Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Breton Lee Morgan, M.D.,	)	Date: March 3, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-529
	)	Decision No. CR1913
The Inspector General.	)	
	)	

DECISION

This matter is before me in review of the Inspector General's (I.G.'s) determination to exclude Petitioner Breton Lee Morgan, M.D., from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G.'s determination to exclude Petitioner is based on the terms of section 1128(a)(3) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(3). There is a basis for Petitioner's exclusion and the undisputed facts in this case require the imposition of the minimum five-year period of exclusion. For those reasons, I sustain the I.G.'s determination.

I. Procedural Background

Petitioner Breton Lee Morgan, M.D., practiced medicine in the State of West Virginia between 2003 and 2006. On August 30, 2006, the Federal Grand Jury sitting for the United States District Court for the Southern District of West Virginia handed up an Indictment charging Petitioner with twenty-nine felonies related to controlled substances allegedly committed during that period. Specifically, Count One of the Indictment charged Petitioner with conspiracy to distribute controlled substances, in violation of 21 U.S.C. § 846; Counts Two through Twenty-Four charged him with unlawful distribution of a controlled substance, in violation of 21 U.S.C. § 841(a)(1); Counts Twenty-Five through Twenty-Eight charged him with acquiring or obtaining possession of a controlled substance by misrepresentation, fraud, deception, and subterfuge, in violation of 21 U.S.C. § 843(a)(3); and Count Twenty-Nine charged him with making materially-false statements to investigators in connection with his activities, in violation of 18 U.S.C. § 1001.

Represented by counsel, Petitioner reached a plea agreement with prosecutors and on December 11, 2006 pleaded guilty to Count Twenty-Eight of the Indictment, and thus admitted his guilt to one felony violation of 21 U.S.C. § 843(a)(3). He appeared on March 12, 2007, and was sentenced to a 30-day term of incarceration, followed by a 3-month term of supervised probation. He was, in addition, ordered to pay a fine of $5000 and an assessment of $100. The Indictment's remaining counts were dismissed on motion of the United States.

Mandated to do so by the terms of section 1128(a)(3) of the Act, the I.G. began the process of excluding Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. On May 30, 2008, the I.G. notified Petitioner that he was to be excluded for a period of five years.

Petitioner timely sought review of the I.G.'s action on June 10, 2008. I convened a prehearing conference by telephone on August 31, 2006, pursuant to 42 C.F.R. § 1005.6. The I.G. expressed the intention to seek summary disposition on written submissions, and I established a schedule for the filing of documents and briefs. That briefing cycle has been completed, and the record in this case closed January 6, 2009.

The evidentiary record on which I decide this case contains ten exhibits. The I.G. has proffered I.G.'s Exhibits 1-5 (I.G. Exs. 1-5), and Petitioner has proffered five exhibits, incorrectly designated Petitioner's Exhibits A-E (P. Exs. A-E). In the interests of simplicity and economy, I have not corrected Petitioner's designation of exhibits. Neither party has objected to the admission of any of these exhibits, and so all are admitted as designated.

II. Issues

The factual and legal issues before me are limited to those listed at 42 C.F.R. § 1001.2007(a)(1). In the specific 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)(3) of the Act; and

2. Whether the five-year term of the exclusion is unreasonable.

The controlling authorities require that both issues be resolved in favor of the I.G.'s position. Because his predicate conviction has been established, there is a basis for Petitioner's exclusion pursuant to section 1128(a)(3) of the Act. A five-year term of exclusion is the minimum established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B).

III. Controlling Statutes and Regulations

Section 1128(a)(3) of the Act, 42 U.S.C. § 1320a-7(a)(3), 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, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in [section 1128(a)(1)] operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." The regulation implementing section 1128(a)(3) appears at 42 C.F.R. § 1001.101(c)(1).

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a Federal . . . court . . . ;" or "when there has been a finding of guilt against the individual . . . by a Federal . . . court." Act, section 1128(i)(1), 42 U.S.C. § 1320a-7(i)(1); Act, section 1128(i)(2), 42 U.S.C. § 1320a-7(i)(2). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(3) is mandatory: the I.G. must impose it for a minimum period of five years. Act, section 1128(c)(3)(B), 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 December 6, 2006, in the United States District Court for the Southern District of West Virginia, Petitioner Breton Lee Morgan, M.D., pleaded guilty to one felony charge of acquiring or obtaining possession of a controlled substance by misrepresentation, fraud, deception, and subterfuge, in violation of 21 U.S.C.§ 843(a)(3). I.G. Exs. 2, 3, 4, 5.

