

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Martin G. Hoffmeister, D.P.M.,
(OI File No. 5-10-40975-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-530

Decision No. CR3973

Date: June 19, 2015

DECISION

Petitioner, Martin G. Hoffmeister, D.P.M., appeals the determination of the Inspector General for the U.S. Department of Health and Human Services (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)) for five years. For the reasons discussed below, I find the I.G. was authorized to exclude Petitioner for the five-year minimum mandatory exclusionary period.

I. Background

The I.G. notified Petitioner, by letter dated October 31, 2014, that he was being excluded, pursuant to section 1128(a)(1) of the Act, from participating in Medicare, Medicaid, and all federal health care programs for the minimum mandatory period of five years. The I.G. advised Petitioner that the exclusion was based on his conviction in the U.S. District Court for the Western District of Michigan of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner timely filed a request for hearing. I convened a prehearing conference with the parties, which I summarized in my January 12, 2015 Order and Schedule for Filing Briefs and Documentary Evidence. Pursuant to that order, I asked the parties to answer the questions on short-form briefs I provided, together with any additional arguments and supporting documents they wished to present. The I.G. filed his short-form brief (I.G. Br.) together with eight exhibits (I.G. Exs. 1-8). Petitioner filed a short-form brief (P. Br.) together with 18 exhibits (P. Exs. 1-18).¹ The I.G. filed a reply. Neither party requested an in-person hearing or objected to the opposing party's exhibits. P. Br. at 2; I.G. Br. at 7. I admit I.G. Exs. 1-8 and P. Exs. 1-18 into the record, and I decide the case based on the written record.

II. Discussion

A. Issue

The only issue before me is whether the I.G. had a legitimate basis to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Act. If I find that the I.G. was authorized to exclude Petitioner, then I must uphold the I.G.'s exclusion because it is for the minimum mandatory period of five years. 42 C.F.R. § 1001.2007(a)(2).

B. Findings of Fact and Conclusions of Law

1. The I.G. had a legitimate basis to exclude Petitioner under section 1128(a)(1) of the Act.

The I.G. must exclude an individual when: 1) the individual has been convicted of a criminal offense, whether a felony or a misdemeanor; and 2) the criminal offense is related to the delivery of an item or service under Medicare or a state health care program. Act § 1128(a)(1); *see also* 42 C.F.R. § 1001.101(a).

a. Petitioner was convicted of a criminal offense.

For exclusionary purposes, a conviction occurs when: 1) a judgment of conviction has been entered against an individual by a federal, state, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to the criminal conduct has been expunged; 2) there has been a finding of guilt against an individual by a federal, state or local court; 3) a plea of guilty or nolo contendere by an individual has been accepted by a federal, state, or local court; or 4) an individual has

¹ I granted Petitioner's uncontested motion to replace P. Ex. 7 with Amended P. Ex. 7, which is a redacted version of the originally filed exhibit.

entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld. Act § 1128(i).

Here, Petitioner does not dispute that he pled guilty before the U.S. District Court for the Western District of Michigan to one count of conversion in connection with health care, a misdemeanor in violation of 18 U.S.C. § 669. I.G. Exs. 6, 7. The court accepted Petitioner's guilty plea and entered judgment against him. I.G. Ex. 6 at 1; I.G. Ex. 7 at 1. The court's acceptance of the guilty plea and judgment of conviction constitute a conviction for exclusion purposes. Act § 1128(i)(1),(3).

b. Petitioner's conviction was related to the delivery of a service under Medicare.

A conviction is related to the delivery of an item or service under Medicare or Medicaid if there is a common sense connection or nexus between the offense and the delivery of the item or service. *Berton Siegel, D.O.*, DAB No. 1467 (1994). Petitioner was a licensed podiatrist in the State of Michigan and owned and operated a podiatric practice that participated as a provider in the Medicare program. I.G. Ex. 2; I.G. Ex. 3 at 1, 2; P. Ex. 3 at 1; P. Ex. 6. In December 2013, a grand jury returned an indictment charging Petitioner with 67 counts of health care fraud. I.G. Ex. 3; P. Ex. 3. With advice of counsel, Petitioner entered into a plea agreement with the U.S. Attorney's Office for the Western District of Michigan. I.G. Ex. 5; P. Ex. 5. Based on the agreement, Petitioner pled guilty to a Superseding Class A Misdemeanor Information charging him with one count of theft from a health care benefit program, in violation of 18 U.S.C. § 669. I.G. Ex. 4; I.G. Ex. 5 at 1; P. Ex. 2 at 1; P. Ex. 5 at 1. The Information to which Petitioner pled guilty states that "[o]n or about February 25, 2009 . . . [Petitioner] knowingly and willfully converted to his own use without authority less than \$100 in moneys and funds belonging to Medicare, a health care benefit program . . ." I.G. Ex. 4; I.G. *see* Ex. 5 at 1.

