Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Keith Nisonoff,

Petitioner,

v.

The Inspector General.

Docket No. C-13-772

Decision No. CR2927

Date: September 18, 2013

DECISION

This matter is before me in review of the Inspector General's (I.G.'s) determination to exclude Petitioner *pro se* Keith Nisonoff from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G.'s determination to exclude Petitioner is based on the terms of section 1128(a)(3) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(3). The facts of this case mandate the imposition of at least the mandatory minimum five-year exclusion, and so I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

HealthTrans is a Greenwood Village, Colorado, healthcare benefits-management business. HealthTrans' activities include the operation of a pharmacy. Petitioner Nisonoff had been an employee of HealthTrans since 2007, and had been licensed as a pharmacist by the State of Colorado since 1992. His license had been placed under restrictions by the Colorado State Board of Pharmacy (CSBP) in 2001 and 2004 for irregularities involving controlled substances, and according to the CSBP, Petitioner violated the 2004 restriction by taking a position at HealthTrans without reporting that fact to the CSBP. I.G. Exs. 3, 4.

At around 10:00 AM on Wednesday, May 6, 2009, a HealthTrans supervisor named Kientz left the building for a brief walk. As Kientz was returning to the building, he encountered another HealthTrans employee in the parking lot. That employee was Petitioner, who was "visibly upset" and who wanted to talk. I.G. Ex. 2.

Nisonoff began an anxious conversation by telling Kientz that he'd done something wrong, but at first Nisonoff would not tell Kientz the details of the misconduct he was nervously admitting. As the conversation developed, however, Petitioner confessed that he had broken into the secure pharmacy area at HealthTrans and stolen drugs, and feared that he had been detected in the act by video surveillance equipment. I.G. Ex. 2.

Kientz escorted Nisonoff to the office of HealthTrans' vice president of human resources. There Petitioner confessed again. An investigation was conducted by several HealthTrans officers and managers, and it confirmed that thefts of over 1500 individual doses of hydrocodone in various strengths had occurred on at least seven dates over the prior two weeks, on April 27, April 28, April 30, May 2, May 3, May 4, and May 5, 2009. Video surveillance and other evidence identified Petitioner as the thief, and pointed to his unauthorized use of an electronic key-card as the method by which he had gained illegal entry into the secure area where HealthTrans stored controlled substances. The firm's senior vice president and general counsel reported the results of its investigation to the Greenwood Village Police Department in June 2009. I.G. Ex. 2.

The police investigation of the incident concluded in mid-October 2009, and on November 9, 2009, the Arapahoe County District Attorney filed a two-count Complaint and Information against Petitioner in the 18th Judicial District Court, Arapahoe County, Colorado. The Complaint and Information charged Petitioner with one felony count of Second Degree Burglary, in violation of COLO. REV. STAT. § 18-4-203(1) and (2)(b), and one felony count of Theft, in violation of COLO. REV. STAT. § 18-4-401(1)(a) and (2)(c). I.G. Ex. 5.

Petitioner and his attorney negotiated a plea agreement with the District Attorney, and on July 26, 2010, Petitioner pleaded guilty to Count 1 of the Complaint and Information. The language of that Count specifically charged that Petitioner had "Between and including 4/1/2009 and 6/11/2009 . . . entered, or remained unlawfully after a lawful or unlawful entry in the building . . . of HealthTrans . . . Further, the defendant's objective was the theft of a controlled substance . . . ." The District Court accepted the plea, found Petitioner guilty, and imposed sentence the same day. Petitioner was sentenced to two years' probation, and was required to pay $5522.00 restitution to HealthTrans, a fine of $1000.00, and other fees and costs totaling $1928.50. Count 2 of the Complaint and Information was dismissed on the District Attorney's motion. I.G. Exs. 6- 9.
The CSBP began a disciplinary action against Petitioner based on the HealthTrans incident, but that proceeding also reflected the two prior disciplinary actions CSBP had taken against him. Specifically, Petitioner had been disciplined in 2001 for improperly

