Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Angelo D. Calabrese, M.D.
(OI File No. 2-09-40518-9),

Petitioner,

v.

The Inspector General,
U.S. Department of Health and Human Services.

Docket No. C-16-289

Decision No. CR4657

Date: July 11, 2016

DECISION

Petitioner, Angelo D. Calabrese, M.D., is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to sections 1128(a)(1) and (a)(3) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1), (a)(3)) effective December 20, 2015. Petitioner's exclusion for five years is required by section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)). An additional period of exclusion of five years, for a total exclusion of ten years,[1] is not unreasonable based upon three aggravating factors established in this case and the absence of any mitigating factors.

I. Background

The Inspector General (I.G.) of the U.S. Department of Health and Human Services notified Petitioner by letter dated November 30, 2015, that he was being excluded from

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[1] Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the minimum period of exclusion.

participation in Medicare, Medicaid, and all federal health care programs for a minimum period of 10 years. The I.G. advised Petitioner that he was being excluded pursuant to sections 1128(a)(1) and (a)(3) of the Act based on his convictions in the United States District Court for the District of New Jersey (District Court), of a criminal offense related to the delivery of an item or service under Medicare or a state health care program as well as a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service, or with respect to any omission in a health care program (other than Medicare or a state health care program) operated by or financed in whole or in part by any federal, state, or local government entity. I.G. Exhibit (Ex.) 2.

Petitioner, through counsel, timely requested a hearing by letter dated February 1, 2016 (RFH). The case was assigned to me on February 5, 2016, to hear and decide. I convened a prehearing conference by telephone on February 24, 2016, the substance of which is memorialized in my order dated February 25, 2016. On April 4, 2016, the I.G. filed a motion for summary judgment, a brief in support of summary judgment (I.G. Br.), and I.G. Exs. 1 through 7. Petitioner filed a brief in opposition (P. Br.) on May 26, 2016. Petitioner also filed two affidavits from colleagues who attest to his general character and trustworthiness,[2] which are treated as if marked Petitioner Exhibits (P. Exs.) 1 and 2. The I.G. filed a reply brief on June 6, 2016. Petitioner did not object to any of the I.G.'s offered exhibits. I.G. Exs. 1 through 7 are admitted as evidence. The I.G. did not specifically object to my consideration of P. Exs. 1 and 2 but argues that the exhibits do not constitute mitigating factors which I may consider under the applicable regulations. I agree with the I.G. that P. Exs. 1 and 2 are not evidence of any of the mitigating factors established by 42 C.F.R. § 1001.201(c) that I may consider. Therefore, P. Exs. 1 and 2 are not relevant to any issue I may decide and they are not admitted as evidence. 42 C.F.R. § 1005.17(c).

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's rights to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services (the Secretary).

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[2] The affidavits are Item #s 6b and 6c in the Departmental Appeals Board Electronic Filing system (DAB E-File).

Pursuant to section 1128(a) of the Act, the Secretary must exclude from participation in any federal health care program any individual convicted under federal or state law of, among other things: a criminal offense related to the delivery of an item or service under Medicare or a state health care program; or a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service, or with respect to any act or omission in a health care program operated by or financed in whole or in part by any federal, state, or local government agency other than Medicare or a state health care program. Act §§ 1128(a)(1), (a)(3). The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(a), (c).[3]

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act will be for a period of not less than five years. 42 C.F.R. § 1001.102(a). The Secretary has published regulations that establish aggravating factors that the I.G. may consider to extend the period of exclusion beyond the minimum five-year period, as well as mitigating factors that may be considered only if the minimum five-year period is extended. 42 C.F.R. § 1001.102(b), (c).

The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that provides the basis of the exclusion. 42 C.F.R. § 1001.2007(c), (d). Petitioner bears the burden of proof and the burden of persuasion on any affirmative defenses or mitigating factors, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b).

B. Issues

The Secretary has by regulation limited my scope of review to two issues:

> Whether there is a basis for the imposition of the exclusion; and
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> Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

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[3] Citations are to the 2015 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold, followed by the pertinent findings of fact and analysis.

1. Petitioner's request for hearing was timely, and I have jurisdiction.

2. Summary judgment is appropriate in this case.

There is no dispute that Petitioner timely filed his request for hearing, and that I have jurisdiction pursuant to section 1128(f) of the Act and 42 C.F.R. pt. 1005.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The Secretary has provided by regulation that a sanctioned party has the right to hearing before an ALJ, and both the sanctioned party and the I.G. have a right to participate in the hearing. 42 C.F.R. §§ 1005.2-.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). An ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12).

Summary judgment is appropriate when the movant shows that there is no genuine dispute as to any material fact and the only questions to be decided involve application of the law to the undisputed facts; or the moving party prevails as a matter of law even if all disputed facts are resolved in favor of the party against whom the motion is made. A party opposing summary judgment must allege facts which, if true, would refute the facts relied upon by the moving party. Deciding a case on summary judgment differs from deciding a case on the merits after a hearing. An ALJ does not assess credibility or weigh conflicting evidence when deciding a case on summary judgment. *Bartley Healthcare Nursing & Rehab.*, DAB No. 2539 at 3-4 (2013); *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010); *Holy Cross Village at Notre Dame, Inc.*, DAB No. 2291 at 5 (2009); *see* Fed. R. Civ. Pro. 56.

There are no genuine disputes as to any material facts in this case. The facts that trigger exclusion under sections 1128(a)(1) and 1128(a)(3) of the Act are conceded, undisputed, or not subject to dispute. Similarly, there is no dispute as to the existence of the aggravating factors cited by the I.G. or the absence of mitigating factors. The I.G. prevails as a matter of law, even if all favorable inferences inure to Petitioner. Petitioner argues that a hearing is required to permit fact finding regarding Petitioner's trustworthiness, and, therefore, summary judgment is not appropriate. As discussed hereafter, whether or not Petitioner is trustworthy or untrustworthy is neither an

aggravating nor a mitigating factor that affects my determination as to whether or not the period of exclusion proposed by the I.G. is unreasonable, and any fact issues related to Petitioner's trustworthiness are simply not material and not a bar to summary judgment.

3. Petitioner's exclusion is required by sections 1128(a)(1) and (a)(3) of the Act.

The I.G. cites sections 1128(a)(1) and (a)(3) of the Act as the bases for Petitioner's mandatory exclusion. The statute provides in relevant part:

> (a) MANDATORY EXCLUSION. – The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
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> (1) Conviction of program-related crimes. – Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program.
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> * * * *
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> (3) Felony conviction relating to health care fraud. – Any individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in paragraph (1)) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

Act § 1128(a)(1), (a)(3).

For an exclusion pursuant to section 1128(a)(1), the plain language of the Act requires that the Secretary exclude from participation in Medicare, Medicaid, and all federal health care programs any individual or entity: (1) convicted of a criminal offense; (2) where the offense is related to the delivery of an item or service; and (3) the delivery of the item or service was under Medicare or a state health care program. For an exclusion pursuant to section 1128(a)(3), the plain language of the Act requires that the Secretary

exclude an individual or entity: (1) convicted of an offense under federal or state law; (2) the offense occurred after August 21, 1996 (the date of enactment of the Health Insurance Portability and Accountability Act of 1996); (3) the offense was committed in connection with the delivery of a health care item or service, or with respect to any act or omission in a health care program (other than Medicare or a state health care program) operated by or financed in whole or in part by any federal, state, or local government agency; (4) the criminal offense was a felony; and (5) the offense was related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

Petitioner admits that the elements for exclusion under both sections 1128(a)(1) and (3) are satisfied in this case. Petitioner specifically states in his brief that he does not dispute that there is a basis for his exclusion pursuant to sections 1128(a)(1) and (3) of the Act. P. Br. at 5. Accordingly, I conclude that exclusion is mandated by sections 1128(a)(1) and (3) of the Act.

4. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is five years.

I have concluded that a basis exists to exclude Petitioner pursuant to sections 1128(a)(1) and (a)(3) of the Act. Therefore, the I.G. must exclude Petitioner for a minimum period of five years pursuant to section 1128(c)(3)(B) of the Act. The I.G. has no discretion to impose a lesser period and I may not reduce the period of exclusion below five years. Petitioner agrees that the minimum period of exclusion under section 1128(a)(1) or (3) is five years. P. Br. at 6. The remaining issue is whether it is unreasonable to extend Petitioner's exclusion by an additional five years.

5. Three aggravating factors are present that justify extending the minimum period of exclusion to ten years.

6. Petitioner has not proven by a preponderance of the evidence any mitigating factors established by regulation.

7. Exclusion for ten years is not unreasonable in this case.

My determination of whether the period of exclusion in this case is unreasonable turns on whether: (1) the I.G. has proven that there are aggravating factors; (2) Petitioner has proven that there are mitigating factors the I.G. failed to consider or that the I.G. considered an aggravating factor that does not exist; and (3) the period of exclusion is within a reasonable range.

The I.G. notified Petitioner that three aggravating factors are present in this case that justify an exclusion of more than five years: (1) the sentence imposed by the court included 37 months of incarceration (I.G. Ex. 5 at 2); (2) the acts resulting in Petitioner's

conviction occurred over a period of one year or more, as Petitioner admitted in his guilty plea that his criminal conduct occurred from 2006 through April 2013 (I.G. Ex. 4 at 1); and (3) Petitioner's medical license was revoked by the New Jersey State Board of Medical Examiners based on the same set of circumstances that is the basis for exclusion (I.G. Ex. 7). The three aggravating factors cited by the I.G., which are proved by the documentary evidence, are established by the regulations as grounds for extending the period of exclusion. 42 C.F.R. § 1001.102(b)(2), (b)(5), (b)(9).

Petitioner concedes that he may be excluded for a period longer than the minimum period of five years because he does not dispute the existence of the three aggravating factors cited by the I.G. under 42 C.F.R. § 1001.102(b)(2), (b)(5), (b)(9). P. Br. at 6-7. I conclude that the I.G. established three aggravating factors, and the I.G. was authorized by the Secretary to rely upon these factors as grounds for extending Petitioner's exclusion by five years for a total exclusion of ten years.

If any of the aggravating factors authorized by 42 C.F.R. § 1001.102(b) justify an exclusion of longer than five years, as they do in this case, then mitigating factors may be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c). The only authorized mitigating factors that I may consider are listed in 42 C.F.R. § 1001.102(c):

> (1) The individual or entity was convicted of 3 or fewer misdemeanor offenses, and the entire amount of financial loss (both actual loss and intended loss) to Medicare or any other Federal, State or local governmental health care program due to the acts that resulted in the conviction, and similar acts, is less than $1,500;
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> (2) The record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional or physical condition before or during the commission of the offense that reduced the individual's culpability; or
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> (3) The individual's or entity's cooperation with Federal or State officials resulted in –
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> > (i) Others being convicted or excluded from Medicare, Medicaid and all other Federal health care programs,

> (ii) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or
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> (iii) The imposition against anyone of a civil money penalty or assessment under part 1003 of this chapter.

Petitioner has the burden to prove by a preponderance of the evidence that there is a mitigating factor for me to consider. 42 C.F.R. § 1005.15(b)(1). Petitioner asserts that there are many mitigating factors in evidence, including his long and otherwise unblemished career and his service to underprivileged communities. However, he "acknowledges that the only mitigating factors the [ALJ] may consider are those at § 1001.101(c)[sic] [42 C.F.R. § 1001.102(c)], none of which applies here." P. Br. at 7.

Based on my review of the entire record, I conclude, consistent with Petitioner's concession, that he has failed to establish any mitigating factor that I am permitted to consider under 42 C.F.R. § 1001.102(c) to reduce the period of his exclusion.

