Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Charles Brian Griffin,
(O.I. File Number H-15-40426-9),

Petitioner

v.

The Inspector General,
Department of Health & Human Services.

Docket No. C-15-3929

Decision No. CR4602

Date: May 5, 2016

DECISION

Petitioner, Charles Brian Griffin, is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(4) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(4)), effective June 18, 2015. There is a proper basis for exclusion. 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 exclusion of five years, for a total minimum exclusion of ten years,[1] is not unreasonable based upon the presence of two aggravating factors and the absence of any mitigating factors.

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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 minimum period of exclusion.

I. Background

The Inspector General (I.G.) of the United States Department of Health and Human Services (HHS) notified Petitioner by letter dated May 29, 2015, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of ten years. The I.G. advised Petitioner that he was being excluded pursuant to section 1128(a)(4) of the Act, based on his felony conviction in the United States District Court for the Western District of Pennsylvania (district court), of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The I.G. further advised Petitioner that the mandatory five-year exclusion was lengthened because Petitioner's sentence included incarceration and he was subject to another adverse action by a state or federal agency or board. I.G. Exhibit (I.G. Ex.) 1.

Petitioner timely requested a hearing by letter dated July 29, 2015 and postmarked July 30, 2015. The case was assigned to me on October 22, 2015 to hear and decide. A prehearing conference was convened by telephone on November 16, 2015, the substance of which is memorialized in my order dated November 17, 2015. On December 16, 2015, the I.G. filed a motion for summary judgment, a brief in support of summary judgment (I.G. Br.), and I.G. exhibits 1 through 6. Petitioner filed a brief in opposition on January 31, 2016, accompanied by 186 pages of exhibits that were not properly marked.[2] The I.G. filed a reply brief (I.G. Reply) on February 16, 2016, and I.G. Exs. 7 and 8. Petitioner filed a sur-reply on March 1, 2016, which is accepted (P. Sur-reply). Petitioner did not object to my consideration of I.G. Exs. 1 through 8. The I.G. did not object to my consideration of P. Exs. 1 through 3 and A through J. The offered exhibits are admitted as evidence.

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[2] Petitioner did not properly mark his exhibits in the manner required by the Civil Remedies Division Procedures, a copy of which was provided to him when his request for hearing was acknowledged. When Petitioner's filing was received by my office, it was uploaded as a single document to the Departmental Appeals Board's Electronic Filing System (DAB E-File) as # 7. The format of the uploaded document includes a page counter. All references to the pages of Petitioner's exchange (brief and exhibits) will be to the page counter. Petitioner's brief is pages 2 through 25 (P. Br.). Petitioner's exhibits (P. Exs.) 1 through 3 and A through J are pages 26 through 213.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) provides Petitioner with rights to an Administrative Law Judge (ALJ) hearing and judicial review of the final action of the Secretary of HHS (Secretary). The right to hearing before an ALJ is set forth in 42 C.F.R. §§ 1001.2007(a) and 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified by 42 C.F.R. § 1005.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5).

Pursuant to section 1128(a)(4) of the Act, the Secretary must exclude from participation in the Medicare and Medicaid programs any individual convicted for an offense that occurred after August 21, 1996, under federal or state law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. 42 C.F.R. § 1001.101(d). Pursuant to section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)), an individual is convicted of a criminal offense when: (1) a judgment of conviction has been entered against him or her in a federal, state, or local court whether an appeal is pending or the record of the conviction is expunged; (2) there is a finding of guilt by a court; (3) a plea of guilty or no contest is accepted by a court; or (4) the individual has entered into any arrangement or program where judgment of conviction is withheld.

Exclusion for a minimum period of five years is mandatory for any individual or entity convicted of a criminal offense for which exclusion is required by section 1128(a) of the Act. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)). Pursuant to 42 C.F.R. § 1001.102(b), an individual's period of exclusion may be lengthened based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years, however, are mitigating factors considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(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. Issue

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

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. Summary judgment is appropriate in this case.

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.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The Secretary has provided by regulation that a sanctioned party has the right to hearing before an ALJ, and both the sanctioned party and the I.G. have a right to participate in the hearing. 42 C.F.R. §§ 1005.2-.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). An ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12).

Summary judgment is appropriate when the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56; *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *David A. Barrett*, DAB No. 1461 (1994); *Robert C. Greenwood*, DAB No. 1423 (1993); *Thelma Walley*, DAB No. 1367 (1992); *Catherine L. Dodd, R.N.*, DAB No. 1345 (1992); *John W. Foderick, M.D.*, DAB No. 1125 (1990). In opposing a properly-supported motion for summary judgment, the nonmovant must show that there are material facts that remain in dispute and that those facts are material, in that, they either rebut the proponent's prima facie case or establish a defense. *Garden City Medical Clinic*, DAB No. 1763 (2001)*; Everett Rehab. and Med. Ctr.*, DAB No. 1628 (1997). It is insufficient for the nonmovant to rely upon mere allegations or denials to defeat the motion and proceed to hearing. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986).

There are no genuine disputes as to any material fact in this case. The facts that trigger exclusion under section 1128(a)(4) of the Act are conceded, undisputed, or not subject to dispute. Petitioner argues that there are material facts in dispute. Petitioner asserts that because he was not convicted of fraud or any offense related to a federally funded

program, the I.G. does not have the authority to exclude him. Petitioner argues that the I.G. failed to consider a mitigating factor. Petitioner also argues that the date of his federal exclusion should be retroactive to the date that the Pennsylvania Board of Pharmacy revoked his license to practice as a pharmacist. P. Sur-reply at 18-20. Petitioner's arguments must be resolved against him as a matter of law. The I.G. is entitled to judgment as a matter of law. Accordingly, summary judgment is appropriate.

3. There is a basis to exclude Petitioner pursuant to section 1128(a)(4) of the Act.

Petitioner did not deny in his request for hearing that he was convicted as alleged by the I.G. but argued that the period of exclusion was unreasonable. In his brief, Petitioner concedes that there is a basis for his exclusion and that he contests only the length of the exclusion. He also argued that the exclusion should have begun on December 12, 2013. P. Br. at 1. In his sur-reply, Petitioner argues that the I.G. has no jurisdiction or authority to exclude him because he was convicted of conspiracy not fraud. Petitioner argues that summary judgment should be issued in his favor. Petitioner further argues that, even if I conclude that the I.G. has the authority and a basis for excluding him, the ten-year exclusion is unreasonable. He argued that his exclusion should have begun on December 12, 2013, the date he lost his license in Pennsylvania. P. Sur-reply at 2-4, 6, 18-19. Petitioner's arguments must be resolved against him as a matter of law. Petitioner admits that he was, in fact, sentenced to 40 months in a federal prison camp and that the Pennsylvania Board of Pharmacy revoked his license to practice pharmacy for five years. But he argues that the district court considered during sentencing that he had a gambling addiction and imposed a reduced sentence on that basis. He argues that the reduced sentence is evidence that the judge found him less culpable and that is a mitigating factor recognized under 42 C.F.R. § 1001.102(c)(2). P. Sur-reply at 16-19.

The I.G. cites section 1128(a)(4) 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)):
>
> > . . . (4) FELONY CONVICTION RELATING TO CONTROLLED SUBSTANCE.–Any individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful

> manufacture, distribution, prescription, or dispensing of a controlled substance.

The statute requires that the Secretary exclude from participation in Medicare or Medicaid any individual or entity: (1) convicted of a felony criminal offense under federal or state law; (2) where the offense occurred after August 21, 1996, the date of enactment of the Health Insurance Portability and Accountability Act of 1996; and (3) the criminal offense relates to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

There is a basis for Petitioner's exclusion. Petitioner does not dispute that: on December 4, 2013, the district court accepted his guilty plea to one count of conspiracy to possess with the intent to distribute and distribute oxycodone, a Schedule II controlled substance, from in or around March 2011 and continuing thereafter to in or around February 2012; that a judgment of conviction and sentence was entered by the district court on December 4, 2013; and that the offense of which he was convicted was a felony. There is no dispute that the acceptance of Petitioner's guilty plea and the entry of a judgment of conviction was a conviction within the meaning of section 1128(i) of the Act. RFH; I.G. Exs. 2-5; P. Br. at 1.

I conclude that the elements of section 1128(a)(4) of the Act are satisfied and the I.G. is required to exclude Petitioner.

Petitioner argues that the effective date of his exclusion should begin on December 12, 2013, the date that the Pennsylvania State Board of Pharmacy revoked his pharmacy license. P. Br. at 2; I.G. Ex. 6 at 14. Petitioner's argument is unavailing and must be resolved against him as a matter of law. The regulations provide that the effective date of exclusion is 20 days after the date on the notice of exclusion. 42 C.F.R. § 1001.2002(b). I have no authority to review the timeliness of the I.G.'s imposition of the exclusion or to adjust the effective date of the exclusion. *Randall Dean Hopp*, DAB No. 2166 at 2-4 (2008).

Petitioner argues in his sur-reply that the I.G. has no jurisdiction or authority to impose exclusion. Petitioner argues that the offense of which he was convicted has nothing to do with fraud or federally funded programs; rather, he points out that he was convicted of conspiracy. Petitioner asserts that because the I.G. has no authority to exclude him, summary judgment should be granted in his favor. P. Sur-reply at 2-4. Petitioner's arguments must be resolved against him as a matter of law. Congress was clear in drafting section 1128(a)(4) of the Act that the Secretary must exclude anyone from participation in Medicare, Medicaid, or other federal health care program who is convicted of a felony committed after August 21, 1996, if the offense is related "to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." Act § 1128(a)(4). Unlike other provisions in which Congress mandated exclusion under

section 1128(a), section 1128(a)(4) does not require that the offense be related to the delivery of an item or service under a federal health care program. There is also no requirement that there be an allegation, evidence, or a judicial finding of fraud or any loss of or threat to federal funds. Congress not only gave the Secretary the authority to exclude but mandated the exclusions of individuals convicted of a drug related offense committed after August 21, 1996. I further conclude, as a matter of law, that conspiracy to possess and distribute a controlled substance, the offense for which Petitioner was convicted, falls squarely within the scope of section 1128(a)(4) as the offense is related "to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." Act § 1128(a)(4); 21 U.S.C. §§ 841(a)(1), (b)(1)(C), 846.

4. Pursuant to section 1128(c)(3)(B) of the Act, a five-year period of exclusion is mandatory.

I have concluded that a basis exists to exclude Petitioner pursuant to section 1128(a)(4) of the Act. Therefore, the I.G. must exclude Petitioner for a minimum period of five years pursuant to section 1128(c)(3)(B) of the Act. The I.G. has no discretion to impose a lesser period and I may not reduce the period of exclusion below five years. The remaining issue is whether it is unreasonable to lengthen Petitioner's exclusion by an additional five years.

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) that Petitioner has proven that the I.G. considered an aggravating factor that does not exist or that there are mitigating factors that the I.G. failed to consider; and (3) the period of exclusion is within a reasonable range.

5. Two aggravating factors are present that justify lengthening the minimum period of exclusion to ten years.

The I.G. notified Petitioner that two aggravating factors are present in this case that justify an exclusion of more than five years: (1) the sentence imposed by the court included incarceration of 40 months; and (2) Petitioner has been subject to 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 because the Pennsylvania Board of Pharmacy revoked his license to practice as a pharmacist as a result of his conviction. I.G. Ex. 1 at 1-2.

Petitioner does not dispute that the district court sentenced him to a period of incarceration, or that the Pennsylvania Board of Pharmacy revoked his license to practice as a pharmacist based on his conviction. P. Br. at 1-2, 4-5, 7, 16-17; P. Sur-reply at 5; P. Ex. J at 211-12; I.G. Exs. 5, 6. I conclude that the aggravating factors that the I.G. cites are established by the evidence before me and are undisputed. The aggravating

factors are a basis for the I.G. to extend the period of exclusion beyond the minimum exclusion of five years. 42 C.F.R. § 1001.102(b)(5), (b)(9).

6. Petitioner has not shown that there is any genuine dispute of material fact as to the existence of a mitigating factor that could be proved by a preponderance of the evidence.

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 established by 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 –
>
> > (i) Others being convicted or excluded from Medicare, Medicaid and all other Federal health care programs,
> >
> > (ii) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or
> >
> > (iii) The imposition against anyone of a civil money penalty or assessment under part 1003 of this chapter.

Petitioner has the burden to prove by a preponderance of the evidence that there is a mitigating factor for me to consider. 42 C.F.R. § 1005.15(b)(1). Petitioner was convicted of a felony offense not misdemeanors and, accordingly, the mitigating factor

established by 42 C.F.R. § 1001.102(c)(1) does not apply. Similarly, Petitioner makes no allegation and there is no evidence that he cooperated with federal or state officials in a manner to trigger the mitigating factor established by 42 C.F.R. § 1002.102(c)(3).

