The Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the case of:	)	
	)	
Nabil Elhadidy, M.D,	)	Date: August 31, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-419
	)	Decision No. CR2000
The Inspector General.	)	
	)	

DECISION

Petitioner, Nabil Elhadidy, M.D., 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. 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

Petitioner is a physician licensed to practice in the State of New York. I.G. Exhibit 1. The I.G. has excluded him from program participation because he was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Petitioner requested review. The parties seem to agree that an in-person hearing is not required, and that the matter may be resolved based on written submissions. I.G. Br. at 5; P. Br. at 2.

The parties have submitted their briefs and exhibits. Petitioner apparently misunderstood my May 14, 2009 order and schedule for filing briefs and documentary evidence. My order directed the I.G. to submit his exchange first, and for Petitioner to submit his exchange 30 days thereafter. Order, at 2 (May 14, 2009). Instead, Petitioner submitted his informal brief at the same time the I.G. submitted his brief. (P. Br.; I.G. Br.). I allowed Petitioner to submit a supplemental brief. (P. Supp. Br.). The I.G. submitted a reply. (I.G. Reply). The I.G. has also submitted five exhibits. (I.G. Exs. 1-5). Petitioner has submitted seven exhibits. (P. Exs. 1-7). In the absence of any objection, I admit into the record 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.

The facts underlying Petitioner's exclusion are not in dispute. Petitioner is a physician licensed by the State of New York with a practice in Brooklyn. I.G. Ex. 1; I.G. Ex. 2, at 1. In November 2005, an undercover investigator for the New York Attorney General's Office visited Petitioner, asking for prescription pain medication for himself and his fictitious wife. The investigator produced Medicaid cards for himself and his "wife." Although Petitioner had never seen the wife (indeed, she did not exist), he supplied prescriptions for the requested drugs (Tylenol 3 and Ambien – schedule III and IV controlled substances), accepting $50 in cash. Petitioner then manufactured a medical record for the bogus wife, which listed the results of a preliminary examination – vital signs, descriptions of organs, and diagnoses. I.G. Ex. 3.

About two weeks later, the investigator returned to Petitioner's office, asking for additional prescriptions for himself and his wife. Petitioner wrote prescriptions for both – Tylenol 3 and Ambien. He made additional false entries into the wife's patient chart, again recording vital signs and diagnoses. I.G. Ex. 3. Petitioner then billed the Medicaid program for services he claimed to have provided to the nonexistent woman. I.G. Ex. 3.

On May 3, 2007, Petitioner was charged in a six count information -- three counts of criminal sale of a prescription for a controlled substance, in violation of New York Penal Law § 220.65, two counts of falsifying business records in the first degree, in violation of New York Penal Law § 175.10, and one count of offering a false instrument for filing in the first degree, in violation of New York Penal Law § 175.35. I.G. Ex. 3.

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

On June 19, 2007, Petitioner pled guilty to one misdemeanor count of offering a false instrument for filing in the second degree, New York Penal Law § 175.30, a misdemeanor. I.G. Ex. 4. His conviction was "conditionally discharged" upon his completion of community service and payment of $160 in fines and surcharges. I.G. Ex. 5.

Thus, the undisputed evidence establishes that Petitioner was convicted of a crime related to the delivery of an item or service under Medicaid, which is a state health care program (Act § 1128(h)(1)) and is subject to a minimum five-year exclusion.

Nevertheless, Petitioner argues that he was not, in fact, "directly engaged" in the offense for which he was convicted, and blames an "outside, independent billing company," for "mistakenly" billing Medicaid for the office visit. *See* P. Ex. 1 (Harewood Decl.). As the I.G. accurately points out, federal regulations 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.") (*citing Olufemi Okonuren, M.D.*, DAB 1319, at 7 (1992)); *Young Moon, M.D.*, DAB CR1572 (2007).

Petitioner also points out that other regulatory bodies have declined to sanction him, and specifically cites a state court decision precluding the Office of the Inspector General for the State of New York from imposing an exclusion. As the I.G. correctly points out, those determinations are simply irrelevant to the narrow questions before me. Petitioner points to a separate section of the Social Security Act, governing civil money penalties (Act § 1128A), and complains that the I.G. has not considered factors set forth in that section. P. Supp. Br. But the statute governing civil money penalties does not apply here, where no civil money penalty was imposed.

Finally, Petitioner argues that a permissive exclusion under section 1128(b) would be more appropriate, since his is a misdemeanor conviction "related to fraud." I.G. Ex. 2, at 4-5. Whether Petitioner's misdemeanor conviction could also justify exclusion under section 1128(b) is also irrelevant. So long as Petitioner falls within the mandatory exclusion provision of section 1128(a)(1), the I.G. *must* impose a mandatory exclusion, whether or not the conviction also fits within the permissive exclusions provisions of 1128(b). *Touradj Farhadi, M.D.*, DAB CR1072, at 3 (2003).

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