Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	Date: April 18, 2007
Shelia Swan,	)	
	)	
Petitioner,	)	Docket No. C-06-674
	)	Decision No. CR1586
-v.-	)	
	)	
The Inspector General.	)	
	)	

DECISION

Petitioner, Shelia Swan, is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (the Act) (42 U.S.C. § 1320a-7(a)(1)), effective September 20, 2006, based upon her conviction of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. There is a proper basis for exclusion. Petitioner's exclusion for the minium period[1] of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)). There are aggravating factors in this case that justify the extension of the period of exclusion to a minimum period of 12 years.

I. Background

The Inspector General for the Department of Health and Human Services (the I.G.) notified Petitioner by letter dated August 31, 2006, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum period of 12 years, pursuant to section 1128(a)(1) of the Act. The basis cited

[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.

for Petitioner's exclusion was her conviction in the United States District Court, Northern District of Illinois, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. *See* Act, section 1128(a)(1); 42 U.S.C. § 1320a-7(a)(1); and 42 C.F.R. § 1001.101(a). I.G. Exhibit (Ex.) 1.

Petitioner timely requested a hearing by letter dated September 12, 2006. The case was assigned to me for hearing and decision on September 22, 2006. On November 6, 2006, I convened a prehearing telephonic conference, the substance of which is memorialized in my Order dated November 7, 2006.

The I.G. filed a motion for summary judgment and supporting brief on December 6, 2006 (I.G. Brief), with I.G. Exs. 1 through 4. Petitioner filed her response to the motion for summary judgment on March 20, 2007 (P. Brief), with Petitioner's Exhibits (P. Ex.) 1 through 4.[2] The I.G. filed a reply brief on April 4, 2007 (I.G. Reply). No objection has been made to the admissibility of any of the proposed exhibits and I.G. Exs. 1 through 4,[3] and P. Exs. 1 through 4, are admitted.

II. Discussion

A. Findings of Fact

The following findings of fact are based upon the uncontested and undisputed assertions of fact in the pleadings and the exhibits admitted. Citations may be found in the analysis section of this decision if not included here.

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[2] Petitioner did not mark her exhibits in accordance with Civil Remedies Division Procedures. I have marked her exhibits as follows: P. Ex. 1, Sentencing Memorandum Filed in the United States District Court; P. Ex. 2, Example Letters Written on Petitioner's Behalf; P. Ex. 3, Affidavit of Attorney Charles McKelvie; and P. Ex. 4, Letter of Attorney Charles McKelvie.

[3] Petitioner is referred to as "Shelia" Swan in the indictment upon which her conviction is based (I.G. Ex. 2) and in the Verdict Form in her criminal case (I.G. Ex. 3). Petitioner also signed her hearing request as "Shelia," and that is how the I.G.'s notice letter refers to her. However, Petitioner is referred to as "Sheila" Swan in the Judgment in her criminal case (I.G. Ex. 4). Both the Verdict Form and the Judgment refer to the same case number, 03-CR-926. Petitioner does not dispute that she is the "Sheila" Swan referred to in the Judgment. *See* P. Brief. Accordingly, I accept I.G. Ex. 4 as an accurate copy of the Judgment in Petitioner's criminal case.

1. Petitioner was convicted by a jury of two counts of mail fraud arising from the mailing of documents between January 12, 1996 and December 24, 1998, and on June 22, 1999, related to the participation in Medicare of the company for which Petitioner was the chief operating officer, in violation of 18 U.S.C. §§ 1341 and 1342. I.G. Ex. 2, at 1-4, 6; I.G. Ex. 3; I.G. Ex. 4, at 1.

2. On January 27, 2006, Petitioner was sentenced to 22 months in prison, followed by three years of supervised release; and to pay to the Centers for Medicare & Medicaid Services restitution of $98,926.00. I.G. Ex. 4, at 2-4.

3. The I.G. notified Petitioner by letter dated August 31, 2006, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum period of 12 years, pursuant to section 1128(a)(1) of the Act. I.G. Ex. 1.

