**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Paul L. Guarino
(OI File No. H-15-4-3080-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-453

Decision No. CR4680

Date: August 16, 2016

# DECISION

The Inspector General (IG) of the United States Department of Health and Human Services notified Petitioner, Paul L. Guarino, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of five years under 42 U.S.C. § 1320a-7(a)(3). Petitioner requested a hearing before an administrative law judge to dispute the exclusion. For the reasons stated below, I affirm the five-year exclusion.

## I. Background

In a January 29, 2016 letter, the IG notified Petitioner that he was being excluded from Medicare, Medicaid, and all federal health care programs for five years. The letter stated that the exclusion would commence 20 days after the date of the letter. The IG informed Petitioner that the exclusion arose because Petitioner was allegedly convicted of a felony in the Malden District Court of Massachusetts (District Court), related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. IG Exhibit (Ex.) 1.

The Civil Remedies Division received Petitioner's request for hearing on April 1, 2016, and the case was assigned to me for a hearing and decision. On April 20, 2016, I held a telephonic prehearing conference with the parties, the substance of which I summarized in my April 21, 2016 Order and Schedule for Filing Briefs and Documentary Evidence (Order). Pursuant to the Order, the IG filed a brief (IG Br.) and six exhibits (IG Exs. 1-6). Petitioner filed a response brief (P. Br.), but did not submit any marked exhibits. The IG filed a reply brief.

## II. Decision on the Record

In the absence of objection, I admit IG Exs. 1-6 into the record. Order ¶¶ 7, 10; Civil Remedies Division Procedures § 14(e).

My Order informed the parties that I would issue a decision based on the written record unless a party requested a hearing in its brief. Order ¶ 5. The IG expressly indicated that he did not believe a hearing was necessary (IG Br. at 10-11), and Petitioner's one-page brief does not indicate that Petitioner seeks a hearing. *See* P. Br. Therefore, I issue this decision on the basis of the written record.

## III. Issue

Whether the IG has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for five years pursuant to 42 U.S.C. § 1320a-7(a)(3). *See* 42 C.F.R. § 1001.2007(a)(1)-(2).

## IV. Findings of Fact, Conclusions of Law, and Analysis[1]

The Secretary of Health and Human Services must exclude an individual from participation in Medicare, Medicaid, and all other federally-funded health care programs if that individual:

> 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 1320a-7(a)(1)]) operated by or financed in whole or in part by any Federal,

[1] My findings of fact and conclusions of law are set forth below in bold and italics.

> 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.

42 U.S.C. § 1320a-7(a)(3).

The four essential elements necessary in this case to support the exclusion are: (1) Petitioner was convicted under federal or state law of a felony offense; (2) the felony offense occurred after August 21, 1996; (3) the felony related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; and (4) the felony offense was in connection with the delivery of a health care item or service. 42 C.F.R. § 1001.101(c).

### *A. Petitioner admitted sufficient facts concerning two counts of larceny, which took place in June and July 2009, and involved stealing prescription narcotics worth more than $250, that Petitioner could have been found guilty of those offenses; however, the District Court placed Petitioner on probation and entered a continuance without a finding (CWOF).*

Petitioner was licensed as a pharmacist in the Commonwealth of Massachusetts. From February 2002 to May 2012, Petitioner worked as a pharmacist for the Cambridge Health Commission in the Whidden Memorial Hospital's pharmacy department. For three of those years, from March 2009 through May 2012, Petitioner was the interim Manager of Record. Between June 2009 and May 2012, Petitioner used his position at the hospital pharmacy department to order thousands of tablets of Oxycodone and Oxycodone/Acetaminophen and then, on 36 occasions, diverted those tablets to himself. IG Ex. 2 at 1.

In December 2013, a criminal complaint alleging 36 counts of larceny of drugs was filed in the District Court against Petitioner. IG Ex. 3. Counts 1 and 2 alleged that on June 19, 2009, and July 21, 2009, respectively, Petitioner stole controlled substances from a person or entity authorized to dispense or possess controlled substances. IG Ex. 3 at 1. On September 16, 2014, Petitioner admitted sufficient facts to prove that he violated amended versions of Counts 1 and 2, which now alleged simple larceny of property over $250 in value. IG Ex. 2 at 2; IG Ex. 3 at 1; IG Ex. 4 at 1-2. Also on that date, the District Court entered a CWOF and ordered Petitioner to serve five years of probation, be drug tested regularly, pass the Massachusetts Professional Recovery System program, and engage in group and individual counselling. IG Ex. 2 at 2; IG Ex. 5; IG Ex. 6.

### *B. Petitioner was convicted of a felony offense for purposes of 42 U.S.C. § 1320a-7(a)(3).*

In his Request for Hearing in this case, Petitioner disputes that he was convicted of a felony because the District Court continued his criminal case without any finding pending his completion of a five-year drug rehabilitation program. Petitioner also asserts that when he completes the program, the District Court will dismiss the criminal complaint without a conviction. In opposition, the IG argues that because the District Court gave Petitioner a CWOF, Petitioner has been "convicted" for exclusion purposes under the definition of that word found in 42 U.S.C. § 1320a-7(i)(4). IG Br. at 6-7.

I agree with the IG that Petitioner was "convicted" of a criminal offense for purposes of exclusion under the definition in 42 U.S.C. § 1320a-7(i)(4). That provision states an individual has been convicted "when the individual . . . has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld." 42 U.S.C. § 1320a-7(i)(4). In order "[t]o determine whether state court proceedings constituted a conviction under § 1320a–7(i), we look to the substance of the proceedings, rather than any formal labels or characterizations used by the state or by the parties." *Travers v. Shalala*, 20 F.3d 993, 996 (9th Cir. 1994).

