Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Rick Leon Perkins, M.D.
(O.I File No. H-16-41775-9),

Petitioner,

v.

The Inspector General,
Department of Health and Human Services.

Docket No. C-17-466

Decision No. CR4915

Date: August 9, 2017

DECISION

Petitioner, Rick Leon Perkins, 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 March 20, 2017. 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)).[1]

I. Background

The Inspector General (I.G.) notified Petitioner by letter dated February 28, 2017, that he was excluded from participation in Medicare, Medicaid, and all federal health care programs for five years. The I.G. cited section 1128(a)(4) of the Act as the basis for Petitioner's exclusion based on his conviction in the State of Wisconsin Circuit Court

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[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.

Branch 3, Portage County, of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance as defined under federal or state law. I.G. Exhibit (Ex.) 1.

On March 21, 2017, Petitioner timely filed a request for hearing. This case was assigned to me for hearing and decision on March 29, 2017. A prehearing conference was convened on April 11, 2017. The substance of the conference is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence dated April 11, 2017 (Prehearing Order).

The I.G. filed a motion for summary judgment and supporting brief (I.G. Br.) on May 3, 2017, with I.G. Exs. 1 through 9. Petitioner filed a cross-motion for summary judgment (P. Br.) on June 12, 2017, with no exhibits. The I.G. filed a reply brief on June 14, 2017. Petitioner did not object to my consideration of I.G. exhibits 1 through 9 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)(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. The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(a). [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 no fewer than five years. 42 C.F.R.

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[2] References are to the 2016 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

§ 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).

B. Issues

The issues in this case are:

Whether summary judgment is appropriate; and

Whether there is a basis for exclusion.

There is no issue of whether or not the period of exclusion is reasonable as the period proposed by the I.G. is the minimum five years authorized by Congress for a mandatory exclusion. 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's request for hearing was timely and I have jurisdiction pursuant to section 1128(f) of the Act and 42 C.F.R. pt. 1005.

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 and no hearing is required where either: there are no genuine disputes 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 which, if true, would refute the facts relied upon by the moving party. *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) (holding in-person hearing is required where the non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992).

During the prehearing conference on April 11, 2017, Petitioner waived an oral hearing. Prehearing Order, para. 5. Nevertheless, CMS filed a motion for summary judgment and supporting brief on May 3, 2017, rather than a brief on the merits. Petitioner subsequently filed a cross-motion for summary judgment on June 12, 2017, which I treat as a withdrawal of Petitioner's waiver of oral hearing. I conclude that summary judgment is appropriate in this case. Petitioner agrees that there is no genuine dispute as to any material fact. P. Br. at 1. Petitioner concedes that he was convicted but argues that his conviction was not related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. P. Br. at 2. The issue raised by Petitioner must be resolved against him as a matter of law and the case can be resolved by applying the law to the undisputed facts.

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

a. Facts

On July 13, 2012, Petitioner was charged by a criminal complaint of seven felony counts of obtaining a controlled substance by fraud between about January 2, 2011 and December 17, 2011; eight felony counts of delivery of a controlled substance at various times between about January 2, 2011 and December 30, 2011; one felony count of conspiracy to obtain a controlled substance by fraud on or about December 30, 2011; and one misdemeanor count of conspiracy to obstruct an officer on or about December 31, 2012. I.G. Ex. 2.

On April 11, 2013, Petitioner was charged by criminal complaint with seven felony counts of obtaining a controlled substance by fraud between about May 4, 2007 and January 11, 2008; seven felony counts of delivery of a controlled substance between about May 4, 2007 and January 11, 2008; and a felony count of intimidation of a witness in about June or July 2012. I.G. Ex. 4.

On February 4, 2013, Petitioner was charged by a criminal compliant with one felony count of obtaining a controlled substance by fraud between about December 2010 and December 2011; one felony count of delivery of a controlled substance between about December 2010 and December 2011; one felony count of intimidation of a witness on or about January 14, 2013; and one felony count of bail jumping on or about January 14, 2013. I.G. Ex. 7.

On February 18, 2015, Petitioner was convicted pursuant to his no contest pleas in case number 2012CF000245, of two misdemeanor counts of obtaining prescription drugs by fraud and one misdemeanor count of conspiracy to resist or obstruct an officer. Four felony counts of manufacturing or delivering non-narcotics, and two felony counts of obtaining a controlled substance by fraud were dismissed. I.G. Ex. 3. Also on February 18, 2015 in case number 2013CF000140, Petitioner was convicted pursuant to his no contest pleas of seven misdemeanor counts of obtaining a prescription drug by fraud and one felony count of intimidating a witness. Eight felony counts of manufacturing or delivering non-narcotics and one misdemeanor count of obtaining a prescription drug by fraud were dismissed. I.G. Ex. 5. Also on February 18, 2015 in case number 2013CF000042, he was convicted pursuant to his no contest plea of a felony count of intimidating a witness. One felony count of manufacturing or delivering non-narcotics and one felony count of bail jumping were dismissed. I.G. Ex. 8.

