Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Angela J. Whitman,
(O.I. File No. H-15-4-0469-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-2446

Decision No. CR4322

Date: October 15, 2015

DECISION

Petitioner, Angela J. Whitman, worked as a nurse at a regional medical center in Colorado. She stole the narcotic Fentanyl from her employer and was convicted of unlawful possession of a controlled substance. Pursuant to section 1128(a)(3) of the Social Security Act (Act), the Inspector General (IG) has excluded her from participating in Medicare, Medicaid, and all federal health care programs for a period of five years.

For the reasons discussed below, I find that the IG is authorized to exclude Petitioner, and that the statute mandates a minimum five-year exclusion.

Background

In a letter dated April 30, 2015, the IG advised Petitioner Whitman that, because she had been convicted of a felony offense related to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct in connection with the delivery of a

healthcare item or service, the IG was excluding her from participating in Medicare, Medicaid, and all federal health care programs for a period of five years. Petitioner requested review.

The parties have submitted their written arguments. (IG Br.; P. Br.). Attached to Petitioner's brief is a typed attachment. (P. Attach.). With his brief, the I.G. submitted seven exhibits (IG Exs. 1-7); Petitioner submitted five exhibits (P. Exs. 1-5). The IG submitted a reply. In the absence of any objections, I admit into evidence I.G. Exs. 1-7 and P. Exs. 1-5.

The parties agree that an in-person hearing is not necessary. IG Br. at 4; P. Attach. at 2.

Discussion

> ***Petitioner must be excluded from program participation for a minimum of five years because she was convicted of a felony relating to fraud and theft in connection with the delivery of a healthcare item or service.***[1]

Section 1128(a)(3) provides that an individual or entity convicted of felony fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service must be excluded from participation in federal health care programs for a minimum of five years. *See* 42 C.F.R. 1001.101(c).

Petitioner Whitman was a nurse at a regional medical center and had access to the center's narcotics. She appropriated the narcotic drug, Fentanyl, claiming that she was administering it to patients. In fact, she was using it for herself. I.G. Ex. 7. She was charged with felony counts of possessing a controlled substance, obtaining a controlled substance by fraud or deceit, and theft. IG Ex. 6. She pled guilty to one felony count of possessing a controlled substance. IG Exs. 2, 4, 5. On October 30, 2014, the Colorado court entered a deferred judgment against her, sentenced her to 50 hours of community service, and ordered her to pay $ 4,716.50 in fines and costs. IG Exs. 1, 3, 4.

Petitioner's felony conviction was thus plainly related to theft and fraud in connection with the delivery of a health care item (drugs). She stole narcotics from her employer (and patients) and fraudulently claimed that she was administering them to the patients who needed them. I.G. Ex. 7 at 2; *see* I.G. Ex. 6; I.G. Ex. 4 at 2, 5. She is therefore subject to exclusion.

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[1] I make this one finding of fact/conclusion of law.

Petitioner, however, argues that the deferred judgment was not a conviction so long as she complied with the probation agreement.

Under the Act and regulations, a person is "convicted" when "a judgment of conviction has been entered" regardless of whether that judgment has been expunged or otherwise removed. Act § 1128(i)(1); 42 C.F.R. § 1001.2(a)(2). Further, individuals who participate in "deferred adjudication or other program or arrangement where judgment of conviction has been withheld" are also "convicted" within the meaning of the statute. Act § 1128(i)(4); 42 C.F.R. § 1001.2(definition of *convicted at (d))*. Based on these provisions, the Departmental Appeals Board (Board) characterizes as "well established" the principle that a "conviction" includes "diverted, deferred and expunged convictions regardless of whether state law treats such actions as a conviction." *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).

The Board explained why, in these I.G. proceedings, the federal definition of "conviction" must apply. That definition differs from many state criminal law definitions. For exclusion purposes, Congress deliberately defined "conviction" broadly to ensure that exclusions would not hinge on the state criminal justice policies. Quoting the legislative history, the Board explained:

> 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. [footnote omitted] 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.

Gupton, DAB No. 2058, at 7-8.

Petitioner also explains that she took the drugs because she was addicted to them. Since her conviction, she has successfully undergone drug treatment and complied fully with the conditions of her probation. I accept these assertions as true; however they are not bases for overturning a mandatory exclusion.

Because Petitioner's conviction falls squarely within the statutory and regulatory definition of "conviction," she is subject to exclusion. An exclusion brought under section 1128(a)(3) must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

Conclusion

For these reasons, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid and all federal health care programs, and I sustain the five-year exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge