summary, Petitioner's conviction for TennCare fraud is related to the delivery of an item or service under a state health care program. Therefore, Petitioner must be excluded under section 1128(a)(1) of the Act. *See Gupton*, 575 F. Supp. 2d at 877 (upholding a mandatory exclusion under section 1128(a)(1) of the Act for a TennCare fraud conviction).

4. Petitioner must be excluded pursuant to section 1128(a)(4) of the Act because Petitioner was convicted of a felony offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

An individual must be excluded from participation in any federal health care program if the individual was convicted of a felony that occurred after August 21, 1996, relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Act § 1128(a)(4); *see also* 42 C.F.R. § 1001.101(d). On May 14, 2015, a jury found Petitioner guilty of criminal responsibility for the acts of another in violation of Tenn. Code Ann. § 39-11-402. P. Ex. 4 at 2. This is a felony offense. *Id*. Thus, Petitioner was convicted of a felony offense that occurred after August 21, 1996.

Petitioner argues, however, that her conviction was not related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance within the meaning of section 1128(a)(4) of the Act. P. Br. at 3-4. As she does with respect to her conviction for TennCare fraud, Petitioner argues that she did not actually commit the criminal acts that led to her felony conviction for criminal responsibility. *Id.* For the reasons discussed above, the argument is equally without merit here. Petitioner does not have to personally engage in the acts in order for the offense to be related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. *See Scott D. Augustine*, DAB No. 2043 at 5-6. The jury found that Petitioner was responsible for the acts of another who unlawfully distributed a controlled substance because Petitioner "act[ed] with intent to promote, or assist, or benefit in the proceeds of, or the results of, the commission of the offense of unlawful distribution or dispensing of a controlled substance." I.G. Ex. 3 at 4. Therefore, Petitioner's felony conviction for criminal responsibility is related to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance within the meaning of section 1128(a)(4) of the Act; accordingly, the I.G. was required to exclude her.

5. Petitioner's proffered testimony does not establish an issue for hearing.

As described above, Petitioner contends that she was not responsible for the actions which led to her convictions. P. Br. at 3. She asks to "testify to the circumstances surrounding the charges and trial that is the basis of the exclusion." P. Br. at 4. To the extent Petitioner seeks to present testimony that she did not commit the acts for which she was convicted, this amounts to an impermissible collateral attack on her convictions. Such collateral attacks are not permitted under the regulations. *See* 42 C.F.R. § 1001.2007(d). Therefore, even had Petitioner submitted her written direct testimony as required by my Order, I would not convene a hearing. This is because any testimony Petitioner would offer to

prove she was not responsible for the acts that led to her convictions is irrelevant in these proceedings. *See, e.g., Ian C. Klein*, DAB CR177 at 7.

6. Petitioner must be excluded for the statutory minimum period of five years under section 1128(c)(3)(B) of the Act.

Because there is a basis for Petitioner's exclusion under section 1128(a)(1) and (4) of the Act, Petitioner must be excluded for five years. An administrative law judge has no authority to reduce the length of exclusion below the minimum statutory period. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a); *see* 42 C.F.R. 1001.2007(a)(2).

7. I am not authorized to grant a request for waiver of an exclusion.

Petitioner argues that her exclusion from participating in Medicare, Medicaid, and other federally-funded health care programs would leave many patients without access to medical care. P. Br. at 5. This argument appears to suggest that I should waive Petitioner's exclusion. Pursuant to 42 C.F.R. § 1001.1801(b), a state health care program may request waiver of a mandatory exclusion in the case of an individual who is "the sole community physician" or "the sole source of essential specialized services in a community." I note that, as far as the record reveals, no official of a state health care program has requested that Petitioner's exclusion be waived. Moreover, even had such a request been made, only the I.G. has authority to grant or deny a waiver request and the "decision to grant, deny or rescind a request for a waiver is not subject to administrative or judicial review." 42 C.F.R. § 1001.1801(a), (f). Therefore, I am without authority to grant (or even to consider) a request to waive Petitioner's exclusion.

V. Conclusion

For the reasons explained above, I conclude that the I.G. properly excluded Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for the statutory minimum period of five years.

_____/s/_____
Leslie A. Weyn
Administrative Law Judge