Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Bernard D. Kornell, M.D.,	)	Date: January 30, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-29
	)	Decision No. CR1893
The Inspector General.	)	
	)	

DECISION

Bernard D. Kornell, M.D. (Petitioner) appeals the decision of the Inspector General (I.G.), made pursuant to section 1128(a)(4) of the Social Security Act (Act), to exclude him from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner, and that the statute mandates a minimum five-year exclusion.

I. Background

The I.G. has excluded Petitioner from program participation for five years because Petitioner was convicted of a felony offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. I.G. Exhibit (I.G. Ex.) 1. Petitioner timely requested review. The parties agree that an in-person hearing is not required and that the matter may be resolved based on written submissions. I.G. Br. at 4; P. Br. at 2. The I.G. has submitted his brief with three exhibits attached, I.G. Exs. 1 - 3. Petitioner filed his brief (P. Br.) with no additional exhibits. In the absence of any objections, I admit into evidence I.G. Exs. 1 - 3. I also consider here the arguments presented in Petitioner's hearing request, which he did not repeat in his brief.

II. Issue

The sole issue before me is whether the I.G. had a basis for excluding Petitioner from participation in Medicare, Medicaid, and all federal health care programs. Because an exclusion under section 1128(a)(4) must be for a minimum period of five years, the reasonableness of the length of the exclusion is not an issue.

III. Discussion

A. Petitioner was convicted of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, within the meaning of section 1128(a)(4) of the Act.[1]

Section 1128(a)(4) of the Act requires that any individual or entity convicted of a felony criminal offense that occurred after the date of the enactment of the Health Insurance Portability and Accountability Act (August 21, 1996) "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance" be excluded from all federal health care programs.[2]

On May 4, 2007, Petitioner pled guilty in a Texas criminal court to obtaining from a legally registered pharmacist, by the use of a false and forged prescription, a controlled substance, Lorazepam, a third degree felony. The court accepted his plea and sentenced him to ten years probation and a $2500 fine. I.G. Exs. 1, 3. Notwithstanding the conviction, Petitioner asserts that his exclusion is not mandatory. He argues that his conviction related solely to possession and obtaining a controlled substance by fraud, which, in his view, is not related to the "unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." In order to reject this assertion, I need look no further than the language of Petitioner's felony conviction: he "unlawfully" obtained the controlled substance "by the use of a false and forged prescription." Petitioner's crime – on its face – thus plainly relates to the unlawful prescription of a controlled substance, so the I.G. has a basis for imposing the exclusion.

B. The statute mandates a five-year minimum period of exclusion, and mitigating factors may not be considered to reduce that period of exclusion.

An exclusion under section 1128(a)(4) 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 . . . .

---

[1] My findings of fact and conclusions of law are set forth, in italics and bold, in the discussion headings of this decision.

[2] "Federal health care program" is defined in section 1128B(f) of the Act as any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government, or any State health care program.

When the I.G. imposes an exclusion for the minimum mandatory five-year period, the reasonableness of the length of the exclusion is not an issue. 42 C.F.R. § 1001.2007(a)(2).

C. I have no authority to order the I.G. to grant Petitioner a waiver.

Finally, in his hearing request, Petitioner asserts that his Medicare and Medicaid patients will suffer if he is not allowed to participate in those programs, and requests a waiver under 42 C.F.R. § 1001.1801(b). That regulation authorizes the I.G. to grant or deny a state health care program's request that exclusion be waived "if the individual. . . is the sole community physician or the sole source of essential specialized services in a community." However, "[t]he decision to grant, deny, or rescind a request for a waiver is not subject to administrative or judicial review." 42 C.F.R. § 1001.1801(f); Act, section 1128(c)(3)(B).

Thus, any request for waiver must be made directly to the I.G. by a state health care program, not by Petitioner himself, and the I.G.'s determination with respect to any waiver request is not reviewable.

IV. Conclusion

For these reasons, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid, and all other federal health care programs, and I sustain the five-year exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge