

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Gabriel R. Harden #08773-028,

Petitioner

v.

The Inspector General.

Docket No. C-10-225

Decision No. CR2218

Date: August 13, 2010

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Judgment on the Written Record. I sustain the determination of the I.G. to exclude Petitioner, Gabriel Harden, from participating in Medicare, Medicaid, and all federal health care programs for a period of 25 years. The I.G.'s determination to exclude Petitioner is based on section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. §1320a-7(a)(1). Petitioner's exclusion of 5 years is mandatory pursuant to section 1128(c)(3)(B) of the Act. An additional 20 year period of exclusion, for a total period of exclusion of 25 years, is not unreasonable based on the four aggravating factors established in this case and the absence of any mitigating factors. For the reasons set forth below, I grant the I.G.'s Motion for Summary Judgment.

I. Background

By letter dated October 30, 2009, the I.G. notified Petitioner that he was being excluded from participating in Medicare, Medicaid, and other federally-funded health care

programs¹ for a period of 25 years. The I.G. specifically informed Petitioner that he was being excluded pursuant to section 1128(a)(1) of the Act, based on Petitioner's conviction in the United States District Court, Southern District of Indiana, of a criminal offense related to the delivery of an item or service under the Medicare or a State health care program, including the performance of management or administrative services relating to the delivery of items or services, under any such program. Additionally, the I.G. asserted that Petitioner's exclusion was based on the presence of four aggravating factors: (1) the loss to a government program of \$5,000 or more; (2) the acts that resulted in the conviction were committed over a period of more than one year; (3) the court sentenced Petitioner to 41 months of incarceration; and (4) Petitioner was convicted of other offenses besides those which formed the basis for the exclusion, or he was the subject of any other adverse action by any Federal, State or local government agency or board, if the adverse action is based on the same set of circumstances that serves as the basis for imposition of the exclusion.

On December 4, 2009, Petitioner, acting pro se, timely appealed the I.G.'s exclusion determination. The matter was docketed and assigned to me on December 23, 2009 for hearing, related proceedings, and a decision. A letter was issued to the parties on January 12, 2010, notifying them that a prehearing conference had been set for January 21, 2010, at 10:30 a.m. Eastern Time. The prehearing conference was conducted as scheduled. Present during the telephone prehearing conference was Petitioner Gabriel R. Harden, Geeta Wadhwa Kaveti, representing the I.G., and with me were Oliver Potts, then-Chief and Terrah A. Dews, Team Leader, Civil Remedies Division.

During the conference, and because Petitioner appeared pro se, I explained to Petitioner that he had the right to be represented by legal counsel in these proceedings. While Petitioner acknowledged that he understood this right, he stated that he wished to represent himself in this matter. Petitioner was also reminded that all material submitted to this office must be provided in duplicate to the I.G. simultaneously with the submission to this office. I explained to the parties the limits of my jurisdiction over this matter. I further explained to Petitioner that I do not have the authority to re-litigate the facts that formed the basis of Petitioner's criminal conviction.

Both parties were provided an opportunity to state their positions as to the issues and whether this case should be litigated through written submission or through an in-person hearing. The I.G. maintained that the case involved purely legal issues and should

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.

therefore be addressed through written submissions. Petitioner stated that he was requesting an in-person hearing, because he wanted to call witnesses to testify to the manner in which certified staff rendered the subject services. I explained to Petitioner that if those witnesses were to testify relative to the facts of the conviction, I did not have the authority to consider a collateral attack of the conviction that is the basis of the criminal conviction. If the witnesses were to provide evidence as to the length of the exclusion, I informed Petitioner that I can only consider evidence of testimony that relates to the aggravating and mitigating factors enumerated in the regulations. I read the relevant sections of the regulation to Petitioner. A copy of the regulations was provided to Petitioner with the Summary of Prehearing Conference Order. I informed the parties that the matter appeared to involve purely legal issues and would therefore proceed on the basis of written submissions. Petitioner was informed he could renew his motion for an in-person hearing in his response brief.

