Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Amir Tadros,

Petitioner,

v.

The Inspector General.

Docket No. C-13-383

Decision No. CR2836

Date: June 19, 2013

DECISION

This matter is before me in review of the Inspector General's (I.G.'s) determination to exclude Petitioner *pro se* Amir Tadros 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 a five-year exclusion, and so I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

At the times material to this discussion, Petitioner Amir Tadros was a registered pharmacist licensed to practice in New Jersey, where he was the owner and pharmacist-in-charge of Five Corners Pharmacy in Jersey City. I.G. Ex. 6. New Jersey law enforcement officials arrested Petitioner in October 2009 on charges related to health care fraud. I.G. Ex. 7, at 21; P. Ex. 5. Approximately 16 months later Petitioner was named in seven counts of a 21-count Indictment handed up in the Superior Court of New Jersey, Hudson County, on February 14, 2011. I.G. Ex. 8. In general, that Indictment charged

that Petitioner and two other co-conspirators — together with a host of unindicted co-conspirators — had organized and executed both a systematic defrauding of health care programs and a multi-county operation illegally distributing controlled substances, in some cases near schools and other public facilities.

Petitioner and his counsel negotiated a plea agreement with prosecutors. I.G. Ex. 10. On May 24, 2011 he appeared in Hudson County Superior Court and pleaded guilty to the amended Count Seventeen of the Indictment, which, as amended by the agreement, charged a violation of N. J. STAT. ANN. § 2C:21-4.3b, Health Care Claims Fraud, classified by state law as "a crime of the third degree." Petitioner's plea was accepted on that date. I.G. Exs. 7, 9. On June 6, 2011 Petitioner was sentenced to a five-year term of probation, was ordered to perform 200 hours of community service, and was required to pay costs, restitution, and assessments in the sum of $55,741.03. The six remaining Counts of the Indictment naming Petitioner were dismissed on prosecution motion. I.G. Ex. 9.

As required by section 1128(a) of the Act, 42 U.S.C. § 1320a-7(a), the I.G. began the process of excluding Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. That process was not without its mis-steps and false starts.

In a letter dated November 7, 2012 the I.G. notified Petitioner that the I.G. was beginning the process of exclusion pursuant to section 1128(a) generally. This "notice-of-intent" letter correctly identified the court and state of Petitioner's conviction. I.G. Ex. 5. On November 30, 2012 the I.G. notified Petitioner that he was in fact being excluded pursuant to the terms of section 1128(a)(1) of the Act for the mandatory minimum period of five years. This first "notice-of-exclusion" letter contained an error: it purported to rely on Petitioner's alleged conviction in a New York state court as the basis for the exclusion. I.G. Ex. 3.

Acting *pro se*, Petitioner timely sought review of the I.G.'s November 30, 2012 action on January 24, 2013. I convened a telephonic prehearing conference on March 6, 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.

On March 7, 2013, the I.G. wrote to Petitioner amending the November 30, 2012 "notice-of-exclusion" letter to reflect the correct state and court of Petitioner's conviction, but the I.G. did not amend his statutory reliance on section 1128(a)(1). I.G. Ex. 2. That statutory reliance remained unaltered until four days before the I.G. filed his Motion for Summary

Disposition and Brief-in-Chief: on April 4, 2013, the I.G. notified Petitioner that this proposed exclusion and the I.G.'s position in this appeal actually relied on section 1128(a)(3).[1]

By Order of March 8, 2013 I established a schedule for the submission of documents and briefs. My Order had framed this appeal as proceeding pursuant to section 1128(a)(1). All briefing is now complete, and the record in this case closed on May 28, 2013.

There are 20 exhibits in this case. The I.G. proffered 11 exhibits marked I.G. Exhibits 1 through 11 (I.G. Exs. 1-11), and Petitioner proffered nine exhibits marked Petitioner's Exhibits 1 through 9 (P. Exs. 1-9). All are admitted without objection.

