

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Marcie A. Conlon,
(OI File No. H-13-42844-9),

Petitioner,

v.

The Inspector General

Docket No. C-14-910

Decision No. CR3338

Date: August 20, 2014

DECISION

Petitioner, Marcie A. Conlon, is a registered nurse, practicing in New York, who forged prescriptions for the narcotic, Percocet. She pled guilty in state court to one count of felony criminal possession of a forged instrument. Pursuant to section 1128(a)(4) of the Social Security Act (Act), the Inspector General (I.G.) has excluded her from participating in Medicare, Medicaid, and all federal health care programs for a period of five years. Petitioner appeals the exclusion.

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

Background

In a letter dated March 31, 2014, the I.G. advised Petitioner Conlon that she was excluded from participation in Medicare, Medicaid, and all federal health care programs because she had been convicted of a felony offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. I.G. Ex. 1. Petitioner requested review.

The I.G. submitted its brief (I.G. Br.) and three exhibits (I.G. Exs. 1-3). In the absence of any objection, I admit into evidence I.G. Exs. 1-3. Petitioner submitted a brief (P. Br.), which included a letter dated June 5 (P. Ltr.) and additional documents, which she did not mark as exhibits. They include: letters from the Office of Professional Discipline for the New York State Education Department, dated September 19, 2013 and October 13, 2013; letters attesting to her character and recovery from addictions; and a December 18, 2013 letter from her then attorney to the I.G., responding to the proposed exclusion.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary, and, if so, to “provide the written direct testimony of any proposed witness in writing and under oath or affirmation.” I also directed the parties “to explain why the testimony is relevant” and why any witness’s proposed “testimony does not duplicate written evidence that has been submitted by either party.” Order and Schedule for Filing Briefs and Documentary Evidence at 2 (May 7, 2014). The I.G. indicates that an in-person hearing is not necessary and submits no declarations from proposed witnesses. I.G. Br. at 4-5. Petitioner, on the other hand, asserts that an in-person hearing is necessary, and lists witnesses who will testify regarding her character, her substance abuse problems, and her recovery. She does not submit written declarations from her proposed witnesses. As discussed below, this proposed testimony is simply not relevant to the narrow issues before me. By regulation, I must exclude irrelevant or immaterial evidence. 42 C.F.R. § 1005.17(c). I am therefore obligated to exclude the proposed testimony, and I decline to schedule a hearing that would serve no purpose.

Discussion

Because Petitioner was convicted of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, she must be excluded from program participation for at least five years. Act §§ 1128(a)(4), (c)(3)(B).¹

Section 1128(a)(4) of the Act requires the Secretary of Health and Human Services to exclude from program participation any individual or entity convicted of a felony criminal offense “relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.”

Here, Petitioner concedes that she was convicted of a drug-related felony. As she admits, and the evidence establishes, she was addicted to the narcotic Percocet, and, to obtain the drug, she stole her (nurse practitioner/physician) parents’ prescription pads, forged

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

