

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Max Kent Cannon, M.D.,

Petitioner,

v.

The Inspector General.

Docket No. C-11-485

Decision No. CR2433

Date: September 20, 2011

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Max Kent Cannon, M.D., from participating in Medicare and other federally funded health care programs for a minimum period of five years.

I. Background

Petitioner is a physician who practiced medicine in the State of Utah. The I.G. notified Petitioner that he was excluded from participating in Medicare, Medicaid, and other federally funded health care programs for at least five years, citing as authority the mandatory exclusion provisions of sections 1128(a)(2) and (a)(4) of the Social Security Act (Act). Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision.

The I.G. filed a brief and a reply brief and exhibits (Ex.) that he designated as I.G. Ex. 1 - I.G. Ex. 9. Petitioner filed a brief and three exhibits that he designated as P. Ex. A -C. I receive these exhibits into evidence.

Petitioner objects to the I.G.'s reliance on two exhibits, I.G. Ex. 2 and I.G. Ex. 3, on the ground that they contain irrelevant evidence. I rely on these exhibits only for those facts that I find to be relevant.

II. Issue, Findings of Fact, and Conclusions of Law

A. Issue

The issue in this case is whether Petitioner was convicted of a crime that mandates his exclusion from Medicare, Medicaid, and other federally funded health care programs for a minimum of five years.

B. Findings of Fact and Conclusions of Law

I make the following findings of fact and conclusions of law.

1. Petitioner was convicted of crimes that mandate his exclusion from Medicare, Medicaid, and other federally funded health care programs.

Section 1128(a)(2) of the Act mandates the exclusion of any individual who is convicted of a State or federal criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service. Section 1128(a)(4) of the Act mandates the exclusion of any individual who is convicted of a felony occurring after August 21, 1996 relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

It is not necessary for the I.G. to prove that Petitioner has been convicted of an 1128(a)(2) and an 1128(a)(4) crime to sustain an exclusion. A conviction that falls within the reach of either section will suffice to mandate that the convicted individual be excluded. However, and as I shall discuss, the evidence in this case supports my finding that Petitioner was convicted of crimes that are described in each of the two statutory sections.

On October 21, 2008, Petitioner pled guilty to Counts 1, 2, 5, and 6 of a criminal information that had been filed against him in a Utah State court. I.G. Ex. 4 at 1-2. Petitioner pled guilty to two felony charges of unlawfully distributing Lortab, a Schedule II controlled substance, and two misdemeanor charges of prostitution (defined under Utah law as engaging in sexual activity with another person for a fee). I.G. Ex. 7 at 1-2.

The charges to which Petitioner entered his pleas were grounded on allegations that he had solicited sexual favors in exchange for prescription drugs. I.G. Ex. 6 at 1. In pleading guilty, Petitioner admitted to having solicited sexual favors from two of his

patients, women whom I refer to as MJ and BB, in return for prescriptions for controlled substances. Petitioner's Brief at 5-6.

The relationships between these two women and Petitioner that are the basis for the charges against Petitioner and his guilty pleas are described in detail in an investigative report ("investigative summary") compiled by the Utah County, Utah Attorney's Office. I.G. Ex. 3. MJ gave the following information to investigators. She met Petitioner in about 2003, when he performed hernia surgery on her. *Id.* at 8. Petitioner performed a second hernia operation on MJ in about March 2006. *Id.* In a follow up visit, MJ complained to Petitioner of experiencing continued post-operative pain. Petitioner offered to waive his fee for his services, if MJ would perform oral sex on him.

From March 2006 until December 2007, Petitioner gave MJ prescriptions for Lortab every two weeks. I.G. Ex. 3 at 8. From December 2007 until January 20, 2008, MJ received weekly prescriptions for 50 tablets of Lortab from Petitioner. MJ had sexual contact with Petitioner at least 100 times during this period. Only rarely would Petitioner prescribe Lortab to MJ without receiving a sexual favor in return. *Id.*

BB told investigators the following. She first went to see Petitioner in May 2007 for advice about her migraine headaches. I.G. Ex. 3 at 9. Petitioner prescribed 50 tablets of Lortab for BB and offered to give her a renewed prescription once a week. Petitioner solicited oral sex from BB in return for his prescribing Lortab. BB was reluctant and refused at first, but eventually performed oral sex on three occasions. *Id.*

The evidence that I have described, coupled with Petitioner's guilty pleas, is more than enough to prove that Petitioner was convicted of crimes described at sections 1128(a)(2) and (a)(4) of the Act. First, Petitioner was convicted of crimes involving sexual abuse of two of his patients, MJ and BB, in connection with the delivery of health care items or services to these two individuals. Petitioner had a doctor-patient relationship with both MJ and BB. He abused the authority and power that this relationship conferred by coercing sexual favors from both individuals in exchange for his prescribing controlled substances to them. His actions were harmful to MJ and BB because they facilitated their dependence on controlled substances.

