Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Joel Adrian Milliner, M.D.
(OI File No. 5-10-40869-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-4186

Decision No. CR4600

Date: May 3, 2016

DECISION

Petitioner, Joel Adrian Milliner, was a physician who practiced in the State of Michigan. The parties agree that he was convicted of a felony relating to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance and is therefore subject to a minimum five-year exclusion from participating in federal health care programs. Social Security Act (Act) § 1128(a)(4). The Inspector General (IG) wishes to exclude him for 15 years. Petitioner challenges the length of the proposed exclusion, arguing that 15 years is excessive and unreasonable.

For the reasons set forth below, I find that a 15-year exclusion is reasonable.

Background

In a letter dated July 31, 2015, the IG advised Petitioner Milliner that he was excluded from participating in Medicare, Medicaid, and all federal health care programs for a minimum period of 15 years because he had been convicted of a criminal offense related

to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. IG Ex. 1. The letter explained that section 1128(a)(4) of the Act authorizes the exclusion. Petitioner requested review.

The IG has submitted its brief (IG Br.) and nine exhibits (IG Exs. 1-9). Petitioner submitted a brief (P. Br.), along with two exhibits (P. Exs. 1-2). The IG filed a reply brief (IG Reply). In the absence of any objection, I admit into evidence IG Exs. 1-9 and P. Exs. 1-2.

The parties agree that an in-person hearing is not necessary in order to decide this case. IG Br. at 13; P. Br. at 4. The parties also agree that Petitioner Milliner was convicted of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance and must be excluded from program participation for at least five years. IG Br. at 2-8; P. Br. at 2; *see* Act §§ 1128(a)(4), (c)(3)(B). Because the parties agree that the IG has a basis upon which to exclude Petitioner from program participation, the sole issue before me is whether the length of the exclusion (15 years) is reasonable. 42 C.F.R. § 1001.2007(a)(1).

Discussion

Based on the aggravating factors and the absence of any mitigating factors, a 15-year exclusion is reasonable.[1]

Petitioner Milliner was a physician, licensed to practice medicine in the State of Michigan. While employed by the Michigan Department of Corrections, he prescribed thousands of units of controlled substances (oxycodone and oxymorphone) to individuals who did not need the drugs for any legitimate medical reason. Petitioner well knew that the drugs he prescribed were not medically necessary and that the prescription recipients would resell them; he wrote the prescriptions in order to enrich himself. IG Ex. 3 at 1-2; IG Ex. 9 at 3. He pled guilty in federal district court to one felony count of conspiracy to distribute controlled substances, in violation of 21 U.S.C. § 841. IG Ex. 3 at 1-2; IG Ex. 9 at 2-3; *see* IG Ex. 4.

Section 1128(a)(4) of the Act mandates that the Secretary of Health and Human Services exclude from program participation any individual or entity convicted of a felony criminal offense "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." An exclusion brought under section 1128(a)(4) must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a); 1001.2007(a)(2). Federal regulations set forth criteria for lengthening

[1] I make this one finding of fact/conclusion of law.

exclusions beyond the five-year minimum. 42 C.F.R. § 1001.102(b). Evidence that does not pertain to one of the aggravating or mitigating factors listed in the regulation may not be used to decide whether an exclusion of a particular length is reasonable.

Among the factors that may serve as a basis for lengthening the period of exclusion are the two that the IG relies on in this case: 1) the sentence imposed by the court included incarceration; and 2) the convicted individual has been the subject of any other adverse action by any federal, state, or local government agency or board, if the adverse action is based on the same set of circumstances that serves as a basis for the exclusion. 42 C.F.R. § 1001.102(b). The presence of an aggravating factor or factors, not offset by any mitigating factor or factors, justifies lengthening the mandatory period of exclusion.

Incarceration. The sentence imposed by the criminal court included five and a half years (66 months) incarceration followed by three years of supervised release. IG Ex. 5 at 2-3. This is significant jail time, which underscores the seriousness of Petitioner's felonious conduct. The Departmental Appeals Board has repeatedly considered longer periods of incarceration relevant to determining the reasonableness of an exclusion period. *Eugene Goldman, M.D., a/k/a Yevgeniy Goldman, M.D.*, DAB No. 2635 at 5-6 (2015) (finding fifty-one months a "substantial period of incarceration"); *see Samir F. Zaky, D.P.M.*, DAB CR3425 at 5 (2014) (finding 41 months a substantial period of incarceration, underscoring the seriousness of the crime), *aff'd*, DAB No. 2621 (2015).

Other adverse actions.[2] Based on the circumstances underlying this exclusion, Petitioner Milliner was the subject of two additional adverse actions:

- On March 4, 2015, the Michigan Department of Licensing and Regulatory Affairs summarily suspended Petitioner's license to practice medicine, finding that "the public health, safety, or welfare requires emergency action." IG Ex. 8; see IG Ex. 7.

- In an order dated June 19, 2014, the Office of Health Services Inspector General for the State of Michigan summarily suspended Petitioner's participation in the state Medicaid program, and, effective thirty days later, terminated his Medicaid participation. IG Ex. 6.

