

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Nenice Marie Andrews
Docket No. A-15-68
Decision No. 2656
September 23, 2015

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

Nenice Marie Andrews (Petitioner) appeals the April 23, 2015 decision by an Administrative Law Judge (ALJ). *Nenice Marie Andrews*, DAB CR3810 (2015) (ALJ Decision). In that decision, the ALJ upheld the Inspector General's (I.G.) exclusion of Petitioner from participating in Medicare, Medicaid, and all federal health care programs for a period of five years pursuant to section 1128(a)(4) of the Social Security Act (Act).¹ The I.G. imposed the mandatory exclusion based on Petitioner's felony convictions for tampering with drug records by unlawfully and knowingly making false statements in prescriptions for controlled substances. Petitioner argues that the ALJ erred in sustaining the exclusion because the state court later converted her two felony convictions to misdemeanors and, therefore, she is not subject to a mandatory exclusion under the Act. The ALJ rejected this argument concluding that her felony convictions fell squarely within the scope of section 1128(a)(4), thereby requiring the mandatory exclusion.

For the reasons explained below, we affirm the ALJ Decision.

Applicable Law

Section 1128(a)(4) of the Act requires the Secretary of Health and Human Services to exclude from participation in all federal health care programs any individual convicted of a felony criminal offense under federal or state law that occurred after August 21, 1996 and that relates "to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." *See also* 42 C.F.R. § 1001.101(d).

Section 1128(i) of the Act provides that an individual is "convicted" of a criminal offense when: (1) a judgment of conviction has been entered against the individual by a federal, state, or local court, regardless of whether there is an appeal pending or whether the

¹ The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact-toc.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp. Table

judgment of conviction or other record relating to criminal conduct has been expunged; (2) there has been a finding of guilt against the individual by a federal, state, or local court; (3) a plea of guilty or no contest by the individual has been accepted by a federal, state, or local court; or (4) the individual has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

Section 1128(c)(3)(B) of the Act imposes a minimum exclusion period of five years for any exclusion that is mandatory under the Act. When an individual appeals an exclusion before an ALJ, if the exclusion is mandatory and is imposed for the statutory minimum five-year period, the individual may request a hearing only on whether the basis for imposing the exclusion exists. 42 C.F.R. § 1001.2007(a)(1), (2).

Case Background

As Petitioner acknowledges, the following facts are undisputed. Request for Review (RR) at 1. Petitioner was a registered nurse and adult nurse practitioner licensed to practice in Oregon. I.G. Ex. 2, at 1.

On January 31, 2014, the District Attorney for the Circuit Court of the State of Oregon for Washington County (state court) charged Petitioner with eleven Class C felony counts of tampering with drug records in violation of Oregon Revised Statutes (ORS) § 167.212. I.G. Ex. 3. On March 20, 2014, Petitioner pled guilty to Counts 1 and 2, both felony charges of tampering with drug records by unlawfully and knowingly making false statements in prescriptions for controlled substances. I.G. Ex. 4. The state court accepted Petitioner's guilty plea, entered a judgment convicting Petitioner, and sentenced her to 18 months of probation. I.G. Exs. 4, 5. The state court noted in the judgment that Petitioner may request misdemeanor treatment of her felony convictions after successfully completing one year of her probation.² I.G. Ex. 5, at 1.

On April 21, 2014, Petitioner voluntarily surrendered her registered nurse license and adult nurse practitioner certificate. P. Ex. 1, at 2. The Oregon State Board of Nursing (Nursing Board) agreed that, after a minimum period of 18 months, Petitioner may submit an application to have her nursing license reinstated. *Id.* The Nursing Board also agreed, that after a minimum period of three years, Petitioner may submit an application to have her nurse practitioner certificate reinstated. *Id.*

By letter dated July 31, 2014, the I.G. notified Petitioner that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs, as defined in section 1128B(f) of the Act, for the statutory minimum period of five years

² Under ORS § 161.705, a state court may convert certain felonies to misdemeanors by entering a judgment of conviction for a misdemeanor when a person convicted of a Class C felony has successfully completed a sentence of probation, and the court believes that it would be unduly harsh to sentence the defendant for a felony.

under section 1128(a)(4) of the Act. I.G. Ex. 1, at 1. As stated in the notice letter, the I.G. imposed this exclusion based on Petitioner's felony convictions, as defined in section 1128(i) of the Act, of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. *Id.*

On September 19, 2014, nearly six months into her 18-month probation period, Petitioner requested the state court to convert the felony convictions to misdemeanor convictions in order to avoid the I.G.'s imposition of a mandatory five-year exclusion under section 1128(a)(4) of the Act. I.G. Ex. 6, at 1. In her request, Petitioner stated that conversion of her felony convictions to misdemeanor convictions would enable her to ask the I.G. to reconsider the basis of the I.G.'s exclusion from mandatory (under section 1128(a)(4), which requires a minimum five-year exclusion) to discretionary (under section 1128(b)(4), which does not). *Id.* On September 23, 2014, the state court issued an order granting Petitioner's request to convert her felony convictions to misdemeanor convictions pursuant to ORS § 161.705. I.G. Ex. 7; I.G. Ex. 8, at 4-5.

