Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Edward Alexander Birts
(O.I. No. 6-08-40416-9),

Petitioner,

v.

The Inspector General.

Docket No. C-11-795

Decision No. CR2516

Date: March 16, 2012

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Disposition affirming the I.G.'s determination to exclude Petitioner Edward Alexander Birts from participation in Medicare, Medicaid, and all other federal health care programs for a period of 23 years. The I.G.'s Motion and determination to exclude Petitioner are based on section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). The undisputed facts of this case show that the minimum five-year exclusion must be imposed, and that the I.G.'s determination to enhance that period to 23 years, based on the aggravating factors found at 42 C.F.R. § 1001.102(b)(1), (2), and (5), is reasonable. Accordingly, I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

Between January 2003 and September 2006, Petitioner Edward Alexander Birts was the owner and operator of a psychiatric counseling center called "Courage to Change, Inc." (CTC), located in. Houston, Texas. CTC participated in the Medicare and Medicaid programs as a provider of services.

On February 24, 2010 Petitioner was charged with a series of federal crimes based on CTC's activities. An Indictment handed up by the Federal Grand Jury sitting for the United States District Court for the Southern District of Texas charged Petitioner with one count of Conspiracy to Commit Health Care Fraud, in violation of 18 U.S.C. § 1349, 12 counts of Health Care Fraud, in violation of 18 U.S.C. § 1347, and four counts of Aggravated Identity Theft, in violation of 18 U.S.C. §§ 1028A and 2. I.G. Ex. 2.

Petitioner appeared in the District Court with counsel on June 1, 2010 and pleaded guilty to three counts of the Indictment: based on a detailed plea agreement, he pleaded guilty to the conspiracy count, 18 U.S.C. § 1349, one count of health care fraud, 18 U.S.C. § 1347, and one count of identity theft, 18 U.S.C. § 1028A. I.G. Ex. 3. He was sentenced on January 19, 2011 to a 65-month term of imprisonment to be followed by three years' supervised probation. I.G. Ex. 4. In addition, he was ordered to pay restitution to the Medicaid and Medicare programs in the sum of $968,583.68 and to pay a special assessment of $300.00. I.G. Ex. 4.

Acting *pro se*, Petitioner timely sought review of the I.G.'s action in an undated document received by the Civil Remedies Division on September 19, 2011. I convened a telephonic prehearing conference on October 20, 2011, pursuant to 42 C.F.R. § 1005.6, in order to discuss the issues presented by the case and the procedures best suited for addressing them. The parties agreed that the case likely could be decided on written submissions, and I established a schedule for the submission of documents and briefs. The details of the conference and the schedule established in it are set out in my Order of October 20, 2011. All briefing is now complete, and for purposes of 42 C.F.R. § 1005.20(c) the record closed January 26, 2012.

The evidentiary record on which I decide the issues before me contains 12 exhibits. The I.G. proffered nine exhibits marked I.G. Exhibits 1-9 (I.G. Exs. 1-9). Petitioner proffered 23 unmarked pages of documents that I have marked Petitioner's Exhibits 1-3 (P. Exs. 1-3). In the absence of objection, I have admitted all proffered exhibits.

II. Issues

The legal issues before me are limited to those set out at 42 C.F.R. § 1001.2007(a)(1). In the context of this record, they are:

> a. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Act; and
>
> b. Whether the length of the proposed period of exclusion is unreasonable.

These issues must be resolved in favor of the I.G.'s position. Section 1128(a)(1) of the Act mandates Petitioner's exclusion, for his predicate conviction is not in dispute. A five-year period of exclusion is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B). The enhancement of that period to 23 years is not unreasonable because the three aggravating factors relied on by the I.G. and found in 42 C.F.R. § 1001.102(b)(1), (2), and (5) are fully established in the record, and because Petitioner has failed to demonstrate any mitigating factor that could reduce the proposed period of exclusion.

III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any individual or entity convicted of a criminal offense related to the delivery of an item or service under title XVIII of the Act (the Medicare program) or any state health care program. The terms of section 1128(a)(1) are restated in similar language at 42 C.F.R. § 1001.101(a).

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a Federal . . . court," (Act § 1128(i)(1)); "when there has been a finding of guilt against the individual . . . by a Federal . . . court," (Act § 1128(i)(2)); or "when a plea of guilty . . . by the individual . . . has been accepted by a Federal . . . court," (Act § 1128(i)(3)). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(1) is mandatory and the I.G. must impose it for a minimum period of five years. Act § 1128(c)(3)(B), 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision. The mandatory minimum period of exclusion may be enhanced in some limited circumstances and on the I.G.'s proof of certain narrowly-defined aggravating factors listed at 42 C.F.R. § 1001.102(b). In this case, the I.G. relies on the three aggravating factors set out at 42 C.F.R. § 1001.102(b)(1), (2), and (5) in seeking to enhance the period of Petitioner's exclusion to 23 years.

