Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Emmanuel Uko Akpan
(OI: 6-03-40688-9),

Petitioner

v.

The Inspector General.

Docket No. C-10-340

Decision No. CR2178

Date: July 8, 2010

DECISION

Petitioner, Emmanuel Uko Akpan, asks review of the Inspector General's (I.G.'s) determination to exclude him for twenty years from participation in the Medicare, Medicaid, and all federal health care programs under section 1128(a)(1) of the Social Security Act (Act). For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner and that the imposition of a twenty-year exclusion is reasonable.

I. Background

Petitioner owned and operated a durable medical equipment supply business in Dallas, Texas. In that capacity, he fraudulently billed the Medicare program for power wheelchairs and accessories. I.G. Exhibit (Ex.) 2 at 2. He was convicted in federal district court of felony health care fraud and for conducting an illegal financial transaction.

In a letter dated December 31, 2009, the I.G. advised Petitioner that, because he was convicted of a criminal offense related to the delivery of an item or service under the Medicare or state health care program, the I.G. was excluding him from participation in

Medicare, Medicaid, and all federal health care programs for a period of twenty years. Section 1128(a)(1) of the Act authorizes such exclusion.

The I.G. indicates that an in-person hearing is not necessary in this case. I.G. Br. at 6-7. The I.G. has submitted its brief (I.G. Br.), a reply brief, and five exhibits (I.G. Exs. 1-5).

In an order dated March 17, 2010, I directed Petitioner to complete and submit a "short-form brief," answering specific questions, including whether an in-person hearing is necessary, and, if so, directing him to: (1) name each witness whose testimony he wants to offer; (2) describe that testimony and explain why it relates to his arguments; and (3) explain why that testimony is not duplicative.[1] Petitioner did not respond to the specific questions on the short-form brief, but instead submitted the following documents: 1) a brief opposing summary judgment and demanding discovery (P. Br.);[2] 2) a motion to strike the exhibits attached to the I.G.'s brief (P. M/Strike); 3) a document titled "Petitioner's Affidavit of the Court's Bias and Prejudice Pursuant to 28 U.S.C. § 144"; and 4) a motion to recuse. With these documents, Petitioner submitted two "attachments," which we have marked P. Exs. 1-2. Petitioner has also submitted a motion for leave to file a sur-reply and the sur-reply itself.[3]

II. Issues

Although Petitioner raises a wide range of issues here, I am authorized to consider only: 1) whether the I.G. has a basis for excluding Petitioner from program participation; and 2) if so, whether the twenty-year exclusion falls within a reasonable range.[4]

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[1] While the short-form brief directs the party to answer specific questions targeted to the issues presented in this case, it also affords him the opportunity to present any additional arguments.

[2] Petitioner captions this submission "Petitioner's Motion and Affidavit to Stay Consideration Opposing Informal Brief of Inspector General for Dismissal or Summary Judgment Pursuant to Fed. R. Civ. P. 56(f)."

[3] I do not list every motion and objection that Petitioner filed, but all of his submissions are included in the record file.

[4] Petitioner moves for discovery. But, the regulations limit discovery to documents that are "relevant and material." 42 C.F.R. § 1005.7. Petitioner has not shown how discovery would produce documents that are "relevant and material." Petitioner also complains bitterly – indeed, he alleges bias and prejudice and demands that I recuse myself – because I declined to appoint, at government expense, an attorney to represent him in these proceedings. As set forth in my orders of February 17 and March 17, 2010, I simply have no authority to appoint counsel to represent him.

III. Discussion

A. Petitioner must be excluded, because he was convicted of a criminal offense related to the delivery of an item or service under the Medicare or a state health program, within the meaning of section 1128(a)(1) of the Social Security Act.[5]

Section 1128(a)(1) of the Act requires that the Secretary of Health and Human Services exclude an individual who has been 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. 42 C.F.R. § 1001.101.

In April 2004, Petitioner admitted his guilt to: 1) "knowingly and willfully" executing a scheme to defraud the Medicare program, in violation of "18 U.S.C. §§ 1347 & 24 and 2"; and 2) "knowingly" conducting a financial transaction of more than $10,000 "involv[ing] the proceeds of a specified unlawful activity, namely, health care fraud," in violation of 18 U.S.C. § 1957(a). I.G. Ex. 2. According to Petitioner, he formally entered his guilty plea in district court on May 17, 2004. P. Br. at 3.

