Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Edgar Narvaez
(O.I. File No. 6-06-40291-9),

Petitioner

v.

The Inspector General
Department of Health and Human Services.

Docket No. C-11-683

Decision No. CR2487

Date: January 11, 2012

DECISION

Petitioner, Edgar Narvaez, 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 August 18, 2011. 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 period of exclusion of ten years, for a total minimum period of exclusion of fifteen years,[1] is not unreasonable based upon the four aggravating factors established in this case and the absence of any mitigating factors.

I. Background

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated July 29, 2011, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of fifteen years. The I.G. advised Petitioner that he was being excluded pursuant to section

[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.

1128(a)(1) of the Act based on his conviction in the United States District Court, Western District of Texas, San Antonio Division, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. The I.G. cited four aggravating factors in support of extending the five-year statutory period of exclusion to fifteen years.

Petitioner timely requested a hearing by letter dated August 7, 2011. The case was assigned to me for hearing and decision on August 16, 2011. A prehearing telephone conference was convened on September 2, 2011, the substance of which is memorialized in my order dated September 6, 2011. During the prehearing conference, Petitioner waived an oral hearing and agreed to proceed upon the documentary evidence and the parties' briefs. On October 13, 2011, the I.G. filed an opening brief, with I.G. Exhibits (I.G. Exs.) 1 through 9. Petitioner filed a brief in opposition (P. Br.) on November 28, 2011, with no exhibits. The I.G. filed a reply brief (I.G. Reply) on December 16, 2011. Petitioner did not object to my consideration of I.G. Exs. 1, 2, 4, 5, 6, and 9, and they are admitted. Petitioner objects to I.G. Ex. 3 on grounds that it was not updated to reflect the "final judgment." P. Br. at 1. The objection is overruled and I.G. Ex. 3 is admitted. I.G. Ex. 3 is a copy of the indictment filed in the United States District Court, Western District of Texas, San Antonio Division, on May 20, 2009, charging Petitioner with ten counts of health care fraud and two counts of conspiracy to commit health care fraud. The document is relevant. Petitioner does not object to I.G. Ex. 4, his plea agreement, which shows that Petitioner agreed to plead guilty to counts 11 and 12 of the indictment. Petitioner also agreed to the conduct alleged in the other counts of the indictment as part of his statement of the factual basis for his plea. Although the grand jury foreperson's signature has been redacted on the last page of the indictment, I find there is sufficient evidence of authenticity based on court stamps and the signatures of the Assistant United States Attorneys. Petition objects to I.G. Exs. 7 and 8. I overrule Petitioner's objection to I.G. Ex. 7, a copy of a judgment dated July 21, 2010, which shows that Petitioner was convicted of one count of forgery in the U.S. District Court, Western District of Texas. I also overrule Petitioner's objection to I.G. Ex. 8, which is a copy of the indictment and criminal complaint charging Petitioner with the one count of forgery of which he was convicted and a related FBI agent's affidavit. I.G. Exs. 7 and 8 are relevant to establish an aggravating factor under 42 C.F.R. § 1001.102(b)(9). I find sufficient indicia that they are authentic, and they are admitted.

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 health care program. The Secretary has promulgated regulations implementing this provision of the Act. 42 C.F.R. § 1001.101(a). 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. 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 must 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
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> 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. Petitioner's exclusion is required by section 1128(a)(1) of the Act.

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction.

Petitioner does not dispute that on April 29, 2010, he agreed to plead guilty to two counts of conspiracy to commit health care fraud in violation of 18 U.S.C. § 1349. I.G. Ex. 4. Petitioner admitted as part of his plea agreement that, from on or about January 2004 to on or about August 2006, he and two other individuals doing business as Narvaez Family Provider Services, engaged in a scheme to defraud the Texas Medicaid Program.

Petitioner admitted in his plea agreement that he and the other individuals fraudulently obtained a Medicaid provider license and contract, which allowed them to wrongfully bill Medicaid for personal assistance services. Petitioner admitted that he and the other individuals engaged in the systematic practice of falsifying client records, forging physician certifications, and billing Medicaid for unauthorized services and services not rendered. Petitioner also admitted in his plea agreement that he and the other individuals obtained $400,000 from Medicaid that they were not authorized to receive. I.G. Ex. 4, at 2-4. Petitioner agreed to forfeit to the United States the sum of $400,000, which represented the amount of proceeds obtained, directly or indirectly, as a result of his criminal conduct. I.G. Ex. 4, at 10.