dispensing controlled substances, and again in 2004 for similar misconduct and for violating the terms of the 2001 restrictions. According to the CSBP, the HealthTrans incident constituted a two-fold violation: first by reason of Petitioner's very employment there, contrary to the 2004 restrictions, and next, of course, by reason of his theft of the controlled substances. These proceedings culminated in the CSBP's Stipulation and Final Agency Order (SFAO), accepted by Petitioner on December 27, 2010, and effective January 4, 2011. By the terms of the SFAO, Petitioner relinquished his license to practice as a pharmacist for a minimum of two years. I.G. Exs. 3, 4.

The I.G. is charged with effecting exclusions based on sections 1128(a)(3) and 1128(c)(3)(B) of the Act. *See* 42 C.F.R. § 1001.101. If the I.G. believes that a conviction constitutes a proper predicate for the exclusion, he must send notice of his intent to exclude the affected individual or entity. The affected party is permitted to respond to this notice of intent with evidence and argument concerning whether the exclusion is warranted and any related issues. 42 C.F.R. § 1001.2001. In this case, the I.G. notified Petitioner of the intended exclusion by letter of December 30, 2010. I.G. Ex. 11. A copy of this letter was sent to Petitioner's attorney in the District Court proceedings.

On April 30, 2013, the I.G. notified Petitioner that he was being excluded pursuant to the terms of section 1128(a)(3) of the Act for the mandatory minimum period of five years. The I.G.'s action was required by the terms of section 1128(a) of the Act, 42 U.S.C. § 1320a-7(a). I.G. Ex. 1.

Acting *pro se*, Petitioner timely sought review of the I.G.'s action by letter dated May 11, 2013. I convened a telephonic prehearing conference on June 5, 2013, pursuant to 42 C.F.R. § 1005.6, in order to discuss the issues presented by the case and procedures for addressing those issues. 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 September 9, 2013.

There are 11 exhibits in this case. The I.G. proffered 11 exhibits marked I.G. Exhibits 1 through 11 (I.G. Exs. 1-11). Petitioner proffered no exhibits of his own. I have admitted all proffered exhibits to the evidentiary record on which this Decision is based.

II. Issues

The issues before me are limited to those listed at 42 C.F.R. § 1001.2007(a)(1). In the specific 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)(3) of the Act; and

2. Whether the length of the proposed 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, there is a basis for Petitioner's exclusion pursuant to section 1128(a)(3) of the Act. A five-year term of exclusion is the minimum established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B) and is therefore not unreasonable.

III. Controlling Statutes and Regulations

Section 1128(a)(3) of the Act, 42 U.S.C. § 1320a-7(a)(3), requires the mandatory exclusion from participation in Medicare, Medicaid, and all other federal health care programs of "[a]ny individual or entity that has been convicted for an offense which occurred after [August 21, 1996,] under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in [section 1128(a)](1)) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." The terms of section 1128(a)(3) are restated in similar language at 42 C.F.R. § 1001.101(c).

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a Federal, State, or local court," Act § 1128(i)(1); "when there has been a finding of guilt against the individual . . . by a Federal, State, or local court," Act § 1128(i)(2); "when a plea of guilty . . . by the individual . . . has been accepted by a Federal, State, or local court," Act § 1128(i)(3); or "when the individual . . . has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld." Act § 1128(i)(4). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(3) is mandatory and the I.G. must impose it for a minimum period of five years. Act § 1128(c)(3)(B); 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 July 26, 2010, in the 18th Judicial District Court, Arapahoe County, Colorado, Petitioner Keith Nisonoff pleaded guilty to one felony count of Second Degree Burglary, in violation of COLO. REV. STAT. § 18-4-203(1) and (2)(b). The conduct to which Petitioner pleaded guilty occurred during April, May and June, 2009. I.G. Exs. 5-8.

2. On July 26, 2010, the District Court accepted Petitioner's guilty plea, found Petitioner guilty, and imposed its judgment of conviction and sentence on Petitioner. I.G. Exs. 7-9.

