Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Robert Seung-Bok Lee,
(OI File No. H-13-42450-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-1068

Decision No. CR3421

Date: October 17, 2014

DECISION

Petitioner, Robert Seung-Bok Lee, appeals the determination of the Inspector General (I.G.) for the U.S. Department of Health and Human Services to exclude him from participating in Medicare, Medicaid, and other federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)) for a period of 13 years. For the reasons explained below, I find that there is a legitimate basis for the I.G. to exclude Petitioner and that an exclusion period of 13 years is reasonable based on three aggravating factors and the absence of any mitigating factors.

I. Background and Procedural History

The following facts are undisputed unless otherwise noted. At the age of 18, Petitioner suffered a severe neck and spinal cord injury while training with the USA Junior Olympic Gymnastics Program. Petitioner's Brief (P. Br.) at 1. As a result, Petitioner continues to have complete paralysis in his lower limbs and limited use of his upper extremities. P. Br. at 1. Despite his physical disability, Petitioner graduated from college and subsequently attended medical school in New Hampshire. P. Exhibit (Ex.) 1 at 2. While in medical school, Petitioner applied for, and received, personal care attendant (PCA)

services through the Medicaid for Employed Adults with Disabilities (MEAD) program, a part of the New Hampshire Medicaid Program. I.G. Br. 2. Under the MEAD program, Petitioner authorized and submitted timesheets for PCA services to Granite State Independent Living (GSIL), a non-profit organization involved in the benefit reimbursement process. I.G. Br. at 2. Based on the timesheets Petitioner submitted, GSIL would submit claims and receive payment from the New Hampshire Medicaid Program. I.G. Br. at 2. Around 2002, Petitioner left New Hampshire and moved to Maryland to pursue post medical school training. P. Hearing Request at 2. Petitioner continued to submit timesheets to GSIL stating that he was receiving PCA services in New Hampshire, when in fact he received no such services. I.G. Br. at 3; P. Br. at 1-2; I.G. Ex. 2 at 1; I.G. Ex. 3. Relying on the falsified timesheets, New Hampshire Medicaid paid GSIL, and GSIL then deposited wage payments for PCA services into a bank account Petitioner controlled. I.G. Ex. 2 at 1. Petitioner illegally received Medicaid benefits from New Hampshire for more than eight years. P. Br. at 1-2. Petitioner admitted that, in total, he wrongfully received $150,000. P. Br. at 2; P. Ex. 1 at 2-3; I.G. Ex. 3.

On August 5, 2013, Petitioner pled guilty to a felony theft charge in New Hampshire. Petitioner's plea resulted in an incarceration sentence for a maximum of four years and a minimum of two years, and the judge ordered Petitioner to pay $150,000 in restitution to the New Hampshire State Attorney General's office. I.G. Ex. 3 at 2-3. By letter dated February 28, 2014, the I.G. notified Petitioner that he was excluding him from participating in Medicare, Medicaid, and other federal health care programs for 13 years. I.G. Ex. 1. The I.G. based the exclusion on Petitioner's aforementioned conviction, in the Merrimack County Superior Court, State of New Hampshire, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. I.G. Ex. 1.

Petitioner filed a timely request for a hearing before an administrative law judge (ALJ). The Civil Remedies Division received the request on May 1, 2014, and assigned the case to me for possible hearing and written decision. I convened a prehearing conference by telephone on June 4, 2014, the substance of which I summarized in my Order and Schedule for Filing Briefs and Documentary Evidence.

The I.G. filed an informal brief (I.G. Br.) and three proposed exhibits (I.G. Exs. 1-3). Petitioner then filed an informal brief (P. Br.) and three proposed exhibits (P. Exs. 1-3). The I.G. thereafter filed a reply brief (I.G. Reply) and two additional exhibits (I.G. Exs. 4-5). Petitioner later filed a Motion to Supplement the Record and an Unsworn Declaration of Petitioner (P. Ex. 4). There were no objections to any of the exhibits, and I therefore admit into evidence I.G. Exs. 1-5 and P. Exs. 1-4. Neither party requested an in-person hearing. Accordingly, I base this decision on the written record of the parties' briefs and documentary evidence.

