Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Matthew D. Nourse,
(O.I. No. 5-11-40363-9),

Petitioner,

v.

The Inspector General
Department of Health and Human Services.

Docket No. C-13-945

Decision No. CR3045

Date: December 23, 2013

DECISION

Petitioner, Matthew D. Nourse, 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 May 20, 2013, based on 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 the exclusion. Petitioner's exclusion for ten years[1] is mandatory pursuant to section 1128(c)(3)(G)(i) of the Act (42 U.S.C. § 1320a-7(c)(3)(G)(i)) because Petitioner was convicted on one previous occasion of an offense for which exclusion may be effected under section 1128(a) of the Act.

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[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.

I. Background

The Inspector General (I.G.) for the Department of Health and Human Services (HHS) notified Petitioner by letter dated April 30, 2013, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of ten years. The I.G. advised Petitioner that he was being excluded pursuant to section 1128(a)(1) of the Act, based on his conviction in the United States District Court, Southern District of Ohio, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. The I.G. further advised Petitioner that the ten-year period of exclusion was mandatory under section 1128(c)(3)(G)(i) of the Act because Petitioner had been convicted on one other occasion of one or more offenses for which exclusion could have been effected under section 1128(a) of the Act. I.G. Ex. 1.

Petitioner timely requested a hearing on June 26, 2013 (RFH). The case was assigned to me on July 8, 2013, for hearing and decision. On July 24, 2013, I convened a prehearing conference by telephone, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence (Prehearing Order) issued on the same date. During the prehearing conference, Petitioner did not waive an oral hearing. The I.G. requested to file a motion for summary judgment prior to further development of the case for hearing and I set a briefing schedule.

The I.G. filed a motion for summary judgment and supporting brief (I.G. Br.) on September 9, 2013, with I.G. exhibits (I.G. Ex.) 1 through 8. Petitioner filed a response in opposition to the I.G. motion (P. Br.) on October 21, 2013, with 31 pages of documents that I treat as P. Ex. 1.[2] Petitioner filed several documents with his request for

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[2] Petitioner failed to properly mark his exhibits as instructed in my July 24, 2013 Prehearing Order and the Civil Remedies Division Procedures (CRDP). The documents were not returned to Petitioner for correction, therefore, I will refer to the documents collectively as P. Ex. 1, and any reference to page numbers corresponds to the page counter for these e-filed documents. The documents filed with Petitioner's brief are: letter from the I.G. dated November 8, 2012; Petitioner's December 3, 2012 response letter to the November 8, 2012 I.G. letter; Petitioner's July 8, 2011 reinstatement letter from the I.G.; the District Court's Bill of Information filed May 11, 2012; Petitioner's sentencing memorandum filed in the District Court on August 6, 2012; the prosecutor's response to Petitioner's sentencing memorandum filed in the District Court on August 13, 2012; the District Court's August 20, 2012 Judgment in a Criminal Case; the notice of satisfaction of criminal judgment regarding money penalties filed in the District Court by the prosecutor on October 4, 2012; and a newspaper article discussing drug abuse.

hearing that were also not marked exhibits that I treat as P. Ex. 2.[3] The I.G. filed a reply brief (I.G. Reply) on November 5, 2013. On November 6, 2013, Petitioner filed a motion for leave to file a sur-reply with his sur-reply (P. Sur-Reply). Petitioner's motion is granted and Petitioner's sur-reply is accepted.

Petitioner has not objected to I.G. Exs. 1 through 8 and they are admitted as evidence. The I.G. did not object to my consideration of the documents that Petitioner submitted with his request for hearing (P. Ex. 2). The I.G. does object to my consideration of the newspaper article at pages 29 through 31 of P. Ex. 1 on ground that the article is not relevant. I.G. Reply at 2, n. 1. I agree with the I.G. that the newspaper article has no relevance to any issue that I may decide and, accordingly, P. Ex. 1, pages 29 through 31 are not admitted. P. Ex. 1, pages 1 through 28 and P. Ex. 2 are admitted.

II. Discussion

A. Applicable Law

The Act provides, in relevant part:

> 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):
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> > 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 [Medicare] or any State health care program.

Act § 1128(a)(1) (42 U.S.C. § 1320a-7(a)(1)). The Secretary has promulgated regulations implementing this provision of the Act. 42 C.F.R. § 1001.101(a).

Exclusion for a minimum period of five years is mandatory for any individual or entity convicted of a criminal offense for which exclusion is required by section 1128(a) of the

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[3] The documents filed with the request for hearing appear in the e-file database as Attachment 1, 2, and 3. P. Ex. 2 includes the following documents: Attachment 1is the April 30, 2013 notice of exclusion letter from the I.G.; Attachment 2 is a copy of Ohio Revised Code § 2951.041 regarding intervention in lieu of conviction; and Attachment 3 is a copy of section 1128 of the Act.

Act. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); 42 C.F.R. § 1001.102(a). However, if an excluded individual has "been convicted on one previous occasion of one or more offenses for which an exclusion may be effected," a ten-year exclusion is mandated. Act § 1128(c)(3)(G)(i); 42 C.F.R. § 1001.102(d)(1). Pursuant to 42 C.F.R. § 1001.102(b), an individual's period of exclusion may be extended based on the presence of specified aggravating factors. If the aggravating factors justify a longer exclusion than the mandatory minimum period of exclusion, then mitigating factors may be considered as a basis of reducing the period of exclusion to no less than the mandatory minimum period of exclusion. 42 C.F.R. § 1001.102(c).

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's right to a hearing before an administrative law judge (ALJ) and judicial review of the final action of the Secretary. The standard of proof in a hearing before an ALJ is preponderance of the evidence. 42 C.F.R. § 1001.2007(c). Petitioner may not collaterally attack the conviction that provides the basis for the exclusion. *Id.* § 1001.2007(d). Petitioner bears the burden of proof, which includes the burden of going forward and the burden of persuasion, on any affirmative defenses or mitigating factors, and the I.G. bears the burden of proof on all other issues. *Id.* § 1005.15(b).

B. Issue

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
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> 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.

There is no dispute that Petitioner timely requested a hearing and preserved his right to review of the issues I am permitted to decide. 42 C.F.R. §§ 1001.2007, 1005.2(c). However, in his request for hearing, Petitioner urges some issues that I am not permitted to decide and that are not properly before me for decision. Petitioner argues that the definition of conviction within section 1128 of the Act is unconstitutionally vague; that the application of that section is in conflict with state law; and that the imposition of a ten-year exclusion is contrary to public policy. RFH at 2. I offer no opinion on these

issues as I have no authority to "find invalid or refuse to follow Federal statutes or regulations." 42 C.F.R. § 1005.4(c)(1).

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 Secretary has provided by regulation that a sanctioned party has the right to a hearing before an ALJ and both the sanctioned party and the I.G. have a right to participate in the hearing. 42 C.F.R. §§ 1001.2007, 1005.2, 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 Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab & Med. Ctr.*, DAB No. 1628 at 3 (1997) (holding 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 Ctr.*, DAB CR700 (2000).

Petitioner states in his request for hearing and his opposition to the motion for summary judgment that he is challenging the reasonableness of the length of the exclusion. RFH at 1; P. Br. at 1. He argues that there are genuine issues of material fact that preclude summary judgment. P. Br. at 2. Petitioner argues that the material facts are related to whether his should be a permissive exclusion rather than a mandatory exclusion and provides a list of alleged mitigating facts. P. Br. at 3; P. Sur-Reply at 2. As noted above, 42 C.F.R. § 1001.102(c) states that "[o]nly if any of the aggravating factors set forth in paragraph (b) of this section justifies an exclusion longer than 5 years, may mitigating factors be considered as a basis for reducing the period of exclusion to no less than 5 years." The I.G. has not cited any aggravating factors to extend Petitioner's period of exclusion beyond the minimum required by law. The ten-year period of exclusion proposed by the I.G. in this case is the minimum required by section 1128(c)(3)(G)(i), therefore, I may not consider any mitigating factors to reduce the period of exclusion below the mandated ten-year period. 42 C.F.R. §§ 1001.102(c) and (d), 1005.4. My discretion is limited in these cases and I cannot reduce the period of an exclusion below the minimum mandated by the Act. Accordingly, Petitioner's argument that a dispute

exists regarding "numerous mitigating factors" that are present and material to the resolution of this case must be resolved against Petitioner as a matter of law.

