Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Albelardo Lecompte-Torres, M.D.,

Petitioner

v.

The Inspector General.

Docket No. C-11-124

Decision No. CR2379

Date: May 31, 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 Albelardo Lecompte-Torres, M.D., 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 the mandatory authority conveyed by section 1128(a)(4) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(4). The predicate for the I.G.'s action is Petitioner's felony conviction of conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846. 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. Background

On September 30, 2010, the I.G. notified Petitioner that for a period of five years, effective October 20, 2010, he was excluding Petitioner from participation in Medicare, Medicaid, and all other federally funded health care programs because he had been convicted of a criminal offense described at section 1128(a)(4) of the Act. I.G. Ex. 1.

By letter dated November 24, 2010 Petitioner timely requested review of the I.G.'s action. I convened a prehearing conference by telephone on December 20, 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 December 22, 2010 I established a schedule for the submission of documents and briefs. The record in this case closed for purposes of 42 C.F.R. § 1005.20(c) on April 8, 2011 in circumstances set out in my Order of that date.

The evidentiary record on which I decide the issues before me contains the five exhibits proffered by the I.G., I.G. Exs. 1-5. Petitioner proffered two exhibits, P. Exs. 1-2. 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:

1. 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)(4) of the Act; and

2. Whether 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)(4) 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)(4) of the Act, 42 U.S.C. § 1320a-7(a)(4), requires the mandatory exclusion from participation in Medicare, Medicaid, and all other federal health care programs of "[a]ny individual or entity that 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." The terms of section 1128(a)(4) are restated somewhat more broadly in regulatory language at 42 C.F.R. § 1001.101(d).

The Act defines "convicted" as including those circumstances: "(1) when a judgment of conviction has been entered against the individual . . . by a Federal . . . court;" or "(2) when there has been a finding of guilt against the individual . . . by a Federal . . . court;" or "(3) when a plea of guilty or nolo contendere by the individual . . . has been accepted

by a Federal . . . court. . . ." Act § 1128(i)(1)-(3), 42 U.S.C. § 1320a-7(i)(1)-(3). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(4) is mandatory and the I.G. must impose it for a minimum period of five years. Act § 1128(c)(3)(B); 42 U.S.C. § 1320a-7(c)(3)(B).

IV. Findings and Conclusions

Based on the undisputed material facts in the record before me, I find and conclude as follows:

1. On May 2, 2007, the Federal Grand Jury sitting for the United States District Court for the District of Puerto Rico charged Petitioner and six co-defendants with 41 criminal counts including: "Conspiracy to Distribute Controlled Substances," "Distribution of Controlled Substances," "Conspiracy to Commit Wire Fraud," and "Money Laundering." I.G. Ex. 3, at 5, 12, 15, 20.

2. On December 19, 2007, Petitioner pleaded guilty to Count One of the Superseding Indictment, "Conspiracy to Distribute Controlled Substances," in violation of 21 U.S.C. § 846. I.G. Ex. 4 at 2; *see* I.G. Ex. 3. Count One charged that, "[I]n or about October 30, 2003 through on or about May 2006, in the District of Puerto Rico, [Petitioner and his co-defendants] did knowingly and intentionally conspire and agree, together, . . . to distribute and possess with intent to distribute, outside the scope of professional practice and not for legitimate medical purpose, a controlled substance, which offense involved a quantity of not less than 40,000 units of Hydrocodone, a Schedule III controlled substance," a felony violation of 21 U.S.C. §§ 841(a)(1); 841(b)(1)(D); 846. I.G. Ex. 4, at 1-2; I.G. Ex. 3, at 1-12; *see* 21 U.S.C. § 841(b)(1)(E); 18 U.S.C. § 3559(a)(3).

3. On August 8, 2008, the United States District Court for the District of Puerto Rico accepted Petitioner's guilty plea. Petitioner was adjudicated guilty of the offense, "Conspiracy to possess with intent to distribute hydrocodone" ending May 2006. I.G. Ex. 5, at 1. Petitioner's sentence included a three-year term of probation, during which he was required to perform 288 hours of unpaid community service, a $100.00 assessment, and forfeiture of any property, other than his medical license, involved in, or traceable to, the offense. I.G. Ex. 5, at 2-5.

4. On September 30, 2010, the I.G. notified Petitioner that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years, based on the authority set out in section 1128(a)(4) of the Act. I.G. Ex. 1.

5. Petitioner timely perfected this appeal from the I.G.'s action by filing his hearing request dated November 24, 2010 on November 26, 2010.

6. The plea, judgment, and sentence described above in Findings 2 and 3 constitute a "conviction" within the meanings of sections 1128(a)(4) and 1128(i)(1), (2), and (3) of the Act, and 42 C.F.R. § 1001.2.

