

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Paul C. Osuji,

Petitioner

v.

The Inspector General.

Docket No. C-09-693

Decision No. CR2146

Date: June 09, 2010

DECISION

Petitioner, Paul C. Osuji, 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), effective August 20, 2009. A separate basis also exists for the Inspector General for the Department of Health and Human Services (I.G.) to exclude Petitioner under section 1128(a)(3) of the Act. Petitioner's exclusion for five years is mandatory pursuant to section 1128(c)(3)(B) of the Act. An additional period of exclusion of 25 years, for a total minimum period of exclusion for 30 years, is not unreasonable based upon the two aggravating factors established in this case and the absence of any mitigating factors.

I. Background

The I.G. notified Petitioner by letter dated July 31, 2009, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs¹ for a

¹ Section 1128B(f) of the Act defines "federal health care program" as any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which the United States Government, or any State health care program funds directly, in whole or in part.

period of 30 years pursuant to sections 1128(a)(1) and 1128(a)(3) of the Act. I.G. Ex. 1 at 1. The notice letter explained to Petitioner that section 1128(a)(1) authorizes exclusion for criminal convictions related to the delivery of an item or service under the Medicare and Medicaid programs, while section 1128(a)(3) authorizes exclusion for felony convictions related to fraud in connection with the delivery of a health care item or service. The I.G. further notified Petitioner that his 30-year exclusion was based on the presence of two aggravating factors: (1) the loss to a government program of \$5,000 or more; and (2) the court imposed sentence included incarceration for 211 months.

Petitioner timely requested a hearing by letter dated August 25, 2009. The case was assigned to me on September 8, 2009 for hearing, related proceedings, and a decision. A telephone prehearing conference with the parties was held on November 25, 2009. At that time, I informed Petitioner that he had a right to be represented by legal counsel in these proceedings. While Petitioner acknowledged that he understood this right, Petitioner indicated that he would represent himself in this matter. The parties agreed that no factual issues were in dispute and that the case could be resolved based on written submissions without an in-person hearing. Summary of Prehearing Conference and Order (December 1, 2009). Both parties submitted written arguments,² and the I.G. filed three exhibits (I.G. Exs. 1-3). Petitioner has filed five exhibits (P. Exs. 1-5)³. In the absence of any objections, I receive into evidence I.G. Exs. 1-3 and P. Exs. 1-5.

II. Issues:

- a. Whether the I.G. has a basis, pursuant to section 1128(a)(1) or section 1128(a)(3) of the Act, to exclude Petitioner from participation in Medicare, Medicaid and all other federal health care programs, and, if so,
- b. Whether a 30-year exclusion is unreasonable.

² The I.G. filed its brief on January 21, 2010 (I.G. Brief), and Petitioner filed his response brief on March 11, 2010 (P. Brief). Both parties filed reply briefs. The I.G. filed its Reply (I.G. Reply) on March 26, 2010, while the Petitioner filed its Reply (P. Reply) on April 4, 2010.

³ Petitioner attached five documents to his reply brief, which he did not mark or paginate in accordance with Civil Remedies Division (CRD) Procedures. A copy of the CRD Procedures was provided when his request for hearing was acknowledged. Because Petitioner apparently intended for me to consider the documents as evidence, I have marked (as P Exs. 1-5) and paginated the exhibits.

III. Applicable Law

Section 1128(a)(1) of the Act requires that the Secretary of Health and Human Services (Secretary) exclude an individual who has been convicted under federal or state law of a criminal offense relating to the delivery of an item or service under Medicare or a state health care program. Section 1128(a)(3) of the Act directs the Secretary to exclude an 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. *See* 42 C.F.R. § 1001.101. Federal regulations set forth criteria for determining the length of exclusions imposed pursuant to section 1128 of the Act. 42 C.F.R. § 1001.102. Individuals excluded under either section 1128(a)(1) or section 1128(a)(3) must be excluded for a period of not less than five years. Act § 1128(c)(3)(B). Factors set out at 42 C.F.R. § 1001.102(b) serve as a basis for lengthening the mandatory period of exclusion, and mitigating factors that serve to decrease the period of exclusion are found at 42 C.F.R. § 1001.102(c). Mitigating factors may be considered as a basis for reducing the period of exclusion to no less than five years only if aggravating factors justify an extension of the exclusion.

