Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Ellen L. Morand
(O.I. File No. H-11-40110-9),

Petitioner

v.

The Inspector General.

Docket No. C-11-473

Decision No. CR2429

Date: September 15, 2011

DECISION

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

I. Background

On April 29, 2011, the I.G. notified Petitioner that she was being excluded for at least five years from participating in Medicare and other federally funded health care programs. Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision. The I.G. filed a brief and four proposed exhibits that he identified as I.G. Exhibit (Ex.) 1 – I.G. Ex. 4. Petitioner filed a brief and two proposed exhibits that it identified as P. Ex. 1 – P. Ex. 2. The I.G. then filed a reply brief and, with that brief, filed an additional exhibit that he identified as I.G. Ex. 5. Petitioner opposed my receiving that exhibit into evidence.

I sustain Petitioner's objection to I.G. Ex. 5. The exhibit – a declaration from Lt. T. Reddy, a police lieutenant with the Lynn, Massachusetts police department – consists of

substantive evidence that is arguably relevant to proving the I.G.'s case in chief. It is not rebuttal evidence as the I.G. contends. The I.G. should have offered this declaration with his initial brief, and, so, I exclude the exhibit because it is untimely filed.

Petitioner additionally objected to my receiving I.G. Ex. 4. This exhibit is a copy of an incident report from the Lynn, Massachusetts police department. Petitioner's objections are that the document has not been authenticated and that it contains hearsay. I overrule these objections. First, Petitioner has provided me with nothing that would show that the exhibit is not a report of a police investigation into allegations of theft. Petitioner has given me no reason to conclude that the exhibit is incomplete or that it is not an accurate copy of a police report. Second, the fact that the exhibit contains hearsay is no impediment to my receiving it. I routinely admit hearsay in cases involving the I.G. Moreover, the probative value of this exhibit is buttressed by the facts that it is an official police report and that it contains admissions of culpability by Petitioner, admissions that Petitioner has not denied.

I receive into the record I.G. Ex. 1 – I.G. Ex. 4 and P. Ex. 1 – P. Ex. 2.

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

A. Issue

The issue in this case 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

I make the following findings of fact and conclusions of law (Findings).

1. The I.G. was mandated to exclude Petitioner because she was convicted of a felony as is described at section 1128(a)(3) of the Social Security Act.

Among other things, Section 1128(a)(3) of the Social Security Act (Act) mandates the exclusion of any individual who is convicted of a felony that was committed in connection with the delivery of a health care item or service and relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. The evidence in this case establishes that Petitioner was convicted of a Section 1128(a)(3) offense. She was convicted of stealing money from the pharmacy that employed her. There is an obvious nexus between Petitioner's crime and health care items or services because the funds that Petitioner stole were composed at least in part of monies that members of the public had paid to her employer for the purchase of health care items or services.

Petitioner was employed as a pharmacy technician at Eaton Apothecary in Lynn, Massachusetts. On July 8, 2010, she was charged with four counts of felony larceny. I.G. Ex. 2 at 1. Petitioner admitted to an investigating police officer that she took funds from the Eaton pharmacy safe, consisting of customers' payments to the pharmacy. I. G. Ex. 4 at 2-4. She acknowledged stealing an amount of between $4,000 and $5,000. *Id.* at 4. Petitioner admitted that there were sufficient facts to convict her, and the case was continued without a finding of guilt. I.G. Ex. 3 at 2.

Petitioner argues that she was not, in fact, "convicted" of a felony. The gravamen of Petitioner's argument is that she entered into an arrangement pursuant to the Massachusetts Criminal Procedure Rules that enabled her to avoid pleading guilty. I find this argument to be without merit. She entered into an arrangement that is explicitly recognized pursuant to the Act as a conviction and under Massachusetts law as the functional equivalent of a guilty plea.

Petitioner entered a plea pursuant to Massachusetts Criminal Procedure Rule 12(a)(2), which allows a defendant to enter a plea of sufficient facts to warrant a finding of guilty. She admitted that there were sufficient facts to convict her of the felony charges that had been filed against her. The court accepted that admission, and the case was continued without a finding. She was sentenced to pay restitution of $8,460.20. I.G. Ex. 3 at 2.

The arrangement that Petitioner entered into is defined to be a conviction by section 1128(i)(4) of the Act. The word "convicted" is defined there to include the circumstance when:

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

Act Section 1128(i)(4). She entered into precisely such an arrangement.

Furthermore, under Massachusetts law, Petitioner's plea is functionally the same as a guilty plea. *Commonwealth v. Hilaire*, 752 N.E.2d 737, 740 n.4 (Mass. App. Ct. 2001); *Commonwealth v. Greene*, 508 N.E.2d 93, 94 (1987). Her plea enabled the court to sentence her – to restitution in this case – and to impose other conditions against Petitioner just as if she had pled guilty to the charges that were filed against her.

Petitioner also argues that the I.G. offered no proof that Petitioner's crimes were in connection with health care items or services. Here, Petitioner asserts that there is no evidence that the money that Petitioner stole was the proceeds of the sales of health care items or services by her employer, reasoning that the pharmacy at which Petitioner worked also sold non-health care related items.

I agree that there is no proof that the money that Petitioner stole constituted the proceeds of the sales of specific health care related items or services. But, such evidence is unnecessary. I take notice that a pharmacy sells a wide range of items including many items that are health care items. These include prescription drugs, but they also include over the counter medications and devices, supplies, and equipment used to deal with health care related problems. Petitioner's employer did not segregate the funds that it collected into separate piles of health care related customer payments and non-health care related customer payments. But, it is obvious that on any given day some, or even most, of the funds that it collected were for health care items. Thus, Petitioner's theft from a pool of money collected by her employer would inevitably involve stealing at least some funds that had been used by customers to purchase health care items. That is sufficient to establish the requisite nexus between Petitioner's crimes and health care items or services.

2. The length of Petitioner's exclusion is reasonable as a matter of law.

An exclusion that is imposed pursuant to section 1128(a)(3) of the Act must be for a minimum period of five years. Act Section 1128(c)(3)(B). Here, the I.G. imposed the mandatory minimum exclusion against Petitioner, and that is reasonable as a matter of law.

/s/
Steven T. Kessel
Administrative Law Judge