Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Tamara Varnado
(O.I. File Number 4-04-40059-9),

Petitioner

v.

The Inspector General
Department of Health and Human Services.

Docket No. C-10-377

Decision No. CR2305

Date: January 5, 2011

DECISION

Petitioner, Tamara Varnado, is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to sections 1128(a)(1) and (3) of the Social Security Act (Act) (42 U.S.C. §§ 1320a-7(a)(1) and (3)), effective January 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 fifteen years, for a total minimum period of exclusion of twenty years,[1] is not unreasonable based upon the two aggravating factors established in this case and the absence of any mitigating factors.

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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 period of exclusion.

I. Background

The Inspector General (I.G.) notified Petitioner by letter dated December 31, 2009, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of twenty years pursuant to sections 1128(a)(1) and (3) of the Act based upon her conviction in the United States District Court for the Western District of North Carolina. The I.G. notified Petitioner that her exclusion was extended to twenty years based on the presence of two aggravating factors: (1) there was monetary loss to a government program of $5,000 or more; and (2) she was sentenced to incarceration.

Petitioner timely requested a hearing by letter dated January 15, 2010. The request for hearing was docketed and assigned to Administrative Law Judge (ALJ) Alfonso Montano for hearing and decision on February 22, 2010. On June 24, 2010, the I.G. filed a motion for judgment on the written record and a supporting brief (I.G. Brief) with I.G. exhibits (I.G. Exs.) 1 through 3. On July 21, 2010, Petitioner moved for an order overturning the I.G. exclusion action or, in the alternative, for a reduction of the period of exclusion to five years on grounds that the I.G. violated an order of Judge Montano. On August 5, 2010, the I.G. filed a brief in opposition to Petitioner's motion to dismiss with I.G. Exs. 4 and 5.

On July 27, 2010, this matter was reassigned to me upon ALJ Montano's transfer to another agency. On September 10, 2010, I issued an order denying Petitioner's motion and resetting the briefing schedule. Petitioner filed her brief in opposition to the I.G.'s motion for judgment (P. Brief) on November 18, 2010. Petitioner did not file any exhibits with her brief. The I.G. filed a reply brief (I.G. Reply) on December 6, 2010. No objection has been made to my consideration of I.G. Exs. 1 through 5, 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 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. Section 1128(a)(3) requires that the Secretary exclude any individual convicted 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. The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(a), (c).

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).

B. Issues

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

> Whether there is a basis for exclusion; and
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> 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. Summary judgment is appropriate in this case.

I construe the I.G.'s motion for judgment on the written record to be a motion for summary judgment. I conclude that summary judgment is appropriate in this case.

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction. 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 right to hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. § 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified by 42 C.F.R.

§ 1005.3. 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 and no hearing is required where either: there are no disputed issues of material fact and the only questions that must be decided involve application of 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. *See, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. and Med. Ctr.*, DAB No. 1628, at 3 (1997) (in-person hearing required where non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also New Millennium CMHC*, DAB CR672 (2000); *New Life Plus Ctr.*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case regarding the existence of a basis for the exclusion of Petitioner. Petitioner concedes that there is a basis for her exclusion pursuant to section 1128(a)(1) and (3) of the Act. Petitioner requests that the duration of her exclusion be reduced to five years. P. Brief at 2. There are no genuine disputes as to the material facts underlying the aggravating factors cited by the I.G. in support of extending the period of exclusion to twenty years. As grounds for reducing her period of exclusion to five years, Petitioner urges me to consider mitigating factors that I am not authorized to consider by 42 C.F.R. § 1001.102(c). Accordingly, the issue of whether an exclusion of 20 years is unreasonable must be resolved against Petitioner as a matter of law and summary judgment is appropriate.

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

4. Petitioner's exclusion is required by section 1128(a)(3) of the Act.

Petitioner does not dispute that she was found guilty, contrary to her plea, in the United States District Court, Western District of North Carolina, of: one count of conspiracy to defraud Medicare and private health insurers; nine counts of aiding and abetting fraud against Medicare and private health insurers; one count of conspiracy to commit money laundering; and seven counts of aiding and abetting money laundering, all in violation of federal law. I.G. Ex. 3, at 1. Petitioner does not dispute that she was sentenced to sixty-three months of confinement for each count on which she was convicted, to be served concurrently; to pay restitution of $1,208,256.53, including $1,192,982.30, to the U.S. Department of Health and Human Services; and to forfeit certain property. Petitioner

does not and cannot[2] dispute before me the facts underlying her conviction as set forth in the First Superseding Bill of Indictment filed May 3, 2007. The gist of the charges is that Petitioner and others conspired to and defrauded Medicare and private pay insurers by using false prescriptions and billing for and obtaining reimbursement for motorized wheelchairs that were not required or delivered. I.G. Ex. 2.

The I.G. cites sections 1128(a)(1) and (3) 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)):
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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 of an offense which occurred after [August 21, 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 [section 1128(a)(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.

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[2] When exclusion is based upon a criminal conviction in federal, state, or local court, the person or entity excluded may not collaterally attack the conviction on procedural or substantive grounds, and I may not review the basis for the conviction. 42 C.F.R. § 1001.2007(d).

Petitioner concedes that there is a basis for her exclusion pursuant to section 1128(a)(1) and (3) of the Act.[3] P. Brief at 1. The evidence shows that the elements necessary for exclusion under both provisions are satisfied in this case. Petitioner was convicted by a federal court. Petitioner was convicted of offenses that occurred after August 21, 1996. The conduct for which Petitioner was convicted related to the delivery of or failure to deliver items to Medicare (Title XVIII of the Act) eligible beneficiaries. Petitioner was convicted of felony offenses related to health care fraud.[4]

Accordingly, I conclude that there is a basis to exclude Petitioner pursuant to section 1128(a)(1) and (3) of the Act.

