Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

James Maister,
(OI File No. H-16-41581-9),

Petitioner,

v.

The Inspector General

Docket No. C-17-232

Decision No. CR4829

Date: April 20, 2017

DECISION

Petitioner, James Maister, was a licensed pharmacist in the State of Florida. He forged prescriptions and was convicted on three felony counts of obtaining or attempting to obtain a controlled substance by fraud. Pursuant to section 1128(a)(3) of the Social Security Act (Act), the Inspector General (IG) has excluded him from participating in the Medicare, Medicaid, and all federal health care programs for a period of five years.

For the reasons discussed below, I find that the IG is authorized to exclude Petitioner and that the statute mandates a minimum five-year exclusion.

Background

In a letter dated November 30, 2016, the IG advised Petitioner Maister that, because he had been convicted of a felony offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a healthcare item or service, the IG was excluding him from participating in Medicare, Medicaid, and all federal health care programs for a period of five years. IG Ex. 1. Petitioner requested review.

The parties have submitted their written arguments. (IG Br.; P. Br.). Each of the parties submitted four exhibits (IG Exs. 1-4; P. Exs. 1-4). In the absence of any objections, I admit into evidence IG Exs. 1-4 and P. Exs. 1-4. Each of the parties also filed a reply brief. (IG Reply; P. Reply).

The parties agree that this case does not require an in-person hearing. IG Br. at 7; P. Br. at 3.

Discussion

> ***Petitioner must be excluded from program participation for a minimum of five years because he was convicted of a felony relating to fraud or theft in connection with the delivery of a healthcare item or service.***[1]

Section 1128(a)(3) provides that an individual or entity convicted of felony fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service must be excluded from participating in federal health care programs for a minimum of five years. *See* 42 C.F.R. 1001.101(c).

Petitioner Maister was a licensed pharmacist, working at a Target store pharmacy. He forged prescriptions for Norco (Hydrocodone), signing for the physician. IG Ex. 3 at 1. In an information filed October 25, 2010, he was charged with three felony counts of obtaining or attempting to obtain a controlled substance by fraud, in violation of Florida law. IG Ex. 2 (citing FLA. STAT. § 893.13(7)(a)9 (2010)). He pled guilty to those charges on March 12, 2015. The Florida Circuit Court sentenced him to three years probation but withheld an adjudication of guilt. IG Ex. 4.

Petitioner concedes that he was convicted of a criminal offense but argues that, because the evidence presented does not show that he wrote the bogus prescriptions on pads pilfered from his employer, the IG has not established that his felonies were "in connection with the delivery of a health care item or service." P. Br. at 3. I note that he has not denied pilfering the pads from his employer nor otherwise explained where he got them. However, the question of whether his crimes were "in connection with" does not turn on how he acquired prescription pads. He admitted that he obtained hydrocodone by fraud and forgery. IG Ex. 3 at 1. The Departmental Appeals Board has repeatedly found the required connection based on a pharmacist's theft of drugs. As the Board has reasoned, drugs are health care items intended for delivery to individuals for healthcare

[1] I make this one finding of fact/conclusion of law.

purposes. Where, as here, a pharmacist (or someone else) interferes with that delivery by taking the drugs for his own use, his crime is committed "in connection with the delivery of a healthcare item." *Kevin J. Bowers*, DAB No. 2143 at 4 (2008), *aff'd*, *Bowers v. Inspector General of the Dep't of Health & Human Servs.*, 2008 WL 5378338 (S.D. Ohio Dec. 19, 2008).

Further, the Board has not required that the criminal offense include the pharmacist's actual delivery of an item or service. The "mere fact that a criminal endeavor (which if successful would have resulted in actual delivery of a health care item or service) was unsuccessful does not mean that there is no connection to the delivery of an item or service." *Kenneth M. Behr*, DAB No. 1997 at 6 (2005). Thus, where a pharmacist was convicted of attempted embezzlement of drugs, he was subject to exclusion under section 1128(a)(3).

> Simply because Petitioner failed to embezzle the drugs at issue and therefore did not "deliver" them farther in the chain of commerce does not mean his offense did not "occur in connection with the delivery of an item or service."

Id.

Petitioner also suggests that he should not have been convicted because he was initially placed in a court diversion program, and (according to Petitioner) he ultimately had to plead guilty to the offenses because his probation officer made a mistake. This argument fails for two reasons. First, Petitioner would be subject to exclusion even if he had successfully completed the diversion program, and the court had ostensibly dismissed the case. Under the Act and regulations, a person is "convicted" when "a judgment of conviction has been entered" regardless of whether that judgment has been (or could be) expunged or otherwise removed. Act § 1128(i)(1); 42 C.F.R. § 1001.2(a)(2). Individuals who participate in a "deferred adjudication[] or other program or arrangement where judgment of conviction has been withheld" are also "convicted" within the meaning of the statute. Act § 1128(i)(4); 42 C.F.R. § 1001.2(d). Based on these provisions, the Board characterizes as "well established" the principle that a "conviction" includes "diverted, deferred and expunged convictions regardless of whether state law treats such actions as a conviction." *Henry L. Gupton*, DAB No. 2058 at 8 (2007), *aff'd sub nom. Gupton v. Leavitt*, 575 F. Supp. 2d 874 (E.D. Tenn. 2008).

Second, federal regulations preclude such a collateral attack on Petitioner's underlying convictions:

> When the exclusion is based on the existence of a . . . determination by another Government agency, or any other prior determination where the facts were adjudicated and a

> final decision was made, the basis for the underlying . . . determination is not reviewable and the individual or entity may not collaterally attack it, either on substantive or procedural grounds, in this appeal.

42 C.F.R. § 1001.2007(d); *Marvin L. Gibbs, Jr., M.D.*, DAB No. 2279 at 8-10 (2009); *Roy Cosby Stark*, DAB No. 1746 (2000).

Finally, Petitioner explains that he committed his crimes while actively suffering from the disease of addiction. He sought treatment and has been successful in his recovery. I accept these assertions as true; however, they are not bases for overturning a mandatory exclusion.

Petitioner's felony convictions were related to fraud in connection with the delivery of a health care item (drugs), and he is therefore subject to exclusion. An exclusion brought under section 1128(a)(3) must be for a minimum period of five years. Act § 1129(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

Conclusion

For these reasons, I conclude that the I.G. properly excluded Petitioner from participating in Medicare, Medicaid, and all federal health care programs, and I sustain the five-year exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge