Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Joby George
(O.I. File No. 1-08-40279-9),

Petitioner

v.

The Inspector General.

Docket No. C-11-592

Decision No. CR2482

Date: January 6, 2012

DECISION

Petitioner, Joby George, 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 May 19, 2011, based upon his 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 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 five years, for a total minimum period of exclusion of ten years,[1] is not unreasonable based upon the four aggravating factors established in this case 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 period of exclusion.

I. Background

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated April 29, 2011, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of ten years. The I.G. advised Petitioner that he was being excluded pursuant to section 1128(a)(1) of the Act based on his conviction in the United States District Court, District of Connecticut, 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 ten years.

Petitioner requested a hearing by letter dated June 30, 2011. The case was assigned to me for hearing and decision on July 14, 2011. On August 2, 2011, the I.G. filed a motion to dismiss the request for hearing on grounds that it was not timely filed and failed to raise an appealable issue. The I.G. filed I.G. exhibits (I.G. Exs.) 1 and 2 with its motion. A prehearing telephone conference was convened on August 3, 2011, the substance of which is memorialized in my order dated August 4, 2011. During the prehearing conference, Petitioner declined to waive an oral hearing. The I.G. requested a ruling on the motion to dismiss prior to further development of the case. The I.G. also requested that the I.G. be permitted to file a motion for summary judgment, if the motion to dismiss was denied. I set a deadline for Petitioner to file a response, with any supporting exhibits, to the I.G.'s motion to dismiss. Petitioner filed a response to the I.G.'s motion on August 14, 2011. On August 26, 2011, the I.G. filed a reply brief.

On September 15, 2011, I denied the I.G.'s motion to dismiss Petitioner's request for hearing. I concluded that Petitioner had timely filed his request for hearing and that his hearing request preserved his right to review of justiciable issues. I established a schedule for briefing on the I.G.'s motion for summary judgment.

The I.G. filed a motion for summary judgment and a supporting brief (I.G. Brief) on October 4, 2011, with I.G. Exs. 3 through 7. Because I did not receive a response from Petitioner, I issued an Order to Show Cause on November 23, 2011. Petitioner submitted an undated response to the Order to Show Cause and the I.G.'s motion for summary judgment (P. Response) that I received on November 30, 2011. Petitioner filed with his response three documents that were not marked as exhibits. I have marked the documents as Petitioner's exhibits (P. Exs.) 1 through 3.[2] The I.G. filed a reply brief on December 13, 2011. Petitioner has not objected to my consideration of I.G. Exs. 1

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[2] P. Ex. 1 is a 2006 Schedule K-1 (Form 1065). P. Ex. 2 is a 2008 Schedule K-1 (Form 1065). P. Ex. 3 is an undated physician's report of examination.

through 7, and they are admitted as evidence. The I.G. did not object to my consideration of P. Exs. 1 through 3, 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
>
> 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.

I previously ruled that Petitioner's request for hearing was timely filed and preserved Petitioner's right to review of justiciable issues. I have also concluded that I have jurisdiction.

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, 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). 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, 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 prevails 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 Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. and Med. Ctr.*, DAB No. 1628, at 3 (1997) (holding 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 Ctr.*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case. There is no dispute that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. No dispute exists as to the existence of the aggravating factors. Petitioner urges me to consider evidence that does not relate to any of the mitigating factors that I may consider under the law. Further, I have no jurisdiction to review the effective date of Petitioner's exclusion. Thus, the issues that Petitioner has raised must be resolved against him as a matter of law. Accordingly, summary judgment is appropriate.

3. There is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

Petitioner was a pharmacist licensed to practice in Connecticut, New Jersey, and New York. He was a part owner of Byram Pharmacy, located in Greenwich, Connecticut. I.G. Exs. 3, 4 at 9; P. Exs. 1, 2. On July 10, 2009, Petitioner agreed to plead guilty to one count of federal health care fraud in violation of 18 U.S.C. § 1347. I.G. Ex. 4. Petitioner

admitted as part of his plea agreement that, from June 2006 through September 2008, he knowingly and willfully submitted various fraudulent claims to Medicare and the Connecticut Medicaid program. The fraudulent claims were for dispensing prescription drugs that were never dispensed and for dispensing brand name prescription drugs when less expensive generic drugs were actually dispensed. I.G. Ex. 4, at 9-10. On April 30, 2010, Petitioner was convicted, pursuant to his guilty plea, of one count of federal health care fraud by the United States District Court, District of Connecticut. Petitioner was sentenced: to be imprisoned for 14 months followed by 2 years of supervised release; to pay a special assessment of $100; and to pay restitution of $344,805.02. I.G. Ex. 5.

Petitioner's plea agreement advised him that his conviction could result in him being excluded from participation in Medicare and Medicaid. Petitioner agreed in the plea agreement to surrender his licenses as a pharmacist in New York, Connecticut, and New Jersey before sentencing in the federal court. I.G. Ex. 4, at 7; I.G. Ex. 6.

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 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.

There is no dispute that on April 30, 2010, Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Act (42 U.S.C. 1320a-7(i)) when the district court accepted Petitioner's guilty plea. I.G. Ex. 5; P. Response. 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; 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 does not dispute that his offense was related to the delivery of an item or service under Medicare or Medicaid.

Petitioner offers some explanation for his criminal acts. P. Response. However, Petitioner's explanations may not be considered as an 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).

Accordingly, I conclude that there is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

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

5. Aggravating factors exist that justify extending the period of exclusion to ten years.

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

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

8. An ALJ is without authority to change the effective date of an exclusion imposed by the I.G.

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 five years.

