Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jason Elliott Evans

Petitioner,

v.

The Inspector General.

Docket No. C-12-693

Decision No. CR2645

Date: October 15, 2012

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Disposition affirming the I.G.'s determination to exclude Petitioner *pro se* Jason Elliott Evans from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G.'s Motion and determination to exclude Petitioner are based on section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). The undisputed material facts in this case require the imposition of a five-year exclusion. Accordingly, I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

On July 29, 2011, in the United States District Court for the Western District of Virginia, the United States Attorney for that District filed an Information charging Petitioner with a felony, False Statements Relating to Health Care Matters, in violation of 18 U.S.C. § 1035. Petitioner and his attorney reached a plea agreement with federal prosecutors, and he appeared with counsel in the United States District Court and pleaded guilty to that charge. The District Court accepted Petitioner's guilty plea, found him guilty on that plea, and on October 24, 2011 entered its judgment of conviction and imposed sentence. Petitioner was sentenced to a three-year term of probation and required to pay a fine of $1000.00 and an assessment of $100.00.

Section 1128(a)(1) of the Act mandates the exclusion of "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under . . . any State health care program" for a period of not less than five years. On April 30, 2012 the I.G. notified Petitioner that he was to be excluded pursuant to the terms of section 1128(a)(1) of the Act for a period of five years.

Acting *pro se*, Petitioner timely sought review of the I.G.'s action on May 10, 2012.

I convened a prehearing conference by telephone on June 5, 2012, pursuant to 42 C.F.R. § 1005.6, in order to discuss procedures for addressing the issues presented by the case. By Order of that date I established a procedure and a schedule for the submission of documents and briefs. The record in this case closed for purposes of 42 C.F.R. § 1005.20(c) on September 12, 2012, in circumstances set out in my June 5, 2012 Order.

The evidentiary record on which I decide the issues before me contains four exhibits proffered by the I.G. marked I.G. Exhibits 1-4 (I.G. Exs. 1-4). Petitioner proffered no exhibits of his own. In the absence of objection, I have admitted all proffered exhibits.

II. Issues

The legal issues before me are limited to those set out at 42 C.F.R. § 1001.2007(a)(1). In the context of this record, they are:

a. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Act; and

b. Whether the five-year length of the proposed period of exclusion is unreasonable.

The controlling authorities require that these issues be resolved in favor of the I.G.'s position. Section 1128(a)(1) of the Act mandates Petitioner's exclusion, for his predicate conviction has been established. A five-year period of exclusion is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B), and is therefore as a matter of law not unreasonable.

III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any individual or entity convicted of a criminal offense related to the delivery of an item or

service under title XVIII of the Act (the Medicare program) or any state health care program such as Medicaid. The terms of section 1128(a)(1) are restated in similar language at 42 C.F.R. § 1001.101(a).

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a Federal . . . court, regardless of . . . whether the judgment of conviction or other record relating to criminal conduct has been expunged," section 1128(i)(1) of the Act; "when there has been a finding of guilt against the individual . . . by a Federal . . . court," section 1128(i)(2) of the Act; "when a plea of guilty or nolo contendere by the individual . . . has been accepted by a Federal . . . court," section 1128(i)(3) of the Act; or "when the individual . . . has entered into participation in a . . . deferred adjudication . . . program where judgment of conviction has been withheld," section 1128(i)(4) of the Act; 42 U.S.C. §§ 1320a-7(i)(1)-(4). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(1) is mandatory and the I.G. must impose it for a minimum period of five years. Section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision.

IV. Findings and Conclusions

I find and conclude as follows:

1. In a Judgment of Conviction entered October 24, 2011 in the United States District Court for the Western District of Virginia, Petitioner *pro se* Jason Elliott Evans was found guilty on his accepted plea of guilty to one count of False Statements Relating to Health Care Matters, in violation of 18 U.S.C. § 1035. I.G. Exs. 2, 3, 4.

2. The accepted plea of guilty, finding of guilt, and Judgment of Conviction described above constitute a "conviction" within the meaning of sections 1128(a)(1) and 1128(i)(1), 1128(i)(2), and 1128(i)(3) of the Act, and 42 C.F.R. § 1001.2.

3. A nexus and a common-sense connection exist between the criminal offense of which Petitioner was convicted, as noted above in Findings 1 and 2, and the delivery of an item or service under the Medicaid program. I.G. Exs. 2, 3, 4; *Berton Siegel, D.O.*, DAB No. 1467 (1994).

4. Petitioner's conviction constitutes a basis for the I.G.'s exclusion of Petitioner from participation in Medicare, Medicaid, and all other federal health care programs, pursuant to section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1).

5. Because the five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, it is as a matter of law not unreasonable. Section 1128(c)(3)(B) of the Act; 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2).

