

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Simin Javahery, D.D.S.,
(OI File No. L-12-40223-9)

Petitioner,

v.

The Inspector General.

Docket No. C-14-147

Decision No. CR3107

Date: February 6, 2014

DECISION

I sustain the exclusion that the Inspector General (I.G.) imposed against Petitioner, Simin Javahery, D.D.S., from participating in Medicare and all federally funded health care programs, for a period of at least five years. The five-year exclusion is mandated by section 1128(a)(1) of the Social Security Act (Act).

I. Background

On July 31, 2013, the I.G. notified Petitioner that she was being excluded from participation in Medicare and all federally funded health care programs for a minimum period of five years because she had been convicted of a criminal offense related to the delivery of an item or service under California's Medicaid program (Medi-Cal). The section of the Act pursuant to which the I.G. imposed the exclusion, section 1128(a)(1), mandates the exclusion of any individual who is convicted of a criminal offense related to the delivery of an item or service under Medicare or a State Medicaid program.

Petitioner requested a hearing and the case was assigned to me. I directed the parties to exchange briefs and exhibits. The I.G. filed a brief and three proposed

exhibits that are identified as I.G. Ex. 1 – I.G. Ex. 3. Petitioner filed a brief and four proposed exhibits that are identified as P. Ex. 1 – P. Ex. 4.¹ I receive all of the parties’ exhibits into the record. Neither party offered the testimony of a witness nor did a party request that I convene a hearing in person.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue in this case is whether the I.G. was mandated to exclude Petitioner for at least five years.

B. Findings of Fact and Conclusions of Law

I find that section 1128(a)(1) mandates Petitioner’s exclusion from participation. Section 1128(c)(3)(B) of the Act mandates that the exclusion in this case be for at least five years.

There is unequivocal evidence that Petitioner was convicted of a program-related crime falling within the reach of section 1128(a)(1). The undisputed facts establish that, on November 18, 2011, Petitioner pled guilty in a California State court to a misdemeanor charge of theft. I.G. Ex. 3 at 2. That conviction was based on the allegation that between October 1 and November 30, 2006, Petitioner unlawfully took funds from a program that is part of Medi-Cal, a State health care program. Thus, Petitioner’s crime was directly related to Medi-Cal services.

Petitioner now asserts that she is not, in fact, guilty of the crime of which she was convicted. She argues that her brother misled her into filing the claims that are the subject of the criminal charge to which she entered a guilty plea. Petitioner’s Informal Brief at 2. That is not an argument that I may consider. The exclusion requirement of section 1128(a)(1) derives from a *conviction* of a program-related crime. Petitioner may not litigate the issues before me that she could have litigated in State court.

Petitioner argues also that the State court has “dismissed” her case and “replaced the guilty plea with a not guilty plea.” Petitioner’s Informal Brief at 5. If her conviction has in fact been vacated in a State court that might be a basis to find that the I.G. no longer has the authority to exclude Petitioner. However, Petitioner

¹ The I.G. also moved to dismiss Petitioner’s hearing request on the ground that Petitioner had not raised an issue that I have authority to hear and decide. I deny that motion. Although Petitioner’s arguments may not be justiciable in the final analysis I nevertheless have the duty to hear them and to decide them.

has not provided me with any evidence that establishes her assertion to be correct. I am aware of no document that shows that Petitioner's conviction was vacated and that Petitioner is now eligible for a trial on the original criminal charges.²

Petitioner argues additionally that her exclusion is unfair. It is unfair, she contends, because the I.G. is rigidly relying on the fact that she was convicted of a crime and is not looking behind the conviction to examine the actual facts and equities of her case. However, this is a case in which the exclusion is mandated by law. The length of the exclusion, at least five years, is also mandatory. Act § 1128(c)(3)(B). Thus, the I.G. has no choice in this matter and I have no authority to question the I.G.'s determination given that all of the requisite criteria for exclusion are met.

Finally, Petitioner questions the lag time of nearly two years between the date of her conviction and the I.G.'s determination to exclude her. The starting date for an exclusion is a matter of discretion for the I.G. I have no authority to question that exercise of discretion.

/s/
Steven T. Kessel
Administrative Law Judge

² Petitioner may be arguing that her conviction was either expunged or vacated as part of a deferred adjudication program. If so, that is no basis for me to find the exclusion invalid. Some States have processes that allow for expungement of guilty pleas in certain types of criminal cases, usually after all terms and conditions of a sentence have been met. Other States allow for deferred adjudication of pleas in which an accused party enters a provisional plea of guilty that may not be made final if the party completes his or her sentence satisfactorily. The Act is explicit that cases in which convictions are expunged, or arrangements in which final judgments of guilt are withheld pending completion of sentence are nonetheless "convictions." Act § 1128(i)(1), (4).