Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Victor E. Igiebor,

Petitioner

v.

The Inspector General.

Docket No. C-09-416

Decision No. CR2114

Date: April 19, 2010

DECISION

Petitioner, Victor E. Igiebor, filed a request for hearing seeking administrative review of the Inspector General's (I.G.'s) determination to exclude him for twenty (20) years from participation in 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 the imposition of a 20-year exclusion is reasonable.

I. Background

On March 31, 2009, the I.G. notified Petitioner that he had determined to exclude him from participation in Medicare, Medicaid, and other federally-funded health care programs for a period of 20 years, based on his conviction of a criminal offense as described at section 1128(a)(1) of the Act. The I.G. informed Petitioner that the length of the exclusion, 20 years, was based on evidence relating to two aggravating circumstances: the acts resulting in his conviction caused a financial loss to a government program of more than $5,000; and the sentence imposed by the court included incarceration. I.G. Ex. 1.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision.

A Civil Remedies Division Acknowledgment letter, dated April 30, 2009, was sent to the parties. This letter advised the parties that I had scheduled a telephone prehearing conference for May 26, 2009, and instructed Petitioner to provide my office with a telephone number five days before the scheduled conference. Because Petitioner did not provide my office with a telephone number, I cancelled the conference and issued an Order to Show Cause to Petitioner. Petitioner submitted a response to the Order to Show Cause, in which he provided a telephone number where he could be reached. I accepted Petitioner's submission and rescheduled the telephone prehearing conference for September 9, 2009. Due to logistical reasons relating to setting up a call at the prison, the prehearing conference could not be held with the parties until September 11, 2009. During the conference, I advised Petitioner of his right to be represented by an attorney. Petitioner stated that he intended to write a letter to his former attorney, and I stated that I would give him 45 days in which to contact his former attorney. The I.G. expressed his position that this case could be resolved on the basis of written briefs, as the case involved purely legal issues. I scheduled another telephone prehearing conference for October 30, 2009.

At the second telephone prehearing conference on October 30, 2009, Petitioner stated that he had not been able to contact his attorney and that he would represent himself in these proceedings. Petitioner agreed to have this case decided on written submissions and agreed to a briefing schedule.

The I.G. filed his brief on December 4, 2009, accompanied by six exhibits (I.G. Exs. 1-6). Petitioner filed a brief in response on January 31, 2010. The I.G. advised me by letter, dated February 22, 2010, that because the I.G. had not received a copy of Petitioner's brief, he would not be filing a reply brief. On February 23, 2010, my office sent a letter to the parties, advising them that Petitioner had submitted a response brief, and that the I.G. had not received a copy of Petitioner's brief. With the letter, my office enclosed a copy of Petitioner's brief for the I.G. and set a deadline for the I.G.'s filing of a reply brief, or to advise me in writing that no reply would be filed. The I.G. submitted a reply brief on March 4, 2010. In the absence of any objection, I admit into the record I.G. Exs. 1-6.

II. Issues

The Secretary of the Department of Health and Human Services (Secretary) has by regulation limited my scope of review to two issues:

1) whether the I.G. has a basis for excluding Petitioner from program participation, pursuant to section 1128(a)(1) of the Act; and

2) whether the length of the exclusion, 20 years, is reasonable.

Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(1).

III. Discussion

A. Petitioner must be excluded under section 1128(a)(1) of the Act, because he was convicted of a criminal offense related to the delivery of an item or service under the Medicare program.[1]

Section 1128(a)(1) of the Act requires that the Secretary 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(a).

During the relevant time period, Petitioner was a co-owner of the Wingate Drug & Alcohol Rehabilitation Center (Wingate), operating in Houston, Texas. I.G. Ex. 4. An investigation by a Medicaid Fraud Unit revealed that Wingate submitted $487,536.04 in false claims to the Medicaid program for chemical dependency treatment, through the accounts of 220 Medicaid recipients, and received $406,577.50 in payment from Medicaid for services not provided. The investigation revealed that any Medicaid claims submitted for chemical dependency treatment services provided by Wingate interns from December 2003 through November 2004 were fraudulent, because Wingate was not registered with the Texas Department of State Health Services as a Counselor Training Institute. I.G. Ex. 4 at 1. In addition, Petitioner was illegally buying Medicaid numbers from several different individuals. *Id*.

On October 8, 2007, a grand jury in the 351st District Court of Harris County, Texas charged Petitioner with one count of felony Aggregate Theft by a Governmental Contractor. I.G. Ex. 5. Petitioner waived a jury trial, and, on September 23, 2008, Petitioner was found guilty in a bench trial and was convicted of a First Degree Felony, Theft by a Government Contractor. I.G. Ex. 6. On that same date, the judge sentenced Petitioner to 10 years in jail and ordered Petitioner to pay $230 in court costs, $1,319.86 in extradition costs, and restitution in the amount of $500,000. *Id*. at 2.

The court records conclusively establish the fact of Petitioner's conviction. The court's adjudication of his guilt and its judgment of conviction satisfy the definitions of "conviction" set out at sections 1128(i)(1) and (2) of the Act. Therefore, Petitioner was "convicted" of an offense within the meaning of the Act.

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

The undisputed evidence also establishes that Petitioner's conviction is related to the delivery of an item or service under the Medicaid program. As stated above, Petitioner fraudulently billed Medicaid for chemical dependency treatment services to Medicaid recipients at Wingate. *See* I.G. Ex. 4. This conduct resulted in $487,536.04 in false billings to the Medicaid program. Petitioner was ordered to pay restitution in the amount of $500,000. The submission of false claims to the Medicare and Medicaid programs has been consistently held to be a program-related crime within the reach of section 1128(a)(1) of the Act. *Jack W. Greene,* DAB No. 1078 (1989), *aff'd sub nom. Greene v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990); *Julius Williams, III,* DAB CR1464 (2006); *Kennard C. Kobrin,* DAB CR1213 (2004)*; Norman Imperial,* DAB CR833 (2001); *Egbert Aung Kyang Tan, M.D.*, DAB CR798 (2001); *Lorna Fay Gardner,* DAB CR648 (2000); *Mark Zweig, M.D.,* DAB CR563 (1999); *Alan J. Chernick, D.D.S.*, DAB CR434 (1996). I find that the required nexus and common-sense connection between the crime of which Petitioner was convicted and the Medicaid program is present here as a matter of fact. *See Berton Siegel, D.O.*, DAB No. 1467 (1994).

Petitioner challenges the facts and circumstances of his underlying conviction. He asserts that his conviction is not "final," because it is currently under appeal, "based on procedural errors." As such, he requests that I hold his exclusion in abeyance, until the court has issued a ruling on his appeal. P. Br. at 2, 3; Petitioner's Hearing Request. But federal regulations explicitly preclude any collateral attacks on his 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).

With respect to Petitioner's pending appeal, 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] Moreover, I am without the authority to hold Petitioner's exclusion in abeyance, or to order the I.G. to remove his exclusion.

[2] If, after issuance of this decision, Petitioner's conviction is overturned on appeal, the I.G. would no longer have basis to impose the exclusion. *See* 42 C.F.R. § 1001.3005.

Petitioner has also indicated in his brief that an in-person hearing is necessary and lists witnesses whose testimony he wishes to offer. P. Br. at 4. Petitioner claims that these witnesses' proposed testimony will "verify who is the actual owner/biller of Wingate." *Id*. 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 Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Livingston Care Ctr. v. U.S. Dep't of Health and Human Servs.*, 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).

B. Petitioner's 20-year exclusion is reasonable.

Once a predicate conviction within the ambit of section 1128(a) of the Act has been demonstrated, exclusion for the minimum period of five years is mandatory. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a),1001.2007(a)(2); *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002); *Lorna Fay Gardner*, DAB No. 1733 (2000); *David A. Barrett*, DAB No. 1461 (1994). The period of exclusion may be enhanced to more than five years, if the I.G. proves the existence of certain aggravating factors listed at 42 C.F.R. §§ 1001.102(b)(1)-(9). If the I.G. undertakes to do so, a petitioner may attempt to limit or nullify the proposed enhancement through proof of certain mitigating factors set out at 42 C.F.R. §§ 1001.102(c)(1)-(3).

In this case, the I.G. has asserted the presence of two aggravating factors. The first aggravating factor on which the I.G. relies is present when "[t]he acts resulting in the conviction, or similar acts . . . caused . . . a financial loss to a Government program . . . of $5,000 or more." 42 C.F.R. § 1001.102(b)(1). Petitioner was ordered to pay $500,000 in restitution as part of his sentence. His criminal conduct resulted in a loss to the Medicaid program of over $400,000, well in excess of $5,000. The I.G. has established this first aggravating factor.

The second aggravating factor cited by the I.G. is that incarceration was imposed, and this factor is specified at 42 C.F.R. § 1001.102(b)(5). The sentence imposed by the criminal court included a significant period of incarceration. Petitioner was sentenced to 10 years in prison. This is significant incarceration time and underscores the seriousness of his crimes. The I.G. has established this second aggravating factor.

In arguing that a mitigating factor is present, Petitioner reiterates that his conviction is not "final," "[u]ntil a mandate is issued after the appeal is exhausted." P. Br. at 3. As I have discussed above, Petitioner's appeal of his conviction has no bearing on the issues before me. There is no dispute that Petitioner was convicted within the meaning of section 1128(a)(1) of the Act, and there may be no collateral attack before me of the conviction that is the basis of the exclusion. Furthermore, when the I.G. has offered evidence of

aggravating factors, the only mitigating factors that may be considered are those specified at 42 C.F.R. §§ 1001.102(c)(1)-(3).

Because Petitioner appears here *pro se*, I have taken care in reading his brief and his request for hearing, guided by the Departmental Appeals Board's reminders that *pro se* litigants should be offered "some extra measure of consideration" in developing their records and their cases. *Louis Mathews*, DAB No. 1574 (1996); *Edward J. Petrus, Jr., M.D.*, DAB No. 1264 (1991). I have reviewed the documents and searched for any arguments or contentions relative to the mitigating factors specified in the regulations. I find that Petitioner has not asserted the existence of any of the mitigating factors set out at 42 C.F.R. §§ 1001.102(c)(1)-(3).

I conclude that the two aggravating factors present in this case justify significantly increasing the period of exclusion beyond the five-year minimum. The amount of the financial loss to the Medicaid program was high, and the seriousness of Petitioner's crimes is highlighted by the 10-year prison sentence imposed by the court. I find that it is not unreasonable for Petitioner to be excluded from participation in Medicare, Medicaid, and all federal health care programs for 20 years.

IV. Conclusion

Based on my review of all of the evidence, I find that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid, and all federal health care programs. I also find that the 20-year exclusion imposed by the I.G. is reasonable based on the evidence in this case.

/s/
Alfonso J. Montaño
Administrative Law Judge