Petitioner does not dispute that on July 21, 2010, he was convicted, pursuant to his guilty plea, of two counts of conspiracy to commit health care fraud by the United States District Court for the Western District of Texas, San Antonio Division. Petitioner was sentenced to: 30 months incarceration on each of the counts, to be served concurrently, followed by 3 years of supervised release; pay a special assessment of $200; and pay restitution of $366,000 to the Texas Health and Human Services Commission. I.G. Ex. 2.

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)):
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> (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.

The statute requires that the Secretary exclude from participation 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 he was convicted within the meaning of section 1128(i) of the Act (42 U.S.C. 1320a-7(i)), when the district court accepted his guilty plea to two counts of conspiracy to commit health care fraud in violation of federal law. I.G. Ex. 2. Pursuant to section 1128(i) of the Act, an individual is "convicted" of a criminal offense when: a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; or there has been a finding of guilt in a federal, state, or local court; or a plea of guilty or no contest has been

accepted in a federal, state, or local court; or an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld.

Petitioner argues that his purported business did not involve delivery of professional medical or therapeutic services but, rather cooking and cleaning services. P. Br. at 1. To the extent that this argument might be construed to be an argument that Petitioner's offenses were not related to the delivery of an item or service under Medicare or Medicaid, it is not persuasive. The plain language of section 1128(a)(1) of the Act shows that it is not limited to criminal offenses related only to the delivery of professional medical services. Rather, the statute plainly states it applies to any criminal offense related to the delivery of an item or service under Medicare or Medicaid. The issue of whether Petitioner's criminal offense is related to the delivery of an item or service under Medicaid is really a question of whether or not there is a nexus or common sense connection between Petitioner's admitted criminal conduct and the Medicaid program. *Berton Siegel, D.O.*, DAB No. 1467 (1994); *Thelma Walley*, DAB No. 1367 (1992). The issue is not whether the services were professional medical services. Petitioner pled guilty to two counts of conspiracy to commit health care fraud. By his plea, he admitted that he engaged in a scheme to defraud the Texas Medicaid Program. I.G. Ex. 4, at 2. Petitioner agreed in his plea agreement that the government could prove beyond a reasonable doubt that he and the other individuals involved fraudulently obtained a Medicaid provider license and contract, which allowed them to wrongfully bill Medicaid for personal assistance services and to engage in the systematic practice of falsifying client records, forging physician certifications, and billing Medicaid for unauthorized services and services not rendered. I.G. Ex. 4, at 1-6. The submission of false billings to the Medicare and Medicaid programs has been consistently held to be a program-related crime within the scope of section 1128(a)(1) of the Act. *Jack W. Greene*, DAB No. 1078 (1989), *aff'd sub nom. Greene v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990); *Mark D. Perrault, M.D.*, DAB CR1471; *Kennard C. Kobrin*, DAB CR1213 (2004); *Norman Imperial*, DAB CR833 (2001); *Egbert Aung Kyang Tan, M.D.*, DAB CR798 (2001); *Mark Zweig, M.D.*, DAB CR563 (1999); *Alan J. Chernick, D.D.S.*, DAB CR434 (1996). The fact that Petitioner was sentenced to pay the Texas Health and Human Services Commission restitution of $366,000 also supports my conclusion that Petitioner's offense was related to the delivery of an item or service under the Texas Medicaid program.

Accordingly, I conclude that all three elements of section 1128(a)(1) of the Act are satisfied, and there is a basis for his exclusion.

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

4. Aggravating factors exist that justify extending the period of exclusion to fifteen years.

5. No mitigating factors established by the regulations have been proven.

6. Exclusion for fifteen years is not unreasonable in this case.

Because I have concluded that a basis exists to exclude Petitioner pursuant to section 1128(a)(1) of the Act, the I.G. must exclude him for a minimum period of five years pursuant to section 1128(c)(3)(B) of the Act. The remaining issue is whether it is unreasonable to extend his period of exclusion by an additional ten years.

