Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Damon Jamuale Heath
(OI File No. H-16-40162-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-237

Decision No. CR4891

Date: July 13, 2017

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Damon Jamuale Heath, from participation in Medicare, Medicaid, and all other federal health care programs based on Petitioner's convictions for criminal offenses related to the abuse of patients in connection with the delivery of a health care item or service. For the reasons discussed below, I conclude that the IG has a basis for excluding Petitioner because he was convicted of nine offenses, including Sodomy in the Third Degree and Sexual Abuse in the First Degree, that were committed against patients in connection with the delivery of a health care item or service. I affirm the 30-year exclusion period because the IG has proven three aggravating factors and there are no mitigating factors present. I also affirm that the effective date of Petitioner's exclusion is November 20, 2016.

I. Background

By letter dated October 31, 2016, the IG notified Petitioner that, pursuant to section 1128(a)(2) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(2), he was being excluded from participation in Medicare, Medicaid, and all federal health care programs

for a minimum period of 30 years, effective 20 days from the date of the letter. IG Exhibit (Ex.) 1 at 1. In the letter, the IG informed Petitioner of the factual basis for the exclusion, stating:

> This action is being taken under section 1128(a)(2) of the Act (42 U.S.C. 1320a-7(a)) and is effective 20 days from the date of this letter. This exclusion is due to your conviction as defined in section 1128(i) (42 U.S.C. 1320a-7(i)), in the Franklin Circuit Court, Commonwealth of Kentucky, Division I, of a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service, including any offense that the Office of Inspector General (OIG) concludes entailed, or resulted in, neglect or abuse of patients (the delivery of a health care item or service includes the provision of any item or service to any individual to meet his or her physical, mental, or emotional needs or well being, whether or not reimbursed under Medicare, Medicaid, or any Federal health care program).

IG Ex. 1 at 1. The IG extended the exclusion period from the statutory minimum of five years to 30 years based on the presence of three aggravating factors. IG Ex. 1 at 1-2. As for the aggravating factors, the IG found the following:

> 1. The sentence imposed by the court included incarceration. The court sentenced you to 15 years of incarceration.
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> 2. The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more. The acts occurred from about April 2013 to about January 2015.
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> 3. The action that resulted in the conviction was premeditated, was part of a continuing pattern of behavior, or consisted of non-consensual sexual acts. While providing care to several patients, you engaged in deviate sexual intercourse with the victims who were incapable of consent due to intellectual disabilities.

IG Ex. 1 at 1-2. Petitioner timely filed a request for hearing before an administrative law judge that was dated November 23, 2016, and received on December 6, 2016. On February 13, 2017, I convened a prehearing conference by telephone pursuant to 42 C.F.R. § 1005.6, during which I clarified the issues of the case and established a schedule for the submission of prehearing briefs and exhibits. The schedule and summary of the prehearing conference was memorialized in an Order and Schedule for Filing Briefs and Documentary Evidence (Order), dated February 14, 2017.

Pursuant to the Order, the IG filed an informal brief (IG Br.) along with five proposed exhibits (IG Exs. 1-5), and also filed a reply brief (IG Reply). Petitioner filed an informal brief (P. Br.) and a "Response to Reply Brief of Inspector General" (P. Sur-Reply).[1]

The IG states that an in-person hearing is not necessary for me to decide this case. IG Br. at 13. Petitioner has not indicated whether he desires an in-person hearing, despite being asked to "answer the questions" contained in the short form brief I provided to him.[2] Order, § 6(b). Further, Petitioner has not availed himself of the opportunity to submit written direct testimony, as discussed in section 6(b) of my Order. In offering the parties an opportunity to submit written direct testimony, I explained that I would not accept direct testimony given for the purpose of attacking "any underlying conviction, civil judgment imposing liability, determination by another government agency, or any prior determination where the facts were determined and a final decision was made, if the conviction, judgment, or determination is the basis for the exclusion." Order, § 6(b). In my Order, I informed the parties of the following with respect to direct testimony:

> Direct testimony must be marked as an exhibit and submitted with a party's documentary exhibits. 42 C.F.R. § 1005.16(b). Any written direct testimony must be in the form of an affidavit or declaration that complies with 28 U.S.C. § 1746. A live hearing, if necessary, will only be for cross-examination of a witness or witnesses who provided direct testimony, if it is deemed necessary. Any request for cross-examination should be submitted no later than the date the IG's reply brief is due, as stated in Section 7(c)(iii) of this Order.