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

[1] The parties' briefing does not make an issue of this confusion. Petitioner complained about it in emails on April 12 and 15, 2013, but as I responded on April 15, 2013 and as I now repeat, the apparent change in the I.G.'s statutory reliance has not operated to Petitioner's prejudice because notice was given of the I.G.'s reliance on section 1128(a)(3) before the filing of the I.G.'s Brief-in-Chief. Nothing in Petitioner's request for hearing or briefing reflects a claim or defense available to him in a section 1128(a)(1) appeal not also available to him in an action based on section 1128(a)(3).

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 his accepted plea of guilty on May 24, 2011, in the Superior Court of New Jersey, Hudson County, Petitioner Amir Tadros was found guilty of one count of Health Care Claims Fraud, a crime in the third degree, in violation of N. J. STAT. ANN. § 2C:21-4.3b. I.G. Exs. 7, 8, 9, 10.

2. Final judgment of conviction was entered against Petitioner and he was sentenced on his guilty plea in the Hudson County Superior Court on July 6, 2011. I.G. Ex. 9.

3. The judgment of conviction, finding of guilt, and accepted plea of guilty 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. Petitioner's conviction of a crime in the third degree under New Jersey statutes as described above in Findings 1 and 2 constitutes conviction of a "felony" 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. N. J. STAT. ANN. § 2C:43-6a(3); *Cynthia D. Critchfield*, DAB CR1839 (2008); *Catherine Ann Fee*, DAB CR1598 (2007); *Cf. Akram A. Ismail, M.D.*, DAB No. 2429 at 7 (2011).

5. Petitioner's conviction as described above in Findings 1 and 2 was based on conduct related to fraud. I.G. Exs. 7, 8, 9, 10, 11; P. Ex. 5.

6. There is a nexus and a common-sense relationship between the felony offense of which Petitioner was convicted, as noted above in Findings 1 and 2, and the delivery of a health care item or service. I.G. Exs. 6, 7, 8, 9, 10, 11; P. Ex. 5.

7. Petitioner's conviction 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).

8. 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).

9. There are no disputed issues of material fact and summary disposition is 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).

Although they are at times unclear, Petitioner's arguments do not contest the basic procedural history of this case. For example, he does not deny that he was convicted on his guilty plea in the Hudson County Superior Court, and he does not argue that the act that led to his conviction took place before August 21, 1996. In any case, he admitted that the specific criminal act for which he was convicted occurred between January and

October 2009. I.G. Exs. 7, at 16-21; 8, at 25. The fourth essential element is established without challenge on this record. Petitioner's defense appears to challenge the I.G.'s proof of the first three essential elements.

His position begins by denying that what New Jersey classifies as a third-degree offense is the equivalent of a felony for purposes of section 1128(a)(3), but that argument has been explicitly rejected in two decisions in this forum and implicitly brushed aside by a recent decision by the Departmental Appeals Board (Board). Petitioner is correct in asserting that the New Jersey Code of Criminal Justice, N. J. STAT. ANN. § 2C:1-1 *et seq.*, does not classify criminal offenses according to the more traditional felony-and-misdemeanor scheme, but instead classifies an offense as "a crime . . . of the first, second, third or fourth degree," or as "petty offenses . . . not crimes" further classified as either "disorderly persons offenses" or "petty disorderly persons offenses." N. J. STAT. ANN. § 2C:1-4a-d. But the sufficiency of third-degree felonies in New Jersey as predicates for the felony-conviction requirements of section 1128(a)(3) has been thoroughly and thoughtfully treated — and persuasively affirmed —in *Cynthia D. Critchfield*, DAB CR1839 and *Catherine Ann Fee*, DAB CR1598. I can add nothing to those perceptive discussions, and I adopt their reasoning and conclusions as my own: for purposes of this analysis of section 1128(a) of the Act, a "crime in the third degree" under the New Jersey Code of Criminal Justice, N. J. STAT. ANN. § 2C:1-1 *et seq.,* is the equivalent of a felony. I also note that the Board may have hinted at a similar conclusion, although perhaps as *dictum*, in *Akram A. Ismail, M.D.*, DAB No. 2429 at 7. Petitioner was convicted of a felony, and the first essential element is established.

