Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Shannon Lee Irons a/k/a Shannon Lee Debroecke
(O.I. File No. H-13-4-3272-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-613

Decision No. CR3760

Date: April 7, 2015

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services (HHS) notified Petitioner, Shannon Lee Irons, 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)(3). Petitioner requested a hearing before an administrative law judge to dispute the exclusion. For the reasons stated below, I conclude that the IG has a basis for excluding Petitioner from program participation and that the five-year exclusion is mandated by law.

I. Background

By letter dated September 30, 2014, the IG notified Petitioner that she was being excluded from Medicare, Medicaid, and all other federal health care programs for a period of five years under 42 U.S.C. § 1320a-7(a)(3). The IG advised Petitioner she was excluded due to her felony conviction in the District Court of Arapahoe County, Colorado (District Court), of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service, including the performance of management or

administrative services relating to the delivery of such items or services, or with respect to any act or omission in a health care program (other than Medicare and a state health care program) operated by, or financed in whole or in part, by any federal, state or local government agency. IG Exhibit (Ex.) 1.

Petitioner filed a timely request for hearing (RFH) on December 1, 2014. The Director of the Civil Remedies Division assigned this case for me to hear and decide. On January 7, 2015, I convened a telephonic prehearing conference, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order), dated January 8, 2015. *See* 42 C.F.R. § 1005.6. Pursuant to the Order, the IG filed a brief (IG Br.) and six exhibits (IG Exs. 1-6). Petitioner filed a response brief (P. Br.). The IG filed a reply brief (IG Reply Br.).

II. Decision on the Record

In the absence of objection, I admit IG Exs. 1-6 into the record. Petitioner did not submit any marked exhibits.

My Order informed the parties that I would issue a decision based on the written record unless a party requested a hearing in its brief and explained why one was necessary. Order ¶ 4. Both the IG and Petitioner indicated on their short form briefs that they did not believe a hearing was necessary and that they did not have any witness testimony to offer. IG Br. at 7; P. Br. 3-4. Therefore, I issue this decision on the basis of the written record.

III. Issue

Whether the IG has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for five years pursuant to 42 U.S.C. § 1320a-7(a)(3). *See* 42 C.F.R. § 1001.2007(a)(1)-(2).

IV. Findings of Fact, Conclusions of Law, and Analysis[1]

The Secretary of HHS must exclude an individual from participation in Medicare, Medicaid, and all other federally-funded health care programs if that individual:

> has been convicted for an offense which occurred [after August 21, 1996,] under Federal or State law, in connection with the delivery of a health care item or service or with

[1] My findings of fact and conclusions of law are set forth below in bold and italics.

> respect to any act or omission in a health care program (other than those specifically described in [section 1320a-7(a)(1)]) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

42 U.S.C. § 1320a-7(a)(3).

The four essential elements necessary in this case to support the exclusion are: (1) the individual to be excluded must have been convicted of a felony offense; (2) the felony conviction must have been related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the felony offense must be in connection with the delivery of a health care item or service; and (4) the felonious conduct must have occurred after August 21, 1996. 42 U.S.C. § 1320a-7(a)(3).

A. Petitioner pled guilty to the felony charge of attempting to obtain a controlled substance through fraud or deceit, and the District Court for Arapahoe County, Colorado, ordered a deferred sentence in Petitioner's case and placed Petitioner on probation for two years.

Petitioner is licensed as a nurse in the state of Colorado. IG Ex. 2 at 1; IG Ex. 6. On November 16, 2012, a deputy district attorney filed a Complaint and Information with the District Court in which he alleged:

> On or about 9/24/2012, by engaging in conduct constituting a substantial step toward the commission of obtaining a controlled substance by fraud and deceit, [Petitioner] unlawfully, feloniously, and knowingly attempted to obtain or procure the administration of Hydrocodone, a controlled substance, by forgery or alteration of an order; in violation of sections 18-18-415(1)(a) and 18-2-101, C.R.S.

IG Ex. 3 at 2.

On April 1, 2013, Petitioner pled guilty to violating section 18-18-415(1)(a) of the Colorado Revised Statutes. IG Ex. 5 at 1, 2, 5; *see also* IG Ex. 2 at 2. On that same date, the District Court ordered a deferred sentence for two years during which Petitioner had to comply with a variety of conditions and was supervised by the probation department. IG Ex. 5; *see also* IG Ex. 2 at 2. Petitioner's two-year deferred sentence concluded on April 1, 2015. IG Ex. 5 at 3.

B. Petitioner was convicted of a felony offense for purposes of 42 U.S.C. § 1320a-7(a)(3).

Petitioner's principal argument is that she has not been "convicted" of a criminal offense.[2] Petitioner asserts that she received deferred judgment in her criminal case and, absent a violation of the conditions of her deferred judgment or a revocation of her probation, Petitioner will not have a criminal record under state law. RFH at 1-2. Petitioner also argues that, in any event, her deferred judgment is defective because the District Court allegedly failed to follow proper procedures to safeguard Petitioner's rights during Petitioner's plea. P. Br. at 1-3. Therefore, the IG cannot rely on the proceeding before the District Court to prove Petitioner ought to be excluded.

