Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Eric Jacobson, M.D.,
(O.I. File Number H-16-42700-9),

Petitioner

v.

The Inspector General,
U.S. Department of Health and Human Services.

Docket No. C-17-349

Decision No. CR4899

Date: August 7, 2017

DECISION

Petitioner, Eric Jacobson, M.D., is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(4) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(4)), effective January 19, 2017. There is a proper basis for exclusion. Petitioner's exclusion for five years is required by section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)). An additional exclusion of 13 years, for a total minimum exclusion of 18 years,[1] is not unreasonable based upon the presence of two aggravating factors and the absence of any mitigating factors.

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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 minimum period of exclusion.

I. Background

The Inspector General (I.G.) of the United States Department of Health and Human Services (HHS) notified Petitioner by letter dated December 30, 2016, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 18 years. The I.G. advised Petitioner that he was being excluded pursuant to section 1128(a)(4) of the Act, based on his felony conviction in the United States District Court for the Eastern District of New York (district court), of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The I.G. further advised Petitioner that the mandatory 5-year exclusion was extended to 18 years because Petitioner's sentence included incarceration and he was subject to another adverse action by a state or federal agency or board. I.G. Exhibit (I.G. Ex.) 1.

Petitioner timely requested a hearing by letter dated January 26, 2017 (RFH). The case was assigned to me on February 17, 2017, to hear and decide. A prehearing conference was convened by telephone on February 28, 2017, the substance of which is memorialized in my order issued that day. On April 14, 2017, the I.G. filed a motion for summary judgment with a supporting brief (I.G. Br.), and I.G. Exhibits 1 through 8. On May 22, 2017, the I.G. received Petitioner's (P. Br.) brief with Petitioner's Exhibits (P. Exs.) A and B. Petitioner's brief and exhibits were not received by my office and a copy was obtained from the I.G. The I.G. filed a reply brief (I.G. Reply) on June 12, 2017. Petitioner did not object to my consideration of I.G. Exs. 1 through 8. The I.G. did not object to my consideration of P. Exs. A and B. The offered exhibits are admitted as evidence.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) provides Petitioner with rights to an Administrative Law Judge (ALJ) hearing and judicial review of the final action of the Secretary of HHS (Secretary). The right to hearing before an ALJ is set forth in 42 C.F.R. §§ 1001.2007(a) and 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified by 42 C.F.R. § 1005.3. 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).

Pursuant to section 1128(a)(4) of the Act, the Secretary must exclude from participation in the Medicare and Medicaid programs any individual convicted for an offense that occurred after August 21, 1996, under federal or state law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. 42 C.F.R. § 1001.101(d). Pursuant to section

1128(i) of the Act (42 U.S.C. § 1320a-7(i)), an individual is convicted of a criminal offense when: (1) a judgment of conviction has been entered against him or her in a federal, state, or local court whether an appeal is pending or the record of the conviction is expunged; (2) there is a finding of guilt by a court; (3) a plea of guilty or no contest is accepted by a court; or (4) the individual has entered into any arrangement or program where judgment of conviction is withheld.

Exclusion for a minimum period of five years is mandatory for any individual or entity convicted of a criminal offense for which exclusion is required by section 1128(a) of the Act. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)). Pursuant to 42 C.F.R. § 1001.102(b), an individual's period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years, however, are mitigating factors considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

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 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 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 when the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56; *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *David A. Barrett*, DAB No. 1461 (1994); *Robert C. Greenwood*, DAB No. 1423 (1993); *Thelma Walley*, DAB No. 1367 (1992); *Catherine L. Dodd, R.N.*, DAB No. 1345 (1992); *John W. Foderick, M.D.*, DAB No. 1125 (1990). In opposing a properly-supported motion for summary judgment, the nonmovant must show that there are material facts that remain in dispute and that those facts are material, in that, they either rebut the proponent's prima facie case or establish a defense. *Garden City Medical Clinic*, DAB No. 1763 (2001)*; Everett Rehab. & Med. Ctr.*, DAB No. 1628 (1997). It is insufficient for the nonmovant to rely upon mere allegations or denials to defeat the motion and proceed to hearing. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986).

