Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	Date: May 5, 2009
Reginald Maurice Dawson, DC # 129868,	)	Docket No. C-08-636 Decision No. CR1949
Petitioner,	)	
- v. -	)	
The Inspector General.	)	

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Affirmance of the I.G.'s determination to exclude Petitioner *pro se* Reginald Maurice Dawson 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)(4) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(4). The facts in this case mandate the five-year exclusion, and for that reason, I grant the I.G.'s Motion for Summary Affirmance.

I. Background

By letter dated June 30, 2008, the I.G. notified Petitioner that he was being excluded for a period of five years from participating in the Medicare, Medicaid, and all federal health care programs. The I.G. informed Petitioner specifically that he was being excluded pursuant to section 1128(a)(4) of the Act based on his felony conviction in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance as defined under federal or state law.

By undated letter which was received by the Civil Remedies Division on July 24, 2008, Petitioner, acting *pro se*, timely sought review of the I.G.'s action, and the matter was assigned to me for a hearing and a decision. On August 21, 2008, I held a telephone prehearing conference with the parties and advised Petitioner of his right to be represented by an attorney. Petitioner indicated that he wished to proceed *pro se*. The I.G. expressed his position that this matter could be resolved on the basis of written submissions. Petitioner did not explicitly state his position on whether an in-person hearing was required. I advised the parties that, once I had received their submissions, I would determine whether an in-person hearing was required. I set a schedule for the submission of briefs and documentary evidence. *See* Pre-Hearing Order, dated September 2, 2008 (Order).

The I.G. has submitted a brief with nine proposed exhibits attached (I.G. Exs. 1-9). Because I did not receive a response brief from Petitioner, I issued an Order to Show Cause, directing Petitioner to show cause why I should not dismiss his request for hearing for abandonment or dismiss as a sanction. Petitioner filed a response to the Order to Show Cause out of time, requesting an opportunity to respond to the I.G.'s position. I was persuaded by Petitioner's explanation for his untimely submission, and accepted his response. I gave Petitioner an opportunity to respond to the I.G.'s brief, and revised the briefing schedule. *See* Order Establishing A Revised Briefing Schedule, dated February 4, 2009.

Petitioner submitted a response, with no proposed exhibits. The I.G. did not file a reply brief. Petitioner has expressed no objection to the I.G.'s proposed exhibits, and so I admit into evidence I.G. Exs. 1-9.

II. Issue

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

III. Controlling Statutes and Regulations

Section 1128(a)(4) of the Act, 42 U.S.C. § 1320a-7(a)(4), 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, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." The terms of section 1128(a)(4) are restated somewhat more broadly in regulatory language at 42 C.F.R. § 1001.101(d).

The Act defines "convicted" as including those circumstances: "(1) when a judgment of conviction has been entered against the individual . . . by a . . . State . . . court, regardless of whether . . . the judgment of conviction or other record relating to criminal conduct has been expunged;" or "(2) when there has been a finding of guilt against the individual . . . by a . . . State . . . court;" or "(3) when a plea of guilty or nolo contendere by the individual . . . has been accepted by a . . . State . . . court . . . ." Act, section 1128(i)(1)-(3), 42 U.S.C. § 1320a-7(i)(1)-(3). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(4) of the Act is mandatory, and the I.G. must impose it for a minimum period of five years. Act, section 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. 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]

During the time period relevant to this case, Petitioner was a licensed pharmacist in the State of Florida. Petitioner operated a pharmacy called "Your Family Pharmacy" located in Jacksonville, Florida. On February 26, 2007, an eight-count criminal information was filed against Petitioner and three others in the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida. I.G. Ex. 7. The information charged Petitioner specifically, at Counts 1, 2, 3, and 7, with violation of racketeering laws, conspiracy to

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

traffic in controlled substances, and Medicaid provider fraud. Specifically, Counts 2 and 3 alleged that Petitioner, "on or between February 1, 2005 and January 24, 2006, in the County of Duval and the State of Florida, did agree, conspire, combine or confederate with [other named co-defendants] to knowingly sell, purchase, manufacture, deliver, bring into the State, or to be knowingly in actual or constructive possession of" Oxycodone and Hydrocodone, "contrary to the provisions of Sections 893.135(5) and 777.04(3), Florida Statutes." I.G. Ex. 7, at 1. Count 7, which was related to Medicaid provider fraud, alleged that Petitioner, "on or between February 1, 2005 and January 24, 2006, in the County of Duval and the State of Florida, did knowingly make, cause to be made or aid and abet in the making of a claim for items or services that are not authorized to be reimbursed by the medicaid program, . . . contrary to the provisions of Section 409.920(2)(b), Florida Statutes." I.G. Ex. 7, at 2.

