Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Brandon Roy LaFuente,
(OI File No. H-16-42398-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-108

Decision No. CR4830

Date: April 20, 2017

DECISION

Petitioner, Brandon Roy LaFuente, was a supplier of durable medical equipment, operating in Oklahoma City, Oklahoma. He pled *nolo contendere* to a variety of charges, including conspiracy to defraud the state, making false claims to the Medicaid program, and grand larceny. Based on this, the Inspector General (IG) has excluded him for five years from participating in Medicare, Medicaid, and all federal health care programs, as authorized by section 1128(a)(1) of the Social Security Act (Act). Petitioner appeals the exclusion. For the reasons discussed below, I find that the IG properly excluded Petitioner LaFuente and that the statute mandates a minimum five-year exclusion.

Background

In a letter dated October 31, 2016, the IG notified Petitioner that he was excluded from participating in Medicare, Medicaid, and all federal health care programs for a period of five years because he had been convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. The letter explained that section 1128(a)(1) of the Act authorizes the exclusion. IG Exhibit (Ex.) 1.

Petitioner timely requested review.

The IG submitted a written argument (IG Br.), five exhibits (IG Exs. 1-5), and a reply brief (IG Reply). Petitioner responded to the IG's brief (P. Br.) and submitted three exhibits. Marked as P. Ex. 1 he submitted a version of his plea that essentially replicates IG Ex. 4, although they are not identical. He also submitted two sections of the Oklahoma Criminal Code, which are marked P. Exs. 1 and 2.

In the absence of any objections, I admit into evidence IG Exs. 1-5. I admit as P. Ex. 1 Petitioner's version of his plea. To avoid confusing the two exhibits marked P. Ex. 1, I decline to admit the provisions of the Oklahoma Criminal Code. Parties may rely on and cite to statutes without my admitting them as exhibits.

The parties agree that an in-person hearing is not necessary. IG Br. at 6; P. Br. at 2.

Discussion

> ***Petitioner must be excluded from program participation for a minimum of five years because he was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program, within the meaning of section 1128(a)(1).***[1]

Under section 1128(a)(1) of the Act, the Secretary of Health and Human Services must exclude an individual who has been convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. 42 C.F.R. § 1001.101(a).

Here Petitioner owned and operated a business that supplied prosthetic limbs and related services to Medicaid beneficiaries. IG Ex. 2 at 1; IG Ex. 3 at 3. He and two others submitted false claims to the Oklahoma Medicaid agency; specifically, they billed for new prosthetic limbs, even though they provided used limbs or did not provide limbs at all. IG Ex. 3. On July 11, 2016, Petitioner pled *nolo contendere* to felony charges of: conspiring to defraud the state; making false claims to the Medicaid program; failing to maintain records of claims submitted to Medicaid; grand larceny; unlawful use of a computer to commit a criminal offense; and engaging in a pattern of criminal offenses. IG Exs. 3, 4; P. Ex. 1. The court accepted his plea and deferred sentencing for five years. IG Ex. 4 at 9; P. Ex. 1 at 8-9.

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

Petitioner denies that he was convicted of a criminal offense, pointing out that he pled *nolo contendere* and received a deferred sentence. He argues that his plea was therefore not a conviction. P. Br. at 1.

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 – not state – definition of "conviction" must apply. 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, at 7-8.

Petitioner's conviction falls squarely within the statutory and regulatory definitions of "conviction," and his conviction for Medicaid fraud is obviously related to the delivery of services under a state health care program. He is therefore subject to exclusion. An exclusion brought under section 1128(a)(1) 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 IG 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