Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
David L. Williford,	)	Date: March 12, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-13
	)	Decision No. CR1923
The Inspector General.	)	
	)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude David L. Williford (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)(3) of the Social Security Act (Act), and that the statute mandates a minimum five-year exclusion.

I. Background

By letter dated July 31, 2008, the I.G. notified Petitioner that he was being excluded for a period of five years from participating in Medicare, Medicaid, and all federal health care programs. The I.G. informed Petitioner specifically that he was being excluded pursuant to section 1128(a)(3) of the Act based on his conviction in the Superior Court of Effingham County, Georgia, of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service, including the performance of management or administrative services relating to the delivery of such items or services, or with respect to any act or omission in a health care program (other than Medicare and a State health care program) operated or financed by, or financed in whole or in part, by any federal, state, or local Government agency.

By letter dated September 26, 2008, Petitioner timely appealed the I.G.'s decision. In his request, Petitioner contended that he had not been convicted of any crime in the Superior Court of Effingham County, Georgia, and that the findings by the I.G. are incorrect.

This case was assigned to me for hearing and decision.

I held a prehearing conference with the parties on October 20, 2008. 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 of exclusion imposed is reasonable. I advised that, in this case, because Petitioner had been excluded for the mandatory five-year period, the reasonableness of the period of the exclusion is not an issue before me. The parties agreed that it would be appropriate for me to decide this matter based on their briefs, and that an in-person hearing was not necessary. I therefore set a briefing schedule. *See* Order and Schedule for Filing Briefs and Documentary Evidence, dated October 28, 2008 (Order).

On December 1, 2008, the I.G. submitted an initial brief with eight proposed exhibits attached (I.G. Exs. 1-8). After receiving an extension of the briefing deadlines, Petitioner submitted his response brief with one exhibit (P. Ex. 1) on January 22, 2009. The I.G. submitted a reply brief on February 9, 2009. In the absence of any objections, I admit into evidence I.G. Exs. 1-8 and P. Ex. 1.

II. Issues

The legal issues before me are expressly limited to those set out at 42 C.F.R. § 1001.2007(a)(1). In the specific context of this record, the issue is:

> – Whether the I.G. had a basis upon which to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(3) of the Act.

When there is a basis for exclusion under section 1128(a)(3) of the Act, and the I.G. imposes an exclusion for the mandatory five-year period, the reasonableness of the length of the exclusion is not an issue. 42 C.F.R. §1001.2007(a)(2).

As I shall explain below, I find that the I.G. has a basis for excluding Petitioner from program participation.

III. Controlling Statutes and Regulations

Section 1128(a)(3) of the Act, 42 U.S.C. § 1320a-7(a)(3), authorizes the Secretary of Health and Human Services (Secretary) to exclude from participation in any federal health care program (as defined in section 1128B(f) of the Act):[1]

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[1] "Federal health care program" is defined in section 1128B(f) as any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government, or any

(continued...)

> Any individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996,[2] 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 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 relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

The terms of section 1128(a)(3) are restated in somewhat restructured regulatory language at 42 C.F.R. § 1001.101(c). This statutory provision encompasses only felony convictions.

The Act defines "conviction" as including those circumstances:

> (1) 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;
>
> (2) when there has been a finding of guilt against the individual . . . by a . . . State . . . court;
>
> (3) when a plea of guilty or nolo contendere by the individual . . . has been accepted by a . . . State . . . court; or
>
> (4) 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, section 1128(i)(1)-(4), 42 U.S.C. § 1320a-7(i)(1)-(4). These definitions are repeated at 42 C.F.R. § 1001.2.

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[1](...continued)
State health care program. "State health care program" is defined in section 1128(h) of the Act and includes the Medicaid program (Title XIX).

[2] The Health Insurance Portability and Accountability Act (HIPAA) of 1996 was enacted on August 21, 1996.

An exclusion based in section 1128(a)(3) 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 was convicted of a felony related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service, within the meaning of section 1128(a)(3) of the Act.[3]

Petitioner is a pharmacist who was licensed by the State of Georgia. Petitioner's license to practice pharmacy was suspended on or about November 17, 2004. I.G. Ex. 7, at 1. In December 2005, he applied for reinstatement of his license. *Id*. at 2.

On December 1, 2005, Petitioner was charged by Accusation filed in the Superior Court of Effingham County, Georgia, with four felony counts of Acquisition of Controlled Substances by Fraud, in violation of GA. CODE ANN. § 16-13-43. I.G. Ex. 3. Specifically, the Accusation charged Petitioner with illegally taking the controlled substances Hydrocodone, Carisoprodol, Provigil, and Tussionex Syrup from WalMart on August 24, 2004. I.G. Ex. 3.

On December 6, 2005, Petitioner pleaded guilty to the four felony counts, and the court accepted Petitioner's guilty plea. Petitioner received a conditional discharge pursuant to GA. CODE ANN. § 16-13-2, and received a felony sentence: three years of probation on the four counts to run concurrently, restitution in the amount of $818.88, a fine of $1000, and other monetary assessments. I.G. Ex. 8.

Petitioner's guilty plea, and its acceptance by the court, constitute a "conviction" within the meaning of section 1128(i)(3) of the Act. Further, Petitioner entered into a deferred adjudication program under GA. CODE ANN. § 16-13-2(a). Thus, I find that Petitioner was also "convicted" of a criminal offense within the meaning of section 1128(i)(4) of the Act.

