

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Michael S. Rudman, M.D.,)	Date: January 8, 2008
)	
Petitioner,)	
)	
- v. -)	Docket No. C-07-714
)	Decision No. CR1720
The Inspector General.)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Michael S. Rudman, M.D., from participating in Medicare and other federally funded health care programs for a minimum period of five years. I find the exclusion to be mandatory in this case because Petitioner was convicted of a criminal offense described at section 1128(a)(2) of the Social Security Act (Act).

I. Background

Petitioner is a physician. On July 31, 2007, the I.G. notified Petitioner that he was being excluded. Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I held a pre-hearing conference at which I directed the parties to file briefs and proposed exhibits addressing the issues in this case. I advised the parties that either of them could request that a hearing be held in person and I advised them further that I would convene an in-person hearing if a party requesting an in-person hearing satisfied me that there existed relevant testimony that did not duplicate the contents of an exhibit.

The parties filed briefs and proposed exhibits. The I.G. also filed a reply brief. Neither party requested that I convene an in-person hearing. The I.G. filed eight proposed exhibits (I.G. Ex. 1 - I.G. Ex. 8). Petitioner filed five proposed exhibits (P. Ex. 1 - P. Ex. 5). Neither party objected to my receiving these proposed exhibits into evidence. Consequently, I receive into evidence I.G. Ex. 1 - I.G. Ex. 8 and P. Ex. 1 - P. Ex. 5.

II. Issues, findings of fact and conclusions of law

A. Issues

The I.G. excluded Petitioner based on a determination that Petitioner was convicted of a criminal offense as is described at section 1128(a)(2) of the Act. Section 1128(a)(2) mandates the exclusion of any individual who:

has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

The issues in this case are whether:

1. Petitioner was convicted of a criminal offense;
2. If he was convicted, was his conviction of an offense as is described at section 1128(a)(2) of the Act; and
3. An exclusion of at least five years is mandatory assuming that Petitioner was convicted of an offense described at section 1128(a)(2).

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding as a separate heading.

1. Petitioner was convicted of a criminal offense.

“Convicted” is defined at section 1128(i) of the Act to include all of the following circumstances:

- (1) when a judgment of conviction has been entered against the individual . . . by a Federal, State, or local court . . . ;
- (2) when there has been a finding of guilt . . . by a Federal, State, or local court . . . ;
- (3) when a plea of guilty or nolo contendere . . . has been accepted by a Federal, State, or local court; or

(4) when the individual . . . has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

Act, section 1128(i)(1) - (4).

The I.G. asserts that Petitioner was convicted of a criminal offense as is defined by sections 1128(i)(3) and (4). Petitioner disputes this assertion. I find that Petitioner was convicted of a criminal offense as is described in both of these subsections of the Act.

The undisputed evidence is that, on August 16, 2006, Petitioner entered what is known colloquially as an “Alford plea” in a Maryland State court to a criminal information charging him with the crime of assault. I.G. Ex. 8, at 4. In accepting Petitioner’s plea the court described it as:

a plea of guilty – an [Alford] plea of guilty, but a plea of guilty nevertheless
.....

Id. After accepting Petitioner’s plea the Maryland court sentenced Petitioner under a State law allowing probation before conviction, a statute which, effectively, permits a conviction to be struck from a person’s criminal record after completion of probation. *Id.* at 28; Md. Code Ann. Crim. Proc. § 6-220.

Petitioner, citing *North Carolina v. Alford*, 449 U.S. 845 (1980), describes his plea as being a specialized type of guilty plea in which he pled guilty to a crime in order to avoid punishment but where he continues to deny his guilt despite pleading guilty. Petitioner’s brief at 5. For purposes of this decision I accept Petitioner’s characterization of his plea as accurate.

I find that Petitioner’s plea falls precisely within the definition of a conviction stated at section 1128(i)(3) of the Act. His plea essentially was a plea of nolo contendere in which he pled guilty without acknowledging his guilt and which was accepted by the Maryland State court as a way of resolving his case.

