Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Syed Rahman,
(OI File No.: H-14-42256-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-797

Decision No. CR3955

Date: June 11, 2015

DECISION

Petitioner, Syed Rahman, appeals the determination of the Inspector General for the U.S. Department of Health and Human Services (I.G.) to exclude him from participating 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)) for the minimum mandatory period of five years. I find the I.G. is authorized to exclude Petitioner, and the statute mandates the minimum five-year exclusion, which is effective 20 days from the October 31, 2014 notice letter. *See* 42 C.F.R. § 1001.2002(b).

I. Background

The I.G. notified Petitioner, by letter dated October 31, 2014, that he was being excluded pursuant to section 1128(a)(1) of the Act from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of five years. The I.G. advised Petitioner that the exclusion was based on his conviction in the Rockland County Supreme Court of the State of New York, of a criminal offense related to the delivery of an item or service under the Medicare or State health care program. I.G. Ex. 1.

Petitioner timely filed his request for hearing. I convened a prehearing telephone conference with the parties, the results of which I summarized in my *Order and Schedule for Filing Briefs and Documentary Evidence* dated January 28, 2015.

Pursuant to that order, I asked the parties to answer the questions on the prepared short-form briefs sent to them, together with any additional arguments and supporting documents that the parties would mark as exhibits. The I.G. filed a brief together with exhibits (I.G. Exs.) 1 through 9. Petitioner submitted his brief (P. Br.) together with six exhibits, P. Exs. 1-6. The I.G. then submitted a reply brief (I.G. Reply). Absent any objection, I admit all exhibits to the record.

Petitioner indicated that he wanted to present testimony of several witnesses. P. Br. at 10, 11. The I.G. objected to an in-person hearing because the testimony Petitioner proposes is not relevant to the I.G.'s basis for exclusion, which is the sole issue before me. I.G. Reply at 2-4. The I.G. specifically objected to Petitioner's proposed witnesses and their expected testimony because Petitioner proposed them for the purpose of challenging and attempting to re-litigate Petitioner's underlying criminal conviction. I find that there are no material facts in dispute, and the testimony that Petitioner wishes to present is not relevant to these proceedings because they amount to a collateral attack of the underlying offense to which Petitioner already voluntarily pled guilty. *See* 42 C.F.R. § 1001.2007(d). Therefore, the record is now closed, and I decide this case based on the written record.

II. Discussion

A. Issue

The scope of my review here is limited. 42 C.F.R. § 1001.2007(a)(1) and (2). The only issue before me is whether the I.G. has a legal basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Act.[1] If I find that the I.G. was authorized to exclude Petitioner, then I must uphold the I.G.'s exclusion because it is for the minimum mandatory period of five years pursuant to the statute. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

[1] Petitioner mistakenly quoted language from section 1128A(a)(1) of the Act, not section 1128(a)(1), and argued that the language of this provision is inapplicable to him and not a basis for exclusion. Section 1128A(a)(1) is the section of the Act allowing the Secretary to impose civil money penalties against a person who presents a false or fraudulent claim. Here, the I.G. actually excluded Petitioner pursuant to section 1128(a)(1), which mandates that the Secretary exclude from participation anyone convicted of a program-related criminal offense.

Section 1128 of the Act 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 or under any State health care program.