II. Discussion

A. Applicable Law

The Act requires that the Secretary of Health and Human Services (Secretary) exclude from participation in all federal health care programs any "individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under [Medicare] or under any State health care program." Act § 1128(a)(1) (42 U.S.C. § 1320a-7(a)(1)). The Secretary has promulgated regulations implementing these provisions of the Act and delegated to the I.G. the authority to exclude individuals and entities. *See* 42 C.F.R. § 1001.101(a).

An exclusion made pursuant to section 1128(a)(1) is mandatory. The I.G. must impose a mandatory exclusion for a minimum period of five years. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); *see* 42 C.F.R. § 1001.102(a). The I.G. may increase an exclusion period based on the presence of certain aggravating factors that the Secretary has established by regulation. 42 C.F.R. § 1001.102(b). Here, the I.G. relied on three aggravating factors to enhance the period of Petitioner's exclusion beyond the minimum mandatory period:

> (1) The acts resulting in the conviction, or similar acts, that caused, or were intended to cause, a financial loss to a Government program or to one or more entities of $5,000 or more. (The entire amount of financial loss to such programs or entities, including any amounts resulting from similar acts not adjudicated, will be considered regardless of whether full or partial restitution has been made);
>
> (2) The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more;
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> * * *
>
> (5) The sentence imposed by the court included incarceration[.]

42 C.F.R. § 1001.102(b)(1), (2), (5); *see* I.G. Ex. 1, at 1-2.

Where the I.G. determines that one or more aggravating factors may support increasing an exclusion period beyond the five-year minimum, the I.G. may then consider certain enumerated mitigating factors "as a basis for reducing the period of exclusion to no less than 5 years." 42 C.F.R. § 1001.102(c).

Rights to a hearing and judicial review of the final action of the Secretary are provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). An ALJ reviews the length of an exclusion *de novo* to determine whether it falls within a reasonable range considering any aggravating and mitigating factors. *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491, at 5 (2012) (citing *Joseph M. Rukse, Jr., R.Ph.*, DAB No. 1851, at 10-11 (2002)).

B. Issues

1. Whether a basis exists for the I.G. to exclude Petitioner from participation in Medicare, Medicaid, and other federal health care programs; and

2. Whether the length of the exclusion is unreasonable.

C. Findings of Fact and Conclusions of Law

1. *A basis exists for the I.G. to exclude Petitioner pursuant to section 1128(a)(1) of the Act.*

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, whether felony or misdemeanor; and (2) the criminal offense is related to the delivery of an item or service under Medicare or any state health care program.

An individual is "convicted" of a criminal offense when: (1) a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; (2) there has been a finding of guilt in a federal, state, or local court; (3) a plea of guilty or no contest has been accepted in a federal, state, or local court; or (4) an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. Act § 1128(i) (42 U.S.C. § 1320a-7(i)); *see also* 42 C.F.R. § 1001.2.

Petitioner does not dispute that, on August 5, 2013, he pled guilty to one count of Theft by Deception, a Class A felony, in violation of N.H. Rev. Stat. Ann. § 637:4. I.G. Ex. 2; I.G. Ex. 3 at 1. The court sentenced him to incarceration for a maximum of four years and a minimum of two years, and the court noted that it would not object to immediate administrative home confinement if deemed appropriate by the Department of Corrections. I.G. Ex. 3 at 2-3. The court also ordered Petitioner to pay restitution of $150,000. I.G. Ex. 3 at 3. The acceptance of Petitioner's guilty plea qualifies as a conviction under the Act. Act § 1128(i)(3).

