Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

William A. Holley, D.P.M.
(OI File No. 2-05-40678-9),

Petitioner,

v.

The Inspector General.

Docket No. C-12-892

Decision No. CR2707

Date: February 13, 2013

DECISION

Petitioner, William A. Holley, D.P.M., appeals the determination of the Inspector General (I.G.) to exclude him from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)), based upon his conviction of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner and that the statute mandates a minimum five-year exclusion.

I. Background

Petitioner is a podiatrist. In a letter dated April 30, 2012, the I.G. notified Petitioner that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years pursuant to section 1128(a)(1) of the Act. The I.G. advised Petitioner that the exclusion was based on his conviction, in the United States District Court for the Western District of New York, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner filed a timely request for hearing. The Civil Remedies Division received the request on June 18, 2012 and assigned the case to me for possible hearing and written decision. I convened a prehearing conference by telephone on October 3, 2012, which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence, dated October 4, 2012.[1]

The I.G. filed a motion for summary judgment and an Informal Brief (I.G. Br.) on November 2, 2012, with I.G. exhibits (I.G. Exs) 1-4. Petitioner filed his Informal Brief (P. Br.) on December 3, 2012, with Petitioner's exhibits (P. Exs.) 1 through 5. The I.G. filed a reply brief (I.G. Reply) on December 21, 2012. There were no objections to any of the exhibits. I therefore admit into evidence I.G. Exs. 1-4 and P. Exs. 1-5.

The I.G. indicated in his brief that an in-person hearing was not necessary, and the case can be decided on the written record. I.G. Br. at 7. Petitioner indicated in his brief that an in-person hearing was necessary to decide his case. However, Petitioner stated he had no oral testimony he wished to offer at an in-person hearing. P. Br. at 3. Considering Petitioner has no testimony to present, I now decide this matter solely on the written briefs and documentary evidence.

II. Issue

The issue before me is whether the I.G. had a basis for excluding Petitioner from federal health care programs. Program exclusion under section 1128(a)(1) must be for a mandatory minimum period of five years, as the case is here, and therefore the reasonableness of the length of the exclusion is not an issue. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); 42 C.F.R. § 1001.2007(a)(2).

III. Applicable Law

Section 1128(a)(1) of the Act requires the Secretary of the U.S. Department of Health and Human Services (Secretary) to exclude from participation in all federal health care programs any "individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program." 42 U.S.C. § 1320a-7(a)(1); *see also* 42 C.F.R. § 1001.101(a). Section 1128(a)(1) does not distinguish between felonies and misdemeanors as predicates for exclusion.

[1] The prehearing conference was originally scheduled for August 17, 2012; however, counsel for Petitioner requested that the conference be postponed until sometime in October due to his unavailability and other scheduling conflicts. I granted the request and rescheduled the telephonic prehearing conference for October 3, 2012.

An exclusion based on section 1128(a)(1) is mandatory, and the I.G. must impose it for a minimum period of five years. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); *see also* 42 C.F.R. § 1001.102(a). The mandatory minimum period of exclusion may be enhanced on the I.G.'s proof of defined aggravating factors listed at 42 C.F.R. § 1001.102(b). In this case, the I.G. did not rely on aggravating factors to enhance the period of Petitioner's exclusion beyond the minimum mandatory period of five years.

Rights to an administrative law judge (ALJ) hearing and judicial review of the final action of the Secretary are provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that is the basis for 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(c).

IV. Findings of Fact, Conclusions of Law, and Analysis

A. There is a basis for the I.G. to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

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, whether felony or misdemeanor; and (2) the criminal offense is related to the delivery of an item or service under Medicare or any state health care program.

1. Petitioner does not contest that he was convicted of a criminal offense within the meaning of section 1128(a)(1) 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 has been a finding of guilt in a federal, state, or local court; (3) a plea of guilty or no contest has been accepted in a federal, state, or local court; or (4) an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. Act § 1128(i) (42 U.S.C. § 1320a-7(i)); *see also* 42 C.F.R. § 1001.2.

Petitioner does not dispute that, on January 5, 2011, Petitioner agreed to plead guilty to a one-count Superseding Misdemeanor Information, which charged Petitioner with violating 18 U.S.C. § 669(a) – Theft from a Health Care Benefit Program. P. Ex. 1; I.G. Ex. 2. Petitioner admitted as part of his plea agreement that, beginning in or about 2001 through May 2006, in the Western District of New York, he submitted claims for reimbursement to Medicare which falsely reported the services he performed on patients. Specifically, Petitioner admitted making false Medicare claims that asserted he

performed wedge excisions on patients, which were procedures with a higher reimbursement rate, when he had actually only rendered routine foot care. I.G. Ex. 2, at 3-4. On May 26, 2011, the United States District Court for the Western District of New York accepted Petitioner's guilty plea and imposed judgment. I.G. Ex. 4. The court sentenced Petitioner to be imprisoned for 6 months at a halfway house followed by a one-year term of supervised release, home detention for 4 months, to pay an assessment of $25, and to pay restitution of $36,868.33 ($36,069.57 of this amount to Medicare). I.G. Ex. 4. These events qualify as a conviction under the Act. Act §§ 1128(i)(1), 1128(i)(2), and 1128(i)(3).

