Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Ethan Edwin Bickelhaupt, M.D.
(O.I. File Number 7-10-40580-9),

Petitioner,

v.

The Inspector General,
U.S. Department of Health and Human Services.

Docket No. C-12-85

Decision No. CR2554

Date: June 18, 2012

DECISION

Petitioner, Ethan Edwin Bickelhaupt, M.D., is excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(4) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(4)), effective September 20, 2011. There is a proper basis for exclusion. 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 (I.G.) notified Petitioner by letter dated August 31, 2011, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years pursuant to section 1128(a)(4)

[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.

of the Act. The basis cited for Petitioner's exclusion was his felony conviction in the United States District Court for the District of Kansas of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance as defined under federal or state law. Act § 1128(a)(4). Petitioner timely requested a hearing on October 25, 2011.[2] The case was assigned to me for hearing and decision on November 7, 2011.

On November 30, 2011, I convened a prehearing conference by telephone, the substance of which is memorialized in my Order dated December 1, 2011. During the prehearing conference, Petitioner did not waive an oral hearing. Counsel for Petitioner agreed that Petitioner was convicted of two felonies by the United States District Court of Kansas. The I.G. requested to file a motion for summary judgment prior to further development of the case for hearing and I set a briefing schedule.

The I.G. filed a motion for summary judgment and supporting brief (I.G. Br.) on January 13, 2012, with I.G. exhibits (I.G. Exs.) 1 through 4. Petitioner filed a response in opposition to the I.G. motion (P. Response) and a cross-motion for summary judgment (P. Br.) on March 14, 2012, with Petitioner's exhibits (P. Exs.) 2 through 4. Petitioner's Exhibit List dated March 14, 2012, reflects that P. Ex. 1 was the amended request for hearing filed on January 24, 2012. Petitioner filed a supplemental exhibit list with P. Ex. 5 on April 9, 2012. The I.G. filed its reply brief and opposition to Petitioner's cross-motion for summary judgment (I.G. Reply) on March 30, 2012. Petitioner filed a reply in support of its cross- motion for summary judgment on April 9, 2012 (P. Reply).

On March 14, 2012, Petitioner filed objections to and a motion to strike I.G. Exs. 3 and 4, citing 42 C.F.R. § 1005.17(b), (c), and (d) and arguing that the exhibits are not relevant, are more prejudicial than probative, may confuse the issues, may result in undue delay, or may be cumulative. The I.G filed a response on March 26, 2012. Petitioner's objection to I.G. Ex. 3 is overruled in part and granted in part. Petitioner's objection to I.G. Ex. 4 is overruled. I.G. Ex. 3 is the indictment in Petitioner's criminal case. The indictment is relevant to show the conduct that was the basis for the criminal charge and the conduct to which Petitioner pled guilty – Counts 1 and 6 (I.G. Ex. 3, ¶¶ 1-16 and 21). To the extent that the indictment contains charges to which Petitioner did not plead guilty (Counts 2 through 5, I.G. Ex. 3, ¶¶ 17-20); conduct that he did not admit; and allegations for which he was not convicted, the indictment is not considered. I.G. Ex. 4 is the plea agreement in Petitioner's criminal case. The plea agreement states the factual basis for Petitioner's guilty plea, i.e., the conduct he admitted. I.G. Ex. 3, ¶¶ 1-16 and 21 and I.G. Ex. 4 are

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[2] Petitioner filed amended hearing requests on January 24, 2012 and March 14, 2012. Both amendments have been accepted in the absence of objection by the I.G.

relevant to show whether or not there is a basis for Petitioner's exclusion. I.G. Ex. 3, ¶¶ 1-16 and 21 and I.G. Ex. 4 are not cumulative of other evidence, even though Petitioner has conceded the fact that he was convicted of offenses that require exclusion. I.G. Ex. 3, ¶¶ 1-16 and 21 and I.G. Ex. 4 are highly probative and not unduly prejudicial. The motion to strike is denied and the entire exhibits remain in the record. The I.G. objects to P. Ex. 2 on two grounds. The objection is sustained on the ground that the affidavit is not relevant to any issue I may decide. The affidavit does not address the issue of whether there is a basis for exclusion. There is no issue of the reasonableness of the period of exclusion as the five-year period is the minimum period of exclusion authorized under the Act. Further, I have no authority to consider whether or not a waiver of exclusion may be appropriate under section 1128(c)(3)(B) of the Act. P. Ex. 2 will remain with the record, but it is not considered for any purpose in reaching this decision. Accordingly, I.G. Exs. 1, 2, 3 ¶¶ 1-16 and 21, and 4 are admitted. P. Exs. 1, 3, 4, and 5 are admitted.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) provides Petitioner the right 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).

Pursuant to section 1128(a)(4) of the Act, the Secretary must exclude from participation in the Medicare and Medicaid programs any individual convicted of a felony criminal offense under federal or state law, that occurred after August 21, 1996, related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Pursuant to section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)), 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) there is a finding of guilt by a court; (3) a plea of guilty or no contest is accepted by a court; or (4) the individual has entered into any arrangement or program where judgment of conviction is withheld.

Exclusion for a minimum period of five years is mandatory for any individual or entity convicted of a criminal offense for which exclusion is required by section 1128(a) of the Act. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)). Pursuant to 42 C.F.R. § 1001.102(b), an individual's period of exclusion may be extended based on the presence of specified aggravating factors. Only if 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. does not cite any aggravating factors to extend the period of exclusion beyond the statutory minimum of five years. Thus, I cannot consider mitigating factors to reduce Petitioner's period of exclusion in this case.

Petitioner bears the burden of going forward with the evidence and the burden of persuasion on any affirmative defenses or mitigating factors. The I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b), (c). The burden of persuasion is judged by a preponderance of the evidence. 42 C.F.R. §§ 1001.2007(c), 1005.15(d). Petitioner may not obtain review of, or collaterally attack on procedural or substantive grounds, a criminal conviction or civil judgment of a federal, state, or local court, or another government agency that is cited in this forum as the basis for exclusion. 42 C.F.R. § 1001.2007(d).

B. Issues

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 a hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. §§ 1001.2007(a) and 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified by 42 C.F.R. § 1005.3. 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). Petitioner did not waive an oral hearing.

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: there are no disputed issues of material fact, and the only questions that must be decided involve application of law to the undisputed facts; or 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 that, 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. & Med. Ctr.*, DAB No. 1628, at 3 (1997) (finding in-person hearing required where non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also New Life Plus Ctr.*, DAB CR700 (2000); *New Millennium CMHC*, DAB CR672 (2000).

Petitioner does not dispute but concedes the facts material to the issue of whether there is a basis for his exclusion under section 1128(a)(4) of the Act. Further, there are no issues of fact related to the reasonableness of the period of exclusion, as the period imposed by the I.G. is the minimum period authorized for an exclusion under section 1128(a) of the Act. Petitioner raises only issues of law challenging the Act and regulations on constitutional grounds and on grounds that the Secretary engaged in rule-making without complying with the Administrative Procedures Act. Summary judgment is appropriate in this case as there is no genuine dispute as to any material fact and the issues raised by Petitioner must be resolved against Petitioner as a matter of law. Accordingly, the I.G.'s motion for summary judgment is granted and Petitioner's cross-motion for summary judgment is denied.

3. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(4) of the Act.

Section 1128(a)(4) of the Act requires that the Secretary exclude from participation in Medicare, Medicaid, and all federal health care programs any individual or entity: (1) convicted of a felony criminal offense under federal or state law; (2) where the offense occurred after August 21, 1996; and (3) the criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

Petitioner expressly "concedes that he was convicted of a felony, occurring after August 1996, relating to the manufacture, distribution, prescription, or dispensing of a controlled substance." P. Response at 1; P. Br. at 2, 11-12. Petitioned does not dispute that on September 2, 2010, he was convicted pursuant to his guilty pleas of: between about June 27 and 29, 2006, knowingly and intentionally distributing and dispensing Percocet (Oxycodone), a controlled substance, outside the scope of professional practice and for no legitimate medical purpose in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2 (Count 1); and on or about July 6, 2006, knowingly and intentionally obtaining and acquiring Adderall (amphetamine), a controlled substance, by misrepresentation, fraud, deception, and subterfuge by using a fraudulent prescription (Count 6). I.G. Ex. 2, at 1; I.G. Ex. 3, at 6, 8-9; I.G. Ex. 4, at 2; P. Ex. 3, at 3. Petitioner

was sentenced to three years probation; he was required to participate in an approved program for substance abuse; he was prohibited from practicing medicine while on probation; and he was required to perform 300 hours of community service. I.G. Ex. 2; P. Ex. 3, at 93-94.

The term "conviction" as defined in the Act includes the entry of a finding of guilty, as well as deferred adjudications and similar programs where a judgment of conviction is withheld by the court. Act § 1128(i)(4). Petitioner was convicted within the meaning of the Act when his guilty plea was accepted. Act § 1128(i); I.G. Ex. 2. The offenses of which Petitioner was convicted were felonies as each offense carried a possible sentence of more than one year in prison. 18 U.S.C. § 3559(a); I.G. Ex. 4, at 2; P. Ex. 3, at 93. Petitioner also concedes that he was convicted of felonies. P. Br. at 2; P. Response at 1. There is no dispute that the offenses of which Petitioner was convicted were related to the unlawful manufacture, distribution, prescription, or dispensing of controlled substances. I.G. Ex. 4, at 2-4.

Accordingly, all the elements for mandatory exclusion pursuant to section 1128(a)(4) of the Act are satisfied.

Petitioner argues that the I.G.'s notice of intent to exclude (P. Ex. 4) and the notice of exclusion (I.G. Ex. 1) could have been better. Petitioner does not specifically request relief on this ground, recognizing that he conceded that there is a basis for exclusion. P. Br. at 11-13; P. Reply at 2-3. Whether or not the I.G. accepts Petitioner's advice, both notices were clearly effective to give Petitioner notice that he was being excluded, the basis for the exclusion, the potential effect of exclusion, of the right to request a hearing, and the notices otherwise met the requirements of 42 C.F.R. §§ 1001.2001 and 1001.2002. Petitioner clearly had no difficulty determining which convictions the I.G. cited as the basis for the decision to exclude. P. Br. at 11-16. Petitioner has articulated no prejudice and I conclude that he was not prejudiced by any defect in the notices.

Petitioner raises several additional challenges regarding the lawfulness of the Act and regulations and their application to his case. I am required to comply with the Act and regulations. I do not have the authority to "[f]ind invalid or refuse to follow Federal statutes or regulations or secretarial delegations of authority." 42 C.F.R. § 1005.4(c)(1). I will not address the merits of Petitioner's challenges to the lawfulness of the Act and regulations, as I have no jurisdiction or authority to conduct the review he requests on those grounds.

Accordingly, I conclude that there is a basis for exclusion and Petitioner's exclusion is mandated by section 1128(a)(4) of the Act.

4. Pursuant to section 1128(c)(3)(B) of the Act, five years is the minimum period of 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 there is a basis for Petitioner's exclusion pursuant to section 1128(a)(4) of the Act. Accordingly, the minimum period of exclusion is five years, and that period is 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 five years pursuant to section 1128(a)(4) of the Act, effective September 20, 2011.

/s/
Keith W. Sickendick
Administrative Law Judge