

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Heather Anne Howells,  
(OI File No. H-15-42515-9),

Petitioner,

v.

The Inspector General

Docket No. C-16-355

Decision No. CR4645

Date: June 24, 2016

**DECISION**

Petitioner, Heather Anne Howells, was convicted of operating an unlicensed assisted living facility, which is a felony under Florida law. Based on this conviction, the Inspector General (IG) has excluded her for five years from participating in Medicare, Medicaid, and all federal health care programs, as authorized by section 1128(a)(3) of the Social Security Act (Act). Petitioner appeals the exclusion.

For the reasons discussed below, I find that the IG properly excluded Petitioner Howells and that the statute mandates a minimum five-year exclusion.

**Background**

In a letter dated December 31, 2015, the IG advised Petitioner Howells 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. The letter explained that section 1128(a)(3) of the Act authorizes the exclusion. IG Exhibit (Ex.) 1.

Petitioner timely requested review.

The parties have submitted their written arguments. (IG Br.; P. Br.). With his brief, the IG submitted five exhibits (IG Exs. 1-5). In the absence of any objections, I admit into evidence IG Exs. 1-5.

The parties agree that an in-person hearing is not necessary. IG Br. at 5; P. Br. at 2.

## Discussion

***Petitioner Howells must be excluded from program participation for a minimum of five years because she was convicted of a 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. Act § 1128(a)(3).***<sup>1</sup>

Section 1128(a)(3) mandates that the Secretary of Health and Human Services exclude an individual who has been convicted of a 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. *See* 42 C.F.R. § 1001.101(c).

Here, in 2010 and 2011, Petitioner Howells rented a house in a residential neighborhood in Pinellas County, Florida. IG Ex. 5 at 3. From this house, she operated an assisted living facility, which housed at least three elderly and incapacitated residents. IG Ex. 5 at 4-7. But the facility was not licensed, as required by Florida state law. IG Ex. 5 at 9. In a felony information, dated July 17, 2013, Petitioner was charged with owning, operating, or maintaining an unlicensed assisted living facility, in violation of section 429.08(1)(b) of the Florida Statutes. IG Ex. 4. On May 6, 2014, she pled guilty. IG Ex. 2. She was sentenced to five years probation “with special conditions” and ordered to pay \$650 in fines and costs. IG Ex. 3.

Petitioner denies that she was convicted of a felony, claiming that the adjudication of guilt was “withheld.” P. Br. at 1.<sup>2</sup> As part of its Order of Probation, the sentencing court entered an Order Withholding Adjudication. The order sets forth a long list of conditions

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<sup>1</sup> I make this one finding of fact/conclusion of law.

<sup>2</sup> Neither party made any effort to develop this issue. Aside from raising the issue, Petitioner did not argue the point nor cite to any portion of the record to support this claim. For his part, the IG did not respond at all to Petitioner’s claim.

and provides that Petitioner's probation could be revoked and that she could be arrested and adjudicated guilty if she failed to comply with all the conditions. IG Ex. 3 at 2.

The statute and regulations provide that a person is "convicted" when "a judgment of conviction has been entered" regardless of whether that judgment has been (or could be) expunged or otherwise removed. Act § 1128(i)(1); 42 C.F.R. § 1001.2(a)(2). 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(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 IG 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.

Next, Petitioner trivializes her conviction as a mere "technical violation" and argues that it was not related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or

service. She claims that the facility residents “received every service and accommodation that they purchased” and were not harmed financially. P. Br. at 2.

In determining whether a conviction is “related” within the meaning of section 1128(a)(3), the Board has long applied what it calls a “common sense” analysis. An offense is “related” if there is “a nexus or common-sense connection” between the conduct giving rise to the offense and one of the listed factors, including fraud or breach of fiduciary responsibility. *Andrew D. Goddard*, DAB No. 2032 at 4-5 (2006); *Kenneth M. Behr*, DAB No. 1997 (2005); *Erik D. Desimone, RPh.*, DAB No. 1932 (2004).

I find that Petitioner’s crime is “related” within the meaning of section 1128(a)(3). Under Florida law, an assisted living facility provides housing, meals, and a variety of personal care and supportive services – including administering medications – to the aged and disabled. Florida Stat. §§ 429.02, 429.256(3); *see* IG Ex. 5 at 2. The residents of Petitioner’s facility suffered dementia, memory loss, and a host of other impairments. Each had been adjudicated incapacitated and in need of a guardian. IG Ex. 5 at 6-7. In return for room and board and, in one case, a small stipend (\$600 per month), facility employees assisted the residents with their activities of daily living and administering medications. IG Ex. 5 at 8-9.

To promote the health, safety, and welfare of its residents (among other reasons), the State of Florida requires that an assisted living facility be licensed. Florida Stat. § 429.01. I agree with the IG that facility staff provided health care items and services – including administering medications – to facility residents. I also agree that operating an unlicensed assisted living facility is fraud. Petitioner’s crime is therefore related to fraud in connection with the delivery of a healthcare item or service. In the alternative, I agree that Petitioner owed a fiduciary duty to the incapacitated residents of her facility. By housing them in an unlicensed facility, she breached that duty.

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. §§ 1001.102(a); 1001.2007(a)(2).

## **Conclusion**

The I.G. properly excluded Petitioner from participation in Medicare, Medicaid and other federal health care programs, and the statute mandates a five-year minimum period of exclusion.

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/s/  
Carolyn Cozad Hughes  
Administrative Law Judge