

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Debra K. McKenzie, M.D.,

Petitioner,

v.

The Inspector General.

Docket No. C-13-594

Decision No. CR2921

Date: September 10, 2013

**DECISION**

The Inspector General (I.G.) of the Department of Health and Human Services notified Petitioner, Debra K. McKenzie, M.D., that she was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of five years under 42 U.S.C. § 1320a-7(a)(1). For the reasons stated below, I conclude that the I.G. has a basis for excluding Petitioner from program participation and that the five-year exclusion is mandated by law.

**I. Background**

In a February 28, 2013 letter, 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 under 42 U.S.C. § 1320a-7(a)(1). I.G. Exhibit (Ex.) 1, at 1. The I.G. excluded Petitioner as a result of her conviction “in the Criminal/Circuit Court of Dyer County, Tennessee, of a criminal offense related to the delivery of an item or service under the Medicare or a State health care program . . . .” I.G. Ex. 1, at 1. The letter referenced OI File Number H-12-40574-9. Petitioner timely filed a request for hearing (RFH) and the Director of the Civil Remedies Division assigned this case to me for hearing and decision.

On April 17, 2013, I convened a telephonic prehearing conference, the substance of which is summarized in my April 18, 2013 Order and Schedule for Filing Briefs and Documentary Evidence (Order). *See* 42 C.F.R. § 1005.6. Pursuant to the Order, the I.G. filed a brief (I.G. Br.) on May 28, 2013, with I.G. Exs. 1-6. Petitioner filed a response (P. Br.) on July 8, 2013. Petitioner did not submit any exhibits with her response. The I.G. filed a reply brief (I.G. Reply) on July 22, 2013. Without objection, I admit I.G. Exs. 1-6 into the record. Additionally, both parties indicated that they did not have any witnesses to offer and that it was not necessary to hold an in-person hearing in this case. I.G. Br. at 8; P. Br. at 6. Therefore, I issue this decision on the basis of the written record.

## **II. Issue**

The sole issue before me is whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(1). *See* 42 C.F.R. § 1001.2007(a)(1)-(2).

## **III. Findings of Fact, Conclusions of Law and Analysis<sup>1</sup>**

The Secretary of Health and Human Services must exclude an individual from participation in any federal health care program if that individual has been convicted of a criminal offense related to the delivery of an item or service under Medicare or any state health care program. 42 U.S.C. § 1320a-7(a)(1).

### ***A. Petitioner entered a “best interest” guilty plea in a Tennessee court to one count of TennCare fraud.***

Petitioner has been a licensed physician in the state of Tennessee since 2003. P. Br. at 1. On February 13, 2012, a Dyer County, Tennessee grand jury indicted Petitioner on one count of TennCare fraud in violation of Tenn. Code Ann. § 71-5-2601. I.G. Ex. 4, at 1.<sup>2</sup> According to the Tennessee Bureau of Investigation, Petitioner “would submit false billing claims to the State of Tennessee’s Medicaid program known as ‘TennCare.’ These claims were for services not rendered such as improper examinations, submission of false PT codes and billing, improper prescribing of controlled substances, upcoding of services and false charting.” I.G. Ex. 5, at 2.

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<sup>1</sup> My findings of fact and conclusions of law are set forth in italics and bold font.

<sup>2</sup> The Dyer County, Tennessee grand jury also indicted Petitioner on one count of distributing a controlled substance in violation of Tenn. Code Ann. § 53-11-401 and one count of making fraudulent insurance claims in violation of Tenn. Code Ann. § 39-14-133. I.G. Ex. 4, at 1. Neither alleged violation is at issue in this case.

On October 2, 2012, Petitioner entered a guilty plea to charges of TennCare fraud in violation of Tenn. Code Ann. § 71-5-2601. I.G. Exs. 2, at 1; 3, at 2. According to Petitioner’s guilty plea, she engaged in “TennCare Fraud over \$10,000” between February of 2008 and November of 2009. I.G. Ex. 3, at 2. The Criminal/Circuit Court of Dyer County, Tennessee accepted Petitioner’s plea as a “best interest” guilty plea and deferred further proceedings pursuant to Tenn. Code Ann. § 40-35-313. I.G. Ex. 2, at 1. The court ordered Petitioner to pay \$24,417 to the state of Tennessee/TennCare in restitution immediately, undergo one year of unsupervised probation, pay court costs, and obtain or maintain gainful employment. I.G. Ex. 2, at 1.

***B. Petitioner was convicted of a criminal offense for purposes of 42 U.S.C. § 1320a-7(a)(1).***

Under 42 U.S.C. § 1320a-7(i), an individual is “convicted” of a criminal offense when: (1) a judgment of conviction has been entered against him or her in a federal, state, or local court whether an appeal is pending or the record of the conviction is expunged; (2) there is a finding of guilt by a court; (3) a plea of guilty or no contest is accepted by a court; or (4) the individual has entered into a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction is withheld.

