Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

John C. Chen
(O.I File No. 9-09-40388-9),

Petitioner,

v.

The Inspector General,
Department of Health and Human Services.

Docket No. C-15-2935

Decision No. CR4493

Date: December 17, 2015

DECISION

Petitioner, John C. Chen, is excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)), effective May 20, 2015. Petitioner's exclusion for the minimum period of five years is required by section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).[1]

I. Background

The Inspector General (I.G.) notified Petitioner by letter dated April 30, 2015, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. The I.G. cited section 1128(a)(1) of the Act as the basis for Petitioner's exclusion and stated that the exclusion was based on his conviction

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[1] Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

in the United States District Court, District of North Dakota, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner timely requested a hearing (RFH) on June 15, 2015. The case was assigned to me on July 10, 2015, for hearing and decision. A prehearing telephone conference was convened on July 23, 2015. The substance of the conference is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence dated July 23, 2015 (Prehearing Order). During the prehearing conference, Petitioner waived an oral hearing and the parties agreed that this matter may be resolved based upon the parties' briefs and documentary evidence.

The I.G. filed a motion for summary judgment and supporting brief (I.G. Br.) on September 9, 2015, with I.G. Exs. 1 through 3.[2] Petitioner did not object to my consideration of I.G. Exs. 1 through 3 and they are admitted as evidence. The I.G. did not file a copy of the April 30, 2015 notice of exclusion as an I.G. exhibit as required by my Prehearing Order ¶ 7. The I.G. is required by 42 C.F.R. § 1001.2003(a)[3] to give an individual or entity to be excluded proper notice. Whether or not Petitioner has a right to hearing, whether or not I have jurisdiction, and whether or not the I.G. may proceed with the exclusion action are all dependent upon whether Petitioner was properly notified by the I.G. The I.G. has the burden under 42 C.F.R. § 1005.15(b) and (c) and my Prehearing Order ¶ 7, to establish that proper notice was given. In this case, Petitioner has raised no issue related to the sufficiency of the April 30, 2015 notice. Petitioner actually filed with his request for hearing the first page of the April 30, 2015 notice and a complete copy with the declaration of Petitioner's counsel. Petitioner's Exhibit (P. Ex.) 5E. Therefore, I conclude that there is no issue to be resolved regarding the sufficiency of the notice Petitioner received, and there is no prejudice due to the I.G.'s failure to comply with the Prehearing Order by filing the notice of exclusion as evidence. Counsel for the I.G. is admonished, however, to ensure careful compliance with the Prehearing Order in the future.

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[2] The I.G. also filed a copy of Petitioner's June 15, 2015 request for hearing without any of the attachments filed by Petitioner. The copy of the request for hearing was not marked as evidence by the I.G. The complete original request for hearing and supporting documents filed by Petitioner are part of the record in this case and there was no need for the I.G. to offer one page of that document as an exhibit. Therefore, the copy of the request for hearing filed by the I.G. with its motion for summary judgment is not accepted or treated as evidence.

[3] References are to the 2014 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

On October 26, 2015, Petitioner personally filed three documents in the Departmental Appeals Board Electronic Filing System (DAB E-File) – documents #14, #14a and #14b. The documents, three certificates that reflect completion of continuing education, were not filed by Petitioner's counsel, not marked as evidence, and not cited by Petitioner's counsel in briefing. The documents are not relevant to any issues that I may decide in this case. Accordingly, I do not consider the three certificates for any purpose in making this decision.

Petitioner filed a response to the I.G. motion (P. Response) on October 26, 2015, with five exhibits. Petitioner failed to mark and number the pages of the documents as required by Civil Remedies Division Procedure § 14. Rather than reject the documents, I treat them as being marked as follows:

> P. Ex. 1: a Wire Transfer Authorization Agreement from Opus Bank dated June 30, 2014, for the amount of $150,000; and page 3 of the judgment in Petitioner's criminal case imposing restitution of $56,642.52.
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> P. Ex. 2: Letter dated April 27, 2015, from the Department of the Treasury to Petitioner; a document showing a routing transaction posted on May 12, 2015, in the amount of $207.06 that was transmitted to an officer at the Wells Fargo Bank in the State of Washington; and a document showing Petitioner's PMA Prime checking account transaction history for May 2015.
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> P. Ex. 3: Letter dated February 18, 2015, from Noridian Healthcare Solutions to D. Jeffrey Burnham and Petitioner; page 3 of a plea agreement.
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> P. Ex. 4: Declaration of John C. Chen, M.D., dated October 26, 2015.
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> P. Ex. 5: Declaration of D. Jeffrey Burnham dated October 26, 2015, and five attachments marked as Exhibits A, B, C, D, and E, which I treat as being marked as P. Exs. 5A, 5B, 5C, 5D, 5E, respectively.

The I.G. has not objected to my consideration of P. Exs. 1 through 5 and they are admitted as evidence. On November 9, 2015, the I.G. waived filing a reply brief.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's rights to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services (the Secretary).

The Secretary must exclude from participation in any federal health care program any individual convicted under federal or state law of a felony or misdemeanor criminal offense related to the delivery of an item or service under Medicare or a state health care program. Act § 1128(a)(1). The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(a).

Pursuant to section 1128(i) of the Act, an individual is convicted of a criminal offense when: (1) a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; (2) there is a finding of guilt in a court; (3) a plea of guilty or no contest is accepted by a court; or (4) the individual has entered into any arrangement or program where judgment of conviction has been withheld. 42 U.S.C. § 1320a-7(i)(1)-(4); 42 C.F.R. § 1001.2.

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act will be for a period of not less than five years. 42 C.F.R. § 1001.102(a). The Secretary has published regulations that establish aggravating factors the I.G. may consider to extend the period of exclusion beyond the minimum five-year period, as well as mitigating factors that may be considered only if the I.G. proposes to impose an exclusion greater than five years. 42 C.F.R. § 1001.102(b), (c).

The standard of proof is a preponderance of the evidence and there may be no collateral attack of the conviction that provides the basis of the exclusion. 42 C.F.R. § 1001.2007(c), (d). Petitioner bears the burden of proof and the burden of persuasion on any affirmative defenses or mitigating factors, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b).

B. Issues

The Secretary has by regulation limited my scope of review to two issues:

> Whether the I.G. has a basis for excluding Petitioner from participation in Medicare, Medicaid, and all federal health care programs; and
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> Whether the length of the proposed period of exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

If, as in this case, the I.G. imposes the minimum authorized five-year period of exclusion under section 1128(a) of the Act, there is no issue as to whether the period of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(2).

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

1. Petitioner's request for hearing was timely and I have jurisdiction.

2. Petitioner waived an oral hearing and a decision on the documents and briefs is permissible.

Petitioner's request for hearing was timely and I have jurisdiction pursuant to section 1128(f) of the Act and 42 C.F.R. pt. 1005.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The Secretary has provided by regulation that a sanctioned party has the right to hearing before an ALJ. Pursuant to 42 C.F.R. § 1005.15(a), Petitioner is entitled to a "hearing on the record." Both the sanctioned party and the I.G. have a right to participate in the hearing. 42 C.F.R. §§ 1005.2-.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5).

During the prehearing conference, Petitioner waived the right to appear at an oral hearing and elected to rely upon the documentary evidence and briefs. I specified in the Prehearing Order that this matter would be resolved on the parties' briefs and documentary evidence. Prehearing Order ¶ 5. The I.G. did not object to proceeding upon the briefs and documentary evidence or state any need or desire to call witnesses for oral testimony. However, the I.G. filed a motion for summary judgment. I do not construe the filing of a motion for summary judgment by the I.G. to be evidence that the I.G. now objects to a decision on the merits based only upon the documents. Furthermore, given my decision in this case, the I.G. suffers no prejudice due to my deciding this case upon the documents and without oral testimony.

3. Petitioner's exclusion is required by section 1128(a)(1) of the Act.

a. Facts

On June 30, 2014, a one-count criminal information dated June 11, 2014, was filed against Petitioner in the U.S. District Court for the District of North Dakota. Petitioner was charged with possession of an authentication feature (a Medicare claim number) with the intent to use it to defraud the United States, in violation of 18 U.S.C. § 1028(a)(4). The criminal information states the charge:

> On or about February 19, 2009, [Petitioner] did knowingly and willfully possess a Medicare Health Insurance Claim Number (HICN) assigned to F.F. by the Social Security Administration, with the intent to use the HICN to defraud the United States, namely, to submit a claim for reimbursement to Noridian Administrative Services, a Medicare Administrative Contractor, for services that the defendant did not render. In violation of Title 18, United States Code, Section 1028(a)(4).

