

Department of Health and Human Service

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Aiad Saman,	)	Date: December 29, 2009
	)	
Petitioner,	)	Docket No. C-09-607
	)	Decision No. CR2050
v.	)	
	)	
The Inspector General.	)	

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**DECISION**

Petitioner, Aiad Saman, is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(3) of the Social Security Act (the Act) (42 U.S.C. § 1320a-7(a)(3)), effective July 20, 2009. Petitioner’s exclusion is based upon his felony conviction in a state court of a criminal offense of fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, the offense was committed after August 21, 1996, and the offense was in connection with the delivery of a health care item or service or an act or omission in a governmental health care program. There is a proper basis for exclusion. Petitioner’s exclusion for the minimum period of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

**I. Background**

The Inspector General for the Department of Health and Human Services (the I.G.) notified Petitioner by letter dated June 30, 2009, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years, pursuant to section 1128(a)(3) of the Act. The basis cited for Petitioner’s exclusion was his felony conviction in the Essex County Superior Court, State of New Jersey, of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in

connection with the delivery of a health care item or service, or any act or omission in a health care program financed in whole or part by a governmental entity. Act, § 1128(a)(3); 42 U.S.C. § 1320a-7(a)(3); and 42 C.F.R. § 1001.101(c).

Petitioner timely requested a hearing by letter dated July 10, 2009. The case was assigned to me for hearing and decision on July 28, 2009. On August 18, 2009, I convened a prehearing telephonic conference, the substance of which is memorialized in my Prehearing Conference Order of that date.

The I.G. filed a motion for summary judgment and supporting brief on September 17, 2009 (I.G. Brief), with I.G. exhibits (I.G. Exs.) 1 through 4. Petitioner filed a cross-motion for summary judgment on October 15, 2009 (P. Brief) with no exhibits. The I.G. filed a response to Petitioner's cross-motion on November 3, 2009 (I.G. Response) with I.G. exhibits 5 and 6. Pursuant to paragraph 6 of the Prehearing Conference Order, Petitioner had 15 days to file any objections to the exhibits the I.G. filed with its response. No objection has been made to the admissibility of any of the proposed exhibits and I.G. exhibits 1 through 6 are admitted.

## **II. Discussion**

### **A. Findings of Fact**

The following findings of fact are based upon the uncontested and undisputed assertions of fact in the pleadings and the exhibits admitted. Citations may be found in the analysis section of this decision if not included here.

1. The I.G. notified Petitioner by letter dated June 30, 2009, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years, pursuant to section 1128(a)(3) of the Act.
2. Petitioner timely requested a hearing by letter dated July 10, 2009.
3. On June 5, 2008, Petitioner entered a guilty plea to charges of conspiracy to commit fencing and perjury in the Superior Court of Essex County, New Jersey. I.G. Exs. 2-3.
4. During the plea colloquy on June 5, 2008, Petitioner admitted under oath that between November 23, 2002 and September 24, 2004, he was employed as a pharmacist at the Ojah Pharmacy in East Orange, New Jersey, and on 86 occasions during that period he brought stolen medication of a value of approximately \$330,000 to the pharmacy for sale to the public, including Medicaid beneficiaries. I.G. Ex. 3, at 5-7.

5. Petitioner further admitted during the plea colloquy that on February 9, 2009, he lied to the grand jury by stating that he did not see any stolen medication come into the Ojah Pharmacy or being used to fill prescriptions. I.G. Ex. 3, at 7-9.
6. On August 25, 2008, Petitioner was sentenced to confinement for five years on the conspiracy charge and to three years on the perjury charge, the periods of confinement to run concurrently, plus various fees. I.G. Ex. 4.

### **B. Conclusions of Law**

1. Petitioner's request for hearing was timely and I have jurisdiction.
2. Summary judgment is appropriate.
3. Petitioner was convicted of a criminal offense that occurred after August 21, 1996, related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service, or any act or omission in a health care program financed in whole or part by a governmental entity, within the meaning of section 1128(a)(3) of the Act.
4. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(3) of the Act.
5. I have no authority to change the effective date of Petitioner's exclusion from July 20, 2009 to the date of his conviction, June 5, 2008.
6. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is five years and that period is presumptively reasonable.

### **C. Issues**

The Secretary of the Department of Health and Human Services (the Secretary) has by regulation limited my scope of review to two issues:

Whether there is a basis for the imposition of the exclusion; and,

Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

## **D. Applicable Law**

Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary is provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). Petitioner's request for a hearing was timely filed and I do have jurisdiction.

Pursuant to section 1128(a)(3) of the Act, the Secretary must exclude from participation in the Medicare and Medicaid programs any individual convicted of a criminal offense that occurred after August 21, 1996, related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service, or any act or omission in a health care program financed in whole or part by a governmental entity.

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years may mitigating factors be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

The standard of proof is a preponderance of the evidence and there may be no collateral attack of the conviction that is the basis for the exclusion. 42 C.F.R. § 1001.2007(c) and (d). Petitioner bears the burden of proof and 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) and (c).

