Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Aleksandr Kharkover,
(O.I. File No. 2-10-40233-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-479

Decision No. CR3263

Date: June 17, 2014

DECISION

Petitioner, Aleksandr Kharkover, 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 November 20, 2013. Petitioner's exclusion for five years is required by section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)). An additional exclusion of 15 years, for a total period of exclusion of 20 years, [1] is not unreasonable based upon the four aggravating factors established in this case and the absence of any mitigating factors.

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[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 of the Department of Health and Human Services (I.G.) notified Petitioner by letter dated October 31, 2013, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of 20 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 for the Eastern District of New York, of a criminal offense related to the delivery of an item or service under the Medicare or a State health care program. The I.G. considered four aggravating factors when deciding to extend the five-year minimum mandatory period of exclusion to 20 years. I.G. Exhibit (Ex.) 1.

Petitioner timely requested a hearing on December 27, 2013 (RFH). The case was assigned to me on January 7, 2014 for hearing and decision. On February 12, 2014, I convened a prehearing telephone conference, the substance of which is memorialized in my order dated February 14, 2014. On March 14, 2014, the I.G. filed a motion for summary judgment, a brief in support of summary judgment (I.G. Br.), and I.G. Exs. 1 through 11. Petitioner filed a brief in opposition (P. Br.) on April 14, 2014, and P. Exs. A, B, C, and D.[2] The I.G. filed a reply brief (I.G. Reply) on April 28, 2014. Neither party objected to the offered exhibits and I.G. Exs. 1 through 11 and P. Exs. A, B, C, and D 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

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[2] Petitioner's exhibits were not correctly marked as required by the Prehearing Order. However, the exhibits were not returned to Petitioner for correction because there was no potential for confusion based on the incorrect marking.

health care program. The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(a).[3]

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. 42 C.F.R. § 1001.102(a). 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 may 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. Summary judgment is appropriate in this case.

Petitioner's request for hearing was timely filed and preserved Petitioner's right to review of justiciable issues. I have jurisdiction.

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[3] References are to the 2013 revision of the Code of Federal Regulations (C.F.R.), unless otherwise indicated.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The Secretary has provided by regulation that a sanctioned party has the right to hearing before an ALJ and both the sanctioned party and the I.G. have a right to participate in the hearing. 42 C.F.R. §§ 1005.2, 1005.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). An ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12). Summary judgment is appropriate and no hearing is required where either: there are no disputed issues of material fact and the only questions that must be decided involve application of law to the undisputed facts; or the moving party prevails as a matter of law even if all disputed facts are resolved in favor of the party against whom the motion is made. A party opposing summary judgment must allege facts which, if true, would refute the facts relied upon by the moving party. *See, e.g.*, Fed. R. Civ. Pro. 56(c); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628 at 3 (1997) (holding in-person hearing is required where the non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also New Millennium CMHC*, DAB CR672 (2000); *New Life Plus Ctr.*, DAB CR700 (2000).

Summary judgment is appropriate in this case. There are no genuine issues of material fact in dispute in this case. The case may be resolved by applying the law to the undisputed facts.

3. Petitioner's exclusion is required by section 1128(a)(1) of the Act.

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.

Act § 1128(a)(1). Section 1128(a)(1) of the Act requires that the Secretary exclude from participation in Medicare, Medicaid, and all federal health care programs 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 on February 15, 2011, he was indicted on five counts of health care fraud in violation of 18 U.S.C. § 1347. Specifically, Petitioner, a physical therapist, was charged with knowingly and willfully executing and attempting to execute a scheme and artifice to defraud Medicare and to obtain by materially false and fraudulent pretenses, representations, and promises, money from the Medicare program in connection with the delivery of and payment for health care benefits, items and services during the period May 2007 to September 2009.[4] I.G. Ex. 5; P. Ex. A. Petitioner also does not dispute that he pleaded guilty to all five counts of the indictment on May 13, 2011. I.G. Ex. 6. Petitioner's guilty pleas were accepted and judgment was entered against him on May 10, 2013. I.G. Exs. 7, 8.

Petitioner argued in his request for hearing that the federal judge who sentenced him did not intend to prevent Petitioner from continuing to practice as a physical therapist, so long as he did not bill the government. RFH at 1. However, in his opposition to the motion for summary judgment, Petitioner accepts that his exclusion from Medicare pursuant to section 1128(a)(1) of the Act is mandatory for at least five years. P. Br. at 2.