Section 1128(i) of the Act defines a “conviction” to include instances when: (1) a judgment of conviction has been entered against an individual by a federal, state, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged; (2) there has been a finding of guilt against the individual by a federal, state or local court; (3) a federal, state, or local court accepts a plea of guilty or nolo contendere; or (4) the individual has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld. 42 C.F.R. § 1001.2 repeats these definitions. The Secretary has delegated authority to impose exclusions to the I.G. 42 C.F.R. § 1001.401(a). As long as the period of exclusion is within a reasonable range and based on demonstrated criteria, an ALJ does not have authority to change it. *Joann Fletcher Cash*, DAB No. 1725 at 7 (2000) (citing 57 Fed. Reg. 3298, 3321 (1992)).

The Act provides that an exclusion pursuant to section 1128(a) “shall be effective at such time and upon such reasonable notice to the public and to the individual or entity excluded as may be specified by regulations” Act § 1128(c)(1). Congress granted the Secretary essentially unfettered discretion though section 1128(c)(1) to establish the effective date of exclusion by regulation. The regulation provides that an exclusion is effective 20 days from the date of the notice of exclusion. 42 C.F.R. § 1001.2002(b).

The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that is the basis of the exclusion. 42 C.F.R. § 1001.2007(c), (d). Petitioner bears the burden of proof 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).

IV. Findings and Discussion

The findings of fact and conclusions of law noted below, in italics and bold face, are followed by a discussion of each.

1. The I.G. has a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

Petitioner owned and operated Chimatex Imports, Inc. (Chimatex), a Medicare-authorized durable medical equipment (DME) supply company incorporated in North Carolina. Chimatex supplied and sold motorized wheelchairs and scooters to Medicare beneficiaries and individuals with private health insurance. In 2007, Petitioner was indicted for submitting false claims to Medicare and the private pay insurers (Aetna, Blue Cross and Blue Shield of Alabama, and Blue Cross and Blue Shield of Texas).

Specifically, it was alleged that Petitioner engaged in a scheme to defraud Medicare and private pay insurance companies by: (1) providing scooters, but up-coding claims to seek reimbursement for more expensive power wheelchairs; (2) obtaining prescriptions and Certificates of Medical Necessity from a physician not properly licensed and who did not examine the beneficiaries; and (3) submitting claims for items not rendered, or not medically necessary. I.G. Ex. 2 at 2-8.

Petitioner's scheme also included backdating of claims. Although Medicare revoked its supplier number in November 2003, Petitioner continued to submit false and fraudulent claims to Medicare through Chimatex for services allegedly provided after that date. Petitioner backdated claim forms, indicating that the service was provided prior to the date of revocation. I.G. Ex. 2 at 8. Petitioner sought reimbursement in excess of \$2 million from Medicare and the private pay insurers, and Petitioner actually received over \$1.2 million as reimbursement for claims filed. I.G. Ex. 2 at 1.

In May of 2007, Petitioner was charged with: one count of conspiracy to commit health care fraud in violation of 18 U.S.C. § 1349; nine counts of health care fraud in violation of 18 U.S.C. § 1347; one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h); and seven counts of money laundering in violation of 18 U.S.C. § 1956(a). I.G. Ex. 2 at 9-14. Petitioner was found guilty of all eighteen counts. I.G. Ex. 3 at 1-2. He was sentenced to 211 months incarceration and ordered to pay \$1,208,256.53 in restitution. I.G. Ex. 3 at 4-6.

