

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)
In the Case of:)
) Date: January 16, 2008
John Shell,)
)
Petitioner,) Docket No. C-07-619
) Decision No. CR1725
-v.-)
)
The Inspector General.)
_____)

DECISION

Petitioner, John Shell, 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 June 20, 2007, based upon his conviction after 1996, of a criminal offense of fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service in a health care program operated by, or financed, in whole or in part, by any federal, state, or local government agency; and his conviction for a criminal offense after 1996 consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. There is a proper basis for exclusion. Petitioner's exclusion for the minimum period¹ of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

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.

I. Background

The Inspector General for the Department of Health and Human Services (the I.G.) notified Petitioner by letter dated May 31, 2007, 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) and (4) of the Act. The basis cited for Petitioner's exclusion was his conviction in the Court of Common Pleas, Hamilton County, Ohio, of a criminal offense of fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service in a health care program operated by, or financed, in whole or in part, by any federal, state, or local government agency; and his conviction for a criminal offense after 1996 consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. *See* Act, section 1128(a)(3) and (4); 42 U.S.C. § 1320a-7(a)(3) and (4); and 42 C.F.R. § 1001.101(c) and (d).

Petitioner timely requested a hearing by letter dated July 22, 2007. The case was assigned to me for hearing and decision on August 15, 2007. On September 14, 2007, I convened a prehearing telephonic conference, the substance of which is memorialized in my Order dated September 17, 2007.

The I.G. filed a motion for summary judgment and supporting brief on October 15, 2007 (I.G. Brief), with I.G. Exhibits (I.G. Exs.) 1 through 8. Petitioner filed an opposition to the motion for summary judgment on November 12, 2007, with no exhibits attached (P. Brief). The I.G. filed a reply brief on December 11, 2007 (I.G. Reply). Petitioner objects to the admission as evidence and my consideration of I.G. Ex. 4 on grounds that it refers to much misconduct not relevant to the issue before me and includes findings based upon a lesser quantum of evidence than required by a court to establish guilt. P. Brief at 1-2. Petitioner's objection is overruled, except that I will limit my consideration of I.G. Ex. 4 to the fact that it shows Petitioner's license to work as a pharmacist or dispense dangerous drugs was suspended by the Ohio State Board of Pharmacy on April 7, 2006. I.G. exhibits 1 through 3 and 5 through 8 are also 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. On March 17, 2005, Petitioner was charged with stealing hydrocodone, a dangerous drug, from Sam's Pharmacy on January 24, 2005, and with making, uttering, selling, or knowingly possessing a false or forged prescription for hydrocodone, a dangerous drug, on October 9, 2004. I.G. Ex. 3.
2. Pursuant to a plea bargain, Petitioner entered a no contest plea, withdrawing a prior plea of not guilty to the count of drug theft and the count of illegal possession of false or fraudulent drug documents. I.G. Ex. 5.
3. Petitioner's plea bargain was accepted by the state criminal court judge and Petitioner was placed on probation for three years. P. Brief at 2; I.G. Ex. 7.
4. On September 25, 2006, Petitioner was released from probation, the indictment was dismissed, and community control was terminated. I.G. Ex. 8.
5. The I.G. notified Petitioner by letter dated May 31, 2007, 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) and (4) of the Act.
6. Petitioner timely requested a hearing by letter dated July 22, 2007.

B. Conclusions of Law

1. Petitioner's request for hearing was timely and I have jurisdiction.
2. Summary judgment is appropriate.
3. Petitioner received a deferred adjudication, which is a conviction within the meaning of section 1128(i) of the Act.
4. Petitioner was convicted within the meaning of section 1128(a)(3) of the Act, of a felony criminal offense related to health care fraud that occurred after August 21, 1996, the date of enactment of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).
5. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(3) of the Act.
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).

In this case, there is no issue as to the reasonableness of the proposed period of exclusion as it is the minimum period of five years mandated by the Act. 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).

D. Applicable Law

Petitioner's right to a hearing by an 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 Medicare and Medicaid programs any individual convicted of a felony criminal offense related to health care fraud that occurred after August 21, 1996, the date of enactment of HIPAA.

Pursuant to section 1128(a)(4) of the Act, the Secretary must exclude from participation in Medicare and Medicaid programs any individual convicted of a felony relating to a controlled substance that occurred after August 21, 1996, the date of enactment of HIPAA.

