Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Michael M. Bouer, R.Ph.,	)	DATE: December 5, 1994
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-94-347
	)	Decision No. CR345
The Inspector General.	)	
	)	

DECISION

On March 17, 1994, the Inspector General (I.G.) notified Petitioner that he was being excluded for a period of three years from participation in the following programs: Medicare, Medicaid, Maternal and Child Health Services Block Grant, and Block Grants to States for Social Services. The I.G. told Petitioner that she had excluded Petitioner based on his conviction of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, in connection with the delivery of a health care item or service, within the meaning of section 1128(b)(1) of the Social Security Act (Act).

Petitioner requested a hearing. The case was assigned to Administrative Law Judge Charles Stratton for a hearing and a decision. Judge Stratton conducted a prehearing conference at which the parties agreed that there was no need for an in-person hearing. The parties agreed that the case could be heard and decided based on their submission of exhibits and arguments.

The parties submitted proposed exhibits and briefs. An oral argument was scheduled. Then, the case was reassigned to me due to the illness of Judge Stratton. On October 12, 1994, I heard oral argument by telephone.

Petitioner submitted three exhibits (P. Ex. 1 - 3). The I.G. did not object to their admission into evidence. The I.G. submitted 15 exhibits (I.G. Ex. 1 - 15). Petitioner did not object to the admission into evidence

of I.G. Ex. 1, 2, 4 - 12, and 14. He objected to the admission into evidence of I.G. Ex. 3 on the grounds that it is general in nature and not specific to Petitioner. He objected to the admission into evidence of I.G. Ex. 13 on the ground that it is not legible. Petitioner objected to the admission into evidence of I.G. Ex. 15 on the ground that it had not been submitted timely by the I.G.

I admit into evidence P. Ex. 1 - 3 and I.G. Ex. 1 - 14. I overrule Petitioner's objections to I.G. Ex. 3 and 13. However, I have determined also that it is unnecessary for me to rely on either of these exhibits in deciding this case, and I do not cite to them in my decision. I exclude I.G. Ex. 15, because the I.G. did not submit it timely and has not demonstrated extraordinary circumstances justifying admission of the exhibit into evidence. 42 C.F.R. § 1005.8(b)(2)(ii).

I have considered the evidence, applicable law and regulations, and the parties' arguments. I conclude that the I.G. had authority to exclude Petitioner pursuant to section 1128(b)(1) of the Act. I conclude also that there exist no mitigating circumstances in this case which justify reducing the exclusion below the three-year period imposed by the I.G. Finally, I conclude that, because no mitigating circumstances have been established, it is unnecessary for me to decide whether there exist aggravating circumstances in this case. Therefore, I sustain the three-year exclusion which the I.G. imposed against Petitioner.

I. Issues, findings of fact, and conclusions of law

The parties have raised three issues. I make specific findings of fact and conclusions of law in addressing and deciding these issues. These findings and conclusions are set forth below, beneath the relevant issues. In setting forth these findings and conclusions, I cite to relevant portions of my decision, at which I discuss my findings and conclusions in detail.

A. Was the I.G. authorized to exclude Petitioner based on Petitioner's conviction of a criminal offense described in section 1128(b)(1) of the Act?

1. Petitioner was convicted of conspiring to purchase prescription drugs at a discount from sources other than legitimate sources, and to resell these drugs to the public for inflated profits. Pages 3 - 4.

2. An element of the conspiracy, to which Petitioner pled guilty, was a scheme to misrepresent to the public that the drugs, which had been obtained unlawfully, were obtained from legitimate sources. Page 5.

3. Petitioner was convicted of a criminal offense, under federal law, in connection with the delivery of a health care item or service. Pages 5 - 6.

4. Petitioner was convicted of a criminal offense, under federal law, relating to fraud. Pages 5 - 6.

5. Petitioner was convicted, in connection with the delivery of a health care item or service, of a criminal offense related to fraud, within the meaning of section 1128(b)(1) of the Act, and, therefore, the I.G. was authorized to exclude him. Page 6.