4. Petitioner does not dispute that there was financial loss to the government in excess of $5,000, as reflected by the order for her to participate in paying restitution of $98,926.00.

5. Petitioner does not dispute that the acts for which she was convicted were committed over a period of more than a year.

6. Petitioner does not dispute that she was sentenced to incarceration.

7. Petitioner has not alleged or presented any evidence that would tend to show the existence of any mitigating factor recognized by 42 C.F.R. § 1001.102(c).

8. Petitioner timely requested a hearing by letter dated September 12, 2006.

B. Conclusions of Law

1. Petitioner's request for hearing was timely and I have jurisdiction.

2. Summary judgment is appropriate.

3. Petitioner was convicted of a criminal offense related to delivery of an item or service under Medicare or a state health care program within the meaning of section 1128(a)(1) of the Act.

4. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act.

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

6. The presence of three aggravating factors and no mitigating factors justifies the extension of the minimum period of exclusion to 12 years, and that period of exclusion is not unreasonable.

C. Issues

The Secretary of Health and Human Services (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).

The standard of proof is a preponderance of the evidence and there may be no collateral attack of the conviction that is the basis for the exclusion. 42 C.F.R. § 1001.2007(c) and (d). Petitioner bears the burden of proof and 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) and (c).

D. Applicable Law

Petitioner's right to a hearing by an Administrative Law Judge (ALJ) and judicial review of the final action of the Secretary is provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). Petitioner's request for a hearing was timely filed and I do have jurisdiction.

Pursuant to section 1128(a)(1) of the Act, the Secretary must exclude from participation in the Medicare and Medicaid programs any individual convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of

specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years may mitigating factors be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

E. Analysis

1. Summary judgment is appropriate in this case.

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 right to a hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. § 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified in 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). The 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 and no hearing is required where either: there are no disputed issues of material fact and the only questions that must be decided involve application of law to the undisputed facts; or, the moving party must prevail as a matter of law even if all disputed facts are resolved in favor of the party against whom the motion is made. A party opposing summary judgment must allege facts which, if true, would refute the facts relied upon by the moving party. *See e.g.*, Fed. R. Civ. P. 56(c); *Garden City Medical Clinic*, DAB No. 1763 (2001); *Everett Rehabilitation and Medical Center*, DAB No. 1628, at 3 (1997) (in-person hearing required where non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also, New Millennium CMHC*, DAB CR672 (2000); *New Life Plus Center*, DAB CR700 (2000).

As discussed in more detail hereafter, Petitioner does not dispute that she was convicted as alleged by the I.G. or that the three aggravating factors cited by the I.G. are present in this case. Rather, Petitioner argues that the motion for summary judgment should be denied and a hearing accorded to Petitioner because there is "a disputed issue of material fact, that the I.G.'s motion does not demonstrate that the 12 year period of exclusion is a decision within the permissible discretion of the I.G. . . . ." P. Brief at 4. Petitioner asserts that there should be a hearing to develop a record about why "qualitative factors" were not considered by the I.G. P. Brief at 4. This issue must be resolved against Petitioner as a matter of law. As discussed hereafter in section 4 of the Analysis, my review is *de novo* and I do not review the I.G.'s exercise of discretion. The issue I consider when reviewing the period of exclusion is whether or not it is unreasonable given the regulatory factors, i.e., whether the period of exclusion falls within a reasonable range. 42 C.F.R. § 1001.2007(a)(1).

Petitioner also argues that summary judgement should be denied because there is evidence of a mitigating factor that should be considered. P. Brief at 4-5. The I.G. asserts that there is no evidence of any mitigating factor recognized by the regulations. I.G. Brief at 10; I.G. Reply at 6-9, 10-11. Petitioner cites 42 C.F.R. § 1001.102(c) and argues that it "states that a mitigating factor can be mental, emotional, or physical conditions that would reduce culpability." P. Brief at 4. Petitioner then asserts that her business was stressful, mentally and emotionally. Petitioner, however, mischaracterizes the plain language of the regulation which provides that it may be considered a mitigating factor if:

> 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 . . . .

42 C.F.R. § 1001.102(c)(2). The mitigating factor that may be considered under the regulation is that the court in the criminal case found Petitioner to be of reduced culpability. Thus, even if I accept Petitioner's allegations as true, the mitigating factor is not present because Petitioner does not allege that the court that convicted and sentenced her considered her to be of reduced culpability due to any mental, emotional, or physical condition. Considering the court records provided by the I.G., there does not appear to be an issue of fact related to whether the criminal court considered Petitioner less culpable due to any mental, emotional, or physical condition. I.G. Exs. 2-4. Furthermore, Petitioner does not assert that there is a material issue of fact in dispute as to whether the criminal court considered Petitioner less culpable due to one of the reasons listed in the regulations. In fact, the sentencing memorandum Petitioner provided for my consideration clearly does not include any argument to the sentencing court that a reduced sentence was warranted based on reduced culpability due to any mental, emotional, or physical condition Petitioner suffered. P. Ex. 1.

There are no genuine issues of material fact in dispute in this case. The only issues raised by Petitioner must be resolved against her as a matter of law. Accordingly, summary judgment is appropriate.

2. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act.

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)):
>
> > (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 the Secretary to 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 Medicaid.

Petitioner does not dispute that she was convicted of a criminal offense within the meaning of section 1128(i) of the Act. The evidence shows that Petitioner was convicted by a jury of two counts of mail fraud arising from the mailing of documents between January 12, 1996 and December 24, 1998, and on June 22, 1999, related to the participation in Medicare of the company for which Petitioner was the chief operating officer, in violation of 18 U.S.C. §§ 1341 and 1342. I.G. Ex. 2, at 1-4, 6; I.G. Ex. 3; I.G. Ex. 4, at 1. Petitioner does not dispute that on January 27, 2006, she was sentenced to 22 months in prison, followed by three years of supervised release. Petitioner was also sentenced to pay to the Centers for Medicare & Medicaid Services restitution of $98,926.00, sharing joint and several responsibility for the payment of restitution with her co-defendant. I.G. Ex. 4, at 2-4.

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

Petitioner has not disputed that the minimum period of an exclusion pursuant to section 1128(a)(1) of the Act is five years, as mandated by section 1128(c)(3)(B), if I determine Petitioner is subject to mandatory exclusion. I have found there is a basis for Petitioner's exclusion pursuant to section 1128(a)(1); thus, the mandatory minimum period of her exclusion is five years. The remaining issue is whether or not it is unreasonable to extend her period of exclusion by an additional seven years.

4. Petitioner's exclusion for five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)) and an additional period of exclusion of seven years, for a total minimum period of exclusion of 12 years, is not unreasonable based upon the three aggravating factors and no mitigating factors in this case.

Petitioner makes two arguments for why she should not be subject to a period of exclusion longer than the mandatory minimum of five years. Her first argument is that the I.G. abused its discretion by extending the period of exclusion to 12 years. Petitioner does not dispute that there was financial loss to the government in excess of $5,000, as reflected by the order for her to participate in paying restitution of $98,926.00; that the acts for which she was convicted were committed over a period of more than a year; or that she was sentenced to incarceration. Thus, the existence of the three aggravating factors cited by the I.G. as a basis for extending Petitioner's minimum period of exclusion pursuant to 42 C.F.R. § 1001.102(b)(1), (2), and (5), is not disputed. P. Brief at 1, 3. Petitioner argues, however, that the I.G. abused its discretion by inappropriately weighing these aggravating factors when deciding to impose a 12-year period of exclusion. P. Brief at 1-4.

Regarding Petitioner's first argument, the Departmental Appeals Board (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 facts related to the existence of the aggravating and mitigating factors established by 42 C.F.R. § 1001.102. *See Joann Fletcher Cash*, DAB No. 1725, n.6 (2000) (www.hhs.gov/dab/decisions/dab1725.html) (n.9 in the original decision and Westlaw™ 2000 WL 710697), and cases cited therein. 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 exclusion should be expected absent some circumstances that indicate no such adjustment is appropriate. The *Katz* panel did not

elaborate upon the weight to be given individual aggravating factors, or how my *de novo* review and assessment of the weight to be given to proven aggravating factors is related to the weight the I.G. assigned those same factors. The decisions of the Board and the regulations are clear. The issue for me is not whether the I.G. correctly weighed the aggravating factors, the existence of which are undisputed. It is not for me to review the I.G.'s exercise of his discretion under the Act and regulations. The issue for me, absent proof that the I.G. incorrectly found an aggravating factor or failed to consider a mitigating factor, is whether the period of exclusion the I.G. chose is within a reasonable range. Petitioner's arguments to the contrary are without merit.

Petitioner's second argument is that there is evidence of a mitigating factor under 42 C.F.R. § 1001.102(c) that should be considered but was not considered by the I.G. Under the prior decisions of the Board, if I agreed with Petitioner it would be incumbent upon me to reassess the period of exclusion. However, Petitioner has misinterpreted the mitigating factor she alleges exists and she has not alleged facts which, if true, would satisfy the regulation's definition of a mitigating factor.

Section 1001.102(c) of 42 C.F.R. provides that if any of the aggravating factors justifies a period of exclusion longer than five years, then mitigating factors may be considered as a basis for reducing the period of the exclusion to no less than five years. Pursuant to 42 C.F.R. § 1001.102(c), the following factors may be considered as mitigating and a basis for reducing the period of exclusion:

> (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 alleges that there is evidence supporting her position that she was subject to emotional and mental stress related to her business. P. Brief at 5. This, however, is not a mitigating factor. The mitigating factor established by 42 C.F.R. § 1001.102(c)(2) requires that "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 . . . ." Petitioner never alleges that the court that sentenced her found her of reduced culpability. Evidence which does not relate to an aggravating factor or a mitigating factor is irrelevant to determining the length of an exclusion. The fact that Petitioner's business or the related fraudulent activity caused her mental or emotional stress is simply irrelevant to the appropriate length of her exclusion. The burden is upon Petitioner to show the presence of mitigating factors. 42 C.F.R. § 1005.15; *Dr. Darren James, D.P.M.*, DAB No. 1828 (2002). On a motion for summary judgment such as this, the absence of any evidence or allegation of fact that would indicate the presence of a legitimate mitigating factor is fatal. Petitioner makes no allegation and has presented no evidence or argument that would tend to establish any of the recognized mitigating factors. Furthermore, my review of the sentencing memorandum Petitioner submitted to her sentencing court reveals that her counsel urged the court to consider no facts that would tend to show the presence of any recognized mitigating factor. P. Ex. 1.

If it were my prerogative to simply reassess the period of exclusion, I would be inclined to impose a significantly longer period of exclusion in this case. The evidence shows that Petitioner was convicted of deliberately engaging in criminal acts over an extended period of time and she appears particularly untrustworthy. Petitioner argues that "the public and Medicare recipients do not need to fear that the Petitioner will commit acts of fraud in the future." P. Brief at 3. I, however, find no evidence to support that assertion. Petitioner's alleged good deeds, enumerated in her brief and in the letters at P. Ex. 2, apparently

occurred during the period of her fraudulent activity and while she was awaiting trial and sentencing. Further, the sentencing memorandum at P. Ex. 1, and the evidence submitted as P. Exs. 3 and 4, clearly show that Petitioner continues to blame or hide behind the complexity of the Medicare system rather than simply accepting responsibility for her misconduct. However, it is not my prerogative to substitute my judgment for that of the I.G. Given the nature of the aggravating factors, I have no difficulty concluding that a minimum period of exclusion of 12 years is not "unreasonable."

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 12 years, effective September 20, 2006, 20 days after the August 31, 2006 I.G. notice of exclusion.

/s/

Keith W. Sickendick
Administrative Law Judge