The Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Robert L. Nold, M.D.,	)	Date: January 13, 2010
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-690
	)	Decision No. CR2054
The Inspector General.	)	
	)	

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Disposition that, if granted, would affirm the I.G.'s determination to exclude Petitioner *pro se* Robert L. Nold, 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 section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). The facts in this case mandate the five-year exclusion, and for that reason I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

Petitioner *pro se* Robert L. Nold, M.D. practiced medicine in the State of Kentucky. Beginning in 2003, he took part in a scheme to sell samples of prescription medications which he obtained in his capacity as a physician. He accomplished his part in the scheme by diverting the samples to a local pharmacy, where the samples were repackaged and resold to their ultimate users, some of whom were Medicare or Medicaid beneficiaries.

Federal law-enforcement authorities became aware of the scheme, and eventually Petitioner and his attorney negotiated an arrangement whereby Petitioner, on October 6, 2008, pleaded guilty in the United States District Court for the Western District of Kentucky to one count of Health Care Fraud, in violation of 18 U.S.C. § 1347, and one

count of the Sale or Trade of Prescription Drug Samples, in violation of 21 U.S.C. §§ 331(t), 333(b)(1)(B), and 353(c)(1). He also agreed to the forfeiture provisions of 18 U.S.C. § 982(a)(7). Petitioner's pleas were accepted, he was adjudged guilty, and was sentenced in the same proceeding.

On June 30, 2009, the I.G. notified Petitioner that he was to be excluded from participation in Medicare, Medicaid and all Federal health care programs pursuant to the terms of section 1128(a)(1) of the Act for the mandatory minimum period of five years. Petitioner timely sought review of the I.G.'s action by his *pro se* letter of July 1, 2009.

I convened a telephonic prehearing conference on September 18, 2009, pursuant to 42 C.F.R. § 1005.6, in order to discuss procedures for addressing the case. By Order of that date, I established a schedule for the submission of documents and briefs. All briefing is now complete, and the record in this case closed on December 31, 2009.

The evidentiary record on which I decide this case contains six exhibits proffered by the I.G. and marked I.G. Exhibits 1-6 (I.G. Exs. 1-6), and one exhibit proffered by Petitioner and marked Petitioner's Exhibit 1 (P. Ex.) 1. In the absence of objection, I admit I.G. Exs. 1-6 and P. Ex. 1.

II. Issues

The 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)(1) of the Act; and

2. Whether the proposed five-year period of exclusion is unreasonable.

Both issues must be resolved in favor of the I.G.'s position. Because his predicate conviction has been established, section 1128(a)(1) of the Act mandates Petitioner's exclusion. A five-year period of exclusion is reasonable as a matter of law, since it is the minimum period 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)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the mandatory exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any "individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII (Medicare) or under any

State health care program." The terms of section 1128(a)(1) are restated in regulatory language at 42 C.F.R. § 1001.101(a). This statutory provision makes no distinction between felony convictions and misdemeanor convictions as predicates for mandatory exclusion.

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a Federal . . . court," (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); or "when a plea of guilty . . . by the individual . . . has been accepted by a Federal . . . court," (section 1128(i)(3) of the Act, 42 U.S.C. §§ 1320a-7(i)(1)-(3)). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based in 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 guilty plea of October 6, 2008, in the United States District Court for the Western District of Kentucky, Petitioner Robert L. Nold, M.D., was found guilty of one count of the criminal offense of Health Care Fraud, in violation of 18 U.S.C. § 1347, and one count of the criminal offense of Sale or Trade of Prescription Drug Samples, in violation of 21 U.S.C. §§ 331(t), 333(b)(1)(B), and 353(c)(1). I.G. Exs. 2-6.

2. The guilty plea, the finding of guilt, and the judgment of conviction as to Petitioner's violations of 18 U.S.C. § 1347 and 21 U.S.C. §§ 331(t), 333(b)(1)(B), and 353(c)(1) 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 Petitioner's conviction, as noted above in Findings 1 and 2 above, and the delivery of an item or service under the Medicare and Medicaid health care programs. I.G. Exs. 2-6. *Berton Siegel, D.O.*, DAB No. 1467 (1994).

4. By reason of Petitioner's conviction, a basis exists for the I.G.'s determination to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs, pursuant to section 1128(a)(1) of the Act.

