Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Verlon Lane Pierce
(OI File Number 4-06-40545-9),

Petitioner

v.

The Inspector General
Department of Health and Human Services.

Docket No. C-10-844

Decision No. CR2307

Date: January 10, 2011

DECISION

Petitioner, Verlon Lane Pierce, is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to sections 1128(a)(1) and (3) of the Social Security Act (Act) (42 U.S.C. §§ 1320a-7(a)(1) and (3)), effective June 17, 2010. Petitioner's exclusion for the minimum period of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)). An additional period of exclusion of seven years, for a total minimum period of exclusion of twelve years,[1] is not unreasonable based upon the three aggravating factors established in this case and the presence of one mitigating factor.

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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 (I.G.) notified Petitioner by letter dated May 28, 2010, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of twelve years pursuant to sections 1128(a)(1) and (3) of the Act based upon his conviction in the United States District Court for the Western District of Kentucky. The I.G. notified Petitioner that his period of exclusion was extended to twelve years based on the presence of three aggravating factors and one mitigating factor. I.G. Exhibit (I.G. Ex.) 1.

Petitioner timely requested a hearing by letter dated July 12, 2010. The request for hearing was docketed and assigned to me for hearing and decision on July 27, 2010. On August 12, 2010, I convened a prehearing conference by telephone, the substance of which is memorialized in my order dated August 13, 2010. The I.G. filed a motion for summary judgment and a supporting brief (I.G. Brief) on September 27, 2010, with I.G. Exs. 1 through 5. On October 31, 2010, Petitioner filed his brief in opposition to the I.G.'s motion for summary judgment (P. Brief) with Petitioner's exhibits (P. Exs.) 1 through 4. On December 10, 2010, the I.G. filed a reply brief (I.G. Reply). No objections have been made to any of the offered exhibits. I.G. exhibits 1 through 5 and Petitioner's exhibits 1 through 4 are admitted as evidence.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) provides Petitioner's rights to a hearing before an administrative law judge (ALJ) and judicial review of the final action of the Secretary of the Department 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 relating to the delivery of an item or service under Medicare or a state health care program. Section 1128(a)(3) requires the Secretary to exclude an individual convicted of a felony "relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct" in connection with the delivery of a health care item or service. 42 C.F.R. § 1001.101(a), (c).

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) 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 and mitigating factors that must be considered 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 is 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. Issue:

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.

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction. Pursuant to section 1128(f) of the Act, a person excluded has a right to reasonable notice and an opportunity for a hearing. The regulations recognize an excluded party's right to hearing before an ALJ and the rights of both the excluded party and the I.G. to participate in a hearing. 42 C.F.R. §§ 105.2, 1005.3. Either party may chose 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). Neither party has waived an oral hearing. 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: no disputed issues of material fact exist 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 that, if true, would refute the facts relied upon by the moving party. *See* 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 material facts are 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). The I.G. moved for summary judgment, and I conclude that summary judgment is appropriate and no oral hearing is necessary.

Petitioner does not dispute the facts that show he was convicted pursuant to his guilty pleas of criminal offenses that provide a basis for his exclusion pursuant to sections 1128(a)(1) and (3) of the Act. Petitioner does not deny the facts upon which the I.G. found three aggravating factors and one mitigating factor. Petitioner requests that, if I find his exclusion mandatory, I reduce his period of exclusion to five years and declare that the exclusion began running on June 1, 2009. As discussed hereafter, Petitioner's exclusion for five years is mandatory and I have no discretion to either reduce his period of exclusion as he requests or to declare that the period of exclusion began June 1, 2009. Accordingly, Petitioner's arguments must be resolved against him as a matter of law and summary judgment is appropriate.

3. Petitioner's exclusion is required by section 1128(a)(1) of the Act.

4. Petitioner's exclusion is required by section 1128(a)(3) of the Act.

Petitioner concedes that on April 6, 2009, he was convicted pursuant to his guilty pleas, by the United States District Court for the Western District of Kentucky, of one count of health care fraud in violation of 18 U.S.C. § 1347; and one count of Selling, Purchasing, and Trading Prescription Drug Samples in violation of 21 U.S.C. §§ 331(t), 353(c)(1), and 333(b)(1)(B). Petitioner does not dispute that he was sentenced to home confinement with electronic monitoring for a period for six months and that he agreed to forfeit $850,000 to the United States. I.G. Ex. 5, at 1, 2; P. Brief at 2; Request for Hearing. The gist of the charges to which Petitioner pled guilty is set forth in his plea agreement. Petitioner agreed in his plea agreement that beginning in 2001 and continuing through December 2004, he obtained prescription drug samples from physicians and another pharmacist; he removed the samples from their original packaging; he sold the drugs through his pharmacy as if the sample drugs had been properly obtained and dispensed; and he and others submitted claims for the sample drugs to Medicaid and private insurers. Petitioner admitted that he engaged in a scheme to defraud Medicaid and private health insurance companies. I.G. Ex. 3, at 2-3.

The I.G. cites sections 1128(a)(1) and (3) 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.
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> * * * *
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> (3) FELONY CONVICTION RELATING TO HEALTH CARE FRAUD. ─ Any individual or entity that has been convicted of an offense which occurred after [August 21, 1996], under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in [section 1128(a)(1)]) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

The evidence shows that both provisions are triggered in this case. A federal court convicted Petitioner of felonies that were committed after August 21, 1996, and the criminal conduct involved fraud related to the delivery of items to Medicaid eligible beneficiaries. Accordingly, I conclude that Petitioner's exclusion is required by sections 1128(a)(1) and (3) 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.

6. Aggravating factors exist that justify extending the period of exclusion.

7. The I.G. identified and considered one mitigating factor.

8. Exclusion for twelve years is not unreasonable in this case.

Petitioner argues that the length of his exclusion is unreasonable and he asks that I reduce the period to five years, with an effective date of June 1, 2009. Request for Hearing at 2; P. Brief at 1-2. My determination of whether or not the period of exclusion is unreasonable depends on whether: (1) the I.G. has proven that there are aggravating factors; (2) Petitioner has proven there is a mitigating factor the I.G. failed to consider; and (3) the period of exclusion is within a reasonable range.

a. Three aggravating factors justify lengthening the period of exclusion beyond the five-year statutory minimum.

The statute mandates a five-year minimum exclusion. Act § 1128(c)(3)(B). The I.G. alleges that three 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 financial loss of $5,000 or more to a government program or one or more entities; (2) Petitioner's criminal acts occurred over a period of one year or more; and (3) Petitioner was sentenced to a period of incarceration. I.G. Ex. 1, at 2. I agree that the evidence shows that all three aggravating factors are present in this case.

The evidence shows that Petitioner admitted to committing criminal acts that resulted in financial losses either to state Medicaid or private insurers and he agreed to forfeit his ill-gotten gain of $850,000. I.G. Ex. 3, at 4, 12; I.G. Ex. 4; Request for Hearing; and P. Brief at 2. Petitioner argues that there was no loss to anyone. He argues that the government and insurers received the medication for which they paid. Petitioner's logic is faulty. Petitioner obtained and sold samples and filed claims for the sample medication. Had the samples of medication been provided to the same beneficiaries at no charge, Medicaid and the private insurers would have paid nothing for the same medications. Petitioner also argues that the value of the sample medication was actually $100,000 not $850,000. I consider Petitioner bound by his plea agreement (I.G. Ex. 3) and the agreed money judgment and final order of forfeiture (I.G. Ex. 4) to which he agreed. Thus, the credible loss to the government and private insurers is the forfeiture amount of $850,000. Furthermore, Petitioner may not collaterally attack and I may not review his criminal conviction. 42 C.F.R. § 1005.2007(d).

Petitioner does not dispute the other two factors. Petitioner admitted as part of his plea that his criminal conduct occurred from 2001 through 2004 (I.G. Ex. 3, at 2), more than one year. Petitioner does not deny that he was sentenced to home confinement with electronic monitoring for a period of six months (I.G. Ex. 5, at 4), which is incarceration under the regulations. 42 C.F.R. § 1001.2.

Accordingly, I conclude that the I.G. has established three aggravating factors, which may be considered as grounds for extending the duration of Petitioner's exclusion.

b. The I.G. identified and considered one mitigating factor.

If any of the aggravating factors 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 a mitigating factor exists for me to consider that was not considered by the I.G. 42 C.F.R. § 1005.15(b)(1).

The I.G. considered as a mitigating factor that Petitioner cooperated with law enforcement. I.G. Ex. 1, at 2. Petitioner does not dispute the existence of the mitigating factor or that it was properly considered by the I.G.

Petitioner argues in his request for hearing and brief, that: other pharmacies and other pharmacists that have committed similar misconduct have been treated less harshly; his actions harmed no individual and no government agency lost any money; individuals received the prescriptions ordered for them; those who paid for the items he provided paid just what they would if they acquired the medication or item from another pharmacy; he has paid out most of the money he accumulated in thirty years in business; and he would like to work as a pharmacist, at least part-time, in his retirement. None of these arguments are mitigating factors recognized by the regulations and they may not be considered as a basis for reducing the period of exclusion.

I conclude that there is no mitigating factor not considered by the I.G. that I may consider to reduce the period of Petitioner's exclusion. Appellate panels of the Departmental Appeals Board (the Board) have 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 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).[2] 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.

In this case, upon *de novo* review, I have concluded that a basis for exclusion exists, and that the evidence establishes the three aggravating factors and one mitigating factor that the I.G. relied on when imposing the twelve-year exclusion. I conclude that a period of exclusion of twelve years is within the reasonable range. Accordingly, no basis exists upon which I might reassess the period of exclusion. Even if I had authority to simply reassess the period of exclusion in this case, I would be inclined to increase the period rather than reduce it. The exclusion remedy serves twin congressional purposes: the protection of federal funds and program beneficiaries from untrustworthy individuals and the deterrence of health care fraud. S. Rep. No. 109, 100th Cong., 1st Sess. 1-2 (1987), reprinted in 1987 U.S.C.C.A.N. 682, 686 ('clear and strong deterrent'); *Joann Fletcher Cash*, DAB No. 1725, at 18 (discussing trustworthiness and deterrence). When Congress added section 1128(a)(3) in 1996, it again focused upon the desired deterrent effect: 'greater deterrence was needed to protect the Medicare program from providers who have been convicted of health care fraud felonies . . . .' H.R. Rep. 496(I), 104th Cong., 2nd Sess. (1996), *reprinted in* 1996 U.S.C.C.A.N. 1865, 1886. Petitioner's arguments before me clearly show that he does not accept the criminal nature of the conduct for which he was convicted or that it amounted to fraud. Therefore, a longer period of exclusion may be necessary to protect the Medicare program and its beneficiaries, to deter Petitioner

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[2] 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.

from future misconduct, and to permit him to demonstrate that he can be a trustworthy program participant.

Petitioner's request that the effective date of his exclusion be changed to June 1, 2009, 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. § 1001.2002(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 other federal health care programs for a period of twelve years, effective June 17, 2010.

/s/
Keith W. Sickendick
Administrative Law Judge