Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Samuel Gerson, M.D.,
(O.I. File No. H-14-42946-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-2574

Decision No. CR4373

Date: October 28, 2015

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services notified Petitioner, Samuel Gerson, M.D., that he was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of five years under 42 U.S.C. § 1320a-7(a)(4). Petitioner requested a hearing before an administrative law judge (ALJ) to dispute the exclusion. For the reasons stated below, I conclude that the IG has a basis for excluding Petitioner from program participation and that the five-year exclusion is mandated by law.

I. Background

By letter dated April 30, 2015, the IG notified Petitioner that he was being excluded from Medicare, Medicaid, and all other federal health care programs for a period of five years, pursuant to 42 U.S.C. § 1320a-7(a)(4). The IG advised Petitioner that the exclusion was based on his felony conviction in the Superior Court of California, County of San Diego, of "a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance as defined under Federal or State law." IG Exhibit (Ex.) 1.

Petitioner timely filed a request for hearing (RFH) and this case was assigned to me for hearing and decision. On July 15, 2015, I convened a prehearing conference by telephone, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order), dated July 15, 2015. *See* 42 C.F.R. § 1005.6.

Pursuant to the Order, the IG submitted a brief together with five exhibits (IG Exs. 1-5). In his brief, the IG moved for summary judgment. Petitioner submitted a response brief (P. Br.) with seven exhibits (P. Exs. 1-7). Petitioner noted in his brief that IG Ex. 2, the Change of Plea form, has been expunged from Petitioner's record and that Count 1 referred to in that form was dismissed from Petitioner's record. The IG submitted a reply brief.

Neither party objected to any of the proposed exhibits. Therefore, I admit all of the proposed exhibits into the record.

II. Issues

The issues in this case are:

1. Whether summary judgment is appropriate;

2. Whether the IG has a basis to exclude Petitioner under 42 U.S.C. § 1320a-7(a)(4) for five years. *See* 42 C.F.R. § 1001.2007(a)(1)-(2).

III. Jurisdiction

I have jurisdiction to adjudicate this case. 42 U.S.C. § 1320a-7(f)(1); 42 C.F.R. §§ 1001.2007, 1005.2.

IV. Findings of Fact, Conclusions of Law, and Analysis[1]

The IG is excluding Petitioner based on 42 U.S.C. § 1320a-7(a)(4)), which requires the IG to exclude "[a]ny individual or entity that has been convicted for an offense which occurred after August 21, 1996, under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance."

Therefore, the four essential elements necessary to support the IG's exclusion are: (1) the individual to be excluded must have been convicted of a criminal offense; (2) the criminal offense must have been a felony; (3) the felony conviction must have been for

[1] My findings of fact and conclusions of law are set forth in italics and bold font.

conduct relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance; and (4) the felonious conduct must have occurred after August 21, 1996. 42 U.S.C. § 1320a-7(a)(4).

A. Summary Judgment is appropriate.

The IG moved for summary judgment asserting that there is no issue of material fact that is in dispute. IG Brief at 9. Petitioner opposes summary judgment contending that he should be allowed to testify in this proceeding concerning his current fully rehabilitated status and the fact that the legislative purpose and intent behind the minimum five year exclusion is not served by excluding him because he does not pose a threat of abuse and fraud to federal programs. P. Br. at 9-11.

At the request of a party, an ALJ may decide an exclusion case by summary judgment "where there is no disputed issue of material fact." 42 C.F.R. § 1005.4(b)(12). "Matters presented to the ALJ for summary judgment will follow Rule 56 of the Federal Rules of Civil Procedure and federal case law . . . ." Civil Remedies Division Procedures § 19(a). As stated by the United States Supreme Court:

> Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment 'shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original).

There are no genuine issues of material fact in dispute in this case. This case presents a narrow issue: whether Petitioner was convicted of a felony that requires mandatory exclusion for not less than five years under 42 U.S.C. § 1320a-7(a)(4). *See* 42 C.F.R. § 1001.2007(a)(1)-(2). As discussed below, the challenges that Petitioner has raised concerning the exclusion all must be resolved against him as a matter of law. Accordingly, summary judgment is appropriate.

