

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Kevin J. Bowers,)	Date: September 27, 2007
)	
Petitioner,)	
)	
- v. -)	Docket No. C-07-471
)	Decision No. CR1661
The Inspector General.)	
_____)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Kevin J. Bowers, from participating in Medicare and all other federally financed health care programs for a period of at least five years.

I. Background

Petitioner is a pharmacist doing business in the State of Ohio. On April 30, 2007 the I.G. notified Petitioner that he was being excluded from participating in Medicare and all other federally financed health care programs for a minimum of five years as a consequence of his conviction of a felony which the I.G. contended fell within the mandatory exclusion requirements of section 1128(a)(3) of the Social Security Act (Act). This section requires the exclusion of any individual who:

has been convicted for an offense which occurred after . . . [August 21, 1996], under Federal or State law, in connection with the delivery of a health care item or service . . . of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I held a pre-hearing conference at which I directed the parties to exchange proposed exhibits and briefs. I also gave the parties the opportunity to request to present testimony in person.

The I.G. filed a brief and six proposed exhibits which he identified as I.G. Ex. 1 - I.G. Ex. 6. Petitioner filed a brief and one proposed exhibit which he identified as P. Ex. 1. The I.G. filed a reply brief and three additional proposed exhibits which he identified as I.G. Ex. 7 - I.G. Ex. 9. Neither party requested that I convene an in-person hearing. I receive into evidence all of the parties' proposed exhibits.

II. Issues, findings of fact and conclusions of law

A. Issue

The issue in this case is whether the I.G. is required by section 1128(a)(3) of the Act to exclude Petitioner for a minimum of five years.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading.

1. Petitioner was convicted of a felony for which section 1128(a)(3) of the Act mandates exclusion.

The facts of this case are not disputed. On or about November 30, 2004 Petitioner pled guilty to two felony offenses in an Ohio State court. I.G. Ex. 3, at 3; I.G. Ex. 5, at 1. One of these felonies consisted of the crime of theft of drugs. I.G. Ex. 5, at 1. More specifically, Petitioner admitted to stealing Tussionex, a Schedule III controlled substance, while practicing pharmacy, and converting the medication to his own illicit use. I.G. Ex. 3, at 2.

The elements of a section 1128(a)(3) offense that apply to this case are that: (1) the excluded individual must be convicted of a felony; (2) that occurred after August 21, 1996; (3) which relates to theft, fraud, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (4) in connection with the delivery of a health care item or service. Act, section 1128(a)(3). I find that all four of these elements are present here. There is no argument from Petitioner that he was convicted of a felony occurring after August 21, 1996 and that his crime consisted of theft. The only dispute between the parties is whether Petitioner committed his crime "in connection with the delivery of a health care item or service."

Logic dictates that Petitioner's crime was committed in connection with the delivery of a health care item or service. Petitioner would not have had access to the drug that he stole but for his pharmacist's job. The drug, Tussionex, was in a stream of commerce from the manufacturer, via Petitioner's pharmacy, to its ultimate destination, patients with

legitimate prescriptions for the drug. The pharmacy served as a transit point for delivery of the drug from the manufacturer to patients for whom the drug was prescribed. The drug could not be put to any possible lawful use other than delivery to patients pursuant to prescription due to its status as a Schedule III controlled substance. The drug thus was a health care item. But for Petitioner's theft of the drug it would eventually have been delivered lawfully. Petitioner's crime is related to the delivery of a health care item because he diverted a drug from lawful delivery.

Petitioner argues that theft of a drug for personal use does not constitute an act in connection with the delivery of a health care item or service. His contention is that the crime did not have anything to do with "delivery" of the drug to the patient but, rather, was simple theft of an item that was in stock at the pharmacy that employed Petitioner. I am not persuaded by this argument. As I discuss above, the pharmacy was a way station for a drug that had no purpose other than to be delivered to patients for whom the drug had been prescribed lawfully. Petitioner's crime certainly consisted of theft but it also consisted of diversion of a health care item from a stream of commerce that had delivery to patients as an end point.

Petitioner argues also that the doctrine of laches should operate to bar the I.G. from excluding him. He notes that the I.G. did not impose the exclusion in this case until more than two years from the date that Petitioner entered his guilty plea and he argues that such a delay in excluding him is unreasonable. However, and as Petitioner concedes, I have no authority to address this argument. By regulation I am limited in a case such as this – where the I.G. has imposed an exclusion for a statutory minimum period of five years – to deciding only whether the I.G. is required by the Act to exclude Petitioner. 42 C.F.R. § 1001.2007(a)(1)(i).¹

¹ In a recent decision, a United States District Court questioned whether a lengthy delay in imposing an exclusion violated an excluded individual's right to due process of law. *Connell v. Secretary of Health and Human Services*, Slip Copy, 2007 WL 1266575 (S.D. Ill. April 30, 2007). But, that decision notwithstanding, the regulations strictly limit the areas which I may address in hearing and deciding a case involving an exclusion imposed pursuant to section 1128 of the Act, and I have no authority to address Petitioner's laches argument.

2. The five-year exclusion imposed by the I.G. is reasonable as a matter of law.

An exclusion imposed by the I.G. pursuant to section 1128(a)(3) *must*, at a minimum, be for a period of at least five years. Act, section 1128(c)(3)(B). The I.G. imposed the five-year minimum in this case, and therefore, it is reasonable as a matter of law.

/s/
Steven T. Kessel
Administrative Law Judge