## **E. Analysis**

### **1. Summary judgment is appropriate in this case.**

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 right to hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. § 1005.2 and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified in 42 C.F.R. § 1005.3. 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). The ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12). Summary judgment is appropriate and no hearing is required where either: there are no disputed issues of material fact and the only questions that must be decided involve application of law to the undisputed facts; or, the moving party must prevail as a matter of law even if all disputed facts are resolved in favor of the party against whom the motion is made. A party opposing summary

judgment must allege facts which, if true, would refute the facts relied upon by the moving party. *See e.g.*, Fed. R. Civ. P. 56(c); *Garden City Medical Clinic*, DAB No. 1763 (2001); *Everett Rehabilitation and Medical Center*, DAB No. 1628, at 3 (1997) (in-person hearing required where non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also*, *New Millennium CMHC*, DAB CR672 (2000); *New Life Plus Center*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case. The sole issue before me for resolution is whether the effective date of Petitioner's exclusion may be changed from July 20, 2009, the twentieth day after the I.G.'s June 30, 2009 notice, to June 5, 2008, the date of Petitioner's conviction. Petitioner's issue must be resolved against him as a matter of law and summary judgment is, therefore, appropriate.

**2. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(3) of the Act.**

The I.G. cites section 1128(a)(3) 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)):

\* \* \* \*

(3) FELONY CONVICTION RELATING TO HEALTH CARE FRAUD. – Any individual or entity that has been convicted for an offense which occurred after the date of the Health Insurance Portability and Accountability Act of 1996 (footnote omitted), under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in paragraph (1)) operated by or financed in whole or part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

The statute requires the Secretary to exclude from participation in Medicare or Medicaid, any individual or entity: (1) convicted in any federal or state court of a felony criminal offense that was committed after August 21, 1996 (the date HIPAA was enacted); (2)

where the offense is related to the delivery of a health care item or service or any act or omission in a health care program, other than Medicare or Medicaid, financed in whole or part by a federal, state, or local government; and (3) the offense for which a conviction is related to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct.

Petitioner does not dispute that he was convicted of a criminal offense within the meaning of section 1128(i) of the Act. Petitioner also does not dispute that his offense of conspiracy to fence stolen medication satisfies the elements of section 1128(a)(3). In his request for hearing Petitioner argues that he was innocent and the victim of corrupt lawyers who pushed him to plea bargain; that he was actually employed at the pharmacy as a maintenance man; and that the government had no evidence of the source of the allegedly stolen medication. Petitioner's arguments attack the basis for his conviction and may not be reviewed, as Petitioner is not permitted to collaterally attack his conviction before me. 42 C.F.R. § 1001.2007(d).

In his cross-motion for summary judgment, Petitioner argues that the effective date of his exclusion should be changed from July 20, 2009, the twentieth day after the I.G.'s June 30, 2009 notice, to June 5, 2008, the date of Petitioner's conviction. Petitioner argues that the notice requirements of section 1128(c)(1) of the Act (42 U.S.C. § 1320a-7(c)(1)) and 42 C.F.R. § 1001.2002(b) were satisfied when Petitioner's guilty plea was accepted in open court. P. Brief at 3-5. Section 1128(c)(1) of the Act provides that exclusion under section 1128 of the Act shall be effective at "such time and upon such reasonable notice to the public and to the individual or entity excluded as may be specified in regulations . . . ." The Secretary has required by regulation that the I.G. send written notice of the exclusion to the affected individual or entity. 42 C.F.R. § 1001.2002(a). The Secretary's regulations further provide that the exclusion will be effective 20 days from the date of the notice. 42 C.F.R. § 1001.2002(b). Petitioner is correct that 42 C.F.R. § 1001.2002(b) does not specify the written notice referred to in 42 C.F.R. § 1001.2002(a). However, both the context and plain language of the regulation are consistent with my conclusion that the notice referred to in section 1001.2002(b) is the written notice required by section 1001.2002(a). The Secretary's regulations do not give me discretion to change the effective date of Petitioner's exclusion and I may not refuse to follow the Secretary's regulations. 42 C.F.R. § 1005.4(c)(1); *Thomas Edward Musial, R.Ph.*, DAB No. 1991 (2005).

**3. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is five years.**

Petitioner has not disputed that the minimum period of an exclusion pursuant to section 1128(a)(3) is five years as mandated by section 1128(c)(3)(B), if I determine Petitioner is subject to mandatory exclusion. Petitioner argued in his request for hearing that he practiced for 19 years as a pharmacist without even a minor incident or any professional

misconduct; he worked long hours; never violated the law; and paid his taxes. Petitioner does not advance this argument in his cross-motion for summary judgment. Because Congress has mandated a minimum period of exclusion of five years, I am unable to lower the period of exclusion based on any mitigating factors.

I have found there is a basis for Petitioner's exclusion pursuant to section 1128(a)(3) and the minimum period of exclusion is thus five years.

### **III. Conclusion**

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid and all federal health care programs for a period of five years, effective July 20, 2009, 20 days after the June 30, 2009, I.G. notice of exclusion. 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.

/s/

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Keith W. Sickendick  
Administrative Law Judge