Petitioner's guilty pleas were accepted by the court. Therefore, Petitioner was convicted within the meaning of the Act. Act § 1128(i) (42 U.S.C. § 1320a-7(i)). Petitioner does not deny that the crimes of which he was convicted were program-related crimes and involved the delivery of a health care item or service. Accordingly, all three elements of section 1128(a)(1) of the Act are met and there is a basis for Petitioner's exclusion.

4. Pursuant to section 1128(c)(3)(b) of the Act, the minimum period of exclusion under section 1128(a) is five years.

5. Four aggravating factors justify extending the minimum period of exclusion to 20 years.

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[4] According to the Counts in the Indictment, Petitioner, a physical therapist licensed to practice in the state of New York, maintained a private physical therapy practice with at least two locations, but Petitioner claimed that he treated the majority of Medicare beneficiaries in the beneficiaries' homes. For the period between January 2005 and July 2010, Petitioner submitted approximately $11.9 million in claims to Medicare for physical therapy services. Petitioner hired individuals who were not certified as physical therapy assistants to provide physical therapy to the Medicare beneficiaries. Thus, he submitted millions of dollars in false and fraudulent claims to Medicare for physical therapy services that were not performed and were not medically necessary. I.G. Ex. 5 at 3-4.

I have concluded that a basis exists to exclude Petitioner pursuant to section 1128(a)(1) of the Act. Therefore, the I.G. must exclude Petitioner for a minimum period of five years pursuant to section 1128(c)(3)(B) of the Act. The I.G. has no discretion to impose a lesser period and I may not reduce the period of exclusion below five years. The remaining issue is whether it is unreasonable to extend his period of exclusion by an additional 15 years.

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.

Petitioner does not dispute or challenge the presence of the four aggravating factors relied upon by the I.G. to support the imposition of 15 more years of exclusion beyond the mandatory five year period. The aggravating factors authorized by 42 C.F.R. § 1001.102(b) that are present in this case are:

- The acts resulting in conviction, or similar acts, caused or were intended to cause a financial loss to a government program or one or more entities of $5,000 or more. 42 C.F.R. § 1001.102(b)(1). Petitioner does not dispute that he was ordered to pay restitution to the Medicare program of $4,665,137.66, which is strong and unrebutted evidence that the loss to Medicare was far more than $5,000. I.G. Ex. 7 at 5.

- The acts that resulted in the conviction . . . were committed over a period of one year or more." 42 C.F.R. § 1001.102(b)(2). The five substantive counts of health care fraud to which Petitioner pleaded guilty occurred between May 12, 2007 and September 16, 2009. I.G. Ex. 5 at 4-5. This fact is not in dispute. Therefore, Petitioner's offenses occurred over a period of more than one year.

- The sentence imposed by the court included incarceration. 42 C.F.R. § 1001.102(b)(5). It is not disputed that Petitioner was sentenced to 24 months of incarceration on each count of the conviction, to run concurrently. I.G. Ex. 7 at 2.

- An individual was the subject of adverse action by a state government agency or board, and the adverse action is based on the same set of circumstances that served as the basis for imposition of the I.G.'s exclusion. 42 C.F.R. § 1001.102(b)(9). Petitioner does not deny that he was subject to three separate adverse actions that were all based on his health care fraud conviction.

- On November 23, 2011, the New York State Office of the Medicaid Inspector General (OMIG) excluded Petitioner from the New York Medicaid program. Petitioner's OMIG exclusion was based on his federal conviction of a crime relating to the "furnishing of or billing for medical care, services or supplies." I.G. Ex. 9.

- On August 6, 2013, Petitioner agreed to a consent order revoking his license to practice physical therapy in the State of New Jersey. I.G. Ex. 10. The consent order stated that Petitioner's federal conviction provided "the grounds for the surrender, to be deemed a revocation, of his license to practice physical therapy" because it was "a crime involving moral turpitude and relating adversely to the practice of physical therapy." Petitioner agreed not to reapply for a license in New Jersey. I.G. Ex. 10 at 2.