Petitioner's plea agreement further details the conduct underlying his offense and further establishes the required nexus to Medicare. I.G. Ex. 5; P. Ex. 5. As part of that agreement Petitioner admitted that he billed Medicare for a partial nail avulsion that was not performed in accordance with Medicare guidelines, which resulted in Petitioner wrongfully obtaining \$49.24 from Medicare. I.G. Ex. 5 at 4; P. Ex. 5 at 4. Petitioner agreed to pay \$8,088 as restitution to the Medicare program, which represented an estimate of the Medicare claims described in the indictment and also for other procedures that Petitioner did not perform in accordance with Medicare guidelines. Petitioner also agreed to an additional payment of \$44,904 to Medicare for reimbursed claims from other podiatric procedures not supported by patient records. I.G. Ex. 5 at 2, 3; I.G. Ex. 8 at 1; P. Ex. at 5 at 2, 3; *see also* I.G. Ex. 6 at 2; I.G. Ex. 7 at 2.

In exclusion cases, restitution has long been considered evidence of the nexus between the offense and the program to which restitution is to be made. *See, e.g., Juan de Leon,*

Jr., DAB No. 2533 at 5 (2013); *Craig Richard Wilder*, DAB No. 2416 at 9 (2011); *Jason Hollady, M.D.*, DAB No. 1855 (2002). Based on Petitioner's restitution and the records from his underlying conviction, I find Petitioner's criminal offense and subsequent conviction relate directly to his delivery of podiatry services under Medicare.

Petitioner disputes that the criminal offense for which he was convicted related to the delivery of a health care item or service under Medicare or a state Medicaid program because he pled guilty to a Class A misdemeanor. P. Br. at 2, 3; P. Ex. 2. However, an exclusion pursuant to section 1128(a)(1) of the Act does not distinguish between felonies and misdemeanors as predicates for program-related offenses. Even when an individual is convicted of a program-related misdemeanor that involves the delivery of an item or service, the mandatory exclusion statute still applies. *Gregory J. Salko, M.D.*, DAB No. 2437 at 4-5 (2012) (citations omitted).

c. I am unable to consider Petitioner's collateral attacks to his predicate conviction.

Petitioner raises issues regarding the fairness of his predicate conviction. Petitioner specifically claims he did not understand the implications of his plea agreement, he did not intend to defraud Medicare, and he has no history of wrongdoing. P. Br. at 6-11; P. Exs. 7-18. Despite Petitioner's assertions, his predicate 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 Departmental Appeals 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)). Although Petitioner alleges he did not realize that accepting the plea would result in his exclusion, that is not a legal basis for me to reverse the exclusion. *See, e.g., Tamara Brown*, DAB No. 2195 at 10 (2008).

2. Petitioner's exclusion for five years is reasonable as a matter of law.

Petitioner claims the five-year exclusion is unreasonable and cites to an administrative law judge decision, *Roderick Spencer, D.P.M.*, DAB CR721 (2000) as support. P. Br. at 3-6. However, that case did not involve a conviction of a criminal offense and resulted in a permissive exclusion based on section 1128(b)(7) of the Act, which is not applicable to Petitioner's mandatory exclusion pursuant to section 1128(a)(1). When an individual is convicted of a Medicare-related criminal offense, not only is the I.G. required to exclude that individual pursuant to section 1128(a)(1) of the Act, but the exclusion period must be for a minimum period of five years.

Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); 42 C.F.R. § 1001.102(a). I do not have the authority to consider any mitigating circumstances here. Therefore, Petitioner's exclusionary period of five years is reasonable as a matter of law.

III. Conclusion

I find the I.G. was authorized to exclude Petitioner under section 1128(a)(1) of the Act because Petitioner was convicted of a misdemeanor offense related to the delivery of a health care service under the Medicare program. The five-year exclusion that the I.G. imposed is mandatory as a matter of law and became effective 20 days from the I.G.'s exclusion notice dated October 31, 2014. *See* 42 U.S.C. § 1320a-7(a); 42 C.F.R. § 1001.101(a).

/s/
Joseph Grow
Administrative Law Judge