Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Rolland G. Eckley, R.Ph.,	DATE: July 30, 1997
Petitioner,	
- v. -	Docket No. C-96-219
The Inspector General.	Decision No. CR483

DECISION

I conclude that Petitioner, Rolland G. Eckley, is subject to a three-year period of exclusion from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs and, therefore, I affirm the Inspector General's (I.G.) determination.[1]

I. Procedural History

By letter dated February 23, 1996, the Petitioner herein, was notified by the I.G., U.S. Department of Health and Human Services (HHS), that he was to be excluded from the Medicare and Medicaid programs for three years. The I.G. explained that such an exclusion is authorized by section 1128(b)(3) of the Social Security Act (Act), because Petitioner was convicted, as defined in section 1128(i) of the Act, in the State of Ohio, Court of Common Pleas, Wood County, of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

Petitioner filed a timely request for review of the I.G.'s action. The parties agreed that this case could be decided without an in-person hearing as there were no facts of

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[1] Unless otherwise indicated, hereafter I refer to all programs from which Petitioner has been excluded other than Medicare, as "Medicaid."

significance genuinely in dispute and that the only matters to be decided are the legal implications of the undisputed facts. Accordingly, I set a schedule for the I.G. to file a motion for judgment on the record and for Petitioner to respond.

II. Applicable law

Section 1128(b)(3) of the Act permits the Secretary of HHS (Secretary) to exclude any individual from participation in the Medicare program and also to direct that individual's exclusion from the Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs, if the individual "has been convicted, under Federal or State law, of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." The applicable regulations provide, in relevant part:

> (a) Circumstances for exclusion. The OIG may exclude an individual or entity convicted under Federal or State law of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, as defined under Federal or State law.
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> (b) for purposes of this section, the definition of "controlled substance" will be the definition that applies to the law forming the basis for the conviction.
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> (c) Length of exclusion. (1) An exclusion imposed in accordance with this section will be for a period of 3 years, unless aggravating or mitigating circumstances listed in paragraphs (b)(2) and (b)(3) of this section form a basis for lengthening or shortening this period.
> . . .
>
> (3 the following factors may be considered tigating and a basis for shortening the period of exclusion--
>
> (i) The individual's or entity's cooperation with Federal or State officials resulted in--
>
> (A) Others being convicted or excluded from Medicare or any of the State health care programs, or

(B) The imposition of a civil money penalty against others; or

(ii) Alternative sources of the type of health care items or services furnished by the individual or entity are not available.

42 C.F.R. § 1001.401 (1995).

III. Rulings on Outstanding Motions

A. Sustaining of Petitioner's Objections to I.G. Exhibits 4 through 9.

During the briefing period, Petitioner filed objections to the I.G.'s Exhibits 1, 4, 5, 6, 7, 8, and 9, on grounds of irrelevancy, undue prejudice, hearsay, and lack of authentication. The I.G. responded to these objections and, in addition, submitted amended copies of her exhibits 1, 4, 5, 8, and 9, with certifications of authenticity. Having considered the parties' arguments concerning the disputed exhibits, I sustain Petitioner's objections except with respect to the I.G.'s Exhibit 1, as revised.

The objections to the I.G.'s Exhibits 4, 5, 8 and 9 are sustained on the basis of their irrelevancy and potential for undue prejudice. Even as amended by the I.G., these documents pertain to actions taken by the Ohio State Board of Pharmacy, whereas the sanction imposed by the I.G. was based on Petitioner's conviction in Ohio State Court. The I.G.'s other exhibits contain sufficient relevant information concerning the nature and extent of Petitioner's conviction for violation of State criminal statutes. In order to resolve the issues before me, it is not necessary for me to consider the actions taken also by the State Board of Pharmacy or its interpretations of Petitioner's criminal conviction.

I am also sustaining Petitioner's objection to I.G.'s Exhibit 7, which contains an explanation of Tylenol with Codeine as published in a medical reference work. Petitioner has correctly noted that, as relevant to this case, a "controlled substance" is defined by law -- not by medical texts. Therefore, the I.G.'s Exhibit 7 is irrelevant to this action.

Because the I.G. did not provide any information to invalidate Petitioner's objection to the I.G.'s Exhibit 6, I an excluding from the record said document as well. The document marked as I.G.'s Exhibit 6 consists of a letter dated September 25, 1995 from the I.G., which seeks to inform Petitioner of a possible exclusion and to solicit relevant information from Petitioner. Petitioner objected to its

admission by noting that there is no evidence that the letter was ever sent by the I.G. The I.G. has not provided any information to show the actual mailing of the letter. Nor has the I.G. stated what relevancy a notice of possible exclusion (even if sent to Petitioner) has to these proceedings. The exclusion at issue here was imposed by the I.G. in a later dated letter. The letter by which the I.G. imposed the exclusion against Petitioner, dated February 23, 1996, was entered into the record for jurisdictional purposes when this case was docketed.

I have accepted into evidence the I.G.'s Exhibit 1 as revised, with certification of authenticity, over Petitioner's objections. This exhibit is a copy of the Indictment issued against Petitioner. It is necessary for me to read the Indictment in order to understand the contents of the I.G.'s Exhibit 2, in which the court summarized the prosecutor's motion to modify one of the charges against Petitioner as well as the pleas entered by Petitioner. Petitioner has filed no objection to the admission of the I.G.'s Exhibit 2. Given also that the certification of authenticity provided by the I.G. overcomes the question of reliability raised by Petitioner, there is no valid basis for excluding the I.G.'s Exhibit 1, as revised, from evidence.[2]

B. Denial of Petitioner's Motion to Enforce Settlement Agreement.

After the parties concluded their briefing on the merits of the case, Petitioner filed a document styled, "Petitioner's Motion to Enforce Settlement Agreement." In the motion, Petitioner alleged that a settlement offer had been made by the I.G. without any apparent deadline for acceptance; however, when Petitioner's counsel contacted the I.G.'s counsel several months later to state that Petitioner had authorized his counsel to accept the I.G.'s offer, Petitioner's counsel was told that the I.G. was no longer willing to settle the case. Accordingly, Petitioner's "Motion to Enforce Settlement Agreement" is premised on Petitioner's asserted belief that the I.G. did not in fact withdraw the settlement offer prior to Petitioner's decision to accept it.

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[2] Since Petitioner has offered no exhibits of his own, the evidence I have admitted into the record consists of I.G. Exhibits (Exs.) 1 Revised, 2, and 3.

The I.G. objected to the motion on grounds which included her counsel's contention that she thought Petitioner, by counsel, had earlier rejected the settlement offer outright. In addition, the I.G. argued that I lack the authority to rule upon Petitioner's motion under 42 C.F.R. § 1005.4(b), (c)(3).

I find the I.G.'s reliance upon said regulations to be inapposite. The regulations preclude administrative law judges from compelling settlement agreements between the parties. 42 C.F.R. § 1005.4(c)(3). The regulations do not, as the I.G. contends, preclude an administrative law judge from determining whether the parties have already entered into a settlement agreement and, if so, the consequences of the agreement. These regulations also do not support the proposition that an administrative law judge is without the authority to ascertain whether counsel was acting with or without authorization from her client during settlement discussions.

Petitioner herein alleged that when Petitioner's counsel contacted the I.G.'s counsel on November 14, 1996, the I.G.'s counsel stated that "'because the [I. G.'s] Brief had been submitted, it was too late to settle.'" Motion to Enforce Settlement Agreement, 2. Petitioner noted in his motion that no order or instructions issued by me indicated that the filing of any brief would preclude the parties from discussing or reaching a settlement agreement. Petitioner alleged also in his motion that the I.G.'s settlement offer had not been made with any deadline for response.

In this case, Petitioner's summary of the alleged exchange between counsel does not make appropriate my looking behind the presumption that an attorney follows her client's wishes and directives in settlement negotiations. Therefore, I will not attempt to verify that counsel for the I.G. was in fact speaking with the authority of her client on November 14, 1996, when Petitioner was informed that settlement was no longer an option. Nor will I attempt to ascertain why a settlement offer from the I.G. was withdrawn -- whether it was due to the filing of a brief by her counsel or for other reasons.

Petitioner has not proven the existence of any settlement agreement to be enforced in this case. There is not even any proof that the parties had reached a meeting of the minds to resolve the case on specific terms. Accordingly, I deny Petitioner's Motion to Enforce Settlement Agreement.

IV. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues in the case are:

a. Whether Petitioner was convicted of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, within the meaning of section 1128(b)(3) of the Act; and

b. Whether the length of Petitioner's exclusion is reasonable.

B. Findings of Fact and Conclusions of Law

1. On September 16, 1993, a Criminal Indictment was filed by the Grand Jury charging that pursuant to Count Three, Petitioner did knowingly sell or offer to sell Tylenol #3 with codeine, a schedule III controlled substance, in an amount equal to or exceeding the bulk amount but in an amount less than three times that amount in violation of Ohio Revised Code Title 29, Section 2925.03(A)(5), a felony of the third degree. I.G. Ex. 1 Revised.

2. On September 16, 1993, a Criminal Indictment was filed by the Grand Jury charging that pursuant to Count Four, Petitioner did knowingly make a false statement in any prescription, order, report or record required by chapter 3719 of the Revised Code, for a schedule III substance, Tylenol #3 with codeine, in violation of Ohio Revised Code Title 29, Section 2925.23(A), a felony of the fourth degree. I.G. Ex. 1 Revised.

3. On January 19, 1994, Petitioner waived his right to trial and pled guilty to and was adjudged guilty of the criminal offenses of illegal processing of drug documents, a felony of the fourth degree, and of attempted trafficking in drugs, a misdemeanor of the first degree. I.G. Ex. 2.

4. Pursuant to the Judgment Entry on Plea dated January 19, 1994, Judge Williamson granted the motion to amend Count Three of Petitioner's Indictment to attempted trafficking in drugs, which is knowingly or purposely engaging in conduct, which, if successful, would constitute or result in the offense of trafficking in drugs, a violation of Ohio Revised Code Title 29, Sections 2925.03 and 2923.02 and a misdemeanor of the first degree. I.G. Ex. 2.

5. Petitioner's sentence by the State court to one year imprisonment for the offense of illegal processing of drug documents and six months imprisonment for the offense of attempted trafficking in drugs, was suspended, and he was placed on probation for two and one-half years provided he met certain conditions which included, in part, 45 days detention, evaluation by and appropriate treatment, if necessary, by a chemical dependency treatment center, 100 hours of community service and a mandatory fine of $1500. I.G. Ex. 3.

6. Petitioner was convicted of a criminal offense related to the distribution, prescription or dispensing of a controlled substance. Findings 2 - 5; Act, section 1128(b)(3).

7. The Secretary delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act.

8. The I.G. has authority to impose and direct exclusions pursuant to section 1128(b)(3) of the Act.

9. Petitioner's conviction is related to the unlawful distribution, prescription or dispensing of a controlled substance.

10. An exclusion imposed pursuant to section 1128(b)(3) of the Act will be for a period of three years, unless specified aggravating or mitigating factors are present. 42 C.F.R. § 1001.401(c)(1).

11. Only the mitigating factors set forth in 42 C.F.R. § 1001.401(c)(3) may be considered as a basis for decreasing the period of exclusion.

12. The record in this case does not support the presence of any of the mitigating factors.

13. Petitioner was properly excluded for a period of three years pursuant to regulations promulgated by the Secretary under the authority of section 1128(b)(3) of the Act.

V. Petitioner's Arguments

Petitioner contends that his exclusion under 1128(b)(3) of the Act and 42 C.F.R. § 1001.401 is not justified because there is no evidence that controlled substances were a necessary element of his convictions for illegal processing of drug documents, a felony in the fourth degree, and for attempted drug trafficking, a misdemeanor of the first degree. Petitioner also contends that the length of his exclusion is unreasonable because the I.G. waited two years

before implementing the three-year exclusion, effectively creating a five-year exclusion, because the I.G. exclusion came immediately after his State Pharmacy license two-year suspension ended.

VI. Discussion

The statute authorizes the I.G. to exclude the Petitioner from participation in the Medicare and Medicaid programs for a period of three years if the Petitioner was convicted under federal or state law of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance as defined under federal or state law.

In this instance, Petitioner does not dispute that he pled guilty to and therefore, was convicted of two drug related offenses; rather, Petitioner merely contends that neither offense was "related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." Contrary to Petitioner's contentions, I conclude that the relevant record, taken together, supports a finding that Petitioner was convicted of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

Petitioner does not dispute that he pled guilty to and was adjudged guilty of attempted trafficking in drugs pursuant to Count Three of the Criminal Indictment as amended. See I. G. Exs. 1 Revised, 2, and 3. Moreover, Petitioner does not dispute that this offense prohibits knowingly or purposely engaging in conduct which, if successful, would result in the selling or offering to sell a controlled substance. Ohio Revised Code Title 29, Sections 2923.02 and 2925.03.

The undisputed facts of this case show that a Criminal Indictment was filed by the Grand Jury against Petitioner on six criminal counts. After that, based on a plea agreement, Petitioner, in lieu of going forward to a hearing on all these counts, agreed to plead guilty to Count Three, as amended, and to Count Four, with the State agreeing to drop the other four counts filed against Petitioner. Petitioner, however, argues that this indictment is of no effect in these proceedings and that I am limited to only the Judgment Entry on Plea and the Judgment Entry on Sentencing to determine the basis for Petitioner's convictions.[3] I disagree. In light

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[3] Petitioner initially moved against admission of the Criminal Indictment as an exhibit in this case, arguing that it was not properly authenticated, that in any event it is

(continued...)

of the circumstances here, the Criminal Indictment must be read together with the Judgments in order to determine the actual offenses for which Petitioner has pled guilty. It would lead to ludicrous results if that indictment was not considered to be incorporated into these Judgments, especially when Judge Williamson specifically granted the State's motion to amend Count Three of the Indictment to Attempted Trafficking in the Judgment Entry on Plea and then granted the State's motion to dismiss Counts One, Two, Five and Six of the Indictment in the Judgment Entry on Sentencing. I.G. Exs. 2 and 3.

Further, Count Three of the Criminal Indictment clearly and specifically states that the Grand Jury found that on or about January 1992, Petitioner "did knowingly sell or offer to sell Tylenol #3 with codeine, a schedule III controlled substance, in an amount equal to or exceeding the bulk amount but in an amount less than three times that amount, to-wit: 60 tablets." I.G. Ex. 1 Revised. There is nothing in the record which would indicate that Judge Williamson's Judgment Entry on the Plea for Count Three, as amended, was not based on these same facts.

I find no merit in Petitioner's additional argument that his conviction for attempted drug trafficking is not an excludable offense under section 1128(b)(3) of the Act because he was convicted under an Ohio Statute which did not require the State to prove the actual existence of any controlled substance to be trafficked. To have an exclusion upheld under section 1128(b)(3) of the Act, the I.G. need only show that the individual has been convicted of a criminal offense related to the distribution, prescription or dispensing of a controlled substance. Petitioner's knowing attempt to sell or offer to sell a controlled substance such as Tylenol #3, a controlled substance, establishes that his offense was related to the distribution or dispensing of a controlled substance. Therefore, it is immaterial whether Petitioner was selling or offering to sell a supply of Tylenol #3 actually in existence or in his possession at the time, or whether he was selling or offering to sell a supply of Tylenol #3 which was to be manufactured or otherwise obtained after he had secured the orders for it. For the foregoing reasons, I conclude that Petitioner's conviction

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[3](...continued)
nothing more than a statement of probable cause, and for other reasons under the Federal Rules of Evidence. The I.G. resubmitted an authenticated, certified copy of this exhibit as Ex. 1 Revised. I see no reason to bar this document from admission into the record, and admitted it and received it as I.G. Ex. 1 Revised.

for attempted trafficking in drugs was an excludable offense within the meaning of the statute.[4] Where an individual is subject to an exclusion under section 1128(b)(3) of the Act, the regulations prohibit review of the I.G.'s exercise of her discretion to impose an exclusion permitted by law. 42 C.F.R. § 1005.3(c)(5). Therefore, the only remaining issue in this case is whether the length of the exclusion imposed by the I.G. is unreasonable. 42 C.F.R. § 1001.2007(a).

As to the length of Petitioner's exclusion, the controlling regulation, 42 C.F.R. § 1001.401(c) provides that "an exclusion imposed in accordance with this section will be for a period of 3 years, unless aggravating or mitigating factors listed in paragraphs (b)(2) and (b)(3) of this section form a basis for lengthening or shortening that period."[5] The regulations state that only the factors set forth may be considered as mitigating and the basis for shortening the length of the exclusion. The regulation then sets forth two mitigating factors: (1) the individual's cooperation with federal or State officials resulted in the conviction, exclusion of others or imposition of a civil monetary penalty; or (2) alternative sources of the type of health care items or services furnished by the individual or entity are not available. 42 C.F.R. § 1001.401(c)(3)(i) and (ii).

Petitioner has not presented any such mitigating factors. While Petitioner contends that under the circumstances the length of the exclusion is unreasonable where the I.G. did not exclude him until two years after his conviction, this is not a basis under the regulations for shortening the period of the exclusion. The three-year period of exclusion is mandated by regulation where there is an absence of any of the specified mitigating factors. Whatever events may have transpired during the years immediately following Petitioner's conviction, they were not caused by the I.G.'s decision to impose the three-year exclusion pursuant to section 1128(b)(3) of the Act. Therefore, in the absence of any evidence in the record that any mitigating factors exist here, I am bound by the regulations, and have no authority to modify the three-year exclusion.

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[4] While Petitioner was also convicted for illegal processing of drug documents, given my finding that Petitioner's conviction for attempted trafficking in drugs is an excludable offense pursuant to section 1128(b)(3) of the Act, there is no reason to make any further determinations here.

[5] No aggravating factors have been alleged by the I.G. Therefore, aggravating factors are not an issue here.

VII. Conclusion

Petitioner was properly excluded for a three-year period pursuant to section 1128(b)(3) of the Act and the applicable regulations at 42 C.F.R. § 1001.401.

/s/

Mimi Hwang Leahy

Administrative Law Judge