Petitioner also does not dispute that his conviction was related to the delivery of an item or service under Medicare. Petitioner's conviction was based on his submission of false

and fraudulent claims for services to the New Hampshire Medicaid program. I.G. Ex. 2. A nexus exists between his criminal acts and the purported delivery of an item or service under Medicare, Medicaid, or federal healthcare programs. *See, e.g.*, *Berton Siegel, D.O.*, DAB No. 1467 (1994) (requiring an ALJ to find that some "nexus" or "common sense connection" exists between the offense of which a petitioner was convicted and the delivery of an item or service under Medicaid). The offense of theft by deception, by submitting claims for PCA services that were never performed to the New Hampshire Medicaid program, is an offense directly related to the delivery of and payment for services under a state health care program. Act §§ 1128(a)(1), 1128(h)(1) (defining "state health care program" to include a program under Title XIX of the Act, *i.e.*, Medicaid). The fact that the court ordered Petitioner to pay restitution to the State of New Hampshire as part of his sentence confirms the nexus showing his offense was program-related.

2. *The exclusion of Petitioner for 13 years is within a reasonable range.*

An exclusion made pursuant to section 1128(a)(1) of the Act must be for a minimum period of five years. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); 42 C.F.R. § 1001.102(a). Here, the I.G. excluded Petitioner for 13 years.

To determine whether an exclusion period is within a reasonable range, an ALJ must weigh any aggravating and mitigating factors in the case, and evaluate the quality of the circumstances surrounding the factors. *Vinod Chandrashekhar Patwardhan, M.D.*, DAB No. 2454, at 6 (2012) (citing *Jeremy Robinson*, DAB No. 1905, at 11 (2004)). The regulations provide several factors that the I.G. may consider as aggravating and a basis for lengthening an exclusion period. 42 C.F.R. § 1001.102(b). If an aggravating factor justifies an increase to the length of an exclusion, the I.G. may then consider various mitigating factors as a basis to reduce the exclusion period to no less than five years. 42 C.F.R. § 1001.102(c).

There is no "rigid formula" for the I.G. or an ALJ to determine an exact exclusion period when weighing and evaluating aggravating and mitigating factors. *Patwardhan*, DAB No. 2454, at 6. Rather, the ALJ must review the factors *de novo* to determine whether the exclusion imposed is within a "reasonable range" of exclusion periods. *Ruske*, DAB No. 1851, at 11 (citing *Gary Alan Katz, R.Ph.*, DAB No. 1842, at 8 n.4 (2002)). 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 cases." *Robinson*, DAB No. 1905, at 5 (quoting *Ruske*, DAB No. 1851, at 11).

Nothing in 42 C.F.R. § 1001.102 or the Act assigns the specific weight to be given to aggravating or mitigating evidence. Additionally, the regulations vest discretion in the I.G. to determine the length of exclusion as long as it is within a reasonable range. I do not have the authority to alter the length of the exclusion, as long as the time chosen

is based on demonstrated criteria and within a reasonable range. *Robinson*, DAB No. 1905, at 3; *Barry D. Garfinkel, M.D.*, DAB No. 1572, at 11 (1996).

Petitioner does not dispute that three aggravating factors apply in his case and that none of the identified mitigating factors listed in 42 C.F.R. § 1001.102(c) apply. P. Br. at 3, 6. Petitioner argues that the three aggravating factors, when considered in context, do not reasonably support a 13-year exclusion and requests that a 5-year minimum period of exclusion be imposed. P. Br. at 5. I have determined, however, that the severity of the three aggravating factors supports the I.G.'s increase in the length of Petitioner's exclusion period beyond the five-year minimum. These factors are addressed below.

a. The acts resulting in Petitioner's conviction caused, or were intended to cause, a loss to a government program of $5,000 or more.

The I.G. may increase the length of an exclusion if the acts resulting in the underlying conviction caused, or were intended to cause, a loss to a government program or to one or more entities of $5,000 or more. 42 C.F.R. § 1001.102(b)(1). The New Hampshire Superior Court ordered Petitioner to pay $150,000 in restitution to the New Hampshire State Attorney General's Office as a result of the loss to the government that Petitioner's offense caused. I.G. Ex. 3 at 3. This government loss is substantially higher than the minimum loss needed to trigger this particular aggravating factor. Thus, the I.G. has demonstrated sufficiently that the acts resulting in Petitioner's conviction resulted in a loss to a government program of $5,000 or more.

Governmental loss is an "exceptional aggravating factor" when, as here, the loss is "very substantially greater than the statutory minimum." *Robinson*, DAB No. 1905, at 11. On its own, the governmental loss here, 30 times greater the minimum needed to support an increase to the exclusion period, must be afforded such substantial weight as to support a significant increase to the reasonable range of exclusion periods that the I.G. may impose. The reasonable range of exclusion periods must reflect the substantial government loss as well as the need to protect government programs from untrustworthy individuals. *See Donald A. Burstein, Ph.D.*, DAB No. 1865, at 12 (2003). The 13-year exclusion period imposed here is within a reasonable range because it is large enough to reflect the scope of government loss and ensure that government programs are protected for a significant period from an individual proven to be untrustworthy when participating in such programs. *See Michael D. Miran, et al.*, DAB No. 2469, at 5-6 (2012) (upholding a 13-year exclusion based on $257,946 loss to government program and one additional aggravating factor); *Robinson*, DAB No. 1905, at 12 (upholding a 15-year exclusion based on a $205,000 loss to a government program and two additional aggravating factors).

b. The acts resulting in Petitioner's conviction occurred over a period of one year or more.

The I.G. may increase the length of an exclusion if the acts resulting in the underlying conviction occurred over a period of one year or more. 42 C.F.R. § 1001.102(b)(2). The New Hampshire Superior Court accepted Petitioner's guilty plea to theft by deception and the indictment stated that Petitioner "beginning in approximately May of 2003 and continuing until September of 2011, with a purpose to deprive, prepared and submitted to [GSIL] of Concord, New Hampshire weekly time sheets falsely representing that [J. P.] performed personal care services for him when no such services were performed. As a consequence of that deception, GSIL directly deposited more than $150,000 in wages payable to [J. P.] into a bank account that [Petitioner] controlled and which money [Petitioner] took. In turn, GSIL billed the New Hampshire Medicaid Program for services that [Petitioner] claimed were performed by [J. P.]." I.G. Ex. 2 at 1. Therefore, Petitioner's involvement in the scheme was for more than one year.

The purpose of this aggravating factor "is to distinguish between petitioners whose lapse in integrity is short-lived from those who evidence a lack of such integrity over a longer period . . . ." *Burstein*, DAB No. 1865, at 8. Petitioner fraudulently submitted claims for services that were never performed for approximately eight years and this demonstrates Petitioner's lack of integrity was more than just "short-lived." Here, the length of Petitioner's conduct shows prolonged lack of integrity that supports the I.G.'s decision to increase the five-year minimum exclusion period to 13 years.

c. The court's sentencing of Petitioner included incarceration.

The I.G. may increase the length of an exclusion if the court's sentence includes a period of incarceration. 42 C.F.R. § 1001.102(b)(5). Here, the New Hampshire Superior Court sentenced Petitioner to two to four years in prison based on his conviction relating to theft by deception. I.G. Ex. 3 at 2. Petitioner is currently serving a minimum of two years of home confinement as a result of the court's sentence. P. Br. at 5. Incarceration is defined as "imprisonment or any type of confinement with or without supervised release, including, but not limited to, community confinement, house arrest and home detention." 42 C.F.R. § 1001.2. Thus, Petitioner's sentence which is being served as "immediate home confinement," is within the meaning of incarceration as defined at 42 C.F.R. § 1001.2. Thus, the I.G. has established the presence of this aggravating factor. A sentence of two to four years for a crime demonstrates the severity of the fraudulent scheme Petitioner directed. Accordingly, this aggravating factor bears substantial weight, and supports the I.G.'s decision of an increase well beyond the five-year minimum exclusion period to 13 years.

d. Petitioner has presented no mitigating factors that I can legally accept to justify reduction of the exclusionary period.

Petitioner acknowledges that none of the identified mitigating factors listed in 42 C.F.R. § 1001.102(c) apply in his case. P. Br. at 6. Petitioner contends, however, that the Due Process Clause of the United States Constitution entitled Petitioner to prior notice of his exclusion, to access all evidence against him, and to an opportunity to argue mitigating factors *before* the exclusion became effective. P. Br. at 6.