Second, Petitioner was convicted of felonies related to the unlawful prescribing of controlled substances. He prescribed Lortab, a Schedule II controlled substance, to MJ and BB in exchange for sexual favors rather than for a legitimate medical purpose.

Petitioner argues that Petitioner's conviction was based only on two discrete events, these being an incident occurring on or about October 1, 2007, when Petitioner provided a Lortab prescription to BB in exchange for sexual favors, and an incident occurring on January 20, 2008, when MJ exchanged sexual favors for a Lortab prescription. Petitioner's Brief at 6. Therefore, according to Petitioner, one may not look at any other

facts relating to his relationships with MJ and BB to decide the nature of Petitioner's convictions.

Read narrowly, the criminal charges to which Petitioner pled guilty address only the discrete events that took place on October 1, 2007, and on January 20, 2008. I find that it is unreasonable to look at these events in isolation. Clearly, the basis for the criminal charges against Petitioner was his abuse of MJ and BB over a period of time. But, even if the facts of this case were limited to the specific unlawful acts that occurred on those dates, those acts would be sufficient to establish that Petitioner was convicted of crimes described at section 1128(a)(2) of the Act. The acts that are the basis for Petitioner's conviction are abuse of the doctor-patient relationship, even if they are only the isolated incidents that occurred on two dates. In each incident, Petitioner coerced sexual favors from patients in exchange for prescribing controlled substances to them.

Petitioner argues also that the crimes of which he was convicted did not relate to abuse or neglect. He asserts that his crimes did not involve the elements of physically or mentally abusive conduct. He describes his crimes as being, essentially, victimless crimes, which involved only improperly prescribing controlled substances. The essence of Petitioner's argument is that, while his behavior was illegal, it was "completely consensual." Petitioner's Brief at 9. Petitioner describes his relationship with MJ and BB as a voluntary relationship in which Petitioner never forced either of these women to do anything that they did not want to do. According to Petitioner:

Each party provided something the other party wanted, namely prescriptions for sexual acts. There is no evidence that . . . [Petitioner] was ever verbally abusive towards the two women. Nor is there any evidence that these two women suffered any physical or mental harm at the hands of . . . [Petitioner].

Petitioner's Brief at 9.

I find this argument to be without merit. Petitioner's assertions to the contrary, his relationships with MJ and BB were not consensual relationships openly entered into between willing adults. The relationships were predicated on Petitioner's power, his ability to prescribe controlled substances to individuals who were drug dependent. The relationships were inherently coercive. Petitioner obtained sexual favors from MJ and BB in exchange for something that they, in their dependent state, had to have.

The assertion that there was nothing harmful in these relationships is belied by the relationships' core elements. The coerced exchange of controlled substances for sexual favors is inherently harmful. So also is facilitating an individual's drug dependency by prescribing medically unnecessary controlled substances to that individual. But, even if no explicit psychological or physical harm occurred from these relationships, the

potential for such harm existed. Furthermore, Petitioner's conduct was neglect within the meaning of the Act. His duty of care to MJ and BB was to prescribe only those medications to these individuals that were medically necessary. Prescribing drugs in return for sexual favors plainly breached that duty.

Petitioner argues that neither MJ nor BB were his patients at the time that he traded prescriptions for controlled substances for sexual favors. He has offered no evidence to support this assertion. Moreover, his claim is belied both by the statements provided by MJ and BB, but also by Petitioner's own admission. MJ and BB both contended that they had an ongoing doctor-patient relationship with Petitioner to obtain prescription medications from him. Petitioner has admitted as much by admitting that he prescribed controlled substances to the two individuals. The fact that he prescribed them for a medically unnecessary purpose does nothing to vitiate the fact that the drugs were prescribed in the context of a doctor-patient relationship.

