Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Arnon Graham,	)	Date: November 8, 2012
(O.I. File No. H-10-40457-9),	)	
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-12-673
	)	Decision No. CR2661
The Inspector General.	)	
	)	

DECISION

Petitioner, Arnon Graham, asks review of the determination of the Inspector General (I.G.) to exclude him 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 April 19, 2012, 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. For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner and that the statute mandates a minimum five-year exclusion.

I. Background

By letter dated March 30, 2012, the I.G. notified Petitioner that he was being excluded from Medicare, Medicaid, and all federal health care programs for a minimum period of five years pursuant to 1128(a)(1) of the Social Security Act (42 U.S.C. § 1320a-7(a)(1)). The I.G. advised Petitioner that the exclusion is due to his conviction in the Superior Court of California, County of San Bernardino, of a criminal offense related to the delivery of an item or service under the Medicare or a state health care program, including the performance of management or administrative services relating to the delivery of items or service, under any such program.

Petitioner timely filed a request for hearing. The Civil Remedies Division received the request on May 7, 2012 and assigned the case to me for a hearing and written decision. An acknowledgement letter and notice of a prehearing conference was issued on May 17, 2012. A prehearing conference was convened by telephone on June 20, 2012, the substance of which is memorialized in my Order and Schedule for Filing Briefs and Documentary Evidence, dated June 26, 2012.

The I.G. filed a motion for summary judgment and an Informal Brief (I.G. Br.) on July 23, 2012, with 10 exhibits identified as I.G. Exs. 1-10. Petitioner filed his Informal Brief and a response to the I.G.'s motion for summary judgment (P. Br. and P. Response) on August 30, 2012. Petitioner did not file any exhibits, or make objections to the I.G. exhibits. I therefore admit I.G. Exs. 1-10 into the record.

Petitioner indicated in his brief that there was no need for oral testimony and that an in-person hearing was not necessary. P. Br. at 6, 7. The I.G. indicated in his brief that an in-person hearing was not necessary, and the case can be decided on the written record. I.G. Br. at 7. As both parties have waived an in-person hearing, I decide this matter on the written briefs and documentary evidence.

II. Discussion

A. Applicable Law

Section 1128(a)(1) of the Social Security Act (Act) requires the Secretary of Health and Human Services (Secretary) to exclude from participation in all federal health care programs any "individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program." 42 U.S.C. § 1320a-7(a)(1); *see also* 42 C.F.R. § 1001.101(a). Section 1128(a)(1) does not distinguish between felonies and misdemeanors as predicates for exclusion.

An exclusion based on section 1128(a)(1) is mandatory, and the I.G. must impose it for a minimum period of five years. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); *see also* 42 C.F.R. § 1001.102(a). The mandatory minimum period of exclusion may be enhanced on the I.G.'s proof of defined aggravating factors listed at 42 C.F.R. § 1001.102(b). In this case, the I.G. did not rely on aggravating factors to enhance the period of Petitioner's exclusion beyond the minimum mandatory period of five years.

Rights to an administrative law judge (ALJ) hearing and judicial review of the final action of the Secretary are provided by section 1128(f) of the Act (42 U.S.C.

§ 1320a-7(f)). The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that is the basis for 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(c).

B. Issue

The sole issue before me is whether the I.G. has a basis for excluding Petitioner from program participation. Because exclusion under section 1128(a)(1) must be for a minimum period of five years, the reasonableness of the length of the exclusion is not an issue. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); 42 C.F.R. § 1001.2007(a)(2).

C. Findings

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

1. There is a basis for the I.G. to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. The essential elements necessary to support an exclusion based on section 1128(a)(1) are: (1) the individual to be excluded must have been convicted of a criminal offense, whether felony or misdemeanor; and (2) the criminal offense is related to the delivery of an item or service under Medicare or any state health care program.

(a) *Petitioner was convicted of an offense within the meaning of section 1128(a)(1) of the Act.*

An individual is "convicted" of a criminal offense when: (1) 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; (2) there has been a finding of guilt in a federal, state, or local court; (3) a plea of guilty or no contest has been accepted in a federal, state, or local court; or (4) an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. Act § 1128(i) (42 U.S.C. § 1320a-7(i)); *see also* 42 C.F.R. § 1001.2.

In this case, the evidence shows that in July 2010, Petitioner was charged with one count of Conspiracy to commit a crime, one count of Theft from an Elder and Dependent Adult

over $400, two counts of Grand Theft of property over $400, one count of Second Degree Commercial Burglary, and one count of Receipt of Stolen Property over $400. I.G. Exs. 4, at 2, 7-8, 23, 24; 6, at 1. Represented by counsel, Petitioner reached a plea agreement with the United States Office of Attorney General, and by the terms of that agreement Petitioner entered a *nolo contendere* plea to the criminal charge of one count of Grand Theft, in violation of California Penal Code § 487(a), a misdemeanor offense, on August 2, 2010. Petitioner's plea was accepted by the criminal court, he was ordered to pay restitution in the amount of $9,100, and he was sentenced to probation with credit for time served. The court dismissed the five remaining counts. I.G. Exs. 2, at 1; 6, at 3-5. Petitioner does not dispute these facts. P. Br. at 1, 4-5; P. Response at 3-5. Petitioner was therefore "convicted," as that term is defined by section 1128(i) of the Act, based on the criminal court's acceptance of his *nolo contendere* plea.

