Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Ahab Elmadhoun
(OI File No. 5-07-40958-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-303

Decision No. CR4710

Date: September 22, 2016

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Ahab Elmadhoun, for 18 years from participation in Medicare, Medicaid, and all other federal health care programs based on Petitioner's conviction of a felony related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Petitioner sought review of the exclusion. For the reasons stated below, I conclude that the IG has a basis for excluding Petitioner because Petitioner was convicted of a felony offense related to the unlawful distribution and dispensing of a controlled substance as defined under state law. Further, I affirm the 18-year length of the exclusion because the IG proved that two aggravating factors exist and Petitioner did not prove that any mitigating factors exist. Finally, the exclusion is effective January 20, 2016, and I have no authority to alter that date.

I. Background

In a December 31, 2015 letter the IG notified Petitioner that he was being excluded from Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-

7(a)(4) for 18 years. IG Exhibit (Ex.) 1 at 1. The IG advised Petitioner that the exclusion was based on his felony conviction "in United States District Court, Eastern District of Michigan, of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance as defined under Federal or State law." IG Ex. 1 at 1. Further, the IG imposed a length of exclusion in excess of the five-year statutory minimum because "[t]he court sentenced [Petitioner] to 72 months of incarceration . . ." and because "[t]he Michigan Department of Licensing and Regulatory Affairs suspended [Petitioner's] license to practice as a pharmacist." IG Ex. 1 at 1-2.

Petitioner timely requested a hearing. I was assigned to hear and decide this case. On April 6, 2016, I convened a prehearing conference by telephone, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order) of the same date. *See* 42 C.F.R. § 1005.6. Pursuant to the Order, the IG submitted a brief (IG Br.) together with nine exhibits (IG Exs. 1-9), Petitioner submitted a response brief (P. Br.), and the IG submitted a reply brief.

II. Decision on the Record

Petitioner objects to my relying on the facts in the Second Superseding Indictment (IG Ex. 4). This objection appears to primarily focus on the dismissed count against Petitioner for health care fraud conspiracy. P. Br. at 3. I note the objection and I will not consider any of the charges in the Second Superseding Indictment to which Petitioner did not plead guilty. Petitioner did not make any other objections to the IG's other proposed exhibits. Therefore, I admit IG Exs. 1-9 into the record. Order ¶¶ 6, 9; Civil Remedies Division Procedures § 14(e). Petitioner did not submit any proposed exhibits.

The decision in this case will be based on the written record. I ordered the parties to complete and submit short form briefs. Order ¶¶ 4, 5(c), 6. The IG filed a completed short form brief and indicated that he did not believe an in-person hearing was necessary and that he did not have any testimony to offer at a hearing. IG Br. at 13. Petitioner filed his own brief and did not complete the short form brief. In his submission, he stated that this "matter may be adjudicated on the written record and that no in-person hearing is required." P. Br. at 18. Therefore, I issue this decision based on the written record.

III. Issue

The issues in this case are limited to determining if there is a basis for exclusion and, if so, whether the length of the exclusion imposed by the IG is unreasonable. 42 C.F.R. § 1001.2007(a)(1)-(2).

IV. Jurisdiction

I have jurisdiction to adjudicate this case. 42 U.S.C. § 1320a-7(f)(1); 42 C.F.R. § 1005.2.

V. Findings of Fact, Conclusions of Law, and Analysis[1]

A. The IG proved each of the required elements under 42 U.S.C. § 1320a-7(a)(4); therefore, there is a basis to exclude Petitioner.

The IG cites 42 U.S.C. § 1320a-7(a)(4) as the basis for Petitioner's mandatory exclusion. IG Ex. 1 at 1. The statute provides:

> (a) Mandatory exclusion
>
> The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1320a–7b(f) of this title):
>
> * * * *
>
> (4) Felony conviction relating to controlled substance
>
> Any individual or entity that has been convicted for an offense which occurred after August 21, 1996, under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

Thus, the elements the IG must prove to sustain Petitioner's exclusion pursuant to 42 U.S.C. § 1320a-7(a)(4) in this case are: (1) Petitioner was convicted of a criminal offense consisting of a felony which occurred after August 21, 1996, and (2) Petitioner's offense was related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

1. Petitioner pled guilty in the U.S. District Court, District of Michigan (District Court), to Conspiracy to Distribute and Possess with Intent to Distribute Controlled Substances, a felony violation under 21 U.S.C. §§ 841(a) and 846, and the federal court entered a Judgment in a Criminal Case.