6. There are no disputed issues of material fact and summary disposition is appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

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; and (2) the criminal offense must have been related to the delivery of an item or service under Title XVIII of the Act (Medicare) or any state health care program. *Tamara Brown*, DAB No. 2195 (2008); *Thelma Walley*, DAB No. 1367; *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Lyle Kai, R.Ph.*, DAB CR1262 (2004), *rev'd on other grounds*, DAB No. 1979 (2005); s*ee also Russell Mark Posner*, DAB No. 2033, at 5-6 (2006). Petitioner has not challenged the I.G.'s proof of these two elements, but has argued that the five-year exclusion should not be imposed.

Although Petitioner has not challenged the I.G.'s proof of the two essential elements, I note that this record provides objective proof of both. Court records of Petitioner's conviction and its procedural history are before me as I.G. Exs. 2, 3, and 4, and establish the first essential element. The relation of Petitioner's crime to the Medicaid program is set out in the language of the Information and was acknowledged by Petitioner in the plea agreement. I.G. Exs. 2, 3. In summary, Petitioner was at the time a provider of mental health services to young Medicaid beneficiaries, and he submitted records claiming that he had provided to some of those Medicaid beneficiaries mental health services that he did not in fact actually provide. I.G. Exs. 2, 3. Those facts establish the nexus or common-sense connection to the Medicaid program defined in *Berton Siegel, D.O.*, DAB No. 1467.

Once an individual's conviction is found to have been "related to the delivery of an item or service under Medicare or a State health care program," and thus to lie within the terms of section 1128(a)(1), the imposition of the five-year minimum exclusion established by section 1128(c)(3)(B) of the Act is mandatory and beyond the authority of the I.G. or an Administrative Law Judge (ALJ) to reduce, modify, or suspend. The Departmental Appeals Board (Board) has used unmistakable language to make this point: "Petitioner's exclusion was mandatory under the Act once the nexus was established between her offense and the delivery of an item or service under the Medicare program. The ALJ had no discretion to impose a lesser remedy." *Salvacion Lee, M.D.*, DAB No. 1850, at 4 (2002). This link between conviction and exclusion allows no exception: "We therefore affirm the ALJ conclusion . . . that once an individual has been found to have

been convicted of a program-related criminal offense under section 1128(a)(1) of the Act, exclusion is mandatory . . . ." *Lorna Fay Gardner*, DAB No. 1733, at 3-4 (2000); *Douglas Schram, R.Ph.*, DAB No. 1372 (1992); *Napoleon S. Maminta, M.D.*, DAB No. 1135 (1990).

Petitioner's specific argument, in which he points out his desire to support his family by working in occupations related to health care, and to "go back to helping people and making a difference" fails when confronted with the mandatory operation of the exclusion and the equally-mandatory minimum period for which it must be imposed. As the Board observed in *Joann Fletcher Cash*, DAB No. 1725 (2000), the precise point of the exclusion mechanism is to prevent untrustworthy individuals from being involved with protected health care programs. That this exclusion may have a limiting effect on Petitioner's or any other excluded individual's future employment or professional career is a natural and predictable consequence of any such exclusion, including this one. The substantial closing-off of certain occupations to Petitioner and the probable loss of earnings from those occupations are no bar to the mandatory imposition of this exclusion. *Henry L. Gupton*, DAB No. 2058 (2007); *Salvacion Lee, M.D.*, DAB No. 1850.

Moreover, because the I.G. has established a basis for Petitioner's exclusion pursuant to section 1128(a)(1), the five-year period of his exclusion is also the mandatory minimum period allowed by section 1128(c)(3)(B) of the Act. 42 U.S.C. § 1320a-7(c)(3)(B). That period is reasonable as a matter of law.

I note once more that Petitioner appears here *pro se*. Because of that I have taken additional care in reading his submissions, guided by the Board's reminders that *pro se* litigants should be offered "some extra measure of consideration" in developing their records and their cases. *Louis Mathews*, DAB No. 1574 (1996); *Edward J. Petrus, Jr., M.D., et al.*, DAB No. 1264 (1991). I have searched Petitioner's submissions for any arguments or contentions that might raise a valid, relevant defense to the proposed exclusion, but have found nothing that could be so construed.

Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts. *Marvin L. Gibbs, Jr., M.D.*, DAB No. 2279 (2009); *Michael J. Rosen, M.D.*, DAB No. 2096. The material facts in this case are undisputed and unambiguous. They support summary disposition as a matter of settled law, and this Decision issues accordingly.

VI. Conclusion

For the reasons set forth above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner *pro se* Jason Elliott Evans from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years pursuant to the terms of section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), is sustained.

/s/
Richard J. Smith
Administrative Law Judge