[2] In its brief, the IG refers to three aggravating factors rather than two, apparently counting each adverse action as a separate aggravating factor. IG Br. at 4, 10. Petitioner objects to the characterization and insists that his case presents just two aggravating factors. P. Br. at 2. I agree with Petitioner and note that the IG's notice letter includes both adverse actions in the same "adverse action" paragraph. IG Ex. 1 at 2. Nevertheless, I find the dispute irrelevant. Petitioner's level of trustworthiness – and thus the reasonableness of the length of the exclusion – does not change based on how the aggravating factors are configured.

Each of the state agencies cited Petitioner's felony conviction as the basis for its actions. IG Ex. 6 at 1; IG Ex. 7 at 2-3; IG Ex. 8.

In Petitioner's view, these aggravating factors do not establish that he is untrustworthy. Pointing to a statement made by the sentencing judge in his criminal proceeding, Petitioner maintains that that he was "found to be rehabilitated" even before he began his prison sentence, and that this "negates any potential showing of untrustworthiness." P. Br. at 3.

As a threshold matter, I note that, in an exclusion case involving an unquestionably altruistic physician, the Departmental Appeals Board gratuitously disparaged the administrative law judge's (ALJ's) deference to a sentencing judge's opinion that a physician was "extraordinarily unlikely to commit another crime." *Vinod Chandrashekhar*, DAB No. 2454 at 8 n.5 (2012) (quoting *Vinod Chandrashekhar*, DAB CR2471 at 5-6 (2011)). There, the sentencing judge and a state licensing ALJ emphasized that the excluded physician/oncologist presented *no danger* of future misconduct. Indeed, the sentencing judge was so convinced that she imposed the lightest sentence possible (nine months of home detention), unlike here, where, notwithstanding the sentencing judge's sympathies, Petitioner spends more than five years in prison. And, responding to a request from the state health care program, the IG granted Petitioner Chandrashekhar a limited waiver, so he continued to participate in the Medicare and Medicaid programs as an oncologist. *See* Act § 1128(c)(3)(B). Nevertheless, the Board found "no clear support" for the district judge's and the state ALJ's opinions. [3]

Moreover, even though the sentencing judge here described Petitioner as "mostly rehabilitated," he was plainly disturbed by the "huge number of pills" Petitioner had illicitly prescribed, with their "potential for great damage." P. Ex. 1 at 17. The judge accepted and was impressed because Petitioner Milliner had not been motivated purely by greed. Petitioner explained that he initially considered his a victimless crime; he simply didn't see any harm in what he was doing. P. Ex. 1 at 11, 19. In fact, "it was like you were kind of helping – you're saving the day." P. Ex. 1 at 12. This type of motivation may reasonably support a lighter prison sentence, but program exclusion is remedial rather than punitive. In many ways, someone who does not recognize the dangers posed by his misconduct presents a greater risk to healthcare programs than the individual who recognizes his bad motives and accepts responsibility for them. *See The Inspector General v. Thomas A. O'Connor*, DAB CR1206 at 37, *aff'd*, DAB No. 1956 (2004).

[3] The ALJ had reduced the period of exclusion to twelve years, and the IG did not appeal the reduction, so the issue was not even before the Board. But the Board unmistakably conveyed its strong disapproval, leaving little doubt as to the outcome had the issue been properly before it.

No mitigating factors. The regulations consider mitigating just three factors: 1) a petitioner was convicted of three or fewer misdemeanor offenses and the resulting financial loss to the program was less than $1,500; 2) the record in the criminal proceedings demonstrates that a petitioner had a mental, physical, or emotional condition that reduced his culpability; and 3) a petitioner's cooperation with federal or state officials resulted in others being convicted or excluded, or additional cases being investigated, or a civil money penalty being imposed. 42 C.F.R. § 1001.102(c). Characterizing the mitigating factor as "in the nature of an affirmative defense," the Board has ruled that Petitioner has the burden of proving any mitigating factor by a preponderance of the evidence. *Barry D. Garfinkel*, M.D., DAB No. 1572 at 8 (1996).

Obviously, because Petitioner was convicted of a felony, the first factor does not apply here. Nor does Petitioner claim any mental, physical, or emotional condition that reduced his culpability.

Pointing to an October 21, 2013 "proffer" letter from the U.S. Attorney's office, Petitioner maintains that he cooperated with law enforcement, providing information concerning the potentially criminal activities of other healthcare providers. P. Ex. 2. I accept that Petitioner spoke to law enforcement, but the regulation requires that his cooperation result in others being convicted or excluded, additional cases being investigated, or a CMP being imposed. Establishing that such results occurred "is entirely Petitioner's burden." *Stacey R. Gale*, DAB No. 1941 at 9 (2004). Petitioner has not met that burden here.

Thus, no mitigating factor offsets the significant aggravating factors present in this case.

Conclusion

So long as the period of exclusion is within a reasonable range, based on demonstrated criteria, I have no authority to change it. *Joann Fletcher Cash*, DAB No. 1725 at 7 (2000) (citing 57 Fed. Reg. 3298, 3321 (1992)). The record in this case establishes that Petitioner committed a crime that was serious enough to earn him more than five years in prison, loss of his medical license, and exclusion from participating in the state Medicaid program. Based on these aggravating factors, and, in the absence of any mitigating factors, I find that the 15-year exclusion falls within a reasonable range.

/s/
Carolyn Cozad Hughes
Administrative Law Judge