

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Harold Schwartz,)	Date: March 18, 2008
)	
Petitioner,)	
)	
- v. -)	Docket No. C-08-136
)	Decision No. CR1752
The Inspector General.)	
_____)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Harold Schwartz, from participating in Medicare and other federally funded health care programs for at least five years.

I. Background

Petitioner is a pharmacist doing business in the State of Ohio. On October 31, 2007 the I.G. notified him that he was being excluded from participating in Medicare and other federally funded health care programs for at least five years as a consequence of his conviction of a felony which the I.G. contended fell within the mandatory exclusion requirements of section 1128(a)(3) of the Social Security Act (Act). This section requires the exclusion of any individual who:

has been convicted for an offense which occurred after . . . [August 21, 1996], under Federal or State law, in connection with the delivery of a health care item or service . . . of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I held a pre-hearing conference at which I directed the parties to file proposed exhibits and briefs. Each party filed a brief. The I.G. filed seven proposed exhibits which

he designated as I.G. Ex. 1 - I.G. Ex. 7. Petitioner filed three proposed exhibits which he designated as P. Ex. 1 - P. Ex. 3. Additionally, Petitioner filed an unsigned draft affidavit of William T. Winsley which I identify as P. Ex. 4. I am receiving into evidence all of the parties' proposed exhibits.

The I.G. also moved for leave to file a reply brief. I grant the I.G.'s motion.

At the pre-hearing conference counsel for Petitioner argued that an in-person hearing would be necessary in order to complete the evidentiary record in this case. Counsel did not explicitly renew this argument in his brief. However, he designated both Petitioner and Mr. Winsley as witnesses and on that basis I conclude that counsel continues to request an in-person hearing. For reasons that I discuss below I find that an in-person hearing is not necessary.¹

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether Petitioner:

1. Was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act; and
2. Assuming Petitioner was convicted of a criminal offense his conviction was of a crime as is described at section 1128(a)(3) of the Act.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading.

¹ Counsel also requested a 30-day continuance of this case so that he could have certain court records unsealed for the purpose of obtaining a signed affidavit from Mr. Winsley. I find that it is unnecessary that I continue this case. I am assuming for purposes of this decision that all of the statements of fact in Mr. Winsley's draft affidavit are true. I do not, however, accept as true the opinions and legal conclusions expressed in the draft affidavit. For reasons that I discuss below, I find Mr. Winsley's proposed testimony to be irrelevant.

1. Petitioner was “convicted” of a criminal offense within the meaning of section 1128(i) of the Act.

The undisputed facts of this case are that, on September 26, 2006, in the Court of Common Pleas in the County of Summit, Ohio, Petitioner pled guilty to three felony counts of theft of drugs. I.G. Ex. 2; *see* I.G. Ex. 5. That plea was accepted by the court. *Id.* On that same date the court found Petitioner to be eligible for intervention in lieu of conviction pursuant to Ohio State law. I.G. Ex. 2. The court withheld a finding of guilt in abeyance and ordered Petitioner to serve a period of rehabilitation of not less than one year subject to enumerated conditions. *Id.* at 1-2. Finally, the court ordered that Petitioner’s case be removed from its pending case list and placed in inactive file subject to reinstatement. *Id.* at 2.

Section 1128(i) defines what constitutes a conviction for purposes of deciding whether an exclusion is mandated under any of the subparts of section 1128(a) of the Act. Among other things, a conviction includes:

(3) when a plea of guilty or nolo contendere by the individual . . . has been accepted by a Federal, State, or local court; or

(4) when the individual . . . 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)(3), (4).

The undisputed facts of this case establish that Petitioner was convicted of a crime within the meaning of both of these two subsections. First, Petitioner entered a plea of guilty to three felony offenses which was accepted by the court. Second, Petitioner entered into an arrangement or program where a final judgment of conviction was withheld.

Petitioner argues that his plea arrangement was not a conviction within the meaning of Ohio law, citing a provision in the Ohio Revised Code which provides that successful completion of an intervention plan shall not be considered as an adjudication of guilt and is not a criminal conviction under Ohio law for purposes of any disqualification or disability imposed by law. Petitioner’s brief at 12; Ohio Revised Code sec. 2951.041(E). He asserts that where the I.G. relies on a State conviction for purposes of imposing an

exclusion under the Act the State definition of a conviction must control. He asserts that, as he was not convicted of an offense under Ohio law, he cannot be convicted of an offense for purposes of deciding whether an exclusion is mandated by section 1128(a)(3) of the Act.

However, section 1128(i) makes it explicit that Congress intended the *federal* definition of “convicted” to control. Petitioner was “convicted” of a criminal offense because his plea in the Ohio court precisely met the definitions of a conviction that are stated at sections 1128(i)(3) and (4). His plea constitutes a conviction for purposes of the Act notwithstanding the State statute cited by Petitioner.²

Petitioner argues finally that section 1128(i) is unconstitutionally vague. I have no authority to decide this argument.

2. Petitioner’s conviction was of a crime as is described at section 1128(a)(3) of the Act.

Each of the three felonies of which Petitioner was convicted consists of the theft of drugs on dates in 2005 and 2006 from his then-employer, a pharmacy. Among the drugs that Petitioner admitted to stealing were Clarinex, Ibuprofen 800 mg, and Darvocet, all described in the indictment as dangerous drugs within the meaning of Ohio State law. I.G. Ex. 5, at 1 - 2. There is no dispute in this case that Petitioner converted these drugs to his own use.

