Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Michael K. Nunn, D.O.,
(O.I. File Number 4-04-40312-9)

Petitioner,

v.

The Inspector General.

Docket No. C-12-319

Decision No. CR2552

Date: June 15, 2012

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Disposition affirming the I.G.'s determination to exclude Petitioner *pro se* Michael K. Nunn, D.O., from participation in Medicare, Medicaid, and all other federal health care programs for a period of 12 years. The I.G.'s Motion and determination are based on section 1128(b)(15) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(b)(15).

The undisputed facts of this case demonstrate that the I.G. is authorized to impose the 12-year exclusion against Petitioner, and that the length of that period of exclusion is not unreasonable. Accordingly, I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

Petitioner Nunn is an osteopathic physician licensed to practice in North Carolina. He organized his practice as a professional corporation, Michael K. Nunn, P.C. (MKNPC) in 1995 and thereafter conducted business in the name Community Wellness Center (CWC)

in three North Carolina communities.[1] At the time of the events described below, CWC was enrolled as a provider in the Medicare and North Carolina Medicaid programs, as well as the Veterans Administration Fee-Basis Program.

As early as January 2001, potential irregularities in CWC's Medicare and Medicaid billing practices had come to the attention of the fiscal intermediaries assigned to service CWC's claims. In 2004 the current fiscal intermediary referred allegations of fraudulent practices by CWC to federal law enforcement officials, who conducted an investigation that included the execution of a search warrant and the seizure of records from CWC's facility in New Bern, North Carolina.

That investigation resulted in CWC's conviction of two federal crimes. On April 25, 2011, in the United States District Court for the Eastern District of North Carolina, CWC pleaded guilty to, was found guilty of, and was sentenced on one count of Health Care Fraud, in violation of 18 U.S.C. § 1347, and one count of Money Laundering, in violation of 18 U.S.C. § 1957(a) and (b). The crimes CWC admitted took place over a 20-month period between May 2003 and December 2004. The guilty pleas and convictions were the result of a negotiated agreement signed on behalf of CWC by Petitioner Nunn, who by the terms of that agreement assumed joint liability with CWC for $297,215.00 in restitution to the government agencies that had been defrauded.

On December 30, 2011, the I.G. took steps to exclude both CWC and Petitioner Nunn individually from participation in the Medicare and Medicaid programs. The I.G. sent a notice-of-exclusion letter to CWC on that date, relying on the terms of section 1128(a)(1) and (a)(3) of the Act, 42 U.S.C. § 1320a-7(a)(1) and (a)(3), to exclude CWC for 12 years. The I.G. also sent a notice-of-exclusion letter to Petitioner Nunn on December 30, 2011. In that letter, the I.G. relied on the terms of section 1128(b)(15) of the Act, 42 U.S.C. § 1320a-7(b)(15), and set the period of Petitioner Nunn's exclusion at 12 years.

Acting *pro se*, Petitioner Nunn sought review of the I.G.'s determination as to himself in a request for hearing received by the Civil Remedies Division on January 30, 2012. Petitioner's request for hearing admits that the business entity CWC was convicted, but points out that he had "not received any charges or convictions concerning healthcare fraud or money laundering."

No hearing request has been filed by CWC, and by operation of law the I.G.'s determination to exclude the business entity for 12 years became final on or about January 19, 2012.

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[1] At every relevant point in the record before me, the business names MKNPC and CWC appear either jointly or interchangeably. For purposes of clarity, however, I use only the name CWC hereafter in this discussion.

I convened a prehearing conference by telephone on February 13, 2012, pursuant to 42 C.F.R. § 1005.6, in order to discuss procedures for addressing the issues presented by this case. By Order of that date I established a schedule for the submission of documents and briefs.

The evidentiary record on which I decide the issues before me contains 34 exhibits. The I.G. proffered 15 exhibits marked I.G. Exhibits 1-15 (I.G. Exs. 1-15). Petitioner proffered 20 exhibits, marked Petitioners' Exhibits 1-20 (P. Exs. 1-20). In the absence of objection, I have admitted all proffered exhibits as designated by the offering party, except one. P. Ex. 18 as proffered is a copy of the I.G.'s Motion for Summary Disposition and supporting Brief-in-Chief; those pleadings are part of the record in this case but are not evidence, and thus are not to be treated as an exhibit.

The record in this case closed for purposes of 42 C.F.R. § 1005.20(c) on May 21, 2012, by the terms of numbered paragraph 8 of the Order of February 13, 2012.

II. Issues

The legal issues before me are limited to those set out at 42 C.F.R. § 1001.2007(a)(1). In the context of this record, they are:

> a. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(b)(15) of the Act; and
>
> b. Whether the 12-year length of the proposed period of exclusion is unreasonable.

