Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Yong S. Cha a/k/a Edward Cha a/k/a Cha Youngseon
(OI File No. L-09-40206-9),

Petitioner,

v.

Inspector General,
U.S. Department of Health and Human Services,

Respondent.

Docket No. C-17-785

Decision No. CR4999

Date: December 21, 2017

DECISION

Petitioner, Yong S. Cha a/k/a Edward Cha a/k/a Cha Youngseon, 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 May 18, 2017. Petitioner's exclusion, for a minimum period of five years, is required by section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).[1]

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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 (I.G.) of the U.S. Department of Health and Human Services notified Petitioner by letter dated April 28, 2017, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for five years. The I.G. cited section 1128(a)(1) of the Act as the basis for Petitioner's exclusion and stated that the exclusion was based upon Petitioner's conviction in the United States District Court, Central District of California 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. advised Petitioner that the exclusion was effective 20 days from the date of the letter. I.G. Exhibit (Ex.) 1.

Petitioner timely requested a hearing on June 12, 2017 (RFH). On June 20, 2017, the case was assigned to me to hear and decide. I convened a telephone prehearing conference on July 17, 2017, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence issued on that date. The parties waived an oral hearing during the prehearing conference and agreed to submit the case for decision on the merits on the briefs and documentary evidence.

On August 29, 2017, the I.G. filed his brief (I.G. Br.) and I.G. Exs. 1 through 4. On September 6, 2017, Petitioner filed his brief (P. Br.) and Petitioner's exhibit (P. Ex.) 1. The I.G. filed a reply brief on October 23, 2017 (I.G. Reply). The parties have not objected to my consideration of the offered exhibits, and I.G. Exs. 1 through 4 and P. Ex.1 are admitted and considered as evidence.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's right 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) of the Act, the Secretary must exclude from participation in any federal health care program any individual convicted under federal or state law of, among other things: a 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 a regulation implementing this provision of the Act. 42 C.F.R. § 1001.101(a).[2]

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 is the basis for 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 the I.G. has a basis for excluding an individual or entity from participating in Medicare, Medicaid, and all other federal health care programs; and
>
> Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

When, as in this case, the I.G. imposes the minimum authorized five-year exclusion under section 1128(a) of the Act, there is no issue as to whether the period of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(2).

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold text followed by my findings of fact and analysis.

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[2] Citations are to the 2016 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

1. Petitioner timely filed his request for hearing and I have jurisdiction.

2. The parties have waived the right to an oral hearing and disposition on the pleadings and documentary evidence is appropriate.

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction pursuant to section 1128(f) of the Act and 42 C.F.R. pt. 1005. Both parties waived the right to an oral hearing and disposition on the pleadings and documentary evidence is permissible. 42 C.F.R. § 1005.6(b)(5).

3. Section 1128(a)(1) of the Act requires Petitioner's exclusion from participation in Medicare, Medicaid, and all other federal health care programs.

a. Facts

Petitioner does not dispute that there is a basis for his exclusion pursuant to section 1128(a)(1) of the Act. The facts are undisputed.

On June 7, 2013, Petitioner was convicted by a jury of one count of aiding and abetting the making of false statements affecting a health care program that occurred on or about February 12, 2009. Subsequently, Petitioner filed a motion for new trial and/or a judgment of acquittal. On September 17, 2014, Petitioner's motion was granted. On April 29, 2015, Petitioner was again convicted of the count of which he was previously convicted. A judgment of guilt was entered against Petitioner on October 16, 2015. P. Br. at 2; P. Ex. 1; I.G. Exs. 2, 3, 4.

b. Analysis

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides in relevant part:

> (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). Congress has, by the plain language of section 1128(a)(1) of the Act, required the Secretary to 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. An individual or entity is considered to have been "convicted" of an offense when a judgment of guilt is entered. Act § 1128(i)(3) (42 U.S.C. § 1320a-7(i)(3)). There is no dispute that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare. I.G. Exs. 2, 3, 4; P. Br. at 2.

