Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Divy Dixit
(O.I. File No. H-14-42581-9),

Petitioner,

v.

The Inspector General,
Department of Health and Human Services.

Docket No. C-15-2879

Decision No. CR4488

Date: December 8, 2015

DECISION

Petitioner, Divy Dixit, is excluded from participation 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 April 20, 2015. Petitioner's exclusion for the minimum period of 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 8 years for a total minimum period of exclusion of 13 years is not unreasonable based upon the 3 aggravating factors established in this case and the absence of any mitigating factors.[1]

I. Background

The Inspector General (I.G.) notified Petitioner by letter, dated March 31, 2015, that he was excluded from participation in Medicare, Medicaid, and all federal health care programs for 13 years pursuant to section 1128(a)(1) of the Act. The basis cited for Petitioner's exclusion was his conviction in the Supreme Court of the State of New York,

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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.

Bronx County, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner timely requested a hearing pursuant to 42 C.F.R. § 1005.2 on May 18, 2015. The case was assigned to me on June 18, 2015. A prehearing telephone conference was convened on July 20, 2015. The substance of the conference is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence dated July 20, 2015 (Prehearing Order). During the prehearing conference, Petitioner did not waive an oral hearing. The I.G. requested to file a motion for summary judgment and I set a briefing schedule.

The I.G. filed a motion for summary judgment and supporting brief (I.G. Br.) on August 19, 2015, with I.G. Exs. 1 through 5.[2] Petitioner filed a response to the I.G. motion (P. Response) on October 5, 2015, and three documents not marked as exhibits. The I.G. waived filing a reply brief on October 27, 2015.

Petitioner did not object to my consideration of I.G. Exs. 1 through 5 and they are admitted as evidence. Petitioner filed with his request for hearing two letters attesting to his character. Neither letter may be admitted as evidence because they are unsworn and unsigned. 42 C.F.R. § 1005.16 (testimony of witnesses must be under oath or affirmation). The letters are also not admissible as evidence because they are not relevant to any issue that I may decide in this case. 42 C.F.R. § 1005.17(c). The letters are not relevant because good character is not a mitigating factor that I may consider in determining whether or not the period of exclusion is unreasonable. 42 C.F.R. § 1001.102(c). Petitioner failed to mark the documents he filed with his response to the I.G.'s motion for summary judgment as required by Civil Remedies Division Procedure § 14. Rather than reject the documents, I treat them as being marked as follows:

> Petitioner's Exhibit (P. Ex.) 1 – Letter dated July 16, 2015 from Uber Technologies, Inc. to Petitioner.
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> P. Ex. 2 – Undated press release titled – CVS Pharmacy Inc. Agrees to Pay $17.5 Million to Resolve False Prescription Billing Case.
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> P. Ex. 3 – June 29 press release titled –Walgreens Settles Medicaid False Billing Case in New York.

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[2] The I.G. did not file a copy of the March 31, 2015 notice of exclusion as an I.G. exhibit as required by my Prehearing Order ¶ 7. Petitioner has raised no issue related to the sufficiency of the March 31, 2015 notice and Petitioner provided a copy of the notice with his request for hearing.

P. Exs. 1 through 3 are minimally relevant to the issue of whether the 13-year exclusion is unreasonable. The I.G. has not objected to my consideration of P. Exs. 1 through 3 and they 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).

The Secretary must exclude from participation in any federal health care program any individual convicted under federal or state law of a felony or misdemeanor criminal offense related to the delivery of an item or service under Medicare or a state health care program. Act § 1128(a)(1). The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(a).[3]

Pursuant to section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)), an individual is convicted of a criminal offense when: (1) a judgment of conviction has been entered against him or her in a federal, state, or local court whether an appeal is pending or the record of the conviction is expunged; (2) there is a finding of guilt by a court; (3) a plea of guilty or no contest is accepted by a court; or (4) the individual has entered into any arrangement or program where judgment of conviction is withheld.

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 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 I.G. proposes to impose an exclusion greater than five years. 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).

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[3] References are to the 2014 revision of the Code of Federal Regulations (C.F.R.), unless otherwise indicated.

B. Issues

The Secretary has by regulation limited my scope of review to two issues:

> Whether the I.G. has a basis for excluding Petitioner from participation in Medicare, Medicaid, and all federal health care programs; and
>
> Whether the length of the proposed period of 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 and I have jurisdiction.

Petitioner has not waived an oral hearing and the I.G. has moved for summary judgment. 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 a 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 -.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 genuine disputes 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. P. 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).

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

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

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 [Medicare] or under any State health care program.

Act § 1128(a)(1); 42 C.F.R. § 1001.101(a).

Petitioner does not dispute that on December 13, 2012, he was convicted pursuant to his guilty plea in the Supreme Court of the State of New York, Bronx County, of one felony count of grand larceny in the second degree in violation of N.Y. Penal Law § 155.40. Petitioner was sentenced on May 14, 2013, and his sentence included probation and restitution. I.G. Ex. 1 at 3, ¶ 7; I.G. Ex. 2 at 3-7; I.G. Ex. 3 at 6-7; I.G. Ex. 4. The acceptance of Petitioner's guilty plea and the entry of the judgment of conviction by the Supreme Court of the State of New York, Bronx County, amounted to a "conviction" within the meaning of sections 1128(i)(1) and (3) of the Act.

Section 1128(a) of the Act requires that Petitioner be excluded if he was convicted of an offense related to the delivery of an item or service under Medicare or a state health care program. Petitioner does not deny that his criminal offense was related to the delivery of a health care item or service under the New York State Medical Assistance program (Medicaid). The Superior Court Information to which Petitioner pleaded guilty describes the details of the charge to which Petitioner pleaded guilty:

> Defendant SYPRAM CORP. d/b/a AKSHAR PHARMACY and Defendant DIVY DIXIT, an owner, supervising pharmacist and high managerial agency of SYPRAM Corp. d/b/a AKSHAR Pharmacy, an enrolled provider in the New York State Medical Assistance Program, commonly known as Medicaid, caused to be submitted claims for payment to Medicaid that falsely represented that SYPRAM CORP. d/b/a

> AKSHAR PHARMACY dispensed the prescription medications itemized on said claims to Medicaid recipients from April 14, 2005 to July 24, 2008. Said claims were false in that the medications were not dispensed to the Medicaid recipients as claimed. In reliance on those claims, the State of New York, through its fiscal agency, paid Defendants $1,041,491.77 to which Defendants were not entitled.

I.G. Ex. 4 at 2. Petitioner admitted as part of his plea agreement that beginning about April 14, 2005 and continuing through about July 24, 2008, he stole $1,041,491.77 from the New York State Medicaid program. Petitioner agreed to pay to the State of New York $1,103,981.28 as restitution, which included the $1,041,491.77 he stole and interest. I.G. Ex. 1 at 1 ¶ 1, 3-4 ¶ 9. The New York State Medicaid program meets the definition of a state health care program. 42 C.F.R. § 1001.2. Therefore, there is no genuine dispute that Petitioner's conviction related to the delivery of a health care item or service under a state health care program.

The two elements that trigger mandatory exclusion under section 1128(a)(1) of the Act are satisfied. Accordingly, I conclude that there is a basis for Petitioner's exclusion, and his exclusion is mandated by section 1128(a)(1) of the Act.

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

5. Three aggravating factors justify extending the minimum period of exclusion to 13 years.

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. Act § 1128(c)(3)(B). 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 for the I.G. to extend Petitioner's period of exclusion by an additional eight 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 within the meaning of 42 C.F.R. § 1001.102(b); (2) Petitioner has proven that there are mitigating factors within the meaning of 42 C.F.R. § 1001.102(c) that 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 that he is subject to the mandatory minimum five-year period of exclusion pursuant to section 1128(c)(3)(B) of the Act. However, Petitioner asks that I reduce the 13-year exclusion imposed by the I.G. RFH; P. Response.

The three aggravating factors in this case are undisputed. The I.G. notified Petitioner in the March 31, 2015 notice of exclusion that there are three aggravating factors which justify an exclusion of more than five years: (1) Petitioner's criminal acts caused a financial loss to a government program of $5,000 or more as evidenced by the order to pay restitution in the amount of $1,041,400; (2) the acts that resulted in Petitioner's conviction occurred over a period of one year or more, as evidenced by Petitioner's plea that his criminal conduct occurred from about April 2005 to about July 2008; and (3) Petitioner was subject to adverse action by the State of New York as he was excluded from the New York Medicaid program.

