Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Srinath Thoompally,
(OI File Number 2-12-40110-9)

Petitioner,

v.

The Inspector General.

Docket No. C-14-489

Decision No. CR3226

Date: May 9, 2014

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Srinath Thoompally, from participating in Medicare, State Medicaid programs, and all other federally funded health care programs for a period of two years. Exclusion is authorized by section 1128(b)(3) of the Social Security Act (Act).

I. Background

The I.G. determined to exclude Petitioner, a pharmacist, for a two-year period. Petitioner requested a hearing, and the case was assigned to me. The I.G. filed a brief and a reply brief along with four proposed exhibits that are identified as I.G. Exs. 1 – 4. Petitioner submitted a brief and a sur-reply brief along with nine proposed exhibits that are identified as P. Exs. 1 – 4, P. Ex. 4a, and P. Exs. 5 – 8. The I.G. moved that I exclude certain of Petitioner's exhibits on the ground that they are irrelevant. While I agree with the I.G. that some of Petitioner's exhibits have no bearing on the issues that I may hear and decide I also find no harm in admitting them. I receive the parties' exhibits into evidence.

Petitioner requested that I convene an in-person hearing in order to take the testimony of three individuals who Petitioner identifies as himself, a

"representative from the U.S. Attorney's Office for the Southern District of New York," and an "expert in retail pharmacy practice." I find no basis to grant Petitioner's request and I deny it.

In the pre-hearing order that I issued, I ordered the parties to reduce any proposed testimony to writing and to submit it under oath or affirmation. Order and Schedule for Filing Briefs and Documentary Evidence (Order) at 2-3. Petitioner has not done that with any of his proposed witnesses' testimony, including his own, nor has he explained why he has not done so. Petitioner's failure to comply with my Order is sufficient reason to deny his request.

Moreover, Petitioner has offered no legitimate justification for offering testimony at an in-person hearing. He asserts that some of the witnesses, including himself and the representative of the United States Attorney's Office, would explain the contents of some of the exhibits that I have received into evidence. But, Petitioner has not identified any ambiguities in these documents or any other reason why a witness should "explain" them. He also proffers the testimony of a pharmacy expert allegedly in order to rebut evidence that the I.G. ostensibly offered concerning the presence of an aggravating factor relating to the length of the exclusion. I find that there is nothing relevant that such an expert can possibly add to the record that would bear on my decision of whether evidence establishes that there is an aggravating factor that justifies increasing the length of Petitioner's exclusion. The aggravating factor that was cited by the I.G. is that Petitioner committed the acts that are the basis for his conviction during a period of more than one year. That is something that Petitioner admitted to when he pled guilty.

More important, the presence of aggravating and/or mitigating evidence simply has no bearing on the length of the exclusion that the I.G. imposed. As I discuss below, the I.G. excluded Petitioner for two years, a period of time that is *less than the standard regulatory exclusion period* for an exclusion imposed pursuant to section 1128(b)(3) of the Act. Petitioner obtained the benefit of a possibly erroneous determination by the I.G., a determination that the I.G. has not requested that I modify. So, in fact, Petitioner received a shorter exclusion than the regulations direct and the presence or absence of an aggravating factor has no bearing on that fortuitous (for him) outcome. Put simply, the aggravating factor that the I.G. identified is irrelevant.

Petitioner also requested that I allow oral argument by the parties. I see nothing in the parties' arguments that needs further elucidation and I therefore deny that request.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether the I.G. may exclude Petitioner pursuant to section 1128(b)(3) of the Act and whether the length of the exclusion, two years, is reasonable.

B. Findings of Fact and Conclusions of Law

The I.G. unquestionably has authority to exclude Petitioner pursuant to section 1128(b)(3). This section authorizes the exclusion of any individual who is convicted of a federal or State misdemeanor relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The evidence establishes that Petitioner pled guilty to a federal misdemeanor charge that is based explicitly on his unlawful dispensing of prescription medications that included controlled substances.

Petitioner was originally indicted as a member of a ring of individuals that unlawfully dispensed controlled substances. I.G. Ex. 4. Eventually, however, Petitioner and the federal government entered into an agreement in which Petitioner pled guilty to a single misdemeanor charge of misbranding drugs. I.G. Ex. 2. The criminal charge to which Petitioner pled is incorporated by reference into the plea agreement and is stated in a Superseding Information that was filed on September 28, 2012. Petitioner pled guilty to having:

> [d]ispensed drugs, *including controlled substances*, to an Individual ("Individual-1") who provided . . . [Petitioner] with stolen prescriptions that were not issued by a practitioner for a legitimate medical purpose, but rather were filled out and issued by Individual-1 and identified individuals other than Individual-1 as the patient, and thus . . . [Petitioner] dispensed such drugs to Individual-1 not upon the written prescription of a practitioner licensed by law to administer such drugs.

I.G. Ex. 3 at 1-2 (emphasis added). In sum, Petitioner was charged with and pled guilty to knowingly and unlawfully dispensing prescription medications, including controlled substances, for which no legitimate prescription had been issued.

