

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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| In the Case of: |) | |
| |) | |
| Kenneth L. Mudd, M.D., |) | Date: August 8, 2007 |
| |) | |
| Petitioner, |) | |
| |) | |
| - v. - |) | Docket No. C-07-274 |
| |) | Decision No. CR1634 |
| The Inspector General. |) | |
| _____ |) | |

DECISION

Kenneth L. Mudd, M.D. (Petitioner) appeals the decision of the Inspector General (I.G.), made pursuant to section 1128(a)(4) of the Social Security Act (Act), to exclude him from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. Although he was convicted on seven felony counts of “trafficking in a prescription blank for a controlled substance,” Petitioner argues that his offense was not “relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance,” which is a prerequisite for exclusion under section 1128(a)(4).

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

I. Background

By letter dated December 29, 2006, the I.G. notified Petitioner of his decision to exclude him from program participation for five years. The letter explained that the I.G. took the action pursuant to section 1128(a)(4) of the Act because Petitioner had been convicted of a felony offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. I.G. Exhibit (I.G. Ex.) 1. Petitioner timely requested review, and the matter has been assigned to me for resolution.

I held a telephone prehearing conference on March 27, 2007, at which Petitioner was represented by counsel. The parties agreed that the issues before me were legal issues for which an in-person hearing is not required and we set a briefing schedule. Order (March 28, 2007). The I.G. has submitted his brief (I.G. Br.) with four exhibits attached, I.G. Exs. 1 - 4. Petitioner filed his brief (P. Br.), submitting nine additional exhibits. P. Exs. 1 - 9. The I.G. submitted a reply brief (I.G. Reply). In the absence of any objections, I admit into evidence I.G. Exs. 1 - 4 and P. Exs. 1 - 9.

II. Issue

The sole issue before me is whether the I.G. had a basis for excluding Petitioner from participation in the Medicare, Medicaid, and all federal health care programs. Because an exclusion under section 1128(a)(4) must be for a minimum period of five years, the reasonableness of the length of the exclusion is not an issue.

III. Discussion

I make findings of fact and conclusions of law to support my decision in this case. I set forth each finding below, in italics, as a separately numbered or lettered heading.

A. Petitioner was convicted of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, within the meaning of section 1128(a)(4) of the Act.

Section 1128(a)(4) of the Act requires that any individual or entity convicted of a felony criminal offense that occurred after the date of the enactment of the Health Insurance Portability and Accountability Act (August 21, 1996) “relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance” be excluded from all federal health care programs.¹

¹ “Federal health care program” is defined in section 1128B(f) of the Act as any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government, or any State health care program.

Petitioner is a physician, licensed to practice medicine in the Commonwealth of Kentucky. P. Ex. 4, at 4. He concedes that, on December 19, 2005, the Circuit Court for Jefferson County, Kentucky convicted him on seven felony counts of “trafficking in a prescription blank for controlled substances,” and one count of illegal possession of a controlled substance. I.G. Ex. 4; P. Br. at 3.² However, he maintains that his conviction was not related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

Relying on the district court decision in *Travers v. Sullivan*, 801 F. Supp. 394 (E.D. Wash. 1992), Petitioner argues that I am limited to considering the language of the statute under which he was convicted, and may not consider any of the facts underlying that conviction. The statute under which he was convicted says that a person is guilty of “trafficking in prescription blanks when he knowingly and unlawfully traffics in a prescription blank or a forged prescription for a controlled substance.” KRS § 218A.286. According to Petitioner this means that he either 1) trafficked in a prescription blank; or 2) forged a prescription for a controlled substance. But he could not have “forged a prescription for a controlled substance” because, as a matter of law, he had the authority to write prescriptions and signing his own name is not forgery. So he must have trafficked in a prescription blank, and, as Petitioner reads the statute, “trafficking in a prescription blank” does not necessarily relate to a controlled substance. Since a prescription blank is, by definition, blank, “nothing in the essential elements of the offense . . . necessarily relate[s] to controlled substances.” In Petitioner’s view, he escapes exclusion because the blanks *could* have been used to obtain antibiotics (which presumably are not within the definition of a “controlled substance”), even though the facts underlying his conviction establish that the blanks were, in fact, used to obtain controlled substances. P. Br. at 9.

