Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Dike H. Ajiri
(OI File No. H-5-11-4-0930-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-129

Decision No. CR4854

Date: May 19, 2017

DECISION

Petitioner, Dike H. Ajiri, is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)), effective October 20, 2016. Petitioner's exclusion for five years is required by section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)). An additional period of exclusion of 8 years, a total minimum exclusion of 13 years,[1] is not unreasonable based upon the existence of the three aggravating factors established in this case and the absence of any mitigating factors.

I. Background

The Inspector General (I.G.) of the U.S. Department of Health and Human Services notified Petitioner by letter dated September 30, 2016, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of

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[1] Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the minimum period of exclusion.

13 years. The I.G. cited section 1128(a)(1) of the Act as the basis for Petitioner's exclusion and stated that the exclusion was based upon Petitioner's conviction in the United States District Court, Northern District of Illinois, of a criminal offense related to the delivery of an item or service under the Medicare of a State health care program. I.G. Exhibit (Ex.) 1.

Petitioner, through counsel, timely requested a hearing on November 22, 2016 (RFH). On November 30, 2016, the case was assigned to me to hear and decide. I convened a telephone prehearing conference on December 12, 2016, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence (Prehearing Order) issued on December 12, 2016. Petitioner waived an oral hearing, and the parties agreed that this matter may be resolved based upon the parties' briefs and documentary evidence. Prehearing Order at 3. On January 26, 2017, the I.G. filed his brief and I.G. Exs. 1 through 6. On March 18, 2017, Petitioner filed his amended brief (P. Br.) and one exhibit (P. Ex. 7). The I.G. filed a reply brief on March 27, 2017 (I.G. Reply). Neither party objected to the opposing party's exhibits and they are admitted as evidence.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services (the Secretary).

Pursuant to section 1128(a) of the Act, the Secretary must exclude from participation in any federal health care program any individual convicted under federal or state law of, among other things: a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Act § 1128(a)(1). The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(a), (c).[2]

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act will be for a period of not less than five years. 42 C.F.R. § 1001.102(a). The Secretary has published regulations that establish aggravating factors

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[2] Citations are to the 2015 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

that the I.G. may consider to extend the period of exclusion beyond the minimum five-year period, as well as mitigating factors that may be considered only if the minimum five-year period is extended. 42 C.F.R. § 1001.102(b), (c).

The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that is the basis for the exclusion. 42 C.F.R. § 1001.2007(c), (d). Petitioner bears the burden of proof and the burden of persuasion on any affirmative defenses or mitigating factors, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b).

B. Issues

The Secretary has by regulation limited my scope of review to two issues:

> Whether the I.G. has a basis for excluding an individual or entity from participating in Medicare, Medicaid, and all other federal health care programs; and
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> Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold text followed by my findings of fact and analysis.

1. Petitioner timely filed his request for hearing, and I have jurisdiction.

2. An oral hearing was waived by the parties and decision on the pleadings and documentary evidence is appropriate.

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction pursuant to section 1128(f) of the Act and 42 C.F.R. pt. 1005.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The Secretary has provided by regulation that a sanctioned party has the right to a hearing before an ALJ, and both the sanctioned party and the I.G. have a right to participate in the hearing. 42 C.F.R. §§ 1005.2-.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). Petitioner waived an oral hearing and the parties agreed that

this matter may be resolved based upon the parties' briefs and documentary evidence. Prehearing Order at 3.

3. Petitioner's exclusion is required by section 1128(a)(1) of the Act.

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides in relevant part:

> (a) MANDATORY EXCLUSION. – The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
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> > (1) Conviction of program-related crimes. – Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program.

Act § 1128(a)(1).

For an exclusion pursuant to section 1128(a)(1), the plain language of the Act requires that the Secretary exclude from participation in Medicare, Medicaid, and all federal health care programs any individual or entity: (1) convicted of a criminal offense; (2) where the offense is related to the delivery of an item or service; and (3) the delivery of the item or service was under Medicare or a state health care program.

Petitioner admits that the elements for the exclusion under section 1128(a)(1) are satisfied in this case. Petitioner does not dispute that there is a basis for his exclusion pursuant to section 1128(a)(1) of the Act and specifically states in his brief that he does not make any excuses for his guilt. P. Br. at 2, 3. Petitioner pleaded guilty to Count 1 of a multiple count indictment charging him with health care fraud in violation of federal law. Petitioner's guilty plea was accepted by the court on May 23, 2016. He was sentenced by the court to incarceration for 15 months followed by 3 years of supervised release; and restitution of $1,854,000, $1,780,000 to be paid to the Medicare Trust Fund and $74,000 to be paid to the Railroad Retirement Board. I.G. Exs. 3, 4, 5. Accordingly, I conclude that there is a basis for exclusion and exclusion is mandated by section 1128(a)(1) of the Act.

4. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is five years.

I have concluded that there is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act. Therefore, the I.G. must exclude Petitioner for a minimum period of five years pursuant to section 1128(c)(3)(B) of the Act. The I.G. has no discretion to impose a lesser period of exclusion. I may not reduce the period of exclusion below five years. Petitioner agrees that the minimum period of exclusion under section 1128(a)(1) is five years. P. Br. at 5. The remaining issue is whether it is unreasonable to extend Petitioner's exclusion by an additional eight years.

5. Three aggravating factors exist in this case, which justify extending the minimum period of exclusion to 13 years.

6. Petitioner has not proven by a preponderance of the evidence any mitigating factors established by regulation.

7. Exclusion for 13 years is not unreasonable in this case.

My determination of whether the period of exclusion in this case is unreasonable turns on whether: (1) the I.G. has proven that there are aggravating factors; (2) Petitioner has proven that there are mitigating factors the I.G. failed to consider or that the I.G. considered an aggravating factor that does not exist; and (3) the period of exclusion is within a reasonable range.