There are no genuine disputes as to any material fact in this case. The facts that trigger exclusion under section 1128(a)(4) of the Act are conceded, undisputed, or not subject to dispute. Petitioner argues that the period of exclusion imposed by the I.G. is unreasonable. Petitioner argues that the I.G. failed to consider an authorized mitigating factor and, on that basis, I should reassess and reduce the period of exclusion. Petitioner's arguments must be resolved against him as a matter of law. The I.G. is entitled to judgment as a matter of law. Accordingly, summary judgment is appropriate.

3. There is a basis to exclude Petitioner pursuant to section 1128(a)(4) of the Act.

The I.G. cites section 1128(a)(4) 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)):
>
> * * * *

> . . . (4) FELONY CONVICTION RELATING TO CONTROLLED SUBSTANCE.–Any individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

The statute requires that the Secretary exclude from participation in Medicare or Medicaid any individual or entity: (1) convicted of a felony criminal offense under federal or state law; (2) where the offense occurred after August 21, 1996, the date of enactment of the Health Insurance Portability and Accountability Act of 1996; and (3) the criminal offense relates to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

The evidence shows that on March 15, 2016, Petitioner was convicted of 19 counts of distribution of oxycodone on or about December 2, 2011, in violation of federal law. Petitioner was sentence to 96 months confinement, followed by 3 years supervised release. I.G. Ex. 4; P. Ex. A.

Petitioner did not deny in his request for hearing that he was convicted as alleged by the I.G. but argued that the period of exclusion was unreasonable. Petitioner admitted that he was convicted of felonies related to prescribing opioid medication without a valid Drug Enforcement Administration registration to 19 patients during one day. He stated that no claims were made to Medicare or Medicaid related to the 19 patients. He also stated that he issued the prescriptions because the patients needed pain relief related to legitimate medical conditions and he felt it was his ethical obligation. RFH. In his brief, Petitioner does not dispute that there is a basis for exclusion pursuant to section 1128(a)(4) of the Act. Rather, he argues that the I.G. failed to consider a mitigating factor that I should consider as a basis for reducing the period of exclusion to the minimum authorized five-year period. P. Br. at 1-2.

There is no dispute that Petitioner was convicted of felonies, committed after August 21, 1996, and those felonies related to the unlawful distribution of a controlled substance. I conclude that the elements that trigger an exclusion pursuant to section 1128(a)(4) of the Act are satisfied and there is a basis for Petitioner's exclusion.

4. Pursuant to section 1128(c)(3)(B) of the Act, a five-year period of exclusion is mandatory.

I have concluded that a basis exists to exclude Petitioner pursuant to section 1128(a)(4) of the Act. Therefore, the I.G. must exclude Petitioner for a minimum period of five years pursuant to section 1128(c)(3)(B) of the Act. The I.G. has no discretion to impose a lesser period and I may not reduce the period of exclusion below five years.

The remaining issue is whether it is unreasonable to extend Petitioner's exclusion by an additional 13 years. My determination of whether the exclusionary period in this case is unreasonable turns on whether: (1) the I.G. has proven that there are aggravating factors; (2) Petitioner has proven that the I.G. considered an aggravating factor that does not exist or that there are mitigating factors that the I.G. failed to consider; and (3) the period of exclusion is within a reasonable range.

5. Two aggravating factors are present that justify extending the minimum period of exclusion to 18 years.

The I.G. notified Petitioner that two aggravating factors are present in this case that justify an exclusion of more than 5 years: (1) the sentence imposed by the court included incarceration of 96 months; and (2) Petitioner has been subject to an adverse action by a federal, state, or local government agency or board, and the adverse action is based on the same set of circumstances that served as the basis for the imposition of the exclusion because the New York State Office of Medicaid Inspector General excluded Petitioner from participation in the state Medicaid program. 42 C.F.R. § 1001.102(b)(2), (3); I.G. Ex. 1 at 1-2.