Petitioner urges me to find that the I.G. failed to consider the mitigating factor established by 42 C.F.R. § 1001.102(b), that is, the district court considered him to be less culpable due to his gambling addiction. RFH; P. Br. at 16-19; P. Sur-reply at 7-11. There is no dispute that the district court imposed a sentence of incarceration that was less than authorized. There is also no dispute by the I.G. that the district court was aware of Petitioner's diagnosed gambling addiction and attention deficit hyperactivity disorder (ADHD). P. Exs. B at 112-39, C at 141-46. The fact that Petitioner was suffering from a gambling addiction at the time he committed the crime of which he was convicted is not, standing alone, evidence sufficient to establish a mitigating factor. Petitioner's psychiatric diagnoses are relevant as a mitigating factor, only if the record from the criminal proceedings demonstrates that the district court determined the condition existed and that the condition reduced Petitioner's culpability. 42 C.F.R. § 1001.102(c)(2). Evidence of this mitigating factor will be considered only if "[t]he record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional, or physical condition . . . that reduced the individual's culpability." *Patel v. Shalala*, 17 F. Supp. 2d 662, 667 (W.D. Ky. 1998).

The district court sentenced Petitioner to 40 months imprisonment, rather than 70 to 87 months as authorized under the federal sentencing guideline and requested by the prosecution. While it is clear that the district court chose to downwardly depart from the sentencing guidelines, it is not clear why. Petitioner's wants me to infer from the court's imposition of the lesser sentence that the district court found Petitioner less culpable. Generally, the nonmovant on summary judgment is entitled to all favorable inferences. However, an inference must be based on more than mere conjecture. The mere fact that a judge imposed less than the maximum sentence is an insufficient basis for inferring that the judge found the accused to be of reduced culpability. There are many factors that a judge may consider in imposing a sentence other than an accused's mental status. Petitioner points to no evidence from the criminal proceedings that suggests the district court found Petitioner less culpable for his crime due to his gambling addiction. Neither the I.G.'s evidence nor that of Petitioner suggests that the district court considered Petitioner less culpable for his crime because he was trying to pay off his gambling debts. Accordingly, I conclude that Petitioner has not established the mitigating factor established by 42 C.F.R. § 1001.102(c)(2).

Petitioner argues that his conspiracy "wasn't some sophisticated, international gang related, cartel operation, or . . . comprised of a network selling drugs to high school kids." P. Sur-reply at 12. Petitioner asserts that he individually did not sell the drugs directly to end users and had "no victims." P. Br. at 25. Neither of the arguments are a recognized mitigating factor. Petitioner's arguments, however, show a lack of

understanding of the potential harm involved in this crime and a true lack of remorse. Although the conspiracy may not have been Petitioner's original idea, a fact I accept as true on summary judgment, he was a necessary player in the scheme. Petitioner knowingly abused his trusted position as a pharmacist by participating in the conspiracy.

Petitioner points to other evidence, including letters of support submitted to the district court. However, none of the additional evidence he argues as mitigation is recognized under 42 C.F.R. § 1001.102(c) and is not relevant in this proceeding.

I conclude that Petitioner has failed to establish an enumerated mitigating factor that the I.G. failed to consider in extending his exclusion to ten years.

7. Exclusion for ten years is not unreasonable in this case.

The regulation states that the ALJ must determine whether the length of exclusion imposed is "unreasonable." 42 C.F.R. § 1001.2007(a)(1). The Board, however, has made clear that the role of the ALJ in exclusion cases is to conduct a de novo review of 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. *Juan De Leon, Jr.*, DAB No. 2533 at 3 (2013); *Craig Richard Wilder, M.D.*, DAB No. 2416 at 8 (2011); *Joann Fletcher Cash*, DAB No. 1725 at 17, n.9 (2000). The Board explained that, in determining whether a period of exclusion is "unreasonable," the ALJ is to consider whether such period falls "within a reasonable range." *Cash*, DAB No. 1725 at 17, n.9. The Board cautions that whether the ALJ thinks the period of exclusion too long or too short is not the issue. The ALJ may not substitute his or her 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 exclusion should be expected absent some circumstances that indicate no such adjustment is appropriate. Thus, the Board has by these various prior decisions significantly limited my authority under the applicable regulation to judge the reasonableness of the period of exclusion.

Based on my de novo review, I conclude that a basis for exclusion exists and that the undisputed evidence establishes the two aggravating factors that the I.G. relied on to impose the ten-year exclusion. Petitioner has not shown any genuine dispute of material

fact or presented any evidence that would establish 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 ten years is in a reasonable range and not unreasonable considering the existence of two aggravating factors and the absence of any mitigating factors. 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 other federal health care programs for a minimum of ten years, effective June 18, 2015.

/s/
Keith W. Sickendick
Administrative Law Judge