

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Godfrey Eze Uwudia
(O.I. File No. 6-09-41049-9),

Petitioner

v.

The Inspector General,
Department of Health and Human Services.

Docket No. C-10-947

Decision No. CR2308

Date: January 10, 2011

DECISION

Petitioner, Godfrey Eze Uwudia, is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. §§ 1320a-7(a)(1)), effective July 20, 2010. Petitioner's exclusion for five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)), and an additional period of exclusion of five years, for a total minimum period of exclusion of ten years,¹ is not unreasonable based upon the two aggravating factors established in this case and the absence of any mitigating factors.

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 period of exclusion.

I. Background

The Inspector General (I.G.) notified Petitioner by letter dated June 30, 2010, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of ten years pursuant to sections 1128(a)(1) of the Act based upon his conviction in the District Court of Oklahoma County, Oklahoma of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. The I.G. notified Petitioner that his exclusion was extended to ten years based on the presence of two aggravating factors: (1) there was an actual or intended monetary loss to a government program of \$5,000 or more, evidenced by court ordered restitution of \$163,000; and (2) the criminal acts of which Petitioner was convicted occurred over a period of one year or more, from about July 2003 to about June 2005.

Petitioner timely requested a hearing through counsel, by letter dated August 30, 2010. The request for hearing was docketed and assigned to me on September 2, 2010, for hearing and decision. On September 27, 2010, I convened a telephonic prehearing conference, the substance of which is memorialized in my order dated September 28, 2010. During the prehearing conference, Petitioner waived an oral hearing and agreed to proceed upon the documentary evidence and the parties' briefs. On October 25, 2010, the I.G. filed an opening brief,² with I.G. Exs. 1 through 7. Petitioner filed his brief on November 29, 2010 (P. Br.), with Petitioner's exhibits (P. Exs.) 1 through 8. Petitioner also filed objections to the admissibility of I.G. Exs. 6 and 7. The I.G. filed a reply brief on December 13, 2010, with I.G. Exs. 8, 9, and 10.

No objection has been made to my consideration of I.G. Exs. 1 through 5 and 8 through 10, and they are admitted as evidence. No objection has been made to the admissibility of P. Exs. 1 through 8, and they are admitted as evidence. I.G. Ex. 6 appears to be a letter dated September 29, 2009, on the letterhead of the Office of Attorney General, State of Oklahoma, with a signature of Don D. Brown, Assistant Attorney General, Patient Abuse and Medicaid Fraud Control Unit. The letter contains information purportedly related to the conviction and sentencing of Petitioner and has fourteen pages of documents attached. Petitioner objects to my consideration of the exhibit on grounds that I.G. Ex. 6 contains testimonial evidence and information that has not been sworn or verified and the person who made the statement has not been properly identified. However, Petitioner has not given me cause to question the authenticity of either the letter or the documents attached to it. There is no evidence that the documents are anything other than what they

² The I.G. titled its pleadings as a motion for summary judgment and brief in support. However, Petitioner never withdrew the waiver of oral hearing, and it is not necessary to proceed on summary judgment. The distinction between proceeding on summary judgment verses proceeding to a decision on the merits after waiver of oral hearing is significant due to the different standards that must be applied. Accordingly, I treat the I.G. filings as an opening brief in support of exclusion of Petitioner.

purport to be. The documents are also clearly relevant to the extent that they contain evidence related to Petitioner's conviction, which is the basis for his exclusion.

Clearly, the documents are hearsay, but hearsay is admissible so long as it is relevant and authentic. I am presumed to know how to weigh hearsay evidence. Further, Petitioner waived his right to demand cross-examination of the declarant by waiving an oral hearing. The analysis regarding the admissibility of I.G. Ex. 7 is essentially the same. Although the authenticity of I.G. Ex. 7 may not be apparent from the face of the document, authenticity is established by I.G. Ex. 8, the affidavit of the custodian of the documents who also attests to the authenticity of both I.G. Exs. 6 and 7. Accordingly, Petitioner's objections to I.G. Exs. 6 and 7³ are overruled, and they are admitted as evidence.

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). Pursuant to section 1128(a)(1) of the Act, the Secretary must exclude from participation in any federal health care program any individual convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. The Secretary has promulgated regulations implementing this provision of the Act. 42 C.F.R. § 1001.101(a). Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) will be for a period of not less than five years. 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 must be considered 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).

