Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
William Johnson, M.D.,	)	Date: November 25, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-453
	)	Decision No. CR2039
The Inspector General.	)	
	)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, William Johnson, M.D., from participating in Medicare, Medicaid, and all federal health care programs for a period of five years. I find that the I.G. is authorized to exclude Petitioner pursuant to Section 1128(a)(1) of the Social Security Act (Act), and that the five-year exclusion imposed by the I.G. is the minimum period of exclusion mandated by the Act.

I. BACKGROUND

The I.G. notified Petitioner by letter dated April 30, 2009, that as a result of his conviction in the Circuit Court of Cook County, Illinois, of a criminal offense related to the delivery of an item or service under the Medicare, Medicaid, or a state health care program, he was being excluded from Medicare, Medicaid, and all other federal health care programs for a period of five years. Petitioner requested a hearing by letter dated May 12, 2009.

I held a prehearing conference, by telephone, on July 7, 2009, which is memorialized in my Order dated July 8, 2009. At the conference, both Petitioner and the I.G. agreed that this matter could be decided on the basis of written submissions and that an in-person hearing was unnecessary. I set a schedule for the submission of briefs and documentary evidence, but I allowed that after reviewing the I.G.'s brief, if Petitioner reconsidered the necessity of an in-person hearing, he could raise it in his brief. Petitioner did not subsequently request an in-person hearing.

The I.G. submitted a brief (I.G. Br.) accompanied by eight exhibits (I.G. Exs.) 1-8. Petitioner submitted a brief in response (P. Br.) accompanied by four exhibits (P. Exs.) 1-4. The I.G. submitted a reply brief (I.G.Reply). Neither party objected to the exhibits of the other, and I admit I.G. Exs. 1-8 and P. Exs. 1-4.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Applicable law

Section 1128(a)(1) of the Act requires the Secretary of Health and Human Services (Secretary) to exclude from participation in Medicare, Medicaid, and all other federal health care programs, any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under the Medicare or Medicaid programs. 42 U.S.C. § 1320a-7(a)(1).

Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary is provided by Section 1128(f) of the act (42 U.S.C. § 1320a-7(f)).

An exclusion imposed under Section 1128(a)(1) must be for a period of at least five years. Act, Section 1128(c)(3)(B); 42 U.S.C. § 1320a-7(c)(3)(B). Pursuant to 1128(c)(3)(B) of the Act, no exclusion based on Section 1128(a)(1) may be for less than five years. *See also* 42 C.F.R. § 1001.102(b).

Conviction is defined by the Act as follows: (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court; (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court; (3) when a plea of guilty or *nolo contendere* by the individual or entity has been accepted by a Federal, State, or local court; or (4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld. Act, Section 1128(i); 42 U.S.C. § 1320a-7(i).

42 C.F.R. § 1001.2007(a)(1)(i) grants an ALJ the authority to address whether a legal basis for the imposition of an I.G. sanction exists, and 42 C.F.R. § 1001.2007(a)(1)(ii) grants an ALJ the authority to address whether the length of the exclusion imposed is reasonable. However, where the exclusion imposed under Section 1128(a)(1) of the Act is for five years, that is the minimum, mandatory period of exclusion contemplated by the Act, the ALJ does not have the authority to consider whether the length of the exclusion is unreasonable. 42 C.F.R. § 1128(c)(3)(B).

B. Issue

The legal issues before me in this case are:

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 and Discussion

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding in italics and bold below as a separate heading. I discuss each Finding in detail.

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

2. Summary disposition is appropriate in this case.

Petitioner has a right to notice and a hearing pursuant to 1128(f) of the Act. Petitioner's request for a hearing was timely filed, and it is properly before me.

Petitioner has a right to a hearing before an ALJ pursuant to 42 C.F.R. § 1005.2. Either party may waive appearance at an in-person hearing and submit written argument and documentary evidence for ALJ review. 42 C.F.R. § 1005.6(b)(5). Or, the ALJ may resolve a case by summary judgment. 42 C.F.R. § 1005.4(b)(12). Summary judgment is appropriate and no hearing is required when 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 when the moving party must prevail 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 disposition must allege facts which, if true, would refute the facts relied upon by the moving party. *See* Fed. R. Civ. P. 56(c); *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992).

Summary judgment is appropriate in this case. Petitioner does not dispute any issue of material fact. In fact, Petitioner concedes the fact of his conviction. P. Br. at 2. Moreover, Petitioner and the I.G. averred that this matter could be decided on the basis of written submissions and that an in-person hearing was unnecessary. As there are no material facts in dispute, and because the parties have requested it, I decide this case based solely on the written arguments and documentary evidence.

