The Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the case of:	)	
	)	
Christian Okey Onwuegbusi,	)	Date: OCT - 2 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-276
	)	Decision No. CR2013
The Inspector General.	)	
	)	

DECISION

Petitioner, Christian Okey Onwuegbusi, asks review of the Inspector General's (I.G.'s) determination to exclude him for twenty years from participation in the Medicare, Medicaid, and all federal health care programs under section 1128(a)(1) of the Social Security Act. For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner, and that the imposition of a twenty-year exclusion is reasonable.

I. Background

The I.G. has excluded Petitioner from program participation because he was convicted of a crime related to the delivery of an item or service under the Medicare or a state health care program. I.G. Ex. 1. Petitioner has requested review.

I held a prehearing conference on March 23, 2009, during which I suggested that Petitioner's appeal appears to present purely legal questions for which an in-person hearing would not be necessary. Nevertheless, I directed the parties to indicate in their submission whether an in-person hearing is necessary, and, if so, to explain why. I also set deadlines for the submission of briefs and documentary evidence. My written order of March 23, 2009, summarizes the matters discussed at the prehearing conference, including the filing deadlines. Order and Schedule for Filing Briefs and Documentary Evidence (March 23, 2009).

The I.G. timely submitted its brief, accompanied by seven exhibits (I.G. Exs. 1-7). Petitioner, however, sought a 30-day extension of time, which I granted, extending his filing deadline to June 26, 2009. Petitioner did not file his submissions as ordered, and, on July 9, 2009, I issued an order to show cause, directing him to show cause, in writing, why his appeal should not be dismissed for abandonment. By letter dated June 15, 2009 (received July 16, 2009), Petitioner notified us of his change of address. In an amended order, dated July 16, 2009, I extended to August 3, 2009, Petitioner's deadline for responding to my order to show cause. Petitioner subsequently explained that he is imprisoned, and sought the assistance of a fellow inmate in presenting his appeal. When Petitioner was transferred to a different prison, his submissions were still in that inmate's possession. Although the inmate forwarded the documents to Petitioner, he sent it to the wrong address; it was returned, and he had to send it out again.

We received Petitioner's informal brief on July 30, 2009, and I found good cause for the late filing. However, Petitioner's brief refers to four exhibits, labeled A through D; no such documents were submitted. By letter dated July 30, 2009, we directed Petitioner to submit those documents no later than August 7, 2009. He did not do so. On August 18, 2009, I directed the I.G. to file his reply to Petitioner's brief within 14 days. The I.G. timely submitted a reply brief.

In the absence of any objection, I admit into the record I.G. Exs. 1-7.

II. Issue

The issues before me are: 1) whether the I.G. has a basis for excluding Petitioner from program participation; and 2) whether the length of the exclusion (twenty years) is reasonable. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(1).

III. Discussion

A. Petitioner must be excluded under section 1128(a)(1) of the Act because he was convicted of a criminal offense related to the delivery of an item or service under the Medicare program.[1]

Section 1128(a)(1) of the Act requires that the Secretary of Health and Human Services exclude an individual who has been convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. 42 C.F.R. § 1001.101(a).

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[1] My findings of fact/conclusion of law are set forth, in italics and bold, in the discussion captions of this decision.

Petitioner participated in the Medicare program as a supplier of durable medical equipment. He billed the Medicare program $1,200,000 for motorized wheelchairs, and received approximately $900,000 in reimbursement. Staff at Palmetto Government Benefits Administrators, which administers Medicare reimbursement for the State of Texas, became suspicious because all of his billings were for motorized wheelchairs to the exclusion of any other type of durable medical equipment – a circumstance they characterized as "highly unusual." Investigators therefore canvassed the Medicare recipients on whose behalf Petitioner had billed Medicare, as well as physicians who had purportedly signed certificates of medical necessity. The vast majority of recipients had not received motorized wheelchairs, but less expensive motorized scooters (approximately $900 apiece, as opposed to approximately $5,000 for a wheelchair). In addition, many of the physicians contacted denied signing certificates of medical necessity. I.G. Ex. 2, at 2-3.