In cases such as this, where the I.G. proposes to enhance the period of exclusion by relying on any aggravating factors, a petitioner may attempt to limit or nullify the proposed enhancement through proof of certain mitigating factors, carefully defined at 42 C.F.R. § 1001.102(c)(1)-(3). In this case, Petitioner claims the benefit of the mitigating factors set out at 42 C.F.R. §§ 1001.102(c)(2) and (c)(3). Petitioner bears the burden of proof regarding mitigating factors by a preponderance of the evidence. 42 C.F.R. § 1005.15(b) and (c).

IV. Findings and Conclusions

I find and conclude as follows:

1. On his accepted pleas of guilty on June 1, 2010, in the United States District Court for the Southern District of Texas, Petitioner Edward Alexander Birts was found guilty of one count of Conspiracy to Commit Health Care Fraud, in violation of 18 U.S.C. § 1349, one count of Health Care Fraud, in violation of 18 U.S.C. § 1347, and one count of Aggravated Identity Theft, in violation of 18 U.S.C. § 1028A(a)(1). I.G. Exs. 2, 3, 4.

2. Petitioner was sentenced on his guilty plea, and a judgment of conviction was entered against him, in the United States District Court on January 19, 2011. As part of his sentence, Petitioner was ordered to serve a 65-month term of imprisonment, and was ordered to pay restitution to the Medicare and Medicaid programs in the sum of $968,583.68. I.G. Ex. 4.

3. The judgment of conviction, finding of guilt, and accepted plea of guilty described above in Findings 1 and 2 constitute a "conviction" within the meaning of sections 1128(a)(1) and 1128(i)(1), (2), and (3) of the Act, and 42 C.F.R. § 1001.2.

4. A nexus and a common-sense connection exist between the criminal offenses to which Petitioner pleaded guilty and of which he was convicted, as noted above in Findings 1, 2, and 3, and the delivery of an item or service under the Medicare and Medicaid programs. I.G. Exs. 2, 3, 4. *Berton Siegel, D.O.,* DAB No. 1467 (1994).

5. By reason of Petitioner's conviction, a basis exists for the I.G.'s exercise of authority, pursuant to section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.

6. Because the acts resulting in Petitioner's conviction caused a financial loss to a government program of more than $5000, the aggravating factor set out at 42 C.F.R. § 1001.102(b)(1) is present.

7. Because the acts that resulted in Petitioner's conviction were committed over a period of one year or more, the aggravating factor set out at 42 C.F.R. § 1001.102(b)(2) is present.

8. Because Petitioner was sentenced to a term of imprisonment, the aggravating factor set out at 42 C.F.R. § 1001.102(b)(5) is present.

9. No mitigating factors set out at 42 C.F.R. § 1001.102(c)(1)-(3) are present. I.G. Ex. 9; P. Exs. 1, 2, 3.

10. The I.G.'s exclusion of Petitioner for a period of 23 years is supported by fact and law, is within a reasonable range, and is therefore not unreasonable. Findings 1-9 above.

11. There are no disputed issues of material fact and summary disposition is therefore appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

The essential elements necessary to support an exclusion based on section 1128(a)(1) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; and (2) the criminal offense must have been related to the delivery of an item or service under Title XVIII of the Act (Medicare) or any state health care program. *Tamara Brown,* DAB No. 2195 (2008); *Thelma Walley*, DAB No. 1367; *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Lyle Kai, R.Ph.,* DAB CR1262 (2004), *rev'd on other grounds*, DAB No. 1979 (2005), *aff'd sub nom. Kai v. Leavitt*, Civ. No. 05-00514 (D. Haw. July 17, 2006); s*ee also Russell Mark Posner*, DAB No. 2033, at 5-6 (2006). Those two essential elements are fully demonstrated in the evidence before me, and their demonstration is conceded by Petitioner in his briefing and in his hearing request.

Although the two elements essential to the basic exclusion are not the points on which Petitioner opposes the I.G.'s actions, it may be helpful to point out briefly the evidence of those two essential elements.

The factual and procedural background of Petitioner's conviction is shown by I.G. Exs. 2, 3, and 4. His guilty pleas were negotiated in terms set out in writing. I.G. Ex. 3. The guilty pleas were tendered and accepted on June 1, 2010, in satisfaction of the definition of "conviction" set out at section 1128(i)(3) of the Act. I.G. Exs. 4, 5. The judgment of conviction and finding of guilt entered against him on January 19, 2011 satisfied the definitions of "conviction" set out at sections 1128(i)(1) and 1128(i)(2) of the Act. I.G. Ex. 5. The first essential element is established by the record.

The language of the Indictment describes in detail how "Edward Birts did knowingly, intentionally, and willfully combine, conspire, and agree with others . . . to . . . defraud health care programs, namely Medicaid and Medicare," how he "caused to be submitted false and fraudulent claims to Medicaid for . . . psychiatric counseling services . . ." and how he "did knowingly transfer, possess, and use, without lawful authority, the personal identification of a Medicaid beneficiary . . . during and in relation to the execution of a scheme to commit health care fraud . . . ." I.G. Ex. 2, at 3, 8, 9. The submission of false claims to the Medicaid or Medicare programs has been consistently held to be a program-related crime within the reach of section 1128(a)(1). *Douglas Schram, R.Ph.*, DAB No. 1372 (1992); *Dewayne Franzen*, DAB No. 1165 (1990); *Jack W. Greene,* DAB No. 1078

(1989), *aff'd sub nom. Greene v. Sullivan,* 731 F. Supp. 835 (E.D. Tenn. 1990). I find the facts of Petitioner's offenses demonstrate the required nexus and common-sense connection between the criminal acts and the Medicaid and Medicare programs. *Berton Siegel, D.O.,* DAB No. 1467. The second essential element is established by the record.

The I.G. relies on three aggravating factors set out at 42 C.F.R. § 1001.102(b)(1), (2), and (5) in seeking to enhance the period of Petitioner's exclusion to 23 years. Petitioner does not directly contest the I.G.'s proof of these aggravating factors, but does argue that the proposed 23-year period of exclusion is unreasonable. I will briefly discuss the I.G.'s proof of the aggravating factors, and will then address Petitioner's position.

The aggravating factor set out at 42 C.F.R. § 1001.102(b)(1) is present when there is a showing of financial loss to a Government program or other entities of more than $5000. In his plea agreement, Birts explicitly admitted receiving payments of $968,583.58 based on false claims he submitted to Medicare and Medicaid through CTC. I.G. Ex. 3, at 12. Part of his sentence required him to pay a total of $968,583.68 in restitution to those programs. I.G. Ex. 4, at 5. Restitution has long been considered a reasonable measure of program losses. *See Jason Holladay, M.D.*, DAB No. 1855 (2002). Petitioner's crimes caused the programs significant financial losses, far in excess of the $5000 threshold for aggravation. The Departmental Appeals Board (Board) has characterized amounts substantially greater than the statutory standard as an "exceptionally aggravating factor" entitled to significant weight. *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, PhD.*, DAB No. 1865 (2003). I note that the very substantial program loss shown here justifies a significant increase in the period of exclusion.

The aggravating factor at 42 C.F.R. § 1001.102(b)(2) is present when "[t]he acts that resulted in the conviction, or similar acts, were committed over a period of one year or more." The charges to which Petitioner pleaded guilty are clear in their recitation that the scheme underlying the convictions lasted from January 2003 to at least September 2006. I.G. Ex. 2, at 3, 6. Birts admitted the correctness of those dates. I.G. Ex. 3, at 10. Thus, the "period of time" aggravating factor is present here. Petitioner does not argue otherwise. The temporal span of Petitioner's criminal activity is more than three times that required to invoke this aggravating factor, and represents a protracted abuse of the programs. It amply supports a significant increase in the period of exclusion.

The aggravating factor set out at 42 C.F.R. § 1001.102(b)(5) is present when the "sentence imposed by the court included incarceration." In this case, Petitioner was sentenced to imprisonment for 65 months. I.G. Ex. 5, at 2; P. Ex. 9, at 2. It is important to note, moreover, that this 65-month sentence was the result of plea negotiations obviously intended to enhance the sentence's punitive effect: two *concurrent* terms of 41 months' confinement were imposed on the violations of 18 U.S.C. §§ 1349 and § 1347, but a *mandatory consecutive term* of 24 months based on the violation of 18 U.S.C.

§ 1028A was "stacked" on the concurrent 41-month sentences. *See* I.G. Ex. 3, at 2. The "incarceration" aggravating factor is present here, and both the total length of Petitioner's confinement and the consecutive nature of the second part of his sentence bespeak the serious nature of Petitioner's crimes. This feature of Petitioner's sentence is enough, in and of itself, to warrant a significant increase in the period of exclusion.