Petitioner challenges the length of his ten-year exclusion, requesting that I decrease it "to a minimum level." Request for Hearing; P. Response. My determination of whether the exclusionary period in this case is unreasonable depends 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; (2) the acts that resulted in Petitioner's conviction occurred over a period of one year or more; (3) the sentence imposed by the court included incarceration; and 4) Petitioner 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.G. Ex. 1. The four aggravating factors considered by the I.G. are authorized by the regulations, and the evidence shows that all four are present in this case. 42 C.F.R. § 1001.102(b)(1), (b)(2), (b)(5), and (b)(9).

There is no dispute that Petitioner agreed to and was sentenced to pay restitution of $344,805.02 to the United States. I.G. Ex. 4, at 2, 11; I.G. Ex. 5; I.G. Ex. 7. Based on the amount of restitution, it can be inferred that the actual or intended loss to the Connecticut Medicaid program as a result of Petitioner's criminal acts exceeded $5,000. The Departmental Appeals Board (Board) has long considered restitution to be a reasonable measure of program losses. *Jason Hollady, M.D.*, DAB No. 1855 (2002). Indeed, the Board has characterized restitution in an amount substantially greater than the $5,000 threshold to be an "exceptional[ly] aggravating factor" that is entitled to significant weight. *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003).

Petitioner argues that the amount of restitution is not representative of the actual losses sustained or his actual profit. According to Petitioner, his criminal conduct "resulted in an agreed-upon loss figure of $109,968." Petitioner contends that he "separately caused an agreed-upon, non-criminal loss of $7450." P. Response. Petitioner states that, pursuant to the plea agreement, he paid the government $350,477, which was triple the amount of loss and included about $6,000 in interest. Petitioner claims that he was a 30 percent shareholder in the pharmacy in 2006 and 2007, and a 45 percent shareholder in 2008, and, based on this, his actual monetary gain from his criminal conduct was at most 45 percent of the total, or $49,485.75. Petitioner claims that his partners declined to contribute to the restitution, and he paid it all himself. Petitioner argues that the "net effect" is that he paid just over $350,000 in restitution, even though he profited just under $50,000 from his criminal acts, as well as serving a 14-month prison term. P. Response. Even if I accepted Petitioner's assertions as true, he has admitted that losses sustained by Medicare or Medicaid exceeded $5,000. I conclude that there is no dispute that Petitioner's criminal conduct resulted in a loss of $5,000 or more and that aggravating factor is clearly established. 42 C.F.R. § 1001.102(b)(1).

Petitioner does not dispute that he admitted in his plea agreement that he submitted false claims to Medicare and Medicaid between June 2006 and September 2008. I.G. Ex. 4, at 9. Accordingly, his 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 also does not dispute that he was sentenced to be imprisoned for fourteen months. I.G. Ex. 5, at 1; P. Response. I conclude the third aggravating factor cited by the I.G. is established. 42 C.F.R. § 1001.102(b)(5).

Petitioner does not deny that he agreed to surrender his New York, New Jersey, and Connecticut Pharmacist licenses on or before the date of his sentencing. I.G. Ex. 4, at 7. Following his conviction, on April 28, 2010, Petitioner submitted to the New York Pharmacy Board, an application for permission to surrender his pharmacy license to the State of New York, citing as grounds his professional misconduct, specifically, his conviction for health care fraud. I.G. Ex. 6. On July 21, 2010, the Pharmacy Board issued an Order granting Petitioner's application, and Petitioner surrendered his New York pharmacist license. I.G. Ex. 6. Petitioner's loss of his pharmacist license, even though by voluntary surrender, is an "adverse action" that was clearly based on the facts that gave rise to his conviction for health care fraud. Thus, I find that the fourth aggravating factor has been established. 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 five 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 –
> (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 that there is a mitigating factor for me to consider. 42 C.F.R. § 1005.15(b)(1).

Petitioner argues that the ten-year exclusion should be reduced to a "minimum level" and urges me to consider the following:

- his fourteen-month term of incarceration;
- the "extraordinary" amount of restitution and his acceptance of responsibility;
- his "extraordinary" family responsibilities;
- his significant debt as a result of paying the restitution;
- the "physical, mental and emotional toll" this matter has had on him; and
- the fact that he paid a restitution amount that was "triple" the amount of actual loss sustained and the fact that his own monetary gain from his criminal conduct amounted to just under $50,000.

P. Response.

The regulations do not recognize or authorize me to consider as mitigating factors any of the factors urged by Petitioner. 42 C.F.R. § 1001.102(c). My review of the record shows that Petitioner has not presented any evidence that tends to show the existence of any authorized mitigating factor. 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).[3] 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

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[3] 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.

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.

In this case, upon *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 ten-year exclusion. Petitioner has not established that the I.G. failed to consider any mitigating factor. Given the absence of any mitigating factors authorized under the regulations, I conclude that a period of exclusion of ten years is in a reasonable range, and, therefore, not unreasonable. Accordingly, no basis exists upon which I might reassess the period of exclusion.

Petitioner has also requested that the effective date of his exclusion be changed to April 30, 2010. P. Response at 2. Petitioner's request must be denied as a matter of law. The regulations are specific that exclusions are effective twenty days from the date of the I.G.'s notice of exclusion. 42 C.F.R. § 1001.202(b). I am bound by the regulations and have no authority to change the effective date of Petitioner's 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 ten years, effective May 19, 2011.

/s/
Keith W. Sickendick
Administrative Law Judge