Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Christopher Switlyk,
(O.I. File No. H-13-40939-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-342

Decision No. CR3250

Date: June 2, 2014

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Christopher Switlyk, from participating in Medicare, State Medicaid programs, and all other federally funded health care programs for a period of at least 20 years.

I. Background

Petitioner, a pharmacist, requested a hearing to challenge his exclusion. I ordered the parties to file briefs and proposed exhibits. The I.G. filed a brief, a reply brief, and six exhibits that are identified as I.G. Exhibit (Ex.) 1 - I.G. Ex. 6.[1] Petitioner filed a brief and numerous exhibits.[2] I receive the parties' exhibits into evidence.

[1] I.G. Ex. 6 is a rebuttal exhibit consisting of an affidavit from a police official concerning the degree of cooperation that Petitioner gave to prosecuting authorities. I would not normally receive an exhibit like this because the I.G. filed it after the deadline that I set for filing exhibits. However, Petitioner opened the door by alleging that his cooperation with prosecuting authorities led to the conviction of other individuals and/or the opening of new investigations based on the information he provided.

[2] I ordered the parties to number their exhibits sequentially using numbers and not letters to identify their exhibits. Petitioner ignored my order and used an idiosyncratic system of

Petitioner also requested that I convene an in-person hearing in order to take his testimony and that of a psychologist who, ostensibly, would testify about Petitioner's mental condition during the period when he committed the crimes that led to his conviction. I find no justification for doing so. Petitioner has not offered anything by way of testimony that he has not already provided in his exhibits. As for the psychologist's possible testimony, I reject that for two reasons. First, I directed both parties to provide me with the written direct testimony of any proposed witness. Petitioner did not do so nor has he explained why he failed to do so. Second, I find no relevance in the psychologist's proposed testimony. For reasons that I explain below, Petitioner has made no showing that the proposed testimony would establish a mitigating factor that might justify reducing the length of his exclusion.

Finally, Petitioner effectively requested that I stay this case pending proceedings that he alleges will result ultimately – and at some indefinite point in the future – in his receiving a reduced prison sentence. I decline to do so. Petitioner could seek reopening and revision of this decision if, at some point in the future his prison sentence is reduced substantially. However, and as I discuss below, even a reduction of several years of Petitioner's sentence would not cause me to reduce his exclusion given the gravity of Petitioner's crimes and the evidence of aggravation that exists in this case.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether the I.G. proved a statutory basis for excluding Petitioner and whether the length of the exclusion that the I.G. determined to impose is reasonable.

B. Findings of Fact and Conclusions of Law

The I.G. excluded Petitioner under the authority of section 1128(a)(4) of the Social Security Act (Act). This section mandates the exclusion of any individual who is convicted of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

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his own invention to identify his exhibits. His exhibits are as follows: 3B-A, 3B-B, 3B-C, 3B-D, 3B-E, 3B-F, 3C-A(1), 3C-A(2), 3C-A(3), 3C-A(4), 3C-A(5), 3C-A(6), 3C-A(7), 3C-A(8), 3C-A(9), 3C-A(10), 3C-A(11), 3C-A(12), 3C-A(13), 3C-B(1), 3C-B(2), 3C-B(3), 5A-1, 5A-2, 5A-3, 5B-1, 5C-1, 5C-2, 5D-1, 5D-2, 5D-3, 5D-4, and 5D-5. I contemplated rejecting these exhibits and directing Petitioner to re-file them with proper identification. However, I have decided to accept them as identified by Petitioner in the interest of saving time.

On December 14, 2010, Petitioner and several other individuals were charged with engaging in a massive conspiracy to sell controlled substances – principally Oxycodone – unlawfully from several pharmacies that they owned and operated in the Tampa, Florida area. I.G. Ex. 2. The indictment charged Petitioner and his co-conspirators with selling controlled substances unlawfully and without any regard for their customers' actual medical conditions. *Id.* at 7 – 8. Petitioner and his co-conspirators were charged with using or causing to be used blank prescription forms upon which unauthorized persons would fill in the controlled substance and dosage and forge the signature of the physicians in whose names the prescriptions were written. *Id.* at 8. The indictment charged Petitioner and his co-conspirators with generating false records in order to support the illegal sales of controlled substances. *Id.* The defendants were also charged with unlawfully distributing controlled substances via individuals who were not authorized to fill prescriptions. *Id.* at 9. Petitioner and his co-conspirators were additionally charged with making false statements to hide their unlawful conspiracy. *Id.*

Petitioner subsequently pled guilty to Counts One, Five, and Six of the Indictment. I.G. Ex. 3. Count One is the conspiracy that I have described. Counts Five and Six allege unlawful monetary transactions of greater than $10,000 using funds derived from the conspiracy specified in Count One. *Id.* Judgment of Conviction was subsequently entered against Petitioner. I.G. Ex. 4.

