Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Gracia L. Mayard, M.D.
(OI File No.: H-15-4-2522-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-320

Decision No. CR4650

Date: June 28, 2016

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Gracia L. Mayard, M.D., 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 he was convicted of a felony offense related to the unlawful distribution of a controlled substance. I affirm the length of the 13-year exclusion because the IG proved that two aggravating factors exist to justify the length of the exclusion, and I affirm that the effective date of Petitioner's exclusion is January 20, 2016.

I. Background

In a letter dated December 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) for a minimum period of 13 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 for the Eastern District of New York of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance" pursuant to section 1128(a)(4) of the Act, 42 U.S.C. § 1320a-7(a)(4). 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 13-year period based on the presence of two aggravating factors: the sentence imposed by the court included incarceration and Petitioner was subject to other adverse actions based on the same circumstances that form the basis for his exclusion.

Petitioner, who is currently not represented by counsel, submitted a timely request for hearing, dated January 18, 2016, that was received on February 16, 2016. On March 21, 2016, pursuant to 42 C.F.R. § 1005.6, I presided over a pre-hearing conference, and shortly thereafter, on March 22, 2016, I issued an Order and Schedule for Filing Briefs and Documentary Evidence (Order).

Pursuant to my Order, the IG filed a brief (IG Brief) in support of a motion for summary judgment and a reply brief, along with ten exhibits (IG Exs.) 1-10. Petitioner filed an unpaginated informal brief (P. Brief) that includes appended documents, including copies of statutory and regulatory provisions and a 10-page Bureau of Prisons "Health Problems" document (Appendices to P. Brief). I admit the parties' submissions and exhibits into the record.

Petitioner has requested that I convene an in-person hearing. Petitioner argues that the anticipated testimony from five witnesses will focus on his "chronic and complicated illnesses," and that Petitioner will testify that he has offered to cooperate with the government. P. Brief. As I will explain below, I have concluded that summary judgment is appropriate.

II. Issues

1. Whether summary judgment is appropriate;

2. Whether the IG has 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.

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

1. Summary judgment is appropriate.

The IG moved for summary judgment and contends that "there are no material facts in dispute and the only questions to be decided involve the application of law to undisputed facts." IG Brief at 4. Petitioner has requested a hearing so that various witnesses can present testimony regarding his "chronic and complicated illnesses" and so that he can also provide testimony regarding his "offer for cooperation with the government." P. Brief (emphasis omitted).

At the request of a party, an administrative law judge (ALJ) may decide an exclusion case by summary judgment "where there is no disputed issue of material fact." 42 C.F.R. § 1005.4(b)(12). "Matters presented to the ALJ for summary judgment will follow Rule 56 of the Federal Rules of Civil Procedure and federal case law . . . ." Civil Remedies Division Procedures § 19(a). As stated by the United States Supreme Court:

> Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment 'shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original).

There are no genuine issues of material fact in dispute in this case. I must only decide whether Petitioner was convicted of a felony that requires mandatory exclusion, and if so, whether the length of the exclusion, 13 years, is reasonable based on the IG's determination that there are two aggravating factors and no mitigating factors present. As discussed below, Petitioner's challenges to the exclusion and the length of the exclusion must be resolved against him as a matter of law. Accordingly, summary judgment is appropriate.

The expected testimony that Petitioner and his witnesses would provide concerning his medical conditions and his offer to cooperate with the government is irrelevant to my

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

decision, as such testimony does not relate to any of the elements for an exclusion under 42 U.S.C. § 1320a-7(a)(4) or any of the aggravating or mitigating factors listed in 42 C.F.R. § 1001.102(b), (c). For purposes of summary judgment, I accept as true that Petitioner would be willing to cooperate with the government. I further accept as true that Petitioner has a number of "health problems" that are listed in his Bureau of Prisons records that include, but are not limited to: diabetes mellitus (Type II), hyperlipidemia, unspecified vitamin D deficiency, obesity, hypertension, end stage renal disease, coronary atherosclerosis, anemia, peripheral neuropathy, peripheral vascular disease, gout, alcohol use disorder, opioid use disorder, angina pectoris, and cataracts.[2] Appendices to P. Brief. The Bureau of Prisons records also reflect recent health problems of "[p]erson feigning illness" (February 2, 2016) and "[d]elusional disorder" (July 7, 2015). Appendices to P. Brief. I have considered all of the evidence that Petitioner submitted, and considering this evidence in the light most favorable to Petitioner, I find the evidence is not relevant to the issues before me.

2. Petitioner's federal conviction subjects him 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):
>
> ****
>
> **(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.

[2] The Bureau of Prisons records list a "diag[nosis] date" of July 11, 2013, for a number of Petitioner's "health problems." Petitioner reports that he has been in custody since March 2013 (P. Brief), and the record shows that Petitioner was in custody at the time of his guilty plea in November 2014. IG Ex. 4.

The IG argues that Petitioner was properly excluded from all federal health care programs based on his felony conviction for an offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. IG Brief at 5-7. Petitioner concedes he was convicted of a felony offense relating to the prescription or dispensing of a controlled substance occurring after August 21, 1996, but he contends that section 1128(a)(4) is not applicable to his offense. P. Brief. As explained below, I find that Petitioner was convicted of a criminal offense that mandates exclusion from all federal health care programs pursuant to section 1128(a)(4).

