

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Billy Joe Wilkerson, Jr.
(OI File No. H-16-42397-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-107

Decision No. CR4863

Date: June 8, 2017

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Billy Joe Wilkerson, Jr. (Mr. Wilkerson or Petitioner) from participating 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). Mr. Wilkerson requested a hearing before an administrative law judge to dispute the exclusion. For the reasons stated below, I affirm the IG's exclusion of Mr. Wilkerson from program participation for five years.

I. Background

In a October 31, 2016 letter, the IG notified Mr. Wilkerson that he was being excluded from Medicare, Medicaid, and all federal health care programs under 42 U.S.C. § 1320a-7(a)(1) for a period of five years. The IG based the exclusion on Mr. Wilkerson's conviction, in the District Court of Oklahoma County, Oklahoma, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program, including the performance of management or administrative services relating to the delivery of items or services, under any such program. IG Exhibit (Ex.) 1 at 1.

Petitioner timely requested a hearing, and this case was assigned to me for a hearing and decision. On November 30, 2016, I issued an Acknowledgment, Prehearing Order, and Notice of Prehearing Conference (APHO). On January 4, 2017, I held a telephonic prehearing conference, at which I gave counsel the opportunity to pose questions or raise issues about my November 30, 2016 APHO. They did not have any questions. During the conference, I advised the parties that because the IG imposed the minimum authorized five-year period of exclusion under section 1128(a) of the Social Security Act (Act), there is no issue as to whether or not the period of exclusion is unreasonable, and the only issue before me is whether there is a basis for Petitioner's exclusion under section 1128(a)(1) of the Act (42 U.S.C. § 1320a-7(a)(1)).

On January 3, 2017, Petitioner filed a document he characterized as a "response" and a court document relating to his criminal case. With respect to the latter, I note that Petitioner did not properly mark it as an exhibit in accordance with the exhibit instructions stated in the APHO ¶ 9 and the Civil Remedies Division Procedures ¶ 14. Nevertheless, I accept the document and refer to it as "P. Ex. 3."

In compliance with the APHO, the IG filed a brief (IG Br.) and three exhibits (IG Exs. 1-3). After requesting and receiving a 90-day extension of time, Petitioner filed a response brief (P. Br.) and P. Exs. 1 and 2. The IG filed a reply brief (IG Reply Br.).

II. Decision on the Record

In the absence of objection, I admit IG Exs. 1-3 and P. Exs. 1-3.

Both parties indicated that they do not have any witness testimony to present and, consequently, an in-person hearing in this case is unnecessary. IG Br. at 4-5; P. Br. at 1-2. 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 under 42 U.S.C. § 1320a-7(a)(1). *See* 42 C.F.R. § 1001.2007(a)(1)-(2).

IV. Findings of Fact, Conclusions of Law, and Analysis

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

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

has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program.

42 U.S.C. § 1320a-7(a)(1).

The two essential elements necessary in this case to support the exclusion are: (1) the individual to be excluded must have been convicted of a criminal offense; and (2) the offense must be related to the delivery of an item or service under Title XVIII of the Act (Medicare) or a State health care program. 42 U.S.C. § 1320a-7(a)(1).

A. Petitioner pled no contest (nolo contendere) to the felony charges of: conspiracy to defraud the State of Oklahoma; making false claims to the Oklahoma Medicaid program; failing to maintain records of claims submitted to the Oklahoma Medicaid program; grand larceny; unlawful use of a computer to commit a criminal offense; and engaging in a pattern of criminal offenses; and the District Court of Oklahoma County, Oklahoma, found Petitioner guilty of the charges and ordered a deferred sentence.

On August 3, 2015, the Attorney General of Oklahoma filed a six-count felony Amended Information against Petitioner and two other individuals in the District Court of Oklahoma County, State of Oklahoma (court), charging them with: one count of conspiracy to defraud the State of Oklahoma, in violation of 21 Oklahoma Statutes (O.S.) § 424(A); one count of making or causing to be made false claims under the Oklahoma Medicaid program, in violation of 56 O.S. § 1005(A)(1); one count of failing to maintain records of claims submitted to the Oklahoma Health Care Authority for services or goods, in violation of 56 O.S. § 1005(A)(7); one count of grand larceny, in violation of 21 O.S. § 1701; one count of unlawful use of a computer to commit a criminal offense, in violation of 21 O.S. § 1953(A)(2); and one count of engaging in a pattern of criminal offenses, in violation of 21 O.S. § 425. IG Ex. 2. According to the Information, Petitioner and two others engaged in a scheme from on or about October 30, 2009 through May 28, 2013, whereby they submitted false claims to the Oklahoma Medicaid program for the payment of new prosthetic limbs when either a used prosthetic limb was provided, or no prosthetic limb was provided. IG Ex. 2 at 1-3.

On July 11, 2016, Petitioner entered a no contest plea to all six counts as stated in the Amended Information. IG Ex. 3. The court accepted Petitioner's plea and found him "guilty as charged." IG Ex. 3 at 9. The court deferred his sentence for five years until July 10, 2021. The court ordered Petitioner to pay \$12,115.19 in restitution, a \$50 fine, a \$300 victim compensation assessment, and other fees, and placed him under supervision by the probation department. IG Ex. 3 at 9, 12, 15; P. Ex. 3.

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

Petitioner's only argument in this case is that he has not been "convicted" of a criminal offense. P. Br. at 1. Petitioner asserts that he "was neither convicted not [sic] did [he] take a conviction" because he received a five-year deferred sentence until July 10, 2021. P. Br. at 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, regardless of 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 nolo contendere 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 the statutory definition for "convicted" under 42 U.S.C § 1320a-7(i)(2) and (3). IG Br. at 2; IG Reply Br. at 3. I agree with the IG that Petitioner was "convicted" of a criminal offense for purposes of exclusion under 42 U.S.C. § 1320a-7(i)(2) and (3). The Oklahoma court record indicates that the court found that a factual basis existed for Petitioner's no contest plea and that he was "guilty as charged." IG Ex. 3 at 9. Therefore, the record shows that he was "convicted" under the definition of that term in 42 U.S.C. § 1320a-7(i)(2).

In addition, Petitioner's plea of no contest is a plea of nolo contendere. The court record expressly states that Petitioner's plea was "accepted by the Court." IG Ex. 3 at 9. Thus, I conclude that Petitioner was also "convicted" under the definition of that term in 42 U.S.C. § 1320a-7(i)(3).

Furthermore, the fact that Petitioner received a deferred sentence from the state court judge following his no contest plea also establishes that he was "convicted" under the statutory definition in 42 U.S.C. §1320a-7(i)(4). Under that provision, 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. 42 U.S.C. § 1320a-7(i)(4).

With his brief, Petitioner submitted two sections from Title 22 (Criminal Procedure) of the Oklahoma Statutes, sections 136 and 991c. P. Exs. 1 and 2. Petitioner neither cited nor discussed these sections, but apparently intended them as support for his argument that he was not convicted under Oklahoma law. In reviewing these provisions, I note that 22 O.S. § 991c states, in relevant part:

A. Upon a verdict or plea of guilty or upon a plea of nolo contendere, but before a judgment of guilt, the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings upon the specific conditions prescribed by the court not to exceed a ten-year period. The court shall first consider restitution among the various conditions it may prescribe

* * *

C. Upon completion of the conditions of the deferred judgment, and upon a finding by the court that the conditions have been met and all fines, fees, and monetary assessments have been paid as ordered, the defendant shall be discharged without a court judgment of guilt, and the court shall order the verdict or plea of guilty or plea of nolo contendere to be expunged from the record and the charge shall be dismissed with prejudice to any further action

* * *

E. Upon violation of any condition of the deferred judgment, the court may enter a judgment of guilt and proceed as provided in Section 991a of this title or may modify any condition imposed. Provided, however, if the deferred judgment is for a felony offense, and the defendant commits another felony offense, the defendant shall not be allowed bail pending appeal.

22 O.S. § 991c.

Although the term “deferred judgment” is used in 22 O.S. § 991c, it is evident, based on the manner in which the state court will treat Petitioner’s criminal charges, that he has entered into a first offender program, a deferred adjudication program and/or a program that withholds a judgment of conviction. I find that the action to be taken by the state court with respect to Petitioner’s criminal case is the type of action contemplated in 42 U.S.C. § 1320a-7(i)(4).

