Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Kamron Hakhamimi, M.D.,
(OI File No. L-09-40043-9),

Petitioner

v.

The Inspector General.

Docket No. C-10-939

Decision No. CR2348

Date: April 6, 2011

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Kamron Hakhamimi, M.D., from participating in Medicare and other federally funded health care programs for a period of at least 12 years.

I. Background

Petitioner is a physician. The I.G. determined to exclude Petitioner, relying on the authority of section 1128(a)(2) of the Social Security Act (Act), which mandates the exclusion of any individual who is convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service. Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision.

The I.G. filed an opening brief, two reply briefs, and 14 proposed exhibits that are identified as I.G. Ex. 1 – I.G. Ex. 14.[1] Petitioner filed an opening brief, a reply brief, and five proposed exhibits that are identified as P. Ex. 1 – P. Ex. 5. I received all of these exhibits into the record. On March 1, 2011, I conducted an in-person hearing by telephone to allow the parties to cross-examine witnesses whose written declarations are in evidence as exhibits. The parties filed final briefs.

II. Issues, Findings of Fact, and Conclusions of Law

A. Issues

The issues are whether:

1. The I.G. is mandated to exclude Petitioner pursuant to section 1128(a)(2) of the Act;

2. An exclusion of 12 years is reasonable.

B. Findings of Fact and Conclusions of Law

I make the following findings of fact and conclusions of law (Findings).

1. The I.G. is mandated to exclude Petitioner pursuant to section 1128(a)(2) of the Act.

The I.G. is mandated to exclude an individual pursuant to section 1128(a)(2), when that individual is convicted of a criminal offense as is described in that section. The I.G. must exclude where: (1) an individual is convicted of a crime; (2) relating to neglect or abuse of patients; (3) in connection with the delivery of a health care item or service.

Those three necessary elements are met here. First, Petitioner was convicted of a crime. On August 13, 2008, Petitioner entered a plea of no contest to two criminal charges that had been filed against him: violation of section 729(a) of the Business and Professions Code of the State of California; and violation of section 242 of the Penal Code of the State of California. Specifically, Petitioner pled no contest to the crimes of: willfully and unlawfully engaging in an act of sexual intercourse, oral copulation, and sexual conduct with a client and a patient identified as "A.K"; and willfully and unlawfully using force upon A.K's person. P. Ex. 1 at 1, 3; I.G. Ex. 4 at 3.

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[1] On November 16, 2010, the I.G. filed a motion to amend the record to replace his proposed I.G. Ex. 3 with a certified copy of the exhibit. I am granting the I.G.'s motion and replacing the certified copy as I.G. Ex. 3.

A plea of no contest or nolo contendere is a conviction within the meaning of section 1128 of the Act. Act § 1128(i)(3). A conviction is not vitiated by a subsequent expungement after completion of sentence.

Second, Petitioner's crimes explicitly related to abuse of a patient. Among other things, Petitioner was convicted of willfully using force against a patient. That is "abuse" under any definition of the term. So also is willfully and unlawfully engaging in a sexual act with a patient, because such an act is an abuse of a relationship of trust.

Petitioner argues that the force that was involved in his conviction is "directly related to the fact that a patient, by law, cannot consent to sex with his or her physician." Petitioner's Opening Brief at 4. Petitioner contends that the force that he used against A.K. was not abusive because it constituted only a technical violation of law based on his physician-patient relationship with A.K. That argument is unpersuasive. Sexual relations between a physician and his or her patient are unlawful in California because of the implicit coercion involved in such relationships. Whether coercion involves physical force, or simply misuse of a relationship of trust, it is abuse because it is involves the use of power against a victim to obtain results that might otherwise be unobtainable.

Third, Petitioner's crimes were committed in connection with the delivery of a health care item or service. That nexus is evident from the crimes of which Petitioner was convicted. Delivery of health care items or services to A.K. was a necessary element of these crimes. Petitioner could not have been charged with, or convicted of, these crimes but for his doctor-patient relationship with A.K.

Petitioner argues that one cannot conclude from the face of his convictions that he perpetrated his crimes in connection with the delivery of a health care item or service. Petitioner asserts that:

> The simple fact that the person with whom he had sexual relations had been seen by him on one occasion as a patient, does not logically permit the conclusion that their sexual relations were connected to Petitioner's medical care and treatment of the patient.

Petitioner's Opening Brief at 4-5.

I disagree. As Petitioner concedes, the doctor-patient relationship that Petitioner had with A.K. was an essential element of the two crimes of which he was convicted. The relationship would not have existed but for his delivery of health care items or services to A.K.