7. Petitioner's conviction described above in Findings 2 and 3 constitutes a Class C felony. 21 U.S.C. § 841(b)(1)(E); 18 U.S.C. § 3559(a)(3); *see also* I.G. Ex. 4, at 4.

8. Petitioner's conviction described above in Findings 2 and 3 was for conduct relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. I.G. Ex. 5.

9. Petitioner's conviction described above in Findings 2 and 3 was for conduct that occurred after August 21, 1996. I.G. Exs. 3-5.

10. By reason of the conviction described above in Findings 2 and 3, Petitioner was subject to, and the I.G. was required to impose, a period of exclusion from participation in Medicare, Medicaid, and all other federal health care programs. Act § 1128(a)(4), 42 U.S.C. § 1320a-7(a)(4).

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

12. There are no disputed issues of material fact and summary disposition is 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

1. *Petitioner's exclusion is mandated by section 1128(a)(4) of the Act because Petitioner was convicted of a felony criminal offense related to the unlawful distribution of a controlled substance after August 21, 1996.*

The essential elements necessary to support an exclusion based on section 1128(a)(4) of the Act 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; and (4) the felonious conduct must have occurred

after August 21, 1996. *Thomas Edward Musial*, DAB No. 1991 (2005); *Russell A. Johnson*, DAB CR1378 (2005); *Gerald A. Levitt, D.D.S.*, DAB CR1272 (2005); *Robert C. Richards*, DAB CR1235 (2004).

In this case those elements are established. Petitioner's exclusion is mandated by the facts underlying his conviction in the United States District Court for the District of Puerto Rico of a felony criminal offense that occurred between October 30, 2003, and May 2006, and was related to the unlawful distribution of a controlled substance. I.G. Ex. 1.

The criminal charge to which Petitioner pleaded guilty was based on the following facts. From approximately October 30, 2003 through May 2006, Petitioner, a licensed physician in the Commonwealth of Puerto Rico, conspired with others to distribute and possess with intent to distribute certain controlled substances, outside the scope of professional practice and not for a legitimate medical purpose. I.G. Ex. 3, at 5-6. Petitioner and his co-defendants, also physicians, worked with various internet facilitation centers to provide prescription services. The internet facilitation centers solicited customers throughout the United States through their internet websites. Customers from across the United States seeking controlled substances would access these websites and order prescription drugs after filling out an online questionnaire and providing payment. I.G. Ex. 3, at 7. Petitioner and his co-defendants prescribed controlled substances and dangerous drugs to the internet customers without establishing a patient history, performing a mental or physical exam, without using appropriate diagnostic or laboratory testing, and without providing a means to monitor medication response. The prescriptions were made after only an alleged internet consultation. Petitioner and his co-defendants were paid based on the number of prescriptions they wrote. I.G. Ex. 3, at 10. Petitioner and his co-defendants received at least $3,288,024.25 in wire transfers for the prescriptions illegally approved by him and his co-defendants. In connection with these illegally prescribed medications, at least one individual was hospitalized and one individual died as a result of drug overdoses.[1] I.G. Ex. 3, at 11-12.

As a result of Petitioner's scheme, the Federal Grand Jury charged Petitioner in a 41-count indictment with a number of violations, including "Conspiracy to Distribute Controlled Substances," "Distribution of Controlled Substances," "Conspiracy to Commit Wire Fraud," and "Money Laundering." I.G. Ex. 3, at 5, 12, 15, 20. On December 19, 2007, Petitioner, as part of a negotiated agreement, pleaded guilty to Count One of the Superseding Indictment and the United States agreed to move for dismissal of the remaining counts against Petitioner. I.G. Ex. 4, at 6. On August 8, 2008, the United States District Judge accepted Petitioner's guilty plea to the charge of conspiracy to

[1] I note, however, that as part of Petitioner's Plea and Cooperation Agreement it was noted that *his* "offense did not result in death or serious bodily injury to any person." *See* I.G. Ex. 4, at 6.

possess with intent to distribute hydrocodone, in violation of 21 U.S.C. § 846. I.G. Ex. 5, at 1. Petitioner was sentenced to three years of probation, 288 hours of unpaid community service, a $100.00 assessment, and forfeiture of any property, other than his medical license, involved in or traceable to the offense. I.G. Ex. 5, at 2-5.

Petitioner argues that his criminal conviction should not be considered a criminal offense as follows:

> The acts for which Petitioner were convicted cannot be validly considered to be Criminal Acts, or violations to the Law, due to the fact that those acts are authorized by the Commonwealth of Puerto Rico, as well as other States.

Hearing Request at 2; *see* Petitioner Brief (P. Br.) at 7-8.

