

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Louis Mathews,)	DATE: November 24, 1995
Petitioner,)	
- v. -)	Docket No. C-95-104
The Inspector General.)	Decision No. CR403

DECISION

This case is before me on the exclusion of Louis Mathews (Petitioner) from participation in the Medicare, Maternal and Child Health Services Block Grant, Block Grants to States for Social Services programs, and from the State health care programs described in section 1128(h) of the Social Security Act (Act) (hereafter, I refer to all programs, other than Medicare, as "Medicaid") for a period of three years, pursuant to the permissive exclusion provisions of section 1128(b)(3) of the Act.

In a letter dated February 3, 1995 (Initial Notice), the Inspector General (I.G.) informed Petitioner that he would be excluded pursuant to the mandatory exclusion provision of section 1128(a)(1) of the Act. Petitioner requested a hearing and the case was assigned to me. I conducted a prehearing conference in this case on April 21, 1995.

As I noted in my Prehearing Order of April 25, 1995, at the prehearing conference, counsel for the I.G. informed Petitioner that the Initial Notice was incorrect and moved to either issue a new notice letter or amend the Initial Notice to reflect that Petitioner had been excluded for a period of three years pursuant to section 1128(b)(3) of the Act. Petitioner consented to the I.G.'s motion to amend the Initial Notice, stating that there was no need for the I.G. to issue a new notice letter.

On May 10, 1995, the I.G. issued an amended notice (Amended Notice) that made clear that Petitioner was being excluded for a period of three years pursuant to section 1128(b)(3) of the Act based upon Petitioner's conviction of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. I.G. Ex. 6. The Amended Notice further stated that Petitioner's three-year exclusion period was arrived at by taking into account the fact of Petitioner's conviction and the lack of any aggravating or mitigating factors.

As the parties have agreed that there are no facts of decisional significance genuinely in dispute in this case, and that the only matters to be decided are the legal implications of the undisputed facts, the parties wished to proceed by filing briefs and exhibits and I have decided this case on the basis of the parties' submissions.¹

I find that the record in this case establishes that Petitioner was properly excluded from participation in the Medicare and Medicaid programs for a period of three years pursuant to section 1128(b)(3) of the Act.

APPLICABLE LAW

This case is controlled by section 1128(b)(3) of the Act, which provides that:

The Secretary may exclude the following individuals and entities from participation in any program under title XVIII and may direct that the following individuals and entities be excluded from participation in any State health care program:

. . . (3) CONVICTION RELATING TO CONTROLLED SUBSTANCE. - Any individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. . . .

¹ I refer to the parties' exhibits as P. Ex. (number) and I.G. Ex. (number), respectively. Petitioner submitted nine exhibits in conjunction with his brief. I receive P. Ex. 1 through 9, inclusive, into evidence. The I.G. submitted eight exhibits in conjunction with her brief. I receive I.G. Ex. 1 through 8, inclusive, into evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period relevant to this case, Petitioner was a Physician Assistant licensed in the State of California. P. Ex. 3.
2. On March 31, 1993, the State of California filed a criminal complaint against Petitioner, charging him with four separate felony counts as follows: 1) knowingly prescribing a controlled substance (codeine) without any good faith belief that it was for a medical purpose; 2) unlawful furnishing by prescription; 3) uttering a forged prescription for codeine; and 4) practicing medicine without a license. I.G. Ex. 7.
3. On July 5, 1994, Petitioner entered into a plea agreement in the Superior Court of California, County of San Bernadino, whereby the court accepted Petitioner's plea of nolo contendere to a misdemeanor count of prescribing without a medical purpose (formerly the felony contained in count I of the complaint) and the court agreed to dismiss the remaining counts against Petitioner. P. Ex. 5; I.G. Ex. 1, 2, 4.
4. The section of the California law to which Petitioner pled nolo contendere spells out the legal requirements for prescribing and dispensing controlled substances, and details the penalty for knowing violation of these requirements. I.G. Ex. 1 - 4.
5. At the time he entered his plea, Petitioner was explicitly informed by the State judge presiding over his plea that Petitioner could be excluded as a provider in the Medicare or Medicaid programs. P. Ex. 5.
6. Petitioner was made aware that his plea agreement would bar only the State of California Attorney General's Office taking further administrative action against him and that his plea agreement would not preclude a federal entity from excluding him from Medicare or Medicaid. P. Ex. 5; I.G. Ex. 4.
7. Petitioner was sentenced by the State court to 240 hours of community service, \$1000 restitution, and probation for three years. I.G. Ex. 2, 4.
8. Petitioner's plea of nolo contendere and the California court's acceptance of that plea constitutes a "conviction" for purposes of section 1128(i)(1) and (3) of the Act. Act, section 1128(i)(1) and (3); Findings of Fact and Conclusions of Law (Findings) 3, 7.

