Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Igor Mitreski, M.D.
(OI File No. H-14-42184-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-1695

Decision No. CR4124

Date: August 14, 2015

DECISION

I sustain the determination of the Inspector General (I.G.) of the Department of Health and Human Services to exclude Petitioner, Igor Mitreski, M.D., from participating in Medicare, Medicaid, and all other federally-funded health care programs for a period of three years. The I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(3) of the Social Security Act (Act) because Petitioner was convicted of misdemeanor aiding and abetting the possession of controlled substances.

I. Background

On February 27, 2015, the I.G. determined to exclude Petitioner for a three-year period, effective March 19, 2015, based on his guilty plea in the United States District Court for the Southern District of Iowa to one count of misdemeanor aiding and abetting simple possession of controlled substances. Petitioner requested a hearing to challenge his exclusion, and the case was assigned to me. Following a prehearing conference by telephone, I directed the parties to file briefs and proposed exhibits. The I.G. filed its brief and four proposed exhibits identified as I.G. Ex. 1 − I.G. Ex. 4. Petitioner filed a brief and five proposed exhibits that I identify as P. Ex. 1 − P. Ex. 5. Petitioner also filed his own written direct testimony, labeled as an Affidavit (P. Aff.). The I.G. then filed a reply brief. In the absence of objections, I receive the parties' exhibits into the record.

Petitioner requested an in-person hearing to present his testimony. However, Petitioner has already offered his written direct testimony as evidence (P. Aff.), which is accepted into the record. The I.G. did not request cross-examination of Petitioner. Accordingly, there is no need to convene an in-person hearing, and I decide this case based on the written record.

II. Issues

The issues presented here are: (1) whether the I.G. has a basis to exclude Petitioner pursuant to section 1128(b)(3) of the Act, and (2) whether the length of exclusion, three years, is reasonable.

III. Findings of Fact and Conclusions of Law

It is undisputed that the I.G. has a statutory basis to exclude Petitioner. Petitioner pled guilty to violating 21 U.S.C. § 844(a) and 18 U.S.C. § 2(a), aiding and abetting simple possession of controlled substances, a misdemeanor. I.G. Ex. 2 at 1. In making this guilty plea, Petitioner admitted that between March 31, 2010 and April 8, 2011, while he was employed as a physician by the United States Department of Veterans Affairs (VA), he used his VA prescription pad and Drug Enforcement Administration registration number to write prescriptions for controlled substances outside the scope of his employment to six individuals who did not have a doctor-patient relationship with Petitioner and were not eligible to receive VA benefits. I.G. Ex. 2 at 3. The I.G. may exclude an individual who has been convicted of a misdemeanor offense related to the unlawful manufacture, distribution, prescription, or dispensing of controlled substances. Act § 1128(b)(3). Petitioner's conviction is for an offense directly related to the unlawful prescription of controlled substances, so there is a clear statutory basis for the I.G. to exclude him.

Petitioner also asks that I review the I.G.'s discretion to exclude Petitioner and consider information about Petitioner that the I.G. did not consider, but I do not have the authority to supplant the I.G.'s legal exercise of discretion. By regulation, my review is limited to whether there is a legal basis for exclusion, not whether the I.G. should have exercised his discretion to exclude. *See* 42 C.F.R. § 1001.2007(d). Therefore, Petitioner's arguments regarding the motivation behind his criminal conduct, the "victimless" nature of his crime, his cessation of criminal conduct upon realizing he was involved in criminal conduct, and his personal or professional character have no bearing on my decision to sustain Petitioner's exclusion as being legally permissible.

The presumptive length of a permissive exclusion taken pursuant to a misdemeanor conviction that is related to the unlawful prescription of a controlled substance is three years. 42 C.F.R. § 1001.401(c)(1). The I.G. may increase the length of exclusion if aggravating factors are found, and may decrease the length of exclusion if mitigating

factors are found. The only aggravating and mitigating factors that the I.G. may consider are established by regulation. *Id.* § 1001.401(c)(2)-(3). The I.G. imposed a three-year exclusion against Petitioner and did not rely on any aggravating or mitigating factors.[1] I.G. Ex. 1 at 1.

Petitioner argues that there is a mitigating factor the I.G. did not consider when setting the three-year exclusion period. He claims that he "fully cooperated with government officials as part of their investigation and helped verify all non-VA individuals to whom he had prescribed controlled substances for investigation." P. Br. at 5. As a result of his cooperation, Petitioner alleges that additional cases were investigated, although the government determined that all six of the individuals for whom Petitioner wrote prescriptions "had legitimate health needs that required prescription medication," so no further action was taken against them. P. Br. at 5. But Petitioner has not offered any evidence to support his claim. There is no evidence that the government initiated any new or "additional" investigations because of Petitioner's cooperation as the mitigating factor requires. *See* 42 C.F.R. § 1001.401(c)(3)(i)(B). Petitioner bears the burden of persuasion to prove the presence of a mitigating factor, and his unsupported claims fail to meet that burden. *Id.* § 1005.15(b)(1).

Petitioner also disputes the date his exclusion took effect. He argues that I should make Petitioner's exclusion effective October 21, 2014, rather than March 19, 2015. Petitioner cites a letter that the I.G. issued on October 1, 2014, warning Petitioner that the I.G. was considering excluding him and allowing him and opportunity to submit any evidence that the I.G. should consider. P. Ex. 1. Petitioner asserts that he never received that warning letter (P. Aff. ¶ 2), but I should nevertheless treat that letter as the I.G.'s exclusion notice. P. Br. at 5. The October 1, 2014 letter is not an exclusion notice as it expressly states that the I.G. was, at that time, "considering excluding" Petitioner. P. Ex. 1 at 1. The letter did not say that the I.G. had determined to exclude Petitioner. Notice of the actual exclusion determination came in the February 27, 2015 letter. Petitioner's exclusion was correctly made effective 20 days after the notice of the actual exclusion. 42 C.F.R. § 1001.2002(b).

/s/
Steven T. Kessel
Administrative Law Judge

[1] The I.G. points out that there is likely an aggravating factor in this case, specifically that Petitioner's criminal conduct lasted for one year or more. I.G. Br at 7; I.G. Ex. 2 at 3; *see* 42 C.F.R. § 1001.401(c)(2)(i). However, the I.G. did not increase Petitioner's exclusion despite that alleged aggravating factor. I.G. Ex. 1 at 1. Therefore, I need not address whether the I.G. has established the presence of that aggravating factor by a preponderance of the evidence.