On June 30, 2009, the Federal District Court for the Northern District of Texas entered judgment against him, sentenced him to a five-year prison term, and ordered him to pay restitution of $710,000 to the Centers for Medicare and Medicaid Services, which is the agency that administers the Medicare program. I.G. Ex. 1. Neither party has explained the long delay between the date Petitioner pled guilty and the date the court entered a judgment against him.

Nevertheless, the parties agree that Petitioner was convicted of defrauding the Medicare program. He is therefore subject to exclusion under section 1128(a)(1).

Petitioner nevertheless claims that he has "always maintained his innocence," and complains that his criminal defense attorney refused to withdraw his guilty plea. He therefore filed his own motion to withdraw, but, after a February 2005 hearing, the federal district court denied his motion. Petitioner has appealed his conviction, and, according to Petitioner, that appeal is currently pending before the Fifth Circuit. P. Motion to Recuse at 2-3.

Federal regulations explicitly preclude any collateral attack on Petitioner's conviction.

> When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final

[5] My findings of fact/conclusions of law are set forth, in italics and bold, in the discussion captions of this decision.

> decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it, either on substantive or procedural grounds, in this appeal.

42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Chander Kachoria, R.Ph.*, DAB No. 1380 at 8 (1993) ("There is no reason to 'unnecessarily encumber the exclusion process' with efforts to reexamine the fairness of state convictions."); *Young Moon, M.D.*, DAB CR1572 (2007).

Further, the Act specifically provides that a pending appeal is irrelevant to whether an individual has been convicted, within the meaning of the Act. "[A]n individual . . . is considered to have been 'convicted' of a criminal offense . . . regardless of whether there is an appeal pending . . . ." Act § 1128(i)(1).

B. Based on the aggravating factors presented in this case, the twenty-year exclusion is reasonable.

An exclusion under section 1128(a)(1) must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2). Federal regulations set forth criteria for lengthening exclusions beyond the five-year minimum. 42 C.F.R. § 1001.102(b). Evidence that does not pertain to one of the aggravating or mitigating factors listed in the regulations may not be used to decide whether an exclusion of a particular length is reasonable.

Among the factors that may serve as bases for lengthening the period of exclusion are: 1) the acts resulting in the conviction, or similar acts, resulted in a financial loss to Medicare and state health care programs of $5,000 or more; 2) the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more; 3) the sentence that the court imposed included incarceration; and 4) the convicted individual or entity has a prior criminal record. 42 C.F.R. § 1001.102(b). The presence of an aggravating factor, or factors not offset by any mitigating factor or factors, justifies lengthening the mandatory period of exclusion.

Here, at least four aggravating factors justify significantly increasing the period of exclusion beyond the five-year minimum:[6]

Financial loss to Medicare (42 C.F.R. § 1001.102(b)(1)). Petitioner's actions resulted in a program financial loss well in excess of $5,000. The district court ordered him to pay $710,000 in restitution to the Medicare program, and restitution has long been considered

[6] The I.G. does not rely on another potentially aggravating factor -- that Medicare overpaid the individual $1,500 or more as a result of *intentional* improper billings. 42 C.F.R. § 1001.201(b)(7).

a reasonable measure of program losses. I.G. Ex. 1 at 5. *Jason Hollady, M.D.*, DAB No. 1855 (2002). Indeed, the Departmental Appeals Board (Board) has characterized restitution in an amount so substantially greater than the standard as 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).

Duration of crime (42 C.F.R. § 1001.102(b)(2)). For more than a year, Petitioner engaged in the acts that resulted in his conviction. In his plea agreement, Petitioner admitted that he began submitting fraudulent claims in March 2002 and continued his illegal conduct through July 2003. I.G. Ex. 2 at 3.

Incarceration (42 C.F.R. § 1001.102(b)(5)). The criminal court imposed a sentence that included a significant period of incarceration. Petitioner was sentenced to five years in prison, which is significant jail time, and underscores the seriousness of his crimes. I.G. Ex. 1 at 2.

