Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Gregory Allen Louck
(O.I. File No. H-15-43553-9),

Petitioner,

v.

The Inspector General,
Department of Health and Human Services.

Docket No. C-16-431

Decision No. CR 4681

Date: August 16, 2016

DECISION

Petitioner, Gregory Allen Louck, is excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(3) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(3)), effective March 20, 2016. Petitioner's exclusion for the minimum period of five years is required by 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 February 29, 2016, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for five years. The I.G. cited section 1128(a)(3) of the Act as the basis for Petitioner's exclusion and stated that the exclusion was based on his conviction in the Elkhart Superior Court, State of Indiana, of a criminal offense related to fraud, theft,

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[*] 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.

embezzlement, breach of fiduciary responsibility or other financial misconduct in connection with the delivery of a health care item or service. I.G. Exhibit (Ex.) 1.

Petitioner filed a request for hearing on March 25, 2016. I convened a prehearing conference by telephone on April 20, 2016, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence dated April 20, 2016 (Prehearing Order). During the prehearing conference, Petitioner waived an oral hearing. The parties agreed to a decision on the briefs and documentary evidence and I set a briefing schedule.

Despite the waiver of oral hearing, the I.G. filed a motion for summary judgment and supporting brief (I.G. Br.) on May 11, 2016, with I.G. Exs. 1 through 7. Petitioner filed a response in opposition to the I.G. motion for summary judgment and a cross-motion for summary judgment and brief in support thereof (P. Br.) on June 10, 2016, with no exhibits. I infer based on Petitioner's filings that Petitioner withdrew the waiver of an oral hearing and I find it necessary to consider the parties' summary judgment motions. I informed Petitioner in the Prehearing Order, para. 7, that if he wished for me to consider the documents he submitted with his hearing request, he had to resubmit the documents properly marked as exhibits with his response brief. Petitioner did not file the attachments to his hearing request marked as exhibits. Accordingly, I do not consider the attachments to the hearing request as evidence in this case. Even if the attachments to the request for hearing were offered, the documents are not relevant to the issues before me and they would have been subject to exclusion on that basis. 42 C.F.R. § 1005.17(c). On June 20, 2016, the I.G. filed a reply brief. Petitioner did not object to my consideration of I.G. Exs. 1 through 7 and they are admitted as evidence.

II. Discussion

A. Applicable Law

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

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 [section 1128(a)(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).

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 by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; (2) there is a finding of guilt in 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 has been withheld. 42 U.S.C. § 1320a-7(i)(1)-(4); 42 C.F.R. § 1001.2.

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act will be for a period of not less than five years. 42 C.F.R. § 1001.102(a). The Secretary has published regulations that establish aggravating factors the I.G. may consider to extend the period of exclusion beyond the minimum five-year period, as well as mitigating factors that may be considered only if the I.G. proposes to impose an exclusion greater than five years. 42 C.F.R. § 1001.102(b), (c).

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), (c).

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 participation in Medicare, Medicaid, and all federal health care programs; and
>
> Whether the length of the proposed period of exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

When, as in this case, the I.G. imposes the minimum authorized five-year exclusion under section 1128(a) of the Act, there is no issue as to whether the period of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(2).

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.

There is no dispute that Petitioner timely filed his request for hearing on March 25, 2016, and that I have jurisdiction pursuant to section 1128(f) of the Act and 42 C.F.R. pt. 1005. Petitioner waived an oral hearing during the prehearing conference. Prehearing Order at 3. 42 C.F.R. § 1005.6(b)(5). However, the I.G. filed a motion for summary judgment and Petitioner filed a response in opposition and a cross-motion for summary judgment. I infer from Petitioner's filings that he withdrew the waiver of oral hearing. Accordingly, it is necessary for me to determine whether or not summary judgment is appropriate or whether I must decide this case on the merits after an oral hearing.

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 Secretary has provided by regulation that a sanctioned party has the right to hearing before an ALJ, and both the sanctioned party and the I.G. have a right to participate in the hearing. 42 C.F.R. §§ 1005.2-.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). 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 when the movant shows that there is no genuine dispute as to any material fact and the only questions to be decided involve application of the 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 which, if true, would refute the facts relied upon by the moving party. Deciding a case on summary judgment differs from deciding a case on the merits after a hearing. An ALJ does not assess credibility or weigh conflicting evidence when deciding a case on summary judgment. *Bartley Healthcare Nursing & Rehab.*, DAB No. 2539 at 3-4 (2013); *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010); *Holy Cross Village at Notre Dame, Inc.*, DAB No. 2291 at 5 (2009); *see* Fed. R. Civ. Pro. 56.