Petitioner specifically argues he "was excluded by letter of February 28, 2014, with no prior notice, with no opportunity to be apprised first of the information/evidence against him, and with no chance to bring to the decision maker's attention all mitigating facts and circumstances that Petitioner believed to be relevant." P. Br. at 6. Petitioner contends he did not receive the I.G.'s notice of intent to exclude dated October 15, 2013 (I.G. Ex. 4) and thus he was not given notice of the I.G.'s proposed action and had "no chance to examine the agency file or to review the proposed evidence against him, and no opportunity to respond to the evidence, or to point out pertinent facts and circumstances in mitigation." P. Br. at 10; P. Ex. 4.

My authority here is limited to reviewing whether a basis for the Petitioner's exclusion exists and whether the length of exclusion is unreasonable, and I may not consider Petitioner's constitutional challenges. *See* 42 C.F.R. § 1001.2007(a)(1); 42 C.F.R. § 1005.4(c)(1). The administrative remedies provided by 42 U.S.C. § 1320a(f)(1) provide all the due process the constitution requires, and a hearing prior to an individual's exclusion is not required by law. *See Erickson v. U.S. ex rel, HHS*, 67 F.3d 858 at 863 (9th Cir. 1995) ("Requiring full-blown predeprivation hearings would frustrate Congress' intent . . . [and] would also impose significant administrative costs.").

The I.G. claims that the October 15, 2013, notice of intent to exclude was mailed to a verified address for Petitioner, the same address the I.G. used to mail the final notice of exclusion on February 28, 2014. I.G. Exs. 1, 4. But even if I were to presume Petitioner did not receive the October 15, 2013 notice letter of the I.G.'s intent to exclude him, there still is no justification for a reduction in Petitioner's period of exclusion. Petitioner has not been prejudiced as he has received the opportunity to review the proposed evidence against him and to respond to the I.G.'s arguments in this proceeding. Petitioner has received the opportunity to present mitigating evidence, and he has not presented evidence relating to any of the mitigating factors listed in 42 C.F.R. § 1001.102(c), which the I.G. could consider as a basis to reduce the length of Petitioner's exclusion.

Petitioner asks me to consider his extensive history of service to others, argues that an exclusion would prevent him from volunteering his services or working in any capacity related to health care organizations, and contends an exclusionary period of five years would be more appropriate. P. Ex. 1 at 4-5. Petitioner includes several letters from

family, clergy, physicians, and others describing Petitioner's attributes, education, skills, and commitment to public service and argues that his "lifelong commitment to service to others, a commitment that is particularly relevant in light of [Petitioner's] physical challenges" should be considered in mitigation. P. Ex. 1 at 4. Petitioner states that he has logged hundreds of hours of volunteer time, including serving as a Korean interpreter for patients at the Johns Hopkins Medical Center and teaching Korean culture and language to U.S. Naval Academy midshipmen. P. Ex. 1 at 4. Petitioner was also providing extensive assistance to his paralyzed mother prior to his home confinement. P. Ex. 1 at 4.

I have carefully reviewed all the materials Petitioner submitted, including the many letters attesting to his character. Petitioner's extensive record of community service and aid to others is commendable, however, the I.G. may only consider the specific mitigating factors outlined at 42 C.F.R. § 1001.102(c) as a basis for reducing Petitioner's period of exclusion. I cannot reduce the I.G.'s period of exclusion based upon equitable considerations, such as for a person's good character. *See Donna Rogers*, DAB No. 2381, at 6 (2011).

III. Conclusion

For the foregoing reasons, I find a basis exists for the I.G. to exclude Petitioner from participating in Medicare, Medicaid, and other federal health care programs pursuant to section 1128(a)(1) of the Act. After considering three aggravating factors and no mitigating factors, I find the exclusion period the I.G. imposed to be within a reasonable range. Therefore, I sustain the I.G.'s exclusion of Petitioner for 13 years, effective March 20, 2014.

/s/
Joseph Grow
Administrative Law Judge