In his response brief, Petitioner argues that the I.G. did not give proper consideration to Petitioner's December 3, 2012 letter and request for waiver submitted prior to the I.G.'s final exclusion determination and, thus, there is a material dispute about whether Petitioner's exclusion should have been a permissive exclusion. P. Br. at 1-3. This issue must also be resolved against Petitioner as a matter of law. There is no factual dispute that Petitioner was previously convicted and excluded or that he has been convicted a second time of an offense that triggers section 1128(a)(1) of the Act. It is well-settled that when a conviction triggers the mandatory exclusion provisions of section 1128(a), the I.G. is precluded from exercising permissive exclusion authority under section 1128(b) of the Act. *Gregory J. Salko, M.D.*, DAB No. 2437 at 4 (2012); *Craig Richard Wilder*, DAB No. 2416 at 6-8 (2011); *Stacy Ann Battle, D.D.S.*, DAB No. 1843 (2002); *Lorna Fay Gardner*, DAB No. 1733 at 5 (2000); *Tanya A. Chuoke*, DAB No. 1721 at 14 (2000).

There are no genuine issues of material fact in dispute in this case. The issues raised by Petitioner must be resolved against him as a matter of law. There is no dispute that Petitioner's conviction triggers the mandatory exclusion provisions of section 1128(a) of the Act. The minimum period of exclusion is dictated by the Act. Accordingly, summary judgment is appropriate.

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

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. Section 1128(a)(1) requires that the Secretary exclude from participation in Medicare or Medicaid any individual or entity: (1) convicted of a criminal offense, whether a felony or a misdemeanor; and (2) the offense is related to the delivery of an item or service under Medicare or a state health care program. Petitioner does not dispute that he was convicted or that his offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner is clear in both his request for hearing and briefing that he only challenges the reasonableness of the ten-year exclusion. RFH at 1; P. Br. at 1. Petitioner does not dispute that on August 16, 2012, he was convicted pursuant to his guilty plea in the United States District Court, Southern District of Ohio of one count of concealing the material fact that he was excluded from participation in all federal health care programs at the time he filled a prescription for a Medicaid patient. I.G. Exs. 2-3. Petitioner does not dispute that the acceptance of his guilty plea and the entry of a judgment of conviction was a conviction within the meaning of section 1128(i) of the Act. He does

not dispute the obvious relationship between his criminal conduct and a state health care program.

Accordingly I conclude that the elements of section 1128(a)(1) of the Act are satisfied and that Petitioner's exclusion is required.

4. Pursuant to section 1128(c)(3)(G)(i) of the Act, a ten-year period of exclusion is mandatory.

5. A ten-year period of exclusion is not unreasonable in this case as a matter of law. Act § 1128(c)(3)(G)(i).

Congress requires that an individual or entity excluded pursuant to section 1128(a) of the Act be excluded for no fewer than five years. Act § 1128(c)(3)(B). Congress also requires that an individual who is excluded pursuant to section 1128(a) of the Act be excluded for ten years if the individual has a prior conviction for an offense that would trigger exclusion under section 1128(a). Act § 1128(c)(3)(G)(i).

Petitioner does not dispute that on October 27, 2004, in the Court of Common Pleas, General Division, Pike County, Ohio, he pled no contest to five counts of felony theft of drugs and that the court entered a finding of guilt and judgment of conviction based on those pleas. Petitioner also does not dispute that on November 16, 2004, the court granted Petitioner intervention in lieu of conviction pursuant to Ohio Revised Code § 2951.04(B), ordering further proceedings stayed to allow a one-year period of rehabilitation. I.G. Ex. 5, 7. Petitioner does not deny that effective February 20, 2006, the I.G. excluded him from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(3) of the Act for a minimum five-year period due to his felony conviction in the Court of Common Pleas, General Division, Pike County, Ohio . I.G. Ex. 4. There is no evidence that Petitioner requested review or otherwise challenged the exclusion. It appears that it was during the five-year exclusion that began on February 20, 2006 and ran through February 19, 2011, that Petitioner dispensed the prescription that resulted in his second conviction on August 16, 2012. Based on these undisputed facts, I conclude that Petitioner's exclusion for ten years is mandated by Congress pursuant to Act § 1128(c)(3)(G)(i). The I.G. and I are granted no discretion to impose a lesser period. Because the minimum period mandated by Congress is ten years, I conclude that that period is not unreasonable as a matter of law.

Petitioner argues that a ten-year period of exclusion is unreasonable. RFH; P. Br. at 1, 4-6. Petitioner urges me to consider mitigating facts when determining whether the length of his exclusion is reasonable. Petitioner lists the following alleged mitigating facts: "a single count Bill of Information (not indictment) for filling prescriptions while under an exclusion . . . ; no fraud, theft, embezzlement, breach of fiduciary duty, or financial misconduct; a successful record of personal recovery from the disease of addiction; no

risk to the public; the U.S. Government's allowing Petitioner to continue to work throughout the proceedings; Petitioner's prompt cooperation with the Government's investigation; and the renewal of his professional license by the Ohio State Board of Pharmacy." P. Br. at 3-6. The regulations are clear, however, that I may only consider mitigating factors when the I.G. argues aggravating factors to justify a period of exclusion in excess of the mandatory minimum. 42 C.F.R. § 1001.102(c). The I.G. has not cited any aggravating factors to extend Petitioner's period of exclusion beyond the ten-year minimum required by section 1128(c)(3)(G)(i) of the Act. Accordingly, I conclude that I may not consider any mitigating fact cited by Petitioner to reduce the period of exclusion below the mandated ten-year period, even if for purposes of summary judgment I accept them as true and draw all inferences in Petitioner's favor.

Petitioner also argues in his request for hearing that his October 27, 2004 no contest pleas, and the findings of guilty and judgment of conviction entered against him in the Court of Common Pleas, General Division, Pike County, Ohio, should not be considered a prior conviction for purposes of section 1128(c)(3)(G)(i) of the Act because the Court granted Petitioner intervention in lieu of conviction pursuant to Ohio Revised Code § 2951.04(B). I.G. Ex. 5, 7. Petitioner argues "that his participation in an intervention in lieu of conviction program for which acceptance is based upon drug addiction or mental illness . . . should not be used as a predicate to a longer minimum exclusionary period." RFH at 2. Petitioner's argument is without merit. Pursuant to section 1128(i) of the Act, for purposes of section 1128, an individual is convicted of a criminal offense: (1) when a judgment of conviction is entered regardless of whether there is a subsequent appeal or the record related to the criminal conduct is expunged; (2) when there has been a finding of guilt; (3) when a plea of guilty or no contest is accepted; or (4) when an individual enters a first offender, deferred adjudication, or other arrangement or other program where a judgment of conviction is withheld. On October 24, 2004, Petitioner's no contest plea was accepted and a judgment of guilt was entered. I.G. Ex. 5. Pursuant to section 1128(i), Petitioner was therefore convicted for purposes of section 1128 of the Act, despite the fact that he was permitted to participate in an intervention in lieu of conviction program that may have ultimately resulted in the judgment of conviction being vacated and/or removed from his record.[4]

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[4] Petitioner's right to challenge the basis for his February 20, 2006 exclusion pursuant to section 1128(a)(1) of the Act expired in April 2006 and is not subject to further review. 42 C.F.R. §§ 1001.2007(d); 1005.2(c).

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 ten years effective May 20, 2013.

/s/
Keith W. Sickendick
Administrative Law Judge