Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Edward Henry Park, M.D.
(O.I. File Number L-09-40529-9),

Petitioner,

v.

The Inspector General.

Docket No. C-11-123

Decision No. CR2360

Date: April 20, 2011

DECISION

Petitioner, Edward Henry Park, M.D., is excluded 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)) effective November 18, 2010, based upon his conviction of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. There is a proper basis for exclusion. Petitioner's exclusion for the minimum period[1] of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

I. Background

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated October 29, 2010, that he was being excluded from participation

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[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.

in Medicare, Medicaid, and all federal health care programs for a period of five years, the minimum statutory period. The I.G. advised Petitioner that he was being excluded pursuant to section 1128(a)(1) of the Act based on his conviction in the Superior Court of California, County of Orange, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner timely requested a hearing by letter dated November 19, 2010. The case was assigned to me on November 30, 2010, for hearing and decision. A prehearing telephone conference was convened on December 20, 2010, the substance of which is memorialized in my order dated December 21, 2010. During the prehearing conference, Petitioner, who appeared by counsel, waived an oral hearing. Accordingly, I set a briefing schedule for the parties.

The I.G. filed a motion for summary judgment and a supporting brief (I.G. Br.) on February 3, 2011, with I.G. exhibits (I.G. Exs.) 1 through 4. Petitioner filed a brief in opposition to the I.G. motion for summary judgment on March 21, 2011 (P. Br.), with Petitioner's exhibit (P. Ex. 1). The I.G. filed a reply brief on April 4, 2011. No objections to my consideration of the offered exhibits have been made and I.G. Exs. 1 through 4 and P. Ex. 1 are admitted.

II. Discussion

A. Applicable Law

Petitioner's rights to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of the Department of Health and Human Services (the Secretary) are provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)).

Pursuant to section 1128(a)(1) of the Act, the Secretary 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. Pursuant to section 1128(i) of the Act, an individual is 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) when there is a finding of guilt by a court; (3) when 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.

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 can 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). No aggravating

factors are cited by the I.G. in this case, and the I.G. does not propose to exclude Petitioner for more than the minimum period of five years.

B. Issue

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).

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

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

1. Petitioner's request for hearing was timely and I have jurisdiction.

2. Summary judgment is appropriate in this case.

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction.

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 by 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). Although Petitioner orally waived an oral hearing during the prehearing conference and agreed to proceed on the briefs and documentary evidence, the parties are proceeding upon a motion for summary judgment. Accordingly, I apply the standards applicable to summary judgment. An ALJ may 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 prevails 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 Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, 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 Ctr., CMHC*, DAB CR700 (2000).

There is no genuine dispute as to any material fact in this case and the issues raised by Petitioner are issues of law, i.e., whether Petitioner was convicted within the meaning of the Act and whether, if there was a conviction, the conviction was of an offense related to the delivery of an item or service under Medicare or Medicaid. Accordingly, summary judgment is appropriate.

3. There is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

Petitioner advises me that he graduated from Harvard College with a bachelor of arts in anthropology in 1989. Subsequently, he graduated from Columbia College of Physicians and Surgeons with his medical degree and a master's degree in public health. He practiced medicine as an obstetrician and gynecologist. P. Br. at 2. On June 26, 2008, a misdemeanor complaint charged Petitioner with delivering between January 1, 2004 and July 1, 2007, a misbranded drug or device, specifically an intrauterine device from Mexico that was not approved by the Food and Drug Administration, in violation of California Health and Safety Code § 111440, a misdemeanor pursuant to California Health and Safety Code § 111825(a). I.G. Ex. 2; P. Br. at 2-3. A Probation Order dated July 9, 2008, states that Petitioner pled guilty to the charge and waived the statutory time for sentencing. The Probation Order states that Petitioner was sentenced on July 9, 2008. The Probation Order further states:

> No legal cause why judgment should not be pronounced and defendant having Pled Guilty to count(s) 1, Imposition of sentence is suspended and defendant is placed on 3 [y]ear(s) INFORMAL PROBATION. . . .

