Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Summit S. Shah, M.D.
(O.I. File No. 5-13-40300-9),

Petitioner,

v.

The Inspector General,
U.S. Department of Health and Human Services.

Docket No. C-17-368

Decision No. CR4927

Date: August 18, 2017

DECISION

Petitioner, Summit Shah, 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 January 20, 2017. 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 December 30, 2016, that he was 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 Court of Common Pleas, Franklin County, Ohio, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. I.G. Exhibit (Ex.) 1.

Petitioner timely requested a hearing (RFH) on February 15, 2017. The case was assigned to me for hearing and decision. A prehearing telephone conference was convened on March 8, 2017. The substance of the conference is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence dated March 9, 2017 (Prehearing Order). During the prehearing conference, the 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 brief (I.G. Br.) on April 24, 2017, with I.G. Exs. 1 through 16. Petitioner filed his response and supporting brief (P. Br.) on June 7, 2017, with no exhibits. The I.G. filed a reply brief on June 22, 2017 (I.G. Reply).

Petitioner objects to my consideration of I.G. Ex. 14 on grounds that I.G. Ex. 14 is irrelevant and, even if minimally relevant, the document is factually inaccurate and misleading and more prejudicial than probative. The I.G. argues that I.G. Ex. 14 is relevant because it tends to show a nexus between the offenses of which Petitioner was convicted and the Ohio Medicaid program. The I.G. also argues that the document is factually accurate and not prejudicial, and it is offered for a limited purpose of establishing the nexus between Petitioner's offenses and Medicaid. I.G. Reply at 10. Petitioner's objection is overruled. I.G. Ex. 14 is a document titled, "State Medicaid Fraud Control Unit HHS-OIG Consolidated Reporting Worksheet: Individual Subject." The document is relevant to the extent it reflects that restitution paid by Petitioner as part of the sentence for his conviction was directed to the Ohio Department of Medicaid. Petitioner did not object on grounds that he is entitled to confront and cross-examine the author of I.G. Ex. 14, and he has waived that objection. The document is admitted for the limited purpose of showing that there is a nexus between Petitioner's conviction and the Ohio Medicaid program, the purpose for which the I.G. offered the document. It is noted that the document includes hearsay, and it is weighed accordingly. Out of an abundance of caution, I give no weight to the specific information that Petitioner identifies as being inaccurate. Petitioner does not object to I.G. Exs. 1 through 13, 15, and 16. Accordingly, I.G. Exs. 1 through 16 are admitted as evidence.

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).[2]

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).

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[2] References are to the 2016 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

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.

There is no dispute that 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 and 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). In this case, Petitioner has waived an oral hearing and the I.G. agreed that this matter may be decided on the documentary evidence and the parties' pleadings.

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

Petitioner does not dispute that he was convicted of a criminal offense. Petitioner argues, however, that the offense of which he was convicted does not trigger section 1128(a)(1) of the Act. P. Br., RFH. The issue to be resolved is whether the preponderance of the evidence shows Petitioner's offenses were related to the delivery of an item or service under Medicare or a state health care program triggering mandatory exclusion pursuant to section 1128(a)(1) of the Act.

a. Facts

On August 25, 2016, in the Court of Common Pleas, Franklin County, Ohio, Case No. 16 CR 4628, Petitioner pleaded guilty to two felony counts of selling, purchasing, distributing, or delivering dangerous or investigational drugs in violation of Ohio Revised Code § 4729.51. I.G. Exs. 5, 7. In the same court, in Case No. 16 CR 4629, Petitioner pleaded guilty to two felony counts of violation of Ohio Revised Code § 4729.51(C)(1). I.G. Exs. 6, 7.

During a joint proceeding in Cases 16 CR 4628 and 16 CR 4629 on August 25, 2016, the prosecutor represented to the court that Petitioner was a licensed physician operating a practice that specialized in allergies. On about June 1, 2011, Petitioner was required by the Ohio Board of Pharmacy to be licensed to dispense dangerous drugs, which were not controlled substances. Between about June 1, 2011 and October 4, 2014, Petitioner and his employee dispensed dangerous drugs without the required state license. The prosecutor stated that Petitioner's offenses were not related to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct but, were solely relate to Petitioner's failure to obtain the proper license. I.G. Ex. 7 at 4-5, 15. Petitioner's guilty pleas to the four counts were accepted by the court. I.G. Ex. 7 at 16. The court imposed as sentence one month of community control (probation) and ordered restitution of $176,826.71 payable to the Ohio Attorney General's Office in case 16 CR 4629. I.G. Ex. 7 at 18, I.G. Ex. 11, I.G. Ex. 13. The court imposed one month community control and restitution of $33,205.65 payable to the Ohio Attorney General's Office in 16 CR 4628. I.G. Ex. 7 at 18-19; I.G. Ex. 10; I.G. Ex. 12. The restitution of $176,826.71 paid by Petitioner in case 16 CR 4629, was delivered to the Ohio Department of Medicaid. I.G. Exs. 15-16.

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)):
>
> (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.

