Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Michael Fish,	)	Date: March 9, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-620
	)	Decision No. CR1909
The Inspector General.	)	
	)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Michael Fish (Petitioner), from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner pursuant to section 1128(a)(1) of the Social Security Act (Act), and that the statute mandates a minimum five-year exclusion.

I. Background

By letter dated May 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)(1) of the Act based on his conviction in the Monmouth County Superior Court of the State of New Jersey, of a criminal offense related to the delivery of an item or service under the Medicare or state health care program, including the performance of management or administrative services relating to the delivery of items or services, under any such program. By letter dated July 17, 2008, Petitioner timely appealed the I.G.'s decision. In his request, Petitioner asked that the proposed exclusion not be imposed and instead, that his State-imposed debarment that began in April 2007 be allowed to serve as the penalty, or in the alternative, that the exclusion run concurrently with the State debarment.

This case was assigned to me for hearing and decision. A telephone prehearing conference was scheduled for August 20, 2008, but then rescheduled to September 23, 2008, to accommodate Petitioner's request. During the conference, I advised the parties that the issues I may review are whether the I.G. has the authority to exclude Petitioner, and, if so, whether the period imposed is reasonable. The parties agreed that there did not appear to be a need for an in-person hearing. With the parties' concurrence**,** I set a briefing schedule. *See* Summary of Prehearing Conference and Order dated September 23, 2008 (Order).

On October 28, 2008, the I.G. submitted an initial brief with seven proposed exhibits attached (I.G. Exs. 1-7). By letter dated November 13, 2008, Petitioner's counsel advised me that Petitioner had insufficient funds to retain his firm for representation in this matter and that Petitioner would be proceeding on a *pro se* basis. Petitioner's counsel attached to his letter a Substitution of Attorney, dated November 17, 2008, signed by himself and Petitioner, stating that Petitioner would represent himself in this matter.

In a letter dated November 23, 2008, which was accompanied by copies of the above-mentioned November 13, 2008 letter and the Substitution of Attorney, Petitioner advised me that he was choosing to represent himself. He stated that he would like the opportunity to present an oral argument as to why his request should be granted. Petitioner stated further that he "know[s] [he] cannot argue any of the facts or circumstances that led to my pleading to an accusation and that is not my intention." Petitioner's letter dated November 23, 2008.

Pursuant to my September 23, 2008 Order, Petitioner had until December 3, 2008, to file a response, and supporting evidence, if any. Petitioner failed to file a response brief. On December 17, 2008, I issued an "Order to Show Cause" to Petitioner. The Order to Show Cause directed Petitioner to file his response brief by January 2, 2009, and advised that failure to file a brief by the deadline would result in this case being dismissed for abandonment.

On December 24, 2008, Petitioner submitted his response brief without any exhibits. The I.G. did not file a reply brief. In the absence of any objections, I admit into evidence I.G. Exs. 1-7.

II. Issues

The legal issues before me are set out at 42 C.F.R. § 1001.2007(a)(1). 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)(1) of the Act; and

2. Whether the proposed five-year period of exclusion is unreasonable.

As I shall explain below, both issues must be resolved in favor of the I.G.'s position. I find that the I.G. has a basis for excluding Petitioner from program participation. Moreover, because an exclusion under section 1128(a)(1) 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)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the mandatory exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any "individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program." The terms of section 1128(a)(1) are restated in regulatory language at 42 C.F.R. § 1001.101(a). This statutory provision makes no distinction between felony convictions and misdemeanor convictions as predicates for mandatory exclusion.

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

An exclusion based in section 1128(a)(1) is mandatory, and the I.G. must impose it for a minimum period of five years. Section 1128(c)(3)(B) of the Act, 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 must be excluded for five years because he was convicted of a criminal offense related to the delivery of an item or service under a state health care program, within the meaning of section 1128(a)(1) of the Social Security Act.[1]

Section 1128(a)(1) of the Act requires that the Secretary of Health and Human Services (Secretary) exclude an individual who has been convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.[2] 42 C.F.R. § 1001.101. Individuals excluded under section 1128(a)(1) of the Act must be excluded for a period of not less than five years. Act, section 1128(c)(3)(B).

On February 7, 2007, Petitioner was charged by Accusation filed in the Superior Court of New Jersey, County of Monmouth, with one count of Medicaid fraud in the third degree, in violation of N.J. STAT. ANN. § 30:4D-17(c)(1). Specifically, the accusation charged that Petitioner

> from on or about October 8, 1999, to February 20, 2002, . . . knowingly did solicit or receive a kickback in connection with the furnishing of services for which payment was made in whole or in part under the New Jersey Medical Assistance and Health Services Act, . . . ("Medicaid"), in that [Petitioner], as principal of Pharmacy Consultants, LLC, received kickbacks from Michael Stavitski, Jr., Mick, Inc., d/b/a. Belmar Hometown Pharmacy, in the aggregate amount of at least $88,693, said kickbacks being made in connection with pharmacy services provided to the Dayton Woods Health Care Center residents by . . . Belmar Hometown Pharmacy and said pharmacy services paid for by Medicaid contrary to the provisions of N.J.S.A. 30:4D-17(c)(1) . . . .

I.G. Ex. 4, at 1.

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[1] My findings of fact and conclusions of law are set forth, in italics and boldface, in the discussion headings of this decision.

[2] The term "state health care program" includes a state's Medicaid program. Act, section 1128(h)(1).

Petitioner appeared with counsel in Monmouth County Superior Court on February 7, 2007, and pleaded guilty to the one-count accusation charging him with third degree Medicaid fraud. I.G. Exs. 2, 3, and 5. The court accepted Petitioner's guilty plea, found him guilty, and entered judgment of conviction on April 20, 2007. I.G. Ex. 2. On that day, Petitioner was sentenced to one year of probation, payment of certain assessments and penalties, and payment of restitution to the State of New Jersey in the amount of $88,693. I.G. Exs. 2, 6. Petitioner further agreed to comply with the terms of a Consent Order dated April 20, 2007, in which he agreed to be debarred from the New Jersey Medicaid program for five years and to voluntarily divest his ownership interests in four Medicaid providers within 90 days. I.G. Ex. 7.

Petitioner does not dispute that he has been convicted of a criminal offense, 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 also does not dispute that the offense for which he was convicted related to the delivery of an item or service under the New Jersey Medicaid program. In describing his unlawful conduct to the judge, Petitioner stated:

> I accepted payments from Belmar Hometown Pharmacy to open doors, bring facilities to them so that they can provide their pharmacy services to these facilities. These facilities had residents that were on Medicaid, and they paid me money to introduce or open the door of these facilities so that they can come in and service them. They paid me more money than would be reasonably, reasonable in the course of doing that kind of business.

I.G. Ex. 5, at 10. In response to further questioning by the judge, Petitioner confirmed that he knew that Medicaid patients were at these facilities.[3] *Id.* Moreover, in his response brief, Petitioner conceded that he pleaded guilty to Medicaid fraud and admitted his wrongdoing, stating "[b]y my accepting money from a pharmacy chain to introduce them to facilities I had contacts with, one of which I had a 10% ownership in was

[3] Although the nursing home facility stated in the Accusation is "Dayton Woods Health Care Center" (I.G. Ex. 4, at 1), Petitioner stated before the judge that the facility is called "Dayton Manor Retirement Center." I.G. Ex. 5, at 10.

considered a kickback." Petitioner's response brief at 1-2. Petitioner has thus admitted that he received kickbacks from Belmar Hometown Pharmacy in exchange for referring Dayton Woods Health Care Center's Medicaid residents to the pharmacy for the furnishing of items or services that would be reimbursable by Medicaid.

As a matter of law, it is a settled principle that conviction of a criminal offense for knowingly and willfully accepting a kickback related to services or items under the Medicaid or Medicare programs is a crime that falls within the scope of section 1128(a)(1) of the Act. *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Jose Grau, M.D.*, DAB CR930 (2002); *Efstathios Mark Varidin, D.O.*, DAB CR971 (2002); *Jitrenda C. Shah, M.D.*, DAB CR720 (2000). Petitioner's conviction in this case is clearly program-related. Accordingly, I conclude that there is a basis for Petitioner's exclusion, and the exclusion is required by section 1128(a)(1) of the Act.

B. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a)(1) is five years.

An exclusion under section 1128(a)(1) 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 minimum mandatory five-year period, the reasonableness of the length of the exclusion is not an issue. 42 C.F.R. § 1001.2007(a)(2).

C. I have no authority to order Petitioner's exclusion be made retroactive.

Petitioner asks that the I.G.'s exclusion not be imposed, and instead, that his five-year debarment from the New Jersey Medicaid program serve as the penalty; or, in the alternative, that the exclusion be made retroactive to April 20, 2007, the date his five-year debarment from the New Jersey Medicaid program began. Petitioner's hearing request; Petitioner's response brief. Petitioner contends that the I.G. notified him of the five-year exclusion on May 30, 2008, and that this "[b]asically add[ed] 13 months to [his] exclusion [from the New Jersey Medicaid program]." Petitioner's response brief at 2. Petitioner argues that it is not reasonable or fair that it took 13 months for the exclusion to be imposed; he would have reevaluated his plea agreement had he been aware of this

result; and that his debarment from the NJ Medicaid program "accomplished the same thing as the ban on the Federal level." *Id*.at 4. Petitioner contends that the delay in the imposition of the exclusion presents a hardship on him and that the law does not "forbid" his exclusion being made retroactive to April 20, 2007. *Id*. at 2, 5.

The relief Petitioner is seeking is beyond my power to grant. The Departmental Appeals Board (the Board) has held that the Act and regulations implementing the Act do not authorize an administrative law judge (ALJ) or the Board to retroactively adjust the beginning date of an exclusion. *Thomas Edward Musial*, DAB No. 1991, at 4-5 (2005) (citing *Douglas Schram, R. Ph.*, DAB No. 1372, at 11 (1992); *David D. DeFries*, *D.C.*, DAB No. 1317, at 6 (1992); *Samuel W. Chang, M.D.*, DAB No. 1198, at 10 (1990)); *Kailash C. Singhvi, M.D.*, DAB No. 2138, at 4-5 (2007); *Lisa Alice Gantt,* DAB No. 2065, at 2-3 (2007); *Kevin J. Bowers*, DAB No. 2143, at 6-7 (2008); *Randall Dean Hopp*, DAB No. 2166, at 3-4 (2008). The Board and I are bound by the Act and the Secretary's regulations implementing the Act.

Further, I do not have the authority to review the timing of Petitioner's exclusion. *Kailash C. Singhvi. M.D.*, DAB No. 2138, at 4-5 (2007); *Randall Dean Hopp*, DAB No. 2166, at 5; *Kevin J. Bowers*, DAB No. 2143, at 6-7. In *Singhvi,* the Board cited court decisions that declined to modify exclusions based on plaintiffs' complaints of delay in the notification or imposition of exclusions, and which held that the Act and the implementing regulations set no deadlines for the I.G. to act. DAB No. 2138, at 6-7 (citing *Seide v. Shalala*, 31 F. Supp. 2d 466, 469 (E.D. Pa. 1998) (affirming *Charles Seide*, DAB CR525 (1998)); *Steven R. Caplan, R.Ph. v. Thompson*, Civ. No. 04-00251 (D. Haw. Dec. 17, 2004) (affirming *Steven R. Caplan, R.Ph.*, DAB CR1112 (2003)). The Board in *Singhvi* also noted another decision, *Connell v. Sec'y of Health and Human Servs*., No. 05-cv-4122-JPG, 2007 WL 1266575 (S.D. Ill. Apr. 30, 2007), in which the court acknowledged that the regulations do not permit an ALJ to consider questions regarding the timing of exclusions, but nevertheless remanded to the Secretary for fact-finding as to the reasons for a 35-month delay between Connell's criminal conviction and his exclusion pursuant to section 1128(a)(1) of the Act.[4] The Board in *Singhvi* concluded that *Connell* did not compel either reversal of Petitioner Singhvi's exclusion or findings on whether the delay in imposing his exclusion was reasonable. DAB No. 2138, at 5-7.

[4] On remand, *Connell* was dismissed pursuant to a motion to withdraw his hearing request. *See* DAB No. 2138, at 6 n.8.

Accordingly, despite Petitioner's arguments in the case at hand, there is nothing in either the Act or the regulations that would have precluded the I.G. from excluding Petitioner when he did, and I have no authority to review the I.G.'s exercise of discretion in this area.

Although Petitioner was represented by counsel initially, he later chose to appear *pro se* in these proceedings. 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 appropriate when settled law can be applied to undisputed material facts. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992). 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, and this Decision issues accordingly.

V. Conclusion

For the reasons set out above, I sustain the I.G.'s exclusion of Petitioner 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)(1) of the Act.

/s/
Alfonso J. Montaño
Administrative Law Judge