

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Shaikh M. Hasan, M.D.,
(OI File No. H-14-4-0705-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-1811

Decision No. CR3663

Date: February 24, 2015

DECISION

Petitioner, Shaikh M. Hasan, M.D., is a physician, licensed to practice in New York, who broke the law by selling prescriptions for the narcotic drug, Percocet. He pled guilty in state court to 41 felony counts of criminal sale of a prescription for a controlled substance. Pursuant to section 1128(a)(4) of the Social Security Act (Act), the Inspector General (I.G.) has excluded him from participating in Medicare, Medicaid, and all federal health care programs for a period of five years. Petitioner appeals the exclusion.

For the reasons discussed below, I find that he I.G. is authorized to exclude Petitioner and that the statute mandates a minimum five-year exclusion.

Background

In a letter dated June 30, 2014, the I.G. advised Petitioner Hasan that he was excluded from participation in Medicare, Medicaid, and all federal health care programs because he had been convicted of a felony offense related to the unlawful manufacture,

distribution, prescription, or dispensing of a controlled substance. I.G. Ex. 1. Petitioner requested review.

The I.G. submitted its brief (I.G. Br.) and ten exhibits (I.G. Exs. 1-10). Petitioner submitted a brief (P. Br.) and ten exhibits (P. Exs. 1-10). The I.G. filed a reply. In the absence of any objection, I admit into evidence I.G. Exs. 1-10 and P. Exs. 1- 10.

The parties agree that an in-person hearing is not necessary and that the case may be decided based on the written record. I.G. Br. at 8; P. Br. at 2.

Discussion

Because Petitioner was convicted of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, he must be excluded from program participation for at least five years. Act § 1128(a)(4), (c)(3)(B).¹

Section 1128(a)(4) of the Act requires the Secretary of Health and Human Services to exclude from program participation any individual or entity convicted of a felony criminal offense “relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.”

Here, Petitioner Hasan was unquestionably convicted of a drug-related felony. On October 10, 2013, he was convicted on 41 felony counts of criminal sale of a prescription. The court sentenced him to 30 days imprisonment followed by five years probation. I.G. Ex. 5; P. Ex. 4 at 1 (admitting “that Dr. Hasan has been convicted of a crime that is noted in 1128(a)(4) of the Social Security Act”); *see* I.G. Exs. 4, 6. He must therefore be excluded from program participation.

Petitioner, however, questions the validity of his convictions, complaining that he “was duped by criminals and arguably entrapped by the police who reacted to information about prescriptions” he had written. P. Br. at 4.² Federal regulations explicitly preclude such a collateral attack on Petitioner’s conviction:

When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction

¹ I make this one finding of fact/conclusion of law.

² Although numbered page 1, this claim appears on the fourth page of Petitioner’s written argument.

. . . is not reviewable and the individual or entity may not collaterally attack it[,] either on substantive or procedural grounds[,] in this appeal.

42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Chander Kachoria, R.Ph.*, DAB No. 1380 at 8 (1993) (“There is no reason to ‘unnecessarily encumber the exclusion process’ with efforts to reexamine the fairness of state convictions.”); *Young Moon, M.D.*, DAB CR1572 (2007).

Petitioner also argues that his conduct did not adversely affect any of his patients, nor has anyone suggested that he defrauded Medicare, Medicaid, or any other health care program. As a threshold matter, selling prescriptions for a highly addictive drug to patients who have not demonstrated a medical need for them likely causes them significant harm. But even accepting Petitioner’s highly questionable premise, exclusion under section 1128(a)(4) does not require findings of patient harm or health care fraud.

Petitioner complains that, if he is excluded, he will effectively not be able to practice medicine. P. Br. at 6. The exclusion’s impact on his profession is irrelevant and not a basis for overturning a mandatory exclusion.

Petitioner suggests that his exclusion be waived because his work in a poor community “fits the [s]pirit of 42 CFR 1001.1801(b).” P. Br. at 7. The waiver provision (42 C.F.R. § 1001.1801(b)) authorizes the I.G. to grant or deny a state health care program’s request that exclusion be waived “if the individual . . . is the sole community physician or the sole source of essential specialized services in a community.” So a *state* health care official must present the request to the I.G. But “the decision to grant, deny, or rescind a request for a waiver is not subject to administrative or judicial review.” 42 C.F.R. § 1001.1801(f); Act § 1128(c)(3)(B).

Finally, Petitioner asks that he be given “credit” for the time he was excluded from the Medicaid program. He was excluded from participation in the Medicaid program effective September 19, 2012, and argues that this exclusion should be made retroactive to that date. P. Br. at 5. As a matter of law, an exclusion becomes effective 20 days after the date of the I.G.’s notice of exclusion. 42 C.F.R. § 1001.2002. I have no authority to review the timing of the I.G.’s determination to impose an exclusion or to alter retroactively the date the exclusion was imposed. *Kailash C. Singhvi*, DAB No. 2138 at 4-5 (2007).

Nor may I reduce the length of Petitioner’s exclusion. An exclusion brought under section 1128(a)(4) must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

Conclusion

For these reasons, I conclude that the I.G. properly excluded Petitioner Hasan from participation in Medicare, Medicaid, and all other federal health care programs, and that period of exclusion must be for a minimum of five years.

/s/

Carolyn Cozad Hughes
Administrative Law Judge