Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Deshonna Coleman-Peterson
(OI File No.: 5-11-40877-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-2732

Decision No. CR4504

Date: January 12, 2016

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Deshonna Coleman-Peterson, 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. For the reasons discussed below, I conclude that the IG has a basis for excluding Petitioner because she was convicted of a felony offense related to the unlawful distribution of a controlled substance. I affirm the length of the ten-year exclusion because the IG proved two aggravating factors exist to justify the length of the exclusion, and I affirm that the effective date of Petitioner's exclusion is April 20, 2015.

I. Background

In a letter dated March 31, 2015, the IG excluded Petitioner from participation in Medicare, Medicaid, and all Federal health care programs as defined in section 1128B(f) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(4), for a minimum period of 10 years, effective 20 days from the date of the letter. IG Exhibit (Ex.) 1 at 1. The IG

explained that Petitioner's exclusion was based on a felony conviction "in the United States District Court, Eastern District of Michigan . . . . related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance" pursuant to section 1128(a)(4) of the Act. IG Ex. 1 at 1. Section 1128(a)(4) of the Act 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 IG extended the exclusion to a 10-year period based on the presence of two aggravating factors: the length of the sentence of incarceration and the acts that resulted in the conviction occurred over more than a two-year duration.

Petitioner, who is currently not represented by counsel, submitted a timely request for hearing, dated April 27, 2015, that was received on May 5, 2015. On July 8, 2015, pursuant to 42 C.F.R. § 1005.6, Administrative Law Judge Joseph Grow presided over a pre-hearing conference, and shortly thereafter, on July 13, 2015, Judge Grow issued an Order and Schedule for Filing Briefs and Documentary Evidence (Order).[1]

Pursuant to Judge Grow's Order, the IG filed an informal brief and a reply brief, along with four exhibits (IG Exs.) 1-4. Petitioner filed an informal brief (P. Br.) that includes appended documents, specifically a partial copy of what appears to be a pre-sentencing report, which I will refer to as Petitioner Ex. 1.[2] I admit the parties' submissions and exhibits into the record. Neither party requested that I convene a hearing in person, and I am therefore deciding this case based on the parties' written filings.

II. Issues

The issues in this case are limited to whether 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).

III. Jurisdiction

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

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[1] This case was reassigned to me on December 18, 2015.

[2] Petitioner filed two separate informal briefs that were mailed prior to the deadline directed by Judge Grow in an October 7, 2015 order. The second brief contains an identical informal brief, but contains additional appended material. All references to Petitioner's informal brief therefore refer to her second informal brief.

IV. Findings of Fact, Conclusions of Law, and Analysis[3]

1. Petitioner's federal conviction subjects her to a mandatory exclusion from all federal health care programs.

A mandatory exclusion from all federal health care programs is set forth at 42 U.S.C. § 1320a-7(a)(4), which states:

> (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):
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> ****
>
> (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.

The IG argues that Petitioner was properly excluded from all Federal health care programs based on her felony conviction for an offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. IG Br. at 5-6. Although Petitioner concedes she was convicted of a felony occurring after August 21, 1996, she does not concede that she was convicted of an offense for which exclusion is required. P. Br. at 2. As explained below, I find that Petitioner was convicted of a criminal offense that mandates exclusion from all Federal healthcare programs.

Pursuant to a plea agreement, which was entered into with the benefit and advice of counsel, Petitioner pleaded guilty to Count 1 of a superseding indictment, admitting that she was a party to a conspiracy to distribute controlled substances, in violation of 21 U.S.C. § 846. Count 1 of the superseding indictment further explained that the intent of the conspiracy was to knowingly, intentionally, and unlawfully distribute controlled substances in violation of 21 U.S.C. § 841(a)(1). IG Ex. 2 at 8. As discussed in the plea agreement, the elements of the offense to which Petitioner pleaded guilty are that *two or more persons conspired, or agreed, to distribute controlled substances*, and that Petitioner *knowingly and voluntarily joined the conspiracy*. IG Ex. 3 at 1. Petitioner

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

admitted that between July 2010 and January 2013, she and her co-conspirators "caused the illegal distribution of not fewer than 2,900 dosage units of the Schedule II controlled substance oxycodone (30mg); not fewer than 2,000 dosage units of the Schedule II controlled substance oxymorphone (Opana); not fewer than 10,000 dosage units of the Schedule III controlled substance hydrocodone; not fewer than 40,000 dosage units of the Schedule IV controlled substance alprazolam; and not fewer than 40,000 milliliters of the Schedule V controlled substance codeine-infused cough syrup." IG Ex. 3 at 3. Petitioner admitted that she served as a "patient recruiter" who brought patients to her co-conspirator, a physician, "and would pay [the physician] cash for those prescriptions." In doing so, Petitioner would arrange for family members and associates to be seen by the physician. The plea agreement indicated that Petitioner "would use these prescriptions to obtain the controlled substances, and these pills would be sold on the streets." IG Ex. 3 at 3.