The testimony that Petitioner would give concerning his rehabilitated status is irrelevant to my decision as Petitioner's testimony does not relate to any of the elements for an exclusion under 42 U.S.C. § 1320a-7(a)(4). For purposes of summary judgment I accept as true that Petitioner is fully rehabilitated and does not pose a threat of fraud or abuse to

federal programs and conclude that no purpose will be served by allowing Petitioner to testify on his own behalf. I have also considered all of the evidence that Petitioner submitted, as well as Petitioner's letter on his own behalf, P. Ex. 1, in which he states that he participated in an intensive program of rehabilitation (including both in and out-patient therapy), successfully completed a court ordered deferred entry of judgment program, and is participating in the Florida Professional Resource Network where he gets random drug testing. Although Petitioner appears to have taken great steps to rehabilitate himself, those facts are simply not material to the outcome of this case.

B. Petitioner pled guilty to the offense of forgery of a prescription for a narcotic drug and received deferred entry of judgment.

Petitioner is a physician. Petitioner admits that he had a self-medicating addiction. RFH at 1. On May 3, 2012, the state of California filed a criminal complaint charging Petitioner with five felony counts of "Forgery of a Prescription for a Narcotic Drug" and five felony counts of "Burglary." IG Ex. 2. Count 1 alleged that Petitioner "did unlawfully forge and alter a prescription for a narcotic drug." IG Ex. 2 at 2. On September 20, 2012, the state court accepted Petitioner's guilty plea to Count 1 for forgery of a prescription for a narcotic drug in violation of California Health and Safety Code section 11368. IG Exs. 3, 4. The court dismissed the remaining nine counts in the complaint. IG Ex. 3 at 1.

On September 21, 2012, Petitioner entered into a deferred entry of judgment program. IG Ex. 4. On March 14, 2014, Petitioner successfully completed the deferred entry of judgment drug diversion program and Count 1 was dismissed. IG Ex. 5.

C. Petitioner was convicted of a criminal offense for the purposes of 42 U.S.C. § 1320a-7(a)(4).

In his request for hearing, Petitioner appears to argue that although he pled guilty to Count 1 of the criminal complaint filed against him, he entered into a deferred entry of judgment program, which ultimately resulted in Count 1 being dismissed; therefore, he was not convicted. RFH at 3.

For the purposes of a violation under 42 U.S.C. § 1320a-7(a)(4), the term "convicted" includes "when a plea of guilty or nolo contendere by the individual . . . has been accepted by a Federal, State, or local court" and "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." 42 U.S.C. § 1320a-7(i); *see also* 42 C.F.R. § 1001.2. Based on the undisputed facts in this case, I conclude that Petitioner

was convicted of a criminal offense for the purposes of exclusion because Petitioner pled guilty and a court accepted that plea, and Petitioner participated in a deferred adjudication program or other similar program.

On September 20, 2012, Petitioner both pled guilty to Count 1 for forgery of a prescription for a narcotic drug in violation of California Health and Safety Code section 11368, and the court accepted that guilty plea. IG Ex. 3 at 1-3; IG Ex. 4.

Further, Petitioner was also involved in a deferred entry of judgment program. IG Exs. 4, 5. California statute establishes the following related to deferred entry of judgment:

> If the defendant consents and waives his or her right to a speedy trial or a speedy preliminary hearing, the court may refer the case to the probation department or the court may summarily grant deferred entry of judgment if the defendant pleads guilty to the charge or charges and waives time for the pronouncement of judgment.

Cal. Penal Code § 1000.1(b).

> If the court finds that the defendant is not performing satisfactorily in the assigned program, or that the defendant is not benefiting from education, treatment, or rehabilitation, or the court finds that the defendant has been convicted of a crime as indicated above, or that the defendant has engaged in criminal conduct rendering him or her unsuitable for deferred entry of judgment, the court shall render a finding of guilt to the charge or charges pled, enter judgment, and schedule a sentencing hearing as otherwise provided in this code.

Cal. Penal Code § 1000.3.

> Any record filed with the Department of Justice shall indicate the disposition in those cases deferred pursuant to this chapter. Upon successful completion of a deferred entry of judgment program, the arrest upon which the judgment was deferred shall be deemed to have never occurred.

Cal. Penal Code § 1001.4(a).

