

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Peter A. Lodewick, M.D.
(OI File No. H-16-40153-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-664

Decision No. CR4743

Date: November 28, 2016

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Peter A. Lodewick, M.D., for five years from participation in Medicare, Medicaid, and all other federal health care programs based on Petitioner's conviction of a felony related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Petitioner sought review of the exclusion. Based on the record in this case, I conclude that Dr. Lodewick was convicted of a federal felony offense related to illegally prescribing controlled substances. Consequently, I affirm the IG's determination to exclude Dr. Lodewick for five years because federal law mandates that exclusion and requires the exclusion to no less than five years in length. 42 U.S.C. § 1320a-7(a)(4), (c)(3)(B).

I. Background

By letter dated May 31, 2016, the IG notified Dr. Lodewick that he was being excluded, effective 20 days from the date on the letter, from Medicare, Medicaid, and all federal health care programs under 42 U.S.C. § 1320a-7(a)(4) for the minimum statutory period of five years because of his felony conviction in the United States District Court,

Northern District of Alabama, Southern Division, of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance as defined under federal or state law. IG Ex. 1 at 1. On June 24, 2016, Dr. Lodewick, through counsel, requested a hearing before an administrative law judge. In the hearing request, Dr. Lodewick requested that I stay the exclusion until after I completed this proceeding. The case was assigned to me for a hearing and decision.

On August 17, 2016, I held a pre-hearing telephone conference with counsel for the parties. At the conference, I denied Dr. Lodewick's request that I stay the exclusion pending the outcome of this case because the regulations require an exclusion to take effect 20 days after the date on an exclusion notice and I do not have any authority to disregard the regulations. 42 C.F.R. §§ 1001.2002(b), 1005.4(c)(1), (4); *see also* 42 U.S.C. § 1320a-7(c)(1). I also set a prehearing exchange schedule, which I included in my August 18, 2016 Order and Schedule for Filing Briefs and Documentary Evidence (Order). *See* 42 C.F.R. § 1005.8.

In response to the Order, the IG submitted a brief (IG Br.) and four exhibits. Petitioner then submitted a response brief (P. Br.) with six exhibits. The IG declined to file a reply brief.

II. Decision on the Record

Neither party objected to any of the proposed exhibits; therefore, I admit them all into the record. Order ¶¶ 6, 7, 9; 42 C.F.R. § 1005.8(c); Civil Remedies Division Procedures § 14(e).

In the briefs submitted by the parties, both parties indicated that neither had any witness testimony to offer and both thought that an in-person hearing was unnecessary to decide this case. IG Br. at 8; P. Br. at 2. Therefore, I issue this decision based on the written record. Civil Remedies Division Procedures § 19(d).

III. Issue

Whether the IG had a basis to exclude Petitioner for five years from participation in Medicare, Medicaid, and all other healthcare programs. 42 C.F.R. § 1001.2007(a)(1)-(2).

IV. Jurisdiction

I have jurisdiction to adjudicate this case. 42 U.S.C. § 1320a-7(f)(1); 42 C.F.R. § 1005.2.

V. Findings of Fact, Conclusions of Law, and Analysis

My findings of fact and conclusions of law are set forth in italics and bold font.

The Secretary of Health and Human Services must exclude an individual from participation in Medicare, Medicaid, and all other federally-funded health care programs if that individual:

has been convicted for an offense which occurred after [August 21, 1996], under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

42 U.S.C. § 1320a-7(a)(4).

Further, the regulations implementing this statute state that this exclusion provision applies to, among others, health care practitioners. 42 C.F.R. § 1001.101(d)(1).

Therefore, the five essential elements necessary to support the IG's exclusion are: (1) the individual to be excluded must have been convicted of a criminal offense; (2) the criminal offense must have been a felony; (3) the felony conviction must have been for conduct relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance; (4) the felonious conduct must have occurred after August 21, 1996; and (5) the individual to be excluded is or was a health care practitioner. 42 U.S.C. § 1320a-7(a)(4); 42 C.F.R. § 1001.101(d)(1).