Petitioner argues that the existence of aggravating and mitigating factors is not determinative of the reasonableness of the period of exclusion. He argues that the Act does not mandate that the Secretary extend the period of exclusion based on the presence of aggravating factors, except in the limited circumstances covered by Congress that are not applicable here. P. Br. at 7-8. Petitioner argues that the reasonableness of the period of exclusion turns, at least in part, on whether or not the evidence shows that Petitioner is trustworthy or not. Petitioner argues that deciding this case on summary judgment is not appropriate because there is a genuine dispute as to whether or not Petitioner is trustworthy. P. Br. at 8-10. Petitioner is in error. Whether or not the period of exclusion is unreasonable is not determined by the ALJ based on whether or not Petitioner is found to be trustworthy. Indeed, whether or not Petitioner is trustworthy is not material to my determination of whether or not the period of exclusion is unreasonable.

The regulation requires that the ALJ determine whether the length of exclusion imposed by the I.G. is "unreasonable." 42 C.F.R. § 1001.2007(a)(1). The Departmental Appeals Board (Board), however, has made clear that the role of the ALJ in exclusion cases is to conduct a de novo review of the facts related to the basis for the exclusion and the existence of aggravating and mitigating factors identified at 42 C.F.R. § 1001.102 and to determine whether the period of exclusion imposed by the I.G. falls within a reasonable range. *Juan de Leon, Jr.*, DAB No. 2533 at 3 (2013); *Craig Richard Wilder, M.D.*, DAB No. 2416 at 8 (2011); *Joann Fletcher Cash*, DAB No. 1725 at 17, n.9 (2000). The Board has explained that, in determining whether a period of exclusion is "unreasonable," the ALJ is to consider whether such period falls "within a reasonable range." *Cash*, DAB No. 1725 at 17, n.9. The Board cautions that whether the ALJ thinks the period of

exclusion too long or too short is not the issue. The ALJ may not substitute his or her judgment for that of the I.G. and may only change the period of exclusion in the limited circumstances identified by the Board.

In *John (Juan) Urquijo*, DAB No. 1735 (2000), the Board made clear that, if the I.G. considers an aggravating factor to extend the period of exclusion and that factor is not later shown to exist on appeal, or if the I.G. fails to consider a mitigating factor that is shown to exist, then the ALJ may make a decision as to the appropriate extension of the period of exclusion beyond the minimum. In *Gary Alan Katz, R.Ph.*, DAB No. 1842 (2002), the Board suggests that, when it is found that an aggravating factor considered by the I.G. is not proved before the ALJ, then some downward adjustment of the period of exclusion should be expected absent some circumstances that indicate no such adjustment is appropriate. The Board has by its prior decisions effectively limited the scope of my authority under the regulations to judging the reasonableness of the period of exclusion by determining whether or not aggravating and mitigating factors are proven. If the aggravating factors cited by the I.G. are proved and Petitioner fails to prove that the I.G. failed to consider a mitigating factor, the Board's interpretation of the regulations is that I have no discretion to change the period of exclusion. Neither the regulations nor the Board's interpretation of those regulations allows an ALJ to consider whether or not an excluded individual or entity is trustworthy as a basis for concluding that the period of exclusion imposed by the I.G. is unreasonable and should be reduced.

In this case, after de novo review, I have concluded that a basis for exclusion exists and that the evidence establishes the three aggravating factors that the I.G. relied on to impose the ten-year exclusion. Petitioner has not established that the I.G. failed to consider any mitigating factor or considered an aggravating factor that did not exist. I conclude that a ten-year exclusion falls within a reasonable range and is not unreasonable considering the existence of three aggravating factors and the absence of any mitigating factors. No basis exists for me to reassess the period of exclusion in this case.

III. Conclusion

For all of the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum of ten years, effective December 20, 2015.

/s/
Keith W. Sickendick
Administrative Law Judge