The essential elements necessary to support an exclusion based on section 1128(a)(1) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; and (2) the criminal offense must have been related to the delivery of an item or service under title XVIII of the Act (Medicare) or any state health care program. *Tamara Brown*, DAB No. 2195 (2008); *Thelma Walley*, DAB No. 1367 (1992).

These two essential elements are conclusively established by the court records the I.G. has submitted as exhibits. Petitioner was convicted of: one count of “Conspiracy to Execute a Scheme or Artifice to Defraud U.S. Health Care Benefit Programs;” nine counts of “Aid and Abet to Defraud and Obtain Money under Custody and Control of Health Care Benefit Programs;” one count of “Conspiracy to Conduct Financial Transactions of Unlawful Activity Health Care Fraud;” and seven counts of “Aid and Abet to Conduct Financial Transactions Involving Proceeds of Health Care Fraud.” I.G. Ex. 2 at 9-13; I.G. Ex. 3 at 1. The record also includes the District Court’s judgment of Petitioner’s guilt on all 18 counts and conviction of the criminal offenses outlined in the Indictment. I.G. Ex. 3.

2. There is a separate basis for Petitioner’s exclusion pursuant to section 1128(a)(3) of the Act.

The four essential elements necessary to support an exclusion based on section 1128(a)(3) of the Act are: (1) the individual to be excluded must have been convicted of a felony offense; (2) the felony offense must have been based on conduct relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the felony offense must have been for conduct in connection with the delivery of a health care program operated by or financed in whole or in part by any federal, state, or local government agency; and (4) the offense must have occurred after August 21, 1996. *Andrew D. Goddard*, DAB No. 2032 (2006).

The evidence of Petitioner’s conviction of 18 felony charges is clear and undisputed. I.G. Ex. 3 demonstrates that on May 4, 2009, Petitioner was found guilty and convicted in the U.S. District Court for the Western District of North Carolina, and sentenced to 211 months of incarceration. Those events satisfy the definitions of “conviction” set out at sections 1128(i)(1), (i)(2), and (i)(3) of the Act. The first essential element is therefore met in this case.

Element two is established with Petitioner’s conviction for an offense involving fraud and other financial misconduct. Petitioner was found guilty of: one count of conspiracy to commit health care fraud; nine counts of health care fraud; one count of conspiracy to commit money laundering in relation to health care fraud; and seven counts of money laundering related to health care fraud. I.G. Ex. 2 at 9-14; I.G. Ex. 3 at 1-2. As the Indictment states and the criminal judgment establishes, Petitioner acted fraudulently when submitting false and fraudulent claims to Medicare. Therefore, the second essential element is met in this case.

The facts also establish the third essential element. In determining whether an offense is related to the delivery of a health care item or service, the Departmental Appeals Board (Board) has been consistent in its approach in considering whether a “common sense

connection” or “nexus” exists between the offense for which a petitioner is convicted and the delivery of a health care item or service. *Andrew D. Goddard*, DAB No. 2032; *Kenneth M. Behr*, DAB No. 1997 (2005); *Erik D. DeSimone, R.Ph.*, DAB No. 1932 (2004). Here, Petitioner was found guilty and convicted of submitting false and fraudulent claims to Medicare and to multiple private pay insurers. The offenses that Petitioner was convicted of were on their face health care fraud. I.G. Ex. 2 at 9-14; I.G. Ex. 3 at 1-2; *see* 18 U.S.C. §§ 1347, 1349, 1956(a), and 1956(h). Therefore, the third essential element has been established as Petitioner’s offenses were in connection with the delivery of an item or service under Medicare or other health care programs financed in whole or part by a federal, state, or local health care program.

The fourth essential element has likewise been established by the facts of this case. Through his conviction, Petitioner’s offenses occurred as charged, between April 2003 to February 2004, thus after August 21, 1996. I.G. Ex.2 at 1; I.G. Ex. 3 at 1.