Petitioner represented that she requested the I.G. to withdraw the mandatory five-year exclusion under section 1128(a)(4) and substitute a permissive exclusion under section 1128(b)(4). P. Informal Br. (Feb. 10, 2015) at 5-6. Petitioner also requested the I.G. to set the exclusion for a reasonable period to coincide with the date by which the Nursing Board stipulated that Petitioner may apply for reinstatement as a registered nurse, which would be 18 months from April of 2014, or October of 2015. *Id.*, citing P. Ex.1, at 2.

On October 1, 2014, Petitioner timely filed a hearing request before an ALJ challenging the basis of her five-year exclusion.

ALJ Decision

On April 23, 2015, the ALJ issued a decision on the written record because the only question was a legal issue. The ALJ rejected Petitioner's argument that she was not subject to a mandatory exclusion because the state court converted her felony convictions to misdemeanor convictions pursuant to relief permitted by an Oregon criminal law provision. The ALJ stated that, "[w]hatever the state court's motivation, it does not have the authority to nullify the exclusion statute." ALJ Decision at 4. The ALJ noted that "[h]ad the court vacated Petitioner's felony convictions because they were made in error, Petitioner would not be subject to a five-year exclusion." *Id.* The ALJ found that the court instead acted to convert the felony convictions after the Petitioner successfully served much of her probation sentence under a state provision to mitigate the harshness of a felony sentence. *Id.* Accordingly, the ALJ concluded that the I.G. was authorized to exclude Petitioner under section 1128(a)(4) for the mandatory minimum period of five years because she was convicted of a felony relating to the unlawful manufacture,

distribution, prescription, or dispensing of a controlled substance based on the definition of “convicted” in section 1128(i) of the Act. *Id.* at 4-5.

Standard of Review

The Board’s standard of review on a disputed issue of law is whether the initial decision is erroneous. 42 C.F.R. § 1005.21(h); *Guidelines – Appellate Review of Decisions of Administrative Law Judges in Cases to Which Procedures in 42 C.F.R. Part 1005 Apply (Guidelines)*.³

Analysis

The only issue on appeal before us is whether the ALJ erred in concluding that Petitioner was “convicted” (as defined in section 1128(i)) of a felony offense relating to the unlawful prescription of a controlled substance and is thereby subject to a mandatory five-year exclusion under section 1128(a)(4). *See* RR at 1; I.G.’s Brief in Opposition to Petitioner’s Appeal (I.G. Br.) at 2. Petitioner argues that the ALJ erred in sustaining the exclusion because the state court later converted her two felony convictions to misdemeanors, which are not subject to a mandatory exclusion under the Act. RR at 1-3. This argument is without merit.

1. *The ALJ correctly found that Petitioner’s felony convictions “fall squarely” within the statutory and regulatory definition of conviction.*

As noted above, for purposes of program exclusion, an individual is considered to be “convicted” of a criminal offense if **any one** of four subsections under section 1128(i)(1)-(4) of the Act is met. *See also* 42 C.F.R. § 1001.2; *Henry L. Gupton*, DAB No. 2058, at 8 (2007), *aff’d sub nom. Gupton v. Leavitt*, 575 F. Supp.2d 874 (E.D. Tenn. 2008) (each subsection of the definition of “conviction” constitutes a “singular, mutually exclusive” basis to find that an individual has been convicted). In *Gupton*, the Board concluded that:

[C]onviction is to be understood very broadly as including even situations where the judgment has been expunged, where a finding of guilt or a plea of guilty or no contest has been accepted by a court . . . and where a diversion arrangement of some kind permits the person to avoid entry of judgment against them. *In other words, the four subsections [of section 1128(i) of the Act] provide four extensions of the meaning of the term “conviction” beyond what might otherwise be considered its ordinary scope.*

Gupton, DAB No. 2058, at 10 (italics added).

³ The *Guidelines* are available at <http://www.hhs.gov/dab/divisions/appellate/guidelines/procedures.html>.

