Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Perry Tan Nguyen,
(O.I. File No. L-10-40659-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-177

Decision No. CR4611

Date: May 19, 2016

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services notified Perry Tan Nguyen (Petitioner), 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 October 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 United States District Court, Central District of California, 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.

On December 16, 2015, Petitioner timely filed a request for hearing and this case was assigned to me for hearing and decision. On December 22, 2015, Petitioner filed an amended request for hearing. On January 20, 2016, 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 January 22, 2016.

Pursuant to the Order, the IG submitted a brief (IG Br.) together with four exhibits (IG Exs. 1-4). In his brief, the IG moved for summary judgment. In response to the IG's brief, Petitioner submitted on March 17, 2016, a letter brief (P. Letter Br.) and eight unmarked exhibits (Departmental Appeals Board Electronic Filing System (DAB E-File) Items # 11, 11a-11f, and 12). On March 29, 2016, Petitioner filed a supplemental letter brief (P. Supp. Letter Br.). The IG submitted a reply brief.

Neither party objected to any of the proposed exhibits. Petitioner did not oppose the IG's motion for summary judgment in either his letter brief or supplemental letter brief.

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

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." Further, the regulations implementing this statute state that this exclusion provision applies to, among others, health care practitioners. 42 C.F.R. § 1001.101(d)(1).

Therefore, the five 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 conduct relating to the unlawful manufacture, distribution, prescription, or dispensing of

a controlled substance; (4) the felonious conduct must have occurred after August 21, 1996; and (5) the individual to be excluded is or was a health care practitioner. 42 U.S.C. § 1320a-7(a)(4); 42 C.F.R. § 1001.101(d)(1).

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 Br. at 11. Petitioner does not dispute that he was convicted of a felony, but argues that his conviction was not related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. P. Letter Br.; P. Supp. Letter Br.

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).

Based on my review of the record, the parties do not dispute the following facts. Petitioner is a registered pharmacist licensed in California. IG Ex. 2 at 7-8; P. Letter Br. at 2; DAB E-File Item # 11f. On May 8, 2014, a grand jury convened in the United States District Court, Central District of California (District Court), returned a Second Superseding Indictment against Petitioner and other individuals. The grand jury charged Petitioner with one count of conspiracy to distribute a controlled substance, in violation of 21 U.S.C. § 846 (Count One); one count of conspiracy to commit health care fraud, in violation of 18 U.S.C. §§ 1349, 2 (Count Three); and five counts of structuring financial transactions, in violation of 31 U.S.C. §§ 5324(a)(3), (d)(2) and 18 U.S.C. § 2 (Counts Ten through Fourteen). IG Ex. 2 at 13-17, 28, 38-40, 42. On October 16, 2014, during the trial, the District Court dismissed Counts One and Three relating to Petitioner. IG Ex. 4; DAB E-File # 11; P. Letter Br. at 1. However, a jury found Petitioner guilty of Counts

Ten through Fourteen. IG Ex. 3; P. Letter Br. at 1. On May 18, 2015, the District Court entered a Judgment and Probation/Commitment Order against Petitioner for "Structuring Financial Transactions; Aiding and Abetting and Causing an Act To Be Done," as charged in Counts Ten through Fourteen of the Second Superseding Indictment, in violation of 31 U.S.C. §§ 5324(a)(3), (d)(2) and 18 U.S.C. § 2. The District Court sentenced Petitioner to incarceration of six months on each of the counts, to be served concurrently, followed by a three-year term of supervised release and twelve months in a home detention program; a $500 assessment; and a $15,000 fine. IG Ex. 3 at 1-2; DAB E-File # 11a.

I conclude that 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, I grant the IG's motion for summary judgment.

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

For exclusion purposes, the Act defines "convicted" as including those circumstances: "when a judgment of conviction has been entered against the individual . . . 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" or "when there has been a finding of guilt against the individual . . . by a Federal, State, or local court." 42 U.S.C. § 1320a-7(i)(1), (2); *see also* 42 C.F.R. § 1001.2. Petitioner was found guilty after a jury trial, and the District Court issued a judgment and sentence. IG Ex. 3; DAB E-File # 11a. Petitioner admits that he was convicted of a criminal offense. Amended Hearing Request at 1; P. Letter Br. at 1; P. Supp. Letter Br. Therefore, I conclude that Petitioner was convicted of a criminal offense for purposes of 42 U.S.C. § 1320a-7(a)(4).

