

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Christopher Michael Ruby
(O.I. File Number 3-10-40192-9),

Petitioner

v.

The Inspector General
Department of Health and Human Services.

Docket No. C-11-686

Decision No. CR2476

Date: December 14, 2011

DECISION

Petitioner, Christopher Michael Ruby, is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to sections 1128(a)(3) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(3)), effective August 18, 2011. There is a proper basis for Petitioner's exclusion based upon his conviction in a state court of a criminal offense committed after August 21, 1996, related to fraud in connection with the delivery of an item or service in a health care program, other than Medicare or Medicaid, operated by, or financed in whole or in part by, any federal, state, or local government agency. Petitioner's exclusion for the minimum period 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 July 29, 2011, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years pursuant to section 1128(a)(3) of the Act, based upon his felony conviction in the Court

of Common Pleas of Fayette County, Pennsylvania, 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.

Petitioner timely requested a hearing by letter dated August 3, 2011, which he supplemented by a letter dated August 18, 2011. The case was assigned to me on August 16, 2011 for hearing and decision. A telephone prehearing conference was convened on August 31, 2011, the substance of which is memorialized in my order dated September 1, 2011. During the prehearing conference, Petitioner waived an oral hearing. The parties agreed that this matter could be resolved based upon the parties' briefs and documentary evidence, and a briefing schedule was set.

The I.G. filed a brief (I.G. Brief) on September 30, 2011, with I.G. exhibits (I.G. Exs.) 1 through 5. Petitioner filed his brief on October 11, 2011, with Petitioner's exhibits (P. Exs.) A through D. The I.G. filed a reply on October 31, 2011. No objection has been made to my consideration of the exhibits offered by the I.G., and I.G. Exs. 1 through 5 are admitted. The I.G. objected to P. Exs. A through D on grounds that they are not relevant. The I.G. argues that the exhibits are offered in support of Petitioner's collateral attack upon his underlying conviction. I.G. Reply at 1. The I.G. is correct that Petitioner may not challenge, and I may not review, whether he was correctly convicted in the state court. However, P. Ex. A through C relate to the underlying conduct or activity for which Petitioner was convicted. The general issue I must resolve is whether the statutory elements of section 1128(a)(3) of the Act are satisfied so that there is a basis for Petitioner's exclusion pursuant to that section as alleged by the I.G. The evidence contained in the exhibits is relevant to the extent that it has a tendency to show whether the facts necessary to meet the statutory elements under section 1128(a)(3) of the Act are more or less probable. FED. R. EVID. 401. Accordingly, I conclude that P. Exs. A through C are relevant, and they are admitted. P. Ex. D contains the results of polygraph examination administered to Petitioner on October 16, 2004. The information in the report does not reveal the conduct or activity of which Petitioner was convicted. Therefore, the report is not relevant to any issue that I may decide. Accordingly, I conclude that P. Ex. D is not admissible, and it is not considered for any purpose.

II. Discussion

A. Applicable Law

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

Pursuant to section 1128(a)(3) of the Act, the Secretary must exclude from participation in any federal health care program:

Any individual or entity that has been convicted for an offense which occurred after August 21, 1996, 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 (other than those specifically described in paragraph (1)) 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 Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(c).

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) will be for a period of not less than 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). No aggravating factors are cited by the I.G. in this case, and the I.G. does not propose to exclude Petitioner for more than the minimum statutory period of five years.

The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that provides the basis of the exclusion. 42 C.F.R. § 1001.2007(c), (d). Petitioner bears the burden of proof and the burden of persuasion on any affirmative defenses or mitigating factors, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b).

B. Issues:

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

Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs; and

Whether the length of the proposed 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. Petitioner's exclusion is required by section 1128(a)(3) of the Act.

Petitioner does not deny that on or about September 30, 2009, he pled guilty to one felony count of insurance fraud. Petitioner does not deny he was convicted pursuant to his guilty plea by the Court of Common Pleas of Fayette County, Pennsylvania, of one count of insurance fraud in violation of Pennsylvania statute. Petitioner does not deny that, on November 30, 2009, he was sentenced to make restitution to private pay insurers and to the Commonwealth of Pennsylvania Department of Welfare, and to two years of supervised probation. Petitioner also does not deny that the criminal actions that formed the basis of his conviction were committed between June 2003 and August 2006, while he was employed as a pharmacist at Burns Drug Pharmacy in Connellsville, Pennsylvania. Petitioner's Supplement Request for Hearing dated August 18, 2011; P. Br. at 1-2; I.G. Ex. 2, at 2; I.G. Ex. 3, at 3; I.G. Ex. 4, at 1; I.G. Ex. 5. The evidence establishes that there is a nexus or common sense connection between Petitioner's conviction of fraud and his position as a licensed pharmacist delivering health care items or services. *Erik D. DeSimone, R.Ph.*, DAB No. 1932, at 5 (2004).

The evidence before me shows that the elements necessary for exclusion under section 1128(a)(3) of the Act are satisfied in this case. Petitioner was convicted by a state court of felony insurance fraud that occurred after August 21, 1996. The conduct for which Petitioner was convicted was in connection with the delivery of health care items or services. Accordingly, I conclude that there is a basis to exclude Petitioner pursuant to section 1128(a)(3) of the Act.

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

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

Petitioner challenges the five-year exclusion as unreasonable based on his dispute of the facts underlying his conviction. Petitioner asserts that he was innocent of the crime to which he pled guilty. Petitioner argues that he can prove that he did not commit the insurance fraud, and that he did not have access to the money that was fraudulently obtained. Petitioner explains that he accepted the criminal charge and plea agreement because it was a non-drug charge that would allow him to minimize the penalty that