Petitioner appeared with counsel in the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, on November 30, 2007, and pleaded guilty to Count 2 of the information, "Conspiracy to Traffic in Controlled Substances," a felony in violation of FLA. STAT. ANN §§ 893.135(5) and 777.04(3). I.G. Ex. 8. The court accepted Petitioner's guilty plea, found him guilty, and entered judgment of conviction on January 7, 2008. I.G. Ex .2.[1] On that day, pursuant to the terms of a negotiated sentence, the court sentenced Petitioner to 24 months in prison, and ordered him to pay court costs of $441, and restitution in the amount of $21,811.14 to the Agency for Health Care Administration, which amount was to be owed jointly and severally with a co-defendant. I.G. Ex. 2; *see* I.G. Ex. 8. As part of the sentence, Petitioner permanently surrendered his Florida Department of Health pharmacy license. I.G. Ex. 2; *see* I.G. Ex. 8. Counts 1, 3, and 7 were dismissed *nolle prosequi*.

Petitioner does not dispute that he has been convicted of a felony, and the fact of his conviction is conclusively established by the court records. The court's acceptance of his guilty plea, finding of guilt, and the entry of a judgment of conviction, constitute a "conviction" within the meaning of sections 1128(i)(1), 1128(i)(2), and 1128(i)(3) of the Act, and 42 C.F.R. § 1001.2.

Petitioner's felony conviction for Conspiracy to Traffic in Controlled Substances, is, on its face, related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. There is no doubt that the criminal conduct described in Count 2 and to which Petitioner pleaded guilty – conspiring with others to "knowingly sell, purchase, manufacture, deliver, bring into the State, or to be knowingly in actual or

[1] Petitioner states that he is currently appealing his conviction to the "district court of appeals." I.G. Ex. 3. Petitioner's appeal of his criminal conviction is irrelevant to my decision here.

constructive possession of Oxycodone" plainly related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The requisite connection to controlled substances is thus established, and there can be no dispute that Petitioner committed a crime that falls squarely within the purview of section 1128(a)(4) of the Act.

In his defense, Petitioner asserts that he "operated [his] Pharmacy never with the intent of defrauding the government in any way" and was not guilty of committing any crimes. Petitioner's hearing request at 1; I.G. Exs. 3, 4; *see* Petitioner's Response. Petitioner contends that other pharmacists engaged in filling fraudulent prescriptions, but were never prosecuted. In Petitioner's view, he was "selectively prosecuted" and "selectively excluded from the Federal Health Care process." Petitioner's hearing request at 1; I.G. Ex. 4. Petitioner argues that the fact that he has not practiced pharmacy for over three years should be disbarment enough, and wonders how he can be perceived as a "threat to the integrity of the system" if he's no longer a practicing pharmacist. Petitioner's Response at 2.

Insofar as Petitioner himself now seeks to minimize or dilute his admission of criminality, he is bound by his guilty plea to Count 2 of the Information. Any form of collateral attack on predicate convictions in exclusion proceedings is precluded by regulation at 42 C.F.R. § 1001.2007(d), and that preclusion has been affirmed repeatedly by the Departmental Appeals Board. *Susan Malady, R.N.*, DAB No. 1816 (2002); *Dr. Frank R. Pennington, M.D.*, DAB No. 1786 (2001); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Paul R. Scollo, D.P.M.*, DAB No. 1498 (1994); *Chander Kachoria, R.Ph.*, DAB No. 1380 (1993).

Petitioner appears here *pro se*, and for this reason, I have taken additional care in reading his submissions. In doing so, 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 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 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 and unambiguous. They support summary disposition as a matter of settled law. This Decision issues accordingly.

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

An exclusion under section 1128(a)(4) of the Act 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 . . . .

When the I.G. imposes an exclusion for the mandatory five-year period, the reasonableness of the length of the exclusion is not an issue. 42 C.F.R. § 1001.2007(a)(2). Petitioner was convicted of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. As a result of Petitioner's conviction, the I.G. was required to exclude him pursuant to section 1128(a)(4) of the Act, for at least five years.

V. 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/
Alfonso J. Montano
Administrative Law Judge