I decide these issues in favor of the I.G.'s position. Sections 1128(a)(1) and (a)(3) of the Act mandated the exclusion of CWC. That exclusion and its 12-year period have become final by operation of law. Because of his relationship with CWC, Petitioner Nunn is subject to the same 12-year period of exclusion by operation of the terms of section 1128(b)(15) of the Act and 42 C.F.R. § 1001.1051(c)(1). The length of this proposed period of exclusion is reasonable as a matter of law.

III. Controlling Statutes and Regulations

Section 1128(b)(15)(A) of the Act, 42 U.S.C. § 1320a-7(b)(15)(A), authorizes the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of "Any individual — (i) who has a direct or indirect ownership or control interest in a sanctioned entity and who knows or should know . . . of the action constituting the basis for the conviction or exclusion described in subparagraph B; or (ii)

who is an officer or managing employee . . . of such an entity." The regulatory language of 42 C.F.R. § 1001.1051(a) affirms the statutory provision.

The statute's term "should know" is defined at section 1128A(i)(7) as meaning that "a person, with respect to information — (A) acts in deliberate ignorance of the truth or falsity of the information; or (B) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required."

Section 1126(b) of the Act defines "managing employee" to include "an individual, including a general manager, business manager, administrator, and director, who exercises operational or managerial control over the entity, or who directly or indirectly conducts the day-to-day operations of the entity."

The definition of "sanctioned entity" appears at section 1128(b)(15)(B) of the Act, and that definition includes any entity convicted of any offense listed in section 1128(a) of the Act, or excluded from participation in a health care program under Title XVIII of the Act (Medicare) or a state health care program.

Exclusions under section 1128(b) are permissive and discretionary with the I.G., and the I.G.'s decision to exercise that discretion is not subject to review. 42 C.F.R. § 1005.4(c)(5). Individuals excluded under section 1128(b)(15) generally must be excluded for the same period as the excluded entity. 42 C.F.R. § 1001.1051(c)(1).

IV. Findings and Conclusions

I find and conclude as follows:

1. CWC pleaded guilty to and was convicted of one count of Health Care Fraud, in violation of 18 U.S.C. § 1347, and one count of Money Laundering, in violation of 18 U.S.C. § 1957(a) and (b), in the United States District Court for the Eastern District of North Carolina on April 25, 2011. I.G. Exs. 6, 7, 8.

2. The I.G. relied on sections 1128(a)(1) and 1128(a)(3) of the Act to exclude CWC from participation in Medicare, Medicaid, and all other federal health care programs for a period of 12 years, effective on or about January 19, 2012. I.G. Ex. 2.

3. CWC is a "sanctioned entity" within the meaning of section 1128(b)(15)(A)(i) and (ii) of the Act, and 42 C.F.R. § 1001.1051(a). Act, section 1128(b)(15)(B).

4. Petitioner Michael K. Nunn, D.O., is the owner, incorporator, sole director, registered agent and authorized Medicare and Medicaid representative of CWC. I.G. Exs. 4, 5, 10, 11, 12, 15.

5. Petitioner knew or should have known of the criminal activities constituting the basis for the conviction and exclusion of CWC described above in Findings 1-3. I.G. Exs. 4, 7, 13, 14.

6. Because Petitioner is the owner, incorporator, sole director, registered agent and authorized Medicare and Medicaid representative of CWC, and because Petitioner knew or should have known of the criminal activities constituting the basis for the conviction and exclusion of CWC, a basis exists for the I.G.'s exercise of authority to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. Act, section 1128(b)(15).

7. The I.G.'s exclusion of Petitioner Nunn for a period of 12 years is not unreasonable. 42 C.F.R. § 1001.1051(c)(1).

8. There are no disputed issues of material fact and summary disposition is therefore appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

The exclusion of an individual based on section 1128(b)(15) of the Act, 42 U.S.C. § 1320a-7(b)(15), is a derivative action, and depends upon proof of two essential elements. It depends first on a showing that a business entity is a "sanctioned entity" that has been convicted of an offense described in sections 1128(a)(1)-1128(a)(4) or 1128(b)(1)-1128(b)(3) of the Act, or has been excluded from participation in a program under Title XVIII of the Act (Medicare) or a state health care program.

If that first showing is made, then the individual is subject to exclusion on the further showing that he or she bears a relationship of responsibility, defined in detail at sections 1126(b) and 1128(b)(15)(A) of the Act, to that sanctioned business entity. When that relationship is one of "direct . . . ownership or control" specified at 1128(b)(15)(A)(i), then the I.G. must show that the individual "knows or should know . . . of the action" for which the business entity has been sanctioned. Specific intent is explicitly not required in meeting that standard: section 1128A(i)(7) provides that the knowledge standard is met when the individual acts "in deliberate ignorance" or in "reckless disregard" of information relating to the action.