3. The accepted plea of guilty, finding of guilty, and judgment of conviction described above in Findings 1 and 2 constitute a "conviction" within the meaning of sections 1128(a)(3) and 1128(i)(1), (2), and (3) of the Act, and 42 C.F.R. § 1001.2.

4. There is a nexus and a common-sense relationship between the felony offense of which Petitioner was convicted, as noted above in Findings 1, 2, and 3, and fraud, theft, and embezzlement in connection with the delivery of a health care item or service. I.G. Exs. 2, 5, 6, 8, 9; *Charice D. Curtis*, DAB No. 2430 (2011); *Berton Siegel, D.O.*, DAB No. 1467 (1994).

5. Petitioner's conviction as noted above in Findings 1, 2, 3, and 4 constitutes a basis for the I.G.'s exclusion of Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. Act § 1128(a)(3); 42 U.S.C. § 1320a-7(a)(3).

6. The five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, and is therefore not unreasonable. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2). *Tamara Brown*, DAB No. 2195, at 8 (2008).

7. There are no disputed issues of material fact and summary disposition is therefore 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 four essential elements necessary to support an exclusion based on section 1128(a)(3) of the Act are: (1) the individual to be excluded must have been convicted of a felony offense; (2) the felony offense must have been based on conduct relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the felony offense must have been for conduct in connection with the delivery of a health care item or service, *or* the felony offense must have been with respect to any act or omission in a health care program operated by or financed in whole or in part by any federal, state, or local government agency; and (4) the felonious conduct must have occurred after August 21, 1996. *Andrew D. Goddard*, DAB No. 2032 (2006); *Kenneth M. Behr*, DAB No. 1997 (2005); *Erik D. DeSimone, R.Ph.*, DAB No. 1932 (2004); *Jeremy Robinson*, DAB No. 1905 (2004); *Breton Lee Morgan, M.D.*, DAB CR1913 (2009); *Morganna Elizabeth Allen*, DAB CR1479 (2006); *Theresa A. Bass*, DAB CR1397 (2006); *Michael Patrick Fryman*, DAB CR1261 (2004); *Golden G. Higgwe, D.P.M.*, DAB CR1229 (2004); *Thomas A. Oswald, R.Ph.*, DAB CR1216 (2004); *Katherine Marie Nielsen*, DAB CR1181 (2004).

Petitioner's pleadings in opposition to the I.G.'s case are not always coordinated or clear, and I shall address what appear to be his two major points below. But it is clear that the I.G.'s proof of at least two of the essential elements are not challenged. Petitioner does not deny that he has been convicted of a felony, nor does he deny that the conduct on which his felony conviction was based occurred after August 21, 1996. The police reports and court records before me positively establish the first and fourth essential elements. I.G. Exs. 2, 5, 6, 8.

Those records also establish the second element, the requirement that Petitioner's conviction be based on conduct "related to fraud, theft, [or] embezzlement . . . ." Now, the statute on which Petitioner was convicted of Second Degree Burglary, COLO. REV. STAT. §§ 18-4-203(1) and (2)(b), does not include as an element, and does not require proof of, a completed theft. In that the Colorado statute is hardly unique: like virtually all modern statutes forbidding burglary, and like the MODEL PENAL CODE § 221.1(1), it specifies that:

> (1) A person commits second degree burglary, if the person knowingly breaks an entrance into, enters unlawfully in, or remains unlawfully after a lawful or unlawful entry in a building or occupied structure with intent to commit therein a crime against another person or property.
>
> (2) Second degree burglary is a class 4 felony, but it is a class 3 felony if:
>
> (a) It is a burglary of a dwelling; or
>
> (b) It is a burglary, the objective of which is the theft of a controlled substance, as defined in section 18-18-102 (5), lawfully kept within any building or occupied structure.