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

Petitioner argues that he did not plead guilty to a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct and that the court's final disposition order did not state that he had pleaded guilty to any of those offenses. Rather, Petitioner contends that he pleaded guilty only to the criminal offense of unauthorized possession of a controlled substance, which is not among the offenses listed in section 1128(a)(3) of the Act.[4] Petitioner's Brief at 1-2. In disputing his conviction, Petitioner contends that an "indictment is not evidence of guilt nor evidence of a conviction." *Id*. at 4. In Petitioner's view, he did not enter into a deferred adjudication program based on the crime of Acquisition of a Controlled Substance by Fraud nor was he convicted of a felony relating to theft in connection with a health care item. *Id*. at 4.

Petitioner's arguments have no merit, and I reject them. It is well-settled that the I.G. may rely on extrinsic evidence to explain the circumstances of the offense of which a party is convicted. *Narendra M. Patel, M.D.*, DAB No. 1736 (2000); *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *Bruce Lindberg, D.C.*, DAB No. 1280 (1991).

I find that Petitioner's Accusation, as well as the criminal warrant, are sufficient for me to infer that the offense of which Petitioner was convicted is the type of offense described at section 1128(a)(3) of the Act. The Accusation charged Petitioner with four counts of illegally taking several controlled substances, specifically, Hydrocodone, Carisoprodol, Provigil, and Tussionex Syrup, from WalMart. I.G. Ex. 3. Further, each of the four criminal warrants issued by a Municipal Court Judge in Effingham County explicity recites that Petitioner is charged with the felony offense of acquiring a controlled substance by fraud or theft, in violation of "O.C.G.A. 16-13-43" – specifically, Tussionex Syrup, Carisoprodol tablets, Provigil tablets, and Hydrocodone tablets – and that, while working as a pharmacist at WalMart, Petitioner consumed and took possession of a prescription drug without a prescription. I.G. Ex. 4. I find the Accusation and the warrants to be reliable and credible for purposes of showing the underlying facts of Petitioner's conduct. *Narendra M. Patel, M.D.*, DAB No. 1736 (2000); *Gerald A. Goff*, DAB CR1123 (2003).

Further, Petitioner has produced no evidence in support of his claim that he was solely convicted of unauthorized possession of a controlled substance. In fact, on the court document titled "Sworn Statement of Defendant," Petitioner has, in the upper right-hand corner, in his own handwriting, described the offenses as "4

[4] In his brief, Petitioner states that this offense is described in GA. CODE ANN. § 16-13-30.

counts of Acquisition of Controlled Substance by Fraud O.C.G.A. 16-13-43." I.G. Ex. 5. Thus, by his own admission, Petitioner has acknowledged the nature and circumstances of his criminal offenses. There can be no doubt that Petitioner was charged with, and pleaded guilty to, four counts of Acquisition of a Controlled Substance by Fraud. Petitioner's conviction was a felony conviction that related to theft of prescription drugs.

B. Petitioner's felony conviction was "in connection with the delivery of a health care item or service."

As stated above, Petitioner denies that his conviction was connected with the delivery of a health care item. He recognizes the line of Departmental Appeals Board cases (*See*, *e.g.*, *Erik D. DeSimone, R.Ph.*, DAB No. 1932 (2004); *Kevin J. Bowers*, DAB No. 2143 (2008)), holding that theft of drugs by a pharmacist from his employer constitutes theft in connection with the delivery of a health care item, but contends that those cases are not applicable to his situation because he "has not been convicted of theft of a controlled substance." Petitioner's Brief at 6. Petitioner insists on arguing that "[t]here is not evidence in any of the documents in the record that [he] has been convicted of theft of a health care item." *Id*.

I reject Petitioner's arguments. As discussed in the preceding section, the weight of the evidence shows that Petitioner acquired controlled substances through fraud, namely theft. There is no dispute that Petitioner was convicted of a felony conviction related to theft of prescription drugs.

It logically follows that Petitioner's crime was committed in connection with the delivery of a health care item or service. The Board's reasoning in finding the requisite "common sense connection" in cases involving theft by pharmacy employees has been as follows: the pharmacy obtains health care items for the purpose of delivering them to members of the general public in order to meet their medical needs. When an employee pharmacist takes one of those drugs, he interferes with the delivery of that item. "[T]heft of [a] drug while under the guise of performing his professional responsibilities is clearly the requisite common sense 'connection' to health care delivery that section 1128(a)(3) requires." *Erik D. DeSimone, R.Ph.*, DAB No. 1932, at 3 (2004) (where the petitioner pled guilty to theft of a controlled substance and paid $2,500 in restitution); *see also Kevin J. Bowers*, DAB No. 2143 (2008); *Robert F. Tschinkel, R.Ph.*, DAB CR1323 (2005); *Thomas A. Oswald, R.Ph.*, DAB CR1216 (2004).

In this case, Petitioner, a pharmacist, stole prescription drugs from his employer, WalMart, and diverted them for his own use. The Board's reasoning set out in the cases cited above is clearly applicable to Petitioner's conduct. I find that there exists a "common sense connection" between Petitioner's theft of prescription drugs, which were intended for consumers, and the delivery of a health care item or service.

I find that the I.G. properly excluded Petitioner under section 1128(a)(3) of the Act. The I.G. has established that Petitioner was convicted of a felony offense involving fraud, theft, or other financial misconduct in connection with the delivery of a health care item or service, occurring after the date of enactment of HIPAA.

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

An exclusion under section 1128(a)(3) 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 mandatory five-year period, the reasonableness of the length of the exclusion is not an issue. 42 C.F.R. § 1001.2007(a)(2). Petitioner was convicted of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. As a result of Petitioner's conviction, the I.G. was required to exclude him pursuant to section 1128(a)(3) of the Act, for at least five years.

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)(3) of the Act.

/s/
Alfonso J. Montano
Administrative Law Judge