

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Nimesh M. Patel, D.P.M.,
(OI file No. M-10-40526-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-389

Decision No. CR3251

Date: June 5, 2014

DECISION

Petitioner, Nimesh M. Patel, D.P.M., appeals the determination of the Inspector General for the U.S. Department of Health and Human Services (I.G.) to exclude him from participating in Medicare, Medicaid, and other federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)) for the minimum mandatory period of five years. For the reasons discussed below, I find the I.G. was authorized to exclude Petitioner, and the five-year exclusion is mandatory.

I. Background

The I.G. notified Petitioner, by letter dated October 31, 2013, that he was being excluded, pursuant to section 1128(a)(1) of the Act, from participating in Medicare, Medicaid, and other federal health care programs for the minimum mandatory period of five years. The I.G. advised Petitioner that the exclusion was based on his conviction in the United States District Court, Middle District of Florida, Tampa Division, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. I.G. Exhibit (Ex.) 1.

Petitioner timely filed a request for hearing, asserting that the I.G. erroneously excluded him under the mandatory section of the exclusion statute (section 1128(a)(1)) when, instead, the I.G. should have excluded him under the permissive section of the statute at section 1128(b)(7) (42 U.S.C. § 1320a-7(b)(7)) based on his conviction for violating the anti-kickback statute (Act § 1128B(b)(1)(B); 42 U.S.C. § 1320a-7b(b)(1)(B)).

I convened a prehearing conference with the parties, which I summarized in my January 23, 2014 Order and Schedule for Filing Briefs and Documentary Evidence (Scheduling Order). Pursuant to that Scheduling Order, I asked the parties to answer the questions on the short-form briefs sent to them, together with any additional arguments and supporting documents they wished to present. The I.G. filed his short-form brief (I.G. Br.) together with six exhibits (I.G. Exs. 1-6). Petitioner filed a brief unaccompanied by exhibits (P. Br.). The I.G. filed a reply (I.G. Reply). Neither party requested an in-person hearing. Petitioner did not object to the exhibits the I.G. filed, and I admit them to the record. Therefore, the record is now closed, and I decide the case based on the written record.

II. Discussion

A. Issue

The scope of my review is limited. 42 C.F.R. § 1001.2007(a)(1) and (2). The only issue properly before me is whether the I.G. had a basis to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Act. If I find that the I.G. was authorized to exclude Petitioner under section 1128(a)(1), then I must uphold the I.G.'s exclusion because it is for the minimum mandatory period of five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

Section 1128(a)(1) of the Act requires that an individual be excluded where: 1) the individual has been convicted of a criminal offense; and 2) the criminal offense is related to the delivery of an item or service under Medicare or a state health care program.

B. Findings of Fact and Conclusions of Law

1. The I.G. had a legitimate basis to exclude Petitioner under section 1128(a)(1).

a. Petitioner was convicted of a criminal offense.

Section 1128(i) of the Act defines a conviction as: 1) when a judgment of conviction has been entered against an individual by a federal, state, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to the criminal conduct has been expunged; 2) when there has been a finding of guilt

against an individual by a federal, state or local court; 3) when a plea of guilty or nolo contendere by an individual has been accepted by a federal, state, or local court; and 4) when an individual has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

I find that the record reflects that Petitioner was convicted of a criminal offense pursuant to section 1128(i)(1)-(3) of the Act. Specifically, on January 14, 2012, the United States Attorney for the Middle District of Florida, Tampa Division, filed a one-count information against Petitioner. I.G. Ex. 3. The information charged, that from on or about January 2009 through on or about June 3, 2011, Petitioner,

. . . did knowingly and willfully solicit and receive remuneration, including kickbacks and bribes, directly and indirectly, overtly and covertly, in cash and in kind, in return for ordering, and arranging for and recommending the ordering, of a good, service, and item which had been paid for in whole and in part by a federal health care benefit program, that is, the Medicare Part B program.

All in violation of Title 42, United States Code, Sections 1320a-7b(b)(1)(B) and Title 18, United States Code, Section 2.

I.G. Ex. 3, at 1. On January 15, 2013, a plea agreement was filed with the court. I.G. Ex. 2. On July 9, 2013, the court “adjudged” Petitioner guilty on count one of the information. I.G. Ex. 4. On the same day, the court entered a criminal judgment against Petitioner, finding him guilty of “[s]oliciting and receiving remuneration, including kickbacks and bribes, in return for ordering, arra[ng]ing for, and recommending the ordering of, a good, service, and item that was paid for by a Federal Health Benefit Program.” I.G. Ex. 5, at 1. The court ordered Petitioner to pay a \$5,000 fine and a \$100 assessment. I.G. Ex. 5, at 3. On July 11, 2013, the court also ordered Petitioner to pay \$8,000 as a forfeiture money judgment, the amount of the proceeds he obtained as a result of his criminal offense. I.G. Ex. 6, at 1-2.

b. Petitioner’s criminal offense is related to the delivery of an item or service under Medicare.

A conviction is related to the delivery of an item or service under Medicare if there is a commonsense connection or nexus between the offense and the delivery of an item or service under Medicare. *Berton Siegel, D.O.*, DAB No. 1467 (1994).