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

Petitioner is a licensed physician practicing in the State of Illinois. I.G. Ex. 5. In September 2005, Petitioner was charged with one count of public vendor fraud in excess of $500,000, and one count of theft in excess of $500,000. I.G. Ex. 6, at 1-2. Petitioner was alleged to have been involved in a scheme to submit "false billing invoices" to the Illinois Department of Public Aid. *See* I.G. Ex. 6. The Illinois Department of Public Aid was the agency responsible for administering the Medicaid program in Illinois. On September 4, 2008, petitioner pleaded guilty in the Circuit Court of Cook County, Illinois to one count of public aid vendor fraud less than $150, which is a misdemeanor. I.G. Ex.2 Petitioner was sentenced to 24 months probation and ordered to pay $146,000 in restitution to the Illinois Department of Healthcare and Family Services.* I.G. Ex.7, at 2.

The I.G. relies on Section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. In order to sustain Petitioner's exclusion from participation in Federal health care programs pursuant to Section 1128(a)(1), Petitioner must have been convicted of a criminal offense as defined at Section 1128(i) of the Act; and the criminal offense must be related to the delivery of an item or service under title XVIII (Medicare) or under any state health care program (e.g., Medicaid).

Petitioner concedes that he was convicted in the Circuit Court of Cook County, Illinois of vendor fraud, and that his conviction falls within the definition of conviction in the Act. P. Br. 1, 2. And, it is clear that Petitioner's conviction was related to the delivery of and item or service under Medicaid, because his conviction was for causing false billing invoices to have been submitted to the Illinois Medicaid Program. Moreover, Petitioner agreed to pay restitution to the Illinois Medicaid program in the amount of $146,000. I.G. Ex. 7, at 2. Therefore there is a basis for Petitioner's exclusion from Federal healthcare programs.

4. Petitioner's exclusion is mandatory pursuant to 1128(a)(1)and he is therefore not subject to permissive exclusion pursuant to Section 1128(b) of the Act.

But Petitioner argues, rather than requiring his exclusion pursuant to Section 1128(a)(1), his conviction "… more aptly falls under Section 1128(b)(1) of the Act." P.Br. 4. Petitioner argues that his exclusion should fall under Section 1128(b)(1) of the Act because he was convicted of a misdemeanor fraud, the I.G. should have applied the permissive exclusion criteria of Section 1128(b)(1)(A) of the Act. Pursuant to this section of the Act, the I.G. has discretion to fix a period of exclusion at three years unless aggravating or mitigating factors for a basis for shortening or lengthening that period. 42 C.F.R. § 1001.201(b)(1).

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* The Illinois Department of Public Aid was renamed.

Petitioner's argument is unavailing. Section 1128(a) does not exclude misdemeanors from those offenses that subject a person to mandatory exclusion, it matters only that the conviction was program-related. *Travers v. Sullivan*, 801 F. Supp. 394, at 405 (E.D.Wash. 1992). And, it is has been discussed often in the decisions of this forum that when a conviction falls into the categories enumerated in both the "permissive statute" 1128(b)(1), and the "mandatory statute" 1128(a)(1), the mandatory period required by 1128(a)(1) must be imposed and neither the ALJ nor the I.G. may proceed under any other provision. *Jay Phillip Parker*, DAB CR1853 (2008); *Scott D. Augustine*, DAB No. 2043 (2006); *James Randall Benham*, DAB No 2042 (2006); *Lorna Fay Gardener*, DAB No. 1733 (2000). Because, in this matter there is no dispute that Petitioner's misdemeanor conviction was program-related, the application of Section 1128(a)(1) is inescapable.

5. Petitioner's exclusion for a period of five years is the mandatory minimum period as a matter of law.

An exclusion under Section 1128(a)(1) of the Act must be for a minimum mandatory period of five years, as set forth in Section 1128(c)(3)(B) of the Act:

> Subject to subparagraph (G), in the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years. . . .

When the I.G. imposes an exclusion for the mandatory five-year period, the reasonableness of the length of the exclusion is not an issue I may decide. 42 C.F.R. § 1001.2007(a)(2). Aggravating factors that justify lengthening the exclusion period may be applied, however the five-year period of exclusion is a mandatory minimum. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid. As a result of Petitioner's program-related conviction, the I.G. was required to exclude him for at least five years.

III. CONCLUSION

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act mandate that Petitioner be excluded from Medicare, Medicaid, and all federal health care programs, for a minimum, mandatory period of five years because of his conviction of a criminal offense related to the delivery of an item or service under Medicaid. I conclude therefore, that I.G. had a basis for the exclusion, and I conclude that the five-year exclusion imposed by the I.G. is the minimum period of exclusion mandated by the Act.

/s/
Alfonso J. Montaño
Administrative Law Judge