

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Henry McCloyn
(OI File No. H-13-4-2457-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-878

Decision No. CR3550

Date: January 6, 2015

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Henry McCloyn, for eight years 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. Petitioner sought review of the exclusion. For the reasons stated below, I conclude that the IG has a basis for excluding Petitioner because Petitioner was convicted of a felony offense related to the unlawful distribution of a controlled substance as defined under state law. Further, I affirm the length of the exclusion because the IG proved that two aggravating factors exist to justify the eight-year exclusion. Finally, the March 20, 2014 exclusion effective date is governed by regulation and I have no authority to alter that date.

I. Background

By letter dated February 28, 2014, the IG notified Petitioner that he was being excluded from Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(4) for a period of eight years. IG Exhibit (Ex.) 1 at 1-2. The IG advised

Petitioner that the exclusion was based on his felony conviction “in United States District Court, District of Utah, of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance as defined under Federal or State law.” IG Ex. 1 at 1. Further, the IG imposed a length of exclusion in excess of the five-year statutory minimum because “[t]he court sentenced [Petitioner] to 34 months of incarceration . . .” and because “[Petitioner] surrendered [his] clinical social worker license to the Utah Division of Occupational and Professional Licensing.” IG Ex. 1 at 1-2.

Petitioner timely filed a request for hearing. I was assigned to hear and decide this case. On June 11, 2014, I convened a prehearing conference by telephone, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order) of the same date. *See* 42 C.F.R. § 1005.6. Pursuant to the Order, the IG submitted a brief (IG Br.) together with five exhibits (IG Exs. 1-5), Petitioner submitted a response brief (P. Br.), and the IG submitted a reply brief.

II. Decision on the Record

Petitioner did not object to any of the IG’s proposed exhibits. Therefore, I admit IG Exs. 1-5 into the record. Order ¶ 5. Petitioner did not submit any proposed exhibits.

The decision in this case will be based on the written record. *See* Order ¶ 6. I ordered the parties to complete and submit short form briefs. The IG filed a completed short form brief and indicated that he did not believe an in-person hearing was necessary and that he did not have any testimony to offer at a hearing. IG Br. at 5. Petitioner only completed one page of the short form brief. In his submission, he did not indicate that an in-person hearing was necessary or that he had testimony to offer. I previously informed Petitioner that he had the right to request a video hearing and that the request must explain why a video hearing is necessary. Order ¶ 4. Petitioner did not request a video hearing or explain why a video hearing was needed. Therefore, I issue this decision based on the written record.

III. Issue

The issues in this case are limited to determining if there is 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).

IV. Jurisdiction

I have jurisdiction to adjudicate this case. 42 U.S.C. § 1320a-7(f)(1); 42 C.F.R. § 1005.2.

V. Findings of Fact, Conclusions of Law, and Analysis¹

A. *The IG proved each of the required elements under 42 U.S.C. § 1320a-7(a)(4); therefore, there is a basis to exclude Petitioner.*

The IG cites 42 U.S.C. § 1320a-7(a)(4) as the basis for Petitioner's mandatory exclusion. IG Ex. 1. 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 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.

Thus, the elements the IG must prove to sustain Petitioner's exclusion pursuant to section 1320a-7(a)(4) in this case are: (1) Petitioner was convicted of a criminal offense consisting of a felony which occurred after August 21, 1996, and (2) Petitioner's offense was related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

1. Petitioner pled guilty in the U.S. District Court, District of Utah, to Distribution of Oxycodone, a felony violation under 21 U.S.C. § 841(a)(1), and the federal court entered a Judgment in Criminal Case.

On July 20, 2011, a grand jury of the United States District Court, District of Utah, Central Division, indicted Petitioner on nine counts of criminal conduct.² IG Ex. 4.

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

² The Indictment included a total of ten counts and involved both Petitioner and a co-defendant. However, Count Nine of the Indictment was only related to Petitioner's co-

Count Two of the Indictment states that, on or about March 14, 2011, Petitioner, “did knowingly and intentionally distribute oxycodone, a schedule II controlled substance within the meaning of 21 U.S.C. § 812, in violation of 21 U.S.C. § 841(a)(1) and punishable pursuant to 21 U.S.C. § 841(b)(1)(C).” IG Ex. 4 at 2. On April 22, 2012, Petitioner pled guilty to Count Two of the Indictment. IG Ex. 2. Petitioner stipulated to the facts describing his criminal conduct: between December 2010 and March 2011, Petitioner sold oxycodone to an individual who later became an informant for the police; thereafter, on four occasions, Petitioner sold 533 oxycodone 30 mg tablets to an undercover federal agent. IG Ex. 2 at 5. On July 16, 2012, the District Court entered a Judgment in Criminal Case in which it: accepted Petitioner’s guilty plea to Count Two of the Indictment; adjudicated defendant guilty of “Distribution of Oxycodone” under 21 U.S.C. § 841(a)(1); and dismissed the other counts in the Indictment related to Petitioner. IG Ex. 3 at 1. The District Court sentenced Petitioner to a 45-month term of imprisonment. IG Ex. 3 at 2. Subsequently, on March 7, 2013, the District Court issued an Amended Judgment in Criminal Case in which the District Court reduced Petitioner’s term of imprisonment to 34 months. IG Ex. 3 at 8.