The I.G. and Petitioner have devoted parts of their briefs to arguing whether Petitioner's conviction is "related" to the unlawful dispensing of a controlled

substance. Both parties miss the point. There is no need to find a "relationship" between Petitioner's crime and the unlawful dispensing of a controlled substance other than this: the crime in this case *is* the unlawful dispensing of medications, including controlled substances, for which no valid prescription had been issued.

In his reply brief the I.G. avers that: "The fact that the count Petitioner pled to did not contain the term 'controlled substance' is not a determining factor as to whether his conviction was related to a controlled substance." I.G.'s Reply Brief at 2. Petitioner, in his sur-reply brief happily adopts this contention and asserts that the I.G. determined to exclude Petitioner based on a "subjective analysis" of Petitioner's plea. I find the I.G.'s statement to be bizarre because it has no basis whatsoever in the record. Indeed, I have no clue as to what I.G.'s counsel is talking about. The Superseding Information explicitly states that the drugs that Petitioner dispensed unlawfully included controlled substances. I.G. Ex. 3 at 1-2. Counsel evidently misread her own exhibit. There is nothing "subjective" about what is stated in the Superseding Information and Petitioner's plea.

Petitioner argues that the language of the criminal statute to which he entered his guilty plea does not refer to controlled substances, citing 42 U.S.C. § 1320a-7(b)(3). True, but the information to which he pled guilty explicitly charges him with unlawfully dispensing controlled substances. For purposes of determining whether authority to exclude exists, what controls is the specific facts to which a party pleads. For example, an individual who steals money from the Medicare program might plead guilty to the generic crime of theft – a crime that doesn't specifically refer to theft from Medicare – and that individual would still have been convicted of theft from the Medicare program if, in fact, the individual's plea agreement specifically references theft from Medicare. The same is true here. Petitioner pled guilty explicitly to dispensing controlled substances unlawfully. I.G. Exs. 2, 3.

Petitioner argues also that the plea agreement that Petitioner signed makes it clear that he was not convicted of any offense involving a controlled substance. As support for this argument he cites this language in the plea agreement:

> In consideration of the defendant's plea to the . . . [Superseding Information] the defendant will not be further prosecuted criminally by this Office . . . for dispensing drugs, including controlled substances, in the course of his work as a pharmacist from in or about 2007 through in or about October 2011, based upon fraudulent prescriptions provided to him by the individual referred to in the Information as "Individual-One" . . . .

I.G. Ex. 2 at 1. Thus, according to Petitioner, all of the allegations against him relating to controlled substances "were dismissed." Petitioner's Informal Brief at ¶ II.

But, that is not at all what the plea agreement says. It unambiguously and explicitly states that Petitioner will not be prosecuted for charges of unlawful dispensing of controlled substances that are *in addition to* the charge to which he pled guilty. That is the only possible meaning of the word "further" in the quoted language from the plea agreement. The agreement would be meaningless if it were interpreted any other way inasmuch as the whole purpose of the agreement was to memorialize Petitioner's guilty plea to a charge of unlawfully dispensing prescription medications that included controlled substances.

The length of exclusions imposed pursuant to section 1128(b)(3) of the Act is governed by regulations at 42 C.F.R. § 1001.401. Subsection (c)(1) of this regulation states that an exclusion imposed pursuant to section 1128(b)(3) will be for a period of three years unless aggravating and/or mitigating factors exist that justify either lengthening or shortening the exclusion period. The I.G. excluded Petitioner for a period of two years. Now, the I.G. contends that he imposed the two-year exclusion erroneously due to misapplication of a mitigating factor. However, the I.G. does not ask that I lengthen Petitioner's exclusion.

Whether the two-year exclusion was imposed incorrectly or not, the determination to do so in lieu of the standard three-year period was an act of discretion by the I.G. to determine the scope and effect of an exclusion imposed under section 1128(b) of the Act. I do not have authority to question the I.G.'s exercise of discretion in this instance, and therefore, if the I.G. advocates that I not alter the two-year exclusion period, the possible misapplication of a mitigating factor in Petitioner's case is beyond my authority to review. 42 C.F.R. § 1005.4(c)(5).

Petitioner argues that the I.G. incorrectly determined that evidence established the presence of an aggravating factor and used that adversely against Petitioner to impose the two-year exclusion. But, that is simply not the case. Ordinarily, the minimum exclusion period imposed for an 1128(b)(3) offense is three years. 42 C.F.R. § 1001.401(c)(1). In this case the I.G. imposed an exclusion that is for less than the standard three-year period. The possible presence of an aggravating factor is simply irrelevant in a case such as this one where the I.G. uses his discretion to impose an exclusion that is for less than the regulatory standard.

Besides, there is evidence that supports the presence of an aggravating factor. An aggravating factor justifying increasing an exclusion to a period of more than three years exists where an individual is convicted of crimes occurring over a period of

one year or more. 42 C.F.R. § 1001.401(c)(2)(i). Petitioner pled guilty to crimes that he committed beginning in or about 2007 and extending through in or about October 2011, a period of more than three years. I.G. Ex. 3 at 1. That evidence, absent proof of a mitigating factor, would justify a greater than three-year exclusion in this case. Petitioner did very well to receive only a two-year exclusion in light of the evidence relating to an aggravating factor and the absence of evidence relating to a mitigating factor. He literally got away with something for which he is not eligible under the regulations.

/s/
Steven T. Kessel
Administrative Law Judge