Petitioner argues that his fifteen-year exclusion is unreasonable. Petitioner contends that his business involved nonmedical services such as cooking and cleaning rather than professional medical services. P. Br. at 1. As already discussed, section 1128(a)(1) of the Act does not distinguish between professional medical services and services such as cooking and cleaning. Thus, Petitioner's attempt to draw a distinction has no impact upon the period of exclusion that is reasonable in this case.

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.

a. Four aggravating factors justify lengthening the period of exclusion beyond the five-year statutory minimum.

The I.G. notified Petitioner that four aggravating factors are present in this case that justify an exclusion of more than five years: (1) Petitioner's criminal acts caused or were intended to cause, a financial loss to a government program or other entities and the loss was $5,000 or more as evidenced by the order to pay restitution to Texas Medicaid in the amount of $366,000; (2) the acts that resulted in Petitioner's conviction occurred over a period of one year or more, as Petitioner agreed his criminal conduct occurred between January 2004 and August 2006; (3) the sentence imposed by the court included incarceration of 30 months; and 4) Petitioner was convicted of other offenses besides those which formed the basis of the exclusion or has been the subject of an adverse action by a federal, state, or local government agency or board, and the adverse action is based on the same set of circumstances that served as the basis for the imposition of the exclusion. I also conclude that there are four aggravating factors recognized by the regulations that serve as a basis for extending the period of exclusion. 42 C.F.R. § 1001.102(b)(1), (b)(2), (b)(5), (b)(9).

Petitioner admitted in his plea agreement that he and the other individuals obtained $400,000 from Medicaid that they were not authorized to receive. I.G. Ex. 4, at 2-4.

Petitioner agreed to forfeit to the United States the sum of $400,000, which represented the amount of proceeds obtained, directly or indirectly, as a result of his criminal conduct. I.G. Ex. 4, at 10. Petitioner was ordered to pay restitution of $366,000 to the Texas Health and Human Services Commission. I.G. Ex. 2, at 6, 7. The foregoing facts support an inference that the actual or intended loss to the Texas Medicaid program as a result of Petitioner's criminal acts exceeded $5,000. *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003); *Jason Hollady, M.D.*, DAB No. 1855 (2002). Petitioner argues that he has requested an appeal regarding the amount of restitution and that there was no determination of the actual loss. P. Br. at 2. The fact that the amount of restitution may be subject to an appeal does not negate the fact that Petitioner admitted as part of his plea agreement that $400,000 represented the amount he obtained as a result of his criminal conduct. I.G. Ex. 4, at 10. The regulation does not require that the I.G. prove the exact amount of the losses sustained by Medicare or Medicaid, but only that the actual or intended loss exceeded $5,000. 42 C.F.R. § 1001.102(c)(1). Based on the plea agreement and the amount of restitution ordered by the court, there can be little doubt that the conduct for which Petitioner was convicted resulted in an actual or intended loss to the Texas Medicaid program of more than $5,000. 42 C.F.R. § 1001.102(b)(1). Further, to the extent that Petitioner disputes the restitution amount as calculated by the court, the regulations specifically prohibit such a collateral attack upon his conviction as that conviction is not subject to collateral attack or review by me, whether on substantive or procedural grounds. 42 C.F.R. § 1001.2007(d). The aggravating factor established by 42 C.F.R. § 1001.102(b)(1) is clearly established.

Petitioner does not deny that the counts of the indictment to which he pled guilty and for which he was convicted show that his criminal conduct occurred from January 2004 to August 2006, a period of more than one year. I.G. Ex. 3, at 10-11; I.G. Ex. 4, at 2-6; P. Br. at 2. However, Petitioner asks that I consider that his business "conducted services pro-bono for a year" and that the I.G. failed to take this into consideration. According to Petitioner, "there were no payments of any sort and the business passed random inspections with flying colors." P. Br. at 2. Petitioner's argument that his business did not charge for its services for a year is not an aggravating or mitigating factor under 42 C.F.R. § 1001.102 and is irrelevant to assessing the reasonableness of the period of exclusion. The undisputed evidence shows that Petitioner's criminal acts occurred over a period of one year or more, and the second aggravating factor is established. 42 C.F.R. § 1001.102(b)(2).

