**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Robert Kanowitz, D.P.M.,
(O.I. File Number 3-09-40161-9)

Petitioner

v.

The Inspector General,

Docket No. C-12-1086

Decision No. CR2702

Date: February 5, 2013

# DECISION

Petitioner, Robert Kanowitz, is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)) effective July 19, 2012, based upon his conviction of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. There is a proper basis for exclusion. Petitioner's exclusion for the minimum period[1] of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

## I. Background

The Inspector General (I.G.) for the Department of Health and Human Services (HHS) notified Petitioner by letter dated June 29, 2012, that he was being excluded from

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[1] Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

participation in Medicare, Medicaid, and all federal health care programs for a period of five years, the minimum statutory period. The I.G. advised Petitioner that he was being excluded pursuant to sections 1128(a)(1) and 1128(a)(3) of the Act. The section 1128(a)(1) exclusion was based on Petitioner's conviction in the Court of Common Pleas of Montgomery County, Pennsylvania, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. On October 16, 2012, the I.G. amended its June 29, 2012 notice letter and notified Petitioner that his exclusion is based solely on section 1128(a)(1) of the Act. I.G. Ex. 4.

Petitioner requested a hearing by an undated letter (Hearing Request) that was received at the Departmental Appeals Board on July 13, 2012. The case was assigned to me for hearing and decision. A prehearing telephone conference was convened on August 29, 2012, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence dated August 29, 2012. During the prehearing conference, the parties agreed that Petitioner's undated hearing request was timely; Petitioner did not waive an oral hearing; and the I.G. requested an opportunity to file a motion for summary judgment. Accordingly, I set a briefing schedule for the parties.

The I.G. filed a motion for summary judgment (I.G. Br.) on October 12, 2012, with a supporting memorandum and I.G. exhibits (I.G. Exs.) 1 through 3. On November 15, 2012, Petitioner filed a response to the I.G.'s motion for summary judgment (P. Response) with a number of unmarked documents consisting of the "Proposed Adjudication and Order of the State Board of Podiatry of the Commonwealth of Pennsylvania," which I have labeled Petitioner's exhibit (P. Ex.) 1, and ten other documents which I have labeled collectively as P. Ex. 2.[2] The I.G. filed a reply brief on December 11, 2012 with I.G. Ex. 4. No objections have been made to my consideration of any of the offered exhibits and all are admitted as evidence. Petitioner filed a letter dated January 23, 2013 with additional documents attached but unmarked which I treat as P. Ex. 3. On February 1, 2013, the I.G. moved for leave to reply to Petitioner's letter

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[2] I refer to the individuals who executed the documents filed by Petitioner that I have designated P. Ex. 2 by initials only. The documents filed by Petitioner include: a June 8, 2012 letter from Petitioner's patient JG; a June 5, 2012 email from NP, the Administrator of an assisted living facility; a May 1, 2012 letter from Petitioner's patient RP; a May 1, 2012 letter from a colleague SL; a June 6, 2012 letter from AV, the president of an assisted living facility; an undated letter from GD; a June 20, 2012 letter from LS, a billing office manager; a June 13, 2012 letter from DR, owner/managing director of a senior living facility; a June 7, 2012 letter from AV, director of a nursing home; and a June 9, 2012 letter from Petitioner's patient JJ.

with a reply. The motion for leave is granted and the I.G. sur-reply is accepted. The I.G. does not specifically object to my consideration of P. Ex. 3, however, the documents that comprise P. Ex. 3 are not relevant to any issue that I may decide, as discussed more fully hereafter, and P. Ex. 3 is not admitted as evidence.

## II. Discussion

### A. Applicable Law

Petitioner's rights to an administrative law judge (ALJ) hearing and judicial review of the final action of the HHS Secretary (Secretary) are provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)).

The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that is the basis for the exclusion. 42 C.F.R. § 1001.2007(c), (d). Petitioner bears the burden of proof and the burden of persuasion on any affirmative defenses or mitigating factors, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b).

