Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Michael R. Swenson, M.D.,	)	Date: February 14, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-667
	)	Decision No. CR1737
The Inspector General.	)	
	)	

DECISION

Michael R. Swenson, M.D. (Petitioner) appeals the decision of the Inspector General (I.G.), made pursuant to section 1128(a)(4) of the Social Security Act (Act), to exclude him from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. 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

By letter dated June 29, 2007, the I.G. notified Petitioner of his decision to exclude him from program participation for five years. The letter explained that the I.G. took the action pursuant to section 1128(a)(4) of the Act because Petitioner had been convicted of a felony offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. I.G. Exhibit (I.G. Ex.) 1. Petitioner timely requested review, and the matter has been assigned to me for resolution.

I held a telephone prehearing conference on October 4, 2007, at which Petitioner was represented by counsel. The parties agreed that the issues before me were legal issues for which an in-person hearing is not required, and we set a briefing schedule by Order dated October 5, 2007. The I.G. has submitted his brief (I.G. Br.) with eight exhibits attached, I.G. Exs. 1-8. Petitioner filed his brief (P. Br.) with one exhibit. P. Ex. 1. The I.G. submitted a reply brief (I.G. Reply). In the absence of any objections, I admit into evidence I.G. Exs. 1-8 and P. Ex. 1.

II. Issue

The sole issue before me is whether the I.G. had a basis for excluding Petitioner from participation in the Medicare, Medicaid, and all federal health care programs. Because an exclusion under section 1128(a)(4) must be for a minimum period of five years, the reasonableness of the length of the exclusion is not an issue.

III. Discussion

A. Petitioner was convicted of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, within the meaning of section 1128(a)(4) of the Act.[1]

Section 1128(a)(4) of the Act requires that any individual or entity convicted of a felony criminal offense that occurred after the date of the enactment of the Health Insurance Portability and Accountability Act (August 21, 1996) "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance" be excluded from all federal health care programs.[2]

Petitioner is a physician who was licensed to practice medicine in the Commonwealth of Kentucky. P. Ex. 1, at 5. He concedes that, on March 16, 2006, he pled guilty to six felony counts of receiving stolen property that had a value of $300 or more. He also concedes that those stolen items were prescription blanks. I.G. Exs. 4, 6; P. Br. at 2. Nevertheless, he argues that his conviction was not related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance because neither the statute under which he was convicted nor his guilty plea refers specifically to controlled substances. Citing the district court decision in *Travers v. Sullivan*, 801 F. Supp. 394 (E.D. Wash. 1992), Petitioner suggests that I should consider only the language of the statute under which he was convicted, and not any of the facts underlying that conviction. In any event, he argues, I should not look beyond the language of the conviction itself. Since the Kentucky criminal court documents say nothing about the facts underlying his conviction, in Petitioner's view, the I.G. cannot establish the necessary connection

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

[2] "Federal health care program" is defined in section 1128B(f) of the Act as any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government, or any State health care program.

between his conviction and the "unlawful manufacture, distribution, prescription, or dispensing of a controlled substance."

I reject Petitioner's argument. In *Travers*, the court held that a petitioner may not collaterally attack the facts underlying his criminal conviction. 801 F. Supp. at 403. But, as I previously held in *Kenneth L. Mudd*, DAB CR1634 (2007), this does not mean that I am compelled to ignore the facts underlying the conviction. It is well-settled that the I.G. may rely on extrinsic evidence to explain the circumstances of the offense of which a party is convicted. *Narendra M. Patel, M.D.*, DAB No. 1736 (2000); *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *Bruce Lindberg, D.C.*, DAB No. 1280 (1991).

Here, although the Kentucky court records offer no explanation of the facts underlying Petitioner's felonious conduct, the Indiana State Court of Appeals adjudicated those underlying facts in a related case involving Petitioner. According to the Indiana court, Petitioner stole blank prescription forms from his treating physician, who practiced in Indiana. Petitioner then forged prescriptions for hydrocodone (a Schedule II controlled substance), and crossed state lines into Kentucky where he presented the forged prescriptions to Louisville pharmacists, who filled them. A pharmacist reported him; he was arrested in Kentucky, and subsequently pled guilty to the charges of receiving stolen property. *Swenson v. Indiana*, 868 N.E. 2d 540, 541 (2007).

While the Kentucky charges were pending, Indiana prosecutors charged Petitioner with felony theft and feloniously obtaining a controlled substance by fraud or deceit. Because the prescriptions had been filled in Kentucky, the Indiana trial court dismissed the latter charge for lack of jurisdiction. But the trial court refused to dismiss the theft charges, and Petitioner appealed. The Indiana appellate court dismissed the theft charge, finding that *the same overt acts* underlay Petitioner's Kentucky conviction, so principles of double jeopardy precluded the State of Indiana from prosecuting. 868 N.E. 2d at 543.

Petitioner asserts that I should not consider the Indiana court decision because it is "not evidence" and "hearsay." P. Br. at 6. I find Petitioner's argument wholly without merit. Petitioner was a party to the Indiana proceedings in which these facts – the same facts that underlay his Kentucky conviction – were adjudicated and a final decision was rendered. He had a full and fair opportunity to litigate the issues. Traditional principles of collateral estoppel therefore preclude him from attacking in this forum that court's findings.

I note also that the Indiana court's findings were based on Petitioner's own admissions, so even if hearsay mattered here, those facts would be admissible as exceptions to the hearsay rule. Indeed, even without the Indiana court decision, I could find the requisite connection to controlled substances based on Petitioner's written admissions to that court. I.G. Ex. 8, at 8-14.

As the Indiana court's rendition of the facts establish, Petitioner's crimes plainly related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, so the I.G. has a basis for imposing the exclusion.

B. The statute mandates a five-year minimum period of exclusion, and mitigating factors may not be considered to reduce that period of exclusion.

As Petitioner recognizes, an exclusion under section 1128(a)(4) must be for a minimum mandatory period of five years. As set forth in section 1128(c)(3)(B) of the Act:

> Subject to subparagraph (G), in the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years . . . .

When the I.G. imposes an exclusion for the minimum mandatory five-year period, the reasonableness of the length of the exclusion is not an issue. 42 C.F.R. § 1001.2007(a)(2).

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