Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Michael Aaron Ganz, M.D.,
(OI File No. H-13-42590-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-1626

Decision No. CR3576

Date: January 14, 2015

DECISION

Petitioner, Michael Aaron Ganz, M.D., 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 other federally funded health care programs pursuant to section 1128(a)(4) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(4)) for a period of five years. For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner for the five-year minimum mandatory exclusionary period.

Background

In a letter dated May 30, 2014, the I.G. notified Petitioner, a physician licensed to practice in Wisconsin, that he was being excluded from participation in Medicare, Medicaid, and other federal health care programs for the minimum statutory period of five years pursuant to section 1128(a)(4) of the Act. The I.G. advised Petitioner that the exclusion was based on his felony conviction in the United States District Court, Eastern District of Wisconsin, of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance as defined under federal

or state law. Petitioner timely requested a hearing on July 31, 2014. The case was assigned to me for a possible hearing and written decision.

On August 25, 2014, I convened a prehearing conference by telephone, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence, dated August 26, 2014. Pursuant to that scheduling order, I asked the parties to answer the questions on the short-form briefs sent to them, together with any additional arguments and supporting documents they wished to present. The I.G. filed a brief (I.G. Br.) on September 24, 2014, together with the I.G.'s exhibits (I.G. Exs.) 1 through 6. Petitioner filed a response (P. Br.) on November 3, 2014, without any exhibits. The I.G. filed a reply brief on November 21, 2014.

Petitioner objects to I.G. Ex. 3, a Superseding Indictment, on relevancy grounds because it was dismissed pursuant to Petitioner's plea agreement. P. Br. at 1; I.G. Ex. 5. I find I.G. Ex. 3 relevant, however, because the charges contained in the Superseding Indictment formed the basis of Petitioner's plea agreement. The Superseding Indictment is referenced multiple times in the plea agreement, provides context to the plea agreement, and it provides facts and circumstances surrounding the underlying conviction. I therefore admit I.G. Exs. 1-6 into the record.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary, and if so, to list the names of the witnesses they would call. Both parties did not request witness testimony and indicated they did not believe an in-person hearing was necessary to decide this case. Therefore, I now decide the case based on the written record.

Discussion

A. Issue

The only issue before me is whether the I.G. has a legitimate basis to exclude Petitioner from participating in Medicare, Medicaid, and other federal health care programs pursuant to section 1128(a)(4) of the Act. If I find that the I.G. is authorized to exclude Petitioner, then I must uphold the I.G.'s exclusion because it is for the minimum mandatory period of five years. *See* 42 C.F.R. § 1001.2007(a)(2).

B. Findings of Fact, Conclusions of Law, and Analysis

1. Petitioner's exclusion is mandated by section 1128(a)(4) of the Act because Petitioner was convicted of a felony offense related to the unlawful distribution of a controlled substance.

The I.G. is required to exclude from participation in Medicare, Medicaid, and other federal health care programs any individual: (1) convicted of a felony criminal offense under federal or state law; (2) where the offense occurred after August 21, 1996; and (3) the criminal offense is related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.[1] Act § 1128(a)(4); *see also* 42 C.F.R. § 1001.101(d).

a. Petitioner was convicted of a felony offense on April 6, 2012.

For exclusion purposes, an individual is convicted of a criminal offense: (1) when a judgment of conviction has been entered against an individual in a federal, state, or local court, regardless of whether an appeal is pending or whether the judgment of conviction or other record relating to the criminal conduct has been expunged; (2) when there has been a finding of guilt by a federal, state, or local court; (3) when a plea of guilty or nolo contendere has been accepted by a federal, state, or local court; or (4) when an individual has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld. Act §1128(i) (42 U.S.C. § 1320a-7(i)).

Court records conclusively establish that Petitioner was "convicted," as set out by subsections 1128(i)(1) and (3), of a felony offense that justifies his exclusion. On January 4, 2012, Petitioner pled guilty to a violation of section 843(b), Title 21, *United States Code*. *See* I.G. Exs. 4 and 5. Petitioner's crime was a felony offense. *See* I.G. Ex. 5, at 3. On April 6, 2012, the District Court entered a judgment of conviction against Petitioner. I.G. Ex. 6. Petitioner was sentenced to a one-year term of probation, ordered to perform 20 hours of community service, ordered to participate in a drug treatment program, fined $5,000, and assessed a penalty of $1,000. I.G. Ex. 6. The District Court's acceptance of Petitioner's guilty plea and its subsequent entry of a judgment of conviction satisfies the conviction definition under the Act.

b. Petitioner's criminal offense was related to the unlawful distribution of a controlled substance.