The evidence overwhelmingly establishes that Petitioner was convicted of an 1128(a)(4) felony and that the I.G. is required to exclude him. One does not need to analyze Petitioner's conviction beyond noting that he was convicted of a felony for conspiring to acquire, maintain, and sell controlled substances unlawfully. I.G. Ex. 4. That crime falls precisely within the ambit of section 1128(a)(4).

An individual who is excluded pursuant to section 1128(a)(4) must be excluded for a minimum of five years. Act § 1128(c)(3)(B). The I.G. excluded Petitioner for at least 20 years. The remaining question, then, is whether an exclusion of 20 years is reasonable when measured against the facts of this case.

I find that an exclusion of at least 20 years is amply justified. Indeed, I would have sustained exclusion for more than that period, had the I.G. chosen to impose a lengthier exclusion, and had the I.G. properly identified all of the aggravating factors that are established by the evidence in this case.

Section 1128 is at bottom a remedial statute with a principal purpose of protecting federally funded health care programs and these programs' beneficiaries and recipients from untrustworthy individuals. *Manocchio v. Kusserow,* 961 F.2d 1539, 1542-3 (11th Cir. 1992); 133 Cong. Rec. 14,177; *Raymond Lamont Shoemaker,* DAB No. 2560, at 9 (2014). The ultimate question that must be answered in any case where the length of

exclusion is at issue is: how lengthy a period of exclusion is reasonably necessary in order to protect against the possibly damaging actions of an untrustworthy individual?

The Secretary of the United States Department of Health and Human Services has published regulations that serve as guidelines for answering this question. The regulations, published at 42 C.F.R. Part 1001, establish aggravating and mitigating factors that must be considered in deciding whether the length of exclusion is reasonable. The factors are not a formula for deciding the length of exclusion. Rather, they serve as rules of evidence. Evidence that falls within the ambit of an aggravating factor or a mitigating factor may be weighed in order to decide what exclusion length is reasonable. 57 Fed. Reg. 3298, 3314-15 (Jan. 29, 1992). Evidence that does not fall within the ambit of an aggravating or a mitigating factor is irrelevant and may not be considered.

The aggravating and mitigating factors that relate to an exclusion imposed pursuant to section 1128(a)(4) are found at 42 C.F.R. § 1001.102(b) and (c). In this case the I.G. asserts that Petitioner's 20-year exclusion is justified based on evidence relating to one of the regulation's aggravating factors, that being the one stated at 42 C.F.R. § 1001.102(b)(5): "[t]he sentence imposed by the court [that adjudicated the criminal case] included incarceration." The I.G. points to the 108-month (nine-year) prison sentence imposed by the adjudicating Court and argues that this is an extraordinarily long sentence for the type of crime he committed. From that, he reasons that the prison sentence alone shows Petitioner to be extraordinarily untrustworthy and that, therefore, justifies a 20-year exclusion.

I agree with the I.G. that the very lengthy prison sentence imposed on Petitioner in and of itself evidences that Petitioner is a highly untrustworthy individual. A 20-year exclusion strikes me as not unreasonable in light of that.

Petitioner argues that his sentence may very well be reduced, for a number of reasons, and that his exclusion period must be reduced commensurately.[3] I find Petitioner's arguments to be speculative. At best, he can say that his sentence *may be* reduced and not that it *will be* reduced. Furthermore, even if Petitioner's sentence ultimately is reduced by two or even three years, the length of prison time that Petitioner would nevertheless have to serve is still very substantial and justifies the exclusion imposed here.

The I.G. also cites evidence relating to a second aggravating factor, which is stated at 42 C.F.R. § 1001.102(b)(9). I.G. Br. at 6-7; *see* I.G. Ex. 5. Under that subsection an aggravating factor exists if, among other things, an excluded individual is subject to adverse State administrative action based on the same facts as are the basis for the

[3] I also note that Petitioner was sentenced to three concurrent terms of incarceration, 108 months of incarceration for each guilty plea. I.G. Ex. 4.

exclusion. Petitioner's pharmacist's license was suspended in Florida based on the facts of his conviction. I.G. Ex. 5. The I.G. asserts that this suspension satisfies the regulatory criteria for an additional aggravating factor, but notes that it was not used as a basis for lengthening Petitioner's exclusion. I.G. Br. at 7. I agree with the I.G. that the adverse state action against Petitioner's license is an aggravating factor that supports the exclusion imposed against Petitioner. Indeed, that license suspension actually is a second statutory ground for excluding him. Act § 1128(b)(4). Nonetheless, I do not rely on the suspension of Petitioner's license as a basis for the 20-year exclusion.