The I.G. argues that Petitioner meets this statutory definition for “convicted” under section 1320a-7(i)(3) and (i)(4). I.G. Br. at 4-6. Petitioner’s primary defense to her exclusion is that she has not been “convicted” of a criminal offense within the meaning of either section 1320a-7(i)(3) or (i)(4). P. Br. at 2, 4-6. Petitioner further argues that excluding her would contravene Congressional intent because Petitioner did not admit to the underlying facts of the charges against her. P. Br. at 3. For the reasons stated below, each of these arguments is unavailing. Petitioner was “convicted” as that word is defined in section 1320a-7(i)(3) and (i)(4).

Petitioner acknowledges that “she entered a ‘Best Interest’ or ‘Alford plea,’” but argues that an *Alford* plea does not render her “convicted” within the meaning of section § 1320a-7(i)(3).<sup>3</sup> P. Br. at 4. An individual is considered to have been “convicted” when a plea of guilty has been accepted by a federal, state, or local court. 42 U.S.C. § 1320a-7(i)(3). That statutory provision is met by an *Alford* plea. *Rudman v. Leavitt*, 578 F. Supp. 2d 812, 815 (D. Md. 2008); *Kim J. Rayborn*, DAB No. 2248, at 5 (2009) (“an *Alford* plea is a guilty plea”) (citing *North Carolina v. Alford*, 400 U.S. 25, 35-38 (1970)). Petitioner concedes that she entered an *Alford* plea. P. Br. at 3. The state court judge accepted Petitioner’s plea. I.G. Ex. 2, at 1. Because Petitioner entered an *Alford* plea, which is a guilty plea, and because the state court accepted that plea, Petitioner must be considered “convicted” within the meaning of section 1320a-7(i)(3).

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<sup>3</sup> Under Tennessee law, a “best interest” plea is an *Alford* plea, which is a plea of guilty. *VanArsdall v. State*, 919 S.W.2d 626, 629-30 (Tenn. Crim. App. 1995).

In addition to Petitioner's guilty plea itself, the fact that the state court judge deferred the proceeding against Petitioner pursuant to Tenn. Code Ann. § 40-35-313 (I.G. Ex. 2, at 1) is further evidence that she pled guilty. Petitioner acknowledges that the state court judge deemed her eligible for a deferred proceeding. P. Br. at 5. In order to qualify for a deferred proceeding under Tenn. Code Ann. § 40-35-313, an individual must be a "qualified defendant." See Tenn. Code Ann. § 40-35-313(A)(1)(a). In order to be a "qualified defendant," an individual must "[be] found guilty of or plead[] guilty or nolo contendere to the offense for which deferral of further proceedings is sought[.]" Tenn. Code Ann. § 40-35-313(a)(1)(B)(i)(a). Petitioner maintains that there is "no dispute that [she] did not enter a nolo contendere plea[.]" P. Br. at 4. Therefore, under Tennessee law, by definition she either pled guilty or was found guilty of an offense that would render her eligible for a deferred proceeding under Tenn. Code Ann. § 40-35-313. See *Gupton v. Leavitt*, 575 F. Supp. 2d 874, 881 (E.D. Tenn. 2008). In either event, she was "convicted" of a criminal offense within the meaning of section 1320a-7(i)(3).

Despite the clear evidence that Petitioner pled guilty, Petitioner contends that she was not convicted within the meaning of section 1320a-7(i)(3) because "she did not confirm the factual basis for the plea and, therefore, cannot be considered to have entered into a guilty plea for purposes of the statute . . . ." P. Br. at 5. Petitioner further claims that excluding her would contravene Congress' intent because Petitioner never admitted criminal conduct due to her *Alford* plea. P. Br. at 3-4.

There is no requirement in section 1320a-7(i)(3) that Petitioner confirm the factual basis of her plea in order to be considered "convicted." Nor does Petitioner offer any support for the proposition that this is a relevant factor for me to consider. All that section 1320a-7(i)(3) requires for an individual to be considered "convicted" of a criminal offense is that "a plea of guilty or nolo contendere by the individual or entity [must have] been accepted by a Federal, State, or local court[.]"

Petitioner's argument concerning Congressional intent also fails because of the basic principle of statutory interpretation that where the plain language of a statute is unambiguous, judges should not look to Congressional intent. See *Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987) (holding that where statutory language is unambiguous it is generally inappropriate to consider legislative history); *Florence Peters*, DAB No. 1706 (1999) ("[t]he general rule of statutory construction is that the plain meaning of the statute should control, and that resort to legislative history is appropriate only where a statute is ambiguous."). Petitioner does not argue that any ambiguity exists in section 1320a-7(i) that would require me to look to Congressional intent. Instead, she jumps directly to the conclusion that Congress only intended to exclude individuals who "admitted they engaged in criminal abuse . . . ." P. Br. at 3 (quoting H.R. Rep. No. 727, 99th Cong., 2d Sess. 75 (1986), (reprinted in 1986

U.S.C.C.A.N. 3607, 3665)). Without any argument as to why I should ignore the plain language of section 1320a-7(i) and look to Congressional intent, I decline to do so.<sup>4</sup>

With respect to section 1320a-7(i)(4), Petitioner acknowledges that the state court deferred the proceeding against her pursuant to Tenn. Code Ann. § 40-35-313, but argues that she was not “convicted” of a criminal offense within the meaning of section 1320a-7(i)(4) because she entered into a deferred prosecution, rather than a deferred adjudication. P. Br. at 5-6 (citing *Travers v. Shalala*, 20 F.3d 993, 997 (9th Cir. 1994)). Under section 1320a-7(i)(4), an individual who has entered into a deferred adjudication or other arrangement or program where judgment of conviction has been withheld is considered to have been “convicted” of a criminal offense.