It will be noted that subsection (2)(b) of this statute applies with particularity to Petitioner's conduct at HealthTrans, and requires only that "the objective of" his entry into the secure pharmacy area have been "the theft of a controlled substance." That same language appears in the Count to which Petitioner pleaded guilty and admitted that "the objective was the theft of a controlled substance." I.G. Ex. 5, at 2. Petitioner's admissions to the CSBP make explicit the relation of the burglary to the theft of drugs. I.G. Ex. 3, at 1, 2. The evidence establishes the second essential element beyond debate.

Petitioner directly challenges the I.G.'s proof of the third element, the requirement that his felony conviction be based on conduct in connection with the delivery of a health care item or service. He relies on a Colorado statute defining the word "deliver" in the context of criminal law and controlled substances, COLO. REV. STAT. § 18-18-102(7), a

context inapplicable here. But more basically, his argument fails to acknowledge the broad reading that this forum gives to the statutory phrase "in connection with the delivery of a health care item or service . . ." and simply ignores clear precedent on the point.

The Departmental Appeals Board (Board) has repeatedly emphasized that the statutory phrase does not require that an individual participate directly in the actual delivery of an item or service in order to be subject to exclusion. The Board has held that the statutory phrase requires only that a "common sense connection or nexus" exist between the offense and the delivery of a health care item or service after an analysis of the specific facts involved. *Charice D. Curtis*, DAB No. 2430; *Kevin J. Bowers*, DAB No. 2143 (2008), *aff'd sub nom. Bowers v. Inspector General*, No. 1:2008cv00159 (S.D. Ohio Dec. 19, 2008); *Andrew D. Goddard*, DAB No. 2032; *Kenneth M. Behr*, DAB No. 1997; *Erik D. DeSimone, R. Ph.*, DAB No. 1932. It is even more significant to this discussion that in four of those cases the Board explicitly held that when persons illegally divert to their own use drugs that their employers obtained and intended for delivery to legitimate users, that illegal diversion prevents the delivery of those drugs as intended, and that such conduct falls squarely within the ambit of the statutory phrase. *Kevin J. Bowers*, DAB No. 2143; *Andrew D. Goddard*, DAB No. 2032; *Kenneth M. Behr*, DAB No. 1997; *Erik D. DeSimone, R. Ph.*, DAB No. 1932. And perhaps most significantly, the Board's interpretation of the statutory phrase has won approval in at least one Article III court. *Bowers v. Inspector General*, No. 1:2008cv00159 (S.D. Ohio). The facts before me fully establish the third essential element, and in doing so complete the evidentiary foundation for Petitioner's exclusion pursuant to section 1128(a)(3) of the Act.

Petitioner's remaining argument is based on what he inaccurately characterizes as a four-year delay in the I.G.'s determination. In his request for hearing, Petitioner untruthfully asserts that his conviction occurred in November 2009, but the District Court records show that date to be merely the point at which charges were filed, and quite clearly not the July 26, 2010 date of his conviction. I.G. Exs. 5-9. And it is no more than fair when discussing this point to recall that the I.G. sent his notice-of-intent letter to Petitioner and his attorney promptly on December 10, 2010, in fact before the CSBP concluded its action against Petitioner on January 4, 2011.

It is possible that the interval between the I.G.'s December 10, 2010 notice-of-intent letter and the I.G.'s April 30, 2013 notice-of-exclusion letter was in some measure attributable to efforts by Petitioner or his attorney to respond to the first letter, or to the I.G.'s reviewing the CSBP's action and its potential for extending the period of exclusion pursuant to 42 C.F.R. § 1001.102(b)(9). This evidentiary record has nothing to say about those possibilities, however: all it shows is that the CSBP action was not relied on by the I.G., and that the I.G. sought no enhancement of the mandatory five-year period in this

case, although I can see no reason why the CSBP action would not support a generous enhancement of what, after all, is the minimum mandatory period. Nevertheless, Petitioner presses the point ardently: "It's a travesty, how it can continue to wreck people's lives . . . and smash all of their hopes and dreams."[1]

The unexplained delay in this case is approximately 28 months. My views on this issue in general have been most recently stated in *Erin Dalton*, DAB CR2922, at 6-7 (2013), and have not changed since *Stephen Michael Cook, M.D.*, DAB CR1234 (2004); *Abelardo Lecompte-Torrez*, DAB CR2379, at 7 (2011); *Marilyn June McCullough*, DAB CR1931, at 6 (2009); *Vivienne Esty-Fenton*, DAB CR1931, at 11 (2009); *Kimberly Mazzeo*, DAB CR1591, at 5 (2007); and *Dana William White*, DAB CR1495 (2006). So far, those views are not reflected in the law of this forum. *Randall Dean Hopp*, DAB No. 2166 (2008); *Kailash C. Singhvi, M.D.*, DAB No. 2138 (2007). The timing of the I.G.'s decision to begin the exclusion process remains entirely beyond the inquiry or review of any ALJ of this forum. *Randall Dean Hopp*, DAB No. 2166; *Kailash C. Singhvi, M.D.*, DAB No. 2138; *Kevin J. Bowers*, DAB No. 2143; *Lisa Alice Gantt*, DAB No. 2065 (2007); *Thomas Edward Musial*, DAB No. 1991 (2005); *Douglas Schram, R.Ph.*, DAB No. 1372 (1992); *David D. DeFries, D.C.*, DAB No. 1317 (1992); *Richard G. Philips, D.P.M.*, DAB No. 1279 (1991); *Samuel W. Chang, M.D.*, DAB No. 1198 (1990).

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[1] This is a remarkable allocution, given Petitioner's repeated violations of the disciplinary restrictions placed on him by the CSBP over eight years, and his repeated, deliberate, and furtive criminal forays into the secure area of HealthTrans' pharmacy in violation of his employer's trust and through misuse of its security systems. And it is worthwhile to recall that Petitioner's confession to HealthTrans' personnel seems to have been precipitated by his nagging fear that he had been detected in those forays.

What the CSBP action teaches about Petitioner's trustworthiness needs no elaboration here. It is enough to say that the facts Petitioner admitted to the CSBP demonstrate that over the period from at least 2001 to 2009 he repeatedly proved himself unwilling to abide by lawful standards of professional conduct. As I have argued most recently in *Ollie Futrell*, DAB CR2901, at 9-10 (2013), the Board's recent decisions in *Craig Richard Wilder*, DAB No. 2416 (2011), *Vinod Chandrashekhar Patwardhan, M.D.*, DAB No 2454 (2012), and *Sushil Anniruddh Sheth*, DAB No. 2491 (2012) release the Administrative Law Judge from any obligation to defer greatly to the I.G.'s determination of the length of an enhanced exclusion when there are no material questions as to the existence of aggravating or mitigating factors. In this case there are no such questions: the I.G. had before him the same CSBP proceedings I have before me. Were it not solely for the fact that Petitioner appears *pro se*, I would rely on the CSBP proceedings to invoke the aggravating factor at 42 C.F.R. §1001.102(b)(9) and enhance the period of Petitioner's exclusion to eight years.

The five-year period of exclusion proposed in this case is the minimum required by section 1128(c)(3)(B) of the Act. As a matter of law it is not unreasonable, and neither the Board nor I can reduce it. 42 C.F.R. § 1001.2007(a)(2); *Tamara Brown*, DAB No. 2195; *Mark K. Mileski,* DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002).

Petitioner appears here *pro se.* Because of that I have been guided by the 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 all of Petitioner's pleadings for any contentions that might raise a valid defense to the I.G.'s determination but have found nothing that could be so construed. His pleading of July 2, 2013 amounts to a request for relief beyond my jurisdiction, and to the extent that it does, the request is denied.

Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts. *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, unambiguous, and support summary disposition as a matter of settled law. This Decision issues accordingly.

VI. Conclusion

For the reasons set forth above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Keith Nisonoff 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)(3) of the Act, is SUSTAINED.

/s/
Richard J. Smith
Administrative Law Judge