I agree with previous ALJ decisions that California's deferred adjudication program is a conviction as that term is defined in 42 U.S.C. § 1320a-7(i). *See Gerald David Austin*, DAB CR1207 at 9 (2004); *Carl Jeffrey Boyette*, DAB CR1165 (2004). Further, the fact

that Petitioner's criminal record in California no longer reflects his arrest or guilty plea following completion of the deferred adjudication program does not affect my determination as to whether Petitioner was convicted of a criminal offense for exclusion purposes. *Rudman v. Leavitt*, 578 F. Supp.2d 812, 815 (D. Md. 2008); *Gupton v. Leavitt*, 575 F. Supp.2d 874, 880-881 (E.D. Tenn. 2008).

Consequently, the record establishes that Petitioner was convicted of a criminal offense for the purposes of 42 U.S.C. § 1320a-7(a)(4).

D. Petitioner was convicted of a felony.

Petitioner pled guilty to the felony offense of "Forgery of a Prescription for a Narcotic Drug." IG Exs. 3 and 4. The maximum punishment for this offense is one year in state prison. Cal. Health and Safety Code § 11368. The criminal complaint indicates that Count 1 is a felony offense. IG Ex. 2 at 1. Petitioner does not dispute that his conviction was a felony offense. Therefore, I conclude that Petitioner was convicted of a felony offense.

E. Petitioner's criminal offense is related to the unlawful distribution, prescription, or dispensing of a controlled substance.

Petitioner was charged with "Forgery of a Prescription for a Narcotic Drug." Petitioner pled guilty to this charge. IG Ex. 3 at 3. The criminal complaint plainly states that Petitioner "did unlawfully forge and alter a prescription for a narcotic drug." IG Ex. 2 at 2. Based on the conduct that Petitioner admitted and the statute Petitioner pled guilty to violating (California Health and Safety Code Section 11368), I conclude that Petitioner was convicted of a felony that is related to the unlawful distribution, prescription, or dispensing of a controlled substance under 42 U.S.C. § 1320a-7(a)(4).

F. The underlying conduct of Petitioner's felony conviction occurred after August 21, 1996.

To be excluded pursuant to 42 U.S.C. § 1320a-7(a)(4), Petitioner's felony offense "must have occurred after August 21, 1996." The record shows that the conduct on which Petitioner's conviction was based occurred on December 8, 2011. IG Ex. 2 at 2. Petitioner does not dispute this fact. I conclude that Petitioner's conviction meets the four elements of a mandatory exclusion under 42 U.S.C. § 1320a-7(a)(4), and, therefore, the IG was authorized to impose a mandatory exclusion.

G. Petitioner's arguments that the IG has failed to prove that Petitioner must be excluded are unavailing.

Petitioner's argues that he should not be excluded because his offense did not relate to the delivery of an item or service under Medicare or Medicaid and did not relate to neglect or

abuse of a patient in connection with the delivery of a health care item or service. RFH at 3; P. Br. at 6. However, Petitioner conflates his exclusion under 42 U.S.C. § 1320a-7(a)(4) with exclusions under 42 U.S.C. § 1320a-7(a)(1) and 42 U.S.C. § 1320a-7(a)(2). As stated above, exclusions under 42 U.S.C. § 1320a-7(a)(4) require four elements, none of which involve the delivery or items or services or abuse of patients. In contrast, exclusions under 42 U.S.C. § 1320a-7(a)(1) involve convictions that relate to the delivery of an item or service under federal health care programs while exclusions under 42 U.S.C. § 1320a-7(a)(2) involve convictions that relate to patient neglect or abuse in connection with the delivery of a health care item or services. Here, Petitioner was convicted of the felony offense of "Forgery of a Prescription for a Narcotic Drug," which occurred in December 2011. As discussed above, this conviction fits squarely under 42 U.S.C. § 1320a-7(a)(4).

H. Petitioner must be excluded for the statutory minimum of five years under 42 U.S.C. § 1320a-7(c)(3)(B).

Because I have concluded that a basis exists to exclude Petitioner pursuant to 42 U.S.C. § 1320a-7(a)(4), Petitioner must be excluded for a minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2). Petitioner concedes that the five-year length of the exclusion is required by law. P. Br. at 9.

V. Conclusion

For the foregoing reasons, I affirm the IG's determination to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for the statutory five-year minimum period pursuant to 42 U.S.C. §§ 1320a-7(a)(4), (c)(3)(B).

/s/
Scott Anderson
Administrative Law Judge