The elements of an 1128(a)(3) offense relevant to this case are that: (1) the excluded individual must be convicted of a felony; (2) that occurred after August 21, 1996; (3) which relates to theft, fraud, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (4) in connection with the delivery of a health care item or service. I find that all four of these elements are present here.

First, there is no question that Petitioner’s convictions were of felonies because he was charged with and convicted of three felonies under Ohio law. I.G. Ex. 5; I.G. Ex. 2, Finding 1. Second, the felonies of which he was convicted all occurred after August 21, 1996. *Id.* Third, the three felonies explicitly charge him with, and he pled guilty to, theft.

² An identical conclusion was recommended by a federal magistrate in *Scheidler v. Secretary of Health and Human Services*, No. 1:04CV404SSBTSH, S.D. Ohio, 2006. I.G. Ex. 6, at 2.

That leaves only the issue of whether Petitioner's crimes were committed in connection with the delivery of a health care item or service. I find that they were.

This case is on all fours with *Kevin J. Bowers*, DAB CR1661 (2007), *aff'd*, DAB No. 2143 (2008). The rationale which controls the decision in that case applies here as well.

Petitioner's crimes were in connection with the delivery of a health care item or service because he diverted health care items (drugs) from their lawful delivery to patients. Petitioner would not have had access to the drugs that he stole but for his pharmacist's job and because the drugs were in a stream of commerce from the manufacturer, via Petitioner's employer, to their ultimate destination, patients with legitimate prescriptions for the drugs. Petitioner's employer served as a transit point for delivery of the drugs from the manufacturer to patients for whom they were prescribed. The drugs could not be put to any possible lawful use other than delivery to patients pursuant to prescriptions. But for Petitioner's theft those drugs eventually would have been delivered lawfully.

Petitioner argues that he was not convicted of an offense that falls within the reach of section 1128(a)(3) because his crimes had nothing to do with any act or omission in a health care program operated by, or financed in whole or in part by any federal, State, or local government agency. Petitioner's brief at 5. For purposes of this decision I accept as accurate Petitioner's characterizations of his crimes, however, that establishes no defense. Section 1128(a)(3) is applicable to felonies consisting of fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct that are committed in connection with a health care item or service *or* with respect to any act or omission in a health care program operated in whole or in part by a federal, State, or local government agency. It is therefore only necessary that the I.G. prove that Petitioner was convicted of a felony relating to theft, etc., committed in connection with the delivery of a health care item or service.

Petitioner also argues that his crimes were not committed in connection with a health care item or service because none of the drugs that he stole had been prescribed to a patient. I do not agree that it was necessary for the drugs to have been prescribed in order for their theft to be crimes related to the delivery of a health care item or service. Inevitably, they would have been prescribed but for Petitioner's theft. As I discuss above, the drugs Petitioner stole could only have been consumed legally if they were used as prescribed medications. In stealing drugs from his employer Petitioner reduced his employer's inventory of drugs that were destined for patient consumption. These drugs were health care items because they had no other lawful purpose.

As I discuss above, Petitioner has offered as proposed testimonial evidence his own affidavit plus a draft affidavit from William T. Winsley. P. Ex. 1; P. Ex. 4. For purposes of this decision I assume that the facts stated in both affidavits are true.³ And, although I have received both of the affidavits into evidence, I find that neither of them offers relevant evidence that affects the outcome of the case. For that reason I find that an in-person hearing to take these individuals' testimony would be of no benefit.

In Petitioner's affidavit he explains how and why he took drugs from his employer's inventory. He avers that he took the drugs for his personal use in order to contend with pain and discomfort that he was experiencing while on the job. P. Ex. 1, at 2-3. Petitioner explains also that he has completed the intervention program that he entered as part of his plea agreement and that his license to practice as a pharmacist has been restored to him. *Id.* at 3-6. While Petitioner's affidavit provides some explanation for his acts it does not provide evidence that I may consider in deciding whether his exclusion is mandated. There is nothing in Petitioner's affidavit that rebuts the I.G.'s evidence proving that Petitioner was convicted of a crime within the meaning of section 1128(i) of the Act nor is there anything in the document that rebuts evidence proving that he was convicted of a felony as is described at section 1128(a)(3).

The draft affidavit of Mr. Winsley's testimony establishes him to be the acting executive director of the Ohio State Board of Pharmacy (pharmacy board). P. Ex. 4, at 1. The affidavit contains an explanation of the facts that are the basis of the indictment against Petitioner as well as an explanation of the pharmacy board's decision to suspend and then reinstate Petitioner's license. The affidavit contains an assertion that, while Petitioner's crimes constituted the commission of felonies they did not involve any health care fraud or abuse, nor were they committed in connection with the delivery of a health care item or service, or with respect to any act or omission in a health care program operated by, or financed in whole or in part by, any federal, state or local government agency, or any private health care program. *Id.* at 6.

I find these assertions to be irrelevant. Mr. Winsley is not qualified to interpret the Act or to render a legal opinion as to the application of the Act to the evidence in this case. Obviously, also, I disagree with the conclusions that Mr. Winsley might deliver should his affidavit be finalized.

³ I do not agree with the legal analysis stated in the affidavit that Petitioner's counsel prepared for Mr. Winsley's signature. *See* P. Ex. 4, at 6.

3. An exclusion of at least five years is mandatory.

The Act mandates that any exclusion imposed pursuant to section 1128(a)(3) be for a minimum of five years. Act § 1128(c)(3)(B). I must sustain the I.G.'s exclusion of Petitioner for at least five years because it is for the minimum statutory period.

/s/
Steven T. Kessel
Administrative Law Judge