**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Peter Nji Igwacho

Petitioner

v.

The Inspector General.

Docket No. C-10-157

Decision No. CR2182

Date: July 13, 2010

# DECISION

Petitioner, Peter Nji Igwacho, is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)), effective October 20, 2009, based upon his conviction of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. A proper basis for exclusion exists. Petitioner's exclusion for the minimum period[1] of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

## I. Background

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated September 30, 2009, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years, the minimum statutory period. The I.G. advised Petitioner that he was being

[1] Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

excluded pursuant to section 1128(a)(1) of the Act based on his conviction in the State of Minnesota, County of Ramsey, Second Judicial District, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner timely requested a hearing by letter dated October 18, 2009. The case was assigned to me for hearing and decision on November 30, 2009. A prehearing telephone conference was convened on January 27, 2010, the substance of which is memorialized in my order dated January 29, 2010. During the prehearing conference, Petitioner was advised of his right to counsel but elected to proceed pro se. Petitioner declined to waive an oral hearing, and the I.G. requested to file a motion for summary judgment. Accordingly, I set a briefing schedule for the parties.

The I.G. filed a motion for summary judgment and a supporting brief (I.G. Brief) on March 15, 2010, with I.G. exhibits (I.G. Exs.) 1 through 6. Petitioner filed a brief in opposition to the I.G. motion on May 1, 2010 (P. Brief), with Petitioner's exhibits (P. Exs.) 1 through 8. The I.G. filed a reply brief on May 19, 2010. The I.G. did not object to P. Exs. 1 through 8, and they are admitted as evidence. Petitioner objected to my consideration of I.G. Ex. 2, page 1, which is the first page of his request for hearing. Petitioner's objection is sustained, but as to all three pages of I.G. Ex. 2. Petitioner's request for hearing sets forth the basis for Petitioner's challenge to his exclusion and serves to define the issues that I must decide. Petitioner's request for hearing is not relevant as evidence in this case. Accordingly, I.G. Ex. 2 is not admitted as evidence. I note that Petitioner offered a copy of his request for hearing as P. Ex. 7, which I have admitted, and exclusion of I.G. Ex. 2, on grounds that it is cumulative, is also appropriate. Petitioner's objections to I.G. Ex. 3, pages 1, 6, 15, and 16, and I.G. Ex. 4, page 5 are overruled. Petitioner does not object to the authenticity or relevancy of I.G. Ex. 3, pages 1, 6, 15, and 16, or to I.G. Ex. 4, page 5. Petitioner's objections go to the weight that I should accord to the exhibits and not their admissibility. Accordingly the objections are overruled. I.G. Exs. 1 and 3 through 6 are admitted and considered as evidence.

## II. Discussion

### A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) provides Petitioner's rights to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of the Department of Health and Human Services (the Secretary).

Pursuant to section 1128(a)(1) of the Act, the Secretary must exclude from participation in the Medicare and Medicaid programs any individual convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Pursuant to section 1128(i) of the Act, an individual is convicted of a criminal offense when: (1) a judgment of conviction has been entered against him or her in a

federal, state, or local court, whether an appeal is pending or the record of the conviction is expunged; (2) a court finds guilt; (3) a court accepts a plea of guilty or no contest; or (4) the individual has entered into any arrangement or program where judgment of conviction is withheld.

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years are mitigating factors considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c). The I.G. cites no aggravating factors in this case, and the I.G. does not propose to exclude Petitioner for more than the minimum period of five years.

### B. Issue

The Secretary has by regulation limited my scope of review to two issues:

> Whether there is a basis for the imposition of the exclusion; and
>
> Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

### C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

**1. Petitioner's request for hearing was timely, and I have jurisdiction.**

**2. Summary judgment is appropriate in this case.**

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The right to hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. § 1005.2, and 42 C.F.R. § 1005.3 specifies the rights of both the sanctioned party and the I.G. to participate in a hearing. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). An ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12). Summary judgment is appropriate, and no hearing

is required where either: (1) no disputed issues of material fact exist and the only questions that must be decided involve application of law to the undisputed facts; or (2) the moving party prevails as a matter of law, even if all disputed facts are resolved in favor of the party against whom the motion is made. A party opposing summary judgment must allege facts, which, if true, would refute the facts that the moving party relied upon. *See, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. and Med. Ctr.*, DAB No. 1628, at 3 (1997) (holding in-person hearing required where non-movant shows material facts are in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also New Millennium CMHC*, DAB CR672 (2000); *New Life Plus Ctr.*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case. There is no dispute that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program and sentenced as described hereafter. The issues that Petitioner raised must be resolved against him as a matter of law. Accordingly, summary judgment is appropriate.

### 3. There is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

On July 23, 2007, Petitioner was charged in the Ramsey County District Court with two felony counts of theft by false representation. Count 1 alleged that between July 1, 2002 and December 17, 2002, Petitioner, d/b/a Prestigious Care and Handicap Ride, obtained by false representation in excess of $2,500 from the Minnesota Department of Human Services as Medicaid reimbursement for transportation services not rendered. Count 2 alleged that between January 14, 2003 and June 30, 2003, Petitioner, d/b/a Prestigious Care and Handicap Ride, obtained by false representation in excess of $2,500 from the Minnesota Department of Human Services as Medicaid reimbursement for transportation services not rendered. I.G. Ex. 4, at 13-14. On February 19, 2009, Petitioner executed a "Petition to Enter Plea of Guilty in a Felony Case Pursuant to Rule 15," in which Petitioner offered to plead guilty to theft of more than $2,500 from Minnesota Medicaid by false representation from about July 1, 2002 to June 30, 2003. Petitioner's offer to plead guilty was in exchange for a sentence limitation. I.G. Ex. 5. Petitioner was convicted pursuant to his guilty plea on February 19, 2009. I.G. Ex. 6. On April 10, 2009, an amended complaint was filed that was consistent with Petitioner's offer to plead guilty. I.G. Ex. 3. Petitioner was sentenced on April 10, 2009: (1) to ten years probation; (2) to pay the Minnesota Medicaid program restitution in the amount of $40,000; (3) to pay a $100 fine; and (3) to serve three days in the county jail. I.G. Ex. 6. It is undisputed that the I.G. notified Petitioner that he was being excluded on September 30, 2009.

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides:

> (a) MANDATORY EXCLUSION. The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
>
> > (1) Conviction of program-related crimes. 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 statute requires that the Secretary exclude from participation in Medicare or Medicaid any individual or entity: (1) convicted of a criminal offense; (2) where the offense is related to the delivery of an item or service; and (3) the delivery of the item or service was under Medicare or a state health care program.

Petitioner does not dispute that he was convicted of a criminal offense within the meaning of section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)). Pursuant to section 1128(i) of the Act, an individual is "convicted" of a criminal offense when: a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; there has been a finding of guilt in a federal, state, or local court; a plea of guilty or no contest has been accepted in a federal, state, or local court; or an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. Petitioner was clearly convicted within the meaning of section 1128 of the Act when the Ramsey County District Court, Minnesota, accepted his guilty plea.

Petitioner argues that he entered an "*Alford* plea" and, by doing so, maintained his innocence in this matter. P. Brief at 2. An "*Alford* plea" is, in short, one by which a defendant does not admit guilt but concedes that the prosecutor has sufficient evidence to obtain a conviction. *North Carolina v. Alford*, 400 U.S. 25, 35-38 (1970). Petitioner's offer to plead guilty does not reflect on its face that it was an "*Alford* plea." I.G. Ex. 5. Paragraph 25 of the offer states "I now make no claim that I am innocent." I.G. Ex. 5. Petitioner's agreement to such language is inconsistent with an "*Alford* plea" but is consistent with a confession of guilt. Furthermore, even if Petitioner's plea was an "*Alford* plea,"[2] such a plea is tantamount to a plea of no contest, which, if accepted by the

[2] Paragraph 4 of the Petition to Enter Plea of Guilty in a Felony Case Pursuant to Rule 15, includes some handwriting that appears to include the words "Alfred" and "Plea." I.G. Ex. 5, at 1. It is not necessary in this case to resolve whether Petitioner's guilty plea was treated by the court that accepted the plea as an Alford plea or not.

court, is a conviction within the meaning of section 1128(i) of the Act. *Charles W. Wheeler and Joan K. Todd*, DAB No. 1123 (1990).