Petitioner does not dispute the facts behind his conviction. P. Br. at 2. These facts are set forth in a plea agreement that Petitioner executed on February 10, 2012. I.G. Ex. 2. In the plea agreement, Petitioner pleaded guilty to one count of an information charging him with violating the anti-kickback statute. Act § 1128B(b)(1)(B); I.G. Exs. 2, 3; P. Br. at 3.

The plea agreement specifically states that Petitioner worked as a Doctor of Podiatric Medicine for Access Health Care, LLC, in and around Hernando and Pasco Counties, Florida. Many of his patients were Medicare beneficiaries. In or around January 2009, Petitioner entered into a business relationship with B.V., a sales representative for ABH, a company that supplies a synthetic skin substitute for treating conditions such as foot ulcers. At some point during this relationship, B.V. offered to provide Petitioner with various gifts and gratuities (gift cards, or cash equivalents, and tickets to sporting events) in return for Petitioner's use of ABH products to treat his patients, including Medicare beneficiaries. Petitioner admitted that he accepted gifts and gratuities from B.V. equaling approximately \$8,000. I.G. Ex. 2, at 2, 7, 4-15; P. Br. at 2-3.

Petitioner's conviction is for soliciting and receiving remuneration in return for ordering and arranging for the orders of goods, services and other items that the Medicare program reimbursed. I.G. Exs. 2, 3, 4, 5. Such conduct is clearly program related. Similarly, the Board has previously concluded that a conviction pursuant to section 1128B(b)(1)(B), as occurred here, constitutes a conviction related to the delivery of an item or service under Medicare or Medicaid. *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Niranjana B. Parikh, M.D., et. al.*, DAB No. 1334 (1992).

2. The I.G. does not have the authority to exclude Petitioner under section 1128(b)(7) of the Act in lieu of section 1128(a)(1).

Although admitting he was convicted of a criminal offense, Petitioner disputes that the I.G. is authorized to exclude him under section 1128(a)(1). Petitioner argues instead that, based on the plain language of the Act and Congressional intent, the I.G. is only authorized to exclude him for an anti-kickback violation under the permissive exclusion authority of section 1128(b)(7).¹ P. Br. at 5. Petitioner concedes that there is "substantial authority to the contrary," but argues that such authority is "directly opposed to the plain language of the statute" and that the case law requiring exclusion under section 1128(a)(1) is "wrongly decided." Petitioner asserts that section 1128(a)(1) is a "catch-all provision" and that it is a basic tenet of statutory interpretation that a statute addressing a matter in specific terms controls over a statute addressing the issue in general terms, unless Congress intended differently. P. Br. at 5-6.

¹ Section 1128(b)(7) of the Act (42 U.S.C. § 1320a-7(b)(7)) permits exclusion where the I.G. has determined that the individual knowingly or willfully solicited or received remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind, for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a federal health care program. Act § 1128B(b)(1)(B).

Petitioner's argument is unavailing. The Board has reviewed the legislative history behind section 1128(a)(1) and determined that the Congressional intent is clear. Congress intended section 1128(a)(1) to require a five-year exclusion for criminal offenses relating to the Medicare and Medicaid programs, strengthening the law then existing which, while mandating exclusion, did not set a minimum length of exclusion for program-related criminal offenses. See *Jack W. Greene*, DAB No. 1078, at 8 (1989), *aff'd sub nom Greene v. Sullivan*, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). As the Board held in *Boris Lipovsky*, "where a conviction falls within the terms of section 1128(a)(1), it is governed by that section. The fact that the conviction also meets the more inclusive elements of section 1128(b) . . . does not remove it from the ambit of section 1128(a)(1) and the I.G. must impose a mandatory exclusion." *Boris Lipovsky*, DAB No. 1363; *Niranjana B. Parikh, M.D. et. al.*, DAB No. 1334. Congress omitted the word "conviction" under section 1128(b)(7), thus authorizing permissive exclusion for prohibited kickback activities that may not result in a conviction. Here, where Petitioner's conviction, which directly involved Medicare beneficiaries, falls within the ambit of section 1128(a)(1), the I.G. has no discretion to consider a permissive exclusion.

3. I cannot consider mitigating or aggravating factors because the I.G. imposed the minimum mandatory exclusion.

Petitioner discusses several aggravating and mitigating factors that I cannot consider here because the I.G. imposed the minimum five-year mandatory exclusionary period. These include Petitioner's characterization of the facts emphasizing the absence of harm to patients (42 C.F.R. § 1001.102(b)(3)); his otherwise clean criminal record (42 C.F.R. § 1001.102(b)(6)); that his criminal conduct did not include intentional improper billings (42 C.F.R. § 1001.102(b)(7)); and that he assisted federal officials in similar ongoing criminal investigations (42 C.F.R. § 1001.102(c)(3)). I am, however, only authorized to consider aggravating and mitigating factors where the I.G. has imposed more than the minimum mandatory period of exclusion.

III. Conclusion

I find the I.G. was authorized to exclude Petitioner under section 1128(a)(1) because he was convicted of an offense related to the delivery of an item or service under Medicare. The five-year exclusion the I.G. imposed is mandatory pursuant to section 1128(c)(3)(B) as a matter of law.

/s/
Joseph Grow
Administrative Law Judge