Order, § 6(b). To the extent that Petitioner challenges the facts contained in the indictment to which he pleaded guilty, his arguments are essentially collateral attacks on his conviction; any testimony, even if solicited from Petitioner, would only serve to further his efforts to collaterally attack his conviction. *See* P. Br.[3] (stating that "Petitioner plains [sic] to reopen his [criminal] case, if for nothing else but to have the dates removed from his record of two (2) years of criminal abuse"). I will decide this case on the written submissions and documentary evidence. *See* Order, § 6(b).

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[1] My Order did not give Petitioner an opportunity to file a sur-reply brief in response to the IG's reply brief, and Petitioner's sur-reply brief was not accompanied by a motion for leave. In light of the fact that the IG has not objected to Petitioner's filing of a sur-reply brief, I will accept it for filing.

[2] Petitioner did not provide answers to the questions contained in the short form brief.

[3] Because Petitioner's briefs are not paginated, I have not provided any pinpoint citations to Petitioner's briefs.

II. Issues

Whether there is a basis for exclusion, and, if so, whether the length of the exclusion that the IG has imposed is unreasonable. 42 C.F.R. § 1001.2007(a)(2).

III. Jurisdiction

I have jurisdiction to decide this case. 42 U.S.C. § 1320a-7(f)(1); 42 C.F.R. § 1005.2.

IV. Findings of Fact, Conclusions of Law, and Analysis[4]

1. Petitioner's guilty plea to the offenses of third-degree sodomy and first-degree sexual abuse are criminal offenses relating to the abuse or neglect of patients in connection with the delivery of a health care item or service and an exclusion from Medicare, Medicaid, and all other federal health care programs for a minimum of five years is warranted.

Section 1128(a)(2) of the Act requires that an individual or entity convicted of "a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service" be excluded from participation in federal health care programs.[5] An individual who is excluded under section 1128(a)(2) must be excluded for a period of not less than five years. 42 U.S.C. § 1320a-7(c)(3)(B).

On February 10, 2015, a grand jury returned a true bill of indictment charging that Petitioner committed nine criminal offenses. IG Ex. 4. Counts One through Five of the indictment charged the following:

> That between on or about the 27th day of April 2013, and on or about the 21st day of January 2015, in Franklin County, Kentucky, the above-named defendant . . . Damon Jamuale Heath committed the offense of Sodomy in the Third Degree when he engaged in deviate sexual intercourse with

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[4] My findings of fact and conclusions of law are set forth in italics and bold font.

[5] While there are slight differences in the wording of Section 1128 of the Act and its codification at 42 U.S.C. § 1320a-7, the two authorities are substantively identical and I refer to them interchangeably. I further note that the Secretary of the Department of Health and Human Services (Secretary) has delegated to the IG the authority "to suspend or exclude certain health care practitioners and providers of health care services from participation in these programs." 48 Fed. Reg. 21662 (May 13, 1983); *see also* 42 C.F.R. § 1005.1.

> another person who was incapable of consent because such person was an individual with an intellectual disability.

IG Ex. 4 at 2-3. Counts Six through Nine charged the following:

> That between on or about the 27th day of April 2013, and on or about the 21st day of January 2015, in Franklin County, Kentucky, the above-named defendant . . . Damon Jamuale Heath committed the offense of Sexual Abuse in the First Degree when he subjected another person to sexual contact who was incapable of consent because such person was an individual with an intellectual disability.

IG Ex. 4 at 3. On June 9, 2015, Petitioner, with the assistance of counsel, "entered a plea of GUILTY to the charges contained in the indictment: **Counts 1 through 5: Sodomy in the Third Degree, Class D Felonies . . . and Counts 6 through 9: Sexual Abuse in the First Degree, Class D Felonies . . . ."** IG Ex. 5 at 1 (emphasis in original). An investigative report indicates that at the time of a polygraph examination, Petitioner admitted that he had "deviate sexual relations with [J.S.] on three occasions" and "had deviate sexual relations with [T.S.] on two occasions." IG Ex. 2 at 3. The investigative report also indicates that Petitioner "had [name redacted] masturbate him on four other occasions," and that "all these events [were] while he was working for [Community Choices Unlimited (CCU)]." IG Ex. 2 at 3.

