

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Nicolai Y. Foong, M.D.,  
(OI No.: 9-09-40471-9),

Petitioner,

v.

The Inspector General.

Docket No. C-11-155

Decision No. CR2367

Date: April 29, 2011

**DECISION**

Petitioner, Nicolai Y. Foong, M.D., asks review of the Inspector General's (I.G.'s) determination to exclude him for five years from participation in the Medicare, Medicaid, and all federal health care programs under section 1128(a)(1) of the Social Security Act. For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner and that the statute mandates a minimum five-year exclusion.

**Discussion**

The sole issue before me is whether the I.G. has a basis for excluding Petitioner from program participation. Because an exclusion under section 1128(a)(1) must be for a minimum period of five years, the reasonableness of the length of the exclusion is not an issue. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

The parties agree that an in-person hearing is not required and that the matter may be resolved based on written submissions. I.G. Br. at 5; P. Br. at 3. The parties have submitted briefs. The I.G. submitted three exhibits (I.G. Exs. 1-3). In the absence of any objections, I admit into evidence I.G. Exs. 1-3.

***Petitioner must be excluded for five years because he was convicted of a criminal offense related to the delivery of an item or service under the Medicare or a state health program, within the meaning of section 1128(a)(1) of the Social Security Act.<sup>1</sup>***

On March 3, 2009, Petitioner, a physician practicing in California, and his professional corporation, Nicolai Y. Foong, M.D., Inc., were indicted on seven felony counts of grand theft, making false or fraudulent claims to the State Medicaid program (Medi-Cal), and receiving and selling misbranded medical devices. I.G. Ex. 3. On August 20, 2009, he pled guilty in California State Court to one misdemeanor count of receiving and delivering a misbranded device, a foreign-made intrauterine device. I.G. Ex. 1 at 3-6; *see* I.G. Ex. 3 at 4.

The court accepted the plea, sentenced him to two years probation, 150 hours of community service, and ordered him to pay restitution. I.G. Ex. 1 at 8; I.G. Ex. 2.

In a letter dated October 29, 2010, the I.G. advised Petitioner that, because he had been convicted of a criminal offense related to the delivery of an item or service under the Medicare or state health care program, the I.G. was excluding him from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. I.G. Ex. 1. The letter further stated that Section 1128(a)(1) of the Act authorizes such exclusion. I.G. Ex. 1.

Section 1128(a)(1) of the Act requires that the Secretary of Health and Human Services exclude an individual who has been convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.<sup>2</sup> 42 C.F.R. § 1001.101.

Petitioner concedes that he was convicted of a criminal offense but argues that he was not convicted of an offense for which an exclusion is required. The indictment charged that he “did unlawfully receive in commerce, deliver, or proffer for delivery to the Medi-Cal program drugs or devices, *to wit*[,] foreign made intrauterine devices with the intent to defraud or mislead the Medi-Cal program.” I.G. Ex. 3 at 4. Petitioner concedes that he pled guilty to a misdemeanor version of that charge, but, in pleading guilty, he explicitly omitted the words: “with the intent to defraud or mislead the Medi-Cal program.” I.G.

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<sup>1</sup> I make this one finding of fact/conclusion of law.

<sup>2</sup> The term “state health care program” includes a state’s Medicaid program. Act § 1128(h)(1); 42 U.S.C. § 1320a-7(h)(1).

Ex. 1 at 4. In his view, this means that his crime was not “related to” the delivery of a health care item or service under that state health care program.

In determining whether a conviction is program-related within the meaning of section 1128(a)(1), I may look beyond both the language of the statute under which the individual was convicted as well as beyond the precise wording of his plea. An offense is related to the delivery of an item or service under Medicare or a state health care program if there is “a nexus or common-sense connection” between the conduct giving rise to the offense and the delivery of the item or service. *Lyle Kai, R.Ph.*, DAB No. 1979 (2005); *Berton Siegel, D.O.*, DAB No. 1467 (1994). It is well-settled that the I.G. may rely on extrinsic evidence to explain the circumstances underlying a conviction. The regulations specifically provide that evidence of “crimes, wrongs, or acts other than those at issue in the instant case is admissible in order to show motive, opportunity, intent, knowledge, preparation, identity, lack of mistake, or existence of a scheme.” 42 C.F.R. §1005.17(g) see *Narendra M. Patel*, DAB No. 1736 (2000); *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *Bruce Lindberg, D.C.*, DAB No. 1280 (1991).

Here, however, I need not even look at extrinsic evidence to find the necessary connection between his crimes and the Medi-Cal program. The criminal court judge specifically asked Petitioner if he “did unlawfully receive in commerce and deliver or proffer for delivery *to the Medi-cal program*, drugs or devices, to wit, foreign made intrauterine devices,” and he answered “guilty.” I.G. Ex. 1 at 7 (emphasis added). Petitioner was therefore convicted of a crime related to the delivery of an item under the Medi-Cal program and is subject to a minimum five-year exclusion. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

## **Conclusion**

The I.G. properly excluded Petitioner from participation in Medicare, Medicaid, and all federal health care programs, and I sustain the five-year exclusion.

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/s/  
Carolyn Cozad Hughes  
Administrative Law Judge