

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Yamilet Fajardo-Cruz,

Petitioner,

v.

The Inspector General,

Respondent.

Docket No. C-14-181

Decision No: CR3162

Date: March 19, 2014

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Yamilet Fajardo-Cruz, from participating in Medicare, state Medicaid programs, and all other federally funded health care programs for a minimum of five years.

I. Background

The I.G. notified Petitioner that she was being excluded from participating in Medicare and other programs because, according to the I.G., Petitioner was convicted of a felony as is described at section 1128(a)(3) of the Social Security Act (Act). Petitioner requested a hearing and the case was assigned to me.

I issued an order directing the parties to file briefs and proposed exhibits. I ordered that the I.G. file his brief and exhibits first and I gave Petitioner the opportunity to review the I.G.'s submission before filing her brief and exhibits. However, Petitioner elected to file a brief and supporting exhibits prior to the date when the I.G. filed his brief. I advised Petitioner that she could nevertheless file a supplemental brief and exhibits after she had

an opportunity to review the I.G.'s brief and exhibits. Petitioner did not avail herself of this opportunity.

The I.G. filed four exhibits that he identified as I.G. Ex. 1 – I.G. Ex. 4. Petitioner filed three exhibits that she identified as P. Ex. A – P. Ex. C. I receive these exhibits into the record.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether Petitioner was convicted of a felony as is described at section 1128(a)(3) of the Act, thereby mandating the I.G. to exclude her for a minimum of five years.

B. Findings of Fact and Conclusions of Law

Section 1128(a)(3) mandates the exclusion of any individual that is convicted of a State or federal felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service.¹ The minimum mandatory period of an exclusion imposed under section 1128(a)(3) is five years. Act, §1128(c)(3)(B).

The undisputed facts of this case are that on October 30, 2012, Petitioner was convicted of the federal felony offense of Misprision of a Felony. I.G. Ex. 4. There is no dispute that this felony occurred after the enactment date of HIPAA. The only questions remaining are whether Petitioner's crime related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, and whether it was committed in connection with the delivery of a health care item or service.

The answer to both questions is clearly yes. First, Petitioner's conviction related to fraud. Petitioner was trained as a physician in Cuba and she immigrated to the United States. She took up residence in Puerto Rico and there she sought to obtain a license to practice medicine. The undisputed facts establish that she failed a portion of the examination that was a prerequisite to obtaining a license but that, somehow, she obtained the benefit of a falsified score, which made it appear as if she had passed. I.G. Ex. 2 at 9. Subsequently, Petitioner concealed from federal agents information that she had that explained how others helped her obtain a false passing score on the examination. *Id.* Her crime of misprision of a felony stems from these facts and they amount to an obvious fraud, the concealment from government agents of a falsified examination score.

¹ The section additionally requires that the felony be committed after the date of enactment of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

Second, Petitioner's crime was committed in connection with the delivery of health care items or services. Her intent in taking the examination was to obtain a physician's license in Puerto Rico. The delivery of health care items or services was the essence of her intended occupation and her concealment from federal agents of critical facts about her licensing examination, which was intended to enable her to continue to provide health care items or services when in fact she should have been barred legally from doing so.

Consequently, Petitioner was convicted of a felony within the meaning of section 1128(a)(3) of the Act. The I.G. was mandated to exclude her. There is no issue as to whether the five year length of the exclusion is reasonable inasmuch as the five year term is for the minimum period required by law. Act, § 1128(c)(3)(B).

Petitioner makes several arguments in support of her challenge to the I.G.'s determination and I find these to be without merit.

First, Petitioner contends that she never worked for a federally funded health care program. However, section 1128(a)(3) does not require a nexus between a crime and a *federal* health care program to put that crime within the category of crimes for which exclusion is required. The section encompasses any health care item or service, whether or not it is federally funded.

Second, Petitioner asserts that she worked in Puerto Rico as an intern and that she was not paid for her services. But, that does not derogate from the fact that she was providing health care items or services to patients and that she would not have been able to do so but for the falsified score on her examination.

Finally, Petitioner argues that she did not commit any fraud with respect to a health care item or service and she questions whether her conviction for misprision of a felony was based on anything unlawful that she had done. This argument is essentially a claim by Petitioner that she is not, in fact, guilty of the crime of which she was convicted. That argument is irrelevant. The requirement for exclusion in this case derives from Petitioner's conviction. She may not, in this proceeding, argue that the conviction is effectively invalid because of her asserted innocence.

/s/
Steven T. Kessel
Administrative Law Judge