There are no genuine disputes as to any material facts in this case. The facts that trigger exclusion under sections 1128(a)(3) of the Act are undisputed. Petitioner agrees that the issue to be decided is an issue of law, specifically "whether a conditional judgment can be construed as a felony conviction for purposes of imposing a mandatory exclusion . . .

under section 1128(a)(3) of the Social Security Act." P. Br. at 3. Petitioner concedes that if there is a basis for exclusion, five years is the minimum period authorized.

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

a. Facts

On April 7, 2015, Petitioner was charged by information filed in the Elkhart Superior Court (state court) with two felony counts. Count I charged Petitioner, a certified registered nurse anesthetist, with stealing Fentanyl, a Schedule II synthetic opioid, from the Elkhart General Hospital between December 31, 2013 and January 29, 2014. Count II charged Petitioner with possessing Fentanyl without a valid prescription or order. I.G. Ex. 3; I.G. Ex. 7.

On October 5, 2015, Petitioner entered into a plea agreement with the Indiana prosecutor. The agreement provided that Petitioner would plead guilty to Count I of the information, which charged Petitioner with felony theft of the Fentanyl. Pursuant to the plea agreement, Count II was to be dismissed and Petitioner's potential sentence was limited. I.G. Ex. 4 at 1-2. The plea agreement provided that Petitioner was "to earn misdemeanor treatment once all terms and conditions have been satisfied." I.G. Ex. 4 at 1.

On November 2, 2015, the state court judge accepted Petitioner's guilty plea and entered a judgment of guilty of felony theft of Fentanyl. The state court judge specified that he "enters judgment conditionally pursuant to [Ind. Code §] 35-38-1-1.5 as a Class D felony subject to potential reduction to a Class A misdemeanor provided the defendant complies with all terms and conditions of probation." I.G. Ex. 5 at 1. Conditional judgment in the state court is authorized by Ind. Code § 35-38-1-1.5 (2015). Count II was dismissed with prejudice. I.G. Ex. 5. Petitioner was sentenced to 540 days of incarceration with four days credit as time served and 536 days suspended. Petitioner was ordered to: pay restitution of $966 to Elkhart General Hospital; continue with all treatment; pay assessed fines and court costs; and serve 18 months of probation. I.G. Ex. 5. The criminal sentencing order states specifically that "Judgment of Conviction entered." I.G. Ex. 5 at 2. The document that establishes the terms of Petitioner's probation states that the state court entered the judgment of guilt of felony theft conditionally pursuant to Ind. Code § 35-38-1-1.5, and that there was "potential" for reduction to misdemeanor charges contingent on Petitioner meeting all terms and conditions of probation. I.G. Ex. 6. Petitioner does not dispute that he has not yet satisfied the terms of his probation agreement and he is not yet eligible to have the conditional felony conviction converted to a misdemeanor. P. Br. at 4, 6.

b. Analysis

The I.G. cites section 1128(a)(3) of the Act as the basis for Petitioner's mandatory exclusion. The statute requires the Secretary to exclude from participation any individual or entity: (1) convicted of an offense under federal or state law; (2) the offense occurred after August 21, 1996 (the date of enactment of the Health Insurance Portability and Accountability Act of 1996); (3) the offense was committed 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 Medicare or Medicaid) operated by or financed in whole or in part by any federal, state, or local government agency; (4) the criminal offense was a felony; and (5) the offense was related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. Act § 1128(a)(3) (42 U.S.C. § 1320a-7(a)(3)); 42 C.F.R. § 1001.101(c). I conclude that all the elements that trigger mandatory exclusion under section 1128(a)(3) of the Act are satisfied in this case.

Petitioner was charged in state court with a state felony offense of theft of Fentanyl. Petitioner does not dispute that he gained access to the drug through his work as a nurse anesthetist at the hospital that owned the drug. Petitioner does not dispute that there is a clear nexus between the theft of the Fentanyl, to which Petitioner had access due to his work as a nurse anesthetist at the hospital, and the delivery of a health care item or service not under Medicare or Medicaid. Petitioner does not dispute that the offense occurred after August 21, 1996. However, Petitioner disputes that he was convicted of felony theft on the theory that the state court entered a conditional judgment. Petitioner's arguments must be resolved against him as a matter of law.

Petitioner does not dispute the facts that the state court accepted his guilty plea and specifically found Petitioner guilty of the class D felony of theft of the Fentanyl and that the judgment of conviction was entered on the records of the court on November 2, 2015. I.G. Ex. 5 at 2. 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 by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; (2) there is a finding of guilt in 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 has been withheld. 42 U.S.C. § 1320a-7(i)(1)-(4); 42 C.F.R. § 1001.2. Therefore, under the Act, Petitioner was convicted of the felony when his guilty plea was accepted, there was a finding of guilt based on the plea, and the judgment of conviction was entered by the state court, all of which occurred on November 2, 2015. Even if under the state law the conditional acceptance of the plea was treated as a withholding of judgment, Petitioner is nevertheless considered to be convicted for purposes of section 1128(a) of the Act.

Furthermore, Ind. Code § 35-38-1-1.5 is titled "Converting Level 6 felony to Class A misdemeanor" and that is exactly what the section provides for, that is, converting a

felony conviction to a misdemeanor. The state statue does not provide for a withholding of entry of judgment or change the nature of the felony conviction until such time as the conditions specified by the statute are satisfied. The statue authorizes a state court to enter a judgment of conviction to a qualifying felony offense with the express provision that it "will be converted" to a misdemeanor at a later date if certain conditions are satisfied. Ind. Code § 35-38-1-1.5(a). The state court is not required to convert a felony to a misdemeanor unless all conditions are met within the time specified and may not convert the conviction if another offense is committed during the time specified. Ind. Code § 35-38-1-1.5(c) – (d). The language of the Indiana statute is clear. The state court judge enters a judgment of conviction of the qualifying felony and provides for it to be converted to a misdemeanor if specified conditions are met by a specified time. The statute does not provide that the felony conviction is not a felony conviction, only that it may be changed at some point to a misdemeanor, if conditions are met. Petitioner argues that pursuant to Ind. Code § 35-50-2-1, a conviction of a Class A misdemeanor under Ind. Code § 35-38-1-1.5 is not a felony conviction. However, this provision has no application to Petitioner as his felony conviction has not yet been converted to a Class A misdemeanor. Petitioner has conceded in briefing that he is not yet eligible to have the felony conviction converted to a misdemeanor. P. Br. at 4, 6. Accordingly, I find as fact and conclude as a matter of law that Petitioner currently has a felony conviction that triggers mandatory exclusion under section 1128(a)(3) of the Act.

Even if Petitioner's conviction is later reduced to a misdemeanor, Petitioner's conviction occurred at the moment when Petitioner's plea to the felony was accepted and a judgment of conviction was entered. *See, e.g., Carolyn Westin*, DAB No. 1382 (1993), *aff'd, Westin v. Shalal*a, 845 F. Supp. 1446 (D. Kan. 1994) (discussing that Congress intended to define the term "conviction" broadly and even if the criminal conviction is later expunged, it remains a "conviction" under this civil federal statute). It is the felony conviction that triggers section 1128(a)(3) of the Act and for which Congress directs exclusion. The subsequent reduction of the felony to a misdemeanor has no impact. Only reversal or vacation of the felony conviction on appeal would require that Petitioner be reinstated. 42 C.F.R. § 1001.3005(a).

Accordingly, I conclude that the elements of section 1128(a)(3) of the Act are satisfied and that Petitioner's exclusion is required pursuant to section 1128(a)(3) of the Act.

4. Five years is the minimum authorized period of exclusion pursuant to section 1128(a)(3) of the Act.

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

I have concluded that there is a basis to exclude Petitioner pursuant to section 1128(a)(3) of the Act. Therefore, the I.G. must exclude Petitioner for a minimum period of five

years pursuant to section 1128(c)(3)(B) of the Act. The I.G. has no discretion to impose a lesser period and I may not reduce the period of exclusion below five years.

Exclusion is effective 20 days from the date of the I.G.'s notice of exclusion to the affected individual or entity. 42 C.F.R. § 1001.2002(b).

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 March 20, 2016.

/s/
Keith W. Sickendick
Administrative Law Judge