2. Final adjudication of guilt, judgment of conviction, and sentence based on that plea of guilty were imposed on Petitioner in the United States District Court on March 12, 2007, and recorded in its Judgment in a Criminal Case filed on March 14, 2007. I.G. Ex. 5; P. Ex. E.

3. On May 30, 2008, the I.G. notified Petitioner that he was to be excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years, based on the authority set out in section 1128(a)(3) of the Act. I.G. Ex. 1.

4. Petitioner perfected his appeal from the I.G.'s action by filing a hearing request on June 10, 2008.

5. The adjudication of guilt, judgment of conviction, and sentence described above in Findings 1 and 2 constitute a felony conviction within the meaning of sections 1128(a)(3) and 1128(i)(1) and (2) of the Act, and 42 C.F.R. § 1001.2.

6. The conduct that resulted in Petitioner's conviction described above in Findings 1 and 2 related to fraud. I.G. Exs. 2, 3, 5.

7. The conduct that resulted in Petitioner's conviction described above in Findings 1 and 2 related to the delivery of a health care item or service. I.G. Exs. 2, 3.

8. The conduct that resulted in Petitioner's conviction described above in Findings 1 and 2 occurred after August 21, 1996. I.G. Exs. 2, 3, 4; P. Ex. E.

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

10. There are no disputed issues of material fact and summary affirmance 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

The four essential elements necessary to support an exclusion based on section 1128(a)(3) of the Act are: (1) the individual to be excluded must have been convicted of a felony offense; (2) the felony offense must have been based on conduct relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the felony offense must have been for conduct in connection with the delivery of a health care item or service, *or* the felony offense must have been with respect to any act or omission in a health care program operated by or financed in whole or in part by any federal, state, or local government agency; and (4) the felonious conduct must have occurred after August 21, 1996. *Andrew D. Goddard*, DAB No. 2032 (2006); *Erik D. DeSimone, R.Ph.*, DAB No. 1932 (2004); *Jeremy Robinson*, DAB No. 1905 (2004); *Morganna Elizabeth Allen*, DAB CR1479 (2006); *Theresa A. Bass*, DAB CR1397 (2006); *Michael Patrick Fryman*, DAB CR1261 (2004); *Golden G. Higgwe, D.P.M.*, DAB CR1229 (2004); *Thomas A. Oswald, R.Ph.*, DAB CR1216 (2004); *Katherine Marie Nielsen*, DAB CR1181 (2004).

Petitioner does not deny the fact of his felony conviction, its nexus to the delivery of health care items and services, and the period of time when his felonious conduct occurred. He does not argue that his one-count conviction is insufficient to satisfy the first, third, and fourth essential elements set out above. Petitioner's Answer Brief (P. Ans. Br.) at 1-2; Petitioner's Response Brief (P. Resp. Br.) at 1. In any case, those three essential elements are demonstrated in the United States District Court records before me. I.G. Exs. 3, 4, 5; P. Ex. E.

Petitioner admits here what he confessed in court: that he accepted drugs from manufacturers' representatives as samples to be given *gratis* to his patients, but took them himself. Petitioner asserts — and there is no evidence to suggest otherwise — that he did not sell or attempt to sell the hydrocodone he obtained for his own use by leading the pharmaceutical companies to believe that he intended to offer them to his patients as samples, and at no charge. What Petitioner does contest is the second essential element, the relation of the conduct underlying his conviction to "fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." The statutory language, argues Petitioner, is so structured as to require that any felony conviction based on any of the alternative terms — an act of fraud, or of theft, or of embezzlement, or of breach of fiduciary duty — must involve financial misconduct before it can fall within the reach of section 1128(a)(3). But that argument cannot succeed in the face of at least three substantial objections.

First, the congruence of the language of the statute forbidding the felonious conduct for which Petitioner was convicted and the language of section 1128(a)(3) makes section 1128(a)(3) applicable — at least arguably — as a matter of law. The statute on which Petitioner was convicted provides that:

> It shall be unlawful for any person knowingly or intentionally —
>
> (3) to acquire or obtain possession of a controlled substance by
>
> misrepresentation, fraud, forgery, deception, or subterfuge.