Petitioner admitted as part of his plea agreement to stealing $1,041,491.77 from New York Medicaid and he agreed to make restitution of that amount plus interest. I.G. Exs. 1, 2, 3 at 10-11. There can be no question that, based on the amount of restitution, the actual loss to Medicaid 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). Further, 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 does not deny that the aggravating factor established by 42 C.F.R. § 1001.102(b)(1) is clearly present in this case.

Petitioner admitted in his plea agreement that his criminal conduct occurred from about April 14, 2005 through about July 24, 2008. I.G. Ex. 1 ¶ 1, 5 ¶ 17. Therefore, Petitioner's criminal acts occurred over a period of one year or more, and the second aggravating factor cited by the I.G. is established in this case. 42 C.F.R. § 1001.102(b)(2).

There is also no dispute that the third aggravating factor cited by the I.G. is present in this case. On January 28, 2014 the New York State Office of the Medicaid Inspector General notified Petitioner that he was excluded from participation in the New York State Medicaid program. I.G. Ex. 5. Petitioner does not deny that he was excluded from participation in the New York State Medicaid program based on his conviction. Therefore, the third aggravating factor is established. 42 C.F.R. § 1001.102(b)(9).

Accordingly, I conclude that the three 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 by eight years.

6. There is no genuine dispute of material fact as to the existence of any mitigating factor.

7. Exclusion for 13 years is not unreasonable.

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). Petitioner does not allege that any of these authorized mitigating factors are present in his case.

Petitioner requests that I reduce his 13-year exclusion because for over two years he has not been practicing as a pharmacist; he has paid his restitution in full; he has completed

the 300 hours of community service ordered by the court as part of his sentence; and he is in full compliance with his probation. Petitioner also argues that he now has limited job opportunities and has not been able to enroll in an educational program in the medical field. He states that if his exclusion is reduced it will be easier for him to secure a job in the medical field and allow him to provide for his mother and son. RFH; P. Response. None of Petitioner's arguments relate to mitigating factors that I may consider under the regulations.

Petitioner also argues referring to P. Exs. 2 and 3 that CVS and Walgreens were not treated as harshly by the I.G. P. Response. Whether or not CVS and Walgreens were treated differently than Petitioner, is the not the issue before me. Whether or not Petitioner's exclusion is unreasonable is the issue I must resolve and that issue is resolved based on the aggravating and mitigating factors in this case not equitable considerations.

Petitioner has failed to raise any genuine dispute of material fact related to the existence of any mitigating factor I am authorized to consider under the regulations. The Board has 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 4-5 (2013); *Craig Richard Wilder, M.D.*, DAB No. 2416 at 8 (2011); *Joann Fletcher Cash*, DAB No. 1725 at 10 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)(ii). 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 10, 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.

I conclude that there is a basis for the I.G. to exclude Petitioner and there is no dispute as to the existence of the three aggravating factors that the I.G. relied on to impose a13-year exclusion. There is also no genuine dispute as to the existence of any authorized mitigating factors that would support a reduction of the period of Petitioner's exclusion. Accordingly, there is no basis for me to reassess the period of exclusion. I conclude that a period of exclusion of 13 years is in a reasonable range and not unreasonable considering the three aggravating factors present.

Petitioner requests that the two and a half years that he has already been excluded from program participation be retroactively applied to reduce the length of his exclusion. P. Response. Petitioner's program-related conviction occurred on December 13, 2012, but I do not have the authority to grant the relief Petitioner seeks. The Board has consistently held that the statute and regulations give an ALJ no authority to adjust the beginning date

of exclusion. *Thomas Edward Musial*, DAB No. 1991, at 4-5 (2005); *Douglas Schram, R.Ph.*, DAB No. 1372, at 11 (1992); *David D. DeFries*, DAB No. 1317, at 6 (1992).

Exclusion is effective 20 days from the date of the I.G.'s written notice of exclusion to the affected individual or entity. 42 C.F.R. § 1001.2002(b). The I.G. notice to Petitioner is dated March 31, 2015, therefore, the effective date of Petitioner's exclusion is April 20, 2015.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of 13 years pursuant to section 1128(a)(1) of the Act, effective April 20, 2015.

/s/
Keith W. Sickendick
Administrative Law Judge