Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Lena Lasher, aka Lena Contang, aka Lena Congtang,
(OI File No. H-15-43152-9),

Petitioner

v.

The Inspector General.

Docket No. C-16-629

Decision No. CR4780

Date: January 30, 2017

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Lena Lasher (aka Lena Contang and Lena Congtang), from participation in Medicare, Medicaid, and all federal health care programs based on her convictions for felony offenses related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct 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 she was convicted of five felony offenses, to include conspiracy to commit wire and mail fraud, mail fraud, and wire fraud while engaged as a pharmacist in a scheme to illegally dispense drugs. I affirm the 10-year exclusion period because the IG has proven two aggravating factors, and there are no mitigating factors present. I also affirm that the effective date of Petitioner's exclusion is April 20, 2016.

I. Background

By letter dated March 31, 2016, the IG notified Petitioner that, pursuant to section 1128(a)(3) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(3), she was being excluded from participation in Medicare, Medicaid, and all federal health care programs

for a minimum period of 10 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 exclusion is due to your felony conviction as defined in section 1128(i) (42 U.S.C. 1320a-7(i)), in the United States District Court for the Southern District of New York, of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service, including the performance of management or administrative services relating to the delivery of such items or services, or with respect to or any act or omission in a health care program (other than Medicare and a State health care program) operated or financed by any Federal, State, or local Government agency.

IG Ex. 1 at 1. The IG informed Petitioner that the exclusion was for "a minimum period of 10 years." IG Ex. 1 at 1; *see* 42 U.S.C. § 1320a-7(c)(3)(B). The IG extended the exclusion period from the statutory minimum of five years to 10 years based on the presence of two aggravating factors. IG Ex. 1 at 1-2. As for the aggravating factors, the IG found the following in a July 25, 2016 letter that amended the previous letter notifying Petitioner of the exclusion: 1) The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more from "about 2010 to about November 2012," and, 2) The sentence imposed by the court included incarceration, namely a three-year period of incarceration. IG Ex. 2 at 1-2; 42 C.F.R. § 1001.102(b). The IG did not consider any mitigating factors. IG Exs. 1, 2; *see* 42 C.F.R. § 1001.102(c).

Petitioner, through her former counsel, timely filed a request for hearing before an administrative law judge on May 25, 2016. On July 20, 2016, 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 pre-hearing briefs and exhibits. I memorialized the schedule and summary of the pre-hearing conference in my Order and Schedule for Filing Briefs and Documentary Evidence (Order), dated July 21, 2016.

Pursuant to the Order, the IG filed an informal brief (IG Br.) along with nine proposed exhibits (IG Exs. 1-9). Petitioner thereafter filed, by mail, what I have construed to be her informal brief (P. Br.), along with numerous disorganized exhibits that were not marked, identified, or paginated in accordance with my Order.[1] Civil Remedies Division staff attempted to organize Petitioner's submissions prior to uploading them to the

[1] I provided a fillable short-form brief as an enclosure to my Order. However, Petitioner did not submit a short-form brief. Rather, Petitioner sent documents containing arguments that were apparently in the form of a printed email message.

Departmental Appeal's Board's electronic filing system on November 15, 2016. The aforementioned exhibits have been docketed as items 14a, 14b, and 14c in the electronic filing system.[2] The IG filed a reply brief (IG Reply) on November 30, 2016. In the absence of any objections, I admit the IG Exs. 1-9 and Petitioner's exhibits that were accepted for filing and uploaded to the electronic filing system on November 15, 2016.