The I.G. reads the statute differently, arguing that the language “for a controlled substance” modifies both the trafficking and the forgery clauses; thus, an individual may be convicted of: 1) trafficking in a prescription blank for a controlled substance, or 2) forging a prescription for a controlled substance. I think the I.G. has the better view on

² Petitioner was initially convicted on seven additional felony counts for “unauthorized dispensing, prescribing, distributing or administering a controlled substance.” I.G. Exs. 2, 3, 4. In an agreed order dated March 23, 2006, his convictions on those counts were set aside and dismissed. His convictions for “trafficking in a prescription blank for controlled substances” and “possession of a controlled substance” remained in effect. P. Ex. 5. I consider here only those convictions that remained in effect.

this, but I need not reach that issue inasmuch as 1) the *Travers* decision does not preclude me from considering the facts underlying Petitioner's felony conviction, and 2) Petitioner was, in fact, explicitly convicted of "trafficking in a prescription blank for a controlled substance." I.G. Exs. 2, 3.

In *Travers*, the court held that a petitioner may not collaterally attack the facts underlying his criminal conviction. 801 F.Supp. at 403. But this does not mean that I am compelled to ignore the facts underlying the conviction, and it certainly does not mean that I should disregard the plain language of the conviction itself. It is well-settled that the I.G. may rely on extrinsic evidence to explain the circumstances of the offense of which a party is convicted. *Narendra M. Patel, M.D.*, DAB No. 1736 (2000); *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *Bruce Lindberg, D.C.*, DAB No. 1280 (1991).

Moreover, in this case, I need not look beyond the language of the felony conviction itself in order to find that it was related to the unlawful distribution, prescription, or dispensing of a controlled substance. The record establishes that Petitioner was charged and convicted on seven counts of the following crime:

Kenneth Lee Mudd . . . committed the offense of Trafficking in a Prescription Blank for a Controlled Substance, by knowingly and unlawfully manufacturing, distributing, selling, transferring, or possessing with the intent to sell, distribute, or transfer a prescription blank for a forged prescription for a controlled substance.

I.G. Ex. 2, at 1 - 3. Further, his guilty plea, on its face, sets forth the underlying facts leading to his conviction. The guilty plea describes the facts of the case as follows:

On or about June 30, 2004, the [defendant] transferred a fraudulent prescription to David Gatlin in the name of Michelle Robertson for 40 Lortab. An individual by the name of Michelle Robertson was not examined by the [defendant]. Also on July 13, 2004, the [defendant] transferred a fraudulent prescription to David Gatlin in the name William Lewis, for 40 Percocet. Again, the [defendant] did not examine an individual by the name of William Lewis[;] said name was provided to the [defendant] by David Gatlin. On July 20, 2004, the [defendant] wrote [5] five fraudulent prescriptions in the names of Catherine Parks [and] Tammy Gatlin for 40 Percocet, 40 Motrin . . . Alprazolam [and] 40

Percocet [and] transferred said prescriptions to David Gatlin in exchange for money. The [defendant] did not examine Catherine Parks or Tammy Gatlin prior to issuing the prescriptions.

I.G. Ex. 3, at 1 - 2.³

Petitioner was thus unquestionably convicted on seven felony counts of trafficking in a prescription blank for a controlled substance, crimes that plainly relate to the unlawful distribution, prescription, or dispensing of a controlled substance.

B. The statute mandates a five-year minimum period of exclusion, and mitigating factors may not be considered to reduce that period of exclusion.

An exclusion under section 1128(a)(4) must be for a minimum mandatory period of five years. As set forth in section 1128(c)(3)(B) of the Act:

Subject to subparagraph (G), in the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years

When the I.G. imposes an exclusion for the minimum mandatory five-year period, the reasonableness of the length of the exclusion is not an issue. 42 C.F.R. § 1001.2007(a)(2).

IV. Conclusion

For these reasons, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid, and all other federal health care programs, and I sustain the five-year exclusion.

/s/

Carolyn Cozad Hughes
Administrative Law Judge

³ According to the guilty plea, this set of facts underlay both Petitioner's convictions for trafficking (upon which this exclusion is based) and the subsequently dismissed convictions for prohibited activities. I consider them solely in relation to the trafficking convictions.