Petitioner admits that he "was employed as a caregiver at CCU and was responsible for caring for patients with intellectual disabilities." P. Br. Further, as a caregiver, Petitioner was convicted of nine criminal offenses related to the abuse of patients in connection with the delivery of health care items or services. 42 U.S.C. § 1320a-7(a)(2); IG Ex. 5 (Judgment and Sentence on Plea of Guilty); *see* Kentucky Revised Statutes (K.R.S.) § 510.090(1)(a) ("A person is guilty of sodomy in the third degree when . . . [h]e or she engages in deviate sexual intercourse with another person who is incapable of consent because he or she is an individual with an intellectual disability . . . ."); K.R.S. § 510.110(1)(b)(3) ("A person is guilty of sexual abuse in the first degree when . . . [h]e or she subjects another person to sexual contact who is incapable of consent because he or she . . . [i]s mentally incapacitated . . . ."). Thus, at a minimum, a mandatory five-year exclusion is warranted because Petitioner pleaded guilty to nine offenses involving the abuse of patients in connection with the delivery of a health care item or service. 42 U.S.C. § 1320a-7(a)(2). *See Clemenceau Theophilus Acquaye,* DAB No. 2745 at 6-7 (2016) (concluding that third-degree criminal sexual contact on a patient warranted exclusion pursuant to section 1128(a)(2)); *Narendra M. Patel, M.D.,* DAB No. 1736 (2000) (concluding that a sexual battery conviction was a criminal offense relating to the abuse of a patient and warranted exclusion pursuant to section 1128(a)(2)).

2. A 30-year exclusion is not unreasonable based on the presence of three aggravating factors and no mitigating factors.

As previously discussed, the Act requires a minimum exclusion period of five years when the exclusion is mandated under section 1320a-7(a). 42 U.S.C. § 1320a-7(c)(3)(B). The IG increased the exclusion period from the minimum five years to 30 years based on his consideration of three aggravating factors. IG Ex. 1 at 1-2. The IG has the discretion to impose an exclusion longer than the minimum period when there are aggravating factors present. *See* 42 C.F.R. § 1001.102(b).

The IG asserts that the presence of three aggravating factors warrants an exclusion for 30 years, and neither the IG nor Petitioner has argued that there are any regulatory mitigating factors present that may be considered as a basis for reducing the period of exclusion to no less than five years. *See* 42 C.F.R. § 1001.102(a)-(c).[6] The first aggravating factor is that the sentence imposed included incarceration, specifically, 15 years of incarceration. 42 C.F.R. § 1001.102(b)(5). Second, the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more, occurring from about April 27, 2013, through January 21, 2015. 42 C.F.R. § 1001.102 (b)(2). Third, Petitioner's conduct consisted of non-consensual sexual acts. 42 C.F.R. § 1001.102(b)(4). While Petitioner disputes the application of aggravating factors and the imposition of a 30-year exclusion, he limits his arguments to only one of the three aggravating factors, namely the length of time over which he committed the acts that resulted in the conviction or similar acts.

First, Petitioner was sentenced to a lengthy period of incarceration for the offenses for which he was convicted. The period of incarceration, 15 years, is quite significant. IG Ex. 5 at 2. The IG properly considered the period of incarceration to be an aggravating factor in this case. *See Jason Hollady, M.D. a/k/a Jason Lynn Hollady*, DAB No. 1855 at 12 (2002) (stating that a nine-month period of incarceration was "relatively substantial"); *Gary Alan Katz, R.Ph.,* DAB No. 1842 at 10 (2002) ("Incarceration for an indeterminate period with a minimum of one year and a maximum of seven is significant in and of itself and certainly justifies a longer period of exclusion than if there was no incarceration or incarceration of a lesser type or shorter period.); *Clemenceau Theophilus Acquaye,* DAB No. 2745 at 7 (concluding that a 13-year exclusion based on a single aggravating factor of a three to a maximum of 15 years of incarceration was reasonable).

Second, with respect to the length of the acts that resulted in Petitioner's felony conviction, Petitioner argues: "While the Petitioner does not dispute that abuse did occur, and is not relitigating the charges itself [sic], the Petitioner does challenge any

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[6] I have reviewed each of the regulatory mitigating factors enumerated in 42 C.F.R. § 1001.102(c)(1)-(3), and I have determined the evidence does not indicate that any of those factors are applicable.