On March 20, 2014, the state court entered a judgment of conviction against Petitioner based on her guilty plea of two felony counts of tampering with drug records. I.G. Ex. 5. The state court's judgment satisfies at least three of the subsections in the conviction definition at section 1128(i). First, the state court issued a judgment of conviction against Petitioner. Act § 1128(i)(1). Second, the state court made a finding of guilt against Petitioner. *Id.* § 1128(i)(2). Third, the state court accepted Petitioner's guilty plea to the two felony offenses at issue here. *Id.* § 1128(i)(3). Moreover, as she did before the ALJ, Petitioner stipulated that she was convicted of two felonies of unlawful prescription of controlled substances. RR at 1-2; P. Informal Br. (Feb. 10, 2015) at 1.

We conclude that the ALJ correctly found that Petitioner's convictions "fall squarely" within the statutory and regulatory definition of "convicted." ALJ Decision at 4. Thus, the Act requires that Petitioner be excluded for at least five years.

Petitioner argues, as she did before the ALJ, that she should instead be subject only to a permissive rather than mandatory exclusion and that the period should coincide with her eligibility for reinstatement of her nursing credentials. RR at 7-8. The Board has long held that, when a conviction falls within the scope of section 1128(a), a minimum five-year exclusion must be imposed, and the I.G. does not have discretion to elect to impose a shorter exclusion period under an alternative permissive provision such as section 1128(b)(4) to which Petitioner cites. *Scott D. Augustine*, DAB No. 2043, at 13-14 (2006), and court cases cited therein (if a conviction falls within the scope of section 1128(a), a mandatory exclusion must be imposed, and neither the ALJ nor the I.G. may proceed under any other provision). Therefore, a permissive exclusion could only apply here if we found that the post-conviction conversion of the felonies to misdemeanors deprived the I.G. of authority to impose a mandatory exclusion. For the reasons explained in the next section, we conclude that the state court's post-conviction action did not alter the I.G.'s authority to impose a mandatory exclusion under federal law.

2. *The ALJ correctly concluded that the state court's conversion of Petitioner's felony convictions to misdemeanor convictions did not eliminate the basis for the five-year mandatory exclusion.*

Petitioner acknowledges that she was indeed convicted of a felony (and states that the ALJ erred in construing her as denying this fact). RR at 2. Nevertheless, she argues that the "key fact" distinguishing her case from those on which the ALJ relied is that the state court "subsequently intervened, altering its sentence and changing Petitioner's convictions in an overt effort to eliminate the basis of a mandatory five-year exclusion, and for no other purpose." RR at 2, 3 (emphasis omitted), *citing* I.G. Exs. 6, 7-8. She also acknowledges longstanding administrative case law (which we note has been upheld by courts as cited above) that post-conviction relief does not remove the I.G.'s authority to act based on a conviction. RR at 3. She argues, however, that the specific relief here of converting felony convictions to misdemeanor convictions is not expressly addressed

in the statute or case law. *Id.* She argues that the “unique” developments in her case should not be considered in the same light as post-conviction relief “conventionally understood,” since she is continuing to serve the same sentence initially imposed and only the nature of the convictions was altered. *Id.* at 4. She further suggests that the urgency of the state court acting to alter the convictions before she even fully completed her sentence specifically to alleviate her vulnerability to a mandatory exclusion somehow means that her situation should be treated differently than other cases in which the Board and the courts have rejected post-conviction relief as undermining the I.G.’s exclusion authority. *Id.* at 5-6.

We agree with the I.G. that “Petitioner’s interpretation of the exclusion statute, and a state’s role in exclusions, however, is patently wrong. Federal law, not state law, controls when defining whether a conviction exists for exclusion purposes.” I.G. Br. at 7, *citing Travers v. Shalala*, 20 F.3d 993, 996 (9th Cir. 1994); *accord Marc Schneider, D.M.D.*, DAB No. 2007, at 5 (2005). Neither the state court’s urgency nor its intention to relieve the Petitioner of her liability to federal exclusion can alter the authority of the I.G. to impose a mandatory exclusion based on the felony convictions here.⁴

As the ALJ correctly explained, the term “convicted” in section 1128(i) is broadly defined. The ALJ further observed that this broad definition is derived from Congress’s goals and intent in enacting the exclusion statute, and she quoted the legislative history contained in *Gupton*:

The rationale for the different meanings of “conviction” for state criminal law versus federal exclusion law purposes follows from the distinct goals involved. The goals of criminal law generally involve punishment and rehabilitation of the offender, possibly deterrence of future misconduct by the same or other persons, and various public policy goals. Exclusions imposed by the I.G., by contrast, are civil sanctions, designed to protect the beneficiaries of health care programs and the federal fisc, and are thus remedial in nature rather than primarily punitive or deterrent. . . . In the effort to protect both beneficiaries and funds, Congress could logically conclude that it was better to exclude providers whose involvement in the criminal system raised serious concerns about their integrity and trustworthiness, even if they were not subjected to criminal sanctions for reasons of state policy.