As stated by the Ninth Circuit in *Travers v. Shalala*:

[w]hat constitutes a ‘conviction’ under [42 U.S.C. 1320a-7] . . . is determined by federal law, not state law. . . 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.

Travers v. Shalala, 20 F.3d 993, 996 (9th Cir. 1994).

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 (emphasis added).¹

In looking at the substance of the proceedings in this case, I find that the Oklahoma court's action in deferring judgment in Petitioner's case is equivalent to a deferred adjudication arrangement. I thus conclude that Petitioner was "convicted" as that term is defined in 42 U.S.C. § 1320a-7(i)(4).

C. Petitioner was convicted of a criminal offense that related to the delivery of an item or service under a State health care program (i.e. Medicaid).

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); 42 C.F.R § 1001.101(a). A state health care program includes a state's Medicaid program. 42 U.S.C. § 1320a-7(h); 42 C.F.R. § 1001.2 (definition of *State health care program*).

¹ I note that the *Travers* court also explained the difference between a deferred prosecution and a deferred adjudication arrangement, stating "[i]n a deferred prosecution, it is not simply the judgment, but the initiation of charges altogether, which is withheld. If the defendant does not live up to the terms of his agreement with the prosecutor, he may be free to enter or persist in a plea of not guilty and proceed to trial." 20 F.3d at 997. In contrast, in a deferred adjudication, a defendant is not free to set aside his plea or proceed to trial. It is evident that the resolution of the criminal charges in Petitioner's case shows that he was subject to a deferred adjudication arrangement, not a deferred prosecution.

It is significant that the term “related to” simply means that there must be a nexus or common sense connection. *See Quayum v. U.S. Dep’t of Health & Human Servs.*, 34 F. Supp. 2d 141, 143 (E.D.N.Y. 1998); *see also Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (describing the phrase “relating 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 quotation marks omitted).

In the present case, I conclude that an obvious nexus exists between Petitioner’s conviction and the delivery of an item or service under Medicaid. One of the counts of which Petitioner was convicted was entitled “Making or Causing to Be Made False Claims Under The Oklahoma Medicaid Program” and alleged that Petitioner knowingly submitted false claims to the Oklahoma Medicaid program for services premised upon providing new prosthetic limbs to Medicaid recipients when, in fact, either used prosthetic limbs were provided or no prosthetic limbs were provided to the Medicaid recipients. IG Ex. 2 at 5-6. Another count of which Petitioner was convicted was entitled “Failing to Maintain Records of Claims Submitted to Oklahoma Health Care Authority For Services or Goods” and alleged that Petitioner failed to maintain proper records relating to the ordering, providing, and billing of prosthetic limbs for two Medicaid recipients, thereby violating his contract with the Oklahoma Health Care Authority. IG Ex. 2 at 6-7. Moreover, Petitioner has conceded that his criminal acts were related to the delivery of an item or service under Medicaid. In his plea agreement, Petitioner admitted the following:

Between 10-09 & 5-13 the state has sufficient evidence to submit to a jury which could return a verdict of guilt that I submitted false claims to the OK Medicaid program, failed to keep proper records, obtained monies in excess of \$500 from said program by fraud . . .

IG Ex. 3 at 9.

Thus, based on the factual recitations in the Amended Information and Petitioner’s plea agreement, there can be no dispute that Petitioner’s criminal conduct, involving filing false claims with the Oklahoma Medicaid program, was “related to” the delivery of an item or service under a state health care program. *Jack W. Greene*, DAB No. 1078 (1989), *aff’d*, *Greene v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990); *Michael Travers, M.D.*, DAB No. 1237 (1991), *aff’d*, *Travers v. Sullivan*, 791 F. Supp. 1471, 1481 (E.D. Wash. 1992), *aff’d*, *Travers v. Shalala*, 20 F.3d 993 (9th Cir. 1994).

D. 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 under 42 U.S.C. § 1320a-7(a)(1), 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).

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)(1), (c)(3)(B).

_____/s/_____
Scott Anderson
Administrative Law Judge