evidence that has been presented as to the dates that the events were suppose[d] to have occurred." P. Br. Petitioner further contends that "the actions underlining [sic] his conviction did not continue for a period of approximately two years, but less than one year, and this Board has not presented any evidence other than Petitioner's time of employment . . . ." P. Br. Contrary to Petitioner's allegations that there is a lack of evidence regarding the length of his criminal acts, I observe that the evidence shows that Petitioner pleaded guilty to all nine counts that were charged in the indictment, and all nine counts detailed that the date range of his criminal conduct was "between on or about the 27th day of April 2013, and on or about the 21st day of January 2015." IG Ex. 4 at 2-3; IG Ex. 5. Petitioner voluntarily pleaded guilty to all nine counts as charged, and Petitioner did not enter his guilty plea with any exceptions or to any amended charges reflecting different date ranges for his offense conduct. IG Exs. 4, 5. Petitioner now disputes the factual veracity of the information contained in the counts to which he entered a plea of guilty. Yet, Petitioner has not alleged the actual and purported dates of his offense conduct, nor has he submitted evidence that the date range to which he admitted committing sodomy and sexual abuse on his patients is incorrect. In the face of Petitioner's own admissions of guilt to committing abuse between on or about April 27, 2013, and on or about January 21, 2015, and absent any evidence to the contrary, the IG properly considered the more than one year length of the acts that resulted in Petitioner's felony conviction as an aggravating factor in this case. *See* 42 C.F.R. § 1001.102(b)(2).

Finally, the IG considered that Petitioner's actions underlying his conviction consisted of non-consensual sexual acts. 42 C.F.R. § 1001.102(b)(4). The IG may consider as an aggravating factor, in cases involving patient abuse or neglect, that the actions are premeditated, or are committed as part of a continuing pattern, or involve non-consensual sexual acts, and may increase the length of an exclusion if such a factor is present. 42 C.F.R. § 1001.102(b)(4). Petitioner's victims were "incapable of consent" due to "intellectual disability," and therefore, the nine counts of sodomy and sexual abuse to which he pleaded guilty involved non-consensual sexual acts. IG Ex. 4 at 2-3; IG Ex. 5. Petitioner "does not dispute that abuse did occur" and that his conviction of "Sexual Abuse in the First Degree explicitly relates to the abuse of his patients." P. Br. at 1. As such, a third aggravating factor is present pursuant to 42 C.F.R. § 1001.102(b)(4).

In summary, the 30-year period of Petitioner's exclusion is not unreasonable based on the significant aggravating factors present in this case. Petitioner was ordered to be incarcerated for 15 years, and admitted to committing nine instances of sexual assault on patients entrusted to his care who were incapable of giving consent. Based on these two aggravating factors, alone, a 30-year exclusion is warranted. Further, a third aggravating factor, the length of the acts underlying the conviction, or similar acts, bolsters that a 30-year exclusion is warranted.

Petitioner argues that he plans to reopen his criminal case "to have the dates removed from his record . . . ." P. Br. However, pursuant to section 1128(i)(1) of the Act, an

individual is considered to have been convicted of a criminal offense "when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending . . . ." 42 U.S.C. § 1320a-7(i)(1). Therefore, Petitioner's stated intent to appeal or otherwise challenge his criminal conviction has no bearing on these proceedings. While Petitioner, who pleaded guilty to the nine count-indictment that specified that the date range of his criminal acts was from April 27, 2013, through January 21, 2015, now feels that "the actions underlining [sic] his conviction did not continue for a period of approximately two years," P. Br. at 4, he may not re-litigate his conviction, including the facts underlying his conviction, in this forum. 42 C.F.R. § 1001.2007(d). Petitioner admitted guilt, and a court imposed judgment based on his admission of guilt to committing multiple counts of felonious sodomy and sexual abuse on intellectually disabled and incompetent individuals between April 27, 2013, and January 21, 2015. IG Exs. 4, 5. Further, and as I previously stated, a 30-year exclusion is warranted *without* consideration of the disputed aggravating factor. Petitioner sexually preyed upon extremely vulnerable patients on numerous occasions, despite the fact that he was entrusted to care for these intellectually disabled individuals, and the two aforementioned aggravating factors, alone, justify a 30-year period of exclusion.

Petitioner's conduct for which he pleaded guilty demonstrates his untrustworthiness and a lack of integrity in dealing with health care programs. I therefore conclude that the 30-year period of exclusion is not unreasonable. *See Jeremy Robinson,* DAB No. 1905 at 3 (2004) (ALJ review must reflect the deference accorded to the IG by the Secretary).

V. Effective Date of Exclusion

The effective date of the exclusion, November 20, 2016, is established by regulation, and I am bound by that provision. 42 C.F.R. §§ 1001.2002(b), 1005.4(c)(1).

VI. Conclusion

For the foregoing reasons, I affirm the IG's decision to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of 30 years, effective November 20, 2016.

/s/
Leslie C. Rogall
Administrative Law Judge