⁴ The urgency arose from the fact that Petitioner had been notified of the proposed exclusion; and that she had not completed her probation was relevant because the Oregon statute required that probation be completed before an offender was eligible to seek conversion of a felony conviction to a misdemeanor conviction. The state court nevertheless granted the relief Petitioner sought, but the fact that the Oregon statute intended this relief to be available only to those who had completed a sentence of probation further undercuts Petitioner’s efforts, rejected later in this section, to distinguish the conversion of her conviction from other forms of post-conviction relief which are available only upon an individual’s “*completion or compliance*” with the terms of a sentence. RR at 6 (italics in original).

ALJ Decision at 3-4, *quoting Gupton* at 7-8 (footnote omitted). The legislative history also shows that the Act’s definition of conviction includes “*all instances of conviction which are removed from the criminal record of an individual for any reason other than the vacating of the conviction itself . . .*” H.R. Rep. No. 99-727, at 75 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3607, 3665 (emphasis added). The I.G.’s regulations similarly provide, by analogy, “that an individual or entity will be reinstated into Medicare, Medicaid and other Federal health care programs retroactive to the effective date of the exclusion when such exclusion is based on . . . a conviction that is *reversed or vacated on appeal*[.]” 42 C.F.R. § 1001.3005(a)(1) (italics added).

The conversion at issue here is of the same nature as post-conviction expungement such as is provided in some state first-offender diversion programs. A state may well have criminal justice policy reasons to provide for conversion or reduction of felony convictions to mitigate the harshness of the impact of felony sentences on certain offenders. If the entire removal of a criminal conviction from an offender’s record does not mean that the federal government will disregard that conviction in making exclusion decisions to protect health care programs and their beneficiaries, it would be even less reasonable to expect that Congress intended to have the I.G. ignore a felony conviction merely because a court elected to re-characterize the conviction as a misdemeanor after the fact. We conclude that, once an individual has been convicted of a felony within the meaning of section 1128(i) of the Act, any further proceedings affecting the characterization of that conviction – other than vacating or reversing the conviction itself – are irrelevant for purposes of determining whether the I.G. has authority to impose an exclusion under section 1128(a) or (b).

We thus agree with the ALJ that “[h]ad the court vacated Petitioner’s felony convictions because they were made in error, Petitioner would not be subject to a five-year exclusion.” ALJ Decision at 4, *citing Jennifer L. Stack*, DAB CR3494 (2014). The ALJ observed that “the petitioner [in *Stack*] was not subject to exclusion based on her felony conviction because the state court vacated that conviction pursuant to a section of the Ohio statutes that allows a defendant to withdraw a guilty plea after sentencing if she shows an extraordinary and fundamental flaw in the original plea proceeding.” *Id.* However, the state court here *did not vacate or reverse* Petitioner’s two felony convictions or determine that the original proceedings against her were in some way fundamentally flawed, and Petitioner does not contend otherwise. I.G. Exs. 7, 8.

Instead, her felony convictions were “converted” pursuant to an Oregon statute stating that “the court may enter judgment of conviction for a Class A misdemeanor and make disposition accordingly when . . . *a person is convicted of any Class C felony*[.]” ORS § 161.705 (italics added); ALJ Decision at 4. In so doing, the state court expressly recognized that Petitioner had indeed been “*duly convicted*” of two Class C felonies but was seeking “misdemeanor treatment” of those “*felony convictions*.” I.G. Ex. 7 (italics added). Far from suggesting that the original felony conviction proceedings were the

result of error or flawed proceedings, the state court judge, in the hearing on the conversion motion, reiterated that “I felt it was appropriate that she [Petitioner] have that felony and that she have the motivation to earn the Court’s consideration.” I.G. Ex. 8, at 2-3. In sum, Petitioner received a form of post-conviction relief but her felony convictions were neither vacated nor reversed.

Thus, we conclude the ALJ correctly found that the state court’s conversion of Petitioner’s felony convictions to misdemeanor convictions did not eliminate the basis for the five-year mandatory exclusion.

Conclusion

For all of the foregoing reasons, we affirm the ALJ Decision.

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member