³ I do not rely upon these exhibits. Petitioner does not dispute that he was convicted, and the pertinent details of his conviction and offenses are revealed by other I.G. exhibits to which there was no objection, by Petitioner's own exhibits, and by Petitioner's pleadings.

B. Issues

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

Whether there is a basis for exclusion; and

Whether the length of the exclusion imposed is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

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. Petitioner's exclusion is required by section 1128(a)(1) of the Act.**

Petitioner does not dispute that the I.G. has a basis to exclude him pursuant to section 1128(a)(1) of the Act. P. Br. at 1. The evidence shows that on September 11, 2009, Petitioner pled guilty in the District Court of Oklahoma County, State of Oklahoma, pursuant to a plea agreement, to seven counts, at least six of which alleged Medicaid fraud, in violation of Oklahoma law. Petitioner admitted to the court as the factual basis for his guilty pleas that in Oklahoma County, Oklahoma: between August 20, 2004 and April 30, 2005, July 1, 2003 and April 28, 2005, October 1, 2003 and June 3, 2005, January 1, 2004 and April 30, 2005, July 30, 2004 and January 17, 2005, and October 1, 2003 and May 1, 2005, he submitted false claims, each exceeding \$2,500, to the Oklahoma Medicaid program; between January 20, 2004 and February 15, 2004, he submitted false claims, each less than \$2,500, to Oklahoma Medicaid. On September 11, 2009, Petitioner was found guilty pursuant to his guilty pleas and sentencing was ordered deferred to September 10, 2014. I.G. Ex. 2. On September 11, 2009, Petitioner was ordered to pay a fine of \$6,500 and to pay restitution of \$163,000 to the Oklahoma Attorney General. I.G. Ex. 3.

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides:

- (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)):

(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.

There is no dispute by Petitioner that he was convicted of criminal offenses. Petitioner also does not dispute that his offenses related to the delivery of a service under the Oklahoma Medicaid program. Accordingly, I conclude that there is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

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

4. Aggravating factors exist that justify extending the period of exclusion to ten years.

5. No mitigating factors established by the regulations have been proven.

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

Petitioner challenges the length of his exclusion as being unreasonable. Request for Hearing; P. Br. at 2. My determination of whether or not the exclusionary period in this case is unreasonable depends 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.

a. Two aggravating factors justify lengthening the period of exclusion beyond the five-year statutory minimum.

The I.G. alleges that two aggravating factors are present in this case that justify an exclusion of more than five years: (1) Petitioner's criminal acts caused or were intended to cause financial loss to a government program or other entities and the loss was \$5,000 or more; and (2) the acts that resulted in Petitioner's conviction occurred over a period of one year or more. 42 C.F.R. § 1001.102(b)(1), (2). I agree that the evidence shows that both aggravating factors are present in this case.

Petitioner denied in his request for hearing that either aggravating factor existed. However, the evidence shows that Petitioner was ordered to pay restitution of \$163,000 to the State of Oklahoma. I.G. Ex. 3, at 5. Petitioner concedes that at least \$90,000 of the \$163,000 was related to the Medicaid fraud counts to which he pled guilty. P. Br. at 2. Thus, the actual or intended loss to the Oklahoma Medicaid program was \$5,000 or

more, and the aggravating factor is clearly established. The evidence also shows that Petitioner admitted as part of his guilty plea that his submission of false claims to the Oklahoma Medicaid program occurred between July 1, 2003 and June 3, 2005, a period greater than one year.

Petitioner argues that the I.G. incorrectly states that the loss due to Medicaid fraud was \$163,000, on the theory that one count to which Petitioner pled was not Medicaid fraud under Oklahoma Law, and \$72,938.71 of the court ordered restitution related to that charge. P. Br. at 2. Even if I accept Petitioner's assertion as true, more than \$90,000 of the restitution was thus related to the remaining six counts of Medicaid fraud. The aggravating factor is established so long as the actual or intended loss is \$5,000 or more, and it clearly is in this case.