### B. Issue

The Secretary has by regulation limited my scope of review to two issues:

> Whether there is a basis for the imposition of the exclusion; and
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> Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

### C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

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

**2. Summary judgment is appropriate in this case.**

There is no dispute that Petitioner timely requested a hearing; and I have jurisdiction to hear the case. Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The right to a hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. §§ 1001.2007(a) and 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified

by 42 C.F.R. § 1005.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). An ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12). Summary judgment is appropriate, and no hearing is required where either: (1) no disputed issues of material fact exist and the only questions that must be decided involve application of law to the undisputed facts; or (2) the moving party prevails 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 judgment must allege facts, which, if true, would refute the facts that the moving party relied upon. *See, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. and Med. Ctr.*, DAB No. 1628, at 3 (1997) (holding in-person hearing required where non-movant shows material facts are in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also New Millennium CMHC*, DAB CR672 (2000); *New Life Plus Ctr.*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case. There is no dispute that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program and sentenced as described hereafter. The minimum period of exclusion is fixed by the Act. The issues that Petitioner raised must be resolved against him as a matter of law. Accordingly, summary judgment is appropriate.

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

On December 9, 2009, an investigating grand jury in the Court of Common Pleas, Montgomery County, Pennsylvania charged Petitioner, a podiatrist, with theft by deception, Medicaid fraud, and receiving stolen property. The charges were based on Petitioner submitting claims for nail avulsion, a surgical procedure involving partial removal of the toenail, when he was actually trimming patient's toenails and therefore billing Medicaid for services not rendered. I. G. Ex. 3 at 9-19. On November 22, 2010, Petitioner pled *nolo contendere* (no contest), pursuant to the terms of a plea agreement, to one count of theft by deception, in violation of 18 Pa. Cons. Stat. Ann. § 3922, and one count of Medicaid fraud, in violation of 62 Pa. Stat. Ann. § 1407(a)(9) both third-degree felonies. P. Response at 2; I. G. Exs. 2, 3. Petitioner was convicted pursuant to his plea; placed on probation for three years; and ordered to pay restitution of $36,000. I.G. Ex. 2 at 2.

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides:

> (a) MANDATORY EXCLUSION. The Secretary shall exclude the following individuals and entities from

> participation in any Federal health care program (as defined in section 1128B(f)):
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> > (1) Conviction of program-related crimes. Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program.

The elements that must be proven by I.G. for an exclusion pursuant to the statute are: (1) the individual or entity was convicted of a criminal offense, whether a felony or a misdemeanor; (2) the offense is related to the delivery of an item or service; and (3) the delivery of the item or service was under Medicare or a state health care program.

Pursuant to section 1128(i) of the Act, an individual is "convicted" of a criminal offense when: (1) a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; (2) there has been a finding of guilt in a federal, state, or local court; (3) a plea of guilty or no contest has been accepted in a federal, state, or local court; or (4) an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. In this case, the evidence shows that Petitioner pled *nolo contendere*, the plea was accepted, and a judgment of conviction was entered based on the accepted plea. Accordingly, I conclude that Petitioner was "convicted" as that term is defined by section 1128(i) of the Act for purposes of exclusion pursuant to section 1128(a)(1) of the Act, based on the court's acceptance of his no contest plea. CMS Ex. 2 at 1.

I also conclude that Petitioner's conviction is program-related within the meaning of section 1128(a)(1) of the Act and under the Medicaid program. Petitioner pled no contest to one count of Medicaid Fraud (count six), in violation of 62 Pa. Stat. Ann. § 1407(a)(9), a third-degree felony. P. Response at 2; I. G. Exs. 2, 3. This statute provides that it is unlawful for any person to submit a claim for a service or item which was not rendered by the provider. I G. Ex. 2; 62 Pa. Stat. Ann. § 1407(a)(9). Petitioner was convicted of Medicaid fraud, specifically the submission of a claim to Medicaid for services or items that were not rendered by Petitioner. Petitioner pled no contest to the charge that alleged he submitted claims to Americhoice and Keystone Mercy Health Plan, Pennsylvania Medicaid Health Maintenance Organizations, and Highmark, the Medicare Administrative Contractor. I. G. Ex. 3 at 9-10. Petitioner's no contest plea means that he accepted that the government could produce evidence to prove the charge. Petitioner was paid $155,770.52 by Medicare and Medicaid for nail avulsions allegedly performed on his patients between January 2005 and January 2008. I.G. Ex. 3 at 11. I conclude based on the undisputed facts that there is a clear "nexus or common-sense connection" here between Petitioner's criminal conduct and the delivery of an item or service under