Additionally, Petitioner’s plea fits within the definition of a conviction stated at section 1128(i)(4). The sentencing court allowed Petitioner to enter into an arrangement in which his conviction would be expunged after successful completion of probation. The court also warned Petitioner that, if he violated probation, he could be sentenced to as much as 10 years in prison plus a fine of \$2,500. I.G. Ex. 8, at 29. These facts establish that Petitioner, effectively, entered into a deferred adjudication program. Section 1128(i)(4)

makes it clear that a deferred adjudication program or a program in which an individual pleads guilty to an offense but where a final judgment of conviction has been withheld is nonetheless a conviction for purposes of section 1128 of the Act.

Petitioner makes the following arguments to support his contention that his plea is not a conviction within the meaning of section 1128(i):

- His plea did not result in a conviction because in pleading guilty he also denied allegations that he committed a crime. Petitioner's brief at 8.
- Entry of a probation before judgment is not a conviction under Maryland State law and, therefore, cannot be a conviction under federal law. Petitioner's brief at 8.
- Maryland law is not preempted in this case by any federal law because there is no conflict between the Act's definition of a conviction and Maryland law. Petitioner's brief at 10 - 11.

I find these arguments to be unpersuasive. First, the definition of a conviction under sections 1128(i)(3) and (4) does not create an exception for circumstances where a party pleads guilty to a crime but in doing so denies his or her guilt. Indeed, section 1128(i)(3) explicitly includes within the definition of a conviction a plea of *nolo contendere* in which a party pleading guilty makes no admission of guilt. Second, if, in fact, a probation before judgment is not a conviction under Maryland law, it nevertheless is a conviction under the Act. In explicitly defining the circumstances that constitute a conviction, the Act expresses Congress' intent that it is the *federal* definition of a conviction – and not the way in which a plea is treated under a State's law – that controls whether a person stands convicted for purposes of section 1128.

Petitioner contends that finding his plea to be a conviction under the Act would effectively override a Maryland law that has as its purpose to encourage settlements of doubtful prosecutions and to eliminate the disabilities that flow from them. Petitioner's brief at 9. That argument ignores the facts that Medicare and other federally funded health care programs are federal programs and that it is Congress that decides the terms and circumstances pursuant to which a provider may participate in them. Indeed, if Petitioner's argument were accepted it would mean that State law would control the terms and conditions of participation under federal health care programs. That is plainly not a result that Congress contemplated.

Petitioner's third argument seems to be premised on the assertion that neither the Act nor State law defines his plea to be a conviction. It is unnecessary for me to address whether Petitioner was convicted of a crime under State law in order to decide that this argument is without merit. Petitioner's plea plainly is a conviction within the meaning of the Act and, as I have stated, the Act trumps State law for purposes of deciding whether an individual was convicted of a crime.

2. Petitioner's conviction was of an offense described at section 1128(a)(2) of the Act.

The evidence offered by the I.G. establishes that Petitioner was convicted of a crime described at section 1128(a)(2) of the Act. Petitioner has not provided evidence or arguments which rebuts what the I.G. offered. Consequently, his exclusion is mandated by law.

Petitioner made his plea in order to resolve criminal charges that were made against him in a criminal complaint (application for statement of charges) that was filed on December 15, 2005. I.G. Ex. 6. The complaint states allegations that Petitioner inappropriately touched a patient in the guise of providing medical care to her. *Id.* at 1 - 6. The crime to which Petitioner pleaded was that of simple assault. However, there is no doubt, and Petitioner does not dispute, that the assault charge was based on the allegations of the complaint.

There an obvious connection between the allegations of the criminal complaint and the charge to which Petitioner pled. The assault charge may not have spelled out explicitly all of the elements of the crime alleged in the complaint. But, it was supported by the facts stated in the complaint. I find that those facts lay out a straightforward and clear charge of abuse committed by Petitioner in the course of providing care to a patient and, consequently, the crime to which he pled fits squarely within the crimes described at section 1128(a)(2) of the Act.

Petitioner heatedly denies that he was, in fact, guilty of the abuse allegations of the complaint. According to Petitioner, these allegations consisted of the unverified complaints of a single patient who suffered from mental problems. Petitioner argues also that the investigation that the State of Maryland conducted into those allegations was irregular and highly unfair to him. Petitioner's brief at 3 - 4.

I have no authority to weigh these assertions. The I.G.'s mandate to exclude Petitioner derives from his conviction of a crime described at section 1128(a)(2). The derivative nature of the exclusion requirement bars Petitioner from arguing before me that he is not, in fact, guilty of the crime to which he pleaded or that he is the victim of an unfair State process.