The IG argues that Petitioner has been convicted for exclusion purposes under 42 U.S.C. § 1320a-7(i)(3) and (4), which defines the word "convicted" to mean a guilty plea that is accepted by the court, or participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld. IG Br. at 4.

I agree with the IG that Petitioner was "convicted" of a criminal offense for purposes of exclusion under the definition in 42 U.S.C. § 1320a-7(i)(4). The District Court documents entered into the record of this case clearly state that Petitioner received a deferred sentence following her guilty plea. IG Ex. 5 at 1, 3, 5; *see also* IG Ex. 2 at 2. In one document, it is called a deferred judgment. IG Ex. 5 at 2. Petitioner describes the effect of the deferred sentence (or deferred judgment) this way:

> [Petitioner] appeared . . . and entered into a conditional plea disposition calling for a deferred judgment for a period of 2 years of supervised probation after which, on April 1, 2015, provided there has not been a revocation of probation during the interim, the case will be reviewed and the conditional plea of guilty will be withdrawn and the case will be dismissed. There has not been nor will there ever be a record of conviction of any type arising from this case.
>
> . . . .

[2] Petitioner's argument is directed at denying the existence of a conviction. Petitioner does not appear to dispute that the offense that Petitioner was charged with violating and to which she ultimately pled guilty is a felony. The record is clear that she was charged with felonious conduct (IG Ex. 3 at 2) and that she pled guilty to a class six felony. IG Ex. 5 at 1-2; Colo. Rev. Stat. § 18-18-415(1)(a) (2010).

> Pursuant to the terms of a Deferred Judgment, the plea of guilty only comes into effect should probation be revoked and the Court actually sentences the defendant in the case. The conditional plea does not legally count as a conviction of a crime and the defendant is never required to report the conviction on any job applications, etc. nor does it appear as a conviction on any criminal record.

RFH at 1-2.

Petitioner's description of the resolution to the criminal charges in her case fits the definition of a conviction under 42 U.S.C. § 1320a-7(i)(4). The District Court's use of the appellation "deferred sentence" and "deferred judgment" for the action it took in Petitioner's case is similar to the term "deferred adjudication" in 42 U.S.C. § 1320a-7(i)(4). However, more importantly, the description Petitioner provided of the action the District Court took is, in substance, exactly the type of action contemplated in 42 U.S.C. § 1320a-7(i)(4). *See Travers v. Shalala*, 20 F.3d 993, 996 (9th Cir. 1994) ("To determine whether state court proceedings constituted a conviction under § 1320a–7(i), we look to the substance of the proceedings, rather than any formal labels or characterizations used by the state or by the parties."). The *Travers* court explained what a deferred adjudication entails.

> In a deferred adjudication . . . if the defendant does not live up to the terms of his agreement, he is not free to set aside his plea or proceed to trial—the court may simply enter a judgment of conviction. Under those circumstances, the entry of a judgment is a mere formality because the defendant has irrevocably committed himself to a plea of guilty or no contest which cannot be unilaterally withdrawn.

20 F.3d at 997. The description in *Travers* of a deferred adjudication is strikingly similar to the description that Petitioner gave of the action the District Court took in her criminal case.

Further, to the extent that Petitioner argues that her criminal record will be clear following successfully completion of the District Court's conditions related to the deferred sentence, such future effect is not relevant to determining whether she was convicted for purposes of exclusion. As stated by one court:

> Contrary to Rudman's assertion, the mere fact that, under Maryland law, Rudman's record could be expunged after three years if he successfully completes the term of probation does not erase the fact that Rudman entered into a "program

> where judgment of conviction has been withheld." The material inquiry is whether § 1320a-7(i)(4) treats Rudman's guilty plea as a conviction, not how state law may treat his guilty plea in the future.

Rudman v. Leavitt, 578 F.Supp.2d 812, 815 (D. Md. 2008); *see also Gupton v. Leavitt*, 575 F.Supp.2d 874, 880-881 (E.D. Tenn. 2008) (expunging of criminal record does not preclude exclusion).

Finally, I cannot reverse the exclusion in this case based on Petitioner's allegation that the District Court committed procedural errors when ordering a deferred sentence for Petitioner. *See* 57 Fed. Reg. 3,298, 3,321 (Jan. 29, 2015) ("The due process afforded by States in convicting their citizens is not a factor we are authorized to consider [when imposing mandatory exclusions]."). Petitioner is precluded from making collateral attacks in this forum on the criminal conviction that serves as the basis for the exclusion. 42 C.F.R. § 1001.2007(d); *see also Travers*, 20 F.3d at 998. Further, to the extent that Petitioner has argued that the District Court committed reversible error, Petitioner is free to appeal the District Court's order of the deferred sentence and, if Petitioner prevails, Petitioner may seek reinstatement from the IG. 42 C.F.R. § 1001.3005(a)(1).

For the reasons stated above, I conclude that Petitioner was "convicted" as that term is defined in 42 U.S.C. § 1320a-7(i)(4).