It is in dealing with the second and third essential elements that Petitioner's arguments become turbid. He expends substantial effort in claiming that his crime was "program-related." He does not elucidate how making that point contradicts the fact that his conduct — billing for drugs he falsely claimed were delivered and were instead retained in his pharmacy's stock of medications — was "in connection with the delivery of a health care item or service . . . ." The relevant portions of Count Seventeen make that connection clear:

> [D]id knowingly make, or cause to be made, a false, fictitious, fraudulent, or misleading statement of material fact . . . in any . . . bill, claim, or other document . . . that is, the said CLIFTON HOWELL and AMIR TADROS, who are both practitioners, did knowingly . . . submit . . . claims for prescription drugs allegedly dispensed, when, in fact, the prescriptions were not dispensed . . . contrary to the provisions of N.J.S.A. § 2C:21-4.2, N.J.S.A. § 2C:21-4.3a, N.J.S.A. § 2C:2-6, and against the peace of this State, the government and dignity of the same.

I.G. Ex. 8, at 25.

Not only does Petitioner's conviction of that specific charge establish the third essential element, but it establishes the second as well, for it reflects the fraudulent character of Petitioner's conduct. Thus, all four essential elements are proven on this record. There is a basis for the I.G.'s exclusion of Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.

Petitioner bases another part of his defense on the assertion that his crime might not be regarded by some states, New York and Texas in particular, as being the serious offense that New Jersey has classified it to be. To this assertion he adds the suggestion that his conduct as admitted in his plea was no more than a reckless or careless lapse of attention. This argument appears to be an effort to invoke the I.G.'s discretionary authority to exclude under section 1128(b)(1), and thus to be subject to the shorter minimum mandatory period of exclusion prescribed by that section.[2] But aside from ignoring the State of New Jersey's undoubted authority to classify the seriousness of crimes committed within its jurisdiction as it sees fit, Petitioner's argument fails when confronted with a well-understood and frequently-cited line of Board decisions holding that when the terms of section 1128(a) apply to the facts at hand, then neither the I.G. nor the Administrative Law Judges of this forum may choose to proceed under the terms of section 1128(b). Once a conviction is shown to be within the reach of section 1128(a), the mandatory operation of that section bars a petitioner from demanding that the I.G. apply the terms of any part of section 1128(b), even in situations where the underlying conviction could be argued to fall within section 1128(a) and one or more of the provisions of sections 1128(b)(1)-(15). *Craig Richard Wilder*, DAB No. 2416, at 6 (2011); *Kenneth M. Behr*, DAB No. 1997, at 9; *Stacy Ann Battle, D.D.S, et al.*, DAB No. 1843 (2002); *Lorna Fay Gardner*, DAB No. 1733, at 6 (2000); *Tanya A. Chuoke*, DAB No. 1721, at 14 (2000).

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); *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002).

Petitioner appears here *pro se*, and 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.*,

---

[2] It may also be an effort to impeach the substantive validity of his conviction. If so, that effort is a collateral attack on the proceedings in the Hudson County Superior Court and will not be heard here. *Donna Rogers*, DAB No. 2381 (2011); *Marvin L. Gibbs, Jr., M.D.*, DAB No. 2279 (2009); 42 C.F.R. § 1001.2007(d).

M.D., et al., DAB No. 1264 (1991). I have searched Petitioner's pleadings for any contentions that might raise a valid defense to the I.G.'s Motion, but have found nothing that could be so construed.

Resolution of a case by summary disposition is particularly apt 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. The 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 Amir Tadros 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