

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

In the Case of:

Michael S. Rudman, M.D.,

Petitioner,

- v. -

The Inspector General

DATE: April 16, 2008

App. Div. Docket No. A-08-56

Decision No. 2171

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Michael S. Rudman, M.D. (Petitioner) appealed the January 8, 2008 decision of Administrative Law Judge (ALJ) Steven T. Kessel upholding Petitioner's exclusion from federal health care programs for five years pursuant to section 1128(a)(2) of the Social Security Act (Act).¹ Michael S. Rudman, M.D., DAB CR1720 (2008) (ALJ Decision). We conclude that the ALJ correctly determined that Petitioner was subject to exclusion 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 (HHS) 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

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.

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.

The mandatory minimum period of exclusion for an individual subject to section 1128(a)(2) is five years. Act § 1128(c)(3)(B).

Case Background²

On January 3, 2006, the state of Maryland filed a criminal information charging Petitioner with two counts of second degree assault and two counts of "sexual offense" in the fourth degree. I.G. Ex. 5. The charges were based on an "Application for Statement of Charges" prepared by a detective with the Frederick County Sheriff's Department. I.G. Ex. 6. The charge application alleged that Petitioner had engaged in "unwanted sexual contact

² The information in this section is drawn from the ALJ Decision and the record before the ALJ, and is presented to provide a context for the discussion of the issues raised on appeal. Nothing in this section is intended to replace, modify, or supplement the ALJ's findings of fact or conclusions of law.

with two patients during medical treatment." Id. at 1.

On August 16, 2006, Petitioner entered an Alford plea in Maryland circuit court to a single count of second degree assault.³ I.G. Ex. 8, at 24. The remaining three counts in the information were dismissed. Id. at 29-30.

Based on the Alford plea, the court sentenced Petitioner to probation under Maryland's "Probation Before Judgment" statute, which authorized the court to impose a sentence of probation and to withhold the judgment of conviction pending completion of the sentence. I.G. Ex. 8, at 28; Md. Code Ann., *Crim. Proc.* § 6-220(b).⁴ When a defendant fulfills the conditions of probation,

³ During his plea colloquy, Petitioner acknowledged that his Alford plea was, in fact, a plea of guilty to the assault charge:

THE COURT: Do you understand you're entering a plea of guilty – an Alfred [sic] plea of guilty, but a plea of guilty nevertheless, to Count One, second degree assault?

THE WITNESS: Yes

* * *

THE COURT: And do you understand that this is a plea of guilty, but a special type of plea of guilty known as an Alfred [sic] plea. Do you understand that?

THE WITNESS: Yes, sir.

* * *

THE COURT: Do you wish to plead guilty, an Alfred [sic] plea of guilty, but a plea of guilty nevertheless, to Count One, second degree assault?

THE WITNESS: Yes, Your Honor.

I.G. Ex. 8, at 4, 10, 20.

⁴ Section 6-220(b) of the Maryland Criminal Procedure Code states that "[w]hen a defendant pleads guilty or nolo contendere or is found guilty of an offense," the court may, under certain
(continued...)

the court "discharges" him from probation. Md. Code Ann., *Crim. Proc.* § 6-220(g)(1). According to the Maryland Probation Before Judgment statute, "discharge" is "a final disposition of the matter" and is made "without judgment of conviction and is not a conviction for the purpose of any disqualification or disability imposed by law because of conviction of a crime." *Id.* § 6-220(g)(2), (g)(3).

On July 31, 2007, the HHS Inspector General (I.G.) notified Petitioner that he was being excluded from participation in federal health care programs for five years pursuant to section 1128(a)(2). I.G. Ex. 1. The I.G.'s notice letter informed Petitioner that the exclusion was based on "your conviction as defined in section 1128(i) . . . in the Circuit Court for Frederick County, Maryland[.]" *Id.*

On September 13, 2007, Petitioner appealed the I.G.'s decision by filing a request for hearing with the ALJ. On October 12, 2007, the ALJ issued a pre-hearing order, directing the I.G. to submit its brief and proposed exhibits by November 28, 2007, and directing Petitioner to do the same by January 4, 2008. The parties made their submissions in accordance with these deadlines, and they also consented to have the ALJ resolve the matter on the basis of their written legal arguments and documentary evidence.

