Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Kevin Wayne Maniece, a.k.a Kevin Wayne William, a.k.a. William Maniece,

Petitioner,

v.

The Inspector General.

Docket No. C-11-40

Decision No. CR2357

Date: April 15, 2011

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* Kevin Wayne Maniece from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G.'s Motion and determination to exclude Petitioner are based on section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). The undisputed material facts in this case require the imposition of a five-year exclusion. Accordingly, I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

On July 22, 2009 the Grand Jury sitting for the United States District Court for the Central District of California handed up an Indictment charging Petitioner with a felony, Bribery Concerning a Program Receiving Federal Funds, in violation of 18 U.S.C. § 666(a)(1)(B). Petitioner and his attorney reached a plea agreement with federal prosecutors in mid-October 2009, and on March 8, 2010 he appeared with counsel in the United States District Court and pleaded guilty to that charge. The District Court accepted Petitioner's guilty plea, found him guilty on that plea, entered its judgment of conviction, and in due course imposed a sentence that included a six-month term of home detention and a two-year term of probation.

Section 1128(a)(1) of the Act mandates the exclusion of "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under [Medicare] or . . . any State health care program" for a period of not less than five years. On August 31, 2010 the I.G. notified Petitioner that he was to be excluded pursuant to the terms of section 1128(a)(1) of the Act for a period of five years.

Acting *pro se*, Petitioner timely sought review of the I.G.'s action by his undated letter mailed on October 12, 2010.

I convened a prehearing conference by telephone on November 10, 2010, pursuant to 42 C.F.R. § 1005.6, in order to discuss procedures best suited for addressing the issues presented by the case. By Order of November 12, 2010 I established a schedule for the submission of documents and briefs, and at Petitioner's request amended that schedule by letter on December 29, 2010. The record in this case closed for purposes of 42 C.F.R. § 1005.20(c) on April 15, 2011, in circumstances set out in my Order of that date.

The evidentiary record on which I decide the issues before me contains the four exhibits proffered by the I.G. marked I.G. Exhibits 1-4 (I.G. Exs. 1-4). Petitioner proffered no exhibits of his own. In the absence of objection, I have admitted all proffered exhibits.

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(a)(1) of the Act; and
>
> b. Whether the five-year length of the proposed period of exclusion is unreasonable.

The controlling authorities require that these issues be resolved in favor of the I.G.'s position. Section 1128(a)(1) of the Act mandates Petitioner's exclusion, for his predicate conviction has been established. A five-year period of exclusion is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B), and is therefore as a matter of law not unreasonable.

III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any individual or entity convicted of a criminal offense related to the delivery of an item or service under title XVIII of the Act (the Medicare program) or any state health care program. The terms of section 1128(a)(1) are restated in similar language at 42 C.F.R. § 1001.101(a).

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a Federal . . . court, regardless of . . . whether the judgment of conviction or other record relating to criminal conduct has been expunged," section 1128(i)(1) of the Act; "when there has been a finding of guilt against the individual . . . by a Federal . . . court," section 1128(i)(2) of the Act; "when a plea of guilty or nolo contendere by the individual . . . has been accepted by a Federal . . . court," section 1128(i)(3) of the Act; or "when the individual . . . has entered into participation in a . . . deferred adjudication . . . program where judgment of conviction has been withheld," section 1128(i)(4) of the Act, 42 U.S.C. §§ 1320a-7(i)(1)-(4). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(1) is mandatory and the I.G. must impose it for a minimum period of five years. Section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision.

IV. Findings and Conclusions

I find and conclude as follows:

1. On his accepted plea of guilty on March 8, 2010, in the United States District Court for the Central District of California, Petitioner *pro se* Kevin Wayne Maniece was found guilty of one count of Bribery Concerning a Program Receiving Federal Funds, in violation of 18 U.S.C. § 666(a)(1)(B). I.G. Exs. 2, 3, 4.

2. The accepted plea of guilty, finding of guilt, and judgment of conviction described above constitute a "conviction" within the meaning of sections 1128(a)(1) and 1128(i)(1), 1128(i)(2), and 1128(i)(3) of the Act, and 42 C.F.R. § 1001.2.

3. A nexus and a common-sense connection exist between the criminal offense to which Petitioner pleaded guilty and of which he was convicted, as noted above in Findings 1 and 2, and the delivery of an item or service under the Medicare program. I.G. Exs. 2, 3, 4; *Berton Siegel, D.O.*, DAB No. 1467 (1994).

