

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Joshua D. Baron, M.D.,
(OI File No. H-16-4-2191-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-343

Decision No. CR4914

Date: August 9, 2017

DECISION

Petitioner, Joshua D. Baron, was a physician, licensed in Illinois, who, in exchange for sex (and sometimes money), wrote amphetamine prescriptions for women he met for that express purpose through Craigslist. He was convicted of one felony count of distributing a controlled substance. Based on this conviction, the Inspector General (IG) has excluded him for 15 years from participating in Medicare, Medicaid, and all federal health care programs, as provided for in section 1128(a)(4) of the Social Security Act (Act). Petitioner concedes that he must be excluded for a minimum period of five years but challenges the length of the exclusion beyond the five years. For the reasons discussed below, I find that the IG properly excluded Petitioner and that the 15-year exclusion falls within a reasonable range.

Background

By letter dated November 30, 2016, the IG notified Petitioner Baron that he was excluded from participating in Medicare, Medicaid, and all federal health care programs for a period of 15 years, because he had been convicted of criminal offenses related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

The letter explained that section 1128(a)(4) of the Act authorizes the exclusion. IG Exhibit (Ex.) 1.

Petitioner appeals. He concedes that he was convicted and is subject to exclusion. Petitioner Brief (P. Br.) at 2.

Each party submitted a written argument (IG Br.; P. Br.). The IG also submitted six exhibits (IG Exs. 1-6) and a reply brief (IG Reply). Petitioner submitted six exhibits, labeled P. Exs. 1- 4 and P. Exs. 6-7, omitting P. Ex. 5.

The IG objects to my admitting P. Ex. 2. P. Ex. 2 is a one-page document from Petitioner's criminal proceedings titled "Sentencing Memorandum." Fax notations at the top of the page suggest that the document represents page 4 of a 5-page fax. Citing Rule 106 of the Federal Rules of Evidence ("Rule of Completeness"), the IG argues that he is entitled to require that the entire document be produced. I am not convinced that Rule 106 requires admission of the entire document. Under the rule, the IG must show that the missing sections are necessary to: 1) explain the admitted portion; 2) place the admitted portion in context; 3) avoid misleading the trier of fact; or 4) insure a fair and impartial understanding. *United States v. Sweiss*, 814 F.2d 1208, 1211-12 (1987). The IG has not met this burden.

In any event, I am not bound by the Federal Rules. 42 C.F.R. § 1005.17. I must exclude evidence that is irrelevant or immaterial; but I find that P. Ex. 2 is relevant and material.

Finally, even though the IG apparently does not possess the entire document, he could have obtained it, either by the same means he used to obtain other court documents (IG Exs. 3-5) or by asking Petitioner to produce it pursuant to 42 C.F.R. § 1005.7.

In the absence of any other objections, I admit into evidence IG Exs. 1-6 and P. Exs. 1- 4 and 6-7.

The parties agree that this case does not require an in-person hearing. IG Br. at 8; P. Br. at 3.

Issue

Because the parties agree that the IG has a basis upon which to exclude Petitioner from program participation, the sole issue before me is whether the length of the exclusion (15 years) is reasonable. 42 C.F.R. § 1001.2007.

Discussion

Section 1128(a)(4) mandates that the Secretary exclude from program participation any individual or entity convicted of a felony criminal offense “relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.” See 42 C.F.R. § 1001.101(d).

Petitioner was a physician practicing in Chicago. On multiple occasions between late 2006 and 2011, he posted advertisements on Craigslist (under such sections as “Men Who Would Pay” and “Casual Encounters”) offering to trade prescription drugs for sex and/or money. IG Ex. 4 at 3, 5; see P. Ex. 2 (noting that Petitioner traded narcotics prescriptions for sexual favors and, sometimes, money). Over time, he dispensed significant amounts of Adderall, Percocet, Demerol, Dilaudid, Facolin, Morphine, Norco, Vicodin, Xanax, Phentermine, and Klonopin. IG Ex. 4 at 6-7.

He was eventually caught, arrested, and charged with 31 felony counts of dispensing a controlled substance (Schedules II, III, and IV) outside the usual course of professional practice and without a legitimate medical purpose, in violation of 21 U.S.C. § 841(a)(1), and one count of attempting to dispense a Schedule II controlled substance outside of the usual course of professional practice and without a legitimate medical purpose, in violation of 21 U.S.C. § 846. IG Ex. 3. In a plea agreement, signed March 21, 2014, Petitioner pled guilty to one count, although he generally admitted to the allegations set forth in the entire indictment. IG Ex. 4. On August 22, 2014, the U.S. district court for the Northern District of Illinois accepted his plea, finding him guilty of distribution of a controlled substance, in violation of 21 U.S.C. § 841. IG Ex. 5.