On January 10, 2013, a Second Superseding Indictment was handed up charging Petitioner and 43 other defendants with five counts of criminal conduct. IG Ex. 4. Count One of the Indictment charged Petitioner with conspiracy to distribute and possess with

[1] My findings of fact and conclusions of law are set forth in italics and bold font.

intent to distribute controlled substances in violation of 21 U.S.C. §§ 841(a) and 846. IG Ex. 4 at 9-12. On July 15, 2014, Petitioner pled guilty to Count One of the Indictment as well as to Count Four related to money laundering, in violation of 18 U.S.C. § 1957. IG Ex. 5.

Petitioner stipulated in his plea agreement to the following facts describing his criminal conduct: Petitioner is a pharmacist who owned and operated his own pharmacy in Detroit, Michigan; Petitioner agreed with other individuals to dispense and did dispense, at a conservative estimate, 1,500 tablets of OxyContin/Oxycodone (a schedule II controlled substance), 100,000 tablets of Vicodin/Hydrocodone Bitartrate (a schedule III controlled substance), and 100,000 tablets of Xanax/Alprazolam (a schedule IV controlled substance) to others; and patient recruiters brought fraudulent prescriptions to Petitioner at his pharmacy, and he dispensed the above mentioned controlled substances, knowing the prescriptions were fraudulent and had no legitimate medical purpose and knowing that his actions were outside the course of usual medical practice. IG Ex. 5 at 3-4. The patient recruiters subsequently filled the prescriptions at Petitioner's pharmacy and the drugs would be transferred and sold on the street market through a network of controlled substance distributors. IG Ex. 4 at 5. Petitioner admitted that he received cash payments of $157,000 or $157,500 for illegally dispensing these controlled substances. IG Ex. 5 at 3-4; IG Ex. 6 at 44; *see also* IG Ex. 4 at 19.

On August 18, 2015, the District Court entered a Judgment in a Criminal Case in which it: accepted Petitioner's guilty plea to Counts One and Four of the Indictment; adjudicated Petitioner guilty of conspiracy to distribute and possess with intent to distribute controlled substances in violation of 21 U.S.C. §§ 841(a) and 846; and dismissed the other counts in the Indictment related to Petitioner. IG Ex. 7 at 1. The District Court sentenced Petitioner to a 72-month term of imprisonment, three years of supervised release after his period of incarceration, an individual forfeiture of $50,000, and a forfeiture money judgment of $2,000,000 jointly and severally held against him and his co-defendants. IG Ex. 7 at 2, 3, 8.

2. Petitioner must be excluded under 42 U.S.C. § 1320a-7(a)(4) because he was convicted of a felony criminal offense related to the unlawful distribution of a controlled substance.

The IG must exclude an individual from participation in all federal health care programs if the individual has been convicted of a criminal offense consisting of a felony that occurred after August 21, 1996, and which related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. 42 U.S.C. § 1320a-7(a)(4).

Petitioner conceded that there is a basis for exclusion: "Accordingly, the undisputed facts of this case demonstrate that the I.G. was required to exclude [Petitioner] pursuant to section 1128(a)(4) of the Act. [Petitioner] does not contest the efficacy of this mandatory exclusion by the I.G." P. Br. at 3.

An individual is "convicted" of a criminal offense "when a judgment of conviction has been entered against the individual . . . by a Federal, State, or local court . . . ." 42 U.S.C. § 1320a-7(i)(1). Further, an individual is also "convicted" of a criminal offense when "a plea of guilty . . . by the individual . . . has been accepted by a Federal, State, or local court." *Id*. § 1320a-7(i)(3). As previously discussed, Petitioner pled guilty to a criminal offense, and the District Court accepted his plea and issued a judgment of conviction. IG Ex. 5; IG Ex. 6 at 38, 46; IG Ex. 7. Accordingly, for purposes of exclusion, Petitioner was "convicted" of a criminal offense.

The plea agreement states that Petitioner's criminal conduct occurred between 2008 and 2009. IG Ex. 5 at 3. Therefore, Petitioner was convicted of an offense that occurred after August 21, 1996.