1. Petitioner pled guilty in the U.S. District Court, Northern District of Alabama (District Court), to knowingly, intentionally, and unlawfully aiding and abetting others to acquire oxycodone, a Schedule II controlled substance, through misrepresentation, fraud, forgery, deception, and subterfuge in violation of 21 U.S.C. § 843(a)(3), and the District Court entered a Judgment in a Criminal Case adjudging Petitioner guilty and sentencing him to 48 months of probation.

On May 20, 2015, the United States Attorney for the Northern District of Alabama filed a one-count Information with the District Court charging Petitioner with violating 21 U.S.C. § 843(a)(3) by aiding and abetting others to illegally acquire oxycodone, a Schedule II controlled substance. IG Ex. 2. On that same date, Petitioner and the United States Attorney filed a Plea Agreement in which Petitioner agreed to plead guilty to the charge in the Information. IG Ex. 3. Petitioner stipulated to the following facts:

Between January 2013 and December 2014, [Dr. Lodewick], an "Internal Medicine and Diabetes" doctor, issued approximately three hundred ninety (390) prescriptions for controlled substances to a group of pill-seekers led by his housekeeper" The group included [seven other individuals]. Dr Lodewick wrote prescriptions for Schedule

II controlled substances, including Oxycodone (two forms), Morphine Sulfate, Adderall, and Norco. Over this two year period, Dr. Lodewick prescribed approximately 22,796 dosage units of prescription opiates.

Beginning in May 2013, the patient files kept in Dr. Lodewick's office clearly state that he discovered that three individuals within this pill-seeking group were pharmacy-shopping. In letters to these patients, Dr. Lodewick terminates the physician-patient relationship because of their behavior. In these three cases, the patient files and prescription histories show that Dr. Lodewick accompanied each termination letter with a prescription for a large amount of opiates. Following the termination letters, Dr. Lodewick continued writing prescriptions for opiates to this group at his usual rate. Dr. Lodewick wrote these patients a new prescription generally every month, except in some cases he wrote multiple prescriptions in one month. On November 6, 16, and 26, 2014, Dr. Lodewick wrote [a member of the group] prescriptions for what constitutes a roughly three month's supply of oxycodone.

IG Ex. 3 at 2-3.

On October 28, 2015, the District Court entered a Judgment in a Criminal Case in which it acknowledged Petitioner pled guilty to the charge in the Information, adjudged Petitioner guilty of that charge, and sentenced Petitioner to 48 months probation. IG Ex. 4.

- 2. Petitioner was convicted of a criminal offense under 42 U.S.C. § 1320a-7(a)(4) because he pled guilty to violating 21 U.S.C. § 843(a)(3), and the District Court accepted that plea, and entered judgment of conviction adjudging him guilty of that crime.***

For exclusion purposes, an individual is “convicted” of a criminal offense “when a judgment of conviction has been entered against the individual . . . by a Federal, State, or local court . . .” 42 U.S.C. § 1320a-7(i)(1). Further, an individual is also “convicted” of a criminal offense when “a plea of guilty . . . by the individual . . . has been accepted by a Federal, State, or local court.” *Id.* § 1320a-7(i)(3). As previously discussed, Petitioner pled guilty to violating 21 U.S.C. § 843(a)(3), and the District Court accepted his plea and issued a judgment of conviction. IG Exs. 2-4. Petitioner concedes that he was convicted of a criminal offense. P. Br. at 1. Accordingly, for purposes of exclusion, Petitioner was “convicted” of a criminal offense.

3. *Petitioner was convicted of a felony.*

Petitioner was convicted of violating 21 U.S.C. § 843(a)(3), punishable pursuant to 21 U.S.C. § 843(d)(1) up to four years imprisonment. Therefore, Petitioner was convicted of a class E felony because the maximum term of imprisonment for his offense was less than five years, but more than 1 year. 18 U.S.C. § 3559(a)(5). Further, Petitioner concedes that he was convicted of a felony. P. Br. at 1.

4. *Petitioner was convicted of a felony criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.*

Petitioner was convicted of violating a law making it illegal to knowingly or intentionally, “acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge.” 21 U.S.C. § 843(a)(3); IG Ex. 2-4. Petitioner admitted that he illegally wrote 390 prescriptions for 22,796 units of controlled substances to a group of pill-seeking individuals. IG Ex. 3 at 2. Petitioner concedes that his conviction related to the unlawful distribution and prescription of controlled substances. P. Br. at 2. Therefore, I conclude that this element necessary for exclusion is met.

