

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Emmanuel Adebayo Ayodele, M.D.,

Petitioner,

v.

The Inspector General.

Docket No. C-14-944

Decision No. CR3335

Date: August 19, 2014

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Emmanuel Adebayo Ayodele, M.D., from participating in Medicare, State Medicaid programs, and all other federally funded health care programs for a minimum period of 20 years.

I. Background

Petitioner requested a hearing in order to challenge the I.G.'s determination to exclude him. The I.G., at my direction, filed a brief and four exhibits that he identified as I.G. Ex. 1 – I.G. Ex. 4.¹ Petitioner filed a brief and one exhibit that he identified as P. Ex. 1. I receive all of these exhibits into the record.

¹ The I.G. also filed a motion to dismiss Petitioner's hearing request, asserting that Petitioner failed to state an argument that I had authority to hear and decide. I deny that motion. Petitioner's arguments – which go to the lawfulness of his conviction – may not be legitimate defenses to the I.G.'s exclusion determination, but I nevertheless have the authority to decide whether they are legitimate.

The I.G. did not request to present testimony in person. Petitioner requested that he be allowed to testify. I deny that request for the following reasons. First, I ordered both parties to reduce any proposed testimony to written declaration or affidavit form. Petitioner did not comply with that directive. Second, the testimony that Petitioner offers is not relevant. He seeks to testify that his guilty plea to the crimes of which he was convicted was “hopelessly defective.” He seeks to testify also in order to offer certain technical and legal arguments that he asserts would invalidate his conviction. As I explain below, the authority to exclude Petitioner in this case derives from his conviction. Petitioner may exercise his right to appeal his conviction in the appropriate forum, but he may not collaterally attack it here and he certainly has no right to litigate before me the merits of the charges to which he pled guilty. Moreover, Petitioner’s arguments are legal arguments. Petitioner is not qualified to testify about matters of law.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are: whether Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Social Security Act (Act); and, whether an exclusion of at least 20 years is reasonable.

B. Findings of Fact and Conclusions of Law

Section 1128(a)(1) of the Act mandates the exclusion of any individual who is convicted of a criminal offense related to the delivery of an item or service under Medicare or a State health care program (State Medicaid program). The evidence offered by the I.G. proves conclusively that Petitioner was convicted of a crime as is described in section 1128(a)(1).

On May 28, 2013, Petitioner pled guilty to the federal crime of health care fraud. I.G. Ex. 3. Subsequently, a United States District Court entered a judgment of conviction against Petitioner based on his plea. I.G. Ex. 4. Petitioner, a physician, specifically pled guilty to writing fraudulent prescriptions for durable medical equipment (DME) to be used as documentation for false Medicare reimbursement claims. I.G. Ex. 2 at 2-3. Petitioner committed his fraud to support a widespread scheme to defraud the Medicare program.

Petitioner’s conviction plainly relates to the delivery of Medicare items or services. Fraud directed against the Medicare program based on the filing of false reimbursement claims or the generation of documentation to support such claims is precisely what is aimed at by section 1128(a)(1). It is unnecessary to analyze Petitioner’s conviction beyond saying that.

Petitioner asserts that his conviction is fatally flawed and he raises a number of legal and constitutional arguments to challenge the court's acceptance of his guilty plea and the court's subsequent entry of a judgment of conviction against him. Additionally, Petitioner asserts that he is actually innocent of the crime of which he was convicted.

These are not valid defenses. The I.G.'s authority to exclude pursuant to section 1128(a)(1) derives from the Petitioner's conviction. I may not decide whether its entry is flawed or look behind the conviction to address the underlying issues of guilt, because the conviction is the basis for the I.G.'s authority so long as it is not overturned by the court that entered it or on appeal. Petitioner is certainly free to argue the merits and lawfulness of his conviction in the appropriate court, but not here.

An individual who is convicted of a crime described in section 1128(a)(1) must be excluded for a minimum of five years. Act, section 1128(c)(3)(B). The I.G. may exclude an individual for more than the five-year minimum where there exists evidence showing that person to be so untrustworthy as to merit a longer exclusion.

There are regulatory factors that function as rules of evidence for deciding whether an exclusion of more than five years is reasonable. These factors are set forth at 42 C.F.R. § 1001.102. The regulatory factors include factors that may be aggravating or mitigating. The factors do not dictate how long any exclusion must be. Evidence that relates to an aggravating or mitigating factor may be weighed to determine an individual's trustworthiness and to decide how long of an exclusion is reasonable. Evidence that does not relate to one of the factors is irrelevant to deciding the length of an exclusion.

The I.G. offered evidence that relates to three aggravating factors. He proved that:

- Petitioner's crime caused government programs to suffer \$5000 or more in losses. 42 C.F.R. § 1001.102(b)(1). In fact, the losses caused by Petitioner's fraud were enormous. He was ordered, along with his co-conspirators, to pay restitution to the Medicare program totaling \$6,335,949. I.G. Ex. 4 at 1.
- Petitioner committed the crime resulting in his conviction over a period of more than one year. 42 C.F.R. § 1001.102(b)(2). Petitioner pled guilty to committing fraud against Medicare for a period of about four years, from June 2006 to June 2010. I.G. Ex. 3 at 6, 21.

