

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	Date: October 5, 2009
)	
Michael Gibbs,)	
)	Docket No. C-09-417
Petitioner,)	Decision No. CR2016
)	
v.)	
)	
The Inspector General.)	

DECISION

Petitioner, Michael Gibbs, is excluded 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)) effective March 19, 2009, 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. There is a proper basis for exclusion. Petitioner's exclusion for the minimum period¹ of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

I. Background

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated February 27, 2009, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years, the minimum statutory period. The I.G. advised Petitioner

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.

that he was being excluded pursuant to section 1128(a)(1) of the Social Security Act (Act) based on his conviction in the Delaware County Court of Common Pleas, Pennsylvania, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner timely requested a hearing by letter dated April 24, 2009. The case was assigned to me for hearing and decision on May 1, 2009. On July 8, 2009, I convened a telephonic prehearing conference, the substance of which is memorialized in my order dated July 10, 2009. At the prehearing conference, Petitioner declined to waive an oral hearing and the I.G. requested the opportunity to file a motion for summary judgment. Accordingly, I set a briefing schedule for the parties.

The I.G. filed a motion for summary judgment and a supporting brief on August 6, 2009, with I.G. exhibits (I.G. Exs.) 1 through 6. Petitioner filed a response in opposition to the I.G. motion on September 3, 2009, with no exhibits (P. Response). The I.G. filed a reply brief on September 22, 2009. Petitioner has made no objection to I.G. Exs. 1 through 6 and they are admitted as evidence.

II. Discussion

A. Applicable Law

Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary is provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). Petitioner's request for a hearing was timely filed and I do have jurisdiction.

Pursuant to section 1128(a)(1) of the Act, the Secretary must exclude from participation in the Medicare and Medicaid programs any individual convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Pursuant to section 1128(i) of the Act, 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) when there is a finding of guilt by a court; (3) when a plea of guilty or no contest is accepted by a court; or (4) when the individual has entered into any arrangement or program where judgment of conviction is withheld.

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years may mitigating factors be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c). No aggravating factors are cited by the I.G. in this case, and the I.G. does not propose to exclude Petitioner for more than the minimum period of five years.

B. Issue

The Secretary of the Department of Health and Human Services (the Secretary) has by regulation limited my scope of review to two issues:

Whether there is a basis for the imposition of the exclusion; and,

Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

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 in this case.

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 right to hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. § 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified in 42 C.F.R. § 1005.3. 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 disputed issues 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 Medical Clinic*, DAB No. 1763 (2001); *Everett Rehabilitation and Medical Center*, DAB No. 1628, at 3 (1997) (in-person hearing required where non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also New Millennium CMHC*, DAB CR672 (2000); *New Life Plus Center*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case. Petitioner does not dispute that he was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program; that there is a basis for his exclusion; or that the minimum period of exclusion is five years. Petitioner urges me to consider him for exclusion pursuant to section 1128(b) of the Act rather than 1128(a). P. Response at 5. The issue before me for resolution is an issue of law, no material facts are in dispute, and summary judgment is appropriate.

3. There is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

4. Petitioner is not subject to permissive exclusion pursuant to section 1128(b) of the Act as his exclusion pursuant to section 1128(a)(1) is mandatory.

On May 20, 2008, Petitioner pled guilty in the Court of Common Pleas of Delaware County, Pennsylvania to Medicaid fraud, theft by deception, tampering with public records or information, and forgery. I.G. Ex. 3, I.G. Ex. 4, at 2, P. Response at 5. The court accepted Petitioner's guilty plea and a judgment of sentence was entered against Petitioner on July 22, 2008. I.G. Ex. 2. Petitioner was sentenced to six years probation, 80 hours of community service, he was ordered to pay the Pennsylvania Medicaid program restitution in the amount of \$35,000, and to pay \$4531.82 in court costs. I.G. Ex. 2; P. Response at 5.

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides:

(a) MANDATORY EXCLUSION. – The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):

(1) Conviction of program-related crimes. – Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program.

The statute requires that the Secretary exclude from participation any individual or entity: (1) convicted of a criminal offense; (2) where the offense is related to the delivery of an item or service; and (3) the delivery of the item or service was under Medicare or a state health care program.

Petitioner does not dispute that he was convicted of a criminal offense within the meaning of section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)). P. Response at 5. Pursuant to section 1128(i) of the Act, an individual is “convicted” of a criminal offense when 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; or when there has been a finding of guilt in a federal, state, or local court; or when a plea of guilty or no contest has been accepted in a federal, state, or local court; or when an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. Petitioner was clearly convicted within the meaning of section 1128 of the Act when his guilty pleas were accepted by the Delaware County Court of Common Pleas, Pennsylvania.

Petitioner was convicted of an offense related to the delivery of an item or service under the Pennsylvania Medicaid program. By pleading guilty to Medicaid fraud, Petitioner admitted to “knowingly or intentionally caus[ing] false or fraudulent claims to be submitted for services under Medical Assistance (the Pennsylvania Medicaid program) . . . for the purpose of obtaining greater compensation than that to which he was legally entitled . . . for services which were not rendered.” I.G. Ex. 3, at 1.

Petitioner alleges that he did in fact perform the total number of hours billed, despite the apparent overlapping times, and that he rendered the services reported on his billing statements. Petitioner specifically denies any allegations that he intentionally submitted false claims for medical services, that any patients did not receive the services billed, or that he forged signatures on the claim forms. P. Response at 5. However, 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).

Petitioner argues that his exclusion should be pursuant to section 1128(b)(1) rather than to section 1128(a)(1) because he, “presents a less serious threat to the federal health care programs.” P. Response at 6. Petitioner misunderstands section 1128(b)(1). Section 1128(b)(1) gives the Secretary discretion to exclude individuals or entities for convictions relating to fraud. However, section 1128(b)(1)(A) does not apply to Petitioner because this section applies only to individuals who were convicted of misdemeanor offenses and Petitioner was convicted of felony offenses. P. Response at 5. Further, section 1128(b)(1)(B) does not apply to Petitioner because Petitioner’s felony conviction concerns Medicaid fraud related to the Pennsylvania Medicaid program. The distinction, as explained by an appellate panel of the Departmental Appeals Board in *Lorna Fay Gardner*, DAB No. 1733 (2000), is not between the degree of fraud against a federal or state health care program, but the difference between defrauding a government program and defrauding another entity's health care program, such as a private health insurance plan. However, more fundamental, if a conviction fits the elements of section 1128(a)(1) as in this case, the I.G. is “bound” to apply the mandatory exclusion of section 1128(a)(1) and has no discretion to apply the permissive exclusion provisions. I am similarly bound by the mandate of Congress to apply the exclusion provisions of section 1128(a)(1) rather than 1128(b).

Petitioner's argument that he should be excluded pursuant to section 1128(b)(1) rather than section 1128(a)(1), is without merit.² I conclude that there is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act and his exclusion pursuant to that provision is mandatory.

5. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is five years.

Petitioner has not disputed that the minimum period of exclusion pursuant to section 1128(a) is five years as mandated by section 1128(c)(3)(B), if I determine he is subject to mandatory exclusion. I have found there is a basis for his exclusion pursuant to section 1128(a) and the minimum period of exclusion is thus five years as a matter of law.

² In his request for hearing Petitioner asserted that he is eligible for a waiver of exclusion pursuant to section 1128(c) of the Act because he is the provider of specialized services in his community. I do not have authority to grant a waiver and Petitioner has not pursued this argument in his opposition to the CMS motion.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years.

_____/s/
Keith W. Sickendick
Administrative Law Judge