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. Br. at 3, n10. Petitioner concedes that he pleaded guilty to four felony counts of violation of Ohio Revised Code § 4729.51. P. Br. 4. Petitioner's guilty pleas were accepted. I.G. Exs. 7,

10, 11, 12, 13. Therefore, I conclude that Petitioner was convicted of criminal offenses within the meaning of section 1128(i) of the Act.

Congress 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 does not dispute that the offenses of which he was convicted related to the delivery of an item or service. Petitioner does dispute that the delivery of the item or service was under either Medicare or the Ohio Medicaid program. Petitioner argues that the I.G. has failed to show by a preponderance of the evidence that there was a nexus between the offenses of which he was convicted and the Ohio Medicaid program. RFH; P. Br. at 3-12.

Appellate panels of the Departmental Appeals Board (the Board) have long held that the statutory terms describing an offense do not control whether that offense is "related to" the delivery of a health care item or service under Medicare or a state health care program for purposes of exclusion pursuant to section 1128(a) of the Act. *E.g.*, *Dewayne Franzen*, DAB No. 1165 (1990) (inquiry is whether conviction is related to Medicaid fraud, not whether the petitioner was convicted of Medicaid fraud). Rather, an ALJ must examine whether there is a "common sense connection or nexus between the offense and the delivery of an item or service under the program." *Scott D. Augustine*, DAB No. 2043 at 5-6 (2006) (citations omitted). To determine whether there is such a nexus or common-sense connection, "evidence as to the nature of an offense may be considered," including "facts upon which the conviction was predicated." *Id.* at 6-7. An ALJ may also use extrinsic evidence to "[fill] in the circumstances surrounding the events which formed the basis for the offense of which Petitioner was convicted." *Narendra M. Patel, M.D.*, DAB No. 1736 at 7 (2000). 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).

Petitioner argues that the I.G. failed to establish by a preponderance of the evidence that Petitioner's conviction was "related to the delivery of an item or services under a Federal health care program" or a "state health care program." P. Br. at 2-3. I disagree. The informations charging Petitioner with the offenses to which he pleaded guilty indicate that he sold at retail dangerous drugs, specifically various allergy injections including antigen extract and serum used in allergy immunotherapy without legal authority to do so. I.G. Exs. 3, 4. Petitioner is correct that neither of the informations stated that the sale was connected to Medicare or Medicaid. The I.G. also presented as evidence an indictment showing that Petitioner was also charged with Medicaid fraud in another case but no facts are alleged that connects that charge with the charges to which Petitioner

pleaded guilty. IG. Ex. 2 at 1-2. Furthermore, the indictment was ultimately dismissed with no prosecution of Petitioner on the alleged charges. I.G. Exs. 8, 9. The only evidence the I.G. has presented to establish the required connection or nexus between the offenses of which Petitioner was convicted and the Ohio Medicaid program is evidence that part of Petitioner's court-ordered restitution was paid to the Ohio Medicaid program by the Ohio Attorney General. I.G. Exs. 15-16. Petitioner urges me to find that the I.G.'s evidence is insufficient. But, Petitioner does not explain why or cite authority for the proposition that the I.G. cannot prove the required nexus by showing that court-ordered restitution was paid to a state Medicaid program even if the court order does not specifically refer to the state Medicaid program. The I.G. must show by a preponderance of the evidence, that it is more likely than not, that the offenses of which Petitioner was convicted were related to Ohio Medicaid. The Supreme Court has described the preponderance of the evidence standard as requiring that the trier-of-fact believe that the existence of a fact is more probable than not before finding in favor of the party that had the burden to persuade the judge of the fact's existence. *In re Winship*, 397 U.S. 358, 371-72 (1970); *Concrete Pipe and Products of California, Inc. v. Construction Laborers*, 508 U.S. 602, 622 (1993). The fact that the Ohio Attorney General delivered part of Petitioner's court-ordered restitution to Ohio Medicaid, rather than to another state account, is sufficient evidence to show it was more likely than not that the offenses of which Petitioner was convicted were related to the sale of allergy injections under Ohio Medicaid. Furthermore, under Ohio law "making restitution to the victim of the offense, the public, or both" is one of the purposes of sentencing. Ohio Revised Code §§ 2929.11(A), 2929.18(A)(1), 2929.21(A), 2929.28(A)(1) . Petitioner does not deny that the Ohio Attorney General delivered a part of the restitution paid by Petitioner to Ohio Medicaid or offer any evidence that there was some other reason for that action.

Accordingly, I conclude that the offenses of which Petitioner was convicted were related to the delivery of an item or service under the Ohio Medicaid program.

The elements necessary to trigger mandatory exclusion pursuant to section 1128(a)(1) of the Act are satisfied in this case. The evidence shows Petitioner was convicted of felony criminal offenses and the conduct that formed the basis of his convictions was related to the delivery of a health care item or service under the Ohio Medicaid program. 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.

4. Five years is the minimum authorized period of exclusion pursuant to section 1128(a) 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 written 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 January 20, 2017.

/s/
Keith W. Sickendick
Administrative Law Judge