4. Petitioner's conviction constitutes a basis for the I.G.'s exclusion of Petitioner from participation in Medicare, Medicaid, and all other federal health care programs, pursuant to section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1).

5. Because the five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, it is therefore not unreasonable. Section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2).

6. 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 essential elements necessary to support an exclusion based on section 1128(a)(1) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; and (2) the criminal offense must have been related to the delivery of an item or service under Title XVIII of the Act (Medicare) or any state health care program. *Tamara Brown*, DAB No. 2195 (2008); *Thelma Walley*, DAB No. 1367; *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Lyle Kai, R.Ph.*, DAB CR1262 (2004), *rev'd on other grounds*, DAB No. 1979 (2005); s*ee also Russell Mark Posner*, DAB No. 2033, at 5-6 (2006). Petitioner has not challenged the I.G.'s proof of these two elements, but has vigorously argued that the exclusion itself should not be imposed.

Although the I.G.'s proof of the two essential elements has not been placed in controversy here, I nevertheless note that the record before me reveals objective proof of each. Court records of Petitioner's conviction and its procedural history are before me as I.G. Exs. 2, 3, and 4, and establish the first essential element. The relation of Petitioner's crime to the Medicare program is set out in the language of the Indictment and acknowledged by Petitioner in the plea agreement. That relationship establishes the nexus or common-sense connection to the Medicare program defined in *Berton Siegel, D.O.*, DAB No. 1467.

It is a well-settled rule of this forum that once an individual's conviction is found to have been "related to the delivery of an item or service under Medicare or a State health care program," and thus to lie within the terms of section 1128(a)(1), the imposition of the five-year minimum exclusion established by section 1128(c)(3)(B) of the Act is mandatory and beyond the authority of the I.G. or an Administrative Law Judge (ALJ) to

reduce, modify, or suspend. The Departmental Appeals Board (Board) has used the clearest possible language to make this point: "Petitioner's exclusion was mandatory under the Act once the nexus was established between her offense and the delivery of an item or service under the Medicare program. The ALJ had no discretion to impose a lesser remedy." *Salvacion Lee, M.D.*, DAB No. 1850, at 4 (2002). This link between conviction and exclusion admits of no exception: "We therefore affirm the ALJ's conclusion . . . that once an individual has been found to have been convicted of a criminal offense relating to delivery of a health care item or service to Medicare, section 1128(a)(1) of the Act makes program exclusion mandatory." *Lorna Fay Gardner*, DAB No. 1733, at 6 (2000); *Douglas Schram, R.Ph.*, DAB No. 1372 (1992); *Napoleon S. Maminta, M.D.*, DAB No. 1135 (1990).

Petitioner's specific argument, in which he points out his desire to support his family by working in occupations related to health care, fails for the same basic reason: the potential closing-off of certain occupations to an excluded individual and the probable loss of earnings from those occupations are not a defense to the mandatory imposition of this exclusion. *Henry L. Gupton*, DAB No. 2058 (2007); *Salvacion Lee, M.D.*, DAB No. 1850. As the Board observed in *Joann Fletcher Cash*, DAB No. 1725 (2000), the precise point of the exclusion mechanism is to prevent untrustworthy individuals from being involved with protected health care programs. That this exclusion may have a dramatic effect on Petitioner's or any other excluded individual's future employment opportunities is a logical consequence of any exclusion, including this one.

Because the I.G. has established a basis for Petitioner's exclusion pursuant to section 1128(a)(1), his exclusion for five years is mandatory pursuant to section 1128(c)(3)(B) of the Act. 42 U.S.C. § 1320a-7(c)(3)(B). That period is reasonable as a matter of law.

I note once more that Petitioner appears here *pro se*. Because of that I have taken additional care in reading his submissions, guided by the Board's reminders that *pro se* litigants should be offered "some extra measure of consideration" in developing their records and their cases. *Louis Mathews*, DAB No. 1574 (1996); *Edward J. Petrus, Jr., M.D., et al.*, DAB No. 1264 (1991). I have searched all of Petitioner's submissions for any arguments or contentions that might raise a valid, relevant defense to the proposed exclusion, but have found nothing that could be so construed.

Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts. *Marvin L. Gibbs, Jr., M.D.*, DAB No. 2279 (2009); *Michael J. Rosen, M.D.*, DAB No. 2096. The material facts in this case are undisputed and unambiguous. They support summary disposition as a matter of settled law, and this Decision issues accordingly.

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 *pro se* Kevin Wayne Maniece from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years pursuant to the terms of section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), is sustained.

/s/
Richard J. Smith
Administrative Law Judge