Petitioner pleaded guilty in November 2014 to Count One of a superseding indictment that charged that he had committed conspiracy to distribute oxycodone in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(c), 846 and 18 U.S.C. § 3551 et seq. IG Exs. 3, 4, 5. By entering a guilty plea to Count One, Petitioner admitted the following:

> On or about and between January 1, 2012 and March 15, 2013, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants GRACIA L. MAYARD and [a named co-defendant], together with others, did knowingly and intentionally conspire to distribute and possess with intent to distribute a controlled substance, which offense involved a substance containing oxycodone, a Schedule II controlled substance, contrary to Title 21, United States Code, Section 841(a)(1).

IG Ex. 3 at 1. Count One of the superseding indictment unambiguously explained that the intent of the conspiracy was to knowingly, intentionally, and unlawfully distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1). IG Ex. 3 at 1.

I find that Petitioner's criminal conviction for conspiracy to distribute a controlled substance 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 a felony offense, as evidenced by the 54-month period of incarceration that was imposed. IG Ex. 5 at 2; *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 November 7, 2014, to Count One of a superseding indictment. IG Exs. 3, 4. In doing so, he admitted that he committed a felony offense under federal law after August 21, 1996, which involved a conspiracy to distribute oxycodone. IG Exs. 2, 5. 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).

3. A 13-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 13 years is warranted. Pursuant to section 1128(a) of the Act, the minimum period of exclusion for 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 13 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 court sentenced Petitioner to incarceration. Petitioner was sentenced to a period of incarceration of 54 months. 42 C.F.R. § 1001.102(b)(5); I.G. Ex. 4. Second, Petitioner was subject to other adverse actions based on the same circumstances that support the exclusion. 42 C.F.R. § 1001.102(b)(9); IG Ex. 2 at 7; IG Exs. 7-9.

With regard to Petitioner's sentence of incarceration, the uncontroverted evidence demonstrates that Petitioner was sentenced to a significant period of incarceration for his role in the conspiracy to distribute oxycodone. A United States District Judge, on July 16, 2015, ordered that Petitioner be committed to the custody of the Bureau of Prisons for a term of 54 months. IG Ex. 5 at 2. The IG properly considered the 54-month 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").

With respect to other adverse actions, Petitioner was excluded from participation in the New York State Medicaid Program (IG Ex. 7) and surrendered his New York State medical license while a charge of professional misconduct was pending. IG Ex. 2. Petitioner's exclusion from the New York State Medicaid Program is properly considered an aggravating factor pursuant to 42 C.F.R. § 1001.102(b)(9). *Brij Mittal, M.D.*, DAB No. 1894 at 5 (2003) (determining that exclusion from New York State Medicaid program based on the same conviction that was the basis for exclusion was an aggravating factor that supported an increase to the exclusion period). Likewise, Petitioner's surrender of his medical license, at which time he "admit[ted] guilt" to a charge of fraudulent practice that was based on the same facts underlying his conviction and exclusion, is also properly considered an adverse action that is an aggravating factor pursuant to 42 C.F.R. § 1001.102(b)(9). IG Ex. 2 at 3.

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 it offsets the lengthening of a period of exclusion due to one or more of

the enumerated aggravating factors listed in 42 C.F.R. § 1001.102(b). 42 C.F.R. § 1001.102(c). While Petitioner argues that there is mitigating evidence in this case, he has not submitted any probative evidence to substantiate the presence of one of the regulatory mitigating factors.

I liberally construe Petitioner's argument for mitigation as suggesting that his culpability is diminished because he suffers from a number of medical impairments. While Petitioner points out the July 2015 notations of "delusional disorder," "self-mutilating behavior," and "bizarre thought processes" in his Bureau of Prisons records, Petitioner has presented no evidence that "[t]he record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that [he] had a mental, emotional or physical condition before or during the commission of the offense that reduced [his] culpability." 42 C.F.R. § 1001.102(c)(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 a mental, emotional, or physical 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.

Finally, Petitioner asserts that if given the opportunity, he will cooperate with the government and "help reduce the bleeding of the Medicare funds." P. Brief. Petitioner argues that this offer of cooperation constitutes a mitigating factor. 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 imposed. 42 C.F.R. § 1001.102(c)(3). A unilateral promise of future cooperation with the government, more than a year after sentencing for a criminal offense, does not meet the specified criteria in 42 C.F.R. § 1001.102(c)(3). Petitioner has not submitted evidence of past cooperation as listed in section 1001.102(c)(3), such as a government motion for a downward departure of his sentence or for a reduction in sentence based on substantial assistance. *See, e.g.*, Fed. R. Crim. P. 35. Therefore, Petitioner's offer of future cooperation with the government is not a basis to reduce the 13-year period of exclusion.

V. Effective Date of Exclusion

The effective date of the exclusion, January 20, 2016, 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 13 years.

/s/
Leslie C. Rogall
Administrative Law Judge