Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Victor Aponte-Aponte, M.D.,

Petitioner,

v.

The Inspector General.

Docket No. C-10-170

Decision No. CR2165

Date: June 22, 2010

DECISION

This case is before me based on Petitioner Victor Aponte-Aponte, M.D.'s request for review of the Inspector General's (I.G.) determination to exclude him from participating in Medicare, Medicaid, and all federal health care programs for a period of five years. The I.G. took this action pursuant to section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). I find that the I.G. was authorized to exclude Petitioner for five years.

I. Procedural Background

By letter dated October 30, 2009, the I.G. notified Petitioner that he was being excluded, under section 1128(a)(1) of the Act, from participating in Medicare, Medicaid, and all federal health care programs for a period of five years. By letter dated November 6, 2009, Petitioner requested a hearing pursuant to 42 C.F.R. § 1005.2.

I set an initial date for a prehearing conference of January 7, 2010, but continued the conference at Petitioner's request. I convened the prehearing conference by telephone on January 21, 2010, pursuant to 42 C.F.R. § 1005.6, in order to discuss the issues presented by the case and to decide on procedures for addressing them. I explained to the parties

that based on my review of the file it appeared likely that the issues in the case could be addressed in the context of a motion for summary disposition filed by the I.G. I explained that if the issues could not be resolved by summary disposition, I would schedule a hearing to address them. By Order dated January 22, 2010, I established a schedule for the submission of documents and briefs.

The I.G. filed his Motion for Summary Disposition and supporting Brief-in-Chief (I.G. Br.), accompanied by five exhibits (I.G. Exs. 1-5) that I admit to the evidentiary record of this case. Petitioner filed an answer brief (P. Br.) entitled "Petitioner's Response in Opposition to Motion for Summary Disposition" unaccompanied by exhibits. The I.G. filed a Reply Brief (Reply Br.). Although given the opportunity, Petitioner did not file a final response brief.

II. Issue

The issue before me is limited to that set out at 42 C.F.R. § 1001.2007(a)(1)(i). It is:

> Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Act.

Under the regulation at 42 C.F.R. § 1001.2007(a)(2), where an exclusion under section 1128(a) is for five years, I am precluded from considering whether the length of the exclusion is unreasonable. Act, section 1128(c)(3)(B).

III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act requires exclusion from participation in Medicare, Medicaid, and all federal health care programs of 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 terms of section 1128(a)(1) are restated in regulatory language at 42 C.F.R. § 1001.101(a). This statutory provision makes no distinction between felony convictions and misdemeanor convictions as predicates for mandatory exclusion.

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a Federal, State, or local court, regardless of . . . whether the judgment of conviction or other record relating to criminal conduct has been expunged," section 1128(i)(1) of the Act; "when there has been a finding of guilt against the individual . . . by a Federal, State, or local court," section 1128(i)(2) of the Act; or "when a plea of guilty or nolo contendere by the individual . . . has been accepted by a Federal, State, or local court," section 1128(i)(3) of the Act. These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(1) is mandatory, and the I.G. must impose it for a minimum period of five years. Section 1128(c)(3)(B) of the Act; 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision.

42 C.F.R. Part 1005 does not specify summary disposition procedures, but summary disposition is explicitly authorized by the terms of 42 C.F.R. § 1005.4(b)(12), and this forum looks to FED. R. CIV. P. 56 for guidance in applying that regulation.

Summary disposition is appropriate in an exclusion case when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *David A. Barrett*, DAB No. 1461 (1994); *Robert C. Greenwood*, DAB No. 1423 (1993); *Thelma Walley*, DAB No. 1367 (1992); *Catherine L. Dodd, R.N.*, DAB No. 1345 (1992); *John W. Foderick, M.D.*, DAB No. 1125 (1990). All the facts and the inferences reasonably to be drawn from those facts must be viewed in the light most favorable to the nonmoving party. *See Pollock v. American Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986); *Brightview Care Ctr.*, DAB No. 2132 (2007); *Madison Health Care, Inc.*, DAB No. 1927, at 5-7 (2004). When the undisputed material facts of a case support summary disposition, there is no need for a full evidentiary hearing, and neither party has the right to one. *Surabhan Ratanasen, M.D.*, DAB No. 1138 (1990); *John W. Foderick, M.D.*, DAB No. 1125.

