

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Thomas Gregory Martin,

Petitioner,

v.

The Inspector General.

Docket No. C-15-617

Decision No. CR3912

Date: May 28, 2015

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Thomas Gregory Martin, from participating in Medicare and other federally funded health care programs for a period of five years.

I. Background

Petitioner requested a hearing to challenge the I.G.'s determination to exclude him. The I.G. filed a brief, and five exhibits that are identified as I.G. Ex. 1 – I.G. Ex. 5. Petitioner filed a brief and an exhibit identified as Exhibit A and three attachments identified as Attachment A and Attachments B1 and B2. Petitioner's Exhibit A and Attachment A are not admitted since these submissions are identical to I.G. Exs. 3 and 5. I admit the I.G.'s exhibits and Petitioner's Attachment B1 and B2 into the record. Neither party requested an in-person hearing.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue to be resolved is whether there is a basis for the I.G. to exclude Petitioner

pursuant to section 1128(a)(3) of the Social Security Act (Act). Where the period of exclusion is the minimum statutory period, no issue exists as to the length of the exclusion.

B. Findings of Fact and Conclusions of Law

The I.G. excluded Petitioner pursuant to the provisions of section 1128(a)(3) of the Act. This section mandates the exclusion of any individual who is convicted of a felony occurring after August 21, 1996, 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 a State Medicaid program, operated by or financed in whole or in part by any federal, state, or local government agency, relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

The evidence offered by the I.G. and not rebutted by Petitioner proves that, on December 2, 2013, Petitioner pled guilty to the federal felony offense of Receipt of Misbranded Prescription Drugs from Interstate Commerce in violation of 21 U.S.C. §§ 331(c) and 333(a)(2) and 18 U.S.C § 2. I.G. Ex. 3. On March 28, 2014, the United States District Court for the Eastern District of Missouri accepted Petitioner's plea and entered a judgment of conviction against Petitioner. I.G. Ex. 3.

Petitioner was convicted of receipt of misbranded prescription drugs from interstate commerce "with intent to defraud and mislead" under 21 U.S.C. §§ 331(c) and 333(a)(2) and 18 U.S.C. § 2. I.G. Ex. 4 at 2. Petitioner was the owner, manager and operator of a medical clinic called Aestheticare LLC (Aestheticare), located in St. Louis, Missouri. I.G. Ex. 5 at 1. Aestheticare provided treatment to patients, including injections of the prescription drug, Onabotulinumtoxin A, commonly known as Botox Cosmetic (Botox). Petitioner was contacted via facsimile by a company that offered to sell "Botox (Turkish)," a version of the Food and Drug Administration (FDA) approved prescription drug Botox. Botox (Turkish) has not been approved by the FDA. Petitioner purchased non-FDA approved prescription drugs, Botox (Turkish), from this company and Aestheticare provided those drugs to their patients. I.G. Ex. 5 at 5. In his plea agreement, Petitioner admitted that he purchased "prescription drugs from an unlicensed wholesale drug distributor . . . [and] through the clinic, ultimately provided th[o]se drugs to patients." I.G. Ex. 4 at 3.

Petitioner's plea and conviction describe all of the elements of a conviction mandating exclusion under section 1128(a)(3). He was convicted of a felony that occurred after August 21, 1996.¹ The conviction plainly related to delivery of health care items or services. Petitioner admitted that he purchased "prescription drugs from an unlicensed wholesale drug distributor . . . [and] through the clinic, ultimately provided th[o]se drugs

¹ From on or about March 31, 2011 through on or about September 20, 2012, Petitioner made over 30 separate purchases from the unlicensed drug distributor. I.G. Ex. 5 at 6.

to patients.” I.G. Ex. 4 at 3. The dispensation or sale of a prescription drug is an evident health care item or service. His criminal offense related to fraud because his plea agreement specifies that he received prescription drugs in interstate commerce “with the intent to defraud or mislead.” I.G. Ex. 4 at 2. He also purchased the counterfeit Botox (Turkish) using Aestheticare’s checking account and passed the non-approved FDA drug to his patients as the real product. Petitioner’s conduct breached his fiduciary responsibility to his patients and he committed financial misconduct that resulted in \$32,000 in illegal proceeds. I.G. Ex. 4 at 8.

Petitioner argues that he was not convicted of a felony within the meaning of section 1128(a)(3) because he was not convicted of health care fraud. Petitioner’s argument is unavailing because the Departmental Appeals Board (DAB) has held that “[s]ection 1128(a)(3) does not require that the felony conviction be for an offense specified as “health care fraud” under federal or state law.” *Charice Curtis*, DAB No. 2430 at 4 (2011). Petitioner also argues that an 1128(a)(3) exclusion can only be supported if a public or private insurance or benefits program would have been charged for the medical benefit rendered. Nothing in this section requires that a public or private insurance or benefits program would have been charged for the medical benefit rendered in order for an individual to be subject to its reach. It plainly applies to any individual who is convicted of a felony described in that section. Lastly, Petitioner makes constitutional arguments but I do not have authority to rule on the constitutional arguments.

The I.G. is required to exclude Petitioner for a minimum of five years. Act § 1128(c)(3)(B). Here, the I.G. opted to exclude Petitioner for a period of five years and the length of the exclusion is reasonable as a matter of law.

/s/
Steven T. Kessel
Administrative Law Judge