Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Paul Donald Apusen,	)	Date: January 7, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-708
	)	Decision No. CR1881
The Inspector General.	)	
	)	

DECISION

Here, Petitioner, Paul Donald Apusen, asks review of the Inspector General's (I.G.'s) determination to exclude him for five years from participation in Medicare, Medicaid and all federal health care programs under section 1128(a)(1) of the Social Security Act. For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner, and that the statute mandates a minimum five-year exclusion.

I. Background

On September 20, 2007, Petitioner pled guilty in California State Court to one count of petty theft, a violation of sections 484 and 488 of the California penal code. I.G. Ex. 2, at 1; I.G. Ex. 5, at 3.

Thereafter, in a letter dated June 30, 2008, the I.G. advised Petitioner that, because he had been convicted of a criminal offense related to the delivery of an item or service under the Medicare or state health care program, the I.G. was excluding him from participation in Medicare, Medicaid and all other federal health care programs for a minimum period of five years. I.G. Ex. 1. Section 1128(a)(1) of the Social Security Act (Act) authorizes such exclusion. Petitioner requested review, and the matter has been assigned to me for resolution.

The parties have submitted their briefs. Attached to the I.G.'s brief are I.G. Exhibits 1-7 (I.G. Exs. 1-7). Attached to Petitioner's brief are Petitioner's Exhibits 1-4 (P. Exs. 1-4). The I.G. filed a reply brief with one additional exhibit, I.G. Ex. 8. In the absence of any objections, I admit into evidence I.G. Exs. 1-8 and P. Exs. 1-4.

II. Issues

The sole issue before me is whether the I.G. has a basis for excluding Petitioner from program participation. Because an exclusion under section 1128(a)(1) must be for a minimum period of five years, the reasonableness of the length of the exclusion is not an issue.

III. Discussion

Petitioner must be excluded for five years because he was convicted of a criminal offense related to the delivery of an item or service under a state health care program, within the meaning of section 1128(a)(1) of the Social Security Act.[1]

Section 1128(a)(1) of the Act requires that the Secretary of Health and Human Services (Secretary) exclude an individual who has been convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.[2] 42 C.F.R. § 1001.101. Individuals excluded under section 1128(a)(1) of the Act must be excluded for a period of not less than five years. Act § 1128(c)(3)(B).

Petitioner was apparently the office manager of a medical clinic located in Huntington Park, California. In a felony complaint dated April 25, 2007, he was charged with three felony counts: grand theft, making fraudulent claims, and falsifying records in support of a fraudulent claim. I.G. Ex. 3. A Declaration of Support accompanied the complaint. Signed by an employee of the California Department of Justice, Bureau of Medi-Cal Fraud and Elder Abuse, the declaration charged that Petitioner was part of a scheme to submit false claims to the Medi-Cal and Family PACT (Planning, Access, Care and

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[1] My findings of fact/conclusions of law are set forth, in italics, in the discussion headings of this decision.

[2] The term "state health care program" includes a state's Medicaid program. Section 1128(h)(1) of the Act; 42 U.S.C. § 1320a-7(h)(1). California's Medicaid program is called "Medi-Cal."

Treatment) programs. I.G. Ex. 4. The Family PACT program is administered and funded by Medi-Cal, the State Medicaid program. I.G. Ex. 8.

On September 20, 2007, the criminal complaint was amended to add an additional count of petty theft, in violation of section 488 of the penal code. Thereafter, the three felony charges were dismissed, and Petitioner pled guilty to petty theft. The court accepted his plea. I.G. Ex. 5, at 3. As part of his plea agreement, Petitioner explicitly agreed that "the loss to the Medi-Cal program *as a result of [his] criminal activities* was $10,000," and that he would make restitution in this amount to the California Department of Healthcare Deposit Fund. I.G. Ex. 2, at 1. The criminal court incorporated this restitution provision into Petitioner's sentence. I.G. Ex. 5, at 3.

Petitioner agrees that he was convicted of a misdemeanor, but argues that he is not subject to exclusion under section 1128(a)(1) because his offense was not "related to the delivery of an item or service" under Medicare or a state health care program. Citing *Lyle Kai, R. Ph.*, DAB 1979 (2005), he articulates the correct standard for determining "relatedness" – a nexus or common sense connection between the offense and the delivery of an item or service under a covered program – but claims that "there is simply insufficient evidence [here] to establish the requisite nexus or common sense connection required." P. Br. at 3.

In fact, when, in his plea agreement, Petitioner acknowledged that his crime cost Medi-Cal $10,000, he left no doubt that his crime was related to the state health care program. I.G. Ex. 2, at 1. Further, he agreed to pay, and the sentencing court ordered him to pay restitution to the state's healthcare fund. Restitution has long been considered a reasonable measure of program losses. *See Jason Hollady*, DAB No. 1855 (2002).

Thus, Petitioner's crime falls within the ambit of 42 C.F.R. § 1128(a)(1), so the I.G. has a basis for the exclusion, and the exclusion must be for a minimum mandatory period of five years. Act § 1128(c)(3)(B).

IV. Conclusion

For these reasons, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid and all other federal health care programs, and I sustain the five-year exclusion.

/s/

Carolyn Cozad Hughes
Administrative Law Judge