Petitioner seems to argue that, for the requisite nexus to exist, Petitioner would have had to commit his crimes during the act of delivering a health care item or service to A.K. If

that is Petitioner's contention, it is incorrect because it rests on a too narrow reading of section 1128(a)(2). The Act only requires that a crime be related to the delivery of a health care item or service. It does not suggest that such relationship exists only where a crime is committed during the course of delivery of a health care item or service. The necessary relationship exists any time that the delivery of a health care item or service is an underlying element of a crime. Here, that element is present because Petitioner could not have been convicted of either of the two offenses to which he pleaded but for his doctor-patient relationship with A.K., which rested on his delivery of health care items or services to that patient.

2. An exclusion of 12 years is reasonable.

Five years is the minimum mandatory exclusion period for an individual who is convicted of a crime that is described at section 1128(a)(2) of the Act. Act § 1128(c)(3)(B). The I.G. has discretion to impose an exclusion of more than five years. Here, the I.G. determined to exclude Petitioner for at least 12 years.

There are regulatory factors that may be used to decide whether an exclusion of more than five years is reasonable. 42 C.F.R. § 1001.102. These factors function as rules of evidence in that they establish what evidence may be relevant to deciding the length of an exclusion. Evidence is relevant only if it relates to at least one of the regulatory factors. The factors also function as rules of evidence in that they establish no formula for deciding the reasonable length of an exclusion. The regulations determine what evidence may be relevant, but they do not dictate the weight that must be given to relevant evidence.

What ultimately determines whether an exclusion is reasonable is the trustworthiness of the excluded person to provide care. Section 1128 is a remedial statute, and its purpose is to protect federally funded health care programs and the beneficiaries and recipients of program funds and items and services from individuals who are untrustworthy. In deciding whether an exclusion is reasonable, therefore, I must weigh all evidence that relates to a regulatory factor and decide what that evidence indicates about the trustworthiness of the excluded individual.

The I.G. offered evidence that, he contends, relates to two factors identified as aggravating by 42 C.F.R. § 1001.102. First, the I.G. asserts that the abuse committed by Petitioner was part of a continuing pattern of behavior, or consisted of non-consensual sexual acts. 42 C.F.R. § 1001.102(b)(4). The I.G. asserts that, by definition, the crimes of which Petitioner was convicted involved non-consensual sex. Furthermore, the I.G. contends that Petitioner, in effect, supplied A.K. with sedative and hypnotic medications and then took sexual advantage of her. I.G.'s Opening Brief at 6. Second, the I.G. asserts that Petitioner was the subject of other adverse action by a State Board that was based on the same circumstances that are the basis for Petitioner's exclusion. 42 C.F.R. §

1001.102(b)(9). The additional adverse action identified by the I.G. consists of a disciplinary action brought against Petitioner by the Medical Board of California. That action was resolved by a Stipulated Settlement and Disciplinary Order in which Petitioner stipulated to some of the allegations against him. I.G. Ex. 9.

The weight of the evidence establishes the presence of these two aggravating factors. Moreover, and, as I shall discuss, the evidence relating to these factors establishes Petitioner to be highly untrustworthy to provide care. I find an exclusion of 12 years to be reasonable.

The sexual relations that Petitioner had with A.K. were non-consensual. First, they were non-consensual as a matter of law. Petitioner pled guilty to unlawfully using force on the person of A.K. That force consisted of abuse of the doctor-patient relationship. Under California law, sex between a physician and his or her patient is non-consensual because of the abuse of authority implicit in such relationship.

Second, the sex between Petitioner and A.K. was non-consensual because Petitioner took advantage of his doctor-patient relationship with A.K. to supply her with medications that, in combination, had a sedating effect on her, and then had sexual intercourse with her when she was under the effect of these drugs.

Petitioner admitted this in the Stipulated Settlement and Disciplinary Order that he executed to settle the State disciplinary action brought against his medical license. I.G. Ex. 9. In settling that action, Petitioner explicitly waived a right to a hearing on the allegations made against him and admitted to each and every charge and allegation that had been made in the Fourth Cause for Discipline that had been filed against him by the Medical Board. *See* I.G. Ex. 9 at 3-4; *see id.* at 21-22. The Fourth Cause, which recited Petitioner's misdemeanor convictions, incorporated by reference allegations that were made at paragraphs 12A-17 of the disciplinary complaint against Petitioner. *Id.* at 19-21.