The District Court's acceptance of Petitioner's admission of sufficient facts to prove his guilt to Counts 1 and 2 of the criminal complaint and then continuance of Petitioner's criminal case pending a period of probation where Petitioner complies with conditions ordered by the District Court, ultimately resulting in dismissal of the criminal charges, are part of a process authorized by state statute. Mass. Gen. Laws ch. 278 § 18. Therefore, I conclude that this process is an arrangement or program where a judgment of conviction has been withheld and, therefore, Petitioner has been "convicted" as that word is defined in 42 U.S.C. § 1320a-7(i)(4). *See Ellen L. Morand*, DAB No. 2436 at 4-5 (2012).

The IG also asserted that, under Massachusetts law, the criminal offenses for which Petitioner was convicted (i.e., for which Petitioner admitted sufficient facts for a finding of guilt) were felonies. The IG argues that Petitioner was convicted of larceny, for which a court may impose a maximum sentence of five years of imprisonment in state prison, and that such a sentence means that Petitioner was convicted of a felony under state law. IG Br. at 6; Mass. Gen. Laws ch. 266 § 30; Mass. Gen. Laws ch. 274 § 1. Petitioner did not dispute this. Therefore, I conclude that Petitioner was convicted of felony offenses.

### *C. Petitioner's felonious conduct occurred after August 21, 1996.*

To be excluded under 42 U.S.C. § 1320a-7(a)(3), Petitioner's felony offense must have occurred after August 21, 1996. The conduct on which Petitioner's conviction was based occurred on June 19, 2009, and July 21, 2009. IG Ex. 3 at 1; IG Ex. 4 at 1; *see also* IG Ex. 2 at 1. Petitioner does not dispute this fact. Therefore, I conclude that Petitioner's conduct that resulted in his conviction of two felonies occurred after August 21, 1996.

### *D. Petitioner's felonious conduct related to theft.*

In order for a conviction to qualify as one mandating exclusion under 42 U.S.C. § 1320a-7(a)(3), it must be a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. The terms "related to" and "relating to" simply mean that there must be a nexus or common sense connection. *See Quayum v. U.S. Dep't of Health and Human Servs.*, 34 F. Supp. 2d 141, 143 (E.D.N.Y. 1998); *see also Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (describing the phrase "relating to" in another part of section 1320a-7 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 quotations omitted).

The IG asserts that Petitioner was convicted of "theft" within the meaning of section 1320a-7(a)(3) because the statute Petitioner was convicted of violating was for larceny, which included the statutory elements that Petitioner stole the property of another valued at over $250. IG Br. at 8; Mass. Gen. Laws ch. 266 § 30. Indeed, Counts 1 and 2 specify that Petitioner "did steal" property. IG Ex. 3 at 1. Further, Petitioner admits he stole the drugs in question. P. Br. Therefore, I conclude that Petitioner was convicted for theft for purposes of section 1320a-7(a)(3).

### *E. Petitioner's felonious conduct was in connection with the delivery of a health care item or service.*

In order for Petitioner to be excluded under 42 U.S.C. § 1320a-7(a)(3), Petitioner's felonious conduct must have been conduct in connection with the delivery of a health care item or service. To be "in connection with" the delivery of a health care item or service, there only needs to be a nexus or common sense connection to the delivery of a health care item or service. *Charice D. Curtis*, DAB No. 2430 at 5 (2011).

The IG argues that Petitioner's offense was in connection with the delivery of a health care item or service because Petitioner stole controlled substances from a hospital pharmacy while he was working for that pharmacy. IG Br. at 9. Petitioner does not dispute this argument. I agree with the IG that Petitioner's conviction directly related to

his position as a pharmacist at a hospital, where he ordered the drugs that he then diverted to his own use. IG Ex. 2 at 2; IG Ex. 3 at 1. Therefore, I conclude that Petitioner's felonious conduct was in connection with the delivery of a health care item or service under section 1320a-7(a)(3).

### *F. Petitioner must be excluded for the statutory minimum of five years under 42 U.S.C. § 1320a-7(c)(3)(B), and the effective date for Petitioner's exclusion must remain February 28, 2016.*

With his request for hearing, Petitioner provided documentation proving that he has fully complied with the terms of his probation and has made significant strides in combating his addiction to prescription medications. Request for Hearing Supporting Documents at 1-12; 21-52. Petitioner states that he did not intend to become addicted to prescription medications, which he first received while being treated for an injury. Further, Petitioner states that he has been sober for three years. Petitioner asks that his exclusion have a retroactive start date of September 16, 2014, the date on which he started his five-year treatment program, so that the exclusion would end when he completes the treatment program. P. Br.

Petitioner's efforts to overcome his substance abuse problem, particularly his continued sobriety in the face of past addiction, are laudable. However, this fact does not affect the outcome in this case. Because I have concluded that a basis exists to exclude Petitioner pursuant to 42 U.S.C. § 1320a-7(a)(3), Petitioner must be excluded for a minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2). Further, the exclusion must commence 20 days after the date on the January 29, 2016 exclusion notice. 42 C.F.R. § 1001.2002(b); *see also* 42 U.S.C. § 1320a-7(c)(1). I have no authority to change the length of exclusion or the date on which the exclusion commences. *Kailash C. Singhvi, M.D.*, DAB No. 2138 at 4 (2007).

## V. Conclusion

I affirm the IG's exclusion of Petitioner from participating in Medicare, Medicaid, and all federal health care programs for five-years under 42 U.S.C. § 1320a-7(a)(3).

/s/
Scott Anderson
Administrative Law Judge