Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Francisca Mbanaja,
a/k/a Francisca M. Simien,

Petitioner,

v.

The Inspector General.

Docket No. C-10-482

Decision No. CR2230

Date: August 30, 2010

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Disposition. That Motion, if granted, would affirm the I.G.'s determination to exclude Petitioner Francisca Mbanaja, a/k/a Francisca M. Simien, from participation in Medicare, Medicaid, and all other federal health care programs for a period of 10 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 facts in this case mandate the imposition of a five-year exclusion, and support the I.G.'s determination to enhance that period of exclusion to 10 years. Accordingly, I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

Francisca Mbanaja was a partner in a Dallas, Texas business called P & F Medical Supply (P & F). P & F was a provider of medical supplies to the Texas Medicaid program, and its specific business activity was delivering incontinence supplies to

Medicaid beneficiaries. Petitioner was responsible for billing Medicaid for the supplies ostensibly delivered. Between January 2003 and August 2006, Petitioner submitted claims to Medicaid from P & F totaling over $200,000 for supplies and equipment not actually delivered as claimed.

On May 8, 2009, Petitioner appeared with counsel in the 283rd Judicial District Court, Dallas County, Texas, and pleaded guilty to one count of Medicaid Fraud, in violation of TEX. PENAL CODE ANN. § 35A.02. She was fined $3000, assessed costs of $236, sentenced to three days' home confinement and a 10-year period of probation, and was ordered to pay restitution to the Texas Medicaid program in the sum of $216,875.

Section 1128(a)(1) of the Act mandates the exclusion of "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under . . . any State health care program" for a period of not less than five years. On December 31, 2009, the I.G. notified Petitioner that she was to be excluded pursuant to the terms of section 1128(a)(1) of the Act for a period of 10 years.

Acting through counsel, Petitioner timely sought review of the I.G.'s action by letter of February 16, 2010.

I convened a prehearing conference by telephone on March 12, 2010, pursuant to 42 C.F.R. § 1005.6, in order to discuss procedures best suited for addressing the issues presented by the case, and by Order of March 15, 2010, as amended by my Order of June 30, 2010, I established a schedule for the submission of documents and briefs.

The briefing cycle in this case closed for purposes of 42 C.F.R. § 1005.20(c) with the filing of Petitioner's Response to the Inspector General's Supplemental Reply Brief on July 14, 2010.

The evidentiary record on which I decide the issues before me contains eight exhibits. The I.G. proffered eight exhibits marked I.G. Exhibits 1-8 (I.G. Exs. 1-8). Petitioner proffered no exhibits. In the absence of objection, I have admitted I.G. Exs. 1-8.

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 10-year length of the proposed period of exclusion is unreasonable.

The controlling authorities require that these issues be resolved in favor of the I.G.'s position. Section 1128(a)(1) of the Act mandates Petitioner's exclusion, for her 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 10 years is not unreasonable, for both of the aggravating factors relied on by the I.G. to enhance the period are fully demonstrated in the record before me, and no mitigating factor has been proven by Petitioner.

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). This mandatory exclusion must be imposed for a minimum of five years. Section 1128(c)(3)(B) of the Act; 42 U.S.C. § 1320a-7(c)(3)(B). Petitioner does not deny that the I.G. has a basis upon which to exclude Petitioner.

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. seeks to enhance the period of Petitioner's exclusion to 10 years, and relies on the two aggravating factors set out at 42 C.F.R. § 1001.102(b)(1) and (2). Petitioner does not deny the presence of these two aggravating factors or contest the I.G.'s proof of them.

In cases where the I.G. proposes to enhance the period of exclusion by relying on any of those 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). In this case, Petitioner has not pleaded a defined mitigating factor, and none appears in the record before me.

IV. Findings and Conclusions

I find and conclude as follows:

1. On May 8, 2009 Petitioner appeared with counsel in the 283rd Judicial District Court, Dallas County, Texas, pleaded guilty to one count of Medicaid Fraud, in violation of TEX. PENAL CODE ANN. § 35A.02., was adjudged guilty on her plea, and was sentenced. I.G. Exs. 5, 7.

2. As part of her sentence, Petitioner was ordered to pay restitution to the Texas Medicaid program in the amount of $216,875. I.G. Ex. 5.

3. The acts for which Petitioner was convicted occurred from about January 1, 2003 to about August 1, 2006. I.G. Exs. 5, 6, 8.

4. On December 31, 2009, the I.G. notified Petitioner that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for 10 years, pursuant to section 1128(a)(1) of the Act. I.G. Ex. 4.

5. On February 16, 2010, Petitioner perfected her appeal from the I.G.'s action.

6. The guilty plea and adjudication of guilt based on Petitioner's violation of TEX. PENAL CODE ANN. § 35A.02, as described in Finding 1 above, constitute a conviction related to the delivery of an item or service under Medicare or Medicaid within the meaning of section 1128(a)(1) of the Act. *Berton Siegel, D.O.*, DAB No. 1467 (1994).

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

8. The acts for which Petitioner was convicted resulted in a loss of $5,000 or more to a government program or one or more entities, the aggravating factor established by 42 C.F.R. § 1001.102(b)(1).

9. The acts for which Petitioner was convicted were committed over a period of one year or more, the aggravating factor established by 42 C.F.R. § 1001.102(b)(2).

10. Petitioner has shown no mitigating factors that I am authorized to consider under 42 C.F.R. § 1001.102(c).

11. 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). That period is presumptively reasonable.

12. Exclusion of Petitioner for an additional period of five years, and thus for a total period of exclusion of 10 years, is not unreasonable based upon the two aggravating factors established in this case and the absence of any mitigating factors.

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 (1992); *Boris*

Lipovsky, M.D., DAB No. 1363 (1992); *Lyle Kai, R.Ph.*, DAB CR1262 (2004), *rev'd on other grounds*, DAB No. 1979 (2005); s*ee also Russell Mark Posne*r, DAB No. 2033, at 5-6 (2006). As noted above, Petitioner has conceded that these two essential elements are present, and the record demonstrates that there is an objective factual basis for that concession. The essential elements of this exclusion have been proven.

Because the I.G. has established a basis for Petitioner's exclusion pursuant to section 1128(a)(1), her 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). That period is reasonable as a matter of law.

The I.G. relies on the two aggravating factors set out at 42 C.F.R. § 1001.102(b)(1) and (b)(2) in seeking to enhance the period of Petitioner's exclusion to 10 years. Petitioner does not challenge the actual existence of these two factors, but argues that the I.G. incorrectly weighed them in setting Petitioner's period of exclusion. Because Petitioner addresses the substance of each of the two aggravating factors in advancing her position, I briefly address each of the two aggravating factors below.

The first aggravating factor on which the I.G. relies is present when "[t]he acts resulting in the conviction, or similar acts . . . caused . . . a financial loss to a Government program . . . of $5,000 or more." 42 C.F.R. § 1001.102(b)(1). The court records show that Petitioner was required to pay $216,875 in restitution to the Texas Medicaid program. I.G. Ex. 5 at 1; I.G. Ex. 6; I.G. Ex. 8 at 3. Appellate panels of the Departmental Appeals Board (Board) have characterized restitution in amounts substantially greater than the regulatory standard as an "exceptional aggravating factor" entitled to significant weight. *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003). The I.G. has established this first aggravating factor, and Petitioner concedes that the factor is present.

The second aggravating factor asserted by the I.G. is specified at 42 C.F.R. § 1001.102(b)(2). That factor is present if "[t]he acts that resulted in the conviction, or similar acts, were committed over a period of one year or more." Here, the language of the charge to which Petitioner pleaded guilty demonstrates the existence of this factor. The True Bill of Indictment describes the period during which Petitioner did "knowingly make misrepresentations of material facts, namely: overstating the quantity of medical supplies provided to Medicaid patients . . . in order to . . . receive payments . . . that were greater than the payments that were authorized . . . ." as beginning on or about January 1, 2003 and continuing until on or about August 1, 2006. I.G. Ex. 6. The acts that resulted in Petitioner's conviction took place over a period of about 43 months, far longer than the one-year regulatory standard. The I.G. has established this second aggravating factor, and Petitioner does not deny its presence.

As noted above, evidence relating to aggravating factors may be countered by evidence relating to any of the mitigating factors set forth at 42 C.F.R. § 1001.102(c)(1)-(3). It is well-settled that Petitioner bears the burden of going forward with the evidence, and the burden of persuasion, in her effort to establish the mitigating factor at issue. *See Stacey R. Gale*, DAB No. 1941 (2004); *Arthur C. Haspel, D.P.M.*, DAB No. 1929 (2004); *see also Dr. Darren James, D.P.M.*, DAB No. 1828 (2002). In this case, Petitioner has not attempted to prove the presence of any of the defined mitigating factors, and my review of the record has not suggested that any of those factors are present.

Now, the central point of contention in this case is not the existence of a basis for the proposed exclusion, nor is it the existence of the two aggravating factors. It is instead Petitioner's argument that the weight given by the I.G. to the two aggravating factors is excessive. Petitioner admits the amount of loss to the Texas Medicaid program, and admits that she submitted fraudulent billings to that program for 43 months, but asserts that the 10-year period of exclusion is simply too harsh a measure. She correctly notes that the I.G. must evaluate any demonstrated aggravating factors in terms of what they show about the trustworthiness or untrustworthiness of a petitioner such as herself, but she fails to appreciate the I.G.'s broad discretion in making such evaluations, and fails to acknowledge that a precise correlation between individual cases and proven aggravating factors and lengths of exclusions, established by "a rigid formula," is not required. *Keith Michael Everman, D.C.*, DAB No. 1880, at 10 (2003).[1]

Thus, when Petitioner points to specific cases in which *greater* losses or more *prolonged* criminal activity resulted in 10-year exclusions similar to hers, she fails to acknowledge that what is required of the I.G. is that the period of exclusion be within a "reasonable range, based on demonstrated criteria." *See Joann Fletcher Cash*, DAB No. 1725, at 17 (2000). A reasonable range is "a range of exclusion periods that is more limited than the full range authorized by the statute and that is tied to the circumstances of the individual case." *Joseph M. Rukse, Jr., R.Ph.*, DAB No. 1851, at 11 (2002). Thus, the I.G. was obliged in this case, after examining and weighing the circumstances of Petitioner's case, to select a period of exclusion not less than the mandatory five-year period, but something less than permanent exclusion and limited in its length by the circumstances proven in this record.

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[1] In arguing that *Dolan v. United States*, 130 S. Ct. 2533 (2010), authorizes me to ignore the statutes, regulations, and precedents governing this case, Petitioner also fails rather conspicuously to acknowledge that first tenet of statutory interpretation: the notion that the statute involved be applicable to the facts at bar. *Dolan* interpreted a provision of the Mandatory Victims Restitution Act, 18 U.S.C. § 3664(d)(5) in circumstances bearing no resemblance whatsoever to the facts or issues in this case.

The I.G.'s discretion in weighing the importance of aggravating and mitigating factors in exclusion cases commands great deference when reviewed by Administrative Law Judges (ALJs). *Paul D. Goldenheim, M.D., et al.*, DAB No. 2268 (2009); *Jeremy Robinson*, DAB No. 1905; *Keith Michael Everman, D.C.*, DAB No. 1880; *Stacy Ann Battle, D.D.S., et al.*, DAB No. 1843 (2002). The source of this doctrine is the belief held by the regulations' authors that the I.G. is invested with "vast experience in implementing exclusions . . . ." 57 Fed. Reg. 3298, 3321 (January 29, 1992). This doctrine of deference requires that the ALJ not substitute her or his own view of what period of exclusion might appear better to the ALJ in any given case for the view of the I.G. on the same evidence. In general, the Board has insisted that ALJs may reduce an exclusionary period only when they discover some meaningful evidentiary failing in the aggravating factors upon which the I.G. relied, or when they discover evidence reliably establishing a mitigating factor not considered by the I.G. in setting the enhanced period. *Jeremy Robinson*, DAB No. 1905. Where, as here, both of the aggravating factors on which the I.G. relied are present and there are no mitigating factors, a holding that the exclusion period chosen by the I.G. is unreasonable could be reached only through the substitution of views that the doctrine of deference forbids.

Accordingly, the only question now before me is whether the length of the period of exclusion is within a reasonable range. In the instant case, the proposed 10-year period is commensurate with the range established as reasonable in such cases as *Emem Dominic Ukpong*, DAB No. 2220 (2008); *Thomas D. Harris*, DAB No. 1881 (2003); *Frances Unoka Nwoshuocha*, DAB CR2057 (2010); *Russell J. Ellicott, D.P.M.*, DAB CR1552 (2007); *Anwar Yamini, Sr.*, DAB CR1095 (2003); *Ira Katz, Little Five Points Pharmacy*, DAB CR1044 (2003); *Egbert Aung Kyang Tan, M.D.*, DAB CR798 (2001); *Paul W. Williams, Jr., et al.*, DAB CR787 (2001); *Tarvinder Singh, D.D.S.*, DAB CR697 (2000); and *Howard S. Weiss, M.D.*, DAB CR421 (1996). I rely on those cases as points of reference because they were, like this one, based on convictions for crimes of financial dishonesty and, like this one, contained evidence of the aggravating factors set out at 42 C.F.R. § 1001.102(b)(1) and (b)(2). The loss attributed to Petitioner's crime is so far in excess of the minimum showing required as to illustrate the exceptional scale of her untrustworthiness, and the temporal span of her criminal activity is sufficient for her to have demonstrated persistent and enduring untrustworthiness over an extended period. I have no difficulty in concluding that the length of the period of exclusion is within a reasonable range, and it is therefore not unreasonable.

Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts. *Marvin L. Gibbs, Jr., M.D.*, DAB No. 2279 (2009); *Michael J. Rosen, M.D.*, DAB No. 2096 (2007). 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.

VII. 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 Francisca Mbanaja from participation in Medicare, Medicaid, and all other federal health care programs for a period of 10 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