The allegations admitted to by Petitioner include the following. Petitioner met A.K. on an internet dating site, and the two agreed to meet in person on May 3, 2006. After their meeting, Petitioner arranged to see A.K. as a patient later on that date. Petitioner then saw A.K. as a patient and prescribed three drugs to her, Ativan, Restoril, and Trazodone. Petitioner had access to A.K.'s medical records, which showed that she had never taken these medications in the past and which did not show that she required these medications. Ativan and Restoril are hypnotic and sedating medications, and Trazodone is a psychoactive medication whose side effects include drowsiness. Petitioner and A.K. subsequently met for dinner on the evening of May 3, 2006. They then returned to Petitioner's home where A.K. began to feel the effects of the medication that Petitioner had prescribed to her. She accepted his offer to sleep in his bed. A.K. had no recollection of any events occurring after she fell asleep. However, on the following

morning, Petitioner informed her that she had had sexual intercourse with him. A.K. has no memory of having had sex with Petitioner. I.G. Ex. 9 at 19-20.

Thus, Petitioner admitted to having sex with A.K. after he prescribed to her sedating and hypnotic medications and while she was under the effect of these medications. I find that A.K.'s drugged state excludes the possibility that she could have knowingly and intelligently consented to Petitioner's advances. But, even if A.K. might have been able to resist Petitioner's advances, the fact that he had sex with her knowing that she was under the influence of sedating and hypnotic medications at the time is proof that he took advantage of her condition and, at the same time, abused the doctor-patient relationship.

Petitioner argues that I should not consider any of this evidence. He argues that the admissions that he made in settlement of the State disciplinary proceeding are not admissions of fact so much as a stipulation "only as to the fact that . . . [Petitioner] had been convicted of two misdemeanor counts . . . ." Petitioner's Opening Brief at 6.

As I have discussed, the allegations in the Fourth Cause for Discipline incorporated by reference allegations that were made elsewhere in the State disciplinary complaint against Petitioner. These admissions include all of the facts that I have described above.

Petitioner argues that these allegations were not incorporated into the Fourth Cause because the Fourth Cause says only that he was convicted of misdemeanors "involving" the allegations that are set forth at Paragraphs 12A-17 of the disciplinary complaint. I.G. Ex. 9, at 21. Petitioner seeks to distinguish the term "involving" by asserting that it does not really mean that the specific allegations at Paragraphs 12A-17 are incorporated into the Fourth Cause. I am not persuaded by this argument. In context, the word "involving" plainly means that the facts stated at Paragraphs 12A-17 are incorporated into the Fourth Cause.

Petitioner now repudiates his prior admissions. He now asserts that his sexual relations with A.K. were entirely consensual and that her conduct did not suggest to him that she was impaired in any way or that she was unable to consent. P. Ex. 4 at 2. Indeed, Petitioner now contends that he did not know, on the night in question, whether A.K. had taken any of the medications that he had prescribed to her.

Petitioner is not a credible witness, and his attempt to repudiate his prior admissions is patently self-serving. He admitted to, in effect, sexually abusing A.K. when it was in his self interest to do so, to enter into a consent agreement with the Medical Board of California. Now, he repudiates his prior admissions when it is in his self interest to do so.

Petitioner attempts to support his repudiation of his previous admissions by offering the testimony of Mace Beckson, M.D., a board-certified psychiatrist and an expert in psychopharmacology. P. Ex. 5. He asserts that the prescriptions that Petitioner wrote for

A.K. were "appropriate and within the standard of care for her complaints." *Id.* at 2. He contends that these medications would not have had the hypnotic and amnestic effects reported by A.K. *Id.* at 2-3. In effect, Dr. Beckson argues that A.K. could have consented to sex with Petitioner, notwithstanding the effect of the medications that she had taken.

I find this testimony to be unpersuasive. Petitioner admitted that the medications he prescribed to A.K. can have side effects that include sedative hypnotic and amnestic effects. Tr. at 15-20. Indeed, some of these medications are intended to induce sleep. Moreover, Petitioner admitted that A.K. *was affected* by the medications he prescribed to her. I.G. Ex. 9 at 19.

I have based my finding that Petitioner had non-consensual sex with A.K. solely on his conviction and on the admissions that Petitioner made during his California Medical Board disciplinary proceeding. The I.G. offered additional evidence addressing this issue, consisting of the testimony of Jeffrey Gomez and the reported statement of A.K. I.G. Ex. 13. I do not rely on this additional evidence because it contains hearsay, and Petitioner has not had the opportunity to confront A.K. and to attempt to impeach her account of what happened. However, Petitioner's guilty plea and his own admissions are sufficient to establish that he engaged in non-consensual sex with A.K.

I find an exclusion of 12 years to be reasonable because the evidence establishes that Petitioner egregiously abused a relationship of trust with A.K. The fact that Petitioner took advantage of his professional position for personal gratification renders him manifestly untrustworthy to provide care to program beneficiaries and recipients of program funds.

/s/
Steven T. Kessel
Administrative Law Judge