After reviewing the parties' submissions, the ALJ concluded that the conditions for exclusion under section 1128(a)(2) were present. In particular, he found that Petitioner had been "convicted" on August 16, 2006, as that term is defined in sections 1128(i)(3) and 1128(i)(4) of the Act. ALJ Decision at 2-5. The ALJ further found that Petitioner's August 16, 2006 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." *Id.* at 5-6. Finally, the ALJ found that the length of the exclusion period (five years) was "reasonable as a matter of law" because it was the mandatory minimum period prescribed by section 1128. *Id.* at 6.

Standard of Review

We review an ALJ decision involving an I.G. exclusion to

⁴ (...continued)
conditions, "stay the entering of judgment, defer further proceedings, and place the person on probation subject to reasonable terms and conditions[.]"

determine whether the decision is erroneous as to a disputed issue of law and whether the decision is supported by substantial evidence in the record as a whole as to any disputed issues of fact. 42 C.F.R. § 1005.21(h).

Analysis

As a preliminary matter, we dispose of certain erroneous assertions by Petitioner concerning the basis for the I.G.'s decision to exclude him. Petitioner asserts that the basis for the I.G.'s decision to exclude him was a decision by the Maryland Board of Physicians to revoke his medical license. P. Br. at 7. He also claims that the I.G. "has failed to produce any evidence to support [its] decision and, therefore, it has failed to provide [him] proper notice of the reasons for its decision." Id.

Petitioner is incorrect on both counts. The basis for the I.G.'s decision to exclude him was not the Maryland Board of Physicians' decision to revoke his medical license. The basis for the I.G.'s decision was the criminal investigation and prosecution that culminated in Petitioner's Alford plea and sentencing in Maryland circuit court on August 16, 2006. That should have been apparent to Petitioner from the I.G.'s July 31, 2007 notice letter, which stated that the exclusion was "due to your conviction as defined in section 1128(i) . . . in the Circuit Court for Frederick County, Maryland[.]" I.G. Ex. 1. The I.G. made the basis for its action even clearer when it filed its initial brief and exhibits with the ALJ on November 28, 2007 – submissions to which Petitioner had more than one month to respond. We thus reject his assertion that the I.G. failed to give proper notice of the reasons for its decision.

We also reject Petitioner's assertion that the I.G. failed to produce evidence supporting its decision. The exhibits submitted by the I.G. contain official documentation of Petitioner's 2006 prosecution in Maryland circuit court. I.G. Exs. 4-8. That documentation includes a copy of the Application for Statement of Charges filed by the Frederick County Sheriff's Department. I.G. Ex. 6. In the charge application, the investigating detective reported, under penalty of perjury, his findings regarding the incident that resulted in the assault charge (count 1 on the statement of charges) to which Petitioner entered his Alford plea. I.G. Ex. 4, at 1; I.G. Ex. 6, at 4-6. In addition to the charge application, the I.G. submitted a copy of the transcript of Petitioner's plea colloquy and sentencing. I.G. Ex. 8. The ALJ's conclusions are based on this evidence.

Petitioner objects to the ALJ's conclusions on two principal grounds. First, he contends that he was not "convicted" of a criminal offense within the meaning of section 1128(a)(2) because the 2006 criminal proceeding did not result in a "conviction" or judicial finding of "guilt" under Maryland law. P. Br. at 7-9. Petitioner emphasizes that, under section 6-220(g)(3) of the Maryland Criminal Procedure Code, "when a probation before judgment has been entered there is no conviction and a guilty plea cannot be used to impose a disability on or deny a right to a defendant to which he would otherwise be entitled under law." Id. at 8.

This contention ignores the applicable federal statute. Under section 1128(i)(3), a person is considered to have been "convicted" of a criminal offense for purposes of section 1128(a)(2) "when a plea of guilty or nolo contendere . . . has been accepted by a Federal, State, or local court." As Petitioner rightly concedes, P. Br. at 1, 5, his February 16, 2006 Alford plea was a guilty plea. North Carolina v. Alford, 400 U.S. 25, 37 (1980). Furthermore, the ALJ found, and Petitioner does not dispute, that the Maryland circuit court accepted that plea.⁵ I.G. Ex. 8, at 24. Thus, the ALJ correctly concluded that Petitioner was "convicted" of second degree assault within the meaning of section 1128(i)(3).

The ALJ also correctly concluded that a conviction occurred within the meaning of section 1128(i)(4). Under that provision, the defendant is considered "convicted" when he "has entered into participation in a first offender, deferred adjudication, or

⁵ It is well-established that a guilty plea is "accepted" when a court concludes, after personal questioning of the defendant under oath, that there is a factual basis for the plea and that the plea is voluntary and informed. See McCarthy v. U.S., 395 U.S. 459, 464-65 (1969); Fed. R. Crim. P. 11(b) (setting out the preconditions for accepting a plea of guilty or nolo contendere). Here, after personally questioning Petitioner to determine that he understood the charges and potential consequences of his plea, the Maryland circuit court judge stated, "I do accept this plea," and proceeded to impose a sentence of probation on the basis of the plea. I.G. Ex. 8, at 24. Thus, there is substantial evidence to support the ALJ's finding that the Maryland court accepted Petitioner's plea. Cf. Michael Travers, M.D., DAB No. 1237 (1991) (affirming the ALJ's finding that a court had "accepted" a no contest plea when it "consent[ed] to receive [the plea] as an element of an arrangement to dispose of a pending criminal complaint").

other arrangement or program where judgment of conviction has been withheld." The ALJ found, and Petitioner does not dispute, that the Maryland circuit court sentenced him under a deferred adjudication arrangement whereby judgment of conviction was withheld. ALJ Decision at 3; I.G. Ex. 8, at 32 (indicating that Petitioner was sentenced to "probation before judgment" pursuant to section 6-220 of the Maryland Criminal Procedure Code).

Petitioner asserts: "An interpretation of section [1128] that an Alford plea along with a probation before judgment constitutes a conviction under the Act would defeat the purpose of Section 6-220(g)(3) of the Criminal Procedure Article of Maryland, which is to encourage settlements of doubtful prosecutions and to eliminate the disabilities that flow from such doubtful prosecutions." P. Br. at 9. We need not decide whether Petitioner's characterization of the Maryland statute's purpose is accurate because his assertion is irrelevant and ignores the text and purpose of section 1128(i)(4), the applicable federal statute. HHS regulations require the Board to apply section 1128(i)(4) in deciding whether Petitioner was subject to exclusion.⁶ As indicated, Petitioner does not dispute that this statute's language – "deferred adjudication" or "other arrangement or program where judgment of conviction has been withheld" – encompasses the disposition of the assault charge to which he pled. Moreover, as we have explained in prior decisions, Congress's clear purpose in enacting section 1128(i)(4) was to ensure that the I.G. had the authority to exclude persons, like Petitioner, who, though not judicially "convicted" under state law, have pled guilty to criminal offenses involving abuse of federal health program participants, and to ensure that efforts to exclude such persons do "not hinge on state criminal justice policies." Carolyn Westin, DAB No. 1381, at 6 (1993), aff'd sub nom., Westin v. Shalala, 845 F. Supp. 1446 (D. Kan. 1994); Marc Schneider, D.M.D., DAB No. 2007 (2005) (discussing legislative history of section 1128(i)(4)). In light of that clear congressional purpose, Petitioner's claim that exclusion would "defeat the purposes" of state law is meritless. Henry L. Gupton, DAB Ruling 2007-1 (March 14, 2007), at 4 ("The fact that Tennessee law may not regard the Petitioner as having a criminal conviction has no bearing on whether the

⁶ The regulations governing this proceeding expressly preclude the ALJ (and hence the Board in its review of the ALJ Decision) from finding invalid or refusing to follow Federal statutes or regulations or secretarial delegations of authority." 42 C.F.R. § 1005.4(c)(1); Keith Michael Everman, D.C., DAB No. 1880 (2003).

I.G. is authorized to exclude him from receiving federal health care monies based on circumstances that fall within the definition of conviction for the purpose of the federal statute.").

Petitioner's second contention is that the I.G. failed to show that his offense involved "neglect or abuse of patients in connection with the delivery of a health care item or service." P. Br. at 7, 8. He suggests that exclusion was improper because a court that reviewed the Maryland Board of Physicians' decision to revoke his medical license found that his conviction for second-degree assault was not a crime of "moral turpitude." Id. at 9.

There is no merit to these assertions. First of all, "moral turpitude" is not the relevant standard. The relevant standard is the one set out in section 1128(a)(2): "neglect or abuse in connection with the delivery of a health care item or service." During Petitioner's plea colloquy, the prosecution outlined the facts it said it was prepared to prove in support of the second degree assault charge.⁷ I.G. Ex. 8, at 21-23. Those allegations were also included in the Application for Statement of Charges prepared by the investigating detective. I.G. Ex. 6, at 4-6. The ALJ found that the assault charge to which Petitioner pled guilty involved inappropriate touching of a patient "in the guise of providing medical care to her." ALJ Decision at 5 (citing I.G. Ex. 6). The facts alleged in both the plea colloquy and charge application indicate that the inappropriate touching was of a sexual nature. Such conduct constitutes "abuse" under any reasonable definition of that term, and Petitioner does not deny that the conduct occurred "in the guise of providing medical care" to a patient. For these reasons, and because the facts proffered by the prosecution during the plea colloquy were the basis upon which the Maryland court accepted Petitioner's guilty plea, see id. at 20-24, we agree with the ALJ that the I.G., by submitting the plea colloquy transcript and charge application, met its burden of showing that Petitioner's criminal offense involved the neglect or abuse of a patient in connection with the delivery of a health care item or service.

Petitioner vaguely suggests that because the state of Maryland dropped both fourth degree "sexual offense" charges, there can no

⁷ Petitioner admitted during his plea colloquy that the state had sufficient evidence to prove the charges beyond a reasonable doubt if the court or jury believed the prosecution's witnesses. I.G. Ex. 8, at 12.

finding that the offense to which he pled guilty involved inappropriate sexual conduct. P. Br. at 9. We disagree. As we have indicated in prior decisions, we must consider evidence regarding the nature of the offense, rather than the state's labeling of the offense, to determine whether it involved conduct warranting exclusion. Lyle Kai, R.Ph., DAB No. 1979 (2005). As noted, that evidence – i.e., the charge application and plea colloquy – clearly establish that Petitioner's offense involved inappropriate sexual conduct. But even if it did not, Petitioner was convicted of second degree assault on a patient who came to him for medical treatment. In itself, such assault is "abuse . . . in connection with the delivery of a health care item or service."

Petitioner makes various other contentions that deserve little or no discussion. He asserts, for example, that the purpose of section 1128 would not be thwarted in this case because "[s]urely, the I.G. cannot argue that the federal legislators' objective by enacting the statute at issue was to punish an innocent man, who has consistently and adamantly denied any and all wrongdoing, in open court and on the record under oath."⁸ P. Br. at 10. Petitioner also suggests that section 1128 is being used by the I.G. to deprive him of his state law right to a license revocation hearing before the Maryland Board of Physicians, a hearing that would, he says, establish his innocence. Id.

These contentions are unavailing. Petitioner's claim of innocence is, in essence, a collateral attack on his conviction (as defined in federal law) for second degree assault. As we have held in many prior cases, the Board has no authority to entertain such a claim. Henry L. Gupton, DAB No. 2058 (2007). We also lack authority to consider or rule on any claim that Petitioner was deprived of state law rights. In any event, such deprivation, assuming it occurred, is not a defense to exclusion under section 1128(a)(2).

⁸ In connection with his claim of innocence, Petitioner asserts that the I.G. improperly relied on federal "preemption" doctrine to support its use of federal law in deciding whether he had been "convicted." We do not read the I.G.'s brief as relying on the preemption doctrine but, rather, as asserting that federal law is the exclusive authority for excluding individuals from the Medicare program and is, therefore, controlling as to what constitutes a conviction for purposes of exclusion.

Conclusion

For the reasons above, the ALJ Decision is affirmed.

_____/s/
Constance B. Tobias

_____/s/
Leslie A. Sussan

_____/s/
Sheila Ann Hegy
Presiding Board Member