Petitioner's conviction constituted a felony offense. Petitioner was convicted of violating 21 U.S.C. §§ 841(a) and 846, punishable by a maximum term of imprisonment of not more than 20 years. IG Ex. 5 at 1. Any offense that is not specifically classified in the section defining it is classified as a class C felony if the maximum term of imprisonment authorized is less than twenty-five years, but ten or more years. 18 U.S.C. § 3559(a)(3). Therefore, Petitioner's conviction of violating 21 U.S.C. §§ 841(a)(1) and 846 constitutes a felony conviction for purposes of exclusion.

Finally, Petitioner's conviction was related to the unlawful distribution and dispensing of a controlled substance. Petitioner pled guilty to conspiracy to distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. §§ 841(a)(1) and 846. IG Ex. 5 at 2-4; IG Ex. 6 at 41-46; IG Ex. 7 at 1. Petitioner specifically pled guilty to dispensing prescriptions of OxyContin, hydrocodone, and alprazolam, controlled substances, which were then distributed and sold on the illegal street market. IG Ex. 5 at 2-4; IG Ex. 6 at 41-46; *see also* IG Ex. 4 at 4-5. Petitioner's stipulations during his guilty plea and the District Court's Judgment in a Criminal Case make it clear that Petitioner unlawfully distributed and dispensed OxyContin, hydrocodone, and alprazolam, controlled substances. Therefore, I conclude that each element under 42 U.S.C. § 1320a-7(a)(4) is satisfied and that Petitioner must be excluded.

B. The presence of two aggravating factors and the absence of any mitigating factors justify excluding Petitioner for a period of 18 years.

Because I have concluded that a basis exists to exclude Petitioner pursuant to 42 U.S.C. § 1320a-7(a)(4), Petitioner must be excluded for a minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B). While the IG must impose the five-year minimum mandatory term of exclusion, 42 U.S.C. § 1320a-7(c)(3)(B), the IG is authorized to lengthen that term if certain aggravating factors exist. *See* 42 C.F.R. § 1001.102. Those aggravating factors are detailed at 42 C.F.R. § 1001.102(b)(1)-(9). The IG added thirteen years to Petitioner's minimum mandatory five-year exclusion based on the presence of two aggravating factors: 42 C.F.R. § 1001.102(b)(5) (the sentence imposed by the court in this case included incarceration) and (b)(9) (an adverse action taken by a State board, based on the same circumstances that serve as the basis for imposing the exclusion.). I must uphold the IG's determination as to the length of exclusion so long as it is not unreasonable. 42 C.F.R. § 1001.2007(a)(1)(ii).

1. The District Court sentenced Petitioner to 72 months of incarceration.

I conclude that an enlargement of Petitioner's exclusion is not unreasonable given the presence of the aggravating factor that Petitioner's sentence included incarceration. 42 C.F.R. § 1001.102(b)(5). The District Court sentenced Petitioner to 72 months of imprisonment. IG Ex. 7 at 2; IG Ex. 8 at 52.

Petitioner contests that a 72-month sentence is "lengthy." P. Br. at 5-6. Petitioner asserts that he was sentenced below the sentencing range in the federal sentencing guidelines, and this should mitigate the length of exclusion. P. Br. at 8-9. I disagree. A prison sentence of as little as nine months is considered to be relatively substantial for exclusion purposes. *Jason Hollady, M.D.*, DAB No. 1855 at 12 (2002). Petitioner's 72-month sentence is eight times longer than that and represents a substantial period of time, which indicates the seriousness of his offense. This length of imprisonment strongly supports the 18-year exclusion.

2. The Michigan Board of Pharmacy,[2] pursuant to a consent order executed by Petitioner, suspended Petitioner's pharmacist license for a minimum of one year.

The Michigan Board of Pharmacy suspended Petitioner's license in 2010 and then again later in 2015. The earlier suspension was based substantively on the conduct for which he was later convicted. The later suspension was based on his conviction. IG Ex. 3.

[2] The State of Michigan Department of Licensing and Regulatory Affairs, Bureau of Health Care Services, Board of Pharmacy, Disciplinary Subcommittee is referred to as the Michigan Board of Pharmacy.