The offense of which Petitioner was convicted is an offense related to the delivery of an item or service under the Minnesota Medicaid program. Petitioner pled guilty to theft by false representation of more than $2,500 from the Minnesota Department of Human Services as Medicaid reimbursement for transportation services not rendered.[3] I.G. Exs. 3, 4. The facts of this case show that a nexus or common-sense connection exists between Petitioner's crime and the Medicaid program. *Berton Siegel, D.O.*, DAB No. 1467 (1994); *Thelma Walley*, DAB No. 1367 (1992). The fact that Petitioner agreed to pay restitution to the Minnesota Medicaid program and that the court ordered such restitution further supports my conclusion that Petitioner's offense was related to the delivery of an item or service under Medicaid.

Petitioner argues that, after an audit in 2003, he was warned that he must keep proper documentation for future claims. He was referred to various chapters of the Minnesota health care manual, but he was told no civil money penalties would be imposed. He states that he immediately terminated his services with Minnesota Medicaid. He argues that revisiting the matter and excluding him in 2009 is "irrational" and with the intent to prevent him from obtaining a license as a psychological associate. Petitioner argues that the investigators had an incorrect driver's license number in the criminal complaint and investigation. He argues that the Medicaid fraud control unit investigations were not completed until 2007 and for purposes of preventing him from writing his psychology examinations. He argues that the delay cannot be substantiated, by which I infer he means justified. Petitioner argues that the delay in his prosecution resulted in violation of his due process rights. He argues that the delay from 2001 until 2009 is unreasonable, inexcusable, and prejudicial. Petitioner also argues that he reentered the United States on or about December 8, 2008, but that his passport was not stamped, and, therefore, he is not properly in the United States and not subject to judgment. He argues that Prestigious Care claims were submitted through an electronic software program, and there was no provision for him to submit additional documentation of his claims; however, he kept a personal diary. He also argues that the van used was the van of Prestigious Care that was registered in Minnesota to provide medical transportation services. Petitioner also argues that his driver's license number was DL I-220-680-631-098, not DL I-200-680-631-098. P. Brief at 2-3; Request for Hearing; P. Exs. 1-8.

[3] The charge to which Petitioner pled guilty alleged that he obtained Medicaid reimbursement while doing business as Prestigious Care and Handicap Ride, Inc. I.G. Exs. 3, 4. Petitioner concedes that Prestigious was a medical transportation service that he operated in Minnesota between 2001 and 2003. P. Brief at 2.

Petitioner's arguments attack the basis for his conviction. Under the regulations, Petitioner's underlying conviction is not reviewable or subject to collateral attack before me, whether on substantive or procedural grounds. 42 C.F.R. § 1001.2007(d). Thus, I may not consider Petitioner's arguments attacking his conviction, including the argument that he was denied due process by the criminal proceedings. Petitioner's arguments may also be construed to be that the I.G. unreasonably delayed the exclusion action against him. However, Petitioner's conviction occurred on February 19, 2009, and the I.G. notified Petitioner of the exclusion based on the conviction on September 30, 2009. I do not find it unreasonable or prejudicial that the I.G. exclusion occurred just seven months after Petitioner's conviction. I also conclude that Petitioner has not been denied due process in the exclusion proceeding. The I.G. provided Petitioner the required notice. Petitioner filed a timely request for a hearing. I have reviewed Petitioner's case, and I issue this decision based on my evaluation of the evidence and the arguments of the parties. Petitioner has received all the process due him in this proceeding.

I conclude that a basis exists for Petitioner's exclusion, and section 1128(a)(1) of the Act mandated his exclusion.

**4. Pursuant to section 1128(c)(3)(B) of the Act, five years is the minimum period of an exclusion pursuant to section 1128(a) of the Act.**

**5. Petitioner's exclusion for five years is not unreasonable as a matter of law.**

Five years is the minimum authorized period for a mandatory exclusion pursuant to section 1128(a). Act § 1128(c)(3)(B). I have found a basis for Petitioner's exclusion pursuant to section 1128(a) of the Act, and the minimum period of exclusion is five years and not unreasonable as a matter of law.

## III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years effective October 20, 2009.

/s/
Keith W. Sickendick
Administrative Law Judge