

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Carrie Marshall,

Petitioner,

v.

The Inspector General.

Docket No. C-10-889

Decision No. CR2274

Date: October 22, 2010

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Carrie Marshall, from participating in Medicare and other federally funded health care programs for a minimum of five years.

I. Background

Petitioner is a registered nurse. The I.G. determined to exclude Petitioner from participating in Medicare and other federally funded health care programs on the ground that she had been convicted of a felony as is described at section 1128(a)(4) of the Social Security Act (Act).

Petitioner requested a hearing to challenge the I.G.'s exclusion determination and the case was assigned to me for a hearing and a decision. The parties exchanged briefs and proposed exhibits. The I.G. filed three proposed exhibits that are identified as I.G. Exhibit (Ex.) 1 – I.G. Ex. 3. Petitioner filed one proposed exhibit that is identified as P. Ex. 1. The parties did not object to my receiving these exhibits into evidence and, therefore, I receive all of them. Neither party requested that I convene an in-person hearing.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues are whether:

1. Petitioner was convicted of a felony as is described at section 1128(a)(4) of the Act; and
2. An exclusion of at least five years is mandated by law.

B. Findings of fact and conclusions of law

I make the following findings of fact and conclusions of law.

1. Petitioner was convicted of a felony as is described at section 1128(a)(4) of the Act.

The Act mandates the exclusion of any individual who is convicted of a felony that was committed after August 21, 1996 relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Act § 1128(a)(4). In making his case against Petitioner, the I.G. relies on the following facts.

A criminal complaint was filed against Petitioner on May 12, 2009 in the Trial Court of Massachusetts, Boston Municipal Court, charging Petitioner with knowingly or intentionally acquiring or obtaining possession of a controlled substance by means of forgery, fraud, deception, or subterfuge, in violation of Massachusetts General Law (M.G.L.) c.94C, § 33(b). I.G. Ex. 1 at 1. A person who violates this Massachusetts law may be punished with up to four years imprisonment in a State prison. *Id.* Any criminal offense punishable by imprisonment in a State prison is a felony under Massachusetts law. M.G.L. c.274, § 1.

The complaint was based on allegations that Petitioner had written several prescriptions for herself for controlled substances including Percocet and Vicodin, had forged the name of a physician on the prescriptions, and had used the forged prescriptions to purchase controlled substances at a pharmacy in South Boston, Massachusetts. I.G. Ex. 3 at 1 (the I.G. misidentified this exhibit as “I.G. Ex. 2” and I have changed the identification to the correct exhibit number).

On September 1, 2009, Petitioner entered a plea to the charge. The plea was recorded on a form as: “Admission to sufficient facts accepted after a colloquy” I.G. Ex. 2 at 2.

These facts are sufficient to establish that Petitioner was convicted of a section 1128(a)(4) offense. Petitioner was charged with and convicted of a felony under Massachusetts law and that crime plainly related to the prescription and dispensing of controlled substances.

Petitioner argues that she was not “convicted” of a crime. She contends that her plea – which she asserts was ultimately resolved with dismissal of the charges against her on September 1, 2010 – was not a plea of guilty or a disposition that amounts to a conviction within the meaning of the Act. Consequently, she asserts, there is no basis to exclude her.

I disagree. The Act defines “convicted” to encompass circumstances which include a guilty plea, a plea of nolo contendere, or:

when the individual . . . has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

Act § 1128(i)(3),(4). By admitting that sufficient facts existed to convict her of the crime with which she was charged, Petitioner entered into an arrangement that was tantamount to a plea of guilty, a plea of nolo contendere, or an “other arrangement or program where judgment of conviction has been withheld” and her plea clearly constituted a conviction within the meaning of the Act. Under Massachusetts law, an “admission to sufficient facts” is the equivalent of a guilty plea or a plea of nolo contendere. Massachusetts Criminal Procedure Rule 12(a).

The fact that Petitioner’s plea may have been expunged or dismissed after her completion of court-ordered requirements – as Petitioner asserts was the case here – is not a basis to bar a finding that she was “convicted” within the meaning of section 1128(i) of the Act. The Act subsumes any conviction even if the conviction is subsequently expunged. Act § 1128(i)(1).

2. An exclusion of at least five years is mandatory.

The five year minimum exclusion that the I.G. imposed against Petitioner is reasonable as a matter of law. The Act mandates a minimum exclusion of five years for any individual who is convicted of an offense that is described at section 1128(a)(4). Act § 1128(c)(3)(B).

_____/s/
Steven T. Kessel
Administrative Law Judge