2. Petitioner does not dispute that his offense was related to the delivery of an item or service under Medicare.

Petitioner also does not dispute that his conviction was related to the delivery of an item or service under Medicare. His conviction was based on his submission of false claims to Medicare for services that he did not perform, and it is evident that a "nexus" exists between his criminal acts and the purported delivery of an item or service under Medicare. *See, e.g., Berton Siegel, D.O.*, DAB No. 1467 (1994). The fact that the District Court ordered Petitioner to pay restitution to Medicare in the amount of $36,069.57 confirms that his offense was program-related.

B. The I.G. had no discretion to exclude Petitioner under the permissive provisions of the Act.

Although Petitioner concedes that his conviction was program-related, his principal argument is that the offense to which he pleaded guilty, Theft from a Health Care Benefit Program, a misdemeanor in violation of 18 U.S.C. § 669(a), meets the requirements for a permissive exclusion under section 1128(b)(1) of the Act, 42 U.S.C. 1320a-7(b)(1). Petitioner argues that the I.G. erred in excluding him pursuant to the mandatory exclusion authority contained in 42 U.S.C. § 1320a-7(a)(1) because Petitioner only pleaded to a single misdemeanor count for theft or embezzlement related to the Medicare and Medicaid programs. P. Br. at 2.

Simply because Petitioner's offense constituted a misdemeanor does not invalidate the mandatory exclusion provision of section 1128(a)(1) of the Act. The text of section 1128(a)(1) does not differentiate between misdemeanor and felony convictions. The Departmental Appeals Board previously held, "the Act expressly provides for mandatory five-year minimum periods of exclusion *whenever* an individual has been convicted 'of a criminal offense related to the delivery of an item or service' under specific programs . . . without any requirement that the offense be a felony." *Craig Richard Wilder*, DAB No. 2416, at 7 (2011) (quoting *Tanya A. Chuoke, R.N.*, DAB No. 1721, at 14 (2000) (italics in original)). Once a conviction is shown to be within the reach of section 1128(a)(1), the Act requires the I.G. to impose a mandatory exclusion. *See, e.g., Wilder*, DAB No. 2416,

at 7; *Lorna Fay Gardner*, DAB No. 1733, at 6 (2000) (rejecting petitioner's argument that her misdemeanor conviction should be considered under the permissive exclusion rather than the mandatory exclusion provisions of section 1128 of the Act.) The I.G. has no discretion to impose a permissive exclusion where an individual's conviction satisfies the elements of section 1128(a)(1) of the Act. *See, e.g., Tarvinder Singh, D.D.S.*, DAB No. 1752 (2000) (rejecting petitioner's claim that his misdemeanor conviction was more properly subject to a three-year permissive exclusion when the threshold provisions of the mandatory provisions of section 1128(a)(1) have been met).

C. I am unable to consider collateral attacks on underlying convictions.

Petitioner maintains his innocence and claims that he "was swept into a federal investigation" involving other wrongdoers. P. Br. at 6. He describes himself as "the victim of a complex and intricate coding system" and maintains that there was no evidence that he ever participated in any billing scheme to defraud Medicare and Medicaid. P. Br. at 5-6. Petitioner claims that he provided medically appropriate care at all times. P. Br. at 5-6.

Petitioner's arguments attack the basis for his conviction. Under the regulations, Petitioner's underlying conviction is not reviewable or subject to collateral attack before me, whether on substantive or procedural grounds. 42 C.F.R. § 1001.2007(d). The Board has repeatedly affirmed this categorical preclusion. *See, e.g., Lyle Kai, R.Ph.*, DAB No. 1979, at 8 (2005) ("Excluding individuals based on criminal convictions 'provides protection for federally funded programs and their beneficiaries and recipients, without expending program resources to duplicate existing criminal processes.'" (internal cite omitted)). Thus, I may not consider Petitioner's arguments attacking his predicate conviction.

D. I am unable to consider mitigating factors for a mandatory minimum period of exclusion.

Petitioner argues that excluding him from federal health care programs will deprive his patients in underserved areas from receiving podiatric services. P. Br. at 4, 6-7. Petitioner offers letters from legislators, church leaders, colleagues, and patients attesting to his upstanding character. This evidence suggests that Petitioner is well-respected within his community. However, as discussed above, Petitioner's exclusion arises under the mandatory provision of section 1128(a)(1) of the Act. The I.G. may only consider mitigating factors in the context of a mandatory exclusion where the I.G. has alleged the existence of certain aggravating factors for extending the period of exclusion beyond the five-year minimum period. 42 C.F.R. § 1001.102(c). Here, because the I.G. imposed the statutory minimum five-year period of exclusion against Petitioner, no aggravating factors are involved, and I therefore may not consider any mitigating factors. Even if the consideration of mitigating factors were relevant in this case, the regulations defining

mitigating factors are specific, and they do not authorize me to consider good reputation or underserved populations. *See* 42 C.F.R. § 1001.102(c) (listing the only mitigating factors that I am able to consider after aggravating factors are relied upon to increase mandatory minimum exclusion periods).

V. Conclusion

For the foregoing reasons, I find Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program, and I sustain the I.G.'s determination to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs for five years pursuant to section 1128(a)(1) of the Act.

/s/
Joseph Grow
Administrative Law Judge