(b) *Petitioner's offense was related to the delivery of an item or service under a state health care program.*

The undisputed evidence of record shows that Petitioner was charged with participating in a scheme to steal monies from patient trust accounts at Community Extended Care Hospital of Montclair (CECHM), a skilled nursing facility (SNF) that received funds from the California Medicaid program known as Medi-Cal. This scheme involved Petitioner, in his role as a delivery driver, CECHM's administrator, office manager, personnel manager, administrative assistant, two social service staff, and a San Bernardino County employee along with some family and friends of these individuals. I.G. Exs. 3, at 3; 4.

Medi-Cal beneficiaries living in an SNF such as CECHM are required to pay their "share of cost" to the SNF, and the state Medi-Cal program then pays the remainder of the monthly balance. I.G. Ex. 3, at 2; Cal. Code Regs. tit. 22 § 50605. Here, the Medi-Cal beneficiaries had CECHM manage their money in what was called a "patient trust account." The evidence shows that the San Bernardino County employee altered the computer records for the Medi-Cal beneficiaries at CECHM so that the beneficiaries' share of cost appeared as zero. The state Medi-Cal program would then overpay the total monthly cost for the beneficiaries' care to CECHM. I.G. Exs. 3-4; 5, at 4-6. As a result, the beneficiaries would not need to pay CECHM from the patient trust account for their share of cost. This provided opportunity for the defendants in this scheme to fraudulently issue checks from the respective patient trust account, cash the checks, and then distribute the proceeds amongst themselves.

Petitioner disputes that his actions were related to the delivery of an item or service in a federal or state health care program and, therefore, maintains the position that his

conviction is not within the reach of 1128(a)(1). Petitioner presents four arguments in support of this position: (1) that the I.G. has not shown that he interfered with the delivery of an item or service to a beneficiary; (2) that unlike his co-defendants, he was not employed by an agency that interacted with the Medi-Cal beneficiaries, he had no actual knowledge of or fiduciary relationship with the Medi-Cal beneficiaries whose trust fund monies were stolen; (3) that he had no knowledge of the fraudulent accounting activities by his co-defendants, and that there has been no showing that he knew the scheme was in existence or that he was involved in any scheme to steal monies; and (4) that the criminal court directed him to pay restitution to CECHM as the victim and not to any individual beneficiary or any state or federal health care program. P. Br. at 3-6; P. Response at 4-7.

The I.G. is not required to show that Petitioner's actions "interfered" with the delivery of a health item of service. Rather, the I.G. must show that there was some "nexus" or "common sense connection" between the offense that was the basis of Petitioner's conviction and the delivery of an item or service under a covered program. *See, e.g., Lyle Kai, R. Ph.*, DAB No. 1979 (2005). There is no requirement in the statute that a fiduciary relationship must exist between Petitioner and the beneficiaries in order for the conviction be "related" to the delivery of an item or service under Medicaid. Moreover, there is no requirement that Petitioner had to have intended his theft be from a federal or state health care program or a requirement that he know of the relationship between his offense and the delivery of items or services in order for the exclusion to be proper. *See, e.g., Robert C. Greenwood,* DAB No. 1423 at 4 (1993) (finding the statutory "language requires only that the factual relationship between the offense and the program exist.")

With regard to the events surrounding his plea, Petitioner explains his involvement was minimal, and he "was merely a pawn used in the larger scheme" because he only cashed one check. P. Br. at 4; P. Response at 4-5. However, Petitioner's request for me to consider these facts in this exclusion action amounts to an impermissible collateral attack on his underlying conviction. When an 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 is not reviewable, and the individual or entity may not collaterally attack it either on substantive or procedural grounds. *See* 42 C.F.R. § 1001.2007(d).

Petitioner claims that the criminal court found that he had taken money from CECHM and not from individual Medi-Cal beneficiaries or from any federal or other state health care program. However, the fact that Petitioner was ordered to pay CECHM restitution does not negate the nexus between his criminal actions and the loss of monies from patient trust funds at CECHM and theft from the state Medi-Cal program. The trust fund

accounts Petitioner stole from contained monies from Medi-Cal beneficiaries who resided at CECHM. The evidence shows that in March 2009, Petitioner received check # 2968, dated March 20, 2009 and in the amount of $9,100, from one of his co-defendants. He then cashed the check at his bank, kept $3,000, and then gave the remainder to one of his co-defendants. I.G. Exs. 4, 7.

The evidence shows that during the investigative interview, Petitioner admitted that he recalled there was a "patient's name" on the memo portion of the check he cashed. I.G. Ex. 7, at 1, 2. The evidence also shows that the check Petitioner cashed was drawn from the account of several Medi-Cal beneficiaries residing at CECHM, and traced specifically to payments that should have been made to the Medi-Cal program or to CECHM on behalf of Medi-Cal beneficiaries who had a share of cost. I.G. Exs. 4, 8-10. It was Petitioner's participation in cashing the check that completed the chain of events that used the Medi-Cal beneficiary patient trust accounts at CECHM to be depositories of funds defrauded from the Medi-Cal program. I.G. Exs. 3 at 2; 7; *see also* I.G. Ex. 9, at 9. The common sense connection of Petitioner's offense to Medi-Cal is clear.

2. Petitioner's Period of Exclusion is not unreasonable

In this case, there is no issue as to the reasonableness of the period of exclusion, as the period of exclusion is mandated by law. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); 42 C.F.R. § 1001.102(a). Accordingly, the minimum period of exclusion is five years, and that period is not unreasonable as a matter of law.

III. Conclusion

For these reasons, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years, effective April 19, 2012.

/s/
Joseph Grow
Administrative Law Judge