The court sentenced Petitioner Baron to 70 months in prison, followed by ten years of supervised release, and ordered him to pay a \$100 assessment, a \$1,000 fine, and to perform 1,000 hours of community service. IG Ex. 5.

Based on one aggravating factor and no mitigating factors, the 15-year exclusion is reasonable.¹

I now consider whether the length of the exclusion, beyond five years, falls within a reasonable range.

Aggravating factor. An exclusion under section 1128(a)(4) must be for a minimum period of five years. Act, § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2). Federal regulations set forth criteria for lengthening exclusions beyond the five-year minimum. 42 C.F.R. § 1001.102(b). Evidence that does not pertain to one of the

¹ I make this one finding of fact/conclusion of law.

aggravating or mitigating factors (42 C.F.R. § 1001.102(c)) listed in the regulations may not be used to decide whether an exclusion of a particular length is reasonable.

Among the factors that may serve as bases for lengthening the period of exclusion is the one that the IG cites to justify the period of exclusion in this case: the sentence imposed by the court included incarceration. 42 C.F.R. § 1001.102(b)(5).²

The criminal court sentenced Petitioner to a very substantial period of incarceration – 70 months, or just under six years. IG Ex. 5.

While any period of incarceration justifies increasing the period of exclusion, the Board has repeatedly held that long periods of incarceration are relevant in determining whether a period of exclusion is reasonable. *Eugene Goldman, M.D. a/k/a Yevgeniy Goldman, M.D.*, DAB No. 2635 at 6 (2015). Generally, the longer the jail time, the longer the exclusion, because a lengthy sentence evidences a more serious offense. See *Jeremy Robinson*, DAB No. 1905 (2004); *Jason Hollady, M.D.*, DAB No. 1855 at 12 (2002) (characterizing a nine-month incarceration as “relatively substantial.”); *Stacy Ann Battle, D.D.S.*, DAB No. 1843 (2002) (finding that four months in a halfway house, followed by four months home confinement justifies lengthening the period of exclusion); *Brenda Mills, M.D.*, DAB CR1461 (2006), *aff’d*, DAB No. 2061 (2007) (finding that six months home confinement justifies increase in length of exclusion).

Mitigating factor. The regulations consider mitigating just three factors: 1) a petitioner was convicted of three or fewer misdemeanor offenses and the resulting financial loss to the program was less than \$1,500; 2) the record in the criminal proceedings 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. 42 C.F.R. § 1001.102(c).

² The IG did not add some additional aggravating factors that potentially apply here: 1) the acts resulting in the conviction, or similar acts, were committed over a period of one year or more; and 2) the convicted individual has been 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 a basis for the exclusion. 42 C.F.R. § 1001.102(b). In his plea agreement, Petitioner admitted that, over a period of *four to five years*, he exchanged drugs for sex and/or money. IG Ex. 4 at 5. And, based on his felony conviction, the Illinois Department of Financial and Professional Regulation suspended his license to practice medicine. IG Ex. 2. This is an adverse action based on the same set of circumstances that underlie Petitioner’s exclusion.

Petitioner claims that his mental health issues – depression and anxiety – constitute a mitigating factor.³ But nothing in his criminal proceedings suggests that his mental or emotional condition reduced his culpability. The sentencing judge did not absolve him of any culpability: she pointed out that he “exploited the weakness and desperation of drug addicts, promoting their addictions and indirectly fostering the abusive and dangerous behavior that is a product of that addiction.” P. Ex. 2. The court expressed some sympathy for the losses Petitioner suffered following his arrest (spouse, job, income, home, license) and suggested that he developed insight and was motivated to change. But she did not imply that he was not fully culpable for his crimes. *Id.*

Petitioner’s felonious conduct was reprehensible. I agree with the sentencing judge: he exploited the weakness and desperation of others. His conduct warranted a lengthy prison sentence. I find that his criminal behavior and the period of incarceration demonstrate Petitioner’s high level of untrustworthiness and justify the 15-year exclusion.

Conclusion

The IG properly excluded Petitioner from participating in Medicare, Medicaid and other federal health care programs. So long as the period of exclusion is within a reasonable range, based on demonstrated criteria, I have no authority to change it. *Joann Fletcher Cash*, DAB No. 1725 at 7, *citing* 57 Fed. Reg. 3298, 3321 (1992). I find that the 15-year exclusion falls within a reasonable range.

/s/
Carolyn Cozad Hughes
Administrative Law Judge

³ The one page of the sentencing report that Petitioner submitted (P. Ex. 2) includes a parenthetical that Petitioner was a victim of sex abuse as a child. However, his October 2012 psychiatric assessment indicates that he denied all physical or sexual abuse. P. Ex. 4 at 2.