Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of: Kim J. Rayborn, Petitioner, - v. - Inspector General.	DATE: May 12, 2009 Civil Remedies CR1891 App. Div. Docket No. A-09-61 Decision No. 2248

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Kim J. Rayborn (Petitioner) appealed the January 23, 2009 decision by Administrative Law Judge (ALJ) Keith W. Sickendick upholding Petitioner's exclusion from federal health care programs for five years pursuant to section 1128(a)(2) of the Social Security Act (the Act).[1] Kim J. Rayborn, DAB CR1891 (2009) (ALJ Decision). We conclude that the ALJ correctly determined that Petitioner was subject to a five-year exclusion

[1] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

under section 1128(a)(2). Accordingly, we affirm the ALJ Decision.

Legal Background

Section 1128(a)(2) of the Act requires the Secretary of Health and Human Services to exclude from federal health care programs any individual who "has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service." (Emphasis added.) Section 1128(i) specifies the circumstances under which a person is considered to have been "convicted" for purposes of section 1128(a):

> (i) CONVICTED DEFINED. — For purposes of subsections (a) and (b), an individual or entity is considered to have been "convicted" of a criminal offense—
>
> > (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
> >
> > (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
> >
> > (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or
> >
> > (4) 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.

An exclusion imposed under section 1128(a) shall be for a minimum period of five years. Act § 1128(c)(3)(B).

AN ALJ may resolve a case, in whole or in part, by summary judgment where there is no disputed issue of material fact. 42 C.F.R. § 1005.4(b)(12). Thus, "summary judgment is appropriate if the affected party either had conceded all the

material facts or proffered testimonial evidence only on facts which, even if proved, clearly would not make any substantive difference in the result." Timothy Wayne Hensley, DAB No. 2044, at 2 (2006).

Case Background

Petitioner was a caretaker and case manager at a facility for the care of individuals with disabilities. ALJ Decision at 3 (Finding of Fact 5). She pled guilty to a misdemeanor count of recklessly abusing or neglecting an adult, in violation of section 209.990(4) of Kentucky Revised Statutes (KRS). Id. at 2 (Findings of Fact 1 and 3). In her plea agreement, Petitioner agreed that she "neglected the victim, a mentally retarded cancer patient, by failing to adequately monitor her pain medication prescription." Id. (Finding of Fact 4).[2] Petitioner's guilty plea was accepted by the court. Id. (Finding of Fact 2). On November 13, 2007, the court sentenced Petitioner to "12 months to be diverted for a period of one year, with no time to serve," on certain specified conditions, and barred her for a period of one year from taking direct care of vulnerable adults. Id. (Finding of Fact 2, quoting I.G. Ex. 5). On November 25, 2008, the court entered on its docket an Agreed Order providing that the charge against Petitioner was "diverted and dismissed" and "shall not constitute a criminal conviction." Id. at 3 (Finding of Fact 6, quoting P. Ex. 1, at 1).

The Inspector General (I.G.) notified Petitioner by letter dated May 30, 2008, that she was being excluded from participating in Medicare, Medicaid, and all federal health care programs for five years pursuant to section 1128(a)(2) of the Act. I.G. Ex. 1. The letter explains that Petitioner's exclusion "is due to your conviction as defined in section 1128(i) [of the Act], in the 27th Judicial District, Laurel District, Division II, Commonwealth of Kentucky, of a criminal offense related to

[2] In her notice of appeal, Petitioner indicates that she is appealing Findings of Fact 1, 3, 4, and 5 from the ALJ Decision; however, in her brief in support of the notice of appeal, Petitioner does not dispute any of these findings. Petitioner argues that the ALJ should have included a finding that the plea she entered was an Alford plea (P. Br. at 2-3) but, as we discuss later, this fact is not material, and its omission does not prejudice Petitioner.

neglect or abuse of patients, in connection with the delivery of a health care item or service[.]" Id.

Petitioner requested a hearing before an ALJ to challenge the I.G.'s determination to exclude her. During a pre-hearing conference, the I.G. moved for summary judgment, and the ALJ, overruling Petitioner's objection, determined that "the matter will proceed on summary judgement in lieu of oral hearing" unless the ALJ were to find that the issues "cannot be resolved in summary fashion." ALJ Order dated 8/19/08, at 2. Following written briefing, the ALJ issued a decision upholding the exclusion.