9. The permissive exclusion provisions of section 1128(b)(3) do not require that a conviction have a nexus to the Medicare or Medicaid programs, they require only that a conviction be related to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance. Act, section 1128(b)(3).

10. Petitioner's conviction is related to the unlawful prescription or dispensing of a controlled substance. Findings 2 - 4; I.G. Ex. 1 - 4, 7; P. Ex. 5.

11. An exclusion imposed pursuant to section 1128(b)(3) of the Act will be for a period of three years, unless specified aggravating or mitigating factors are present. 42 C.F.R. § 1001.401(c)(1).

12. An aggravating factor that may be used as a basis for lengthening a period of exclusion above three years is that the acts that resulted in the conviction or similar acts were committed over a period of one year or more. 42 C.F.R. § 1001.401(c)(2)(i).

13. An aggravating factor that may be used as a basis for lengthening a period of exclusion above three years is that the acts that resulted in conviction or similar acts had a significant adverse physical, mental, or financial impact on program beneficiaries or other individuals in the Medicare or State health care programs. 42 C.F.R. § 1001.401(c)(2)(ii).

14. An aggravating factor that may be used as a basis for lengthening a period of exclusion above three years is that the sentence imposed by the court included incarceration. 42 C.F.R. § 1001.401(c)(2)(iii).

15. An aggravating factor that may be used as a basis for lengthening a period of exclusion above three years is that the convicted individual or entity has a prior criminal, civil, or administrative sanction record. 42 C.F.R. § 1001.401(c)(2)(iv).

16. The I.G. has not alleged that any of the aggravating factors that are specified in the regulations are present in this case.

17. The record in this case does not support the presence of any of the aggravating factors. I.G. Ex. 1 - 8; P. Ex. 1 - 9.

18. Mitigating factors that may be used as a basis for decreasing the period of exclusion is that the individual's or entity's cooperation with federal or

State officials resulted in others being convicted or excluded from Medicare or Medicaid, or the imposition of a civil monetary penalty against others. 42 C.F.R. § 1001.401(c)(3)(i)(A) and (B).

19. A mitigating factor that may be used as a basis for decreasing the period of exclusion is that alternative sources of the type of health care items or services furnished by the individual or entity are not available. 42 C.F.R. § 1001.401(c)(3)(ii).

20. Petitioner has alleged that information he gave to the I.G. office in San Diego in 1990 led to the arrest and conviction of another individual.

21. There is nothing in the record other than Petitioner's assertion to support that Petitioner's cooperation with the I.G.'s office led to the arrest and conviction of another individual.

22. The record in this case does not support the presence of any of the mitigating factors. I.G. Ex. 1 - 8; P. Ex. 1 - 9.

23. Petitioner was properly excluded for a period of three years pursuant to section 1128(b)(3). Findings 1 - 22.

24. There is no basis for either increasing or decreasing Petitioner's three-year exclusion. Findings 1 - 23.

25. Petitioner's contention that he recommended a treatment plan only, and did not unlawfully prescribe or dispense a controlled substance, is a collateral attack on his conviction and is contradicted by the evidence of record. I.G. Ex. 1 - 8; P. Ex. 1 - 9; Douglas Schram, R.Ph., DAB 1372, at 2 - 3 (1992); Sonia M. Geourzoung, M.D., DAB CR286 (1993); Peter J. Edmonson, DAB 1330 (1990); Joel Fass, DAB CR349 (1994).

26. Petitioner may not use these proceedings to collaterally attack his conviction. Peter J. Edmonson, DAB 1330 (1992); Roger Littge, M.D., DAB CR302 (1994); Joel Fass, DAB CR349 (1994).

27. Petitioner was properly excluded for three years, pursuant to section 1128(b)(3) of the Act. Findings 1 - 26.

PETITIONER'S ARGUMENTS

Petitioner maintains that he acted in accord with the instructions and general policies of his supervising physician when he wrote the prescription in question. Therefore, he believes that he did not unlawfully distribute a controlled substance as charged by the State.

Petitioner contends that the mitigating factor at 42 C.F.R. § 1001.401(c)(3)(i)(A) is applicable to this case because he allegedly provided information to the I.G. which resulted in the conviction of another individual.

Petitioner argues that the State Attorney General made an assurance to him in the context of his plea bargain that is binding upon the I.G. and would preclude the I.G. from excluding him. Finally, Petitioner contends that a three-year suspension is unduly harsh when compared to the severity of the acts underlying his conviction.

DISCUSSION

The statute under which the I.G. seeks to exclude Petitioner -- section 1128(b)(3) of the Act -- requires, initially, that Petitioner have been convicted of a criminal offense.

Section 1128(i) of the Act provides that an individual will be deemed "convicted" under any of the following circumstances --

- (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
- (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 judgement of conviction has been withheld.