> B. Do there exist mitigating circumstances in this case which justify reduction of Petitioner's exclusion to less than three years?

6. Petitioner did not prove that the record in his criminal case demonstrates that the court determined that he had a mental, emotional, or physical condition, before or during the commission of his offense, that reduced his culpability. Pages 7 - 8.

7. Petitioner did not prove that there exist mitigating circumstances in this case. Page 8.

> C. Do there exist aggravating circumstances which would offset the presence of any mitigating circumstances?

8. Regulations mandate that at least a three-year exclusion be imposed pursuant to section 1128(b)(1) of the Act in the case where there exist no mitigating circumstances. Pages 8 - 9.

9. There is no need to find the presence of aggravating circumstances here, because no mitigating circumstances have been proven, and because the I.G. imposed the minimum exclusion mandated under 42 C.F.R. § 1001.201(b)(1). Page 9.

II. Discussion of the issues

A. The I.G.'s authority to exclude Petitioner

Petitioner does not dispute that he was convicted of a criminal offense. On November 12, 1992, Petitioner pled

guilty, in the United States District Court for the Southern District of New York, to the offense of criminal conspiracy, and the court accepted that plea. I.G. Ex. 7 at 3, 6, 12. The parties dispute whether Petitioner's conviction is a conviction that would authorize the I.G. to exclude Petitioner pursuant to section 1128(b)(1) of the Act.

Section 1128(b)(1) of the Act authorizes the Secretary (or her delegate, the I.G.) to exclude an individual who has been convicted of a criminal offense:

> [I]n connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

The I.G. argues that in this case Petitioner's conviction meets two necessary components of section 1128(b)(1). These are that Petitioner's conviction was of an offense that: (1) was committed in connection with the delivery of a health care item or service and (2) related to fraud.

Petitioner argues that the record of this case establishes only that he was convicted of the offense of "conspiracy." He asserts that it cannot be concluded from his conviction that he was convicted of an offense which was committed in connection with a health care item or service or which relates to fraud. Furthermore, according to Petitioner, the plain meaning of section 1128(b)(1) of the Act prohibits looking behind the conviction to decide the nature of the conduct which resulted in the conviction.

It is not necessary for me to decide Petitioner's argument that the plain meaning of section 1128(b)(1) prohibits looking behind a party's conviction to decide whether the underlying facts of the case establish that the conviction falls within that section of the Act. In this case, the offense to which Petitioner pled guilty explicitly encompasses facts which satisfy the criteria of section 1128(b)(1).

I disagree with Petitioner's contention that he was convicted only of the crime of "conspiracy." Petitioner did not plead guilty only to the undefined crime of "conspiracy." Petitioner pled guilty to a detailed charge of conspiracy which is elaborated in 78 paragraphs as count 1 of an indictment. I.G. Ex. 5 at 1 - 35. There is nothing in the record of this case which suggests that, in pleading guilty, Petitioner limited his plea only to an admission of "conspiracy" without admitting to the facts alleged in the indictment. To the contrary, the record plainly establishes that Petitioner pled guilty to count 1 in its entirety, including the scheme and conduct alleged in that count.

Petitioner, who is a pharmacist, pled guilty to a criminal conspiracy to divert prescription drugs from their lawful distribution channels and to resell them to members of the public at inflated profits. I.G. Ex. 5 at 7 - 10. The scheme involved diverting drugs from various sources, including Medicaid recipients and individuals who trafficked in physicians' samples of drugs. Id. at 7. An object of the conspiracy was to buy drugs from diversion sources at lower prices than were paid to legitimate sources for the same types of drugs. Id. at 9. The plan was then to deceive members of the public into believing that the diverted drugs had been obtained legitimately, thus enabling the conspirators to sell the drugs to the public at the prices they would charge for legitimately obtained drugs. Id. at 9 - 10.

The conspirators' plan to misrepresent to consumers that the diverted drugs had been obtained legitimately would have deceived consumers in two respects. First, the plan would mislead members of the public into believing that the diverted drugs had been stored under safe and sanitary conditions in safe and sanitary containers. Id. at 9 - 10. In fact, Petitioner did not know whether the diverted drugs had been stored and contained safely. Id. Second, the plan would deceive consumers into believing that the diverted drugs had proper expiration dates. Id. at 10. In fact, Petitioner did not know the actual expiration dates of the diverted drugs which he conspired to sell. Id. at 10.

That Petitioner pled guilty to the specific conspiracy charged in the indictment, and not just to the undefined charge of "conspiracy" is evident from the transcript of the proceedings in which Petitioner entered his guilty plea. I.G. Ex. 7. In those proceedings, United States

District Court Judge Kevin Thomas Duffy characterized the conspiracy as consisting of a scheme to:

> receive in interstate commerce drugs that were adulterated and misbranded with intent to defraud and mislead, and to deliver and proffer those drugs for pay and otherwise, and to commit wire fraud.

I.G. Ex. 7 at 3. Judge Duffy questioned Petitioner about the conspiracy, and Petitioner admitted engaging in the conspiracy, essentially as charged in the indictment. Id. at 9 - 11.

I have examined the conspiracy in the context of section 1128(b)(1), and I conclude that the offense to which Petitioner pled guilty plainly falls within the meaning of that section.[1] There are two critical elements which must be met for an offense to fall within section 1128(b)(1) of the Act. First, the offense must be committed in "connection with the delivery of a health care item or service." Social Security Act, section 1128(b)(1).[2] Second, the offense must relate to "fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." Id.

The conspiracy of which Petitioner was convicted meets both critical elements. A necessary element of the conspiracy was the sale of diverted prescription drugs. Prescription drugs are health care items or services. "[P]rescription medications are an integral part of health care delivery by a pharmacist." Chander Kachoria, R.Ph., DAB 1380, at 6 (1993). Thus, the conspiracy was committed in connection with the delivery of health care items or services. A central objective of the conspiracy was to defraud purchasers of prescription drugs by misrepresenting to them that the drugs had been obtained from legitimate sources and met packaging and labeling standards. Thus, the conspiracy related to fraud.

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[1] Petitioner has not denied that the conspiracy described in Count 1 of his indictment constitutes a criminal offense within the purview of section 1128(b)(1).

[2] Alternatively, the offense must be committed with respect to any act or omission in a program operated by or financed in whole or in part by any federal, State, or local government agency. Social Security Act, section 1128(b)(1). The I.G. did not allege that Petitioner's conviction is described by this language.

B. The absence of mitigating factors

The I.G. imposed the exclusion against Petitioner pursuant to regulations contained in 42 C.F.R. Part 1001. A section of these regulations pertains explicitly to exclusions imposed under section 1128(b)(1) of the Act. 42 C.F.R. § 1001.201. That section provides that an exclusion imposed under section 1128(b)(1) must be for a period of three years, unless aggravating or mitigating factors exist which provide a basis for lengthening or shortening the exclusion. 42 C.F.R. § 1001.201(b)(1). Factors which may be considered to be mitigating are described in 42 C.F.R. § 1001.201(b)(3). The regulation states that only those factors which are listed as possible mitigating factors may be considered as grounds for reducing the length of an exclusion, assuming that one or more of them is proved in a given case. Id.

Petitioner asserts that a mitigating factor exists in this case. According to Petitioner, the record of his criminal conviction and sentencing establish that his culpability for the conspiracy was reduced due to his mental state.

The mitigating factor which Petitioner asserts exists here is stated at 42 C.F.R. § 1001.201(b)(3)(ii) as follows:

> The record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional or physical condition, before or during the commissiion of the offense, that reduced the individual's culpability.

The critical elements of this section include the requirement that the court make a "determination" of a petitioner's reduced culpability which is evident from the record of that petitioner's criminal case. I do not read this section as requiring that an explicit pronouncement of reduced culpability be contained in the record of a petitioner's criminal case. The section is written so as to permit an inference of a determination of reduced culpability to be made from the entire record of a petitioner's criminal case.