Section 1128(a)(3) applies to felony convictions related to health care fraud “other than those specified in section 1128(a)(1).” Although the 18 felony offenses Petitioner was convicted of may be accurately described under either section 1128(a)(1) or section 1128(a)(3), the plain language of the Act clearly gives preference to section 1128(a)(1). Because the Act gives preference to section 1128(a)(1) and it is clear Petitioner’s offenses were related to the delivery of an item or service under Medicare, I find that section 1128(a)(1) directs Petitioner’s mandatory exclusion. However, as noted above, section 1128(a)(3) provides a separate basis for the I.G. to exclude Petitioner.

3. The minimum period of exclusion under section 1128(a) is five years, and an additional period of exclusion of 25 years, for a total period of exclusion of 30 years, is not unreasonable in this case based on the presence of two aggravating factors and no mitigating factors.

My determination of whether the exclusionary period in this case is unreasonable depends on whether: (1) the I.G. has shown the existence of aggravating factors; (2) Petitioner has shown there is a mitigating factor the I.G. failed to consider; and (3) the period of exclusion is within a reasonable range.

The I.G. relies on two aggravating factors set out at 42 C.F.R. § 1001.102(b)(1) and (b)(5) in seeking to increase the period of Petitioner’s exclusion beyond the mandatory minimum of five years to that of 30 years.

a. Petitioner’s criminal conduct resulted in a financial loss to a government program of \$5,000 or more.

The court records show that Petitioner’s misconduct, beginning approximately April 2003 through February 2004, resulted in his receiving reimbursement from both the

Medicare program and private pay insurers in excess of \$1.2 million that he was not entitled to.

Petitioner's actions resulted in a program financial loss well in excess of \$5,000. The court determined that Petitioner participated in a scheme to defraud Medicare and private pay insurers for over \$2 million and was required to pay restitution in the amount of \$1,208,256.53. Although Petitioner suggests otherwise,⁴ I am bound to accept the court's findings. *See* 42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725; *Chander Kachoria, R.Ph.*, DAB No. 1380 at 8 (1993). Here, the sentencing court made specific findings as to the dollar amount of losses sustained as a result of Petitioner's offenses, based on his conviction, and ordered Petitioner to make restitution accordingly. I.G. Ex. 3 at 6.

Petitioner presents several arguments that include the fact that: (1) the items and services billed to Medicare were rendered to Medicare beneficiaries; (2) he had ineffective counsel at trial, and the District Court failed to grant him new counsel; (3) he did not have the requisite intent to defraud; and (4) he did not engage in money laundering nor conspire to do so. *See generally* P. Brief and P. Reply. Unfortunately, however real Petitioner's problems were relative to his legal representation during the criminal proceedings, he does not raise any relevant arguments over which I have jurisdiction or authority. The regulations explicitly preclude my review of the facts underlying Petitioner's conviction. Further, the regulations prohibit Petitioner from collaterally attacking his criminal conviction in this proceeding. When the exclusion is based on the existence of a criminal conviction where the facts were adjudicated and a final decision was made, the basis for the underlying conviction is not reviewable in this forum. Therefore, Petitioner may not collaterally attack his conviction either on substantive or procedural grounds before me. 42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725; *Paul R. Scollo, D.P.M.*, DAB No. 1498 (1994).

b. Petitioner was sentenced to incarceration for a period of 211 months.

The I.G. argues that an aggravating factor exists in this case, because the sentence that the District Court judge imposed included incarceration. The evidence establishes that Petitioner was sentenced to 211 months, over 17 years, of incarceration. I.G. Ex. 3 at 2. An aggravating factor exists if a court imposes incarceration. Petitioner does not address or dispute this aggravating factor.

⁴ Petitioner argues that the investigation report outlining the restitution amount is "Third Party" and "unacceptable." P. Brief at 6.

c. Petitioner has failed to prove any mitigating factors.

The period of exclusion can be reduced if mitigating factors are proven. The Petitioner bears the burden of proving any mitigating factor by a preponderance of the evidence. *Dr. Darren James, D.P.M.*, DAB No. 1828 (2002); *Barry D. Garfinkel, M.D.*, DAB No. 1572 at 8 (1996).