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

6. Aggravating factors exist that justify extending the period of exclusion to twenty years.

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

8. Exclusion for twenty years is not unreasonable in this case.

Petitioner challenges the length of her exclusion stating that it is unreasonable. 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

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[3] Petitioner states that she is currently seeking judicial review of her conviction and the ordered restitution. If Petitioner prevails on appeal, she may seek reinstatement pursuant to 42 C.F.R. § 1001.3005.

[4] Petitioner asserts she was not a provider under the federal health care program and that her role was merely that of a signatory on a business bank account and an owner of a wholesale distribution company. P. Brief at 2. Her assertion does not impact my decision. Section 1128(a) does not require that she be a provider or supplier participating in a federal health care program for her to be excluded or barred from future participation for a period of years or permanently. To the extent Petitioner suggests by her assertion that I should review the facts underlying her conviction, I may not do so as such review is specifically prohibited in this forum. 42 C.F.R. § 1001.2007(d).

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) Petitioner was sentenced to a period of incarceration. 42 C.F.R. § 1001.102(b)(1), (b)(5). I agree that the evidence shows that both aggravating factors are present in this case. The evidence shows that Petitioner participated in a criminal scheme and committed criminal acts that resulted in financial losses to government health care programs and to private insurance companies in the amount of $1,208,256.53. Petitioner was ordered as part of her sentence to pay restitution in the amount of $1,208,256.53 to the government and the insurers. I.G. Ex. 2; I.G. Ex. 3, at 4, 6. The evidence also shows that Petitioner was sentenced to serve sixty-three months of confinement. I.G. Ex. 3, at 2-3. Petitioner does not deny the terms of her sentence.

Petitioner argues that the I.G. should not be permitted to consider the amount of loss or the fact she was sentenced to incarceration. P. Br. at 2. This argument is without merit. The Act requires a five-year minimum exclusion for exclusions pursuant to section 1128(a) of the Act. 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(a), (b). The list of aggravating factors authorized includes both financial loss of $5,000 or more to a government program or private insurers; and a sentence to incarceration. 42 C.F.R. § 1001.102(b)(1), (b)(5). In this case, both aggravating factors were present, and the I.G. was authorized by the Secretary[5] to rely upon these factors as a basis for extending Petitioner's exclusion by fifteen 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):

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[5] If it is Petitioner's intent is to challenge the lawfulness of the Secretary's regulations, such a challenge is not within my jurisdiction.

> (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 twenty-year exclusion is unreasonable because it is: too long; unjustified; unreasonable; and inappropriate. Petitioner argues that she will face the stigma of being a convicted felon who was in prison; and that at the time of the offense she was young and made bad choices. She argues that she did not intend to defraud, abuse, or victimize anyone or any program. Petitioner argues that a period of exclusion greater than five years is unreasonable because it is a second punishment for her criminal acts. Finally, Petitioner argues that she does not pose a future threat to any program and proposes that she volunteer to teach others about prevention of program fraud and abuse. Request for Hearing; P. Brief at 1-3. Petitioner did not present evidence to show the existence of any authorized mitigating factor. Petitioner does not argue that an authorized mitigating factor exists. Therefore, I conclude that there is no mitigating factor upon which I may rely to shorten Petitioner's period of exclusion. Petitioner's argument that the exclusion for twenty years amounts to a "second punishment" (P. Brief at 2) deserves additional comment. I.G. exclusions pursuant to section 1128 of the Act are civil sanctions designed to protect the beneficiaries of health care programs and are remedial in nature. Exclusions by the I.G. thus do not trigger the constitutional protections related to criminal sanctions, *e.g*. double jeopardy, since they are primarily remedial and not punitive. *Manocchio v. Kusserow*, 961 F.2d 1539, 1542-43 (11th Cir.

1992); *cf. Patel v. Thompson,* 319 F.3d 1317 (11th Cir. 2003), *cert. denied*, 539 U.S. 959 (2003) (no *ex post facto* problem because remedial not punitive).[6]

Petitioner argues, based upon a decision of the Departmental Appeals Board (the Board) in *Joann Fletcher Cash*, DAB No. 1725 (2000), that I may determine a different exclusion period than the I.G. and that I should do so in her case. P. Brief at 2. But, my discretion is much more limited than Petitioner suggests. Appellate panels of 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. *Cash*, DAB No. 1725, n.6 (2000).[7] 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.

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[6] The exclusion remedy serves twin congressional purposes: the protection of federal funds and program beneficiaries from untrustworthy individuals and the deterrence of health care fraud. S. Rep. No. 109, 100th Cong., 1st Sess. 1-2 (1987), reprinted in 1987 U.S.C.C.A.N. 682, 686 ('clear and strong deterrent'); *Joann Fletcher Cash*, DAB No. 1725, at 18 (2000) (discussing trustworthiness and deterrence). When Congress added section 1128(a)(3) in 1996, it again focused upon the desired deterrent effect: 'greater deterrence was needed to protect the Medicare program from providers who have been convicted of health care fraud felonies . . . .' H.R. Rep. 496(I), 104th Cong., 2nd Sess. (1996), reprinted in 1996 U.S.C.C.A.N. 1865, 1886.

[7] 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.

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 twenty 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 twenty years, effective January 20, 2010.

/s/
Keith W. Sickendick
Administrative Law Judge