Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Gustavo E. Borjas (OI File No. H-13-42964-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-1080

Decision No. CR3334

Date: August 19, 2014

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Gustavo E. Borjas, from participating in Medicare, all State health care programs (State Medicaid programs) and all other federally funded health care programs for a minimum of five years.

I. Background

Petitioner requested a hearing to challenge the I.G.'s determination to exclude him and the case was assigned to me. I directed the parties to file briefs and proposed exhibits. The I.G. filed a brief, a reply brief, and four proposed exhibits, which are identified as I.G. Ex. 1 – I.G. Ex 4. Petitioner filed a brief. Neither party requested that I convene an in-person hearing.

I receive I.G. Ex. 1 – I.G. Ex. 4 into the record.

II. Issue, Findings of Fact, and Conclusions of Law

A. Issue

The issue here is whether the I.G. is mandated to exclude Petitioner for a period of at least five years.

B. Findings of Fact and Conclusions of Law

The I.G. excluded Petitioner under the authority of section 1128(a)(4) of the Social Security Act (Act). This section mandates the exclusion of any individual who is convicted of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The evidence provides overwhelming support for the I.G.'s determination.

On September 12, 2013, Petitioner pled nolo contendere to a felony under Florida State law, namely, the crime of Solicitation to Purchase Cocaine. F.S. §§ 893.03(2)(a)(4), 777.04; I.G. Ex. 2 at 3. On its face Petitioner's plea establishes that he was convicted of a felony within the meaning of section 1128(a)(4), thereby mandating that the I.G. exclude him.

Petitioner argues that he was not "convicted" of a crime because adjudication of guilt was withheld under Florida law. He asserts that, under Florida law, an individual is not "convicted" of a crime if adjudication of guilt is withheld in that individual's case and he or she successfully completes a term of probation. Petitioner's Brief § I.

Whether or not that is so is irrelevant. Petitioner plainly was "convicted" within the meaning of section 1128 of the Act. An individual is convicted of a crime for section 1128 purposes if that individual enters a plea of nolo contendere to an offense and that plea has been accepted by a federal, State, or local court. Act § 1128(i)(3). Additionally, an individual is convicted if that individual enters into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld. Act § 1128(i)(4). Both of these sections apply to the nolo contendere plea entered by Petitioner and accepted by the Florida court.

Petitioner argues that, even if he was convicted of a crime, he was not convicted of a felony that is related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. He contends that the essential element of his crime, soliciting the purchase of cocaine, a controlled substance, is neither manufacture, distribution, prescription, or dispensing of cocaine. Petitioner's Brief § II.

The I.G. argues at length that, whatever were the statutory elements of Petitioner's crime, his intent was to purchase a large quantity of cocaine (a kilogram) for resale. That intent, according to the I.G., relates Petitioner's crime to the unlawful distribution of cocaine and makes Petitioner's felony conviction a conviction of a crime within the meaning of section 1128(a)(4). I.G. Brief § I.B. The I.G. relies on a sworn and notarized statement made to the Sunrise, Florida Police Department that Petitioner was, in fact, operating a cocaine distribution operation and was looking for additional sources of the drug so that he could grow his criminal enterprise. I.G. Ex. 2 at 5.

However, it is unnecessary that I look at evidence that is extrinsic to Petitioner's conviction in order to find that Petitioner was convicted of an offense that is related to the unlawful distribution of a controlled substance. Any unlawful purchase or sale of cocaine is an unlawful distribution of that substance. Petitioner was convicted of attempting to purchase cocaine unlawfully. That crime is, on its face, related to unlawful distribution of cocaine, a controlled substance. No additional analysis of the evidence is needed in order to find that Petitioner was convicted of a felony that falls within the reach of section 1128(a)(4).

There is no issue in this case as to whether the length of Petitioner's exclusion – for a period of at least five years – is reasonable. That is the minimum exclusion period for any exclusion imposed pursuant to section 1128(a)(4). Act § 1128(c)(3)(B).

/s/ Steven T. Kessel Administrative Law Judge