Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Mukunda Mukherjee, M.D., (O.I. File No. 5-07-40153-9),	)	DATE: August 25, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-228
	)	Decision No. CR1835
The Inspector General.	)	
	)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Mukunda D. Mukherjee, M.D., from participating in the Medicare program and other federally financed health care programs, including State Medicaid programs, for a period of 50 years.

I. Background

The I.G. determined to exclude Petitioner because he found that Petitioner had been convicted of felonies relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance as is described at section 1128(a)(4) of the Social Security Act. Petitioner requested a hearing and the case was assigned to me for a hearing and a decision.

I held a pre-hearing conference at which I assigned the parties deadlines for exchanging briefs and proposed exhibits. The I.G. then filed a brief along with nine proposed exhibits, which he identified as I.G. Ex. 1 - I.G. Ex. 9. Petitioner, both directly and through his counsel, made multiple filings of various documents including two briefs, one

signed by Petitioner, and one signed by his counsel.[1] I receive into the record of this case I.G. Ex. 1 - I.G. Ex. 9 plus all of the filings by Petitioner which I describe in the attachment to this decision.

In the brief filed by Petitioner's counsel Petitioner requested that there be an in-person hearing in order to take testimony concerning Petitioner's cooperation with prosecuting authorities in various criminal proceedings involving other individuals. P. Ex. 7, Informal Brief of Petitioner, June 9, 2008, at 6. Because Petitioner is presently incarcerated I directed Petitioner to file an affidavit containing his testimony. Petitioner did so and the I.G. stated in a reply brief that he declined to cross-examine him. I have received Petitioner's affidavit into evidence as written direct testimony along with all of the attachments he filed in connection with that affidavit. I find no reason to convene an in person hearing given that the I.G. declined to cross-examine Petitioner.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. Petitioner is convicted of crimes for which exclusion is mandated by section 1128(a)(4) of the Act; and

2. An exclusion of 50 years is reasonable.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading.

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[1] Petitioner's many filings include his hearing request with numerous unnumbered attachments, an affidavit by Petitioner (with two attachments) dated July 24, 2008 and a transcript of testimony given by Petitioner in a criminal trial of another individual. Petitioner did not designate any of these filings with exhibit numbers. In order to create an orderly record of this case I am assigning exhibits numbers to each of Petitioner's filings (but not to briefs or letters signed by his attorney). These are set forth in an appendix which I attach to this decision.

1. Petitioner was convicted of crimes for which exclusion is mandated by section 1128(a)(4) of the Act.

On October 25, 2006 a criminal judgment was entered against Petitioner in the United States District Court for the Eastern District of Michigan, after a jury verdict, convicting him of multiple counts of illegal distribution of controlled substances in violation of federal law. These convictions were of 44 separate felony counts contained in a superseding indictment issued on December 29, 2004.[2] Petitioner's crimes took place between April 2 and June 21, 2004. The controlled substances of which Petitioner was convicted of distributing unlawfully included OxyContin and Avinza (Morphine), both Schedule II controlled substances.

For a conviction to fall within the reach of section 1128(a)(4) the following criteria must be met. An individual must be convicted of: (1) a felony or felonies which; (2) transpired after August 21, 1996 and; (3) which relate to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. All of these criteria are met here. Petitioner was convicted of 44 separate felonies which were perpetrated after August 21, 1996. All of these felonies were related to the unlawful distribution, prescription, or dispensing of controlled substances. Petitioner, who is a physician, was effectively convicted of unlawfully distributing, prescribing, or dispensing controlled substances. Specifically, he was convicted of:

> knowingly, intentionally, and willfully distribut[ing] . . . prescriptions [for controlled substances] without a legitimate medical purpose and outside the course of professional practice.

I.G. Ex. 5, at 2; I.G. Ex. 6.

2. A 50-year exclusion is reasonable.

Any individual who is convicted of a crime falling within one of the subsections of section 1128(a) of the Act, including section 1128(a)(4), must be excluded for a minimum of five years. Act, section 1128(c)(3)(B). In such a case, however, the I.G. has discretion to impose an exclusion of more than five years. Where he does so – as he did in this case – that raises the issue of whether the length of the exclusion is reasonable.

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[2] Petitioner was convicted of Counts 3, 4, 7, 9, 11, 12, 13, 15, 17 - 25, 27 - 50, and 52 - 54 of the first superseding indictment. I.G. Ex. 5, at 2 - 6; I.G. Ex. 6, at 1 - 2.

Section 1128 is a remedial statute. The statutory purpose of exclusions is to protect federally funded health care programs and their beneficiaries and recipients from providers whose conduct has established them to be untrustworthy to provide care. In a case such as this one, where the I.G. has determined to exclude an individual for more than the statutory minimum exclusion period, there are regulatory criteria which must be used to decide whether the exclusion is reasonable. 42 C.F.R. § 1001.102(b), (c).

