Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Vinay Kumar Bararia,
(OI File No.: H-14-4-1075-9),

Petitioner,

v.

The Inspector General

Docket No. C-15-1108

Decision No. CR3863

Date: May 14, 2015

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Vinay Kumar Bararia, from participating in Medicare and other federally funded health care programs for a period of at least ten years.

I. Background

The I.G. excluded Petitioner, a physician, for a minimum period of ten years pursuant to the requirements of section 1128(a)(4) of the Social Security Act (Act). This section mandates the exclusion of any individual who is convicted of a felony occurring after August 21, 1996, relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The I.G. based the minimum ten-year exclusion period on the presence of certain aggravating factors that I shall describe.

Petitioner requested a hearing. The I.G. filed a brief and a reply brief, plus exhibits that are identified as I.G. Ex. 1 – I.G. Ex. 7. Petitioner filed a brief plus two exhibits. I identify these exhibits as P. Ex. 1 and P. Ex. 2. I receive the parties' exhibits into the

record. Neither party requested that I convene a hearing in person and so I am deciding this case based on the parties' written filings.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether: the I.G. is mandated to exclude Petitioner; and, the ten-year minimum exclusion is reasonable.

B. Findings of Fact and Conclusions of Law

There is no dispute as to the I.G.'s mandate to exclude Petitioner. In his brief Petitioner admits that he was convicted of a felony as is described at section 1128(a)(4) of the Act. Petitioner's Brief at 1. Indeed, the evidence establishes that Petitioner was convicted of such an offense. On December 18, 2013, Petitioner pled guilty to a single felony offense under federal law consisting of unlawful distribution of a controlled substance. I.G. Ex. 5. In pleading guilty Petitioner explicitly admitted to selling unlawfully 500 hydrocodone pills (hydrocodone is a controlled substance) to an agent of the United States Drug Enforcement Administration. *Id.* at 4. The crime of which Petitioner was convicted falls squarely within the reach of section 1128(a)(4). It is a felony committed after August 21, 1996, consisting of the unlawful distribution of a controlled substance.

All that is left in dispute is whether the minimum ten-year exclusion imposed by the I.G. is reasonable. Exclusions imposed pursuant to section 1128(a) of the Act must be for a minimum period of five years. Act § 1128(c)(3)(B). Here, the I.G. opted to exclude for a term that is longer than the minimum period.

The I.G. has discretion to do so where there is evidence that proves that an excluded individual is so untrustworthy as to necessitate an exclusion that is for a longer period than the five-year statutory minimum. Evidence of untrustworthiness is admissible if it relates to one of the aggravating factors that is described at 42 C.F.R. § 1001.102(b).

In this case the I.G. asserts the presence of two aggravating factors. First, Petitioner was sentenced to a period of incarceration. 42 C.F.R. § 1001.102(b)(5). He was sentenced to 44 months' imprisonment. I.G. Ex. 2. Second, Petitioner was subject to another adverse action by a State government agency based on the same facts and circumstances that are the basis for his exclusion. 42 C.F.R. § 1001.102(b)(9). Petitioner voluntarily surrendered his license to practice medicine in the State of Nevada on March 13, 2013, after the Investigative Committee of the Nevada State Board of Medical Examiners (Nevada Board) had suspended his license. I.G. Exs. 6, 7. In suspending his license the Nevada Board cited Petitioner's "blatant violation" of federal laws regulating controlled substances. I.G. Ex. 6 at 2.

Evidence relating to the two aggravating factors is sufficient to justify a ten-year exclusion because it establishes Petitioner to be highly untrustworthy. Most damaging is evidence cited by the Nevada Board, which found that Petitioner had engaged in repeated unlawful sales of controlled substances. I.G. Ex. 6 at 2. This undisputed evidence proves that Petitioner was systematically selling controlled substances unlawfully. Moreover, the lengthy term of incarceration that the sentencing judge imposed on Petitioner – 44 months – is strong evidence of his untrustworthiness.

Evidence of aggravation may be offset by evidence of mitigation if it relates to one of the factors set forth at 42 C.F.R. § 1001.102(c). Petitioner argues that there is mitigating evidence in this case. I have examined Petitioner's arguments and the evidence that he offered in support, and I find no evidence relating to one of the regulatory mitigating factors.

Petitioner argues that a ten-year exclusion will have a devastating effect on him, personally, as well as on his family. That is not permissible mitigating evidence. The fact that Petitioner and his family may be affected personally by his exclusion simply cannot be considered in deciding whether the exclusion is reasonable. Adverse personal impact is not a mitigating factor nor should it be. It is likely that any period of exclusion may have an adverse financial impact on the excluded individual. But, that is the collateral consequence of a remedy that is designed to protect programs and their beneficiaries from untrustworthy individuals.

Petitioner also suggests that his culpability is diminished in this case by virtue of the fact that he suffers from a mental illness. Petitioner's Request for Hearing; Petitioner's Brief at 3. To that end, he offered two exhibits consisting of psychiatric evaluations of his mental state that discuss Petitioner's bipolar disorder. P. Exs. 1, 2.

The regulations governing exclusions recognize that a mitigating factor may exist where the sentencing judge determines that the excluded individual's culpability is reduced by virtue of mental illness. 42 C.F.R. § 1001.102(c)(2). The finding of diminished culpability must be memorialized in the record of the sentencing proceeding. *Id.* Petitioner has not offered evidence to prove that the sentencing judge in his case made such a finding. I cannot find the presence of a mitigating factor in the absence of such evidence. Indeed, what evidence exists suggests that the judge did not find diminished culpability. As I.G.'s counsel notes in her reply brief, the sentencing judge apparently denied Petitioner's argument of diminished mental capacity. I.G.'s Reply Brief at 4.

/s/
Steven T. Kessel
Administrative Law Judge