Following Petitioner's filing of her brief and supporting exhibits, she continued to file numerous documents after her October 28, 2016 filing deadline. Petitioner did not file a motion for leave to file arguments and evidence after the expiration of the October 28, 2016 deadline, and I did not grant Petitioner leave to do so. Likewise, Petitioner submitted, without requesting leave, a "rebuttal" to the IG's reply brief, in which she again challenged her conviction, discussing allegations of prosecutorial misconduct and ineffective assistance of counsel, as well as her efforts to seek appellate review of her conviction. Petitioner's rebuttal to the IG's reply brief is not contemplated by my Order, and I do not accept it for filing. Further, I have reviewed each document that Petitioner submitted after the deadline for filing her brief and supporting exhibits; I observe that these documents are largely duplicative and irrelevant, and have been submitted for the sole purpose of collaterally attacking her criminal convictions, which is not permitted in this forum. Any argument or evidence submitted by Petitioner after the October 28, 2016 deadline is rejected and not admitted into the record.

Petitioner has not asserted that she desires an in-person hearing, and she has not availed herself of the opportunity to submit written direct testimony, as discussed in section 5(b) of my Order. The IG contends that an in-person hearing is unnecessary. 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, § 5(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 will only be held for cross-examination of a witness or witnesses who provided direct testimony, if it

[2] Under other circumstances, I would have rejected Petitioner's submissions because they do not comply with my Order or the Civil Remedies Division Procedures. Owing to Petitioner's current incarceration, which may cause delay in mail service, along with her present inability to use the electronic filing system due to her incarceration, I have nonetheless accepted any documents she filed, via mail, on or before the October 28, 2016 deadline for filing her brief and supporting exhibits.

> 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 5(c)(iii) of this Order. I strongly caution that if written direct testimony is submitted, the submitting party should be fully cognizant that written direct testimony will not be accepted for the purpose of being a collateral attack on 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. 42 C.F .R § 1001.2007(d). If a live hearing is not necessary, then I will proceed to issue my written decision.

Order, § 5(b.). Petitioner's arguments focus on her efforts to collaterally attack her conviction, and any testimony, even if solicited from Petitioner, would only serve to further her efforts to collaterally attack her conviction. I will decide this case on the written submissions and documentary evidence. *See* Order, § 5(b).

II. Issues

Whether there is a basis for exclusion, and, if so, whether the length of the 10-year exclusion that the IG has imposed is unreasonable. 42 C.F.R. § 1001.2007(a)(1)-(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[3]

1. Petitioner's felony convictions, to include convictions for conspiracy to commit mail and wire fraud, mail fraud, and wire fraud, require her exclusion from Medicare, Medicaid, and all federal health care programs for a minimum of five years.

The Act requires the exclusion of any individual or entity from participation in Medicare, Medicaid, and all federal health programs based on four types of criminal convictions. 42 U.S.C. § 1320a-7(a). In this case, the IG relied on section 1320a-7(a)(3) as the legal basis to exclude Petitioner, which states:

> (a) Mandatory exclusion

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

> The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1320a–7b(f) of this title):
>
> * * *
>
> (3) Felony conviction relating to health care fraud
>
> Any individual or entity that has been convicted for an offense which occurred after [August 21, 1996], under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in paragraph (1)) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

42 U.S.C. § 1320a-7(a)(3).

The IG argues that Petitioner's exclusion is required based on her convictions related to her role as a pharmacist in a conspiracy "to dispense hundreds of thousands of pain pills without valid prescriptions through an internet pharmacy scheme." IG Br. at 2, citing IG Exs. 3, 4, and 5. The IG contended that "Petitioner's offense occurred in connection with the delivery of health care services as a licensed and practicing pharmac[ist]," and that "[t]here can be no dispute that Petitioner's offense occurred 'in connection with' the delivery of a health care item or service or that her offense was also related to fraud or other conduct within the ambit of section 1128(a)(3) of the Act." IG Br. at 4-5. Petitioner does not dispute that, for purposes of the Act, she has multiple "convictions" for her role an internet pharmacy scheme. P. Br.; 42 U.S.C. § 1320a-7(i)(3), (4). However, Petitioner primarily argues that she was wrongly convicted of the offenses to which she was found guilty at trial. P. Br.