This argument, however, is not persuasive. It fails for at least two reasons. First, federal law — specifically section 1128(i) of the Act — not state law, or the law of the Commonwealth of Puerto Rico, defines the circumstances under which an individual is considered convicted for the purposes of section 1128(a) and (b) of the Act. *See supra* Part III. This definition differs from many state criminal law definitions. In *Henry L. Gupton*, DAB No. 2058, at 8 (2007), the Departmental Appeals Board explained why, in these I.G. proceedings, the federal definition of "conviction" must apply. *Henry L. Gupton*, DAB No. 2058, *aff'd Gupton v. Leavitt*, 575 F. Supp. 2d 874 (E.D. Tenn. 2008). For purposes of section 1128(a) of the Act, Congress deliberately defined "conviction" broadly to ensure that exclusions would not hinge on state criminal justice policies or definitions. Second, in this case, Petitioner was convicted of a criminal offense against the laws of the United States, not those of Puerto Rico, when his guilty plea was accepted by the United States District Court for the District of Puerto Rico. Whether "the Commonwealth of Puerto Rico, as well as other States" allow or condone Petitioner's behavior — a proposition in no need of resolution in this case — is irrelevant here: the United States has by law declared it to be felonious.

I further note that Petitioner's argument is essentially a collateral attack on the propriety of the conviction, which neither the I.G. nor the ALJ may consider in the case of a mandatory exclusion based on a criminal conviction. 42 C.F.R. § 1001.2007(d); *Ioni D. Sisodia, M.D.*, DAB No. 2224 (2008); *Paul R. Scollo, D.P.M.*, DAB No. 1498 (1994); *Peter Edmondson*, DAB No. 1330 (1992); *Charles W. Wheeler and Joan K. Todd*, DAB No. 1123, at 9 (1990), *aff'd, Wheeler v. Sullivan*, No. 2:90-0266 (S.D. W.Va. 1991).

2. *A five-year exclusion is reasonable as a matter of law.*

Because the I.G. has established a basis for Petitioner's exclusion pursuant to section 1128(a)(4), 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. *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850; *Lorna Fay Gardner*, DAB No. 1733 (2000); *David A. Barrett*, DAB No. 1461 (1994).

Petitioner contends, however, that because the exclusion began two years after he was sentenced, the exclusion is in effect punitive rather than remedial and overly severe. Hearing Request at 6-7; P. Br. at 8-9. Specifically, after serving two years of his three-year term of probation, Petitioner received notice that beginning October 20, 2010, he would be excluded for a period of five years. *Id.*; *see* I.G. Ex. 1. Petitioner argues that he "already stopped practicing telemedicine," and that "an additional five (5) years of sanctions . . . would hinder his practicing of medicine." Hearing Request at 6-7; P. Br. at 8-9.

Neither the statute nor the regulations, however, require the I.G. to act promptly once an individual has become subject to exclusion. *Chander Kachoria, R.Ph.*, DAB No. 1380 (1993). An I.G. exclusion imposed after substantial delay, and even well after the beginning of other sanctions to which a petitioner may be subject, is in no way any less valid, even if the results of that delay are enough to shame reason and conscience. An ALJ cannot adjust the effective date of a validly-imposed exclusion by invoking principles of even the most basic fairness, which I note are not clearly apparent in the present case. *See*, *e.g.*, *Vivienne Esty-Fenton*, DAB CR1931 (2009); *Kimberley Mazzeo*, DAB CR1591 (2007); *Stephen Michael Cook, M.D.*, DAB CR1234 (2004). An unbroken line of authority spanning over two decades places the timing of the I.G.'s action completely beyond my review here. *Randall Dean Hopp,* DAB No. 2166 (2008); *Kevin J. Bowers*, DAB No. 2143 (2008); *Kailash C. Singhvi*, DAB No. 2138 (2007); *Thomas Edward Musial*, DAB No. 1991 (2005); *Samuel W. Chang, M.D.,* DAB No. 1198 (1990).

Resolution of a case by summary disposition is appropriate when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *Michael J. Rosen, M.D.*, DAB No. 2096; *Thelma Walley*, DAB No. 1367. Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). This forum looks to FED. R. CIV. P. 56 for guidance in applying that regulation. *Robert C. Greenwood*, DAB No. 1423 (1993); *Thelma Walley*, DAB No. 1367. The material facts in this case are undisputed, clear, and unambiguous, and support summary disposition as a matter of law.

IV. Conclusion

For the foregoing reasons, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner, Albelardo Lecompte-Torres, M.D., 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)(4) of the Act, 42 U.S.C. § 1320a-7(a)(4), is sustained.

/s/

Richard J. Smith
Administrative Law Judge