Criminal sanction record (42 C.F.R. § 1001.102(b)(6)). The June 2009 felony conviction was not Petitioner's first. In March 1997, he pled guilty to one felony count of making a false statement in the acquisition of a passport, and aiding and abetting, in violation of 18 U.S.C. § 1542 and 2. I.G. Ex. 3. Notwithstanding this earlier conviction, Petitioner denies any "criminal sanction record," arguing that his earlier conviction "does not satisfy the regulatory requirement for consideration as an aggravating factor." P. Br. at 3. Petitioner does not further explain why a felony conviction would not be considered a "criminal sanction."

Nothing in the plain language of 42 C.F.R. § 1001.102(b)(6) limits its reach to situations involving exclusions or other program-related penalties.[7] Indeed, such qualifying language would make the provision redundant. Section 1001.102(b)(8) includes, as an aggravating factor, convictions for criminal offenses "involving the same *or similar* circumstances." (Emphasis added). Section 1001.102(b)(9) includes, as an aggravating factor, convictions for "other offenses besides those which formed the basis for the exclusion" as well as "other adverse action. . . based on the same set of circumstances that serves as the basis for imposition of the exclusion." I interpret this section to cover contemporaneous convictions, but not necessarily the individual's criminal history. The drafters of the regulation thus recognized that individuals with additional criminal convictions are inherently less reliable and so authorized the I.G. to consider aggravating *all* criminal convictions, whether contemporaneous or past, exclusion-related or not. In this way, the regulation furthers the statutory and regulatory purpose of protecting federal

[7] If Petitioner's earlier crime had been subject to exclusion under section 1128, he may have been subject here to a significantly longer period of exclusion, since the statutory minimum for those previously excluded is ten years, rather than five. Act § 1128(c)(3)(G).

health care programs from those who have shown themselves to be untrustworthy. Any individual with repeated felony convictions for crimes based on fraud is simply not to be trusted.

Petitioner's significant history of felonious fraudulent conduct heightens the risk that he poses to program integrity. I would sustain a twenty-year exclusion based on this factor alone.

C. No mitigating factors justify decreasing the period of exclusion.

The regulations consider mitigating just three factors: 1) a petitioner was convicted of three or fewer misdemeanor offenses, and the resulting financial loss to the program was less than $1,500; 2) the record *in the criminal proceedings* demonstrates that a petitioner had a mental, physical, or emotional condition that reduced his culpability; and 3) a petitioner's cooperation with federal or state officials resulted in others being convicted or excluded, or additional cases being investigated, or a civil money penalty being imposed. 42 C.F.R. § 1001.102(c) (emphasis added). Characterizing the mitigating factor as "in the nature of an affirmative defense," the Board has ruled that Petitioner has the burden of proving any mitigating factor by a preponderance of the evidence. *Barry D. Garfinkel, M.D.*, DAB No. 1572 at 8 (1996).

Obviously, because Petitioner's *felony* conviction involved program financial losses many times greater than $1,500, the first factor does not apply here. Nor does Petitioner claim that he suffered any condition that reduced his culpability nor that he cooperated with government officials.

Petitioner nevertheless lists seven factors, which he characterizes as "mitigating." P. Br. at 3-4. These include revocation of his supplier number, loss of earnings, and government seizure of his property. None of these are mitigating.

Petitioner also claims, without any support, that he was, in fact, excluded over six years ago. According to Petitioner, after he entered his guilty plea, a government agent told him that he was automatically excluded and sent him a copy of the exclusion rules. P. Br. at 2-3. I accept this as true for purposes of resolving this case, but I do not find it material. That a government employee advised him of, and sent him the rules governing, mandatory exclusions does not mean that the I.G. excluded him any earlier than January 2010, as set forth in the I.G.'s December 31, 2009 notice letter. Indeed, he could not have been excluded prior to the date of his conviction, June 30, 2009.

Moreover, all of the evidence in this record establishes that Petitioner was excluded effective January 20, 2010. By letter dated July 17, 2009, the I.G. notified Petitioner that he would be excluded and invited him to submit any information he wanted the I.G. to consider in determining the period of exclusion. I.G. Ex. 5 at 1-2. Petitioner responded

by letter dated July 20, 2009, in which he said only that his conviction was under appeal. He did not then mention any earlier exclusion. I.G. Ex. 5 at 3-4.

IV. Conclusion

For these reasons, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid, and all federal health care programs, and I sustain as reasonable the twenty-year exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge