Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jose C. Menendez Campos, M.D.,
Petitioner,

v.

The Inspector General.

Docket No. C-13-640

Decision No. CR2923

Date: September 19, 2013

DECISION

This matter is before me in review of the Inspector General's (I.G.'s) determination to exclude Petitioner *pro se* Jose C. Menendez Campos, M.D., from participation in Medicare, Medicaid, and all other federal health care programs for a period of 40 years. The I.G.'s determination to exclude Petitioner is based on the mandatory authority conveyed by section 1128(a)(4) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(4). The undisputed material facts in this case require the imposition of a 40-year exclusion. Accordingly, I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

Petitioner was licensed by the State of Florida as a critical need physician and operated a medical practice in Kissimmee, Florida. I.G. Exhibits (Exs.) 2, 7. In October 2010, a search warrant was executed by the Florida Department of Law Enforcement, Osceola County Investigative Bureau, at Petitioner's medical practice. Petitioner was arrested after admitting to unlawfully writing multiple prescriptions for Oxycodone in exchange for direct cash payments of $200 per prescription. I.G. Ex. 2, at 2-3. On April 28, 2011, Petitioner was named in a one-count Amended Indictment handed up in the Circuit Court

of the Ninth Judicial Circuit in and for Osceola County, Florida. In general, that Amended Indictment charged that Petitioner and two other co-conspirators conspired to traffic in 28 grams or more of Oxycodone, a controlled substance, from February 1, 2010 through October 30, 2010. I.G. Ex. 3.

Petitioner and his counsel negotiated a plea agreement with prosecutors. On October 5, 2011, he appeared with counsel in the Circuit Court of the Ninth Judicial Circuit in and for Osceola County, Florida, and pleaded guilty to one-count of conspiracy to traffic in Oxycodone, 28 grams or more, a first degree felony, in violation of FLA. STAT. ANN. §§ 893.135(1)(c) and 893.135(5). Petitioner's plea was accepted on that date. On January 27, 2012, Petitioner was sentenced to a 25-year period of incarceration, and was required to pay specified costs and over $500,000 in fines. I.G. Ex. 4.

As required by section 1128(a) of the Act, 42 U.S.C. 1320a-7(a), the I.G. began the process of excluding Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. In a letter dated February 28, 2013, the I.G. notified Petitioner that for a period of 40 years, effective March 20, 2013, he was excluding Petitioner from participation in Medicare, Medicaid, and all other federally funded health care programs because he had been convicted of a criminal offense described at section 1128(a)(4) of the Act. I.G. Ex. 1.

Acting *pro se*, Petitioner timely sought review of the I.G.'s action on March 29, 2013. I convened a telephonic prehearing conference on May 2, 2013, pursuant to 42 C.F.R. § 1005.6, in order to discuss the issues presented by the case and procedures for addressing those issues. By Order of May 2, 2013, I established a schedule for the submission of documents and briefs.

Petitioner filed a pleading dated June 12, 2013, asking that I stay this appeal until such time as his motion to set aside his plea and vacate his sentence, which he filed with the Circuit Court on February 26, 2012, is resolved. I denied Petitioner's motion by Order of July 9, 2013.

All briefing is now complete and the record in this case closed for purposes of 42 C.F.R. § 1005.20(c) on September 3, 2013.

The evidentiary record on which I decide the issues before me contains eight exhibits, all proffered by the I.G. and marked I.G. Exs. 1-8. Petitioner did not proffer any exhibits. In the absence of objection, I admit all proffered exhibits.

II. Issues

The legal issues before me are limited to those set out at 42 C.F.R. § 1001.2007(a)(1). In the context of this record they are:

a. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(4) of the Act; and

b. Whether the length of the proposed period of exclusion is unreasonable.

Both issues must be resolved in favor of the I.G.'s position. Because his predicate conviction has been established, there is a basis for Petitioner's exclusion pursuant to section 1128(a)(4) of the Act. A five-year period of exclusion is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B), and here the I.G. relied on two aggravating factors to enlarge the exclusion beyond five years. 42 C.F.R. §§ 1001.102(b)(5) and (b)(9). The length of the proposed period of exclusion is reasonable.

III. Controlling Statutes and Regulations

Section 1128(a)(4) of the Act, 42 U.S.C. § 1320a-7(a)(4), requires the mandatory exclusion from participation in Medicare, Medicaid, and all other federal health care programs of "[a]ny individual or entity that has been convicted for an offense which 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." The terms of section 1128(a)(4) are restated somewhat more broadly in regulatory language at 42 C.F.R. § 1001.101(d).

The Act defines "convicted" as including those circumstances: "(1) when a judgment of conviction has been entered against the individual . . . by a State . . . court;" or "(2) when there has been a finding of guilt against the individual . . . by a State . . . court;" or "(3) when a plea of guilty or nolo contendere by the individual . . . has been accepted by a State . . . court . . . ." Act § 1128(i)(1)-(3), 42 U.S.C. § 1320a-7(i)(1)-(3). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(4) is mandatory and the I.G. must impose it 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), 1001.2007(a)(2). The period of exclusion may be extended based on the presence of specified aggravating factors. 42 C.F.R. § 1001.102(b). Only if the aggravating factors justify an exclusion of longer than five years 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).

IV. Findings and Conclusions

Based on the undisputed material facts in the record before me, I find and conclude as follows:

1. On October 5, 2011, Petitioner appeared in the Circuit Court of the Ninth Judicial Circuit in and for Osceola County, Florida, and pleaded guilty to one-count of conspiracy to traffic in Oxycodone, 28 grams or more, a first degree felony, in violation of FLA. STAT. ANN. §§ 893.135(1)(c) and 893.135(5). I.G. Ex. 3. Count One charged that, "[O]n or about the 1st day of February, 2010 and continuing through on or about the 30th day of October, 2010, in the Ninth and Twelfth Judicial Circuits of Florida . . . [Petitioner and his two co-conspirators] did agree, conspire, combine, or confederate with each other and other persons, known or unknown, to knowingly possess, sell, purchase, manufacture, deliver or bring into the State of Florida, twenty-eight (28) grams or more of oxycodone or of a mixture containing oxycodone, a substance controlled by Florida Statue 893.03(2)(a)1.o, and in furtherance of said conspiracy to traffic oxycodone . . . ."

2. On his accepted plea of guilty, in the Circuit Court of the Ninth Judicial Circuit in and for Osceola County, Florida, Petitioner was found guilty of one count of conspiracy to traffic in Oxycodone, 28 grams or more, a first degree felony, in violation of FLA. STAT. ANN. §§ 893.135(1)(c) and 893.135(5). I.G. Exs. 3, 4. Petitioner was sentenced to a minimum mandatory 25-year term of incarceration, and was ordered to pay specified costs and over $500,000 in fines. I.G. Ex. 4.

3. Oxycodone is a schedule II controlled substance. I.G. Exs. 3, at 1; 7, at 4; FLA. STAT. ANN. § 893.03(2)(a).

4. On November 18, 2011, the State of Florida Board of Medicine revoked Petitioner's license to practice medicine. I.G. Ex. 8, at 2

5. On February 28, 2013, the I.G. notified Petitioner that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 40 years, based on the authority set out in section 1128(a)(4) of the Act. I.G. Ex. 1.

6. Petitioner timely perfected this appeal from the I.G.'s action by filing his hearing request on March 29, 2013.

7. The plea, judgment, and sentence described above in Findings 1 and 2 constitute a "conviction" within the meanings of sections 1128(a)(4) and 1128(i)(1), (2), and (3) of the Act, and 42 C.F.R. § 1001.2.

8. Petitioner's conviction described above in Finding 2 constitutes a first degree felony. FLA. STAT. ANN. § 893.135(5).

9. Petitioner's conviction described above in Findings 1 and 2 was for conduct relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. I.G. Exs. 2, 3, 4.

10. Petitioner's conviction described above in Findings 1 and 2 was for conduct that occurred after August 21, 1996. I.G. Ex. 3.

11. By reason of the conviction described above in Findings 1 and 2, Petitioner was subject to, and the I.G. was required to impose, a period of exclusion from participation in Medicare, Medicaid, and all other federal health care programs. Act § 1128(a)(4), 42 U.S.C. § 1320a-7(a)(4).

12. A five-year period of exclusion is the mandatory minimum period provided by law. Act § 1128(c)(3)(B), 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2). Here, two aggravating factors are present, which warrant increasing the exclusion to 40 years. 42 C.F.R. §§ 1001.102(b)(5) and (b)(9).

13. There are no established mitigating factors present to justify decreasing the period of exclusion. 42 C.F.R. § 1001.102(c).

14. There are no disputed issues of material fact and summary disposition is appropriate in this matter. *Marvin L. Gibbs, Jr., M.D.*, DAB No. 2279 (2009*); Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

1. Petitioner's exclusion is mandated by section 1128(a)(4) of the Act because Petitioner was convicted of a felony criminal offense related to the unlawful distribution of a controlled substance after August 21, 1996.

The essential elements necessary to support an exclusion based on section 1128(a)(4) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense; (2) the criminal offense must have been a felony; (3) the felony conviction must have been for conduct relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance; and (4) the felonious conduct must have occurred after August 21, 1996. *Thomas Edward Musial*, DAB No. 1991 (2005); *Russell A. Johnson*, DAB CR1378 (2005); *Gerald A. Levitt*, D.D.S., DAB CR1272 (2005); *Robert C. Richards*, DAB CR1235 (2004).

All four essential elements appear plainly in the records of the state court. Petitioner's conviction is shown by I.G. Exs. 2 and 3, and the crime proscribed by FLA. STAT. ANN. §§ 893.135(1)(c) and 893.135(5) is a felony under Florida law. The court records show that the conduct on which his conviction was based occurred in 2010, well after the 1996 benchmark date. The specific acts are fairly characterized as conspiracy and trafficking, inasmuch as while in his capacity as a critical need physician, Petitioner unlawfully wrote prescriptions for Oxycodone in return for bribes. There is no dispute that the offenses of which Petitioner was convicted were related to the unlawful distribution and prescription of a controlled substance, and the nexus of this misconduct to the unlawful distribution and prescription of a controlled substance is obvious. I.G. Exs. 2, 3, 7.

Petitioner does not contest the I.G.'s proof of the four essential elements, and concedes that he is in fact subject to exclusion. What he seeks in this appeal is a reduction in the length of his exclusion, which, as proposed by the I.G., is for a period of 40 years.

2. Based on the aggravating factors in this case and the absence of any mitigating factors, the 40-year exclusion falls within a reasonable range.

Among the factors that may serve as bases for lengthening the period of exclusion are the two relied on by the I.G. in determining the length of Petitioner's exclusion. The first is that the sentence imposed by the state court included a substantial prison sentence — 25 years of incarceration. I.G. Ex. 4; 42 C.F.R. § 1001.102(b)(5); *see Jason Hollady, M.D.*, DAB No. 1855, at 12 (2002) (characterizing a nine-month incarceration as "relatively substantial."); *Jeremy Robinson*, DAB No. 1905 (2004) citing to 57 Fed. Reg. 3298, 3314 (Jan. 29, 1992) ("the circumstances of a particular case" drive the weight that a decision maker can give the aggravating and mitigating factors"). Here, Petitioner was involved in drug trafficking, a serious offense, and the term of the period of incarceration is representative of both the seriousness of the crime and Petitioner's considerable role in executing the criminal activities.

The second aggravating factor involves an adverse administrative action based on the same set of circumstances supporting the basic exclusion. I.G. Ex. 8; 42 C.F.R. § 1001.102(b)(9). On November 18, 2011, the State of Florida's Department of Health filed an administrative complaint with the State Board of Medicine against Petitioner based upon his conviction of conspiracy to traffic in Oxycodone. The complaint stated that Petitioner was found guilty of "a crime which directly relates to the practice of medicine or the ability to practice medicine" and pointed out that his " [area of critical need] medical license enabled him to commit the crime . . . or to prescribe oxycodone to patients or to work in a pain management clinic and treat patients in which oxycodone was prescribed." I.G. Ex. 7, at 3. On August 16, 2012, the Board of Medicine concurred with the findings of the Department of Health and ordered that Petitioner's license to practice medicine in the State of Florida be revoked immediately. I.G. Ex. 8. The revocation of Petitioner's medical license pursuant to a disciplinary proceeding

constitutes an adverse administrative action, clearly based on the same set of circumstances forming the basis of the I.G.'s exclusion of Petitioner. The concerns raised in the complaint filed by the Department of Health and the Board of Medicine's determination that Petitioner's actions warranted revocation of his license rather than a lesser sanction, reflect how egregious his conduct was and lend further support to the I.G.'s decision to increase Petitioner's exclusion well beyond the five-year minimum to a 40-year period of exclusion. The facts clearly show that Petitioner used his medical license to perpetrate — and in effect, to conceal — the crime of which he was convicted, a crime which in itself created a menace to public health and safety. It requires no exercise of judicial or administrative notice to observe that the abuse of Oxycodone has reached plague-like proportions in many localities, and that virtually all of those victimized communities are further plagued by thriving — and extremely dangerous — street-level secondary markets in the drug. This Petitioner deliberately facilitated that plague, and did so by violating the law and his professional oath in return for squalid payments of money.[1]

Petitioner does not deny the existence of these aggravating factors. Rather, Petitioner contends generally that mitigating factors (" special circumstances") exist that support reducing the length of his exclusion. Hearing Request; P.Br. at 1. As mitigating factors, Petitioner claims that the practice of medicine is the only way he has ever provided for his family, and a 40-year exclusion from program participation is, in effect, a permanent exclusion. He asks for lenience and asks that the period of exclusion be coterminous with his 25-year period of incarceration. P. Br. at 1.

The regulations are narrowly drawn and consider only three factors to be mitigating: (1) that a petitioner was convicted of three or fewer misdemeanor offenses and the resulting financial loss to the program was less than $1,500; (2) that the record in the criminal proceedings demonstrates that a petitioner had a mental, physical, or emotional condition that reduced his culpability; and (3) that a petitioner's cooperation with federal or state officials resulted in others being convicted or excluded, or additional cases being investigated, or a civil money penalty being imposed. 42 C.F.R. § 1001.102(c). As the regulations are structured, the specified mitigating factors operate as evidentiary rules. Thus, I may consider only evidence related to a specified mitigating factor in making a determination as to the touchstone question: the Petitioner's trustworthiness. Characterizing a mitigating factor as "in the nature of an affirmative defense," the

[1] Should the views I express here require further elaboration, then reference might usefully be made to the official report of the search of the home of the person to whom Petitioner sold the Oxycodone prescriptions. What authorities found there included "8 lbs of suspected cannabis, an undetermined amount of prescription pills (estimated in the thousands), two firearms, a ballistic vest, and U.S. currency . . . the majority of the prescriptions recovered were issued by Dr. Menendez." I.G. Ex. 2, at 3.

Departmental Appeals Board has ruled that Petitioner has the burden of proving any mitigating factor by a preponderance of the evidence. *Barry D. Garfinkel, M.D.*, DAB No. 1572, at 8 (1996). Here, Petitioner failed to allege the elements of any of the three mitigating factors that can be considered to offset the aggravating factors.

The exclusion remedy serves twin congressional purposes: the protection of federal funds and program beneficiaries from untrustworthy individuals and the deterrence of health care fraud. S. Rep. No. 109, 100th Cong., 1st Sess. (1987), reprinted in 1987 U.S.C.C.A.N. 682, 686 ("clear and strong deterrent"); *Joann Fletcher Cash*, DAB No. 1725, at 18, 15 (2000) (discussing trustworthiness and deterrence). The preamble to the final rule provides, first, that the I.G. has "broad discretion" in establishing the length of an exclusion and, second, that the Administrative Law Judge's (ALJ's) scope of review is "limited to reviewing whether the length is unreasonable. So long as the amount of time chosen by the OIG is within a reasonable range, based on demonstrated criteria, the ALJ has no authority to change it under this rule." *Joann Fletcher Cash* at 20, citing 57 Fed. Reg. 3298, 3321 (1992). This principle is well-known, but may be subject to a certain process of re-evaluation.[2]