Petitioner does not dispute that he was sentenced to be imprisoned for thirty months. I.G. Ex. 2, at 2; P. Br. at 1. I conclude the third aggravating factor cited by the I.G. is established. 42 C.F.R. § 1001.102(b)(5).

The I.G. cites both a forgery conviction and Petitioner's exclusion from Texas Medicaid in support of the fourth aggravating factor. I.G. Ex. 1. On July 21, 2010, Petitioner was

convicted by the United States District Court, Western District of Texas in San Antonio of one count of forgery, in violation of 18 U.S.C. § 505. I.G. Exs. 7, 8. The Texas Health and Human Services Commission notified Petitioner by letter dated February 18, 2011, that he was excluded from Texas Medicaid for at least six years, effective twenty-five days from the date of the letter. I.G. Ex. 9. The I.G. argues that the fourth aggravating factor is present under 42 C.F.R. § 1001.102(b)(9) based on Petitioner's unrelated conviction of forgery and his exclusion from Texas Medicaid. I.G. Brief at 3, 9-10. Petitioner argues that the forgery conviction should not be considered. The I.G. alleges that Petitioner's forgery conviction falls within the meaning of 42 C.F.R. § 1001.102(b)(9) because it is a conviction of another offense besides that which formed the basis for his exclusion. The I.G. recognizes Petitioner's forgery conviction was based on completely different factual circumstances and has no relation at all to Petitioner's conviction for the conspiracy to commit health care fraud. I.G. Br. at 9-10; I.G. Reply at 4. The I.G.'s interpretation of 42 C.F.R. § 1001.102(b)(9) is consistent with the plain language of the regulation and I conclude that consideration of the forgery conviction (I.G. Exs. 7 and 8) is appropriate to establish the aggravating factor under 42 C.F.R. § 1001.102(b)(9). Even if I refused to consider the forgery conviction as Petitioner urges, Petitioner's exclusion from Texas Medicaid (I.G. Ex. 9) clearly establishes the fourth aggravating factor under 42 C.F.R. § 1001.102(b)(9).

Accordingly, I conclude that the I.G. has established four aggravating factors, and the I.G. was authorized by the Secretary to rely upon these factors as a basis for extending Petitioner's exclusion by ten years.

b. No mitigating factors justify reducing the period of exclusion.

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 –
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> (i) Others being convicted or excluded from Medicare, Medicaid and all other Federal health care programs,
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> (ii) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or
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> (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. 42 C.F.R. § 1005.15(b)(1).

Petitioner urges me to consider that he is working to show that he is trustworthy. P. Br. at 3. However, Petitioner points to no evidence that establishes a mitigating factor established by the regulations. Accordingly, this case presents no mitigating factors to justify reducing the period of exclusion.

The Board has made clear that the role of the ALJ in cases such as this is to conduct a "*de novo*" review as to 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. *Joann Fletcher Cash*, DAB No. 1725 n.6 (2000).[2] The regulation specifies that I 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," I am to consider whether such period falls "within a reasonable range." *Cash*, DAB No. 1725 n.6. The Board cautions that whether I think the period of exclusion too long or too short is not the issue. I am not to substitute my 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

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[2] The citation is to the version of the decision of the Board available at http://www.hhs.gov/dab/decisions/dab1725.html. In the original decision released by the Board and the copy available on Westlaw™, it is footnote 9 rather than footnote 6.

exclusion should be expected absent some circumstances that indicate no such adjustment is appropriate.

In this case, after *de novo* review I have concluded that a basis for exclusion exists and that the evidence establishes the four aggravating factors that the I.G. relied on to impose the fifteen-year exclusion. Petitioner has not established that the I.G. failed to consider any mitigating factor or considered an aggravating factor that did not exist. I conclude that a period of exclusion of fifteen years is in a reasonable range and not unreasonable. Accordingly, no basis exists for me to reassess the period of exclusion.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of fifteen years, effective August 18, 2011.

/s/
Keith W. Sickendick
Administrative Law Judge