Petitioner’s argument that she received a deferred prosecution is one of semantics rather than substance. The state court judge issued an “Order of Deferral (Judicial Diversion)” in Petitioner’s case. *See* I.G. Ex. 2, at 1. In deferring Petitioner’s case, the state court judge used a pre-printed form to accept Petitioner’s guilty plea that references “the prosecution in th[e] case [being] deferred pursuant to T.C.A. 40-35-313[.]” I.G. Ex. 2, at 1. However, 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. Significantly, at least one court has identified a deferred proceeding under Tenn. Code Ann. § 40-35-313 as a deferred adjudication under section 1320a-7(i)(4), rather than a deferred prosecution. *See Gupton*, 575 F. Supp. 2d at 881-82.

In addition to the plain text of the state statute, the deferment of a proceeding in this matter has the attributes of a deferred adjudication and not a deferred prosecution. There are “two principal characteristics of a deferred prosecution program: the deferral of initiation of charges and the ability to enter or persist in a plea of not guilty if the agreement with the prosecutor is voided.” *Marc Schneider, D.M.D.*, DAB Decision No. 2007, at 8 (2007). On the other hand, “in a deferred adjudication a defendant is not free to set aside his plea or proceed to trial.” *Id.*

Petitioner’s deferred proceeding under Tenn. Code Ann. § 40-35-313 has the characteristics of a deferred adjudication. The initiation of charges against Petitioner was not withheld because, just as in *Schneider*, a grand jury indicted Petitioner for a criminal offense. I.G. Ex. 4, at 1. Petitioner had no right to unilaterally withdraw her plea when

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<sup>4</sup> Even if one were to consider Congressional intent, “[t]he legislative history makes clear that any admission by an individual that he or she has engaged in criminal abuse of a federal or state health care system will result in exclusion, whether an actual judgment of conviction has been entered or there is a conviction by guilty plea, nolo contendere plea, or participation in some type of deferral program.” *Gupton*, 575 F. Supp. 2d at 881-82 (emphasis added). An *Alford* plea is a guilty plea and that plea fulfills the requirement of an admission. *See Rudman*, 578 F. Supp. 2d at 815.

she knowingly waived her right to trial and to appeal. I.G. Ex. 3. Despite the language used on the pre-printed Order of Deferral, Petitioner substantively received a deferred adjudication and, therefore, was “convicted” for purposes of section 1320a-7(i)(4).

***C. Petitioner’s conviction requires exclusion under 42 U.S.C. § 1320a-7(a)(1) because her criminal conduct was related to the delivery of an item or service of health care.***

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. 42 U.S.C. § 1320a-7(a)(1). Petitioner pled guilty to charges of TennCare fraud in violation of Tenn. Code Ann. § 71-5-2601. I.G. Exs. 2, at 1; 3, at 1. The term “state health care program” expressly includes Medicaid. 42 U.S.C. § 1320a-7(h)(1); 42 C.F.R. § 1001.2. TennCare, Tennessee’s Medicaid program, is therefore a state health care program. *See* I.G. Ex. 5, at 2; *Gupton*, 575 F. Supp. 2d at 877. Further, Petitioner pled guilty to charges of billing TennCare for services not rendered and for medically unnecessary services. I.G. Exs. 4, at 1; 5, at 2. The state court also ordered Petitioner to pay restitution to TennCare in the amount of \$24,417. Moreover, Petitioner concedes that her conviction was related to the delivery of an item or service of health care. P. Br. at 6. Therefore, I conclude that the record fully supports Petitioner’s mandatory exclusion under 42 U.S.C. § 1320a-7(a)(1). *See Sanford Orloff, R.Ph.*, DAB CR209 (1992); *Merrill D. Van Patten, D.O.*, DAB CR206 (1992); *Arthur B. Stone, DPM*, DAB CR26, at 9 (1989).

***D. Petitioner must be excluded for the statutory minimum period of five years under 42 U.S.C. § 1320a-7(c)(3)(B).***

Because there is a basis for Petitioner’s exclusion under 42 U.S.C. § 1320a-7(a)(1), Petitioner must be excluded for a minimum period of five years and I cannot reduce the length of exclusion. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

**IV. Conclusion**

For the foregoing reasons, I affirm the I.G.’s determination to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for the statutory minimum period of five years pursuant to 42 U.S.C. § 1320a-7(a)(1), (c)(3)(B).

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/s/  
Scott Anderson  
Administrative Law Judge