The I.G. may decide that periods of exclusion longer than the five-year minimum are reasonable and necessary to fight health care fraud, and here, as outlined above, two extremely serious aggravating factors are indisputably present. They are not only present, but each tells volumes about Petitioner's trustworthiness. In this case, Petitioner's crime demonstrates that he presents significant risks to the integrity of health care programs because he has shown himself willing to violate both law and professional standards by turning highly-dangerous drugs into the public domain in return for bribes. Petitioner's admitted crimes are, in and of themselves, sufficient to justify an exclusion in the range of 40 years. Petitioner committed calculated and serious crimes over a period of approximately one year. He used the authority and protection of his license as a critical need physician to obtain unlawfully large sums of money during this period through the trafficking of controlled substance for his personal financial gain. Petitioner was sentenced to a mandatory 25-year term of incarceration. The sentencing judge did

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[2] As I have argued most recently in *Keith Nisonoff*, DAB CR2927 (2013) and *Ollie Futrell*, DAB CR2901, at 9-10 (2013), the Board's recent decisions in *Craig Richard Wilder*, DAB No. 2416 (2011), *Vinod Chandrashekhar Patwardha, M.D.*, DAB No. 2454 (2012), and *Sushil Anniruddh Sheth*, DAB No. 2491 (2012) release the ALJ from any obligation to defer greatly to the I.G.'s determination of the length of an enhanced exclusion when there are no material questions as to the existence of aggravating or mitigating factors. In this case there are no such questions: the I.G. had before him the same factors I have before me. Were it not solely for the fact that Petitioner appears *pro se*, I would rely on those aggravating factors and the absence of any mitigating factors and enhance the period of Petitioner's exclusion to 50 years.

not reduce his term of imprisonment as had been done with one of Petitioner's co-conspirators, suggesting that the sentencing judge found Petitioner to be a highly-culpable individual. I.G. Ex. 5, at 1 (where Petitioner's co-conspirator was ordered to serve just 49 days of incarceration and eight years of probation.).

In regard to the protection of federal funds and program beneficiaries from untrustworthy individuals, the aggravating factors established by the I.G. in this case prove Petitioner is an untrustworthy individual. Petitioner's lack of trustworthiness is established by the fact that he was a primary participant in the unlawful trafficking of a controlled substance. The actions for which he was convicted were recurrent and deliberate, not random and impulsive. Those actions imperiled the public's health and safety, and it is impossible to imagine that Petitioner was unaware of the peril he was creating. During the search of his premises and after having been read his "Miranda" rights, Petitioner admitted to the Special Agent of the Florida Department of Law Enforcement that he knew that his co-conspirators were profiting from the illegal sale of the Oxycodone (*i.e.*, for just one day, on October 26, 2010, Petitioner received $3,600 for prescriptions he wrote for 4,500 pills of Oxycodone (30 mg and 15 mg weights). I.G. Ex. 2, at 3. The egregious circumstances and results of his acts amply justify the exclusion imposed, and I find that his 40-year exclusion falls within a reasonable range.

I note that Petitioner appears here *pro se*. Because of that I have been guided by the Board's reminders that *pro se* litigants should be offered "some extra measure of consideration" in developing their records and their cases. *Louis Mathews*, DAB No. 1574 (1996); *Edward J. Petrus, Jr., M.D., et al*, DAB No. 1264 (1991). I have searched all of Petitioner's pleadings for any arguments or contentions that might raise a valid, relevant defense to the I.G.'s Motion, but have found nothing that could be so construed.

Resolution of a case by summary disposition is appropriate when settled law can be applied to undisputed material facts. *Marvin L. Gibbs, Jr.*, DAB No. 2279; *Michael J. Rosen, M.D.*, DAB No. 2096. Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). This forum looks to FED. R. CIV. P. 56 for guidance in applying that regulation. *Robert C. Greenwood*, DAB No. 1423 (1993). This Decision issues accordingly for the material facts in this case are undisputed, unambiguous, and support summary disposition as a matter of settled law.

VI. Conclusion

For the reasons set forth above, the I.G.’s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Jose C. Menendez Campos, MD., from participation in Medicare, Medicaid, and all other federal health care programs for a period of 40 years pursuant to the terms of section 1128(a)(4) of the Act, 42 U.S.C. § 1320a-7(a)(4), is SUSTAINED.

/s/
Richard J. Smith
Administrative Law Judge