I.G. Ex. 1 at 1; I.G. Ex. 2.

Petitioner entered into a plea agreement with the United States Attorney on May 29, 2014. The agreement provided that Petitioner agreed to plead guilty to the one-count criminal information. I.G. Ex. 3 at 2, 4, 12. Petitioner stipulated as part of his plea agreement that between approximately April 2007 and March 2010, he

> worked as a physician in skilled nursing facilities, and also served as a director of a skilled nursing facility for a portion of that time period. . . . [Petitioner] billed Medicare almost exclusively for performing procedure code 99309, the third highest code . . . for that kind of skilled nursing home visit. The code describes the performance of at least two of the following three tasks: (1) a detailed interval history; (2) a detailed examination, and (3) a medical decision of moderate complexity. The procedure must be performed in the presence of a patient in order to be submitted to Medicare for reimbursement. . . .
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> For the three years between April, 2007 and March, 2010 [Petitioner] billed skilled nursing facility procedure code 99309 in nearly 200 cases in which records indicate the patient was not present in a skilled nursing facility.
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> In addition to the types of claims above, [Petitioner] submitted numerous claims to Medicare, amounting to 600 or more, that were billed for dates on which [Petitioner] was physically outside the United States.
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> [Petitioner] admits that during the relevant time period that the above claims were made, he possessed a Medicare number belonging to F.F. with the intent to defraud the United States.

I.G. Ex. 3 at 5-6.

On June 30, 2014, Petitioner entered a guilty plea in the U.S. District Court for the District of North Dakota to the one-count criminal information. The district court accepted Petitioner's guilty plea to possession of an authentication feature with the intent to use it to defraud the United States in violation of 18 U.S.C. § 1028(a)(4). The district court entered a judgment of conviction against Petitioner and sentenced him to pay $56,642.52 in restitution to the Centers for Medicare & Medicaid Services (CMS), one-year probation, and a $25 assessment. I.G. Ex. 1 at 2-4.

b. Analysis

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides:

> (a) MANDATORY EXCLUSION.—The Secretary **shall** exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
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> (1) Conviction of program-related crimes. — Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program.

Act § 1128(a)(1) (emphasis added). The statute requires that the Secretary exclude from participation any individual or entity: (1) convicted of a criminal offense (whether felony or misdemeanor); (2) where the offense is related to the delivery of an item or service; and (3) the delivery of the item or service was under Medicare or a state health care program. Section 1128(a)(1) includes no language that requires conviction of a felony offense.

Petitioner does not dispute that he was convicted of a criminal offense within the meaning of section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)). RFH; P. Response at 2, 5-6. Petitioner's guilty plea was accepted and he was found guilty based on his plea. The district court issued a judgment of conviction and sentenced Petitioner for the offense of which he was convicted. I conclude that Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Act.

The statute requires that Petitioner be excluded if he was convicted of an offense related to the delivery of an item or service under Medicare or a state health care program. Act § 1128(a)(1). Petitioner cannot deny that his criminal offense was related to the delivery of a health care item or service under Medicare. Petitioner admitted as part of his plea

agreement that he billed Medicare for procedures that contained billing and coding errors. Petitioner admitted that he billed Medicare for services he claimed to have provided to nursing home residents on dates the residents were not even present at the facility. Petitioner admitted that he submitted 600 or more claims to Medicare for reimbursement for services provided that were billed for dates he was actually outside of the United States. Petitioner admitted that he had a Medicare billing number, not his own, and with the intent to defraud Medicare. I.G. Ex. 3 at 5-6. Petitioner was ordered to pay $56,642.52 in restitution to CMS, the federal agency that administers Medicare. I.G. Ex. 1 at 4. The evidence clearly establishes the nexus between the offense of which Petitioner was convicted and the delivery of a health care item or service under Medicare.