2. Petitioner must be excluded under 42 U.S.C. § 1320a-7(a)(4) because he was convicted of a felony criminal offense related to the unlawful distribution of a controlled substance.

The IG must exclude an individual from participation in all federal health care programs if the individual has been convicted of a criminal offense consisting of a felony that occurred after August 21, 1996, and which related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. 42 U.S.C. § 1320a-7(a)(4).

An individual is “convicted” of a criminal offense “when a judgment of conviction has been entered against the individual . . . by a Federal, State, or local court . . .” *Id.* § 1320a-7(i)(1). Further, an individual is also “convicted” of a criminal offense when “a plea of guilty . . . by the individual . . . has been accepted by a Federal, State, or local court.” *Id.* § 1320a-7(i)(3). As previously discussed, Petitioner pled guilty to a criminal offense, and the District Court accepted his plea and issued a judgment of conviction. IG Exs. 2-3. Further, Petitioner concedes he was convicted of a felony. P. Br. at 1. Accordingly, for purposes of exclusion, Petitioner was “convicted” of a criminal offense.

Count Two of the Indictment, to which Petitioner pled guilty, states that the criminal conduct occurred “on or about March 14, 2011.” IG Ex. 4 at 2. Further, Petitioner stipulated that the conduct occurred “between December 2010 and March 2011” and concedes that he was convicted a felony occurring after August 21, 1996. IG Ex. 2 at 5;

defendant. The remaining counts were brought against either both defendants or Petitioner only.

P. Br. at 1. Therefore, Petitioner was convicted of an offense that occurred after August 21, 1996.

Petitioner's conviction constituted a felony offense. Petitioner was convicted of violating 21 U.S.C. § 841(a)(1), punishable pursuant to 21 U.S.C. § 841(b)(1)(C). IG Ex. 4 at 2. Any offense that is not specifically classified in the section defining it is classified as a class C felony, if the maximum term of imprisonment authorized is less than twenty-five years but ten or more years. 18 U.S.C. § 3559(a)(3). Although 21 U.S.C. § 841(a)(1) is not specifically classified as a felony, section 841(b)(1)(C) states that the maximum term of imprisonment is 20 years. Therefore, Petitioner's conviction of violating 21 U.S.C. § 841(a)(1) constitutes a felony conviction for purposes of exclusion.

Finally, Petitioner's conviction was related to the unlawful distribution of a controlled substance. As previously noted, Petitioner pled guilty that he "did knowingly and intentionally distribute oxycodone, a schedule II controlled substance within the meaning of 21 U.S.C. § 812, in violation of 21 U.S.C. § 841(a)(1)" IG Ex. 4 at 2. The statute at 21 U.S.C. § 812 delineates schedules of controlled substances, and ascribes oxycodone as a schedule II controlled substance. Petitioner stipulated that he knowingly unlawfully sold oxycodone. The statute, Petitioner's stipulations during his guilty plea, and the District Court's Judgment of Criminal Conviction make it clear that Petitioner unlawfully distributed oxycodone, a controlled substance. Therefore, I conclude that each element under 42 U.S.C. § 1320a-7(a)(4) is satisfied and that Petitioner must be excluded.

B. The presence of two aggravating factors and the absence of any mitigating factors justify excluding Petitioner for a period of eight years.

Because I have concluded that a basis exists to exclude Petitioner pursuant to 42 U.S.C. § 1320a-7(a)(4), Petitioner must be excluded for a minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B). While the IG must impose the five-year minimum mandatory term of exclusion, the IG is authorized to lengthen that term if certain aggravating factors exist. *See* 42 C.F.R. § 1001.102. Those aggravating factors are detailed at 42 C.F.R. § 1001.102(b)(1)-(9). The IG added three years to Petitioner's exclusion based on the presence of two aggravating factors: 42 C.F.R. § 1001.102(b)(5) (the sentence imposed by the court in this case included incarceration) and (b)(9) (an adverse action taken by a State board, based on the same circumstances that serve as the basis for imposing the exclusion.) I must uphold the IG's determination as to the length of exclusion so long as it is not unreasonable. 42 C.F.R. § 1001.2007(a)(1)(ii).

1. The U.S. District Court, District of Utah, sentenced Petitioner to 34 months of incarceration.

I conclude that an enlargement of Petitioner's exclusion is not unreasonable given the presence of the aggravating factor that Petitioner's sentence included incarceration.

42 C.F.R. § 1001.102(b)(5). The District Court sentenced Petitioner to 34 months of imprisonment. IG Ex. 3 at 8. A prison sentence of as little as nine months is considered to be relatively substantial for exclusion purposes. *Jason Hollady, M.D.*, DAB No. 1855, at 12 (2002). Petitioner's sentence is almost four times longer than that and represents a substantial period of time, which indicates the seriousness of his offense. This length of imprisonment is probably sufficient, by itself, to justify the 8-year exclusion.

2. The Utah Department of Commerce, Division of Occupational Licensing, entered a disciplinary order accepting Petitioner's surrender of all residual and reinstatement rights to his expired license to practice as a licensed clinical social worker.

I conclude that an enlargement of Petitioner's exclusion is not unreasonable given the presence of the aggravating factor that Petitioner stipulated to the surrender of his residual and reinstatement rights to his Utah license to practice as a licensed clinical social worker and the Utah Department of Commerce, Division of Occupational Licensing (Utah Division of Occupational Licensing), entered a disciplinary order accepting that stipulation. 42 C.F.R. § 1001.102(b)(9).

Petitioner was licensed to practice in Utah as a licensed clinical social worker in January 2008, and his license expired on or about September 30, 2012. CMS Ex. 5 at 2. However, it appears that at some time following his criminal conviction, the Utah Division of Occupational Licensing issued a Notice of Agency Action. *See* CMS Ex. 5 at 2-3. Although Petitioner's Utah license expired on or about September 30, 2012, Petitioner stipulated that the Utah Division of Occupational Licensing had jurisdiction over him and the subject matter of the action that had been commenced. CMS Ex. 5 at 1. Respondent stipulated to the same set of facts in his criminal case (i.e., Petitioner illegally sold over 500 tablets of oxycodone and pled guilty to Count Two of the Indictment) and that his conduct constituted "unprofessional conduct" under Utah law justifying disciplinary action. CMS Ex. 5 at 3. Petitioner stipulated to the surrender of all residual and reinstatement rights pertaining to his expired license as a licensed clinical social worker in Utah and agreed not to reapply for licensure for four years. IG Ex. 5 at 3. The Utah Division of Occupational Licensing issued an order on February 13, 2013, in which it approved Petitioner's stipulations. CMS Ex. 5 at 6. That order is considered a disciplinary action under Utah law. CMS Ex. 5 at 6.

Based on these facts, I conclude that the IG proved that Petitioner was subject to an adverse action by a state agency that was based on the same set of circumstances that formed the basis for the IG's exclusion. 42 C.F.R. § 1001.102(b)(9). Accordingly, the presence of this additional aggravating factor further justifies Petitioner's exclusion for an extended period of eight years.

3. *Petitioner did not prove the existence of any mitigating factors that would justify a reduction in the length of exclusion imposed by the IG.*

In his brief, Petitioner details his career path and dedication to the field of social work, and explains that he dedicated his professional life to providing social and mental health services, often for underserved populations. P. Br. at 1-4. Petitioner asserts that I ought to use my discretion to reduce the length of exclusion to five years because: Petitioner's crime did not relate to the services he provided to his clients; his professional competence, professional performance, and financial integrity are not in question; obtaining employment in the field of social services is the best way for Petitioner to return to being a productive citizen; and Utah will permit Petitioner to reapply for his for his license as a licensed clinical social worker in 2017. P. Br. at 4-5.

I am unable to reduce the length of exclusion in this case. Under the regulations, I may reduce the length of exclusion to no less than five years if one or more mitigating factors are present; however, I may only reduce the length of exclusion based on the mitigating factors specified in the regulations. 42 C.F.R. § 1001.102(c). While Petitioner's career path, as expressed in his brief, is laudable, Petitioner does not present any mitigating factors cognizable under the regulations. 42 C.F.R. § 1001.102(c) (1) – (3). I have limited discretion to reduce the length of exclusion. *See* 57 Fed. Reg. 3,298, 3,321 (Jan. 29, 1992). Therefore, I must uphold the IG's eight-year exclusion because it is not unreasonable under the regulations.

C. The effective date of exclusion is March 20, 2014, and I have no authority to modify that effective date.

Petitioner requests that the effective date of exclusion be retroactively commenced to the date of his conviction "and not at the time of [this] decision." P. Br at 4.

Exclusions are effective 20 days after the date of the notice. 42 C.F.R. § 1001.2002(b); *see also* 42 U.S.C. § 1320a-7(c)(1). When an exclusion is effective before a decision is issued by an administrative law judge, as it is in this case, that exclusion is "deemed to commence on the date such exclusion originally went into effect." 42 C.F.R. § 1005.20(b).

In the present matter, the IG issued the exclusion notice on February 28, 2014. IG Ex. 1 at 1. Therefore, Petitioner's exclusion commenced 20 days later on March 20, 2014. I have no authority to change the effective date. *See* 42 C.F.R. § 1005.4(c)(1).