Petitioner also requested the documents used in his conviction in Indiana, as he believed it would be helpful in refuting the arguments made in the brief that the I.G. submitted. I denied Petitioner's request noting that Petitioner's document request appeared to be an effort to re-litigate the criminal conviction in this case. I informed Petitioner he could renew his request in his response brief and articulate how the requested documents relate to the limited issues before me.

The I.G. filed a Motion for Summary Judgment on the Written Record, accompanied by four exhibits (I.G. Exs. 1-4). Petitioner did not file a timely response to the I.G.'s Motion in accordance with my Order dated January 26, 2010. On April 19, 2010, I issued an Order to Show Cause directing Petitioner to show cause in writing on or before April 30, 2010 as to why I should not dismiss the case for abandonment. On April 19, 2010, Petitioner submitted a letter dated April 10, 2010 requesting permission to file his motion via facsimile by April 25, 2010. Petitioner submitted a brief and a request for extension dated April 23, 2010, but the brief had a certificate of service date of March 19, 2010. Petitioner's brief was accompanied by Petitioner (P.) Exs. 1 -10. On May 18, 2010, the I.G. filed a Reply to Petitioner's Submissions. On June 14, 2010, Petitioner filed a Reply to the I.G.'s Submissions, along with P. Exs. 13 – 15. In the absence of any objection, I admit into the record I.G. Exs. 1 - 4, P. Exs. 1 - 10 and P. Exs. 13 – 15. On June 25, 2010, I issued an Order Closing the Record in this matter.

II. Issues

1. Whether the I.G. has a basis pursuant to section 1128(a)(1) of the Act to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs;

2. Whether the I.G. is entitled to summary judgment on the ground that undisputed facts demonstrate that the I.G. properly determined to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs; and
3. Whether the 25 year exclusion is reasonable.

III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act requires exclusion from participation in Medicare, Medicaid, and all federal health care programs of 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 terms of section 1128(a)(1) are restated in regulatory language at 42 C.F.R. § 1001.101(a). 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 section 1128(a)(1) 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).

42 C.F.R. Part 1005 does not specify summary disposition procedures, but summary disposition is explicitly authorized by the terms of 42 C.F.R. § 1005.4(b)(12).

Summary disposition is appropriate in an exclusion case when no disputed issues of material fact exist and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *David A. Barrett*, DAB No. 1461 (1994); *Robert C. Greenwood*, DAB No. 1423 (1993); *Thelma Walley*, DAB No. 1367 (1992); *Catherine L. Dodd, R.N.*, DAB No. 1345 (1992); *John W. Foderick, M.D.*, DAB No. 1125 (1990). All the facts, and the inferences reasonably to be drawn from those facts, must be viewed in the light most favorable to the nonmoving party. See *Pollock v. American Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986); *Brightview Care Ctr.*, DAB No. 2132 (2007); *Madison Health Care, Inc.*, DAB No. 1927, at 5-7 (2004). When the undisputed material facts of a case support summary disposition, no need exists for a full evidentiary hearing, and neither party has the right to one. *Surabhan Ratanasen, M.D.*, DAB No. 1138 (1990); *John W. Foderick, M.D.*, DAB No. 1125.

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

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

Petitioner owned and operated a mobile dental service, generally known as “Dental Express” in Indiana, Kentucky, and Ohio from September 2000 to May 2004. Dental Express applied for, and received, authorization to bill Medicaid in Indiana, Kentucky, and Ohio for its services. I.G. Ex. 2. In 2006, Petitioner was indicted for ordering and directing employees of “Dental Express” to provide services that were not medically necessary or reimbursable by Medicaid, and then billed Medicaid for these services. *Id.* Petitioner also ordered and directed employees to document that they provided services, which were not provided, and billed Medicaid based on falsified documentation. *Id.*

Specifically, it was alleged that Petitioner engaged in a scheme to defraud Medicaid by: (1) targeting Medicaid-eligible children as a customer base, then billing Medicaid for dental services for those children that were either not provided or medically unnecessary; and (2) directing and applying pressure to Dental Express employees to provide services that were either not provided or medically unnecessary. I.G. Ex. 2 at 4 – 5.