On August 29, 2006, Petitioner was charged with first degree felony theft. I.G. Ex. 2, at 1. He entered a plea of *nolo contendere* to second degree felony theft, and, on December 5, 2007, a court in Harris County, Texas, entered its judgment of conviction. I.G. Ex. 4.

Thus, the undisputed evidence establishes that Petitioner was convicted of a crime related to the delivery of an item or service under the Medicare program and he is therefore subject to a minimum five-year exclusion.

Petitioner asserts that his guilty plea was involuntary, and is currently under appeal. P. Br. at 2. But federal regulations explicitly preclude this collateral attack on his conviction.

> When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it, either on substantive or procedural grounds, in this appeal.

42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Chander Kachoria, R.Ph.*, DAB No. 1380, at 8 (1993) ("There is no reason to 'unnecessarily encumber the exclusion process' with efforts to reexamine the fairness of state convictions."); *Young Moon, M.D.*, DAB CR1572 (2007).

In this regard, Petitioner indicates that an in-person hearing is necessary, and lists witnesses, who have not previously testified because he did not have a criminal trial. According to Petitioner, the testimony of these witnesses will establish his innocence. P. Br. at 4. However, because I have no authority to review his criminal conviction, such testimony would be irrelevant. An in-person hearing is therefore not necessary - indeed, it would serve no purpose. *See* Order and Schedule for Filing Briefs and Documentary

Evidence, at 2 (March 23, 2009). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48; *Livingston Care Center v. United States Department of Health and Human Services*, 388 F.3d 168, 173 (6th Cir. 2004) (hearing unnecessary because case turns on a question of law and presents no genuine dispute as to any material fact).

With respect to Petitioner's pending appeal, the Act specifically precludes my considering whether such an appeal is pending. Act § 1128(i). ("[A]n individual . . . is considered to have been 'convicted' of a criminal offense . . . regardless of whether there is an appeal pending . . . .")[2]

B. Based on the aggravating factors presented in this case, the twenty-year exclusion is reasonable.

An exclusion under section 1128(a)(1) must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2). Federal regulations set forth criteria for lengthening exclusions beyond the five-year minimum. 42 C.F.R. § 1001.102(b). Evidence that does not pertain to one of the aggravating or mitigating factors listed in the regulation may not be used to decide whether an exclusion of a particular length is reasonable.

The following factors may serve as bases for lengthening the period of exclusion: 1) the acts resulting in the conviction, or similar acts, caused a financial loss to Medicare and state health care programs of $5,000 or more; 2) the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more; 3) the sentence imposed by the court included incarceration; and 4) the convicted individual or entity has been the subject of any other adverse action by any federal, state or local government agency or board, if the adverse action is based on the same set of circumstances that serves as the basis for imposition of the exclusion. 42 C.F.R. § 1001.102(b). The presence of an aggravating factor or factors not offset by any mitigating factor or factors justifies lengthening the mandatory period of exclusion.

Here, two aggravating factors justify significantly increasing the period of exclusion beyond the five-year minimum. First, Petitioner's actions resulted in a program financial loss well in excess of $5,000. His conviction was for the theft of an amount more than $100,000 and less than $200,000, or *at least twenty times greater* than the $5,000 necessary to justify extending the period of exclusion. I.G. Ex. 4. Second, the sentence imposed by the criminal court included a significant period of incarceration. Petitioner was sentenced to fifteen years in prison. This is significant incarceration time, and underscores the seriousness of his crimes. Together, these aggravating factors justify a twenty-year exclusion.

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[2] If, in fact, Petitioner's conviction is overturned on appeal, the I.G. would no longer have a basis for imposing the exclusion. *See* 42 C.F.R. § 1001.3005.

Neither party cites any mitigating factor to justify decreasing the period of exclusion. *See* 42 C.F.R. § 1001.102(c).

IV. Conclusion

For these reasons, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid and all federal health care programs, and I sustain as reasonable the twenty-year exclusion.

/s/ Carolyn Cozad Hughes
Administrative Law Judge