Pursuant to section 1128(i) of the Act, an individual is "convicted" of a criminal offense when 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; or when there has been a finding of guilt in a federal, state, or local court; or when a plea of guilty or no contest has been accepted in a federal, state, or local court; or when an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld.

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 certain 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).

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, CMHC*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case. The sole issue in dispute before me is a question of law, *i.e.*, whether Petitioner was convicted within the meaning of the Act. P. Brief at 2-3. Accordingly, summary judgment is appropriate.

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

Petitioner does not dispute that on March 17, 2005, a two count indictment was filed against him in the Court of Common Pleas of Hamilton County, Ohio. Petitioner was charged with stealing hydrocodone, a dangerous drug, from Sam's Pharmacy on January 24, 2005, and with making, uttering, selling, or knowingly possessing a false or forged

prescription for hydrocodone, a dangerous drug, on October 9, 2004. I.G. Ex. 3. The I.G. has presented evidence that Petitioner entered a no contest plea, withdrawing a prior plea of not guilty to the count of drug theft and the count of illegal possession of false or fraudulent drug documents. I.G. Ex. 5. Petitioner admits that a plea bargain was worked out in his case under which the judge did not transfer his case to the drug court and he was placed on a probation for three years. Petitioner asserts that the judge warned him that if he violated probation he would be brought back to court, tried, and sentenced. Petitioner also asserts that he was never asked to enter a plea and the judge never stated that his plea was accepted. P. Brief at 2. Petitioner does not dispute that the judge executed a document titled “Entry Finding Defendant Eligible for Treatment In Lieu of Conviction, Staying Proceedings, and Ordering Period of Rehabilitation,” which document shows that the judge found him eligible for treatment in lieu of conviction; that Petitioner entered a plea of no contest; that ordered a stay of all pending criminal proceedings pending treatment; that placed Petitioner on probation for three years; and that established the terms of Petitioner’s probation. I.G. Ex. 7. On September 25, 2006, the criminal court judge released Petitioner from probation, ordered that the indictment be dismissed and that community control was terminated. I.G. Ex. 8.

Petitioner’s argument is that the documents submitted by the I.G. do not show that he was given intervention in lieu of conviction under Ohio law; that he never entered a plea, and that the facts show a deferred prosecution rather than a conviction within the meaning of the Act. Petitioner cites the decision of the Ninth Circuit Court of Appeals in *Travers v. Shalala*, 20 F.3d 993, 996-99 (9th Cir. 1994) in support of his position. However, the decision in *Travers* is actually contrary to Petitioner’s position. The court in *Travers* recognized the important points that it is the Social Security Act, not the state law, that provides the definition for the term “conviction,” and that it is necessary to look at the substance of the proceedings in the criminal court rather than rely upon labels or characterizations used by the state or the parties in those proceedings. The court in *Travers* also defined a “deferred prosecution” as an agreement between the prosecutor and the defendant pursuant to which the prosecutor delays prosecuting the charges. The court recognized that a “deferred adjudication” does not involve a deferral of prosecution by the prosecutor. 20 F.3d at 996-97.

I have considered the substance of the proceeding in this case and conclude that it was a deferred adjudication rather than a deferred prosecution as argued by Petitioner. The documents presented reflect that the judge accepted a plea of no contest and imposed probation without entering a finding of guilt. My conclusion is consistent with Petitioner’s representation that a plea bargain was worked out in chambers with the judge. The prosecutor did not defer prosecution in this case. Rather, the case was before the judge, a plea bargain was agreed to by the parties before the judge, and the judge accepted that bargain and the resulting no contest plea. The deal involved the prosecutor,

defendant and the judge, not just the prosecutor and defendant. Even accepting Petitioner's statement as true that the judge never discussed the plea in open court, that omission by the judge is not controlling, rather the substance of what occurred controls. I conclude that Petitioner received a deferred adjudication which is a conviction within the meaning of the Act.

The I.G. also notified Petitioner that he was being excluded based upon section 1128(a)(4) of the Act. Because I have found that there is a basis for exclusion pursuant to section 1128(a)(3) which requires Petitioner's exclusion, it is not necessary for me to examine whether section 1128(a)(4) provides another basis for exclusion.

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. 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 June 20, 2007, 20 days after the May 31, 2007, I.G. notice of exclusion.

/s/
Keith W. Sickendick
Administrative Law Judge