Standard of Review

The standard of review on a disputed factual issue is whether the initial decision is supported by substantial evidence on the whole record. The standard of review on a disputed issue of law is whether the initial decision is erroneous. 42 C.F.R. § 1005.21(h). Whether summary judgment is appropriate is a legal issue that we, like the courts, address *de novo*. Hensley at 2, citing Crestview Parke Care Center, DAB No. 1836 (2002), aff'd in part, Crestview Parke Care Ctr. v. Thompson, 373 F.3d 743 (6th Cir. 2004).

Discussion

Petitioner takes exception to the following numbered Conclusions of Law in the ALJ Decision:

2. Summary judgment is appropriate.
3. Petitioner was convicted within the meaning of section 1128(i)(42 U.S.C. §1320a-7(i)) of the Act.
5. Petitioner's exclusion is mandated by section 1128(a)(2) of the Act.
6. A five-year exclusion is mandatory pursuant to section 1128c(3)(B) (42 U.S.C. §1320a-7(i)) of the Act.
7. Exclusion is effective 20 days from the date of the notice of exclusion. 42 C.F.R. §1001.2002(b).

Notice of appeal at 2, quoting ALJ Decision at 3.

Below, we first discuss Petitioner's exception to Conclusion of Law 3. We then discuss together Petitioner's exceptions to Conclusions of Law 2 and 5-6. (Petitioner's exception to Conclusion of Law 7 appears to be based solely on her contention that she was not subject to a five-year mandatory exclusion.)

1. **The ALJ did not err in concluding that Petitioner was convicted within the meaning of section 1128(i).**

Petitioner argues that ALJ erred in concluding that she was convicted within the meaning of section 1128(i). Although the ALJ Decision does not specifically indicate which of the four definitions of "convicted" in that section the ALJ was relying on in reaching that conclusion, it appears that he was relying on section 1128(i)(3) ("when a plea of guilty . . . has been accepted . . . .) since the ALJ Decision states that "Petitioner does not dispute that she pled guilty and her guilty plea was accepted by the Kentucky court." ALJ Decision at 6. As we discuss below, we agree with the ALJ that section 1128(i)(3) is applicable here. As we also discuss, we conclude that the undisputed facts establish that Petitioner was convicted within the meaning of section 1128(i)(4) as well.

The ALJ found that Petitioner pled guilty in Kentucky court to one count of a Class A misdemeanor. ALJ Decision at 2 (Finding of Fact 1), citing I.G. Ex. 5. Petitioner asserts that she did not "simply plead guilty as stated in Finding of Fact 1" but rather "entered an 'Alford Plea' pursuant to North Carolina v. Alford, 400 U.S. 25 . . . (1970) under which a defendant may plead guilty while protesting innocence when he makes a conscious choice to plead simply to avoid the expenses and vicissitudes of trial."[3] P. Br. at 3, citing I.G. Ex. 4, at 1-2. The record shows that Petitioner did in fact enter an Alford plea. I.G. Ex. 4, at 1. However, an Alford plea is a guilty plea. North Carolina v. Alford, 400 U.S. 25, 35-38 (1970); Kennedy v. Frazier, 357 S.E.2d 43, 45 (W.Va. 1987). Indeed, the motion filed by Petitioner is captioned "Motion to Enter Guilty Plea Pursuant to North Carolina vs Alford" and states "I wish to plead 'GUILTY[.]'" I.G. Ex. 4, at 1-2. Moreover, Petitioner does not dispute the ALJ's finding that her guilty plea was accepted. ALJ Decision at 2 (Finding of Fact 2), citing I.G. Ex. 5. Thus, the two elements of a conviction as defined in section 1128(i)(3) are present here.

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[3] Petitioner's characterization of the reasons for filing an Alford plea is not consistent with the plea she filed, which states "I do not admit guilt, but I believe the evidence against me strongly indicates guilt and my interests are best served by a guilty plea." I.G. Ex. 4, at 2.

Petitioner nevertheless argues that she was not convicted within the meaning of section 1128(i) because her "conviction" was dismissed and diverted pursuant to KRS § 533.258.[4] P. Br. at 2. KRS § 533.258 provides in part that "[i]f the defendant successfully completes the provisions of the pretrial diversion agreement the charges against the defendant shall be listed as 'dismissed/diverted' and shall not constitute a criminal conviction." According to Petitioner, since her "State conviction . . . no longer 'constitutes' a conviction" under Kentucky law, there was no conviction within the meaning of section 1128(i). P. Br. at 4.

This argument is not a valid basis for finding that section 1128(i)(3) does not apply here. The issue here is not whether Petitioner was considered convicted under State law but whether the entry of her plea of guilty in a State court proceeding met the federal definition of "convicted," which it does under section 1128(i)(3). As the ALJ correctly observed, "Federal law, not state law, provides the definition for 'conviction' in this case."[5] ALJ Decision at 6, citing Travers v. Shalala, 20

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[4] We note that "conviction" is the term used by Petitioner to describe the outcome of her State court proceeding. As indicated by the language of KRS § 533.258 quoted below, the statute actually operates to divert and dismiss the criminal charges upon successful completion of the pretrial diversion agreement.

[5] The ALJ went on to state, "the fact that the Kentucky trial court subsequently expunged the record is not controlling in a case involving an exclusion pursuant to section 1128(a) or (b) of the Act." ALJ Decision at 6. However, nothing in the record before us indicates that the record of Petitioner's pretrial diversion proceeding was actually "expunged". The Kentucky court order dismissing Petitioner's case one year after the court entered her Alford guilty plea states that under Kentucky's pretrial diversion statute the court's order "shall not constitute a criminal conviction" but says nothing about expunging the record. P. Ex. 1. Petitioner Exhibit 3 is a Kentucky appellate court decision in an unrelated case holding that, absent express legislative intent to the contrary, a successful pretrial diversion participant was entitled to have his records "segregated" under KRS § 17.142, not expunged. In any event, as we discuss later, the ALJ correctly concluded that Kentucky law addressing whether pretrial diversion records can

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F.3d 993, 996 (9th Cir. 1994); accord Marc Schneider, D.M.D., DAB No. 2007, at 5 (2005).

In addition, Petitioner's participation in the pretrial diversion program under KRS § 533.258 would constitute a conviction within the meaning of section 1128(i)(4), which defines "convicted" as "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." (Emphasis added.) In Schneider, citing the Travers court's distinction between a deferred adjudication and a deferred prosecution, the Board concluded that an individual's participation in the pretrial diversion program authorized by the same Kentucky statute on which Petitioner relies was a deferred adjudication and, thus, fell within the ambit of section 1128(i)(4).[6] We adopt the analysis in that decision and conclude without further discussion that Petitioner was "convicted" within the meaning of section 1128(i)(4). Thus, there are two independent bases in section 1128(i) for concluding that Petitioner was "convicted."

Petitioner also argues that the ALJ was precluded from considering the evidence of her conviction pursuant to KRS § 533.258(3), which provides that "[p]retrial diversion records shall not be introduced as evidence in any court in a civil, criminal or other matter without the consent of the defendant." See Attachment to Petitioner's request for hearing (copy of the statute). Petitioner states that she "does not consent to the use of pretrial diversion records to be used against her." P. Br. at 2.

(Continued . . .)
be used in Kentucky court proceedings does not govern federal exclusion proceedings.

[6] In Schneider, the petitioner cited KRS § 533.250 rather than section 533.258. Section 533.250 lists the "elements" of the pretrial diversion program (primarily going to who is eligible to participate in the program), while section 533.258 specifically addresses the "[e]ffects of successful completion of pretrial diversion agreement." The distinction does not affect our decision.