It is undisputed that Petitioner was sentenced to 96 months incarceration. I.G. Ex. 4 at 2; P. Br. It is also not disputed that Petitioner was excluded from the New York Medicaid program based on his conviction. I.G. Ex. 6; P. Br.

I conclude that the aggravating factors that the I.G. cites are established by the evidence before me and are undisputed. The aggravating factors are a basis for the I.G. to extend the period of exclusion beyond the minimum exclusion of five years. 42 C.F.R. § 1001.102(b)(5), (9).

6. Petitioner has not shown that there is any genuine dispute of material fact as to the existence of a mitigating factor that could be proved by a preponderance of the evidence.

If any of the aggravating factors authorized by 42 C.F.R. § 1001.102(b) 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 established by 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 by a preponderance of the evidence that there is a mitigating factor for me to consider. 42 C.F.R. § 1005.15(b)(1). Petitioner was convicted of a felony offense, not misdemeanors, and, accordingly, the mitigating factor established by 42 C.F.R. § 1001.102(c)(1) does not apply. Similarly, Petitioner makes no allegation and there is no evidence that he cooperated with federal or state officials in a manner to trigger the mitigating factor established by 42 C.F.R. § 1002.102(c)(3).

Petitioner urges me to find that the I.G. failed to consider the mitigating factor established by 42 C.F.R. § 1001.102(c)(2), that is, the district court considered Petitioner to be less culpable due to his mental and emotional impairment. P. Br. at 2. After entering his guilty pleas on May 5, 2014, Petitioner received a psychiatric evaluation, the report of which is dated December 9, 2015 and has been admitted as P. Ex. B. The report was prepared to be considered on sentencing and was before the district court judge at

sentencing. P. Ex. A at 18. The psychiatrist rendered the diagnosis of adjustment disorder with depressed mood. P. Ex. B at 9. The psychiatrist opined that Petitioner's "unique situation, life experiences, and psychological liabilities played a significant role in his involvement in the offense conduct and warrant consideration as psychologically mitigating factors at sentencing." P. Ex. B at 10. The credibility of this medical opinion is not at issue before me and it is simply accepted for what it is, a medical opinion offered for consideration by Petitioner's sentencing court. Pursuant to 42 C.F.R. § 1001.102(c)(2), the issue is whether "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." P. Ex. B is evidence prepared for sentencing which establishes the existence of a mental or emotional impairment. The question under 42 C.F.R. § 1001.1002(c)(2) is whether the district court judge determined that Petitioner's mental or emotional condition reduced his culpability for his offenses. Petitioner points to pages 30 and 31 of the transcript of the sentencing proceedings which has been admitted as P. Ex. A. There is no dispute that prior to sentencing Petitioner and the prosecutor had agreed that the range for incarceration would be seven to nine years, that is, 84 to 108 months. P. Ex. A at 13. There is no dispute that Petitioner was sentenced to 96 months (I.G. Ex. 4 at 2), right in the middle of the agreed range. Petitioner's attorney at sentencing argued that the district judge should consider Petitioner's mental and emotional condition as a mitigating factor. P. Ex. A at 18. The district court judge stated that he gave Petitioner full credit for being remorseful. The judge also stated he recognized that Petitioner was not a bad person, and that he had helped patients, had been law-abiding, and had contributed to society. P. Ex. A. at 23. The judge stated that he considered:

> [T]he nature and circumstances of the offense and the history and characteristics of [Petitioner], the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law and to provide a just punishment for the offense, to afford adequate deterrence to criminal conduct and to protect the public from further crimes by a defendant.

P. Ex. A at 27-28. The district court judge imposed 96 months, that is, 8 years, incarceration. P. Ex. A at 28. The judge discussed the seriousness of the offense and how it is even more serious because a doctor used his license to facilitate the crime. He noted these factors warranted severe punishment. P. Ex. A at 29. The judge also articulated the mitigating factors he considered.

> He [Petitioner] accepted responsibility. As I said to him, there is no doubt in my mind his remorse is genuine. Any concern that he will do anything like this again, obviously he

will not be a doctor, so he can't do that. I don't expect he'll ever been (sic) in trouble again.

This has a devastating impact on him in so many ways. He's certainly remorseful and he will learn from this. He has no criminal history. As I noted he appears to have been a productive member of society in so many ways, an excellent father. The letters from his children were among the best letters I've read and his wife explained what a good father he was to them. They need him. So I think as [defense counsel] noted, I'm trying to fashion a sentence that allows him to be reunited with his family as soon as I think he can be, given all the factors I have to consider, but I do believe that the letters from the patients show that he was not simply a "pill mill" that there were patients who he treated, including patients, some of whom he got off of prescription medications based upon the letters I've read. So that needs to be considered as well.

I've also considered, I will not go into the details of it, but he had a horrific childhood on several different levels and I read Dr. Bradley's report and obviously an abusive childhood is <u>not an excuse for illegally distributing drugs</u>, but certainly he carries with him those experiences and certainly it affected, I think, his ability to make proper judgments that a doctor would make.

I do believe there is a component of greed. He noted that in his letter. There is no doubt about that. It's actually amazing to me as [defense counsel] noted, that despite his abusive childhood, that he was able to do well in school and achieve the things he did. I think that says a lot about him as a person because most of the people I sentenced who had childhood like that, dropped out of school and never had a job. Not only did he not do that, he achieved great things as a doctor, despite those unbelievable obstacles, so I think that says something about him and what kind of person he will be when he gets out. For all those things reasons I think nine years is too much.

P. Ex. A at 30-32 (emphasis added).

The question is: Does the above extract from the sentencing transcript meet the requirement of 42 C.F.R. § 1001.102(c)(2), which requires that the record "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?" The term culpability is not defined in 42 C.F.R. chap. V. A common legal definition for culpability is "blameworthiness." *Black's Law Dictionary*, 406-07 (8th ed. 2004). There is no dispute that the sentencing transcript excerpt clearly shows that the district judge considered the impact of Petitioner's mental and emotional condition when sentencing him. The judge said specifically that Petitioner's condition was no excuse for illegal distribution of drugs. The judge's statements show he did not find Petitioner less blameworthy on account of his mental and emotional condition. Rather, the judge was explaining that he understood that Petitioner's condition contributed to him acting unlawfully. Accordingly, I conclude that Petitioner's evidence does not establish the mitigating factor set forth in 42 C.F.R. § 1001.102(c)(2).

7. Exclusion for 18 years is not unreasonable in this case.

The regulation states that the ALJ must determine whether the length of exclusion imposed is "unreasonable." 42 C.F.R. § 1001.2007(a)(1). The Board, however, has made clear that the role of the ALJ in exclusion cases is to conduct a de novo review of the facts related to the basis for the exclusion and 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. *Juan De Leon, Jr.*, DAB No. 2533 at 3 (2013); *Craig Richard Wilder, M.D.*, DAB No. 2416 at 8 (2011); *Joann Fletcher Cash*, DAB No. 1725 at 17, n.9 (2000). The Board explained that, in determining whether a period of exclusion is "unreasonable," the ALJ is to consider whether such period falls "within a reasonable range." *Cash*, DAB No. 1725 at 17, n.9. The Board cautions that whether the ALJ thinks the period of exclusion is too long or too short is not the issue. The ALJ may not substitute his or her 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. Thus, the Board has by these various prior decisions significantly limited my authority under the applicable regulation to judge the reasonableness of the period of exclusion.

Based on my de novo review, I conclude that a basis for exclusion exists and that the undisputed evidence establishes the two aggravating factors that the I.G. relied on to impose the 18-year exclusion. Petitioner has not shown any genuine dispute of material fact or presented any evidence that would establish that the I.G. failed to consider any mitigating factor or considered an aggravating factor that did not exist. I conclude that a period of exclusion of 18 years is in a reasonable range and not unreasonable considering the existence of two aggravating factors and the absence of any mitigating factors. No basis exists for me to reassess the period of exclusion.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of 18 years, effective January 19, 2017.

/s/
Keith W. Sickendick
Administrative Law Judge