I.G. Ex. 3, at 1. Petitioner states that he entered into a "negotiated resolution of the charge." P. Br. at 3. Pursuant to the terms of his plea agreement, Petitioner pled guilty to the misdemeanor charge in exchange for the suspended imposition of sentence and the imposition of probation, the terms of which included 100 hours of community services and the payment of restitution. Petitioner does not deny that in July 2008 his restitution was sent to the Bureau of Medi-Cal Fraud and Elder Abuse – Headquarters, Office of the California Attorney General. I.G. Ex. 4. Petitioner subsequently filed a motion to withdraw his guilty plea, which was granted on January 11, 2010, his probation was terminated, and the charge against him was dismissed. P. Ex. 1; P. Br. at 3.
The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. The statute 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)):
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> > (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.

The statute requires that the Secretary exclude from participation in Medicare or Medicaid any individual or entity: (1) convicted of a criminal offense, whether a felony or a misdemeanor; (2) where the offense is related to the delivery of an item or service; and (3) the delivery of the item or service was under Medicare or a state health care program.

Petitioner argues that he was not convicted within the meaning of section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)) of a criminal offense. Petitioner argues that no "judgment of conviction" was entered against him; his guilty plea was not accepted by the California court; and the dismissal of the charge placed him in the same position as if the charge was never brought. P. Br. at 4-6.

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. Contrary to Petitioner's arguments, the Probation Order clearly states that Petitioner pled guilty to the charge; there was no legal cause why judgment should not be pronounced; and, upon Petitioner's waiver, the court immediately proceeded to sentencing – suspending the imposition of the sentence and imposing informal probation with a requirement for community service and restitution. I.G. Ex. 3. Furthermore, the undisputed facts show that the California court acted upon and accepted Petitioner's plea. The Court did not specifically reject the plea but proceeded upon the terms of the plea agreement to which Petitioner had agreed. Even if I concluded that a judgment of conviction was never actually entered against Petitioner, he would nevertheless meet the definition of having been "convicted" under section 1128(i)(4) of the Act to the extent that judgment was withheld pending completion of the terms of probation and the eventual dismissal of the charge. Petitioner's argument that the dismissal of the charge placed him in the same position as if he was never charged is also without merit. Congress is clear in section 1128(i) of the Act that one is "convicted" even if the record is subsequently expunged or judgment is withheld as part of a first

offender program, deferred adjudication program, or a similar program. Accordingly, I conclude that Petitioner was convicted within the meaning of the Act, even though his conviction may no longer be a matter of public record in the State of California.

Petitioner argues that his offense was not related to the delivery of an item or service under any federal or state health care program. P. Br. at 7-8. Petitioner is correct that nothing on the face of the charge or in section 111440 of the California Health and Safety Code ties Petitioner's offense to Medicare or the California Medicaid program, Medi-Cal. I accept for purposes of ruling on summary judgment Petitioner's representation that by pleading guilty he did not admit to any nexus between his offenses and the Medi-Cal or Medicare programs. Petitioner does not dispute or deny, however, that his restitution went to the Medi-Cal fraud recovery unit in the California Office of the Attorney General. I conclude that that undisputed fact establishes the nexus or common sense connection between Petitioner's criminal offense and the delivery of an item or service under Medicare or Medicaid. *Timothy Wayne Hensley*, DAB No. 2044 (2006); *Neil R. Hirsch, M.D.*, DAB No. 1550 (1995); *Chander Kachoria, R.Ph.*, DAB No. 1380 (1993). Accordingly, I conclude that the offense of which Petitioner was convicted was related to the delivery of an item or service under the California Medi-Cal program and the elements necessary for exclusion pursuant to section 1128(a) of the Act are satisfied.

Petitioner asserts that, though he pled guilty to the criminal charge, he believed he was in compliance with the law. P. Br. at 3. Petitioner's assertion may be construed to be an attack upon his conviction. Under the regulations, Petitioner's underlying conviction is not reviewable or subject to collateral attack before me, whether on substantive or procedural grounds. 42 C.F.R. § 1001.2007(d). Thus, I may not consider Petitioner's arguments attacking his conviction.

I conclude that there is a basis for Petitioner's exclusion and his exclusion is mandated by section 1128(a)(1) of the Act.

4. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) of the Act is five years.

5. Petitioner's exclusion for five years is not unreasonable as a matter of law.

Five years is the minimum authorized period for a mandatory exclusion pursuant to section 1128(a). Act § 1128(c)(3)(B). I have found there is a basis for Petitioner's exclusion pursuant to section 1128(a) of the Act, and the minimum period of exclusion is five years and not unreasonable as a matter of law.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years effective November 18, 2010.

_____/s/_____
Keith W. Sickendick
Administrative Law Judge