

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jay Shankar Jha
(O.I. File No. 5-06-40629-9),

Petitioner

v.

The Inspector General
Department of Health and Human Services.

Docket No. C-11-732

Decision No. CR2495

Date: January 27, 2012

DECISION

Petitioner, Jay Shankar Jha, is excluded from participating in Medicare, Medicaid, and all 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, 2011, based upon his conviction of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. There is a proper basis for exclusion. 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 eight years, for a total minimum period of exclusion of thirteen years,¹ is not unreasonable based upon the four aggravating factors established in this case and the presence of one mitigating factor.

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 for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated June 30, 2011, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of thirteen years. The I.G. advised Petitioner that he was being excluded pursuant to section 1128(a)(1) of the Act based on his conviction in the United States District Court, Eastern District of Michigan, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. The I.G. considered four aggravating factors and one mitigating factor when deciding to extend the five-year statutory period of exclusion to thirteen years. I.G. Exhibit (I.G. Ex.) 1.

Petitioner timely requested a hearing by letter dated August 23, 2011 (RFH). The case was assigned to me for hearing and decision on August 30, 2011. A prehearing telephone conference was convened on September 14, 2011, the substance of which is memorialized in my order dated September 15, 2011. During the prehearing conference, Petitioner waived an oral hearing and agreed to proceed upon the documentary evidence and the parties' briefs. On October 31, 2011, the I.G. filed an opening brief, with I.G. Exhibits (I.G. Exs.) 1 through 7. Petitioner filed a brief in opposition (P. Br.) on December 12, 2011, with Petitioner's Exhibits (P. Exs.) 1 through 3. The I.G. filed a reply brief on December 27, 2011. No objections have been made to any of the offered exhibits. I.G. Exs. 1 through 7 and Petitioner's Exs. 1 through 3 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) of the Act 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 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

Whether the length of the exclusion 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.

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction.

a. Facts

Petitioner does not deny that, on June 4, 2010, he was convicted, pursuant to his guilty plea, by the United States District Court, Eastern District of Michigan, of one count of conspiracy to commit health care fraud in violation of 18 U.S.C. § 1349. RFH; P. Br. at 2; I.G. Ex. 2, at 1. Petitioner admitted as part of his plea agreement that, beginning approximately February 2003 and continuing through approximately December 2005, he willfully conspired with others to commit health care fraud, in violation of federal law. Petitioner admitted in his plea agreement that he engaged in a scheme whereby Medicare beneficiaries' identification numbers were used to submit claims for reimbursement for physical and occupational therapy services to Medicare, when in fact no such services had taken place. Petitioner admitted that, in the course of the scheme, he signed approximately 336 fictitious physical therapy files that indicated that he had provided physical therapy services to Medicare beneficiaries when in fact he had not. Petitioner also admitted that he and the other individuals submitted claims to the Medicare program totaling approximately \$1,680,000 for services reflected in files that were falsified by

Petitioner and others and that they obtained \$772,800 from Medicare on those claims. I.G. Ex. 3, at 2-4. Petitioner agreed to forfeit to the United States the sum of \$772,800, which represented the amount of proceeds derived from his criminal conduct as set out in the Indictment. I.G. Ex. 3, at 6. Petitioner was sentenced to: 27 months incarceration, followed by 2 years of supervised release; pay a special assessment of \$100; and pay restitution of \$772,800 to the Medicare Trust Fund. I.G. Ex. 2, at 2, 3, 5.

b. Analysis

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.

The statute requires that the Secretary exclude from participation 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.

Petitioner does not dispute that he was convicted within the meaning of section 1128(i) of the Act (42 U.S.C. 1320a-7(i)), when the district court accepted his guilty plea to one count of conspiracy to commit health care fraud in violation of federal law. RFH; P. Br. at 7; I.G. Ex. 2. Pursuant to section 1128(i) of the Act, an individual is "convicted" of a criminal offense when: a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; or there has been a finding of guilt in a federal, state, or local court; or a plea of guilty or no contest has been accepted in a federal, state, or local court; or an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld.

Petitioner also does not dispute that his criminal conduct was related to the delivery of an item or service under Medicare or Medicaid. Petitioner also does not dispute that, due to his conviction, there is a basis for his exclusion pursuant to section 1128(a)(1) of the Act. RFH; P. Br. at 7-8. Accordingly, I conclude that there is a basis for Petitioner's exclusion, which is mandatory under 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.**
- 5. The I.G. identified and considered one mitigating factor.**
- 6. Exclusion for thirteen years is not unreasonable in this case.**

Petitioner does not dispute that he is subject to the mandatory minimum period of exclusion of five years pursuant to section 1128(c)(3)(B) of the Act. RFH; P. Br. at 7. Petitioner argues, however, that: he was a “minor player” in the scheme; his involvement lasted less than three years; his criminal sentence will be a sufficient deterrent to engaging in future offenses against Medicare or state health care programs; an exclusion of thirteen years is “grossly excessive under the circumstances;” and the I.G. gave “excessive weight” to the aggravating factors and “failed to give appropriate weight” to the mitigating factor of his cooperation with government officials. RFH; P. Br. at 8-11. Petitioner requests that I reduce the period of exclusion from thirteen years to five years. P. Br. at 1, 12.

My determination of whether the exclusionary period 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.