In the case at hand, sections 1128(i)(1) and (3) are applicable. Petitioner pled nolo contendere and the court accepted such plea and imposed a sentence. Therefore, Petitioner was convicted within the meaning of section 1128(i) of the Act.

As to the nature of Petitioner's offense, the record establishes that the court's acceptance of his plea of nolo contendere was based on Petitioner violating a California law which prohibits the prescribing or dispensing of a controlled substance without a proper medical basis. Findings 2 - 4. The record reveals that codeine was the controlled substance that Petitioner unlawfully and knowingly prescribed or dispensed without a proper medical basis. I.G. Ex. 1 - 4, 7; Findings 2 - 4, 10.

As to the term of Petitioner's exclusion, the controlling regulation, 42 C.F.R. § 1001.401(c) provides that "an exclusion imposed in accordance with this section will be for a period of 3 years, unless aggravating or mitigating factors listed in paragraphs (b)(2) and (b)(3) of this section form a basis for lengthening or shortening that period."

There are four aggravating factors in the regulations. The first two aggravating factors exist if the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more; or had a significant adverse physical, mental, or financial impact on program beneficiaries or other individuals or the Medicare/Medicaid programs. 42 C.F.R. § 1001.401(b)(2)(i) - (ii). The final two aggravating factors are present if the sentence imposed by the court included incarceration, or if the convicted individual has a prior criminal, civil, or administrative sanction record. 42 C.F.R. § 1001.401(b)(2)(iii) - (iv).

In this case, the I.G. has not alleged the existence of any aggravating factors, nor is there any evidence of aggravating factors. Findings 12 - 17.

The regulations set out two mitigating factors. It is a mitigating factor if the individual's cooperation with federal or State officials resulted in the conviction, exclusion, or imposition of a civil monetary penalty. 42 C.F.R. § 1001.401(b)(3)(i)(A) and (B). It is also a mitigating factor if alternative sources of the type of health care items or services furnished by the individual or entity are not available. 42 C.F.R. § 1001.401(c)(3)(B).

Petitioner alleged that his cooperation with I.G.'s San Diego office resulted in the conviction of another individual in 1990, but did not offer any documentation to support this contention. The burden is on the Petitioner to establish mitigating factors. Jose Ramon Castro, M.D., DAB CR259 (1993); James H. Holmes, DAB CR270 (1993); Joel Fass, DAB CR349 (1994). Petitioner has failed to meet that burden because he did not offer proof of his allegation and he failed to establish that his allegation, even if true, is in any way related to the events in this case. Moreover, Petitioner alleges that his cooperation happened in 1990 and he was not charged with his offense until 1993, which casts doubt upon his assertion. I.G. Ex. 1 - 4, 7. Accordingly, there is no mitigating factor. Findings 18 - 22.

Petitioner contends that he acted appropriately and that his conviction was based only on the recommendation of a treatment plan to a patient. I take Petitioner's contention to mean that he believes he was wrongfully convicted of an offense which he did not really commit. However, Petitioner may not use this forum to collaterally attack his conviction. Peter J. Edmonson, DAB 1330 (1992). The regulations specifically provide that, in circumstances such as this case, where the exclusion is based on the fact of conviction, ". . . the basis for the underlying determination is not reviewable and the individual or entity may not collaterally attack the underlying determination, either on substantive or procedural grounds." 42 C.F.R. § 1001.2007(d); Joel Fass, DAB CR349 (1994); Roger O. Littge, M.D., DAB CR302 (1994). Accordingly, I cannot consider Petitioner's contention that he was wrongfully convicted.

Petitioner argues that he should not be subject to an exclusion because the State Attorney General's Office agreed, as a condition of Petitioner's plea, not to initiate any adverse administrative action against him. The record reflects, however, that the State judge who accepted Petitioner's plea went to great lengths to ensure that Petitioner was made aware that he could still be subject to an exclusion based on action taken by federal authorities, such as the I.G. Findings 5 - 6. Moreover, even if I were to accept Petitioner's assertion as true, any such assurance made by a State attorney general would not be binding upon the I.G. Anthony Accaputo, Jr., DAB CR249 (1993), aff'd DAB 1416 (1993).

Finally, Petitioner contends that a three-year period of exclusion is unduly harsh. However, the three-year period of exclusion is mandated by regulation where, as here, there is a lack of aggravating or mitigating

factors. 42 C.F.R. § 1001.401(c)(1). I am bound by the regulations, and I have no authority to modify the three-year exclusion absent the existence of aggravating or mitigating factors. Roger O. Littge, M.D., DAB CR302 (1994).

CONCLUSION

Petitioner was properly excluded for a three-year period pursuant to section 1128(b)(3) of the Act.

/s/

Joseph K. Riotto
Administrative Law Judge