IV. Findings and Conclusions

I find and conclude as follows:

1. In 2005, Petitioner was a medical doctor licensed to practice in Puerto Rico. I.G. Ex. 3, at 4.

2. By entry of plea dated February 13, 2009, in the United States District Court for the District of Puerto Rico, Petitioner pleaded guilty to Count One of a forty-four-count indictment; that Count specifically charged Petitioner with the crime of conspiracy to commit health care fraud, a violation of 18 U.S.C. §§ 1347 and 1349. I.G. Exs. 3-5.

3. Count One of the Indictment charged that Petitioner and four others conspired to devise a scheme to knowingly submit and cause to be submitted false and fraudulent claims to Medicare. I.G. Ex. 3, at 1-5.

4. Based on Petitioner's guilty plea, on May 18, 2009, Petitioner was adjudicated guilty of conspiracy to commit health care fraud in violation of 18 U.S.C. §§ 1347 and 1349, and sentenced to five years of probation, 960 hours of community service, and ordered to pay a $100 special monetary assessment. I.G. Exs. 4, 5.

5. The accepted guilty plea and judgment of conviction described above constitute a "conviction" within the meaning of section 1128(i) of the Act and 42 C.F.R. § 1001.2.

6. A nexus and a common-sense connection exist between the criminal offense to which Petitioner pleaded guilty, as noted above in Findings 1 through 4, and the delivery of an item or service under Medicare. I.G. Exs. 3-5; *Berton Siegel, D.O.*, DAB No. 1467 (1994).

7. By reason of Petitioner's conviction, a basis exists for the I.G.'s exercise of authority, pursuant to section 1128(a)(1) of the Act, to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs.

8. Because the five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, I may not consider whether it is otherwise unreasonable. Section 1128(c)(3)(B) of the Act; 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2).

9. There are no disputed issues of material fact and summary disposition is warranted in this matter.

V. Discussion

The essential elements necessary to support an exclusion based on section 1128(a)(1) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; and (2) the criminal offense must have been related to the delivery of an item or service under Title XVIII of the Act (Medicare) or any state health care program. *Tamara Brown*, DAB No. 2195 (2008); *Thelma Walley*, DAB No. 1367; *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Lyle Kai, R.Ph.*, DAB CR1262 (2004), *rev'd on other grounds*, DAB No. 1979 (2005); *see Russell Mark Posner*, DAB No. 2033, at 5-6 (2006).

The first essential element, the fact of Petitioner's conviction, is conclusively established by the records in evidence, which include the Indictment in the United States District Court for the District of Puerto Rico (I.G. Ex. 3); Petitioner's plea agreement (I.G. Ex. 4); and the judgment in which Petitioner was sentenced (I.G. Ex. 5).

The acceptance of Petitioner's guilty plea to Count One, after which the court found him guilty and entered judgment, satisfies the definition of "conviction" set out at sections 1128(i)(1)-(3) of the Act. I.G. Exs. 3-5.

It is also clear that Petitioner's conviction is related to the delivery of an item or service under Medicare. The charge in Count One to which Petitioner pleaded guilty specifically notes that Petitioner and his co-defendants "conspire[d] to commit an offense against the United States, . . . devis[ing] a scheme and artifice to defraud . . . Medicare . . . by means of materially false and fraudulent pretenses [and] . . . knowingly submitted and caused to be submitted to Medicare . . . false and fraudulent claims for the cost of infusion therapy treatments of Rituximab." I.G. Ex. 3, at 5. The general allegations surrounding the conspiracy set out in the Indictment — and specifically incorporated in Count One — relate that Petitioner was the Medical Director of Inter Med Corporation (IMC), a corporation in the business of providing infusion services, from June 2005 until September 2005. IMC provided infusion therapy to terminally-ill patients with diagnoses of cancer and HIV. IMC claimed to provide intravenous infusion treatments to administer Rituximab (commonly referred to as Rituxan), a medication used by oncologists to treat cancer patients. The Indictment alleges that from on or about June 15, 2005, through on or about August 17, 2005, IMC billed Medicare (through Triple S, the Medicare Part B carrier) for infusion treatments of Rituximab to Medicare beneficiaries. However, the beneficiaries for whom IMC billed Medicare did not suffer from medical conditions qualifying them to receive infusion therapy treatments under Medicare regulations, and the beneficiaries did not receive the infusion therapy treatments of Rituximab billed to Medicare. The Indictment alleges specifically that Petitioner treated patients and ordered Rituximab during this time. I.G. Ex. 3, at 1-5.

The submission of false claims to the Medicare and Medicaid programs has consistently been held to be a program-related crime within the reach of section 1128(a)(1). *Jack W. Greene*, DAB No. 1078 (1989), *aff'd sub nom. Greene v. Sullivan*, 731 F. Supp 835 (E.D. Tenn. 1990); *Lorna Fay Gardner*, DAB CR648 (2000), *aff'd*, DAB No. 1733 (2000). Moreover, there can be little question that conspiring to submit false claims for infusion therapy services to Medicare beneficiaries is related to the delivery of a health care item or service. *Salvacion Lee, M.D.*, DAB CR920 (2002), *aff'd*, DAB No. 1850 (2002). I find the factual underpinnings of the offense to which Petitioner pleaded guilty conclusively demonstrate the required nexus and common-sense connection between Petitioner's criminal act and the Medicare program. *Berton Siegel, D.O.*, DAB No. 1467.

Petitioner asserts that I should not decide this case on the I.G.'s Motion for Summary Disposition because there are key facts that are contested and that dispute the nexus between Petitioner's conviction and the delivery of an item or service under Medicare. Petitioner suggests that because his conviction relates to a conspiracy to defraud Medicare the conviction is not related to the delivery of items or services under Medicare. And Petitioner asserts that his constitutional rights are being violated because he has a vested property interest in his status as a medical doctor authorized to receive reimbursement through Medicare. Petitioner's arguments are unavailing, and his constitutional argument is simply wrong.

Petitioner specifically argues that a genuine issue of material fact exists regarding whether he "personally ordered medically unnecessary drugs that were often never delivered."

Petitioner also asserts that the facts in his case should be "proven beyond a reasonable doubt or admitted by petitioner, not [reliant on] facts alleged in the charging document." P. Br. at 2. Petitioner argues that he did not adopt the "Government's Version of Facts" in his plea agreement, which charged that during the conspiracy the other co-conspirators,

> [I]nstructed [Petitioner] to create false progress notes diagnosing customers with Thrombocytopenia or Chronic Inflammatory Demyelinating Polyneuritis, when in fact, the customers did not suffer from any medical conditions, as indicated to support the medical necessity of drug infusion treatment of Rituximab.

I.G. Ex. 4, at 8.

Petitioner asserts that he did not sign the "Government's Version of Facts" (although his counsel did) and that the above noted language was specifically bracketed and then annotated with the handwritten words "Do not accept this specific allegation." *Id*. Petitioner asserts that because of this notation he never admitted to the I.G.'s characterization that the "prescriptions were medically unnecessary because the patients did not suffer from any medical condition that would support the prescribing or administration of the drug," nor did he admit that "IMC routinely submitted claims for prescriptions that were never provided." P. Br. at 3, citing I.G. Br. at 3.

With regard to the resolution of this case by summary disposition, the regulations allow an Administrative Law Judge (ALJ) to decide a case on summary judgment or disposition when where is no disputed issue of material fact. 42 C.F.R. § 1005.4(b)(12). The Departmental Appeals Board (Board) held in *Michael J. Rosen, M.D.*, DAB No. 2096, at 4, that an ALJ may:

> "[u]pon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact . . . " 42 C.F.R. § 1005.4(b)(12). A requirement affording the opportunity for oral hearing is not contravened by summary judgment if there are no genuine issues of material fact. *Travers v. Shalala*, 20 F.3d 993, 998 (9th Cir. 1994). Thus, summary judgment is appropriate if the affected party either had conceded all of the material facts or proffered testimonial evidence only on facts which, even if proved, clearly would not make any substantive difference in the result. *Big Bend Hospital Corp.*, DAB No. 1814 (2002), *aff'd*, *Big Bend Hospital Corp. v. Thompson*, No. P-02-CA-030 (W.D. Tex. Jan. 2, 2003).

> Whether summary judgment is appropriate is a legal issue that we address de novo, viewing the proffered evidence in the light most favorable to the non-moving party. *See, e.g., Crestview Parke Care Center*, DAB No. 1836 (2002), *aff'd in part, Crestview Parke Ctr. v. Thompson*, 373 F. 3d 743 (6th Cir 2004); *Timothy Wayne Hensley*, DAB No. 2044 (2006).

Petitioner's arguments do not call a material fact into issue in this case. Petitioner's position is contradicted by the record, and by the nature of the crime to which he pleaded guilty: the crime of conspiracy is based on an agreement to violate the law, in this case the conspirators' agreement to swindle Medicare. This particular crime of conspiracy was complete as soon as any one of the conspirators committed an overt act in furtherance of that agreement. Whether Petitioner committed the overt acts he now disclaims is of no importance whatsoever, and, further, his disclaimer is an impermissible collateral attack on the underlying conviction in his case. Where an exclusion is based on an underlying conviction, the basis for the underlying conviction is not reviewable by the ALJ and cannot be contested on substantive or procedural grounds. 42 C.F.R. § 1001.2007(d).

It is well-settled that an ALJ may consider the facts set forth in an indictment upon which a conviction is based. *Tanya A. Chuoke, R.N.*, DAB No. 1721; *Berton Siegel, D.O.*, DAB No. 1467; *Carolyn Westin*, DAB No. 1381 (1993); *DeWayne Franzen*, DAB No. 1165 (1990). By pleading guilty to Count One of the Indictment, Petitioner admitted to being part of a conspiracy that ordered medically-unnecessary drugs that were never delivered to the patients for whom those drugs were ostensibly intended. Petitioner's attempt to limit his admission in his plea agreement ignores the specific facts supporting his conviction contained in Count One of the Indictment.[1]

Petitioner also maintains that because his criminal conviction was for a conspiracy to defraud Medicare it was not related to the delivery of items or services under Medicare. However, conviction for a conspiracy to defraud Medicare has been found related to the delivery of items or services under Medicare and I have found it so related here. *Salvacion Lee, M.D.*, DAB No. 1850; *Douglas Schram, R.Ph.*, DAB No. 1372 (1992).

Petitioner also asserts that as a medical doctor he has a constitutionally-protected property interest in being able to receive Medicare reimbursement and that he must receive due process prior to being fully divested of such property interest. P. Br. at 2, 6.

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[1] Although it is not necessary to my decision, I note that the plea agreement recites that "the accompanying Statement of Facts signed by the defendant [here by Petitioner's counsel] is hereby incorporated into this Plea Agreement. Defendant adopts the Statement of Facts and agrees that the facts therein are accurate in every respect and, had the matter proceeded to trial, that the United States would have proven those facts beyond a reasonable doubt." I.G. Ex. 4, at 5.

Constitutional challenges are beyond the scope of this litigation in particular and this forum in general. *Michael J. Rosen, M.D.*, DAB CR1566; *Keith Michael Everman, D.C.*, DAB No. 1880. But beyond that, it is settled that no petitioner, including this one, has a constitutionally-protected property interest in continued participation in the Medicare program. *Kahn v. I.G.*, 848 F. Supp 432 (S.D.N.Y. 1994); *Hillman Rehab. Ctr.*, DAB No. 1611 (1997); *Edmund D. Eisnaugle, D.O.*, DAB CR1010 (2003); *Morton Markoff, D.O.*, DAB CR538 (1998).

VI. Conclusion

For the reasons set forth above, the I.G.'s Motion for Summary Disposition must be, and it is, GRANTED. The I.G. was authorized to exclude Petitioner for a period of five years, the minimum mandatory period of exclusion under sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

/s/
Richard J. Smith
Administrative Law Judge