However, the record of the proceedings in Petitioner's criminal case establishes neither that Judge Duffy made an explicit determination of reduced culpablity nor does it suggest that such determination was implicit in Judge

Duffy's disposition. To the contrary, the record establishes that Judge Duffy was not persuaded by Petitioner's arguments that his culpability was reduced.

I have carefully reviewed the entire record of Petitioner's criminal case, including the indictment (I.G. Ex. 5), the letter containing the plea agreement (I.G. Ex. 6), the transcript of Petitioner's guilty plea (I.G. Ex. 7), the presentencing report (P. Ex. 2), and the transcript of sentencing (I.G. Ex. 8). I do not find anything in these exhibits which states or suggests a determination by Judge Duffy that Petitioner's culpability was reduced. At his sentencing, Petitioner argued that his sentence ought to be reduced because he did not intentionally distribute drugs to customers believing that they would be harmed. I.G. Ex. 8 at 8. Judge Duffy was not swayed by this argument. Indeed, Judge Duffy castigated Petitioner for dispensing drugs without knowing whether they were in a condition that would cause harm to his customers. Id. at 16 - 17.

Thus, I find no evidence in this case that Judge Duffy determined that Petitioner's culpability was reduced.[3] Petitioner has not established the presence of any mitigating factor.

C. The possible existence of aggravating factors

The I.G. argues that, if a mitigating factor is established by Petitioner, then that mitigating factor is offset by the presence of aggravating factors. Specifically, the I.G. asserts that: (1) Petitioner's sentence included incarceration and (2) Petitioner has a record of a prior administrative sanction, consisting of a directed surrender of his license to practice pharmacy. According to the I.G., these facts prove the existence of

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[3] Petitioner argues that 42 C.F.R. § 1001.201(b)(3)(ii) would allow as evidence of mitigation any evidence that shows that the judge in his criminal case made a determination that his culpability was reduced. This is a very broad, and, arguably, overly broad reading of the phrase "mental, emotional, or physical condition." However, I do not have to address Petitioner's interpretation of the regulation here. Inasmuch as the record of Petitioner's criminal case establishes no determination of reduced culpability, there is no need for me to define the circumstances under which such determination would be a "mental, emotional, or physicial condition" within the meaning of 42 C.F.R. § 1001.201(b)(3)(ii).

aggravating factors as defined by 42 C.F.R. § 1001.201(b)(2)(iv) and (v).[4]

It is undisputed that Petitioner's sentence included a term of incarceration. See Petitioner's Proposed Findings of Fact and Conclusions of Law at 6 - 7. Nor does Petitioner deny that a State administrative proceeding resulted in his loss of his license to practice pharmacy. Petitioner asserts, however, that his loss of his license to practice pharmacy is not a "prior" sanction because it relates to and arises from the conduct that resulted in his criminal conviction.

It is not necessary for me to decide whether aggravating factors exist. The existence of aggravating factors would be relevant only if there existed a mitigating factor which might otherwise serve as a basis for reducing the length of the exclusion below the three-year minimum period imposed by the I.G. There are no mitigating factors present in this case and, therefore, the possible presence of any aggravating factor is irrelevant.

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[4] These sections define aggravating factors to include circumstances where:

- o the sentence imposed by the court included incarceration; or
- o the convicted individual or entity has a prior criminal, civil or administrative sanction record.

42 C.F.R. § 1001.201(b)(2)(iv), (v).

III. Conclusion

I conclude that the I.G. was authorized to impose an exclusion against Petitioner pursuant to section 1128(b)(1) of the Act. I conclude further that there exist no mitigating factors in this case which would justify reducing the exclusion below the three-year minimum imposed by the I.G. The possible existence of an aggravating factor is not relevant. Therefore, I sustain the three-year exclusion.

/s/

Steven T. Kessel
Administrative Law Judge