C. Petitioner was convicted of a felony.

Petitioner was convicted of violating 31 U.S.C. §§ 5324(a)(3), (d)(2) and 18 U.S.C. § 2. Although 31 U.S.C. § 5324, which is titled "Structuring Transactions To Evade Reporting Requirement Prohibited," does not specifically state that it is a felony, it does provide that the maximum term of imprisonment for violating that section is not more than 5 years. 31 U.S.C. § 5324(d)(1). Any offense that is not specifically classified by a letter grade in the section defining it is classified as a Class E felony if the maximum term of imprisonment authorized is more than 12 months and less than 5 years. 18 U.S.C. § 3559(a)(5). Further, Petitioner admits that he was convicted of a felony.

Amended Hearing Request at 1. Therefore, I conclude that Petitioner was convicted of a felony offense.

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

Although Petitioner concedes the material facts in this case, Petitioner argues that while he was convicted of a felony, he was not convicted of a crime that involves the unlawful distribution, prescription, or dispensing of a controlled substance. Petitioner points to the District Court's dismissal of the counts which related to conspiracy to distribute a controlled substance (Count One) and conspiracy to commit health care fraud (Count Three). Amended Hearing Request at 3; P. Letter Br. at 1; P. Supp. Letter Br. Petitioner asserts that he was found guilty of five counts of "Structuring Financial Transactions," which only involved the "breaking up [of his] cash deposits" into "multiple deposits on a given day." P. Letter Br. at 1. Petitioner argues further that there is no evidence or allegation that he tried to hide the deposits or avoid paying taxes. P. Letter Br. at 1.

I reject Petitioner's argument. Petitioner was involved in a conspiracy to illegally distribute OxyContin, and his attempt to characterize his criminal acts as being solely of a financial nature ignores the specific facts recited in the Second Superseding Indictment and incorporated into the counts to which he was convicted. When considering all of the facts alleged in Counts Ten through Fourteen, the counts under which Petitioner was convicted, it is clear that his criminal conduct was related to the unlawful distribution, prescription, or dispensing of a controlled substance. For purposes of reaching this conclusion, it is significant that the terms "related to" and "relating to" in 42 U.S.C. § 1320a-7 simply mean that there must be a nexus or common sense connection. *Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (describing the phrase "relating to" as "deliberately expansive words," "the ordinary meaning of [which] is a broad one," and one that is not subject to "crabbed and formalistic interpretation") (internal quotes omitted); *Quayum v. U.S. Dep't of Health and Human Servs.*, 34 F.Supp.2d 141, 143 (E.D.N.Y. 1998).

In the Second Superseding Indictment, the grand jury charged Petitioner with one count of conspiracy to distribute a controlled substance (Count One); one count of conspiracy to commit health care fraud (Count Three); and five counts of structuring financial transactions (Counts Ten – Fourteen). Count One, which begins at paragraph 54 of the indictment, states that it "repeats and re-alleges paragraphs 1 through 53 of the Second Superseding Indictment, as though fully set forth herein." IG Ex. 2 at 13. Count Three, which begins at paragraph 62, states that it "repeats and re-alleges paragraphs 1 through 53, 56, and 60; Overt Act Nos. 28, 29 and 33, as set forth in paragraph 57 of this Second Superseding Indictment, as though fully set forth herein." IG Ex. 2 at 38. Counts Ten through Fourteen begin at paragraph 68, and the grand jury states that it "**repeats and re-alleges paragraph 1 through 53, 56, and Overt Act Nos. 98 through 106 of**

paragraph 57 of this Second Superseding Indictment, as though fully set forth herein." IG Ex. 2 at 42 (emphasis added). The District Court dismissed Counts One and Three, and, in doing so, dismissed the paragraphs associated with those counts. However, with respect to Counts Ten through Fourteen, all the paragraphs that were repeated and re-alleged under Counts Ten through Fourteen remained incorporated by reference into those counts.