Accordingly, I conclude that all elements that trigger a mandatory exclusion pursuant to section 1128(a)(1) of the Act are satisfied and the I.G. has a basis to exclude Petitioner.

4. Section 1128(c)(3)(B) of the Act requires a minimum exclusion period of five years for any exclusion pursuant to section 1128(a) of the Act.

5. Petitioner's exclusion for five years is not unreasonable as a matter of law.

6. I have no authority to change the effective date of the running of the period of exclusion.

Congress established five years as the minimum period of exclusion for exclusions pursuant to section 1128(a) of the Act. Act § 1128(c)(3)(B). Pursuant to 42 C.F.R. § 1001.2007(a)(2), when the I.G. imposes an exclusion pursuant to section 1128(a) of the Act for the statutory minimum period of five years, there is no issue of whether or not the period is unreasonable. Accordingly, I conclude that Petitioner's exclusion for a period of five years is not unreasonable as a matter of law.

Petitioner does not dispute that his exclusion for five years is mandated by Congress. Rather, he argues that I have the authority to declare that the five year period began to run either the date of his first conviction on June 7, 2013 or, at latest, the date of his second conviction on October 16, 2015, rather than May 18, 2017, 20 days after the date on the I.G. notice of exclusion. Petitioner argues that I have necessary jurisdiction to change the effective date of the running of a period of exclusion because the United States Supreme Court has recognized that the role of a federal ALJ is "functionally comparable" to that of an Article III judge, citing *Butz v. Economou*, 438 U.S. 478, 513-14 (1978). Petitioner argues that the unreasonable delay in giving Petitioner notice of exclusion violates the requirement of section 1128(c)(1) of the Act (42 U.S.C. § 1320a-7(c)(1)) to give notice of the exclusion within a reasonable amount of time. Petitioner further argues that I should

employ the equitable doctrine of laches to remedy the error and adjust the effective date of the period of exclusion. P. Br. 3-6.

Petitioner is correct that the Supreme Court has recognized that ALJ functions are roughly equivalent to those of federal trial judges. But Petitioner overlooks that federal district courts are courts established by Congress with such jurisdiction as Congress directs. U.S. Const. art. III, § 1. Similarly, ALJs who serve as neutral adjudicators in Executive Branch agencies, have only such authority as is delegated by Congress through statutes and agency heads through authorized regulations. My jurisdiction or delegated authority in this case is limited by the Secretary to the single issue of whether or not the I.G. has a basis to exclude Petitioner. The issue of whether or not the period of exclusion is reasonable is not even before me in this case. 42 C.F.R. § 1001.2007(a)(1)-(2).

I conclude that I have no authority to change the effective date of the running of a period of exclusion in this case. Section 1128(c)(1) of the Act provides that exclusion under section 1128 of the Act 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 in regulations . . . ." The Secretary has required by regulation that the I.G. send written notice of the exclusion to the affected individual or entity. 42 C.F.R. § 1001.2002(a). The Secretary's regulations further provide that the exclusion will be effective 20 days from the date of the notice. 42 C.F.R. § 1001.2002(b). Both the context and plain language of the regulation are consistent with my conclusion that the notice referred to in section 1001.2002(b) is the written notice required by section 1001.2002(a). The Secretary's regulations do not give me discretion to either review or change the effective date of Petitioner's exclusion, and I may not refuse to follow the Secretary's regulations. 42 C.F.R. § 1005.4(c)(1). The Departmental Appeals Board (the Board) has addressed the issue and concluded that ALJs and the Board have no authority to change the effective date of the running of the period of exclusion as required by the Secretary. *Thomas Edward Musial*, DAB No. 1991 at 3 (2005) (and cases cited therein).

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.'s notice to Petitioner is dated April 28, 2017. Accordingly, the effective date of Petitioner's exclusion is May 18, 2017.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs for the minimum statutory period of five years, effective May 18, 2017.

/s/
Keith W. Sickendick
Administrative Law Judge