B. Findings of Fact and Conclusions of Law

1. Petitioner pled guilty to one count of grand larceny in the fourth degree in violation of N.Y. Penal Law § 155.30(1).

Since September 1978, Petitioner held a license to practice pharmacy in New York. I.G. Ex. 2. At all relevant times, Petitioner was the vice president and supervising pharmacist of Prescription Plus Corporation. I.G. Ex. 3 at 13, 16-17; I.G. Ex. 4 at 11; I.G. Ex. 5. His co-defendant in the underlying criminal conviction was also a licensed pharmacist authorized to practice in New York. I.G. Exs. 5, 6. The co-defendant served as a managerial agent of Kwik Aid Pharmacy, Inc., and Petitioner previously had employed her at another pharmacy. I.G. Ex. 3 at 14. On or about March 30, 2008, the co-defendant informed Petitioner that she was unable to service Medicaid beneficiaries through Kwik Aid Pharmacy because both she and Kwik Aid had been excluded from the New York State Medicaid program. I.G. Ex. 3 at 14-15; I.G. Ex. 5 at 66-7. Petitioner conspired with the co-defendant to evade these exclusions by agreeing that the co-defendant would continue servicing her Medicaid clients at Kwik Aid and have Petitioner submit Kwik Aid's claims to Medicaid through Prescription Plus. I.G. Ex. 3 at 15-20; I.G. Ex. 4 at 11-13; I.G. Ex. 5. The co-defendant provided Petitioner with Medicaid recipient information, which Petitioner and Prescription Plus used to file false claims with Medicaid. I.G. Ex. 5 at 67. Petitioner then remitted payments received on these Medicaid claims to the co-defendant and Kwik Aid. I.G. Ex. 3 at 18; I.G. Ex. 5 at 67-73. This continued from on or about March 30, 2008 to on or about December 1, 2009. I.G. Ex. 3 at 15; I.G. Ex. 5.

On March 20, 2013, a 40-count indictment was filed in the Rockland County Supreme Court charging Petitioner with various health care fraud-related offenses, including grand larceny in the second degree, a Class C felony. I.G. Ex. 5 at 4-5; I.G. Ex. 7. On November 22, 2013, Petitioner appeared in court and pled guilty to an amended Count 1 of the indictment: grand larceny in the fourth degree. I.G. Ex. 3; I.G. Ex. 4 at 7-17; I.G. Ex. 8. The court accepted Petitioner's plea, and on March 28, 2014, sentenced Petitioner to five years of probation and 210 hours of community service. I.G. Ex. 3 at 26; I.G. Ex.

4 at 27-28; I.G. Ex. 8. The court also ordered Petitioner to pay $679,386 in joint and several restitution to New York State Medicaid plus a 5% surcharge to the Westchester County Department of Probation through the Medicaid Fraud Control Unit Restitution Fund. I.G. Ex. 4 at 17-24, 33; I.G. Ex. 8; I.G. Ex. 9.

2. Petitioner was convicted of a criminal offense for purposes of section 1128(a)(1) of the Act.

The Secretary of Health and Human Services must exclude from participation in the Medicare and Medicaid programs any individual convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Act §1128(a)(1) (42 U.S.C. § 1320a-7(a)(1)). The Secretary delegated this authority to the I.G. 48 Fed. Reg. 21662 (May 13, 1983); *see also* 42 C.F.R. § 1001.101(a). An individual is considered convicted of a criminal offense when: (1) a judgment of conviction has been entered against him or her in a federal, state, or local court whether an appeal is pending or the record of the conviction is expunged; (2) there is a finding of guilt by a court; (3) a plea of guilty or no contest is accepted by a court; or (4) when the individual has entered into any arrangement or program where judgment of conviction is withheld. Act § 1128(i) (42 U.S.C § 1320a-7(i)).

Petitioner, with advice of his counsel, voluntarily agreed to plead guilty to one count of grand larceny in the fourth degree, a felony. Petitioner's plea was predicated upon his knowing submission of false claims, through Prescription Plus, to the New York State Medicaid program, for prescription drugs that had in actuality been furnished by his excluded co-defendant and Kwik Aid Pharmacy. The court accepted his plea and sentenced him to probation, community service, and payment of restitution, jointly and severally with the co-defendant, of $679,386 to the New York State Medicaid program. I.G. Ex. 3 at 26, I.G. Ex. 4 at 17-24, 27-28, 33; I.G. Exs. 8 and 9. Petitioner's entry of a guilty plea and the court's acceptance of that plea constitutes a "conviction" within the meaning of section 1128(i)(3) of the Act. 42 U.S.C. § 1320a-7(i)(3); *see also* 42 C.F.R. § 1001.2. I therefore find that Petitioner was convicted of a criminal offense within the meaning of the exclusion statute.

3. Petitioner's conviction requires exclusion under section 1128(a)(1) because his criminal conduct related to the delivery of an item or service under Medicaid.