5. *The conduct for which Petitioner was convicted occurred after August 21, 1996.*

In the Information that charged Petitioner with violating 21 U.S.C. § 843(a)(3), the United States Attorney alleged that Petitioner’s conduct occurred on November 11, 2014. IG Ex. 2. In his plea agreement, Petitioner admits that his criminal conduct occurred from January 2013 through December 2014. IG Ex. 3 at 2. Petitioner admits that his criminal conduct occurred after August 21, 1996. P. Br. at 1. Therefore, I conclude that this element required for exclusion is met.

6. *Petitioner is a health care practitioner.*

The state of Alabama licensed Petitioner to practice medicine on April 9, 1990. P. Ex. 4 at 1. Although Petitioner’s medical license was placed on indefinite probation on April 5, 2016, in Alabama, Petitioner can still practice medicine because, as of July 18, 2016, he met all of the conditions placed on him by the Alabama Medical Licensure Commission. P. Exs. 5, 6. Therefore, Petitioner is a health care practitioner and meets this element necessary for exclusion.

7. *Under 42 U.S.C. § 1320a-7(a)(4), Petitioner must be excluded from participation in all federal health care programs and under 42 U.S.C. § 1320a-7(c)(3)(B), the exclusion must last for a minimum of five years.*

As indicated above, the record conclusively shows that Petitioner's conviction meets all of the elements under 42 U.S.C. § 1320a-7(a)(4) for exclusion. Because I conclude that a basis exists to exclude Petitioner under 42 U.S.C. § 1320a-7(a)(4), Petitioner must be excluded for a minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2).

Petitioner argues that his situation is one that should be resolved in a manner that would permit him to return to work in the medical field. Petitioner asserts that he immediately took responsibility for his actions, surrendered his Drug Enforcement Administration license, and cooperated with law enforcement authorities. Petitioner indicates that he did not sell prescriptions for profit to his former patients, but rather was manipulated by them. Petitioner avers that the prosecutor and the District Court thought that probation was sufficient punishment for they believed that he simply engaged in poor judgment when committing the crime for which he was convicted. Petitioner points out that even the Alabama Medical Licensure Commission stayed its revocation of Petitioner's medical license and put him on probation. Petitioner asserts that his professional reputation is still high and has submitted many character reference letters. Finally, Petitioner asserts that he also complied with all conditions that the Commission placed on him. P. Br. at 3-5; P. Exs. 1-6.

Despite Petitioner's arguments, neither the IG nor I have any authority to remove the exclusion or reduce the length of the exclusion. *See* 42 C.F.R. § 1001.1(b), 1001.101(d), 1001.102(a). The United States Court of Appeals for the Ninth Circuit explained the mandatory five-year exclusion in the following manner:

However, the Inspector General was not engaging in a fact-finding or discretionary function when he excluded Travers.

Conviction of a program-related offense as defined by § 1320a-7(i) is the triggering event that mandates the Secretary to impose a minimum five-year exclusion. The language—“[t]he Secretary shall exclude”—is mandatory, not discretionary. 42 U.S.C. § 1320a-7(a). To determine whether Travers was convicted of a program-related offense, the Inspector General looked to the substance of the state proceedings and the nature of Travers' crime as charged by the State of Utah. As noted by the district court, “[i]t is not necessary or proper for the Inspector General to delve into the facts surrounding the conviction.” *Travers v. Sullivan*, 801 F.Supp. 394, 403 (E.D.Wash.1992). Once he found that the

Utah state court's disposition of the charge amounted to a conviction of a program-related offense, the Inspector General had no choice but to impose the mandatory 5-year exclusion under § 1320a-7(a)(1).

Travers v. Shalala, 20 F.3d 993, 998 (9th Cir. 1994).

VI. Conclusion

I affirm the IG's determination to exclude Petitioner for five years from participating in Medicare, Medicaid, and all federal health care programs under 42 U.S.C. § 1320a-7(a)(4).

/s/
Scott Anderson
Administrative Law Judge