In April 2006, Petitioner was charged with two counts of Health Care Fraud in violation of 18 U.S.C. § 1347, and nine counts of Illegal Monetary Transaction in violation of 18 U.S.C. § 1957. I.G. Ex. 2 at 7 – 10. Petitioner pled guilty to two counts of Health Care

Fraud and one count of Illegal Monetary Transaction. I.G. Ex. 1, at 1. He was sentenced to 41 months of incarceration and ordered to pay an assessment of \$300 and restitution in the amount of \$1,683,412.32. I.G. Ex. 1, at 2-5.

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; *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Lyle Kai, R.Ph.*, DAB CR1262 (2004), *rev'd on other grounds*, DAB No. 1979 (2005); *see Russell Mark Posner*, DAB No. 2033, at 5-6 (2006).

The court records the I.G. has submitted as exhibits conclusively establish these two essential elements. Petitioner was convicted of: two counts of Health Care Fraud; and one count of Illegal Money Transaction. I.G. Ex. 1, at 1. The record includes the District Court's judgment of Petitioner's guilt and conviction of the criminal offenses outlined in the Indictment. I.G. Ex. 1.

2. The I.G. is entitled to summary judgment on the ground that it properly determined that Petitioner should be excluded from participation in all federal health care programs for a period of 25 years.

With regard to the resolution of this case by summary judgment, the regulations allow an Administrative Law Judge (ALJ) to decide a case on summary judgment or disposition, when no disputed issue of material fact exists. 42 C.F.R. § 1005.4(b)(12). The Departmental Appeals Board (Board) held in *Michael J. Rosen, M.D.*, DAB No. 2096, at 4, that an ALJ may:

“[u]pon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact . . .” 42 C.F.R. § 1005.4(b)(12). A requirement affording the opportunity for oral hearing is not contravened by summary judgment if there are no genuine issues of material fact. *Travers v. Shalala*, 20 F.3d 993, 998 (9th Cir. 1994). Thus, summary judgment is appropriate if the affected party either had conceded all of the material facts or proffered testimonial evidence only on facts which, even if proved, clearly would not make any substantive difference in the result. *Big Bend Hospital Corp.*, DAB No. 1814 (2002), *aff'd*, *Big Bend Hospital Corp. v. Thompson*, No. P-02-CA-030 (W.D. Tex. Jan. 2, 2003).

Whether summary judgment is appropriate is a legal issue that we address de novo, viewing the proffered evidence in the light most favorable to the non-moving party. *See, e.g., Crestview Parke Care Center*, DAB No. 1836 (2002),

aff'd in part, Crestview Parke Ctr. v. Thompson, 373 F. 3d 743 (6th Cir 2004); *Timothy Wayne Hensley*, DAB No. 2044 (2006).

Petitioner's arguments do not call a material fact into issue in this case. The record and the nature of the crime to which he pleaded guilty contradict Petitioner's position. The crime of health care fraud is based on an intent to violate the law; in this case, the Petitioner's actions intend to defraud Medicaid. Whether Petitioner committed the acts that led to his conviction are not at issue before me. His current disclaimer that he did not commit the acts for which he was convicted is an impermissible collateral attack on the underlying conviction in his case. Where an exclusion is based on an underlying conviction, the basis for the underlying conviction is not reviewable by the ALJ and cannot be contested on substantive or procedural grounds. 42 C.F.R. § 1001.2007(d).

3. The minimum period of exclusion under section 1128(a) is five years, and an additional period of exclusion of 20 years, for a total period of exclusion of 25 years, is not unreasonable in this case based on the presence of four 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 a mitigating factor exists that the I.G. failed to consider; and (3) the period of exclusion is within a reasonable range.