The Michigan Board of Pharmacy ordered a license suspension "for a minimum period of one (1) year" based on a stipulation from Petitioner. IG Ex. 3 at 1-2. The stipulation stated that Petitioner did not contest the facts and law stated in the 2014 disciplinary complaint. IG Ex. 3 at 4. Petitioner admitted in the stipulation that his conviction was based on the same underlying behavior that resulted in a December 2010 license suspension. The stipulation states, "[w]hile the 2009 complaint did not address [Petitioner's] conviction, as he had not been indicted at that time, it did cover the same time frame and inappropriate dispensing practices as the indictment." IG Ex. 3 at 5. The complaint charged Petitioner with selling, prescribing, giving away or administering drugs for other than lawful purposes. IG Ex. 3 at 7. Factually, the complaint alleges that Petitioner was convicted of the criminal offense at issue in this case. IG Ex. 3 at 8. Petitioner also stipulated to the payment of a $10,000 fine prior to applying for reinstatement. IG Ex. 3 at 2. Petitioner does not contest that his pharmacy license was suspended for a year. Therefore, the aggravating factor listed at 42 C.F.R. § 1001.102(b)(9) is proven.

I conclude that an enlargement of Petitioner's exclusion is not unreasonable given the presence of this aggravating factor. Petitioner, however, contests that the suspension was related to his criminal conviction because it involved a different set of circumstances. P. Br. at 6-7. Petitioner's argument fails in the face of his admission before the Michigan Board of Pharmacy. IG Ex. 3 at 4, 5. Petitioner also asserts that his license had already expired by the time he agreed to a one-year suspension and that Petitioner only acknowledged by the suspension that he violated state law. The fact that Petitioner allowed his license to lapse does not change the fact that the Michigan Board of Pharmacy took an adverse action against him based on the same set of circumstances that resulted in his conviction. 42 C.F.R. § 1001.102(b)(9).

Based on these facts, I conclude that the IG proved that Petitioner was subject to an adverse action by a state agency that was based on the same set of circumstances that formed the basis for the IG's exclusion. 42 C.F.R. § 1001.102(b)(9). Accordingly, the presence of this additional aggravating factor further justifies Petitioner's exclusion for an extended period of 18 years.

3. Petitioner did not prove the existence of any mitigating factors that would justify a reduction in the length of exclusion imposed by the IG.

Petitioner asserted that the District Court found that Petitioner had a mental, emotional, or physical condition before or during the commission of his offense that lessened his culpability, thereby qualifying as a mitigating factor under 42 C.F.R. § 1001.102(c)(2). P. Br. at 4. Petitioner asserts that the criminal judgment ordered that Petitioner be incarcerated at a facility with a drug treatment program (P. Br. at 13) and imposed conditions on Petitioner's ultimate supervised release. P. Br. at 14. I placed the burden

of proof for mitigating factors on Petitioner. April 6, 2016 Order ¶ 8; 42 C.F.R. § 1005.15(c). I conclude Petitioner did not meet the burden of proof by a preponderance of the evidence. 42 C.F.R. § 1005.15(d).

The relevant inquiry is whether Petitioner has proven that the District Court determined that his drug problem reduced his culpability. *Patel v. Shalala*, 17 F. Supp. 2d 662, 667 (W.D. Ky. 1998) ("Plaintiff has not provided any citation to the record in the criminal proceeding where the court made any finding that plaintiff was less culpable for his crimes due to a dependence on alcohol or drugs."). As is made clear by 42 C.F.R. § 1001.102(c)(2), evidence of this mitigating factor will be considered only if "[t]he record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional or physical condition . . . that reduced the individual's culpability." I have reviewed the record to determine not only whether the sentencing judge expressly found reduced culpability due to Petitioner's drug problem, but also whether, in the absence of an express finding, there is sufficient basis for inferring such a finding. *See Farzana Begum, M.D.*, DAB No. 2726 at 9-10 (2016). I conclude that the District Court did not specifically state that it determined that Petitioner's culpability was reduced by Petitioner's drug problem, and I cannot infer from the sentencing judge's statements during sentencing or the sentence imposed that he made such a determination. In fact, the District Court concluded Petitioner was personally culpable for his actions.

In Petitioner's criminal case, the sentencing range should be 78-87 months under the federal sentencing guidelines. IG Ex. 8 at 32, 35. The District Court reduced the sentence to 72 months because that is what it gave Petitioner's co-defendant. IG Ex. 8 at 50-51. I am not certain why the sentencing judge reduced the co-defendant's sentence, but there is no evidence to prove or even to suggest that it was based on a finding of a mental, emotional, or physical condition that lessened Petitioner's culpability. In fact, the sentencing judge was clear that he thought Petitioner very culpable. IG Ex. 8 at 47-51.