Petitioner's argument, that I should look at the actual crime he committed, i.e., aiding and abetting in the structuring or assisting in the structuring of bank transactions as part of a pattern of illegal activity (IG Ex. 2 at 42) in a vacuum, would preclude me from determining whether his criminal conduct is related to the unlawful distribution, prescription or dispensing of controlled substances. I must reject Petitioner's argument because I am permitted to look beyond the specific statutory language of a criminal offense to determine the surrounding circumstances of the offense. *See Berton Siegel, D.O.*, DAB No. 1467 (1994).

As stated above, a jury found Petitioner guilty of Counts Ten through Fourteen. When the District Court entered judgment against Petitioner, it explicitly stated that Petitioner was convicted "as charged in Counts Ten, Eleven, Twelve, Thirteen, and Fourteen of the Second Superseding Indictment." IG Ex. 3 at 1. These counts incorporated by reference facts alleged throughout much of the Second Superseding Indictment to that point. Although Petitioner was only found guilty of the criminal offenses specified under Counts Ten through Fourteen, this does not mean that the allegations set forth in "paragraph[s] 1 through 53, 56, and Overt Act Nos. 98 through 106 of paragraph 57," which paragraphs were re-alleged and incorporated by reference into Counts Ten through Fourteen, are meaningless or inapplicable to determining the circumstances surrounding Petitioner's crime. To the contrary, those facts are directly relevant. Even if the facts specifically associated with Counts One and Three cannot be considered due to the dismissal of those counts, the facts alleged prior to Count One, i.e., paragraphs 1 through 53, are sufficient to show the required nexus since they were not dismissed.

Paragraphs 1 through 13 of the Second Superseding Indictment describe the scheme, of which Petitioner was a part, as involving a purported medical clinic that generated fraudulent prescriptions for OxyContin, which was subsequently diverted and sold on the streets. IG Ex. 2 at 1-4. Paragraph 12 of the Second Superseding Indictment describes Petitioner's role in the scheme:

> Defendants [another individual] and [Petitioner], together with co-conspirator [another individual], structured the deposits of cash generated from the sale of OxyContin prescribed by the Clinic and its doctors into their bank accounts by depositing the cash in amounts of $10,000 or less

> to evade bank reporting requirements for transactions over $10,000.

IG Ex. 2 at 4. Paragraph 29 of the indictment directly pertains to Petitioner:

> [Petitioner] was a pharmacist, licensed in California to lawfully dispense prescribed Schedule II narcotic drugs. [Petitioner] owned and operated St. Paul's Pharmacy . . . located in Huntington Park, California, from which [Petitioner] filled and caused to be filled prescriptions from the Clinic, starting in or about December 2008. [Petitioner] controlled bank accounts at Bank of America, a domestic financial institution, . . . , into which [Petitioner] deposited proceeds from the sale of OxyContin.

IG Ex. 2 at 7-8. As already stated above, the allegations in the Second Superseding Indictment alleged before Counts One and Three, and incorporated by reference in Counts Ten through Fourteen, indicate that Petitioner and his pharmacy participated in a scheme that included the illegal sale of OxyContin, and Petitioner's financial transactions furthered this criminal activity.

If we also consider all of the incorporated facts from Counts One and Three of the Second Superseding Indictment, the nexus of Petitioner's crime to the distribution, prescribing, or dispensing of controlled substances is even clearer. Subparagraphs j. and q. of Paragraph 56 also explain Petitioner's involvement in the scheme:

> Defendants . . . [Petitioner and other co-conspirators], would dispense or cause to be dispensed the OxyContin to [one of the defendants], [other co-conspirators] . . . , who would in turn give the OxyContin to the Runners.
>
> * * *
>
> To dispose of cash proceeds generated from the proceeds of OxyContin without drawing scrutiny, . . . [other defendants and Petitioner], would structure deposits of cash proceeds from the sale of OxyContin by regularly depositing the cash proceeds in amounts of $10,000 or less to evade bank reporting requirements.

IG Ex. 2 at 15, 17.

Further, the Overt Acts Nos. 98 through 104, set out under Paragraph 57 of the indictment, explicitly state that Petitioner "dispensed or caused to be dispensed"

OxyContin pills to co-conspirators and a recruited patient in November 2008, March 2009, April 2009, June 2009, July 2009, and August 2009. Overt Act No. 105 under Paragraph 57 states that, on or about January 28, 2009, Petitioner "made or caused" two separate cash deposits in the amounts of $10,000 and $10,000 into two accounts at Bank of America. Overt Act No. 106 under Paragraph 57 states that, on or about August 19, 2009, Petitioner "made or caused" two separate cash deposits in the amounts of $9,000 and $10,000 into an account at Bank of America. IG Ex. 2 at 28.