Evidence relating to aggravating factors may be countered by evidence relating to any mitigating factors set forth at 42 C.F.R. § 1001.102(c)(1)-(3). Here, Petitioner claims entitlement to two of those factors, and I will discuss them below. But before addressing Petitioner's claims in mitigation, it may be useful to point out that in any situation where a petitioner asserts entitlement to mitigation, it is the petitioner's obligation to prove the claim, and in the context of potential summary disposition, it is a petitioner's obligation to raise the claim to the level of a genuine dispute as to a material fact. Mere assertions of such claims are insufficient to defeat a motion for summary disposition, and any such claim must, at the very least, begin by pleading facts that conform strictly to the very specifically-defined mitigating factors themselves.

The first mitigating factor Petitioner seeks to invoke may be claimed 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).

Now, Petitioner has submitted documents that reflect his treatment for drug- and alcohol-related problems *after* his commitment to the custody of the Bureau of Prisons. They were created in June, July, and October of 2011. P. Ex. 1, at 1-6. They obviously could not have been considered by the District Court before Petitioner was sentenced on January 19, 2011. He has proffered testimonials from family and friends that, from their dates, appear to have been presented to the District Court. P. Ex. 1, at 7-12. However, a close reading of those testimonials reveals nothing suggestive of a "mental, emotional or physical condition" leading to some reduction of Petitioner's culpability for the crimes he committed over a period of more than three years. That close reading of the testimonials also reveals that they make no clear effort to discuss Petitioner's mental, emotional, or physical health during or before the three-year span of his criminal activity between January 2003 and September 2006.

Those failings leave Petitioner's claim of reduced culpability considerably short of a genuine issue of material fact on the point. Taken at face value, there is simply nothing to suggest that questions of Petitioner's mental, emotional, or physical health were before the District Court at the time of sentencing. There is nothing in the sentence imposed by the District Court to suggest that it regarded Petitioner's culpability to have been affected in any way by such questions — and there is every reason to believe, based on the "stacked" sentence of 24 months, that the District Court saw no reason at all to treat

Petitioner as other than fully culpable for his abuse of the protected health care programs. Petitioner has raised no genuine issue of material fact in support of his claim of the mitigating factor set out at 42 C.F.R. § 1001.102(c)(2).

Petitioner also asserts that he is entitled to claim benefit of the mitigating factor set out at 42 C.F.R. § 1001.102(c)(3). The mitigating factor Petitioner seeks to invoke may be claimed if:

> (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.

42 C.F.R. § 1001.102(c)(3).

I repeat that since Petitioner's invocation of the mitigating factor is in the nature of an affirmative defense, Petitioner bears the burden of proving it. This allocation of the burden of proof is set out at 42 C.F.R. § 1005.15(b)(1). It is acknowledged in Board decisions. *Russell Mark Posner*, DAB No. 2033; *Stacey R. Gale,* DAB No. 1941 (2004); *Dr. Darren James, D.P.M.,* DAB No. 1828, at 7-8 (2002); *Barry D. Garfinkel, M.D.*, DAB No. 1572 (1996).

Petitioner asserts that he "fully cooperated with federal authorities who investigated my case prior to my plea of guilty . . . which also led to the prosecution of others." P. Ans. Br., at 1. Even if that assertion were true, such cooperation is not in and of itself a mitigating factor under the regulation. Rather, the regulation requires that Petitioner's activities must produce positive results of a particularly-objective kind. The Board has made it plain that even enthusiastic cooperation is not enough to invoke the mitigating factor unless it results in the investigation of a new case or the issuance of a report. *Hazem Garada, M.D.*, DAB No. 2027 (2006); *Marcia C. Smith, a/k/a Marcia Ellison Smith*, DAB No. 2046 (2006); *Stacey R. Gale*, DAB No. 1941. Petitioner has offered no evidence whatsoever of any "significant or valuable cooperation that yielded positive results . . . in the form of a new case actually being opened for investigation or a report actually being issued." *Gale*, DAB No. 1941, at 11. Thus I need not resolve a genuine issue of material fact concerning his alleged cooperation: his claim falls short on a

critical point when it fails to describe or identify any such "positive results." And it will be noted that Petitioner certainly had notice and opportunity to correct the deficiency if he could: the filing of I.G.'s Reply Brief put Petitioner on notice that the I.G. denied the application of the mitigating factor because no "positive results" had come of Petitioner's cooperation. I.G. Reply Br. at 6-8; I.G. Ex. 9. On this point, I do not weigh or evaluate conflicting evidence about "positive results" because there is no conflicting evidence to be considered. Petitioner's only evidence of cooperation is set out in P. Ex. 3, and nothing in that Exhibit so much as hints at positive results in the form of a new case actually being opened or a report actually being issued. In the absence of such results, Petitioner is not entitled to claim the mitigating factor set out at 42 C.F.R. § 1001.102(c)(3).

Petitioner maintains that the 23-year length of his exclusion is unreasonable. However, the I.G.'s discretion in exclusion cases when weighing the importance of aggravating and mitigating factors usually commands great deference when reviewed by an Administrative Law Judge (ALJ). *Jeremy Robinson*, DAB No. 1905 (2004); *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); *Stacy Ann Battle, D.D.S., et al.,* DAB No. 1843 (2002). The justification for that deference was recognized by the drafters of the regulations as the I.G.'s "vast experience" in implementing exclusions. 57 Fed. Reg. 3298-3321 (January 24, 1992). In most circumstances, the ALJ must not substitute his or her own view of what period of exclusion might appear "best" in any given case for the view of the I.G. on the same evidence; so long as the period chosen by the I.G. is within a reasonable range and is based on demonstrated criteria, the ALJ ought not alter it. *Jeremy Robinson*, DAB No. 1905; *Joann Fletcher Cash*, DAB No. 1725, at 20 (2000). The ALJ should reduce an exclusionary period only when she or he discovers some meaningful evidentiary failing in the aggravating factors upon which the I.G. relied, or when he or she discovers evidence reliably establishing a mitigating factor not considered by the I.G. in setting the enhanced period. *Jeremy Robinson*, DAB No. 1905.[1]

[1] The *Robinson-Everman-Battle-Cash* line of authority may have been blurred by the Board's decision in *Craig Richard Wilder, M.D.*, DAB No. 2416 (2011). Although the ALJ found that the I.G. had considered all proven aggravating and mitigating factors, and although the Board acknowledged that there were no differences between the record of those factors before it and the record before the ALJ and the I.G., the Board nevertheless departed from its own settled rule and revised the 35-year period of exclusion downward to 18 years, so that it might conform more satisfactorily to what the Board considered best. It is too soon to tell whether *Wilder* signals new responsibility for the Board and ALJs in overseeing the I.G.'s application of his "vast experience," or whether any such new responsibility includes the discretion to lengthen, as well as shorten, the period determined by the I.G.

Here, all three of the aggravating factors relied on by the I.G. have been established as pleaded, and the details of each proven factor further support an enhancement of the period of exclusion. Petitioner has not established the mitigating factors based on his claim of diminished culpability or on his claimed cooperation with authorities. Given these considerations, the I.G.'s determination to enhance the term of Petitioner's exclusion to 23years is manifestly not unreasonable. While comparisons with other cases are of limited utility and are certainly not controlling, they can illustrate what a reasonable range has been understood to mean when the ALJ examines a lengthy exclusion. *Paul D. Goldenheim, M.D., et al.*, DAB No. 2268, at 29 (2009). The length of this exclusion is well within a reasonable range and is commensurate with the range established as reasonable in *Akube Worumoni Ndoromo*, DAB CR2092 (2010); *Neil E. Norwood*, DAB CR1780 (2008); *Peggy A. Bisig*, DAB CR1416 (2006); and *Golden G. Higgwe, D.P.M.*, DAB CR1229 (2004).

Petitioner appears here *pro se*, and I have been guided by the Board's reminders that *pro se* litigants should be offered "some extra measure of consideration" in developing their records and their cases. *Louis Mathews*, DAB No. 1574 (1996); *Edward J. Petrus, Jr., M.D., et al.*, DAB No. 1264 (1991). I have searched all of Petitioner's pleadings for any arguments or contentions that might raise a valid, relevant defense to the I.G.'s Motion, but have found nothing that could be so construed.

Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts. *Michael J. Rosen, M.D.*, DAB No. 2096; *Thelma Walley*, DAB No. 1367. Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). This forum looks to FED. R. CIV. P. 56 for guidance in applying that regulation. *Robert C. Greenwood*, DAB No. 1423 (1993). The material facts in this case are undisputed and unambiguous. They support summary disposition as a matter of settled law. This Decision issues accordingly.

VI. Conclusion

For the reasons set forth above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Edward Alexander Birts from participation in Medicare, Medicaid, and all other federal health care programs for a period of 23 years pursuant to the terms of section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), is sustained.

/s/
Richard J. Smith
Administrative Law Judge