But, it is the facts that the I.G. doesn't discuss that explain why Petitioner received such a lengthy prison sentence and that provide overwhelming support, in addition to the evidence and aggravating factor that I have cited, for an exclusion of at least 20 years. In pleading guilty Petitioner admitted to having perpetrated a conspiracy to sell controlled substances unlawfully for a period of about five years. I.G. Ex. 2 at 5; I.G. Ex. 3. Moreover, in pleading guilty Petitioner acknowledged that his crimes had resulted in ill-gotten revenues of about $11 million and he agreed to forfeit well over $2 million in cash and other valuables. I.G. Ex. 3 at 10 – 12. This undisputed evidence relates to two aggravating factors not cited by the I.G. First, Petitioner committed his crimes over a period of a year or more. 42 C.F.R. § 1001.102(b)(2). Second, the financial impact of Petitioner's crimes exceeded $5,000. 42 C.F.R. § 1001.102(b)(1). And, the evidence establishes the presence of yet another aggravating factor, that being the adverse physical and psychological impact that Petitioner's crimes had on individuals. 42 C.F.R. § 1001.102(b)(3). That adverse impact may easily be inferred from Count One of the indictment, to which Petitioner pled guilty, which avers that Petitioner and his co-conspirators sold Oxycodone to individuals essentially without regard to these individuals' true need for this controlled substance. I.G. Ex. 2 at 7 – 8. I take notice that Oxycodone is an addictive drug that has the potential for tremendous adverse physical and psychological effects on individuals when consumed without a proper prescription and physician supervision.

I would have found these additional aggravating factors to be independent grounds supporting a 20-year exclusion in this case (or even a longer period of exclusion) had the I.G. cited them and urged me to do so. I have no idea why the I.G. failed to rely on these factors and I do not rely on them as independent bases for the 20-year exclusion in this case. But, the evidence that relates to these factors also is relevant to explaining why Petitioner received such a lengthy prison sentence and it is therefore relevant to establishing Petitioner's untrustworthiness to provide care for that reason.

The evidence reveals the true magnitude of Petitioner's crimes. Even if I do not consider this evidence as establishing additional aggravating factors due to the I.G.'s inexplicable failure to allege them, it provides a great deal of explanation as to why Petitioner received the very lengthy prison sentence that he received. Petitioner is manifestly untrustworthy to deal with program funds, beneficiaries and recipients. Indeed, the facts that I have

recited, just when considered as an explanation for Petitioner's prison sentence, suggest that, if anything, the I.G. was overly lenient in excluding Petitioner for only 20 years. Petitioner and his co-conspirators were, effectively, drug dealers. Their crimes are only technically different from the crimes committed by large-scale sellers of street narcotics.

Petitioner argues that there are mitigating factors present in his case that the I.G. did not take into consideration and that justify reducing the length of his exclusion. He asserts, first, that he has cooperated extensively with prosecuting officials and that this cooperation should be a basis for reducing his exclusion. *See* 42 C.F.R. § 1001.102(c)(3). This subsection defines as a mitigating factor cooperation that leads to: other individuals being convicted or excluded from Medicare, State Medicaid programs, or other federally funded health care programs; the identification of program vulnerabilities or weaknesses through the investigation of other cases; or the imposition of a civil money penalty against others. To support his assertion Petitioner has provided a list of persons whose conduct Petitioner allegedly has discussed with authorities. However, even if Petitioner has cooperated with authorities he has provided no evidence that this cooperation has resulted in any of the outcomes identified in the subsection. Therefore, he has not offered evidence that establishes the presence of the mitigating factor described in the subsection.

The I.G. offered as rebuttal evidence the sworn declaration of Jeffrey Shearer, a detective for the Tampa, Florida police department. I.G. Ex. 6. Detective Shearer was in charge of the investigation that led to Petitioner's indictment and conviction and he makes it clear that Petitioner's cooperation has not led either to the opening of new investigations or to the prosecution or conviction of others. Indeed, Detective Shearer describes Petitioner as a manifestly untrustworthy and, in the end, deceptive witness. Although this evidence is certainly relevant, I find it to be unnecessary to decide that Petitioner failed to establish the presence of cooperation as a mitigating factor. For that reason I have not held open the record of this case for possible cross-examination of Detective Shearer by Petitioner.

Petitioner also asserts that he suffers from psychological problems that reduced his culpability. *See* 42 C.F.R. § 1001.102(c)(2). But, Petitioner's psychological problems, whatever they may be, do not establish a mitigating factor because Petitioner has not shown that these problems influenced the judge who sentenced him to find that Petitioner's psychological condition reduced his culpability.

Moreover, I would not reduce the exclusion from the 20-year minimum determined by the I.G. even if Petitioner were to prove the presence of *both* of the mitigating factors that he alleges. As I have stated, the regulatory aggravating and mitigating factors provide no formula that dictates the length of an exclusion in any case. Mitigating evidence *may* be a basis to offset aggravating evidence but the regulations do not state that it *must* offset aggravating evidence where it is present. In this case Petitioner's crimes were so outrageous that even the presence of one or two mitigating factors would not be a legitimate basis to reduce the length of the exclusion below 20 years.

Finally, Petitioner argues that in other, similar cases, individuals have received shorter exclusions than he received. He contends that his exclusion is unreasonable when compared with the exclusions imposed in other cases.

A comparative standard is not used to determine whether an exclusion is reasonable. An exclusion is reasonable when it is supported by the facts of the case. In this case the facts more than amply support the 20-year exclusion that the I.G. determined to impose.

/s/
Steven T. Kessel
Administrative Law Judge