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

The statute mandates a five-year minimum exclusion. Act § 1128(c)(3)(B). The I.G. notified Petitioner that four 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, a financial loss to a government program or other entities, and the loss was \$5,000 or more as evidenced by the order to pay restitution in the amount of \$772,800; (2) the acts that resulted in Petitioner’s conviction occurred over a period of one year or more, as Petitioner agreed his criminal conduct occurred from about February 2003 to about December 2005; (3) the sentence imposed by the court included incarceration of 27 months; and (4) Petitioner was convicted of other offenses besides those which formed the basis of the exclusion or has been the subject of an adverse action by a federal, state, or local government agency or board, and the adverse action is based on the same set of circumstances that served as the basis for the imposition of the exclusion. I.G. Ex. 1. The evidence before me shows that all four aggravating factors are present in this case.

Petitioner admitted in his plea agreement that he and other individuals participated in a criminal scheme to defraud Medicare and obtained \$772,800 from Medicare that they were not authorized to receive. I.G. Ex. 3, at 2-4. Petitioner agreed to forfeit to the United States the sum of \$772,800, which represented the amount of proceeds derived from his criminal conduct. I.G. Ex. 3, at 6. Petitioner was ordered as part of his sentence to pay restitution of \$772,800 to the Medicare Trust Fund. I.G. Ex. 2, at 5; P. Br. at 7. There can be no question that, based on the amount of restitution, it can be inferred that the actual or intended loss to Medicare as a result of Petitioner's criminal acts exceeded \$5,000. The Departmental Appeals Board (Board) has long considered restitution to be a reasonable measure of program losses. *Jason Hollady, M.D.*, DAB No. 1855 (2002). Indeed, the Board has characterized restitution in an amount substantially greater than the \$5,000 threshold to be an "exceptional[ly] aggravating factor" that is entitled to significant weight. *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003). Petitioner himself does not deny that the aggravating factor at 42 C.F.R. § 1001.102(b)(1) is clearly established.

Petitioner does not deny that he admitted in his plea agreement that his criminal conduct occurred from approximately February 2003 to December 2005, a period of more than one year. I.G. Ex. 3, at 2-4. Accordingly, Petitioner's criminal acts occurred over a period of one year or more, and the second aggravating factor is established. 42 C.F.R. § 1001.102(b)(2).

Petitioner also does not dispute that he was sentenced consistent with his plea agreement to 27 months incarceration, which reflected a reduction based on his cooperation in the prosecution of others. P. Br. at 3; I.G. Ex. 2, at 2. I conclude the third aggravating factor cited by the I.G. is established. 42 C.F.R. § 1001.102(b)(5).

Petitioner does not deny that his license to practice physical therapy was suspended by the State of Michigan. RFH; P. Br. at 6; P. Ex. 3; I.G. Ex. 6. Following his conviction, on August 5, 2010, the Michigan Board of Physical Therapy (Michigan Board), by Order of Summary Suspension, suspended Petitioner's physical therapist license. I.G. Ex. 6. The suspension was based on Petitioner's conviction for conspiracy to commit health care fraud. I.G. Ex. 6. On April 19, 2011, the Michigan Board entered a Consent Order whereby it dissolved the earlier Order of Summary Suspension and suspended Petitioner's physical therapist license for a minimum period of one year. P. Ex. 3. Petitioner's license suspension is an "adverse action" that was clearly based on the facts that gave rise to his conviction for health care fraud conspiracy. Thus, I find that the fourth aggravating factor has been established. 42 C.F.R. §1001.102(b)(9).

Accordingly, I conclude that the four aggravating factors considered by the I.G. are undisputed and are established by the evidence. The I.G. was authorized by the Secretary to rely upon these factors as grounds for extending the duration of Petitioner's exclusion.

b. The I.G. identified and considered one mitigating factor.

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 that was not considered by the I.G. 42 C.F.R. § 1005.15(b)(1).

The I.G. considered as a mitigating factor that Petitioner cooperated with federal authorities. I.G. Ex. 1, at 2. Petitioner does not dispute that the mitigating factor was considered by the I.G. P. Br. at 8; I.G. Ex. 1; I.G. Ex. 5. Petitioner argues that the I.G. failed to give significant weight to the fact that Petitioner withdrew from the conspiracy and cooperated significantly with the federal authorities. RFH; P. Br. at 8. The evidence shows that Petitioner ended his participation in the scheme in December 2005, well before the government began its investigation in 2007. P. Br. at 6; P. Ex. 2, at 12. Petitioner argues that his level of cooperation with the government was extremely extensive and helpful but the I.G. gave insufficient weight to this mitigating factor. Petitioner argues that the I.G. attaches too much weight to his license suspension by the Michigan Board and to his twenty-seven month term of incarceration. P. Br. at 10-11.

I conclude, based upon consideration of Petitioner's arguments and all the evidence, that Petitioner has not identified a mitigating factor that the I.G. failed to consider. The Board has 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 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).² 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, based on de novo review, I have concluded that a basis for exclusion exists, and that the evidence establishes the four aggravating factors and one mitigating factor that the I.G. relied on to impose the thirteen-year exclusion. I may not substitute my judgment of the weight to be accorded the mitigating factor for the I.G.'s judgment. Based upon my review, I conclude that a thirteen-year period of exclusion falls within a reasonable range and is not unreasonable given the severity of the aggravating factors and given the mitigating factor. Accordingly, no basis exists for me to reassess the period of exclusion.

² 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.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of thirteen years, effective July 20, 2011.

/s/

Keith W. Sickendick
Administrative Law Judge