21 U.S.C. § 843(a)(3).

There is no requirement of a financial exchange, of a financial motive, or of a financial profit or loss, for the offense to be complete. On the other hand, the requirement that the controlled substance be obtained by some form of false representation is central to the offense. The crime proscribed by 21 U.S.C. § 843(a)(3) is by its definition the purest form of *crimen falsi*. Thus, any violation of 21 U.S.C. § 843(a)(3) must necessarily involve a fraudulent act as contemplated by the first alternative term in section 1128(a)(3)'s second essential element, particularly given this forum's adaption of a definition of "fraud" as "a knowing misrepresentation of the truth or concealment of a

material fact to induce another to act to his or her detriment." *Mohammad A. Adas, M.D.*, DAB CR1202 (2004).

This point is important in considering the second substantial objection to Petitioner's argument. This second objection is based on the well-understood principle that the I.G.'s authority to exclude entities and individuals derives from twin remedial imperatives: the protection of federal funds and program beneficiaries from untrustworthy individuals and the deterrence of health care fraud. *Jeremy Robinson*, DAB No. 1905; *Joann Fletcher Cash*, DAB No. 1725, at 18, 15 (2000); *Larry White, R. Ph.*, DAB No. 1346 (1992). *See also* S. Rep. No. 109, 100th Cong., 1st Sess. (1987), *reprinted in* 1987 U.S.C.C.A.N. 682, 686. When Congress added section 1128(a)(3) in 1996, it again focused upon the desired deterrent effect: "greater deterrence was needed to protect the Medicare program from providers who have been convicted of health care fraud felonies . . . ." H.R. Rep. 496(I), 104th Cong., 2nd Sess. (1996), *reprinted in* 1996 U.S.C.C.A.N. 1865, 1886. The statute's broad target comprises crimes of falseness, deceit, or dishonesty. To read that statute so as to limit its reach, as Petitioner argues, only to crimes of falseness, deceit, or dishonesty involving money would be unreasonable in light of its clear purpose and clearer goal. And it may be helpful to note that because the exclusionary authority is remedial rather than criminal, the narrow reading of statutory language usually required of criminal laws is not required here.

Finally, although there may be good reason to rely upon them with a measure of caution, the decisions of the Departmental Appeals Board (Board) and the Administrative Law Judges (ALJs) of this forum do not support Petitioner's argument. When medical professionals, pharmacists, and caregivers have been convicted of dishonestly diverting prescription medications to their own illicit use, the Board and ALJs have never asked whether a financial exchange was involved before applying section 1128(a)(3). *Kevin J. Bowers*, DAB No. 2143 (2008); *Andrew D. Goddard*, DAB No. 2032; *Kenneth M. Behr*, DAB No. 1997 (2005); *Eric D. DeSimone*, DAB No. 1932; *Danielle Lyn Timkovich*, DAB CR1793 (2008); *John Shell*, DAB CR1725 (2008); *Kevin J. Bowers*, DAB CR1661 (2007); *James Rosselit, Jr.*, DAB CR1477 (2006); *Dorothy Jane Vultaggio, a/k/a Dorothy J. Voltaggio*, DAB CR1448 (2006); *Theresa A. Bass*, DAB CR1397. Now, it must be noted that in the cited cases (and in many more, of which the cited cases are representative) the Board and the ALJs were not asked to rule on the precise point Petitioner has raised here. Nevertheless, there appears nowhere in any of the cases the hint or suggestion that the reach of section 1128(a)(3) is limited to crimes involving financial or monetary gain or loss. For that reason, and for the reasons set out in my discussion of the first two objections to Petitioner's argument, I decline to read such a limitation into the statute.

The five-year period of exclusion proposed in this case is the absolute minimum required by section 1128(c)(3)(B) of the Act. As a matter of law it is not unreasonable, and neither the Board nor I can reduce it. *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002); 42 C.F.R. § 1001.2007(a)(2).

Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts. *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). The material facts in this case are undisputed and unambiguous. They support summary disposition as a matter of settled law. This Decision issues accordingly.

VI. Conclusion

For the reasons set out above, the I.G.'s Motion for Summary Affirmance should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Breton Lee Morgan, M.D., from participation in Medicare, Medicaid, and all other federal health care programs for a term of five years, pursuant to the terms of section 1128(a)(3) of the Act, is sustained.

/s/
Richard J. Smith
Administrative Law Judge