42 C.F.R. § 1001.102(c) outlines three mitigating factors, which are: (1) a petitioner was convicted of three or fewer misdemeanor offenses and the resulting financial loss to the program was less than \$1500; (2) the record demonstrates that a petitioner had a mental, physical, or emotional condition that reduced his culpability; and (3) a petitioner's cooperation with federal or state officials resulted in others being convicted or excluded, or additional cases being investigated, or a civil money penalty being imposed.

Here, the first mitigating factor is not applicable, since Petitioner's felony convictions involved program financial losses in excess of \$1,500. Further, Petitioner neither claims that any medical condition reduced his culpability nor argues that he cooperated with government officials, which resulted in others being convicted, excluded, or led to the investigation of other cases. Thus, this case presents no mitigating factors that I can consider that would reduce the period of exclusion.

It must be noted that Petitioner makes additional legal arguments, which must be addressed. Petitioner argues that the I.G. abused her power and violated his constitutional rights in excluding him for a 30-year period by imposing the exclusion "before judicial review, hearing and determination of the outcome." P. Brief at 3; P. Reply at 4, 5, 14. Petitioner therefore asks that I vacate the exclusion and reinstate his constitutional rights. P. Reply at 5. Petitioner raises constitutional arguments I am without authority to hear or decide. Applicable law and regulations limit my authority to decide exclusion and other cases involving the I.G..

Petitioner also advised me that his criminal conviction is under appeal. However, the Secretary has specifically provided a remedy in the event an underlying conviction is reversed or vacated on appeal by a court of proper jurisdiction. *See* 42 C.F.R. § 1001.3005.

Because Petitioner appears here *pro se*, I have taken care in reading the two briefs he filed, his exhibits, and his request for hearing. I have been guided by the Board's reminders that *pro se* litigants should be offered "some extra measure of consideration" in developing their records and their cases. *Louis Mathews*, DAB No. 1574 (1996); *Timothy L. Stern, M.D.*, DAB No. 1314 (1992); *Edward J. Petrus, Jr., M.D.*, DAB No. 1264 (1991). However, I have been unable to find any argument or contention in Petitioner's submissions that might raise a valid defense to the proposed exclusion.

d. The 30-year period of exclusion is not unreasonable.

The regulations do not limit the additional period of exclusion the I.G. may impose based upon the presence of aggravating factors. The regulations also do not specify how much of an extension is warranted by the existence of an aggravating factor. The Board has indicated that it is not the number of aggravating factors that is determinative, but, rather, it is the quality of the circumstances, whether aggravating or mitigating, which controls in analyzing these factors. *Barry D. Garfinkel, M.D.*, DAB No. 1572.

I have found that the aggravating factors the I.G. considered are present in this case. The evidence establishes that Petitioner knowingly engaged in a scheme that involved submitting false and fraudulent claims for reimbursement for services that were not covered items or were reimbursable at a lower rate per claim. These claims involved a Petitioner's receipt of over \$1.2 million from the Medicare program and from private pay insurers. Based on this illegal conduct, Petitioner was convicted and sentenced to incarceration of 211 months. Considering these facts and the magnitude of Petitioner's abuse of the Medicare program and private pay insurers, a significant period of exclusion is justified. Further, and as noted above, no mitigating factors offset these aggravating factors. The evidence establishes that Petitioner deliberately engaged in criminal acts for his own financial gain. I find that Petitioner presents a significant risk to program integrity and the 30-year exclusion falls within a reasonable range.

VI. Conclusion

Based on my review of all of the evidence in this case, I find that the I.G. was authorized under section 1128(a)(1) and section 1128(a)(3) of the Act to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. Moreover, Petitioner's 30-year exclusion from program participation is not unreasonable. The effective date of Petitioner's exclusion is August 20, 2009, 20 days after the July 31, 2009 I.G. notice of exclusion.

/s/
Alfonso J. Montaña
Administrative Law Judge