On April 2, 2015, a grand jury returned a true bill of indictment, specifically a superseding indictment, that charged that Petitioner committed the following offenses:

> Count One: Conspiracy to introduce misbranded prescription drugs into interstate commerce and to misbrand prescription drugs while held for sale, in violation of 21 U.S.C.§ § 331(a) and 333(a)(2).
>
> Count Two: Introducing misbranded prescription drugs into interstate commerce, in violation of 21 U.S.C. §§ 331(a) and 333(a)(2) and 18 U.S.C. § 2.

> Count Three: Conspiracy to commit mail fraud and wire fraud, in violation of 18 U.S.C. § 1349.
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> Count Four: Mail fraud, in violation of 18 U.S.C. §§ 1341 and 2.
>
> Count Five: Wire fraud, in violation of 18 U.S.C. §§ 1343 and 2.
>
> Count Six: Witness tampering, in violation of 18 U.S.C. §§ 1512(b)(1), 1512(i), and 2.

IG Ex. 5 at 5. The superseding indictment described how, from "in or about 2010, up to and including in or about November 2012," Petitioner introduced and delivered into interstate commerce misbranded drugs (i.e., drugs "without accurate or any labels") and "re-dispensed" those drugs to other customers by shipping those drugs by mail. IG Ex. 5 at 1-10. A press release issued by the United States Attorney's Office for the Southern District of New York explained that Petitioner was found guilty after a two-week trial, and described her offense conduct as follows:

> [Petitioner], along with others, engaged in a scheme to dispense prescription drugs, including addictive pain medications, to customers who ordered them online, without meeting or consulting with a physician. Over the course of the scheme, [Petitioner], a licensed pharmacist who was the Pharmacist-In-Charge at Hellertown Pharmacy in Hellertown, Pennsylvania, and who supervised a second pharmacy, Palmer Pharmacy & Much More in Easton, Pennsylvania, dispensed and caused others to dispense hundreds of thousands of pain pills without valid prescriptions.
>
> [Petitioner] also directed employees at the two pharmacies she supervised to ship pills in vials with false or misleading labels. At [Petitioner's] direction, instructions on the labels for how often a customer should take certain drugs were often altered, and the descriptions on the labels regarding the quantity of pills in the vial were often inaccurate. She also directed employees then to re-dispense the pills to other customers with new labels, without informing those new customers that they were receiving pills that had previously been dispensed to others. [Petitioner] also instructed her employees to store pills without required information, such as a lot number or expiration date.

IG Ex. 3 at 1-2. A United States District Judge imposed judgment on September 2, 2015, for Counts 1 through 5, the five counts for which she was found guilty at trial. IG Ex. 6. Petitioner was ordered to the custody of the United States Bureau of Prisons for a period of three years on each count, to be served concurrently. IG Ex. 6 at 3.

On December 11, 2015, Petitioner admitted the following when she sought permission to surrender her license to practice as a pharmacist in the state of New York: "I admit guilt to the aforementioned specification of professional misconduct, charging me with being convicted of committing an act constituting a crime under Federal law (Conspiracy to Misbrand Prescription Drugs; Misbranding Drugs; Conspiracy to Commit Mail and Wire Fraud; and Wire Fraud). IG Ex. 7 at 5. Petitioner admitted that she committed these offenses "from 2010 to November 2012." IG Ex 7 at 7-13.

Petitioner now challenges her exclusion based on arguments that she was "wrongly convicted" for the five offenses. Among her numerous arguments, Petitioner argues that the presiding judge improperly refused to admit testimony and evidence, and that the verdicts were erroneous for reasons such as that there "are human errors in hand and machine counting" of pills, and that a counting error "is not fraud." P. Br. Petitioner also appears to allege that prosecutors committed misconduct because, as she alleges, they failed to turn over exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963).

