The Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the case of:	)	
	)	
John Billam-Walker,	)	Date: August 25, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-409
	)	Decision No. CR1997
The Inspector General.	)	
	)	

DECISION

Petitioner, John Billam-Walker, asks review of the Inspector General's (I.G.'s) determination to exclude him for five years from participation in the Medicare, Medicaid, and all federal health care programs under section 1128(a)(1) of the Social Security Act (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 July 2, 2007, in the Family Court for the First Circuit of Hawaii, a jury convicted Petitioner on two misdemeanor counts of endangering the welfare of an incompetent person, in violation of HAW. REV. STAT. § 709-905. I.G. Exs. 2, 3. The court entered a judgment of conviction and sentenced Petitioner to 120 days in prison and one-year probation. Petitioner was required to pay a $2,000 fine and to undergo mental health intervention. He was ordered not to contact his victim or certain other members of the victim's family. I.G. Ex. 2.

In a letter dated February 27, 2009, 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 a state health care program, the I.G. was excluding him from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. I.G. Ex. 1. Section 1128(a)(1) of the Act authorizes such exclusion. Petitioner requested review, and the matter has been assigned to me for resolution.

The parties have submitted their briefs. With his brief, the I.G. submitted five exhibits (I.G. Exs. 1-5). Petitioner submitted additional exhibits that were unmarked, so we have

numbered them P. Exs. 1-7. The I.G. declined to file a reply brief. In the absence of any objections, I admit I.G. Exs. 1-5 and P. Exs. 1-7.

II. Issue

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. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

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 the Medicare or 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 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. 42 C.F.R. § 1001.101.

Petitioner concedes that he was convicted on two misdemeanor counts of endangering the welfare of an incompetent person, but he attacks the validity of that conviction. I.G. Ex. 2. He complains that the prosecution of his case was riddled with errors, that state investigators, including individuals from the Hawaii Attorney General's Office of Medicare-Medicaid Fraud Control, were guilty of misconduct, and that certain witnesses, who might have exonerated him, were not called to testify on his behalf. P. Br. at 2-3; P. Ex. 2. Federal regulations, however, explicitly preclude such collateral attacks on an underlying conviction.

> 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); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Chander Kachoria, R.Ph.*, DAB No. 1380, at 8 (1993) ("There is no reason to 'unnecessarily encumber the exclusion process' with efforts to reexamine the fairness of state convictions."); *Young Moon, M.D.*, DAB CR1572 (2007).

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[1] I make this one finding of fact/conclusion of law.

In this regard, Petitioner has asked for an in-person hearing. He indicates that a hearing is necessary so that he can present witnesses (including himself) who were not called to testify at his criminal trial, and whose testimony, presumably, would establish his innocence. P. Br. at 2-3. However, because I have no authority to review his criminal conviction, such testimony would be irrelevant. An in-person hearing is therefore not necessary – indeed, it would serve no purpose. *See* Order and Schedule for Filing Briefs and Documentary Evidence, at 2 (May 14, 2009). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48; *Livingston Care Center v. United States Department of Health and Human Services*, 388 F. 3d 168, 173 (6th Cir. 2004). (hearing unnecessary because case turns on a question of law and presents no genuine dispute as to any material fact).

The undisputed evidence also establishes that Petitioner's crimes were related to the delivery of an item or service under Medicaid, which is a state health program. Act § 1128(h)(1). Petitioner worked as a personal assistant and job coach for a program called "Winners at Work," which operated under a contract with the Hawaii Medicaid program. I.G. Exs. 4, 5. Petitioner's victim was a 34-year-old mentally disabled man who participated in that program. For a time, Petitioner had been the victim's personal assistant. I.G. Ex. 5. Thus, while working in a Medicaid-funded program, Petitioner "endangered the welfare" of one of the program clients. His criminal offense was therefore "related to" the delivery of services under Medicaid, a state health program.

Petitioner also points out that his conviction is currently on appeal, and has challenged the constitutionality of the criminal statute under which he was convicted. P. Br. at 2. However, the Act specifically precludes my considering whether such an appeal is pending. Act § 1128(i). ("[A]n individual . . . is considered to have been "convicted" of a criminal offense. . . regardless of whether there is an appeal pending.") [2]

IV. Conclusion

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

/s/ Carolyn Cozad Hughes
Administrative Law Judge

[2] If, in fact, Petitioner's conviction is overturned, the I.G. would no longer have a basis for imposing the exclusion.