The I.G. notified Petitioner that three aggravating factors established by the regulations are present in this case that justify an exclusion of more than five years: (1) the acts resulting in conviction caused a financial loss of $5,000 or more to a government program, in this case the court ordered a forfeiture of $300,000 and total restitution of $1,854,000 (42 C.F.R. § 1001.102(b)(1)); (2) the acts of which Petitioner was convicted were committed over a period of one year or more (42 C.F.R. § 1001.102(b)(2)); and (3) the sentence imposed by the court included incarceration, in this case 15 months (42 C.F.R. § 1001.102(b)(5)). I.G. Ex. 1. The three aggravating factors cited by the I.G. in the notice of exclusion are established by the evidence and their existence is not disputed by Petitioner: I.G. Exs. 4 at 2-6; 5 at 2, 6; P. Br. at 1-2.

If any of the aggravating factors authorized by 42 C.F.R. § 1001.102(b) justify an exclusion longer than five years, as they do in this case, then mitigating factors may be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c). The only authorized mitigating factors that I may consider are established by 42 C.F.R. § 1001.102(c):

> (1) The individual or entity was convicted of 3 or fewer misdemeanor offenses, and the entire amount of financial loss (both actual loss and intended loss) to Medicare or any other Federal, State or local governmental health care program due to the acts that resulted in the conviction, and similar acts, is less than $1,500;
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> (2) 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 commission of the offense that reduced the individual's culpability; or
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> (3) The individual's or entity's cooperation with Federal or State officials resulted in –
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> > (i) Others being convicted or excluded from Medicare, Medicaid and all other Federal health care programs,
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> > (ii) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or
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> > (iii) The imposition against anyone of a civil money penalty or assessment under part 1003 of this chapter.

Petitioner has the burden to prove by a preponderance of the evidence that there is a mitigating factor for me to consider. 42 C.F.R. § 1005.15(b)(1). Petitioner argues that the 13-year exclusion is unreasonable in light of the fact that it is ten times longer than his sentence to 15 months of incarceration. He argues that the 13-year exclusion brings Petitioner close to the end of his normal working life. He asks if the purpose of exclusion is protecting Medicare from Petitioner rather than deterrence, why did the sentencing judge sentence Petitioner to only 15 months rather than a longer period. He argues that the minimum period of exclusion for ten years is required in the case of multiple convictions and Petitioner did not have multiple convictions. He implies that the appropriate range for exclusion in this case is between the minimum five-year exclusion for a single conviction verses a minimum exclusion of ten years for repeated convictions. He urges me to consider that the sentencing judge concluded that Petitioner had learned his lesson. He urges me to consider Petitioner's life-long service. Petitioner urges me to conclude that I have the authority to reduce the period of exclusion imposed by the I.G. because the period is simply too long. P. Br. at 2-5.

The regulation requires that I determine whether the length of exclusion imposed by the I.G. is "unreasonable." 42 C.F.R. § 1001.2007(a)(1). The Departmental Appeals Board (Board), however, has made clear that the role of the ALJ in exclusion cases is to conduct a de novo review of the facts related to the basis for the exclusion and the existence of aggravating and mitigating factors identified at 42 C.F.R. § 1001.102 and to determine whether the period of exclusion imposed by the I.G. falls within a reasonable range. *Juan de Leon, Jr.*, DAB No. 2533 at 3 (2013); *Craig Richard Wilder, M.D.*, DAB No. 2416 at 8 (2011); *Joann Fletcher Cash*, DAB No. 1725 at 17 n.9 (2000). The Board cautions that whether the ALJ thinks the period of exclusion is too long or too short is not the issue. The ALJ may not substitute his or her judgment for that of the I.G. and may only change the period of exclusion in the limited circumstances identified by the Board.

In *John (Juan) Urquijo*, DAB No. 1735 (2000), the Board made clear that, if the I.G. considers an aggravating factor to extend the period of exclusion and that factor is not later shown to exist on appeal, or if the I.G. fails to consider a mitigating factor that is shown to exist, then the ALJ may make a decision as to the appropriate extension of the period of exclusion beyond the minimum. In *Gary Alan Katz, R.Ph.*, DAB No. 1842 (2002), the Board suggests that, when it is found that an aggravating factor considered by the I.G. is not proved before the ALJ, then some downward adjustment of the period of exclusion should be expected absent some circumstances that indicate no such adjustment is appropriate. The Board has by its prior decisions effectively limited the scope of my authority under the regulations to judging the reasonableness of the period of exclusion by determining whether or not aggravating and mitigating factors are proven. If the aggravating factors cited by the I.G. are proved, and Petitioner fails to prove that the I.G. failed to consider a mitigating factor, the Board's interpretation of the regulations is that I have no discretion to change the period of exclusion.

In this case, I concluded after de novo review that a basis for exclusion exists and that the evidence and admissions of Petitioner establish the three aggravating factors that the I.G. relied on to impose the 13-year exclusion. Petitioner has not established that the I.G. failed to consider any mitigating factor established by the regulations or that the I.G. considered an aggravating factor established by the regulation that did not exist in this case. No basis exists for me to reassess the period of exclusion in this case. Accordingly, I conclude that the 13-year exclusion falls within a reasonable range and is not unreasonable considering the existence of three aggravating factors and the absence of any mitigating factors.

III. Conclusion

For all of the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum of 13 years, effective October 20, 2016.

/s/
Keith W. Sickendick
Administrative Law Judge