Petitioner has been convicted of conspiracy to commit mail and wire fraud, mail fraud, and wire fraud, among other offenses. IG Ex. 6 at 1-2. The plain language of the Act clearly states that an exclusion is mandated when the underlying conviction is for a felony "relating to" fraud, meaning that the conviction need not have been based on the actual commission of fraud, but rather, have only been *related to fraud*. Being that Petitioner was found guilty of five offenses related to her role in a scheme to illegally dispense drugs, to include conspiracy to commit fraud and the actual commission of fraud, her convictions are undoubtedly related to fraud.

Additionally, Petitioner's criminal offenses were in connection with the delivery of a health care item or service. The statute states that an exclusion is warranted when the conviction is for an offense "in connection with" the delivery of a health care item or service, meaning that a criminal offense warranting exclusion is not limited only to the actual delivery or provision of such an item or service. 42 U.S.C. § 1320a-7(a)(3); *see Charice D. Curtis*, DAB No. 2430 at 4 (2011) ("[T]he plain language of section 1128(a)(3) encompasses felonies 'relating to' fraud . . . not just to felonies that constitute fraud or one of the other listed offenses."). The Departmental Appeals Board (Board) has also explained that an ALJ does not need to limit review to the elements of an offense, but may consider the extrinsic evidence surrounding the conviction to determine whether it is "relating to" fraud and done "in connection with" the delivery of a health care item or service. *See Narendra M. Patel, M.D.*, DAB No. 1736 at 6 (2000), *aff'd*, *Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003). The Board has also explained that there should be a "common sense connection" between the underlying crime and the delivery of a health care item or service in order to meet the statutory basis for exclusion. *Erik D. DeSimone, R.Ph.*, DAB No. 1932 at 5 (2004). When applying a common sense analysis to the underlying facts of this case, I conclude that Petitioner's role, as a pharmacist in a

scheme to dispense drugs, was "in connection with" the delivery of such health care services to patients. The crux of Petitioner's criminal offense was that she was dispensing drugs in a manner contrary to law; thereby, her offense was related to the delivery of a health care item or service.

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). On May 15, 2015, Petitioner was found guilty of Counts One through Five of the superseding indictment. IG Ex. 3 at 1; *see* IG Exs. 5, 6. On September 2, 2015, a United States District Judge imposed judgment based on the findings of guilt by the jury. IG Ex. 6. While Petitioner feels she was "wrongly convicted" and did not receive a fair trial, she may not re-litigate her conviction in this forum. 42 C.F.R. § 1001.2007(d).

The Board recently summarized its history of declining to review challenges to criminal convictions, stating:

> The Board has long held that such "collateral attacks" on the validity of criminal convictions on which exclusions are based are forbidden by regulation. Section 1001.2007(d) states that when an exclusion "is based on the existence of a criminal conviction or a civil judgment imposing liability by Federal, State or local court" (or "on a determination by another Government agency, or any other prior determination where the facts were adjudicated and a final decision was made"), then "the basis for the underlying conviction, civil judgment or determination ***is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal***" (emphasis added). *See, e.g., Michael J. Vogini, D.O.*, DAB No. 2584, at 8 (2014) ("Petitioner pled guilty to and was convicted of Count 14 and may not now collaterally attack that conviction"); *Lyle Kai, R.Ph.*, DAB No. 1979, at 5 (2005) ("'the basis for the underlying conviction . . . is not reviewable and the individual . . . may not collaterally attack it . . . .' 42 C.F.R. § 1001.2007(d)"); *Peter J. Edmonson*, DAB No. 1330, at 4 (1992). . . . A petitioner who "believes there are serious flaws" in the state's action on which the exclusion is based thus "must challenge it 'in the appropriate forum.'" *Marvin L. Gibbs, Jr., M.D.*[, DAB No. 2279] at 10 [(2009)], citing *Leonard Friedman, M.D.*, DAB No. 1281 (1991). Per section 1001.2007(d), this is not the appropriate forum for Petitioner to air his grievances about the propriety of his conviction.