> So the sentence that I am imposing needs to be sufficient to recognize the *enormity, the seriousness of behavior* in which you knowingly and willingly, even almost *joyfully* engaged, according to the reports of your reaction, sir. You regret it now, but the choice you made then has made you the person that you are today. Choices have consequences, and you are going to live with the consequences of your choices. Nobody else is going to bear this burden as heavily as you.

IG Ex. 8 at 51 (emphasis added). Further, the sentencing judge described Petitioner's offense as an extraordinarily serious offense that devastated an entire community. *Id.*

The District Court did order drug testing and prohibited Petitioner from using illegal drugs (IG Ex. 8 at 52-54), but this is not the same as considering Petitioner's drug problem to be in mitigation of his culpability. The mere fact that the judge sentenced Petitioner to a period of incarceration that was below the range suggested by the federal sentencing guidelines, particularly when considered in the context of his comments during sentencing, does not, in and of itself, mean that he made a finding of reduced culpability due to his drug problem. I have considered the entire record before me and the full transcript of the sentencing hearing, and find insufficient proof that the mitigating factor at 42 C.F.R. § 1001.102(c)(2) applies in this case.

C. The length of Petitioner's exclusion is within a reasonable range.

Petitioner argues that an 18-year exclusion is not reasonable. Petitioner cites to *Raymond Lamont Shoemaker*, DAB No. 2560 (2014), where a 55-month prison sentence was found to support a 10-year exclusion. Petitioner also argued that the 18-year exclusion is punitive and seeks a 10-year exclusion. P. Br. at 16-17.

I am to determine if an 18-year exclusion is within a reasonable range. I note that the sentencing judge stated that he was imposing a sentence "sufficient to recognize the *enormity, the seriousness of behavior* in which [Petitioner] knowingly and willingly, even almost *joyfully* engaged." IG Ex. 8 at 51 (emphasis added). Further, the sentencing judge described Petitioner as an "enthusiastic participant" that "down the line, caused the death of a number of people." IG Ex. 8 at 47, 51. The sentencing judge added:

> This is an *extraordinarily serious* offense. It *devastated* an entire community. *Families were virtually wiped out by the oxycodone wave that wasted this community* with [Petitioner's] help to the tune of 15 million dollars of billings over the course of several months. Millions of dollars spent on these drugs, illegally distributed and to the *tremendous ill-effect* to the community . . . ."

IG Ex. 8 at 51 (emphasis added).

When considering the length of exclusion, "[t]he evaluation does not rest on the specific number of aggravating or mitigating factors or any rigid formula for weighing those factors, but rather on a case-specific determination of the weight to be accorded each factor based on a *qualitative assessment of the circumstances surrounding the factors in that case*." *Begum*, DAB No. 2726 at 2 (emphasis added). I conclude that Petitioner directly betrayed his profession as a pharmacist and, due to greed, harmed countless individuals. His actions show him to be extremely untrustworthy. Petitioner's lengthy prison sentence, underscored by the sentencing judge's remarks, the suspension of his license, and the absence of any mitigating factors, fully supports an 18-year exclusion.

In regard to Petitioner's argument that the exclusion is punitive, it is well-settled that exclusion is remedial in nature and serves to protect federally funded health care programs from untrustworthy individuals. *Manocchio v. Kusserow*, 961 F.2d. 1539, 1542 (11th Cir. 1992).

D. The effective date of exclusion is January 20, 2016, and I have no authority to modify that effective date.

Petitioner makes an equitable argument that the effective date of his exclusion should be retroactive to March 21, 2013, the date he was subject to a similar exclusion imposed upon him at his pre-trial release. P. Br at 17.

Exclusions are effective 20 days after the date of the notice issued by the IG. 42 C.F.R. § 1001.2002(b); *see also* 42 U.S.C. § 1320a-7(c)(1). When an exclusion is effective before a decision is issued by an administrative law judge, as it is in this case, that exclusion is "deemed to commence on the date such exclusion originally went into effect." 42 C.F.R. § 1005.20(b).

In the present matter, the IG issued the exclusion notice on December 31, 2015. IG Ex. 1 at 1. Therefore, Petitioner's exclusion commenced 20 days later, on January 20, 2016. I have no authority to change the effective date. *See* 42 C.F.R. § 1005.4(c)(1).

VI. Conclusion

For the foregoing reasons, I affirm the IG's determination to exclude Petitioner for 18 years from participating in Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(4).

/s/
Scott Anderson
Administrative Law Judge