Medicaid. *Timothy Wayne Hensley*, DAB No. 2044 (2006); *Lyle Kai, R.Ph.*, DAB No. 1979 (2005); *Berton Siegel, D.O.*, DAB No. 1467 (1994); *Thelma Walley*, DAB No. 1367 (1992); *Tanya Chuoke, R.N.*, DAB No. 1721 (2000). Accordingly, I conclude that elements of section 1128(a)(1) of the Act are satisfied, there is a basis for Petitioner's exclusion, and exclusion is required.

Petitioner argues that the evidence against him in the underlying case was false and that he pled *nolo contendere* for financial and personal reasons. P. Response at 1-2. Petitioner also admits that he did his own billing and did not keep up with billing changes and that was the cause of his legal problems. P. Response 1-2. Petitioner's arguments are collateral attacks on the underlying conviction. I may not review the underlying conviction and Petitioner may not collaterally attack or challenge the conviction in this proceeding. 42 C.F.R. § 1001.2007(d); *Peter J. Edmonson*, DAB No. 1330 (1992).

Petitioner has submitted statements from patients and other individuals attesting to his care and qualifications as a podiatrist. Recommendations concerning Petitioner's professional care and qualifications are not relevant to the case before me. Congress requires exclusion in this case under section 1128(a)(1) of the Act. The I.G. and I have no discretion not to exclude Petitioner.

**4. Pursuant to section 1128(c)(3)(B) of the Act, five years is the minimum period of exclusion pursuant to section 1128(a) of the Act.**

**5. Petitioner's exclusion for five years is not unreasonable as a matter of law.**

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years are mitigating factors considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c). The I.G. does not cite any aggravating factors in this case and does not propose to exclude Petitioner for more than the minimum period of five years. Therefore, the reasonableness of the period of the exclusion is not subject to my review.

I have concluded that Petitioner's exclusion is required by section 1128(a)(1) of the Act. Accordingly, the minimum period of exclusion is five years, and that period is not unreasonable as a matter of law.

Petitioner argues in his letter dated January 23, 2013, that the effective date of his exclusion from Medicare should be November 22, 2010, the date of his conviction and sentencing, and the effective date of his termination from participation in various private

insurance companies according to letters in P. Ex. 3. It is well established that I have no authority or discretion under the Act or regulations to adjust the beginning date of a period of exclusion. *Randall Dean Hopp*, DAB No. 2166, at 2 (2008); *Kevin J. Bowers*, DAB No. 2143, at 5 (2008); *Kailash C. Singhvi, M.D.*, DAB No. 2138, at 3 (2007); *Thomas Edward Musial*, DAB No. 1991, at 4-5 (2005).[3]

## III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years effective July 19, 2012.

/s/
Keith W. Sickendick
Administrative Law Judge

[3] Petitioner enclosed with his January 23, 2013 letter, a copy of a December 12, 2012 reconsideration decision from a Medicare contractor hearing officer upholding the initial decision to revoke Petitioner's participation in Medicare. Requests for review of such reconsideration decisions are submitted to and assigned to ALJs in my office for hearing and decision pursuant to 42 C.F.R. Parts 424 and 498. Out of an abundance of caution to ensure that Petitioner's rights to ALJ review are not prejudiced, I have referred Petitioner's January 23, 2013 letter and enclosures for docketing as a request for review of the December 12, 2012 Medicare contractor's reconsideration decision.