b. Analysis

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 is related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

Petitioner does not dispute that on February 18, 2015, he was convicted pursuant to his no contest pleas of: (1) one count of felony witness intimidation on or about December 1, 2010 in violation of Wis. Stat. § 940.43(7); and (2) one count of felony witness intimidation committed on or about June 15, 2012 in violation of Wis. Stat. § 940.43(3). I.G. Exs. 5, 8. Petitioner's convictions were Class G felonies under the Wisconsin statutes. Wis. Stat. § 940.43 (I.G. Ex. 6). Petitioner concedes that he was convicted under state law based on his no contest pleas of criminal offenses within the meaning of 42 C.F.R. § 1001.2. The term "conviction," as defined in the Act, includes the acceptance by a state court of a plea of *nolo contendere* or no contest by an individual. Act § 1128(i)(3); 42 C.F.R. § 1001.2. I conclude that Petitioner was convicted within the meaning of the Act when his no contest pleas to two counts of intimidating witnesses were accepted. I.G. Ex. 5, 8. Petitioner also concedes that the offenses of which he was convicted were felonies within the meaning of 1128(a)(4) of the Act. Petitioner does not dispute that his convictions were for offenses that occurred after August 21, 1996. P. Br.

at 2. Therefore, I conclude that Petitioner was convicted of a felony criminal offense committed after August 21, 1996, and the first two elements for exclusion under section 1128(a)(4) of the Act are satisfied.

Petitioner's argument is that his felony convictions for intimidating a witness are not related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, the third element necessary to trigger mandatory exclusion pursuant to 1128(a)(4) of the Act. P. Br. at 1.

Appellate panels of the Departmental Appeals Board (the Board) have long held that the statutory terms describing an offense do not control whether that offense is "related to" the delivery of a health care item or service under Medicare or a state health care program for purposes of an exclusion pursuant to section 1128(a) of the Act. *E.g.*, *Dewayne Franzen*, DAB No. 1165 (1990) (inquiry is whether conviction is related to Medicaid fraud, not whether the petitioner was convicted of Medicaid fraud). Rather, an ALJ must examine whether there is a "common sense connection or nexus between the offense and the delivery of an item or service under the program." *Scott D. Augustine*, DAB No. 2043 at 5-6 (2006) (citations omitted). To determine whether there is such a nexus or common-sense connection, "evidence as to the nature of an offense may be considered," including "facts upon which the conviction was predicated." *Id.* at 6-7. An ALJ may also use extrinsic evidence to "[fill] in the circumstances surrounding the events which formed the basis for the offense of which Petitioner was convicted." *Narendra M. Patel, M.D.*, DAB No. 1736 at 7 (2000). The terms "related to" and "relating to" in 42 U.S.C. § 1320a-7 simply mean that there must be a nexus or common sense connection. *Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (describing the phrase "relating to" as "deliberately expansive words," "the ordinary meaning of [which] is a broad one," and one that is not subject to "crabbed and formalistic interpretation") (internal quotes omitted); *Quayum v. U.S. Dep't of Health and Human Servs.*, 34 F.Supp.2d 141, 143 (E.D.N.Y. 1998).

Petitioner was not convicted of a single felony offense of unlawful distribution, prescription, or dispensing of a controlled substance. Petitioner correctly notes that all the felony drug charges were dismissed. P Br. at 3; I.G. Exs.3, 5, 8. However, my determination is not based solely upon the language of the statutes Petitioner was convicted of violating. Rather, I look at all the facts related to the conviction to determine whether the required nexus exists between Petitioner's conviction and the unlawful distribution, prescription, or dispensing of a controlled substance. In this case, the nexus clearly exists based upon Petitioner's misdemeanor convictions on February 18, 2015, of nine counts of obtaining prescription drugs by fraud. Further, Petitioner admits that he had conversations with witnesses related to the drug charges in which he attempted to dissuade those witnesses from testifying against him in a future trial. P. Br. at 2. Petitioner argues that the intimidation of the witnesses was not based on the same facts as the drug charges that were dismissed. P. Br. at 3. But, it is clear that the

witnesses who he does not contest that he attempted to intimidate were potential witnesses in a trial on the drug charges. Contrary to Petitioner's arguments, I have no difficulty finding that the remedial purposes of section 1128(a) of the Act are satisfied by his mandatory exclusion as Congress intended. P. Br. at 3-4.

I conclude that there is a sufficient nexus between the felony witness intimidation charges of which Petitioner was convicted and the misdemeanor drug charges of which he was convicted to satisfy the third element for mandatory exclusion pursuant to section 1128(a)(4) of the Act. 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 March 20, 2017.

/s/
Keith W. Sickendick
Administrative Law Judge