In this case, the I.G. has made the first showing. CWC has been convicted of the offenses described in sections 1128(a)(1) and 1128(a)(3) and has been excluded from all federal health care programs for 12 years. I.G. Exs. 2, 4, 6, 7, and 8. That exclusion and the underlying conviction are final, and are not subject to challenge or revision in these proceedings. Petitioner's Answer Brief concedes the finality of both. P. Ans. Br. at 6, 7. The first essential element is established in this record.

The I.G. has made both parts of the second showing as well. Petitioner acknowledged ownership of CWC to the North Carolina Medical Board. I.G. Ex. 4, at 1. His role as incorporator, sole director, and registered agent of CWC is affirmed in other official filings in North Carolina state offices. I.G. Exs. 4, 5, 15. He appears as the official authorized to submit the applications by which CWC became eligible to provide services though the Medicare and Medicaid programs. I.G. Exs. 10, 11, 12. Thus, the evidence shows that Petitioner's organizational relationships to CWC are among those defined at section 1128(b)(15)(A).

Petitioner does not deny that he was the owner, incorporator, director, registered agent, and authorized Medicare signatory for CWC. What he does deny is having any personal knowledge that CWC had bilked the protected programs for $297,215.00 between May 2003 and December 2004, an average of over $14,000.00 per month. He denies any responsibility for the conduct of CWC's business affairs, and most particularly denies any role whatsoever in its coding and billing practices.

While such an argument may test credulity, it is not necessary that I assay it here. It is true, as the I.G. points out, that virtually all of Petitioner's defense to the exclusion rests on his claims that disgruntled, incompetent, dishonest, or vindictive employees of CWC were simultaneously responsible for the fraudulent billings and for keeping him from finding out about the scheme. Were it necessary to sift out the truth in any of Petitioner's accusations and explanations, that very exercise of weighing evidence and assessing credibility would place this decision beyond the reach of the summary disposition mechanism. However, such an exercise is unnecessary here.

Instead, there are three salient matters of undisputed material fact proving that Petitioner knew or should have known of the criminal activity at CWC.

First, Petitioner acknowledged to the North Carolina Medical Board that he was under a professional obligation to see that coding and billing operations at CWC were truthful and accurate, and that he failed to fulfill his responsibility to ensure that CWC billed correctly. I.G. Ex. 4, at 2. Put in slightly different terms, Petitioner admitted to the Medical Board that he *should have known* that fraudulent billing was rampant at CWC and did nothing to stop it.

Next, in executing the plea agreement, Petitioner implicitly admitted receiving the proceeds of the scheme by "agreeing that Dr. Michael Nunn will be jointly and severally responsible with the corporate defendant for the payment of restitution." I.G. Ex. 7, at 2. This implicit admission is reinforced by the interesting language of Count II of the Information — the money-laundering count — describing how $38,000.00 of the scheme's proceeds were transferred from the CWC account "into a personal bank account." I.G. Ex. 6, at 10. Nothing in this record suggests that anyone other than Petitioner was authorized to make that transfer. But whether Petitioner got the

$38,000.00 in proceeds or not, his participation in the plea negotiations and the plea itself are clear evidence of his familiarity with and authority over CWC's financial affairs,[2] and that in holding such a position he *knew or should have known* of the fraudulent coding and billing, and of the laundering of CWC's criminally-derived cash.

And finally, there is no doubt that after January 2002, Petitioner could have been unaware of the scheme *only through "deliberate ignorance" or "reckless disregard"* of the warnings conveyed to him after the consultation performed by Ms. Loebl. I.G. Exs. 13, at 2, and 14, at 4-8.

Because the I.G. has established a basis for the exclusion of Petitioner pursuant to section 1128(b)(15) of the Act, his exclusion for 12 years is authorized by 42 C.F.R. § 1001.1051(c)(1). That period is reasonable as a matter of law, based as it is on the 12-year exclusion imposed on CWC. Petitioner's request that I limit the effect of the exclusion is explicitly beyond my authority. 42 C.F.R. § 1005.4(c)(5).

VI. Conclusion

For the reasons set forth above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Michael K. Nunn, D.O., from participation in Medicare, Medicaid, and all other federal health care programs for a period of 12 years pursuant to the terms of section 1128(b)(15) of the Act, 42 U.S.C. § 1320a-7(b)(15), is sustained.

/s/
Richard J. Smith
Administrative Law Judge

[2] He was certainly in a position of authority sufficient to execute employment contracts on behalf of CWC (P. Ex. 16) at least in 1998, and to complain to his congressman about CWC's financial relationship with the Veterans Administration (P. Ex. 19) at least in 2002.