Finally, under Counts Ten through Fourteen, the counts for which Petitioner was convicted, the indictment charges that Petitioner:

> aided and abetted by others . . . knowingly, and for the purpose of evading the reporting requirements of Section 5313(a) of Title 31, United States Code, and the regulations promulgated thereunder, structured, assisted in structuring, and caused to be structured, the following transactions with Bank of America, . . . as part of a pattern of illegal activity involving more than $100,000 in a 12-month period, and while violating another law of the United States.

IG Ex. 2 at 42. Following this text is the recitation of the specific charges under Counts Ten, Eleven, Twelve, Thirteen, and Fourteen, stating the date of activity and the transaction associated with that date. I note that the charges in Counts Ten and Fourteen are identical to Overt Acts Nos. 105 and 106, described above. Count Ten charges that Petitioner, on January 28, 2009, made cash deposits in the amounts of $10,000 and $10,000 into two accounts at Bank of America, and Count Fourteen charges that, on August 19, 2009, Petitioner made cash deposits in the amounts of $9,000 and $10,000 into an account at Bank of America. IG Ex. 2 at 42.

It is thus clear from the Second Superseding Indictment's language that Petitioner's criminal acts, as charged in Counts Ten through Fourteen, involved more than simply engaging in illegal financial transactions. As discussed above, the paragraphs of the Second Superseding Indictment that were re-alleged and incorporated within Counts Ten through Fourteen establish that Petitioner had an active role in a scheme to illegally distribute OxyContin. The underlying facts supporting Petitioner's conviction show that Petitioner dispensed OxyContin pills to other co-conspirators or a recruited patient and also structured cash deposits from the sale of OxyContin to evade bank reporting requirements. The requisite connection to controlled substances is thus established, and I conclude that Petitioner was convicted of a felony that is related to, i.e., has a nexus to, the unlawful distribution, prescription, or dispensing of a controlled substance under 42 U.S.C. § 1320a-7(a)(4).

E. 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 criminal acts which formed the basis of Petitioner's conviction occurred between January and August 2009. IG Ex. 2 at 42. Petitioner does not dispute this fact and admits that he was "convicted of a felony occurring after August 21, 1996." Amended Hearing Request at 1.

F. Petitioner, as a licensed pharmacist, is a health care practitioner subject to exclusion under 42 U.S.C. § 1320a-7(a)(4).

The regulations implementing 42 U.S.C. § 1320a-7(a)(4) state that an exclusion under that section applies to, among others, "a health care practitioner." 42 C.F.R. § 1001.101(d)(1). Petitioner admits that he is licensed as a Registered Pharmacist in California. P. Letter Br. at 2; DAB E-File Item # 11f. Therefore, he is a health care practitioner who is subject to exclusion under 42 U.S.C. § 1320a-7(a)(4).

G. Petitioner's additional arguments are unavailing.

In explaining his position, Petitioner states that the pain management clinic through which the distribution operation was conducted held itself out as legitimate to pharmacists such as himself. Petitioner claims that he conducted "due diligence" in checking the background of the physicians at the clinic and making sure that patients picked up their prescriptions with valid identification. P. Letter Br. at 1. To the extent that Petitioner attempts to minimize the illegality of his actions, I consider his statements to constitute an impermissible collateral attack on his conviction. Under the regulations, Petitioner is explicitly prohibited from re-litigating his criminal offense before me, and I cannot review the efficacy of Petitioner's conviction. 42 C.F.R. § 1001.2007(d); *see also Travers v. Shalala*, 20 F.3d 993, 998 (9th Cir. 1994); *Anderson v. Thompson*, 311 F. Supp. 2d 1121, 1128 (D. Kan. 2004).

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

I conclude that Petitioner's conviction meets the five elements of a mandatory exclusion under 42 U.S.C. § 1320a-7(a)(4) as well as the requirement in 42 C.F.R. § 1001.101(d)(1). Therefore, the IG was authorized to impose a mandatory exclusion. 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).

V. Conclusion

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