Addressing the same argument made by Petitioner below, the ALJ concluded that assuming KRS § 533.258(3) was applicable at all to this federal proceeding, Petitioner waived the application of that statute by requesting a hearing, not objecting to the admissibility of I.G. exhibits related to the State court proceeding, and introducing Petitioner Exhibit 1, which also relates to that proceeding. See ALJ Decision at 6, n.2. Indeed, Petitioner's argument that she was not convicted depends on the documents related to her pretrial diversion. For these reasons, we agree with the ALJ that Petitioner waived any application of KRS § 533.258(3). We also note that KRS § 533.258(3) by its own terms applies only to the introduction of evidence in court proceedings, not administrative proceedings, and that KRS § 533.258(2) appears to recognize that the statute cannot interfere with federal law requirements.[7] However, even absent a waiver, KRS § 533.258(3) would not preclude consideration of the evidence in these proceedings since they are governed by federal, not state, law.

2. **The ALJ did not err in concluding that Petitioner was required by sections 1128(a)(2) and 1128(c)(3)(B) of the Act to be excluded for a period of five years.**

Petitioner argues, as she did below, that the individual who signed and attested to the criminal complaint against her, Agent Dudinskie of the Medicaid Fraud and Abuse Control Division in the Kentucky Office of the Attorney General, "is an agent of Medicaid and thus the Federal Government is bound to the one year exclusion of Ms. Rayborn from the care of adults as stated in the Plea Agreement." P. Br. at 4. What Petitioner calls an "exclusion" was a bar, imposed by the State court pursuant to her plea agreement, prohibiting her from taking direct care of vulnerable adults for one year. See I.G. Ex. 4, at 4, and I.G. Ex. 5, at 1-2. That bar, imposed in a State court proceeding unrelated to a section 1128(a) exclusion, has no relevance to this proceeding. More importantly, the federal exclusion statute mandates a five-year exclusion. Thus, Agent Dudinskie, even if he were an agent of the federal government, could not bind the I.G. to a one-year exclusionary period. Moreover, for

[7] KRS § 433.258(2) provides: "The defendant shall not be required to list this disposition on any application for employment, licensure or otherwise unless required to do so by federal law." Attachment to Petitioner's request for hearing (copy of the statute).

the reasons stated in the ALJ Decision, we agree with the ALJ's finding that Agent Dudinskie was not an agent of the federal government. See ALJ Decision at 6.

Petitioner also argues that her five-year exclusion pursuant to section 1128(a) violates her "substantive and procedural Due Process Rights to be free to enter into the type of employment she chooses . . . especially . . . where the exclusion of Ms. Rayborn is . . . in violation of the Plea Agreement entered into here." P. Br. at 5. Petitioner's reliance on the one-year bar imposed by the court pursuant to the plea agreement is misplaced for the reasons discussed above. In addition, Petitioner has identified no valid basis for finding that her exclusion pursuant to section 1128(a)(2) deprived her of substantive due process. As the ALJ noted, contrary to what Petitioner argues, her exclusion "does not prohibit her from engaging in any employment; rather it precludes her from participating in . . . federal health care programs and payment for her services through those programs." ALJ Decision at 9. Moreover, we agree with the ALJ's conclusion that Petitioner's right to procedural due process has been satisfied by the proceedings before the ALJ and the Board since Petitioner has not identified any dispute of material fact requiring a hearing. Id.

Contrary to what Petitioner argues, there is no factual dispute as to the underlying basis for the plea agreement, since Petitioner, like the ALJ, identifies this basis as Petitioner's failure to adequately monitor a patient's pain medication prescription. See P. Br. at 2; ALJ Decision at 2, citing I.G. Ex. 4, at 4. In any event, there is no basis for Petitioner's assertion that this fact is material to the exclusion proceedings because, she says, it shows that "there was no allegation that the Federal Government through Medicaid or Medicare was defrauded[.]" P. Br. at 2-3. As the ALJ correctly observed, section 1128(a)(2) "does not include an element that the individual or entity to be excluded either received or claimed payment of funds from a federal source." ALJ Decision at 8. Rather, the issue is whether the conviction was for "a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service." Act § 1128(a)(2). Petitioner does not dispute on appeal that her criminal conviction involved "neglect or abuse of patients in connection with the delivery of a health care item or service."

Conclusion

For the reasons explained above, we affirm and adopt the Findings of Fact and Conclusion of Law in the ALJ Decision.

_____/s/_____
Judith A. Ballard

_____/s/_____
Leslie A. Sussan

_____/s/_____
Sheila Ann Hegy
Presiding Board Member