Clemenceau Theophilus Acquaye, DAB No. 2745 at 7 (2016). Petitioner has criminal convictions for fraud, and the fraud she committed was related to the delivery of a health care item or service. As such, she is subject to exclusion. Congress, through enactment of the Act, determined that an individual who has been convicted of a fraud in the delivery of a health care item or service must be excluded from federal health care programs for no less than five years, and it afforded neither the IG nor an administrative law judge the discretion to impose an exclusion of a shorter duration. 42 U.S.C. § 1320a-7(c)(3)(B). I cannot shorten the length of the mandatory period of exclusion to a period of less than five years because I do not have authority to "find invalid or refuse to follow Federal statutes or regulations." 42 C.F.R. § 1005.4(c)(1). Petitioner therefore has a criminal conviction for fraud involving the delivery of a health care item or service that mandates exclusion for a minimum period of five years.

2. A 10-year minimum exclusion is not unreasonable based on the presence of two aggravating factors and no mitigating factors.

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). In this case, exclusion is required under section 1320a-7(a)(3), and therefore Petitioner must be excluded for a minimum of five years. The IG increased the minimum exclusion period from five years to 10 years based on his consideration of two aggravating factors. IG Exs. 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.

The IG asserts that the presence of two aggravating factors warrants an exclusion for 10 years. First, the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more, occurring from about 2010 through November 2012. 42 C.F.R. § 1001.102 (b)(2). Second, the sentence imposed included incarceration, specifically three years of incarceration. 42 C.F.R. § 1001.102(b)(5).

With respect to the length of the acts that resulted in Petitioner's felony convictions, Petitioner was charged with various offenses that occurred from on or about 2010 through November 2012. IG Ex. 5. Petitioner was found guilty of five of those offenses at trial. IG Ex. 6. After her conviction, Petitioner admitted guilt to the charges for which she was convicted (IG Ex. 7 at 5), and acknowledged that her offenses occurred "from 2010 to November 2012." IG Ex. 7 at 7-13. The IG properly considered the length of the acts that resulted in Petitioner's felony convictions to be an aggravating factor in this case. *See* 42 C.F.R. § 1001.102(b)(2) (stating an aggravating factor exists if "[t]he acts that resulted in the conviction, or similar acts, were committed over a period of one year or more").

With regard to the length of Petitioner's incarceration, the uncontroverted evidence demonstrates that Petitioner was sentenced to a significant period of incarceration for her offenses, which included conspiracy to commit fraud, wire fraud, and mail fraud. On September 2, 2015, a United States District Judge imposed judgment and ordered that Petitioner be committed to the custody of the United States Bureau of Prisons for a term of three years. IG Ex. 6 at 3. The IG properly considered the three-year length of imprisonment to be an aggravating factor in this case. *See Jason Hollady, M.D., a/k/a Jason Lynn Hollady*, DAB No. 1855 (2002) (stating that even a nine-month period of incarceration was "relatively substantial").

Evidence of aggravation may be offset by evidence of mitigation if it relates to one of the factors set forth at 42 C.F.R. § 1001.102(c). I am not able to consider evidence of mitigation unless one or more of the enumerated aggravating factors listed in 42 C.F.R. § 1001.102(b) justifies an exclusion of longer than five years. 42 C.F.R. § 1001.102(c). I have examined Petitioner's arguments and the evidence that she offered in support, and I find that Petitioner has not raised a regulatory mitigating factor in her submissions.

The 10-year period of Petitioner's exclusion is not unreasonable based on the two aggravating factors present in this case. Petitioner's criminal activity lasted for two years or longer, and she was sentenced to a period of three years of incarceration, which is a significant period of incarceration. I conclude that the IG's imposition of a minimum period of exclusion for 10 years is not unreasonable. 42 C.F.R. § 1001.2007(a).

V. Effective Date of Exclusion

The effective date of the exclusion, April 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 federal health care programs for a minimum period of 10 years effective April 20, 2016.

/s/
Leslie C. Rogall
Administrative Law Judge