The two essential elements necessary to support an exclusion based on section 1128(a)(1) of the Act are satisfied. Petitioner was convicted of a misdemeanor criminal offense and the conduct that formed the basis of his conviction was related to the delivery of a health care item or service under Medicare. Accordingly, I conclude that there is a basis for Petitioner's exclusion. I further conclude that exclusion is mandated by section 1128(a)(1) of the Act.

Petitioner does not deny that he was convicted of a criminal offense related to the delivery of an item or service under Medicare. However, he argues that the I.G. should have applied the permissive exclusion provisions of section 1128(b) of the Act and excluded him for no more than two years. The gist of Petitioner's argument is that part of his deal with the government when he pleaded guilty was that any exclusion would be a permissive exclusion and for less than the five years required for a mandatory exclusion under section 1128(a)(1). P. Response; P. Ex. 4 at 1; P. Ex. 5 at 1-2. Petitioner also argues that the offense to which he plead guilty is a misdemeanor and meets the requirements for a permissive exclusion under section 1128(b)(1)(A) of the Act. P. Response at 6.

Petitioner's arguments are without merit. It is important to understand the limited nature of the review to which Petitioner is entitled in this forum. The judgment of the district court and the bases for that judgment are not reviewable by me or subject to collateral attack by Petitioner in this forum. Therefore, Petitioner is bound in this forum by the facts to which he stipulated in pleading guilty and the resulting conviction. 42 C.F.R. § 1001.1007(d). I am limited to deciding whether there is a basis for Petitioner's exclusion. Because the I.G. only proposed to impose the minimum authorized period of five years, there is no issue of whether that period is unreasonable. 42 C.F.R. § 1001.2007(a)(1)-(2). I have no jurisdiction or authority to review and enforce the terms of any civil settlement agreement or criminal plea agreement that Petitioner entered with the United States Attorney or the I.G.

Furthermore, I am bound to follow the provisions of the Act and the Secretary's regulations. 42 C.F.R. § 1005.4(c)(1). Petitioner's conviction falls within the scope of section 1128(a)(1), and Congress mandates that for such a conviction, Petitioner be excluded for the minimum period of five years. Even if I had jurisdiction to review Petitioner's agreements with the government, I could not determine to enforce them contrary to the specific requirements of the law. Section 1128(a)(1) of the Act and its application are well established and understood. Appellate panels of the Departmental Appeals Board (the Board) have recognized in many cases that Congress has mandated exclusions for convictions that fall within the scope of section 1128(a). The Board has stated that "the Act expressly provides for mandatory five-year minimum periods of exclusion *whenever* an individual has been convicted 'of a criminal offense related to the delivery of an item or service' under specific programs . . . without any requirement that the offense be a felony." *Craig Richard Wilder*, DAB No. 2416 at 7 (2011) (quoting *Tanya A. Chuoke, R.N.*, DAB No. 1721 at 14 (2000) (italics in original)). Once a conviction is shown to be within the scope of section 1128(a)(1), the Act requires the I.G. to impose a mandatory exclusion. *See, e.g.*, *Wilder*, DAB No. 2416 at 7; *Lorna Fay Gardner*, DAB No. 1733 at 6 (2000) (rejecting petitioner's argument that her misdemeanor conviction should be considered under the permissive exclusion rather than the mandatory exclusion provisions of section 1128 of the Act.). The Board has expressed the opinion that the I.G. also has no discretion to impose a permissive exclusion when an individual's conviction satisfies the elements of section 1128(a)(1) of the Act. *See, e.g.*, *Tarvinder Singh, D.D.S.*, DAB No. 1752 (2000) (rejecting petitioner's claim that his misdemeanor conviction was more properly subject to a three-year permissive exclusion when the threshold provisions of the mandatory provisions of section 1128(a)(1) have been met).

4. Five years is the minimum authorized period of exclusion pursuant to section 1128(a)(1) of the Act.

5. Petitioner's exclusion for five years is not unreasonable as a matter of law.

I have concluded that there is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act. Therefore, Petitioner must be excluded for a minimum period of five years pursuant to section 1128(c)(3)(B) of the Act.

Exclusion is effective 20 days from the date of the I.G.'s notice of exclusion to the affected individual or entity. 42 C.F.R. § 1001.2002(b).

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years, effective May 20, 2015.

/s/
Keith W. Sickendick
Administrative Law Judge