

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
David Albert Hoxie, M.D.,	)	Date: May 30, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-272
	)	Decision No. CR1794
The Inspector General.	)	
_____	)	

**DECISION**

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, David Albert Hoxie, M.D., from participating in Medicare and other federally funded health care programs for a minimum of five years. Petitioner's exclusion is mandated by sections 1128(a)(4) and 1128(c)(3)(B) of the Social Security Act (Act).

**I. Background**

Petitioner, a physician, requested a hearing from the I.G.'s determination to exclude him. The case was assigned to me for a hearing and a decision. I held a pre-hearing conference by telephone at which I ordered the parties to file and exchange proposed exhibits and briefs addressing the issues in the case. I also afforded each party the opportunity to request an in-person hearing. The I.G. timely filed his brief and proposed exhibits. He did not request that I convene an in-person hearing. Petitioner failed to file a brief or exhibits. I sent an order to show cause to Petitioner in which I directed him either to file his brief and proposed exhibits or to explain his failure to do so.

Petitioner did neither. Instead, on May 21, 2008 Petitioner's counsel belatedly filed a notice of appearance. Additionally, Petitioner moved that I stay this proceeding, or alternatively, dismiss it without prejudice while Petitioner appeals his conviction to an appellate court in the State of Ohio.

I deny Petitioner's motions. It would not be in the interest of justice to stay this case pending the outcome of what may be a lengthy State appellate process. Furthermore, I do not have authority to dismiss a case "without prejudice." A dismissal of Petitioner's hearing request renders the decision of the Secretary in this case administratively final and I do not have authority to grant a party new hearing rights in that circumstance. However, I note that regulations governing exclusions provide that the I.G. will reinstate an excluded individual if a conviction on which an exclusion is based is reversed or vacated on appeal. 42 C.F.R. § 1001.3005(a)(1). Consequently, Petitioner will be entitled to reinstatement should he prevail on his appeal of his conviction.

The I.G. filed proposed 10 exhibits, which he designated as I.G. Ex. 1 - I.G. Ex. 10, to support his determination to exclude Petitioner. I receive these exhibits into evidence.

## **II. Issues, findings of fact and conclusions of law**

### **A. Issues**

I could sanction Petitioner for failing to file a brief or exhibits addressing the merits. My authority to impose sanctions includes the authority to dismiss Petitioner's hearing request. However, I am electing to issue a decision on the merits in light of the overwhelming evidence offered by the I.G. supporting his determination to exclude Petitioner. In deciding this case I have considered and I address the argument that Petitioner raised in his hearing request.

The sole issue in this case is whether Petitioner's five-year exclusion is mandated by sections 1128(a)(4) and 1128(c)(3)(B) 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 as a separate heading.

#### ***1. An exclusion of Petitioner is mandated by section 1128(a)(4) of the Act.***

Section 1128(a)(4) mandates the exclusion of any individual who is convicted of a felony occurring after August 21, 1996, relating to the manufacture, distribution, dispensing, or prescription of a controlled substance. The undisputed facts of this case prove that Petitioner was convicted of such a felony. On August 21, 2006, Petitioner pled guilty to a felony under Ohio law and that plea was accepted by a State court. I.G. Ex. 6, at 19 - 20. In pleading guilty Petitioner admitted to violating an Ohio law which makes it unlawful to

knowingly make a false statement in any prescription, order, report, or record. Petitioner made a false statement with respect to a prescription of the drug Valium, a controlled substance. I.G. Ex. 5, at 4; I.G. Ex. 8, at 6. In effect, Petitioner falsely represented that he had a Drug Enforcement Administration registration number which enabled him to write a prescription for a controlled substance when, in fact, he did not.

Petitioner's conviction relates to the distribution, dispensing, or prescription of a controlled substance. He uttered a false statement in connection with a prescription in order to facilitate the dispensation of a controlled substance. Consequently, his conviction falls squarely within the reach of section 1128(a)(4).

In his hearing request Petitioner does not deny that he was convicted of a crime or that his conviction related to the distribution, dispensing, or prescription of a controlled substance. His sole argument is that he ought to have been convicted of a misdemeanor offense rather than a felony. I have no authority to address the merits of Petitioner's argument because the undisputed facts establish that he was convicted of a felony and the I.G.'s authority to exclude Petitioner derives from his felony conviction. Neither the Act nor implementing regulations authorize me to look behind Petitioner's conviction to address arguments that he was convicted wrongfully. As I discuss above, Petitioner evidently has appealed his conviction to a State appellate court. That is the proper venue for him to raise his argument that he was convicted wrongfully.

***2. Petitioner's five-year minimum exclusion is mandated by law.***

The five-year exclusion imposed by the I.G. is mandatory in this case. The Act mandates that any individual who is convicted of a felony as is described at section 1128(a)(4) must be excluded for a minimum period of five years. Act, section 1128(c)(3)(B).

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/s/  
Steven T. Kessel  
Administrative Law Judge