

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
David A. Thomas, M.D.,)	Date: March 30, 2009
)	
Petitioner,)	Docket No. C-09-114
)	Decision No. CR1936
- v. -)	
)	
)	
Centers for Medicare & Medicaid)	
Services.)	
_____)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, David A. Thomas, M.D., from participating in Medicare and other federally funded health care programs for a period of five years.

I. Background

On September 30, 2008 the I.G. notified Petitioner that it had determined to exclude him from participating in Medicare and other federally funded health care programs for a period of five years. The exclusion determination was based on Petitioner's alleged conviction of a felony as is defined at section 1128(a)(4) of the Social Security Act (Act).

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. Neither party requested that I hold an in person hearing. The I.G. filed proposed exhibits which he designated as I.G. Ex. 1- I.G. Ex. 8. Petitioner objected to my receiving into evidence I.G. Ex. 5 and I.G. Ex. 8. Each party submitted briefs and I permitted the I.G. to file a reply brief addressing Petitioner's objections to my receiving I.G. Ex. 5 and I.G. Ex. 8.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. I should exclude from evidence I.G. Ex. 5 and I.G. Ex. 8;
2. Petitioner was convicted of a felony as is described at section 1128(a)(4) of the Act; and
3. Petitioner's five year exclusion is reasonable as a matter of law.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision. I set forth each Finding below as a separate heading.

1. I overrule Petitioner's objections to I.G. Ex. 5 and I.G. Ex. 8.

The gravamen of Petitioner's objections to these two exhibits is that they are inherently unreliable. I.G. Ex. 5 consists of a report compiled by the Louisville, Kentucky police department which contains allegations concerning Petitioner's allegedly unlawful prescription of controlled substances. I.G. Ex. 8 is a document prepared in conjunction with a State disciplinary proceeding involving Petitioner's license to practice medicine in Kentucky.

I overrule Petitioner's objections to these two exhibits. Essentially, Petitioner objects to them because they contain hearsay allegations about Petitioner. This proceeding is not governed by formal rules of evidence. Administrative law judges routinely admit hearsay evidence in cases involving the I.G. For that reason, the fact that these exhibits contain hearsay is not a sufficient basis to exclude them from the record.

Having said that, I also find that there is in fact, no need to rely on the allegedly defective contents of these two exhibits in order to sustain the I.G.'s determination in this case. As I discuss below, at Finding 2, the official records of Petitioner's criminal case and conviction, contained in I.G. Ex. 2 – I.G. Ex. 4, suffice to provide a basis for his exclusion.

2. Petitioner was convicted of a felony that is described at section 1128(a)(4) of the Act.

Section 1128(a)(4) of the Act mandates the exclusion of any person who has been convicted of a felony occurring after August 21, 1996 that is related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The I.G. alleges that Petitioner was convicted of such a crime thereby mandating his exclusion.

The evidence offered by the I.G. establishes that, on December 19, 2007, Petitioner pled guilty in United States District Court, Western District of Kentucky, Louisville Division, to the crime of misprision of a felony. I.G. Ex. 2; I.G. Ex. 3, at 1; I.G. Ex. 4, at 1-2. The crime is a felony under federal law. 18 U.S.C. sections 4; 3559(a). Specifically, Petitioner pled guilty to:

having knowledge of the actual commission of a felony cognizable by a court of the United States – namely, the acquiring and obtaining possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge by . . . [another person] in violation of Title 21, United States Code, Section 843(a)(3) – concealed and did not as soon as possible make known the same to some judge or some other person in civil or military authority under the United States.

I.G. Ex. 2, at 2. The conviction was based on a plea agreement in which Petitioner admitted that he had concealed and/or withheld information concerning commission of crimes involving the prescription and distribution of controlled substances. Petitioner admitted that he had written prescriptions to an individual for the controlled substances Oxycontin and Lortab while deliberately ignoring the high probability that this individual was in fact obtaining the controlled substances by misrepresentation, deception, and subterfuge. I.G. Ex. 2, at 2. Petitioner also admitted that, when contacted by law enforcement personnel concerning their suspicions, he failed to explain all relevant information that he was aware of and failed to report his knowledge of crimes to responsible authorities. *Id.*

Petitioner's conviction was related to the prescription of controlled substances because his prescription of controlled substances was a necessary element of the crime of which he was convicted. There would have been no crime had Petitioner not prescribed controlled substances under the circumstances that are described in his plea agreement.

Petitioner contends that there is nothing in the elements of his conviction that suggests that he was convicted of anything related to the prescription of a controlled substance. Petitioner's brief at 3. He argues that his conviction was not based on "his unlawful

prescription of drugs, but rather on his failure to report the unlawful conduct of another.” Id. The obvious flaw in Petitioner’s logic is that his conviction did not occur in a vacuum. There could not have been a conviction but for Petitioner’s prescription of controlled substances in a setting that gave Petitioner knowledge of the likelihood that the beneficiary of the prescription had no legitimate use for those medications. It was that knowledge that Petitioner concealed unlawfully.

Petitioner argues also that his “mere silence” regarding the criminal conduct of a third party is not the situation that section 1128(a)(4) of the Act is intended to remedy. Petitioner’s brief at 3. I disagree. The Act was intended to encompass all felonies related to the prescription of controlled substances. It makes no exception for situations where individuals commit felonies related to the prescription of controlled substances by failing to inform authorities of crimes of which they are aware.

Petitioner also contends that he was, in effect, caught unfairly between the requirements of federal criminal law and his obligation as a physician to protect the privacy of his patient. That is not an argument that I have authority to consider because it is, essentially, a defense to the charge to which Petitioner pled guilty. The I.G.’s obligation to exclude derives from Petitioner’s conviction of a felony that falls within the reach of section 1128(a)(4). I may not consider arguments that constitute legal or equitable defenses to the crimes which are the basis for the conviction.

3. Petitioner’s five year exclusion is reasonable as a matter of law.

The I.G. must exclude any individual who is convicted of an offense that falls within the reach of section 1128(a)(4) for a minimum period of five years. Act, section 1128(c)(3)(B). The I.G. imposed the minimum five year exclusion against Petitioner. Therefore, it is reasonable as a matter of law.

/s/
Steven T. Kessel
Administrative Law Judge