Petitioner, in her informal brief, now refutes her admission to the United States District Court for the Eastern District of Michigan that she was a conspirator in a scheme that led to thousands of pills being sold on the streets. Contrary to what she admitted in her written plea agreement, Petitioner now contends that she "did refer family and friends[,] but they are drug addicted and never sold one pill[,] they shot and snorted the pills." P. Br. at 4.

I find that Petitioner's criminal conviction for conspiracy to distribute controlled substances mandates exclusion. An individual is "convicted" of a criminal offense "when a judgment of conviction has been entered against the individual . . . has been accepted by a Federal, state, or local court." 42 U.S.C. § 1320(a)-7(i)(3). Furthermore, Petitioner pleaded guilty to committing a felony offense, as evidenced by the three-year period of incarceration that was imposed. *See* 21 U.S.C. § 802(44) (defining a felony drug offense as an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State.) Petitioner entered a guilty plea on April 28, 2014, to Count 1 of a twelve-count superseding indictment and acknowledged that the offense was subject to up to 20 years of incarceration.[4] IG Ex. 2, 3. In doing so, she admitted to committing a felony offense under federal law after August 21, 1996, which involved a conspiracy to distribute tens of thousands dosage units of controlled substances. The crime to which Petitioner pleaded guilty falls squarely within the reach of section 1128(a)(4) of the Act. *Id.* The basis for Petitioner's underlying conviction is not reviewable and is binding on this proceeding. 42 C.F.R. § 1001.2007(d).

[4] Petitioner was one of three co-conspirators named in the superseding indictment, and she was indicted by a Federal grand jury on six felony counts. Count 1 pertains to the charge to which she ultimately pleaded guilty. Counts 8, 9, and 10 involve specific controlled substance transactions involving Petitioner and a named co-conspirator. Count 11 pertains to a charge of conspiracy to commit health care fraud, and Count 12 pertains to a charge of conspiracy to commit money laundering.

2. A 10-year minimum exclusion is warranted based on the presence of two aggravating factors and no mitigating factors.

Petitioner argues that the IG was unreasonable in his determination that an exclusion for a minimum period of 10 years is warranted. Pursuant to section 1128(a) of the Act, the minimum period of exclusion for such a felony conviction involving the unlawful distribution of a controlled substance is five years. 42 U.S.C. § 1320a-7(c)(3)(B). Owing to the existence of aggravating factors, the IG opted to exclude Petitioner for 10 years, which is longer than the minimum period. The IG has the discretion to impose an exclusion longer than the minimum period when there are aggravating factors present. *See* 42 C.F.R. § 1001.102.

The IG asserts the presence of two aggravating factors. First, the length of the conspiracy that underlies the conviction was for more than two years. 42 C.F.R. § 1001.102(b)(2). Second, Petitioner was sentenced to a period of incarceration for 36 months.[5] 42 C.F.R. § 1001.102(b)(5). I.G. Ex. 4.

With respect to the length of the acts that resulted in her felony conviction, Petitioner's plea agreement acknowledged that she was a party to the conspiracy from June 2010 through January 2013, which is a period of approximately two and a half years. IG Ex. 3 at 3. While Petitioner now argues that "I only worked at his office 3 times and all I did was take vitals of patients," and seemingly denies the two and a half year long conspiracy to which she pleaded guilty, I am not persuaded by her current arguments. Petitioner, upon the advice of counsel, pleaded guilty to conspiring from June 2010 through January 2013 to the illegal distribution of controlled substances. IG Ex. 3 at 3. The IG properly considered the length of the conspiracy to be an aggravating factor in this case. *See Vinod Chandrashekhar Patwardhan, M.D.*, DAB No. 2454 at 7 (determining that three-year duration of conduct was an aggravating factor).

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[5] The maximum period of incarceration for a conviction pursuant to 21 U.S.C. § 846 agreed upon by the parties to the plea agreement was 20 years of confinement. As Petitioner pleaded guilty under Federal law, the duration of the incarceration imposed was governed by the United States Sentencing Guidelines (U.S.S.G.). Without any reductions in sentencing, the U.S.S.G. indicated that the sentencing guideline range for Petitioner was 57 to 71 months. IG Ex. 3; *see* U.S.S.G., Chapter 5 (Sentencing Table). Petitioner received a reduction of three levels for "acceptance of responsibility" by pleading guilty to the charge of conspiracy named in Count 1 of the indictment, and she also received a two-level reduction based on an anticipated change in the U.S.S.G. for drug-related offenses. IG Ex. 3 at 7, 8. She was ordered to serve 36 months of incarceration to be followed by two years of supervised release, and was ordered to pay a special assessment of $100.

With regard to the length of Petitioner's incarceration, the uncontroverted evidence demonstrates that Petitioner was sentenced to a significant period of incarceration for her role in the conspiracy to distribute tens of thousands of dosage units of controlled substances that had been illegally prescribed and obtained by people who had no medical basis for obtaining those medications. United States Senior Judge George Caram Steeh, on August 20, 2014, ordered that Petitioner be committed to the custody of the United States Bureau of Prisons for a term of 36 months. IG Ex. 4 at 2. The IG properly considered the three-year length of imprisonment to be an aggravating factor in this case. *See Jason Hollady, M.D.*, DAB No. 1855 at 12 (2002) (stating that a nine-month period of incarceration was "relatively substantial").