Moreover, there is nothing in section 1128(a)(2) of the Act that requires the presence of an ongoing doctor-patient relationship. Crimes that grow out of a doctor patient relationship occurring at some point in the past are covered by the section, even as are crimes that take place within the context of a current treatment relationship.

Petitioner argues that there was no "valid" doctor-patient relationship because he prescribed drugs unlawfully to MJ and BB. Petitioner's Brief at 11. That argument, carried to its end, produces the result that no crime committed by a physician against his or her patient can be covered by section 1128(a)(2) of Act because the section is not intended to reach "illegitimate" acts performed by a physician. In fact, it is precisely those acts that the section applies to. To read the section as is advocated by Petitioner would be to read it out of the Act entirely.

Petitioner argues similarly that he did not commit his crimes in connection with the delivery of a health care item or service because his prescriptions were illegal and thus, according to him, cannot be viewed as health care items or services. Petitioner's Brief at 12. I reject this argument for the reasons that I reject Petitioner's assertions that no doctor-patient relationship existed between him and MJ and BB. Furthermore, there were health care items or services that underlay the unlawful prescription of controlled substances to these individuals. Neither of these individuals would have sought drugs from Petitioner had they not visited him for valid medical reasons. Petitioner's unlawful prescription of drugs to MJ and BB was the end product of a chain of events that began with legitimate health care items or services. That nexus is sufficient to establish the requisite statutory connection between Petitioner's crimes and health care items or services.

With respect to section 1128(a)(4) of the Act, Petitioner concedes that he was convicted of unlawfully prescribing controlled substances. He argues, however, that he was not

convicted of a felony and, thus, may not be excluded pursuant to this section of the Act. Petitioner acknowledges that he pled guilty to two felonies of unlawful prescription of controlled substances. He asserts, however, that the felony convictions were subsequently reduced to misdemeanor convictions. Petitioner's Brief at 14. Thus, according to Petitioner, he was actually convicted only of misdemeanors.

This argument is unpersuasive. The unequivocal proof in this case is that Petitioner was convicted of two felonies involving unlawful prescription of controlled substances. The fact that a court subsequently reduced his convictions from felony convictions to misdemeanor convictions, for reasons related to Petitioner's successful completion of his sentence, does not change the fact that Petitioner was convicted of felonies.

The Act does not specifically address a situation in which a court reduces a conviction from a felony to a misdemeanor after a convicted individual successfully completes his sentence. However, it does address analogous circumstances, and I find the Act's treatment of such circumstances to be a clear expression of statutory intent.

The Act defines the word "convicted" to include the circumstance when:

a judgment of conviction has been entered against the individual or entity 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 criminal conduct has been expunged

Act Section 1128(i)(1). Thus, for example, if an individual pleads guilty to a felony of unlawful prescription of controlled substances and his or her conviction is subsequently expunged as a part of a plea agreement, that person is nevertheless convicted of a felony for purposes of the Act. It would be an absurd result if an individual who pleads guilty to an identical offense escapes the reach of the Act because his conviction is subsequently *reduced* as a consequence of his or her plea agreement but not *expunged* completely, and I do not find that Congress intended the Act to produce absurd results.

2. As a matter of law, Petitioner must be excluded for at least five years.

The I.G. must exclude any individual who is convicted of a crime described at section 1128(a)(2) or (a)(4) of the Act for a minimum period of five years. Act Section 1128(c)(3)(b). Petitioner was convicted of offenses that fall within the reach of both sections 1128(a)(2) and (a)(4) of the Act. Consequently, an exclusion of at least five years is mandatory as a matter of law.

Petitioner argues that his crimes were a manifestation of a mental disorder that he suffered from. He contends that he was in the throes of bipolar disorder when he committed his crimes and that he poses no current threat either to federally funded health

care programs or to program beneficiaries and recipients of program funds. Thus, he asserts, imposing an exclusion against him would be unreasonably punitive.

This argument is irrelevant because, as I have discussed, Congress made exclusion a mandatory remedy for conviction of an 1128(a)(2) or (a)(4) crime. The I.G. has no discretion in the matter, he must exclude Petitioner. I have no discretion to modify that exclusion inasmuch as the I.G. imposed it for the minimum period mandated by the Act.

/s/

Steven T. Kessel
Administrative Law Judge