- On October 30, 2013, Petitioner signed a consent agreement and order with the Commonwealth of Pennsylvania agreeing to a permanent voluntary surrender of his license to practice physical therapy. I.G. Ex. 11. The adverse action was based on the Petitioner's federal health care fraud conviction. I.G. Ex. 11 at 2-5. Specifically, Petitioner and the Pennsylvania State Board of Physical Therapy agreed that the permanent surrendering of his license was appropriate because he was convicted of a "crime of moral turpitude" and engaged in unprofessional conduct by "charging a patient or third-party payor for a physical therapy service which was not performed." I.G. Ex. 11. at 4.

The adverse actions by the three state agencies are predicated on the same set of circumstances that supported the I.G.'s exclusion and constitute an aggravating factor that may justify extending the period of exclusion.

I conclude that the I.G. established four aggravating factors that permit extending Petitioner's exclusion by fifteen years beyond the five-year minimum mandatory period.

6. Petitioner has not shown the existence of any authorized mitigating factors.

7. Exclusion for 20 years is not unreasonable.

Petitioner has not presented evidence of any mitigating factors that the I.G. failed to consider under 42 C.F.R. § 1001.102(c) that would support my reassessing and imposing a shorter period of exclusion. If the I.G. imposes a period of exclusion beyond the five-year minimum mandatory period based on the presence of aggravating factors, there are only three mitigating factors established by 42 C.F.R. § 1001.102(c) that may be considered to reduce the extended period of exclusion: (1) whether the individual was convicted of three or fewer misdemeanor offenses coupled with a financial loss of less

than $1,500; (2) whether the individual was suffering from a mental, emotional, or physical condition at the time of the offense that reduced his or her culpability; or (3) whether the individual cooperated with federal or state officials resulting in others being convicted or excluded, additional cases investigated or the imposition against anyone of civil money penalties of assessments. 42 C.F.R. § 1001.102(c)(1)-(3).

Petitioner argues that the 20-year exclusion is unreasonable because the judge at sentencing expressed a desire for Petitioner to be able to continue to work as a physical therapist to pay off the restitution order. The sentencing transcript shows however, that the Petitioner and the judge were informed by the Assistant U.S. Attorney prosecuting the case that Petitioner would be excluded from the Medicare program. P. Ex. B at 33-34; I.G. Ex. 8 at 33-34. Petitioner also argues that he was cooperative with the government, admitted his guilt, and made restitution of nearly $2,000,000. P. Br. at 3; RFH at 2.

In this case, there is no evidence that any of the authorized mitigating factors listed in 42 C.F.R. § 1001.102(c) exist. The federal judge's preferences and comments at sentencing do not constitute mitigating factors authorized by the regulation. The fact Petitioner admitted his guilt is not a mitigating factor. Cooperation may be a mitigating factor but, in this case, there is no evidence that Petitioner's cooperation resulted in others being investigated, convicted, excluded, or penalized. Petitioner was sentenced to pay restitution and the fact that he paid part of the restitution that he was ordered to pay is not a recognized mitigating factor. Therefore, I conclude that Petitioner failed to establish any mitigating factor that I am permitted to consider to reduce the period of his exclusion.

Appellate panels of the Departmental Appeals Board (the Board) have made clear that the role of the ALJ in cases such as this is to conduct a de novo review of 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. *Juan De Leon, Jr.*, DAB No. 2533 at 3 (2013); *Craig Richard Wilder, M.D.*, DAB No. 2416 at 8 (2011); *Joann Fletcher Cash*, DAB No. 1725, at 17, n.9 (2000). The applicable regulation specifies that the ALJ 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," the ALJ is to consider whether such period falls "within a reasonable range." *Cash*, DAB No. 1725 at 17, n.9. The Board cautions that whether the ALJ thinks the period of exclusion too long or too short is not the issue. The ALJ may not substitute his or her 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.

Based on my de novo review, I conclude that there is a basis for Petitioner's exclusion and the evidence establishes the four aggravating factors that the I.G. relied on to impose the 20-year exclusion. Petitioner failed to establish the existence of any authorized mitigating factors not considered by the I.G. that would support a reduction of the period of exclusion. No basis exists for me to reassess the period of exclusion. I conclude that a period of exclusion of 20 years is in a reasonable range and not unreasonable considering the four aggravating factors present.

III. Conclusion

For the foregoing reason, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum of 20 years, effective November 20, 2013.

/s/
Keith W. Sickendick
Administrative Law Judge