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). I am not able to consider evidence of mitigation unless one or more of the enumerated aggravating factors listed in 42 C.F.R. § 1001.102(b). 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 she offered in support, and I find no probative evidence to substantiate one of the regulatory mitigating factors.

Petitioner suggests that her culpability in the conspiracy is diminished because the physician who was her co-conspirator "knew about [her] learning disability and emotional state" and "took advantage" of her. In support of this argument, Petitioner offers a partial copy of a pre-sentencing report that references recent medical treatment. I find this argument to be utterly unpersuasive.

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). In such an instance, 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 made such a finding. I cannot find the presence of this mitigating factor in the absence of such evidence. Furthermore, and as discussed below, Petitioner has not shown that any mental illness diminished her capabilities. In fact, Petitioner has owned and operated her own business, completed extensive medical training, and achieved college-level academic success.

Despite her allegation that a "mental problem" mitigated her role in the conspiracy, the incomplete copy of a pre-sentencing report that was submitted as P. Ex. 1 documents that Petitioner did not believe she had a mental disorder. The report documented that Petitioner obtained a General Equivalency Development (GED) and has certifications in cardio-pulmonary resuscitation, automated external defibrillator (AED) use, and has completed a nursing assistant training program. Furthermore, since January 2014, Petitioner has completed 12 college credit hours, attaining a grade point average of 3.1 on

a 4.0 scale. Thus, Petitioner has not demonstrated that a mental condition reduced her culpability for participating in the conspiracy. Aside from the lack of persuasiveness in Petitioner's contentions, there is simply no evidence that the sentencing District Court determined that she had a mental, emotional, or physical condition before or during the commission of the offense that reduced her culpability. 42 C.F.R. § 1001.102(c)(2).

Furthermore, Petitioner's arguments regarding her purported mental limitations demonstrate that her statements have limited credibility. Petitioner has portrayed herself as someone who is afflicted with a severe learning disability and mental illness, and that only through the Social Security Administration's "Ticket to Work" program was she able to obtain employment. P. Br. at 5. In making this argument, Petitioner explained that she was in receipt of SSA disability benefits for her "mental problem from 1996 – 2014." During the same period in which Petitioner alleges she was in receipt of SSA benefits due to a mental problem, and thereby was unable to work, she appears to have earned well above the substantial gainful activity level[6] that serves as a basis for SSA's determination of whether person with physical and/or mental impairments can work.[7] Petitioner, based on her statements, received Social Security disability benefits for an extended period of time because she was unable to work, yet was also able to simultaneously maintain legitimate employment *and* participate in (and presumably receive income from) the drug distribution conspiracy that is the basis for her exclusion. Therefore, the fact that Petitioner received Social Security benefits does not support her claim that she had a debilitating mental illness or establish a mitigating factor that I may consider in this case.

Finally, Petitioner asserts that she cooperated with the federal prosecutor and that this cooperation should have been taken into account by the IG. Petitioner is incorrect; cooperation is only considered a mitigating factor when it results in others being convicted or excluded, additional cases being investigated, or a civil money penalty

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[6] The Social Security Administration's regulations unambiguously state that if "you are able to engage in substantial gainful activity, we will find that you are not disabled." 20 C.F.R. § 416.971.

[7] The substantial gainful activity level was less than $1,000 per month from 2006 through 2009, and less than $1,100 per month from 2010 through 2014. https://www.socialsecurity.gov/oact/cola/sga.html. The partial copy of a pre-sentencing report that was submitted as P. Ex. 1 shows that Petitioner reported earning approximately $1,000 per month from 2006 through 2009. P. Ex. 1. Petitioner also reported earning $2,000 to $3,000 per month "when business was good" from being the owner and operator of an internet-based business in which she sold purses and clothing. *Id.* The report further documents that Petitioner owned and operated Glamhouse77.com from December 2010 through January 2013, which is a period of time that overlaps with the entire duration of the conspiracy to which she pleaded guilty. *Id.*

imposed. 42 C.F.R. § 1001.102(c)(3). General cooperation with prosecutors, absent meeting the specified criteria in 42 C.F.R. § 1001.102(c)(3), is not a mitigating factor. Petitioner has not submitted evidence of cooperation as listed in section 1001.102(c)(3), such as a government motion for downward departure or for a reduction in sentence based on substantial assistance. *See, e.g.*, Federal Rules of Criminal Procedure, Rule 35.

V. Effective Date of Exclusion

The effective date of the exclusion, April 20, 2015, is established by regulation and I am bound by that provision. 42 C.F.R. § 1001.2002(b); 1005.4(c)(1).

VI. Conclusion

For the foregoing reasons, I affirm the IG's decision to exclude Petitioner from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of 10 years.

/s/
Leslie C. Rogall
Administrative Law Judge