C. Petitioner's felonious conduct related to fraud.

In order for a conviction to qualify as one mandating exclusion under 42 U.S.C. § 1320a-7(a)(3), it must be a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. The terms "related to" and "relating to" simply mean that there must be a nexus or common sense connection. *See James Randall Benham*, DAB No. 2042 (2006) (internal citations omitted); *see also Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (describing the phrase "related to" in another part of section 1320a-7 as "deliberately expansive words," "the ordinary meaning of [which] is a broad one," and one that is not subject to "crabbed and formalistic interpretation") (internal quotes omitted).

The IG argues that the criminal offense to which Petitioner pled guilty specifically included the word "fraud" in it; therefore, Petitioner's conviction meets the requirement of being related to fraud. IG Br. at 3. Petitioner did not directly dispute the IG on this point.

Petitioner's admitted criminal conduct was "that she forged a prescription for [H]ydrocodone/Vicodin from her employment and attempted to fill the prescription." IG Ex. 2 at 2; *see also* IG Ex. 4 at 1. At its most basic, fraud is: "A knowing

misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment . . . . A misrepresentation made recklessly without belief in its truth to induce another person to act." *Black's Law Dictionary* 670 (7th ed. 1999). In the present case, the facts related to Petitioner's conduct, along with the statute she pled guilty to violating, are sufficient to conclude that her felony offense was related to fraud. *See Dawn Coffee*, DAB CR2804, at 5 (2013).

D. Petitioner's felonious conduct was in connection with the delivery of a health care item or service.

In order for Petitioner to be excluded under 42 U.S.C. § 1320a-7(a)(3), the felony offense that was the basis of Petitioner's conviction must have been for conduct in connection with the delivery of a health care item or service. To be "in connection with" the delivery of a health care item or service, there only needs to be a nexus or common sense connection to the delivery of a health care item or service. *Charice D. Curtis*, DAB No. 2430, at 5 (2011).

The IG argues that Petitioner's offense was in connection with the delivery of a health care item or service because:

> Petitioner's criminal conviction is based on her attempt to obtain hydrocodone by forging a prescription obtained through her place of employment. I.G. Ex. 4 at 1. It is well understood that a nexus exists between a criminal offense and the delivery of a health care item or service when a healthcare professional misuses his or her positon as part of the underlying offense. See Dawn Coffee, DAB CR2804 at 4 (2013) (holding that a nexus between a criminal offense and the delivery of a health care item or service was "obvious" where a nurse's conviction was based on the "unauthorized generation of [a] hydrocodone prescription.").

IG Br. at 5-6. Petitioner did not directly dispute the IG's argument or assert that her felony offense had no connection to the delivery of a health care item or service.

I agree with the IG that the nexus between Petitioner's felony offense in this case and the delivery of a health care item or service is obvious. Petitioner admits that she used Hydrocodone and Vicodin for medicinal purposes and because she was addicted to those controlled substances. IG Ex. 4 at 1. She attempted to obtain delivery of those medications by submitting a forged prescription to a pharmacy. IG Ex. 4 at 1. Therefore, I conclude that Petitioner's felony offense was in connection with the delivery of health care items or services.

E. The underlying conduct of Petitioner's felony conviction occurred after August 21, 1996

To be excluded pursuant to 42 U.S.C. § 1320a-7(a)(3), Petitioner's felony offense must have occurred after August 21, 1996. The record shows that the conduct on which Petitioner's conviction was based occurred on September 24, 2012. IG Ex. 2 at 2; IG Ex. 3 at 2; IG Ex. 4 at 1. Petitioner does not dispute this fact. Therefore, I conclude that Petitioner's conviction meets the four elements of a mandatory exclusion under 42 U.S.C. § 1320a-7(a)(3), and, therefore, the IG was required to impose a mandatory exclusion.

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

Because I have concluded that a basis exists to exclude Petitioner pursuant to 42 U.S.C. § 1320a-7(a)(3), Petitioner must be excluded for a minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2).

Petitioner states that I should consider mitigating circumstances in this case. Specifically, Petitioner asserts that she has taken effective action to control her substance abuse problems, kept her nursing license, and maintained custody of her two children. Petitioner argues that a regulatory scheme that does not permit me to consider such mitigating factors lacks a rational basis. P. Br. at 4-5; *see also* IG Ex. 4.

Petitioner's efforts to overcome her substance abuse problem following the significant difficulties she has experienced in life are laudable. If either the IG or I had discretion to consider these efforts when imposing an exclusion, Petitioner may well have been able to receive a reduced length of exclusion. As it is, the IG imposed the minimum exclusion permitted under law. However, Congress did not provide the IG or me with discretion to impose exclusions of less than five years on individuals who are convicted of crimes described under 42 U.S.C. § 1320a-7(a), *see Travers* 20 F.3d at 998, and I have no authority to invalidate or refuse to implement a federal statute. 42 C.F.R. § 1005.4(c)(1).

V. Conclusion

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

/s/
Scott Anderson
Administrative Law Judge