The Act requires a five-year minimum exclusion for exclusions pursuant to section 1128(a). Act § 1128(c)(3)(B). The Secretary has provided by regulation that the period of exclusion may be extended based on the presence of specified aggravating factors. 42 C.F.R. § 1001.102(b). The list of aggravating factors authorized includes: actual or intended financial loss to a government program or private insurers of \$5,000 or more; and criminal acts that occurred over a period of one year or more. 42 C.F.R. § 1001.102(b)(1), (2). In this case, both aggravating factors are present, and the I.G. was authorized by the Secretary to rely upon these factors as a basis for extending Petitioner's exclusion by five years.

b. No mitigating factors justify reducing the period of exclusion.

If any of the aggravating factors authorized by 42 C.F.R. § 1001.102(b) justify an exclusion of longer than five years, 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;
- (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

(3) The individual's or entity's cooperation with Federal or State officials resulted in –

(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

(iii) The imposition against anyone of a civil money penalty or assessment under part 1003 of this chapter.

Petitioner has the burden to prove that there is a mitigating factor for me to consider. 42 C.F.R. § 1005.15(b)(1).

Petitioner argues that the ten-year exclusion is unreasonable because he complied with a subpoena issued by the Oklahoma Attorney General and produced eleven boxes of documents that could have been used to prosecute numerous individuals for Medicaid fraud. Petitioner asserts that the I.G. and the Oklahoma Attorney General have not advised him whether or not the documents produced resulted in convictions, exclusions, or investigations of others. He further asserts that he did all he could by producing the documents and that he could not force the state or federal government to prosecute or exclude others. He asks that his production of the documents be considered a mitigating factor. P. Br. at 1-2.

The production of documents is not a mitigating factor under the regulations. Petitioner bears the burden to show that his cooperation actually led to the conviction or exclusion of others, the investigation of additional cases that identified program vulnerabilities or weakness, or resulted in the imposition of a civil money penalty or assessment. 42 C.F.R. § 1001.102(c); *Stacey R. Gale*, DAB No. 1941 (2004). Thus, Petitioner has not met his burden of persuasion. The I.G. also submitted, as rebuttal, the affidavit of the investigator that executed the subpoena, and he attests that the documents produced by Petitioner did not lead to a separate investigation or prosecution. I.G. Ex. 10.

Petitioner also argues that he had no choice but to plead guilty to the charges to avoid imprisonment. P. Br. at 3-5; Request for Hearing. It is not necessary to discuss Petitioner's theory in detail. Petitioner pled guilty and was convicted by the Oklahoma court. Petitioner is prohibited from collaterally attacking his conviction in this forum, and I am prohibited from reviewing the underlying conviction. 42 C.F.R. § 1001.2007(d).

I conclude that there is no mitigating factor upon which I may rely to shorten Petitioner's period of exclusion. Appellate panels of the Departmental Appeals Board (the Board) have made clear that the role of the ALJ in cases such as this is to conduct a "*de novo*" review as to the facts related to the basis for the exclusion and the facts related to 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. *Joann Fletcher Cash*, DAB No. 1725, n.6 (2000).⁴ The regulation specifies that I must determine whether the length of exclusion imposed is “unreasonable” (42 C.F.R. § 1001.2007(a)(1)). The Board has explained that, in determining whether a period of exclusion is “unreasonable,” I am to consider whether such period falls “within a reasonable range.” *Cash*, DAB No. 1725, n.6. The Board cautions that whether I think the period of exclusion too long or too short is not the issue. I am not to substitute my judgment for that of the I.G. and may only change the period of exclusion in limited circumstances.

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.

In this case, upon *de novo* review, I have concluded that a basis for exclusion exists and that the evidence establishes the two aggravating factors relied upon by the I.G. when imposing the twenty-year exclusion. Petitioner has not established that there is any mitigating factor not considered by the I.G. I conclude that a period of exclusion of ten years is in a reasonable range and, therefore, not unreasonable. Accordingly, there is no basis upon which I might reassess the period of exclusion.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of ten years, effective July 20, 2010.

/s/
Keith W. Sickendick
Administrative Law Judge

⁴ The citation is to the version of the decision of the Board available at <http://www.hhs.gov/dab/decisions/dab1725.html>. In the original decision released by the Board and the copy available on Westlaw™ it is footnote 9 rather than footnote 6.