

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Teresa Brewer-Gable
(O.I. File No. H-14-42115-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-161

Decision No. CR3719

Date: March 20, 2015

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services (HHS) notified Petitioner, Teresa Brewer-Gable, 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)(4). 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, pursuant to 42 U.S.C. § 1320a-7(a)(4). The IG advised Petitioner that the exclusion was based on her conviction in the Circuit Court of Harrison County, Mississippi, of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. IG Exhibit (Ex.) 1.

Petitioner timely filed a request for hearing (RFH) and this case was assigned to me for hearing and decision. On December 22, 2014, I convened a prehearing conference by telephone, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order), dated December 24, 2014. *See* 42 C.F.R. § 1005.6. Pursuant to the Order, the IG filed a brief (IG Br.) and five exhibits (IG Exs. 1-5). Petitioner filed a response brief (P. Br.). The IG filed a reply brief (IG Reply Br.), and Petitioner filed a supplemental brief (P. Supp. Br.).¹

In the absence of objection, I admit IG Exs. 1-5 into the record. Petitioner did not submit any marked exhibits.

II. Decision on the Record

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 ¶ 3. The IG indicated on his short form brief that he did not believe a hearing was necessary and did not have any witness testimony to offer. IG Br. at 7-8. Petitioner did not file a short form brief and made no request for a hearing in the briefs that she filed. 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)(4). *See* 42 C.F.R. § 1001.2007(a)(1)-(2).

IV. Findings of Fact, Conclusions of Law, and Analysis²

The IG is excluding Petitioner based on 42 U.S.C. § 1320a-7(a)(4)), which requires the IG to exclude “[a]ny individual or entity that has been convicted for an offense which occurred after August 21, 1996, under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.”

Therefore, the four essential elements necessary to support the IG’s exclusion are: (1) the individual to be excluded must have been convicted of a criminal offense; (2) the criminal offense must have been a felony; (3) the felony conviction must have been for

¹ I grant Petitioner’s March 13, 2015 motion for leave to file a supplemental brief.

² My findings of fact and conclusions of law are set forth below in bold and italics.

conduct relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance; and (4) the felonious conduct must have occurred after August 21, 1996. 42 U.S.C. § 1320a-7(a)(4).

A. Petitioner pled guilty to the charge of Prescription Forgery; however, a state court withheld adjudication of guilt and placed Petitioner on three years of non-adjudicated probation.

Petitioner was accused of violating section 41-29-144(1) of the Mississippi Code based on a February 6, 2012 affidavit filed in the Circuit Court for Harrison County, Mississippi (Circuit Court). Petitioner waived presentation of the indictment to the grand jury and, instead, agreed to indictment by Information. IG Ex. 3 at 1.

On August 27, 2012, an assistant district attorney filed an Information in the Circuit Court. The Information charged that Petitioner “did unlawfully, willfully, knowingly, intentionally and feloniously acquire and obtain possession of Hydrocodone, a schedule III controlled substance, by misrepresentation and deception, to wit: by presenting a forged prescription . . . in violation of § 41-29-144(1).” IG Ex. 2.

On March 4, 2013, Petitioner pled guilty to one-count of Prescription Forgery in violation of section 41-29-144(1) of the Mississippi Code. The Circuit Court then “specifically with[eld] acceptance of [Petitioner’s] plea and adjudication of guilt and imposition of sentence in accordance with Mississippi Code of 1972, Annotated, § 41-29-150 pending successful completion of the conditions imposed in this order.” IG Ex. 4 at 1. The Circuit Court ordered Petitioner to serve “a period of **Three (3) Years Non-Adjudication Probation . . .**” IG Ex. 4 at 2 (emphasis in original). Further, the Circuit Court ordered that “upon finding that [Petitioner] has failed to comply with the terms and conditions imposed shall immediately accept [Petitioner’s] plea of guilty and proceed to sentence her.” IG Ex. 4 at 2.

On November 4, 2013, the Circuit Court released Petitioner from probation early, dismissed the criminal charge against Petitioner, and expunged the criminal charge from Petitioner’s record. IG Ex. 5.

B. Petitioner was convicted of a criminal offense for purposes of 42 U.S.C. § 1320a-7(a)(4).

The only issue Petitioner raises is that she has not been “convicted.” Petitioner argues that there has been no conviction because Petitioner participated in a non-adjudication program, ultimately resulting in the dismissal of all charges against her and an expunged record. RFH at 1-2; P. Br. at 1, 3; P. Supp. Br. at 1, 2; IG Exs. 4, 5. Petitioner cites *United States v. Matassini*, 565 F.2d 1297 (5th Cir. 1978) for the proposition that state law pardons control as to whether someone was convicted for federal purposes unless

Congress specifically legislates the effect of a pardon for federal purposes. P. Br. at 2, 4. Petitioner appears to argue that non-adjudication is not the same as deferred adjudication in 42 U.S.C. § 1320a-7(i)(4). Presumably, this argument is based on the title of the Circuit Court’s Order (i.e., Non-Adjudication Order) and the text of section 49-29-150(d)(1) of the Mississippi Code, which states: “Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained by the bureau solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection.”

The IG argues that Petitioner has been convicted for exclusion purposes under 42 U.S.C. § 1320a-7(i)(4), which provides that an individual is convicted when he or she “has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.”³ The IG asserts that Petitioner entered into such a program. IG Ex. 4. The IG avers that in the event Petitioner had not completed the terms of the Non-Adjudication Order, the Circuit Court would “immediately accept [Petitioner’s] plea of guilty and proceed to sentence her.” IG Ex. 4 at 2. Further, the IG argues that Congress has specifically legislated what constitutes a conviction for exclusion purposes, therefore, *Matassini* does not apply.

I agree with the IG’s argument. Congress has clearly defined by statute what it means to be “convicted” for exclusion purposes and that definition controls. *Travers v. Shalala*, 20 F.3d 993, 996 (9th Cir. 1994) (“What constitutes a ‘conviction’ under the Medicaid Act, however, is determined by federal law, not state law.”).

Further, Petitioner’s claim that a “non-adjudication” under Mississippi law is not a deferred adjudication under 42 U.S.C. § 1320a-7(i)(4) is incorrect. “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*, 20 F.3d at 996. Therefore, the title difference

³ The IG also argues that Petitioner was “convicted” under 42 U.S.C. § 1320a-7(i)(3) because she pled guilty to a felony offense. IG Br. at 5. I doubt that Petitioner would be considered convicted because section 1320a-7(i)(3) requires a court to have accepted the guilty plea. In the present matter, the Circuit Court “specifically with[eld] acceptance of [Petitioner’s] plea and adjudication of guilt and imposition of sentence in accordance with Mississippi Code of 1972, Annotated, § 41-29-150 pending successful completion of the conditions imposed in this order.” IG Ex. 4 at 1. This is consistent with the statute cited by the Circuit Court, which states that “upon a plea of guilty, the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him on probation upon such reasonable conditions as it may require and for such period, not to exceed three (3) years, as the court may prescribe.” Miss. Code Ann. § 41-29-150(d)(1). However, I do not need to reach a definitive conclusion concerning this issue because I affirm the IG’s exclusion on other grounds.

Petitioner raises between non-adjudication and deferred adjudication is not controlling. Rather, it is more significant that Petitioner pled guilty to a criminal charge and that the guilty plea was one that, should Petitioner have violated the terms of the non-adjudication order, the Circuit Court would have accepted and then sentenced Petitioner. IG Ex. 4 at 2; Miss. Code Ann. § 41-29-150(d)(1) (“Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided.”). This provision in the non-adjudication order and the statute authorizing that order is sufficient to conclude that it qualifies as a deferred adjudication under 42 U.S.C. § 1320a-7(i)(4). As the court stated in *Travers*:

In 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. In a deferred adjudication, on the other hand, 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.

Petitioner argues that the Circuit Court’s order expunging Petitioner’s criminal record should, under state law, preclude consideration in this forum of Petitioner’s guilty plea and the Circuit Court’s order of a period of non-adjudicated probation. P. Supp. Br. at 2; *see also* P. Br. 1, 4. Although Petitioner’s record has been expunged, this does not mean that I cannot consider the circumstances surrounding Petitioner’s guilty plea to determine whether, under federal law, Petitioner must be excluded. 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).

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

C. Petitioner was convicted of a felony.

Petitioner was convicted under section 41-29-144(1) of the Mississippi Code. In court documents, this offense is described as a felony. IG Ex. 3 at 1. Further this crime requires a term of imprisonment of no less than one year and no more than five years. Miss. Code Ann. § 41-29-144(3). Crimes punishable by more than one year in prison are felonies. 18 U.S.C. § 3559(a). Petitioner does not dispute that an offense under section 41-29-144(1) of the Mississippi Code is a felony. Therefore, I conclude that Petitioner was convicted of a felony offense.

D. Petitioner’s criminal offense is related to the unlawful distribution, prescription, or dispensing of a controlled substance.

Petitioner was charged with “unlawfully, willfully, knowingly, intentionally, and feloniously acquir[ing] or obtain[ing] possession of Hydrocodone, a schedule III controlled substance, by misrepresentation and deception, to wit: by presenting a forged prescription at Walgreens” IG Ex. 2. Petitioner pled guilty to this charge. IG Ex. 3 at 1. Based on the conduct that Petitioner admitted and the statute Petitioner pled guilty to violating (Miss. Code Ann. § 41-29-144(1)), I conclude that Petitioner was convicted of a felony that is related to the unlawful distribution, prescription, or dispensing of a controlled substance under 42 U.S.C. § 1320a-7(a)(4).

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)(4), 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 between July 2011 to January 2012. IG Ex. 2. Petitioner does not dispute this fact. *See generally* RFH; P. Br.; P. Supp. Br. Therefore, I conclude that Petitioner’s conviction meets the four elements of a mandatory exclusion under 42 U.S.C. § 1320a-7(a)(4), and, therefore, the IG was authorized 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)(4), 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)(4), (c)(3)(B).

/s/

Scott Anderson
Administrative Law Judge