5. 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).

6. 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

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).

These two essential elements are conclusively established by the District Court records. Those records include a 15-page memorandum reflecting the plea agreement, the first three pages of which detail the process by which Petitioner took part in the scheme (I.G. Ex. 2); the Indictment to which Petitioner pleaded guilty, two counts of which recite similar details and the first count of which is expressly linked to the Medicare and Medicaid programs (I.G. Ex. 4); and a transcript of the proceedings on October 6, 2009, during which Petitioner acknowledged his role in the scheme and specifically acknowledged its effect on the Medicare and Medicaid programs (I.G. Ex. 6, at 6-7). The I.G. has proved the two essential elements.

Moreover, while I find the required nexus and common-sense connection between Petitioner's criminal acts and the protected programs present here as a matter of fact, *Berton Siegel, D.O.*, DAB No. 1467, I believe that Petitioner's conviction for violating 18 U.S.C. § 1347 is a program-related crime as a matter of law.

Petitioner admits his conviction here, as he admitted his crimes in the District Court. P. Ans. Br. at 1; P. Ex. 1. The core of Petitioner's *pro se* defense to the proposed exclusion is set out fully in his then-attorney's letter to the I.G. on April 2, 2009. P. Ex. 1. That defense rests on the assertion that Petitioner's role in the scheme was minimal, and that he acted chiefly as an aider and abetter of other – and presumably more culpable – participants. Further, Petitioner argues that the five-year exclusion is too long, and thus unreasonable, because of his present age and his belief that he will be too old to practice medicine by the time it ends.

Whatever the quantum of Petitioner's actual culpability in the three-year-long scheme to repackage and resell for a personal gain of $649,600 the drugs he received *gratis* as samples, the fact remains that he may not now challenge his plea-based and counsel-assisted conviction on two felony charges related to the delivery of items under the protected programs. To the extent that Petitioner attempts to do so, it is well-settled that such collateral attacks are simply not permitted in exclusion proceedings. 42 C.F.R. § 1001.2007(d); *Johnnelle Johnson Bing*, DAB No. 2251 (2009); *Lyle Kai, R. Ph.*, DAB No. 1979 (2005).

And assuming *arguendo* that Petitioner was convicted as an aider and abetter, rather than as a principal (an assertion not supported by the citation of 18 U.S.C. § 2 at any point whatsoever in the District Court's records, and implicitly contradicted by the language of both charges asserting that he was "aided and abetted by others . . ."), there are three very serious reasons why that argument gains Petitioner nothing. First, by its terms 18 U.S.C. § 2 is pellucid: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." Second, and as the I.G. correctly points out, this forum does not distinguish between convictions based on conduct that aids and abets others in crimes against the protected programs and on convictions based on crimes committed directly against those programs. *Nina Joanne Gram a/k/a Nina Regan*, DAB CR1168 (2004). But the most comprehensive answer to this part of Petitioner's defense lies in the language of section 1128(a)(1) of the Act: the operant words of the statute are "a criminal offense related to the delivery of an item or service . . . ." Whether his actions were those of an aider and abetter or those of a principal, they were incontestably "related" to the scheme to sell, repackage, and resell the drug samples, and thus squarely within the scope of section 1128(a)(1).

Nor can I accept Petitioner's other arguments and reduce the period of Petitioner's exclusion. Once an individual has been convicted of a criminal offense within the meaning of section 1128(a), including 1128(a)(1), exclusion from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of five years is mandatory and reasonable as a matter of law. The five-year mandatory minimum period of exclusion cannot be shortened. Act, section 1128(c)(3)(B). *Ioni D. Sisodia, M.D.*, DAB No. 2224 (2008); *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002).

Because Petitioner appears here *pro se*, I have taken care in reading his brief, his exhibit, and his request for hearing, guided by the Departmental Appeals 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 for any arguments or contentions that might raise a valid defense to the proposed exclusion. I have found nothing that could be so construed.

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). The material facts in this case are undisputed, clear, and unambiguous. They support summary disposition as a matter of law, and this Decision is issued accordingly.

VI. Conclusion

For the reasons set out above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Robert L. Nold, 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)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), is thereby affirmed.

/s/
Richard J. Smith
Administrative Law Judge