Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Sharad Jaitly, M.D.,
(OI File No. H-13-43064-9),

Petitioner,

v.

The Inspector General,
Department of Health & Human Services.

Docket No. C-14-1258

Decision No. CR3543

Date: December 30, 2014

DECISION

Petitioner, Sharad Jaitly, M.D., is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(1)(A)(ii) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(b)(1)(A)(ii)), effective May 20, 2014. There is a proper basis for Petitioner's exclusion based upon his conviction of a misdemeanor criminal offense, committed after August 21, 1996, related to fraud with respect to an act or omission other than the delivery of a health care item or service, in a health care program operated by the federal, state, or local government. Petitioner's exclusion for a three-year period is not unreasonable. Act § 1128(c)(3)(D) (42 U.S.C. § 1320a-7(c)(3)(D)).[1]

[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.) for the Department of Health and Human Services notified Petitioner by letter dated April 30, 2014, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of three years. The I.G. cited section 1128(b)(1) of the Act as the basis for Petitioner's exclusion and stated that the exclusion was based upon his conviction in the Albany City Court of the State of New York.[2]

Petitioner timely requested a hearing on May 27, 2014. On June 6, 2014, the case was assigned to me to hear and decide. I convened a telephone prehearing conference on July 1, 2014, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence (Prehearing Order) issued on July 1, 2014. On August 15, 2014, the I.G. filed a motion for summary judgment, a brief in support of summary judgment (I.G. Br.), and I.G. Exs. 1 through 3. Petitioner filed a brief in opposition (P. Br.) on October 6, 2014, with no exhibits. The I.G. filed a reply brief on November 4, 2014 (I.G. Reply). Petitioner did not object to my consideration of I.G. Exs. 1 through 3 and they are admitted as evidence.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's right 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(b)(1)(A) of the Act, the Secretary may exclude from participation in any federal health care program an individual convicted under federal or state law of a misdemeanor criminal offense committed after August 21, 1996, related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of any health care item or service or with respect to any act or omission in a health care program not subject to section 1128(a)(1), operated by or financed in whole or part by any federal, state, or local government. Pursuant to section 1128(b)(1)(B), the Secretary may exclude from participation in any

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[2] Petitioner did not file a copy of the April 30, 2014, I.G. notice with its request for hearing. On June 30, 2014, counsel for the I.G. uploaded a copy of the April 30 I.G. notice to the Departmental Appeal Board's Electronic Filing System (DAB e-File) Item No. 4.

federal health care program an individual convicted under federal or state law of a misdemeanor criminal offense committed after August 21, 1996, related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct with respect to any act or omission in a program other than a health care program operated or financed by a federal, state or local government. The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.201(a).[3]

Section 1128(c)(3)(D) of the Act provides that an exclusion imposed under section 1128(b)(1) of the Act will be for a period of three years, unless the Secretary determines in accordance with published regulations that a shorter period is appropriate because of mitigating circumstances or that a longer period is appropriate because of aggravating circumstances. 42 C.F.R. § 1001.201(b). Recognized aggravating and mitigating factors are those listed in 42 C.F.R. § 1001.201(b)(2) and (3).

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 the I.G. has a basis for excluding an individual or entity from participating in Medicare, Medicaid, and all other federal health care programs; and
>
> Whether the length of the proposed exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

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[3] References are to the 2013 revision of the Code of Federal Regulations (C.F.R.), unless otherwise indicated.

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 timely filed his request for hearing, and I have jurisdiction.

2. Summary judgment is appropriate.

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction pursuant to section 1128(f) of the Act and 42 C.F.R. pt. 1005.

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-.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. Deciding a case on summary judgment differs from deciding a case on the merits after a hearing. An ALJ does not assess credibility or weigh conflicting evidence when deciding a case on summary judgment. *Bartley Healthcare Nursing and Rehab.*, DAB No. 2539 at 2-3 (2013); *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010); *Holy Cross Village at Notre Dame, Inc.*, DAB No. 2291 at 5 (2009).

There are no genuine issues of material fact in dispute in this case. Petitioner does not deny that he entered a guilty plea in Albany City Court of a misdemeanor offense of Obstructing Governmental Administration. P. Br. at 1, 3. Petitioner argues that his conviction did not relate to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct and that his conviction was not in connection with the delivery of any health care item or service. All the issues raised by Petitioner must be resolved against him as a matter of law. Accordingly, summary judgment is appropriate.

3. Section 1128(b)(1)(A)(ii) of the Act permits Petitioner's exclusion from participation in Medicare, Medicaid, and all other federal health care programs.

The I.G. notice of exclusion dated April 30, 2014 cited section 1128(b)(1) of the Act as the basis for Petitioner's exclusion. DAB e-File Item No. 4. The I.G. also cites section 1128(b)(1) as the basis for exclusion in its brief. I.G. Br. at 3-6; I.G. Reply. Because the offense to which Petitioner entered a guilty plea was related to Medicaid, a state health care program, only section 1128(b)(1)(A) is applicable in this case, because section1128(b)(1)(B) does not apply to government health care programs.

I also conclude that section 1128(b)(1)(A)(ii) is the applicable provision of the Act in this case. My analysis is as follows. Section 1128(b)(1)(A)(ii) states that it applies to misdemeanor convictions for offenses other than those offenses covered by section 1128(a)(1), that is, felony or misdemeanor offenses related to the delivery of a health care item or service under Medicare or a state health care program. Because Petitioner's offense was related to the New York Medicaid program, Petitioner would have been subject to mandatory exclusion under section 1128(a)(1) of the Act if his offense was related to the delivery of an item or service under Medicaid. Section 1128(a)(1) of the Act mandates exclusion of one convicted of an offense, felony or misdemeanor, related to delivery of an item or service under Medicare or a state healthcare program such as New York Medicaid. Therefore, while the I.G. notice of exclusion and the I.G. brief are not precise as to the basis for Petitioner's discretionary exclusion, only if section 1128(b)(1)(A)(ii) of the Act applies, does the Secretary have the discretion to impose a permissive exclusion rather than a mandatory exclusion for a minimum of five years. I presume that the Secretary and her delegate, the I.G., act in accordance with their lawful authority. The pertinent provision of section 1128(b)(1)(A)(ii) of the Act is:

> (b) PERMISSIVE EXCLUSION. – The Secretary may exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
>
> (1) CONVICTION RELATING TO FRAUD. – Any individual or entity that has been convicted for an offense which occurred after [August 21, 1996] the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law –
>
> (A) of a criminal offense consisting of a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct –

* * * *

> (ii) with respect to any act or omission in a health care program (other than those specifically described in subsection (a)(1)) operated by or financed in whole or in part by any Federal, State, or local government agency; . . .

Thus, the elements for exclusion pursuant to section 1128(b)(1)(A)(ii) are: (1) conviction in a state or federal court; (2) conviction is of a misdemeanor offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; and (3) the offense is related to any act or omission in a health care program operated by the federal, state, or local government, other than the delivery of a health care item or service.[4]

On April 5, 2013, a Special Assistant Attorney General in the Medicaid Fraud Control Unit filed an Information in Albany City Court, County of Albany, New York, charging Petitioner with one count of Obstructing Governmental Administration in the second degree, in violation of N.Y. Penal Law § 195.05. I.G. Ex. 3. The Information alleged that Petitioner:

> [I]ntentionally obstructed or impaired a governmental function of the New York State Department of Health to accurately process and approve Medicaid provider enrollment requests by means of the independently unlawful act of filing a Medicaid Provider Enrollment Application with New York State Department of Health containing false statements as to his prior restriction from the Medicaid program and prior enrollment denials.

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[4] Petitioner may complain that the I.G. notice of exclusion was insufficient to give Petitioner notice of the legal basis for his exclusion. I agree that the I.G. notice should have been more precise. However, I find no prejudice to Petitioner. The I.G.'s citation to section 1128(b)(1) of the Act gave Petitioner notice that it was necessary for him to defend all possible bases for permissive exclusion under that section. In his request for hearing and his brief, Petitioner does not argue he is not subject to permissive exclusion under section 1128(b)(1)(A)(ii) of the Act, even though the I.G. notice clearly did not limit the basis for exclusion to either section 1128(b)(1)(A)(i) or (ii). I presume counsel is competent and, therefore, conclude that the omission of any discussion of section 1128(b)(1)(A)(ii) was a reasoned tactical judgment and not a strategic error.

I.G. Ex. 3 at 2. On April 4, 2013, Petitioner waived his right to a jury trial, signed a plea agreement, and entered a guilty plea to the single count contained in the Information. I.G. Ex. 2. The plea agreement states that Petitioner understood that by pleading guilty, the plea "will operate just like a conviction of guilty after a jury trial." I.G. Ex. 2 at 2 ¶4g. Petitioner also indicated that he understood that a condition of his plea agreement was "a prohibition from applying to become a Medicaid or Medicaid Managed Care provider in New York State." I.G. Ex. 2 at 3 ¶7. Petitioner admits in his plea agreement that:

> [B]etween about November 1, 2010 and February 8, 2011, as a duly licensed physician in the State of New York, [he] intentionally obstructed or impaired a governmental function of the New York State Department of Health to accurately process and approve Medicaid provider enrollment requests by means of the independently unlawful act of filing a Medicaid Provider Enrollment Application with New York State Department of Health containing false statements as to [his] prior restriction from the Medicaid program and prior enrollment denials and such application was filed with the New York State Department of Health in order to become a Medicaid eligible provider in the State of New York.

I.G. Ex. 2 at 3-4 ¶14. The court entered a Certificate of Conviction, convicting Petitioner of a violation of N.Y. Penal Law § 195.05 and imposing a sentence of a fine and court surcharge on April 9, 2013. I.G. Ex. 1.

Petitioner does not dispute that he was convicted of an offense for purposes of section 1128(b). An individual or entity is considered to have been "convicted" of an offense if, among other things, "there has been a finding of guilt against the individual or entity by a Federal, State, or local court," or "when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court" Act § 1128(i)(2), (3) (42 U.S.C. § 1320a-7(i)(2), (3)). Petitioner's guilty plea was accepted by the state court and he was found guilty pursuant to his guilty plea. Accordingly, I conclude that Petitioner was convicted within the meaning of section 1128(b)(1) of the Act.

Petitioner disputes that his misdemeanor conviction for Obstructing Governmental Administration in the second degree is a conviction for an offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. Petitioner argues that he did not omit information from his Medicare enrollment application with the intent to harm or injure any person or health care program. P. Br. at 3-4. Petitioner contends he did not intend to harm the New York Medicaid program, but

"he was merely trying to comply with his employer's requirement that all employees involved in the supervision of medical services to Medicaid patients be enrolled in the Medicaid program . . . he did not even intend to bill Medicaid for services that were covered by Medicaid." P. Br. at 4. Thus, Petitioner believes his misdemeanor conviction was not related to fraud or other financial misconduct.

"Fraud" is "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." Black's Law Dictionary 685 (8th ed. 2004). Petitioner pled guilty to Obstructing Governmental Administration, and his plea agreement states that he intentionally obstructed or impaired a governmental function to process and approve Medicaid enrollment applications by filing an application containing false statements as to his prior restrictions and Medicaid enrollment denials, in order to become a Medicaid eligible provider in New York. I.G. Ex. 2 at 3-4. Thus, Petitioner admitted to making intentional misrepresentations and false statements in his enrollment application in order to induce the New York Medicaid program to approve his application so he could become eligible to provide Medicaid services. Petitioner argues that when withholding material information on his Medicaid enrollment application, he did not intend to harm the Medicaid program and he only intended to comply with his employer's requirements. However, whether or not Petitioner intended to bill Medicaid or whether he made the false statements in his Medicaid enrollment application only to comply with his employer's requirements is not determinative. What is determinative is that Petitioner signed a plea agreement indicating that he submitted a Medicaid enrollment application containing false statements for the purpose of becoming a Medicaid eligible provider in the State of New York. After review of the underlying facts, I conclude that the misdemeanor offense of Obstructing Governmental Administration is related to fraud. Thus, Petitioner was convicted of an offense relating to fraud which is subject to 1128(b)(1)(A) of the Act.

Petitioner also disputes that his conviction for Obstructing Governmental Administration was related to the delivery of a health care item or service under a state health care program because Petitioner never "delivered any health care items or services in any way in relation to the application." P. Br. at 4. I agree. As already discussed, if Petitioner's offense had been related to the delivery of an item or service under New York Medicaid, his exclusion would have been mandatory pursuant to section 1128(a)(1) of the Act and for the minimum period of five years under section 1128(c)(3)(b). The offense Petitioner admitted to was intentionally obstructing or impairing processing and approval of Medicaid enrollment applications by filing a Medicaid application that contained false statements about his prior restrictions and Medicaid enrollment denials. Petitioner's offense clearly falls within the scope of section 1128(b)(1)(A)(ii) not section 1128(b)(1)(A)(i). Petitioner does not address section 1128(b)(1)(A)(ii) or deny its application in this case as a basis for his exclusion.

Accordingly, I conclude that all three elements of section 1128(b)(1)(A)(ii) of the Act have been met and there is a basis for Petitioner's exclusion.

4. Petitioner's exclusion for three years is not unreasonable.

The period of exclusion under section 1128(b)(1) is three years, unless aggravating or mitigating factors justify lengthening or shortening that period. Act § 1128(c)(3)(D); 42 C.F.R. § 1001.201(b)(1). Only the mitigating factors authorized by 42 C.F.R. § 1001.201(b)(3) may be considered to reduce the period of exclusion. The notice letter states that the I.G. considered one aggravating and one mitigating factor in determining the length of Petitioner's exclusion for three years. The notice indicates that the I.G. considered as an aggravating circumstance that Petitioner has been the subject of an adverse action, as the New York Office of the Medicaid Inspector General excluded Petitioner from participation in the Medicaid program. The I.G. also considered as a mitigating circumstance that Petitioner was convicted of three of fewer misdemeanor offenses and the entire amount of financial loss to a Government program or to other individuals due to acts that resulted from the conviction is less than $1,500. DAB e-File Item No. 4.

Petitioner does not argue that any other mitigating factors listed in 42 C.F.R. § 1001.201(b)(3) existed that the I.G. did not consider when determining the length of Petitioner's exclusion. I am limited to considering only the mitigating factors in 42 C.F.R. § 1001.201(b)(3) to determine whether a downward adjustment from a three-year exclusion may be made. 42 C.F.R. § 1005.4(c)(6). The I.G. appropriately considered one aggravating and one mitigating factor when determining the length of Petitioner's exclusion for three years. Petitioner has failed to show by a preponderance of the evidence that there are mitigating factors that may be grounds for shortening Petitioner's exclusion to less than the minimum three-year period of exclusion required by section 1128(c)(3)(D) of the Act. Accordingly, I conclude that Petitioner's exclusion for a period of three years is not unreasonable.

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 three years, effective May 20, 2014.

/s/
Keith W. Sickendick
Administrative Law Judge