These criteria are described as potentially aggravating and mitigating factors. The factors function like rules of evidence. Evidence that relates to an aggravating or a mitigating factor is relevant to deciding whether the length of an exclusion is reasonable. Evidence that does not relate to one of the factors is irrelevant and may not be considered. Furthermore, and as is the case with rules of evidence, the regulations contain no formula for assigning weight to that evidence which is admissible.

The I.G. determined to exclude Petitioner for at least 50 years. That is an extraordinarily lengthy exclusion that is, effectively, a permanent exclusion from participating in Medicare and other federally funded health care programs.[3] In light of that the issue for me to decide becomes whether Petitioner is so untrustworthy as to merit a permanent exclusion.

The evidence submitted by the I.G. relates to two aggravating factors. First, Petitioner was sentenced to a period of incarceration. I.G. Ex. 6, at 3 - 4; 42 C.F.R. § 1001.102(b)(5). Second, Petitioner was subject to adverse action by State licensing authorities in Michigan and Ohio based on the same facts as were the basis for his criminal convictions. I.G. Ex. 1; I.G. Ex. 2; I.G. Ex. 7; I.G. Ex. 8; 42 C.F.R. § 1001.102(b)(9).

The evidence relevant to these two aggravating factors provides strong support for the I.G.'s exclusion determination. Of particular importance is that Petitioner was sentenced to serve a lengthy term in prison. The judge who sentenced Petitioner sentenced him to a total of 328 years. I.G. Ex. 6, at 4. The total sentence consisted of 12 terms of incarceration of 20 years for unlawfully distributing Schedule II controlled substances including OxyContin and Morphine, 14 terms of incarceration of five years for unlawfully distributing Schedule III controlled substances, and 18 terms of incarceration

[3] That the exclusion is essentially a permanent exclusion is made even more obvious by reason of Petitioner's age (64). P. Ex. 7, Informal Brief or Petitioner, June 9, 2008, at 7.

of one year for unlawfully distributing Schedule V controlled substances. *Id.* In sentencing Petitioner the trial judge specifically directed:

> all counts to be served consecutive to all others; *all intended to accomplish a life sentence*.

Id. (Emphasis added).

I note that Petitioner has appealed his sentence, arguing that it exceeds federal sentencing guidelines, is excessive, and unconstitutional. But, in making that appeal Petitioner concedes that, assuming his convictions are affirmed, federal guidelines would support a sentence of from seven to eight years in federal prison. Petitioner's brief in the United States Court of Appeals for the Sixth Circuit, at 23.[4] Thus, even if Petitioner's present sentence is vacated on appeal, Petitioner would at a minimum receive a very lengthy, albeit substantially reduced, prison sentence for his crimes.

The requirement of a lengthy incarceration for Petitoner's crimes clearly reflects their repugnant nature. Petitioner was convicted essentially of turning his medical practice into a distribution center for unlawfully prescribed narcotics including Schedule II narcotics such as OxyContin and Morphine. He was convicted based in part on testimony of undercover police operatives that showed that Petitioner gave out prescriptions for such drugs to individuals who were willing to pay him sums as low as $45 for the prescriptions. According to this testimony Petitioner gave out these prescriptions to individuals without ascertaining that they had a medical need for them and, in some cases, without even conducting a physical examination of them. I.G. Ex. 1, at 6 - 11.[5]

That behavior establishes Petitioner to be the antithesis of a trustworthy physician. It is not necessary for me to conclude that Petitioner committed his crimes purely for pecuniary return, or whether he committed them out of indifference to the medical standards governing the prescription of controlled substances, for me to decide that his

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[4] The brief is the last attachment to Petitioner's hearing request, P. Ex. 1.

[5] The testimony I cite in particular is an affidavit by Jeffrey J. Madaj, who was an undercover police officer for the Saginaw Police Department. The affidavit was provided in connection with a disciplinary proceeding brought against Petitioner by the State of Michigan Department of Community Health Bureau of Health Professions. However, there is no dispute that Officer Madaj's testimony was also an element of the criminal prosecution of Petitioner and I infer that his testimony in Petitioner's trial was essentially the same as the substance of his affidavit. P. Ex. 1, at 6 - 9.

crimes establish him to be an extraordinarily untrustworthy provider of care. Given the nature of his conduct an exclusion that is tantamount to a permanent exclusion is merited. I would reach the identical conclusion whether Petitioner's current sentence is sustained on appeal or is substantially reduced to as low as the range that even Petitioner concedes is merited for his crimes.

The adverse administrative actions taken against Petitioner in Michigan and Ohio are additional grounds for finding Petitioner to be highly untrustworthy. Petitioner's license to practice medicine in Michigan was suspended as a consequence of his convictions and he surrendered permanently his license to practice medicine in Ohio in the face of disciplinary proceedings in that state based on his convictions. I.G. Ex. 1; I.G. Ex. 2; I.G. Ex. 7; I.G. Ex. 8.