On February 15, 2011, Petitioner was charged with one count of conspiracy to distribute cocaine and one count of possession with the intent to distribute cocaine. I.G. Ex. 3, at 1-2, 10. On January 4, 2012, Petitioner pled guilty to one count of "knowingly and intentionally us[ing] a communication facility, to wit: a telephone, in committing, or in causing and facilitating the commission of an act or acts constituting the attempted

[1] The Secretary of Health and Human Services has delegated to the I.G. the authority to determine and impose exclusions under section 1128(a)(4). *See* 53 Fed. Reg. 12993 (Apr. 20, 1988).

possession **with the intent to distribute a controlled substance**, a felony" in violation of 21 U.S.C. § 843(b). I.G. Exs. 4, 5 (emphasis added).

In his plea agreement, Petitioner stipulated to the following:

> On March 13, 2009, Michael A. Ganz called [D.E.] by telephone and arranged to buy 1/2 ounce of cocaine from [D.E.] for $400 **for his use and the use of others**. Later that same day, [D.E.] received a 1/2 ounce of cocaine from [S.G.] that he paid $400.00 for and in turn drove this 1/2 ounce of cocaine to Michael A. Ganz at Ganz' residence . . . .

I.G. Ex. 5, at 2 (Emphasis added).

Petitioner's plea agreement clearly articulated the elements of his offense and shows that the intent to distribute a controlled substance is a necessary element of the crime to which Petitioner pled guilty:

> Elements
>
> The parties understand and agree that in order to sustain the charge of unlawful use of a communication device as set forth in Count One of the Information, the government must prove each of the following propositions beyond a reasonable doubt:
>
> First — the defendant used a telephone;
>
> Second — that use of the telephone was accomplished as part of the committing of, or to cause or facilitate the committing of the attempted possession **with the intent to distribute** a controlled substance; and
>
> Third — that such use of a telephone was knowing or intentional.

I.G. Ex. 5, at 3 (emphasis added). Petitioner acknowledged, agreed, and understood that he was in fact guilty of a felony involving the attempted possession of a controlled substance with the intent to distribute it. I.G. Ex. 5, at 2 ¶ 6.

There is no dispute that Petitioner was convicted of a felony that occurred after August 21, 1996. There is no dispute that cocaine is a controlled substance. Petitioner contends that the facts in the plea agreement do not establish a common sense nexus to a finding that Petitioner distributed a controlled substance. Petitioner emphasizes that the gravamen of Petitioner's offense is that he used a communication device, a telephone. Petitioner states that the "crime was committed, completed, when the telephone call was

made" and that "Petitioner was not convicted of purchasing or using or sharing. He was convicted of making a telephone call." P. Br. at 2-3. Petitioner also asserts that the facts in the plea agreement do not describe any use by any other person or any "distribution activities." P. Br. at 3-4.

Petitioner's assertion that the facts in the plea agreement do not describe any distribution activities could be construed as a collateral attack of his predicate conviction. The factual findings that support Petitioner's conviction, however, are not reviewable in the instant proceeding. "When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal." 42 C.F.R. § 1001.2007(d). 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. *See, e.g.*, *Lyle Kai, R.Ph.*, DAB No. 1979, at 8 (2005).

Here, Petitioner attempted to possess cocaine with the intent for others to use the drug. Petitioner's admission satisfies the "related to" distribution requirement of section 1128(a)(4) of the Act. *Frank R. Pennington, M.D.*, DAB No. 1786, at 5 (2001) (affirming that a conviction was related to the distribution of a controlled substance where a physician intended to share cocaine with others). Accordingly, I conclude that there is a basis to exclude Petitioner pursuant to section 1128(a)(4) of the Act.

2. Petitioner's five-year exclusion is not unreasonable as a matter of law.

Five years is the minimum authorized period for a mandatory exclusion pursuant to section 1128(a). Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)). I have found there is a basis for Petitioner's exclusion pursuant to section 1128(a)(4) of the Act. Accordingly, the minimum period of exclusion is five years, and as a matter of law that period is not unreasonable.

Conclusion

I sustain the I.G.'s determination to exclude Petitioner from participating in Medicare, Medicaid, and other federal health care programs pursuant to section 1128(a)(4) of the Act, which mandates the exclusion due to Petitioner's felony conviction related to distributing a controlled substance. The five-year exclusion that the I.G. imposed is mandatory as a matter of law and is effective 20 days from the I.G.'s exclusion notice dated May 30, 2014.

/s/
Joseph Grow
Administrative Law Judge