The I.G. relies on four aggravating factors set out at 42 C.F.R. §1001.102(b)(1),(2),(5), and (9) in seeking to increase the period of Petitioner's exclusion beyond the mandatory minimum of five years to that of 25 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, from approximately September 2000 through May 2004, resulted in his receiving reimbursement from the Medicaid program in excess of \$4 million dollars. 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 Medicaid, and the total loss for guideline purposes was \$1,595,814.30. I.G. Ex. 3, at 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. 1, at 5.

b. Petitioner was sentenced to incarceration for a period of 41 months.

The regulations state that an aggravating factor is present, and may be considered to lengthen the period of exclusion, if the sentence that the court imposes includes incarceration. 42 C.F.R. § 1001.102(b)(5). The I.G. argues that, because the sentence that the District Court Judge imposed included incarceration, the imposition of incarceration justifies lengthening Petitioner's exclusion period beyond the 5 year mandatory minimum. The evidence in this case establishes that Petitioner was sentenced to 41 months of incarceration. I.G. Ex. 1, at 2. Therefore, the aggravating factor of Petitioner's incarceration is a legitimate basis for increasing Petitioner's exclusion period beyond the 5 year mandatory minimum.

c. Petitioner's offense was committed over a period of one year or more.

In its Motion for Summary Judgment, the I.G. argues that Petitioner pled guilty to health care fraud, and the plea agreement states that "from on or about September 2000 through on or about October 2002, Petitioner engaged in a scheme to defraud a health care benefit institution in violation of 18 U.S.C. § 1347 (Health Care Fraud)." I.G. Ex. 3, at 1. Therefore, the I.G. asserts that the presence of this aggravating factor is a legitimate basis upon which to lengthen Petitioner's exclusion beyond the mandatory minimum of 5 years. Petitioner responds the act was committed during a period of ignorance. Clearly, Petitioner's ignorance is not a valid defense to the proposed exclusion.

d. Petitioner was the subject of an adverse action by a state agency based on his conviction.

The exhibits that the I.G. submitted demonstrate that Petitioner was excluded from participation in the Ohio Medicaid program. I.G. Ex. 4. The Ohio Department of Jobs and Family Services (ODJFS), which administers the Ohio Medicaid Program, excluded Petitioner based on Petitioner's conviction for health care fraud on November 13, 2008 in the United States District Court for the Southern District of Indiana. Therefore, Petitioner was the subject of an adverse action by a state agency based on the same set of circumstances that forms the basis for imposing the exclusion. In addition, the state action was a legitimate basis upon which to lengthen Petitioner's exclusion beyond the mandatory minimum of five years.

In response to the four aggravating factors that the I.G. outlined, Petitioner presents several arguments, including: (1) ineffective assistance of counsel; (2) the presence of transparency with reporting all claims using 3 party NCR Authorization forms; and (3) no knowledge, or willingness, to defraud the Government of any monies. *See generally* P. Brief. 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).

e. 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 conviction 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.

Because Petitioner appears here pro se, I have taken care in reading his filed submissions, 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.

f. The 25 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 providing dental services that were not medically necessary or reimbursable by Medicaid and then billed Medicaid for these services. Petitioner also directed employees to document that services were provided, which, in fact, were not provided and billed Medicaid based on falsified documentation. This criminal activity continued over a period of more than one year. Petitioner submitted claims totaling more than \$4 million dollars to the Medicaid program. Based on this illegal conduct, Petitioner was convicted and sentenced to incarceration of 41 months. Finally, Petitioner was the subject of an adverse action by a state agency based on his conviction. Considering these facts and the magnitude of Petitioner's abuse of the Medicaid program, 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 25 year exclusion falls within a reasonable range.

V. Conclusion

Because no genuine issue to any material fact exists, and for the reasons set forth above, the I.G.'s Motion for Summary Judgment must be, and is, GRANTED. Further, I sustain the I.G.'s determination to exclude Petitioner from program participation in Medicare, Medicaid, and all other federal health care programs, and I find the 25 year exclusion from program participation is not unreasonable.

/s/

Alfonso J. Montaña
Administrative Law Judge