Petitioner argues that his license was only suspended in Michigan and not revoked. From that, Petitioner contends that the Michigan State licensing board considered Petitioner's crimes to be relatively minor and considered Petitioner not to be particularly untrustworthy. I do not draw that inference from the action of the Michigan State licensing board. The suspension, which was imposed as a part of a settlement between Petitioner and the State licensing board, requires Petitioner to apply for reinstatement before regaining his license. And, it specifically requires Petitioner to:

> supply clear and convincing evidence to the Michigan Board of Medicine (Board) that . . . [he] is of good moral character, is able to practice medicine with reasonable skill and safety, and that it is in the public interest for . . . [him] to resume practice.

I.G. Ex. 7, at 3. In other words, the terms of Petitioner's settlement in Michigan places the burden squarely on him to explain why his license should be reinstated. There is nothing in the settlement agreement to suggest that the State licensing authorities considered Petitioner's crimes to be minor in nature or that they would reinstate Petitioner easily.

Moreover, Petitioner surrendered his license to practice medicine *permanently* in the State of Ohio. There is nothing in the agreement between Petitioner and the Ohio State Medical Board to suggest that the surrender is revocable or even that Petitioner has a right to apply for reinstatement in that State. I.G. Ex. 8, at 1 - 2. His permanent loss of license

in Ohio is strong support for what is effectively a permanent exclusion even if his suspension in Michigan is not.[6]

Petitioner argues that there is a mitigating factor present in this case that justifies reduction of the length of his exclusion. He contends that he provided substantial cooperation to prosecuting authorities in two criminal trials. P. Ex. 7, Informal Brief of Petitioner, June 9, 2008, at 6 - 7; P. Exs. 10, 11.

I am not persuaded that Petitioner offered mitigating evidence. Furthermore, I would not find such evidence – even if it is relevant – to be sufficient to offset the evidence supporting the exclusion that I sustain in this case.

Evidence may be considered to be mitigating if it shows that an excluded individual'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 . . . .

42 C.F.R. § 1001.102(c)(3)(i) - (iii).

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[6] Petitioner's loss of licenses to practice medicine in Michigan and Ohio gave the I.G. additional grounds to exclude him pursuant to section 1128(b)(4) of the Act. An exclusion imposed under (b)(4) must *at a minimum* be coterminous with the term of a loss of a professional license for reasons of a provider's professional competence, professional performance, or financial integrity. Act, section 128(c)(3)E); 42 C.F.R. § 1001.501(b)(1). An exclusion of Petitioner pursuant to section 1128(b)(4) based on his license revocation in Ohio, therefore, would have been a permanent exclusion.

The evidence offered by Petitioner establishes that he testified for the prosecution twice, in 2003 and 2004 in criminal cases that are unrelated to the crimes of which Petitioner was convicted.[7] Neither of the defendants in these cases was convicted of a crime. Petitioner has not alleged that either of them or any other individual was excluded from participating in Medicare or other federally funded health care programs based on Petitioner's testimony. Nor has he asserted that his testimony resulted in the imposition of a civil money penalty against any individual. Nor is there any evidence that Petitioner's testimony resulted in cases being investigated or reports being issued by law enforcement agencies identifying program weaknesses or vulnerabilities. In other words, Petitioner has made no showing that his testimony in the two cases produced any of the results for which mitigation of a period of exclusion might be justified.

Furthermore, and as I have noted, Petitioner's testimony occurred prior to his committing the crimes which are the basis for his exclusion. Whatever degree of trustworthiness Petitioner might have demonstrated by coming forward and testifying in the two cases is more than negated by the evidence showing his subsequent commission of the crimes of which he was convicted.

Petitioner raises additional arguments about his conviction and his personal circumstances which he asserts that I should take into consideration in deciding the reasonableness of the exclusion. He:

- attacks the constitutionality of his sentence;

- claims that his convictions were the consequence of false testimony, improper acts by the prosecution, and errors by the trial judge;

- maintains that he is innocent of the crimes of which he was convicted and contends that the picture of his practice created at the trial by the prosecution is a caricature of the true nature of his practice; and

- argues that a decision as to the reasonableness of the exclusion should reflect his age (64), his personal background, and his history of dedicated service to an economically depressed patient community.

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[7] In fact, Petitioner's testimony in both of these cases predates his subsequent indictment and conviction.

None of these assertions and arguments raise issues that I may hear and decide. First, none of them fall within any of the potentially mitigating factors that are described at 42 C.F.R. § 1001.102(c). For that reason they are irrelevant. Second, I have no authority to decide issues of constitutionality nor to address Petitioner's claims that his conviction is tainted by errors committed by the judge who presided at his trial.[8]

/s/
Steven T. Kessel
Administrative Law Judge

[8] The proper forum for Petitioner to assert his arguments concerning the fairness of his trial and the constitutionality of his sentence is a federal appeals court. Petitioner has appealed his conviction. Should it be reversed on appeal, then clearly, the I.G. would be required to rescind the exclusion. But, I have no control over that process nor do I have the authority to hear and decide in this forum those arguments that Petitioner may have made in a federal appeals court.