Here, the underlying facts of the scheme establish that Petitioner's criminal offense related to the delivery of an item or service under a state health care program, in this case, the New York State Medicaid program. Petitioner pled guilty to grand larceny in the fourth degree based upon his submission, through Prescription Plus, of false claims to Medicaid for medications that his pharmacy had not furnished. He knowingly submitted

the claims for prescription drugs to Medicaid on behalf of his co-defendant and Kwik Aid.

A conviction of a criminal offense is related to the delivery of a health care item or service under Medicare or a state health care program if 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). It is well established that submitting false Medicaid claims is "related to" the delivery of an item or service of health care. *Juan de Leon, Jr.*, DAB No. 2533 (2013) (concluding that submission of "false and fraudulent Medicare and Medicaid claims" is related to the delivery of an item or service of health care); *Gregory J. Salko, M.D.*, DAB No. 2437 (2012) (characterizing the proposition that an offense does not have to result in the actual delivery of an item or service in order to be "related to" delivery as "repeatedly confirmed"); *Michael Travers, M.D.*, DAB No. 1237 (1991), *aff'd, Travers v. Sullivan*, 791 F. Supp. 1471, 1481 (E.D. Wash. 1992) and *Travers v. Shalala*, 20 F.3d 993 (9th Cir. 1994); *Jack W. Greene*, DAB No. 1078 (1989) *aff'd, Green v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990) (concluding a conviction for submitting a false bill is "directly related to the delivery of the item or service because the submission of a bill or claim for Medicaid reimbursement is the necessary step, following the delivery of the item or service, to bring the item within the purview of the program") (internal quotations omitted). Additionally, the fact that the court ordered Petitioner to pay restitution to the New York State Medicaid Program (I.G. Exs. 8, 9) is further evidence of a nexus to the Medicaid program. Therefore, the circumstances underlying Petitioner's conviction support the existence of a nexus between his conviction and the delivery of an item or service under Medicaid.

Although Petitioner now strenuously contends that he never submitted false claims, Count 1 of the indictment charged that Petitioner, along with his co-defendants, "knowingly submitted and caused to be submitted . . . false claims for the provision of prescription medications to Medicaid recipients." I.G. Ex. 5 at 4. The only difference between the original charge and Amended Count 1—the offense to which Petitioner pled guilty—was a reduction in the value of the property unlawfully obtained from more than $50,000 to more than $1,000. I.G. Ex. 3 at 5. Having already admitted that he presented false claims to the Medicaid program, Petitioner cannot now challenge that fact.

Petitioner voluntarily, in consultation with his attorney, agreed to plead guilty to the charges and understood that as a result he was subject to probation, community service, and the payment of considerable restitution. He nevertheless sets forth numerous arguments all of which amount to collateral attacks on his conviction. Primarily he

argues that he is innocent and pled guilty because he had "no choice."[2] The applicable regulation explicitly precludes any collateral attack on Petitioner's conviction:

> When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal.

42 C.F.R. § 1001.2007(d). Statutory and regulatory authority require exclusion under the circumstances if the elements of section 1128(a)(1) are met. Thus, I must uphold the exclusion and may not consider Petitioner's collateral attacks on his underlying criminal conviction.

4. Petitioner must be excluded for the statutory minimum period of five years.

An exclusion imposed under section 1128(a) of the Act must be for a minimum period of five years. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); 42 C.F.R. § 1001.102(a). Because I conclude that a basis exists to exclude Petitioner pursuant to section 1128(a)(1), then exclusion of Petitioner for the minimum period of five years is mandatory and reasonable as a matter of law.

/s/
Joseph Grow
Administrative Law Judge

[2] Petitioner submitted as evidence a transcript of the court proceedings concerning his acceptance of the plea agreement and the entering of his plea of guilty to the negotiated reduced charge. P. Ex. 1. Those proceedings establish that the judge ensured that Petitioner understood he waived his right to appeal under the terms of his plea acceptance. P. Ex. 1 at 20-27. Although Petitioner alleges he did not realize that accepting the plea would result in his exclusion, that is not a legal basis for me to reverse the exclusion. *See, e.g., Tamara Brown*, DAB 2195, at 10 (2008).