Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Deborah Morris,	)	Date: December 30, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-517
	)	Decision No. CR1877
The Inspector General.	)	
	)	

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Affirmance of the I.G.'s determination to exclude Petitioner *pro se* Deborah Morris from participation in Medicare, Medicaid, and all other federal health care programs for a period of 15 years. The I.G.'s Motion and determination to exclude Petitioner are based on the terms of section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). The facts in this case mandate the imposition of a five-year exclusion, and fully support the I.G.'s determination to enhance that period of exclusion to 15 years. For those reasons, I grant the I.G.'s Motion for Summary Affirmance.

I. Procedural Background

Deborah Morris was the owner and operator of a business called D. N. Morris & Associates (DNMA), an ostensible provider of outpatient mental health services to Pennsylvania children and their families under the Medicare program. Beginning in 1997, Petitioner devised a scheme to defraud Medicare by means of a virtual cascade of mendacity.

That activity led to Petitioner's indictment by the Federal Grand Jury sitting for the Eastern District of Pennsylvania: on October 25, 2005, the Grand Jury handed up a 49-count Indictment charging Petitioner with 34 counts of violating 18 U.S.C. § 1347, Health Care Fraud; 14 counts of violating 18 U.S.C. § 1341, Mail Fraud and 18 U.S.C. § 2,

Aiding and Abetting; and one count of violating 18 U.S.C. § 1035, False Statements Related to Health Care Matters. The Grand Jury specifically alleged that, as a consequence of Petitioner's false representations and claims, Medicare paid Petitioner and DNMA approximately $278,507.

On December 7, 2006, upon her plea of not guilty, and following a six-day jury trial in the United States District Court for the Eastern District of Pennsylvania during which she was represented by counsel, Petitioner was found guilty of all 49 charged felonies exactly as charged in the Indictment. On October 23, 2007, Petitioner was sentenced to a prison term of 60 months to be followed by a three-year term of supervised probation, and was ordered to pay restitution to The Centers for Medicare & Medicaid Services in the sum of $278,507.05.

On May 30, 2008, the I.G. notified Petitioner that she was to be excluded from Medicare, Medicaid, and all other federal health care programs for a period of 15 years, pursuant to the terms of section 1128(a)(1) of the Act. Section 1128(a)(1) mandates the exclusion, for a period of not less than five years, of "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or any State health care program." The I.G.'s determination to set the period of exclusion at 15 years was based on the asserted presence of three aggravating factors set out at 42 C.F.R. §§ 1001.102(b)(1), (b)(2), and (b)(5).

Petitioner timely sought review of the I.G.'s action by her *pro se* letter of June 3, 2008. Problems related to Petitioner's status as an inmate in Alderson Federal Prison Camp in Alderson, West Virginia, prevented the successful scheduling of a telephonic prehearing conference pursuant to 42 C.F.R. § 1005.6(c), so by Order on July 22, 2008, I established a schedule by which Petitioner's appeal could proceed in a speedy, orderly, and fair manner in the context of summary disposition based on the submission of documents and briefs. All briefing is now complete, and the record in this case closed November 19, 2008.

The evidentiary record on which I decide the issues before me contains 11 exhibits. The I.G. proffered six exhibits marked I.G. Exhibits 1-6 (I.G. Exs. 1-6). Petitioner proffered five exhibits marked Petitioner's Exhibits 2, 3, 5, 6, and 7 (P. Exs. 2, 3, 5, 6, and 7), but did not proffer exhibits marked Petitioner's Exhibits 1 and 4, and did not correct the omission when the matter was called to her attention in my Stay of Proceedings order dated October 20, 2008. In the absence of objection I have admitted I.G. Exs. 1-6 and P. Exs. 2, 3, 5, 6, and 7 as designated by her. Petitioner continues to appear *pro se*.

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:

1. 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)(1) of the Act; and

2. Whether the proposed 15-year period of exclusion is unreasonable.

I resolve both issues in favor of the I.G.'s position. Because her predicate conviction has been established, section 1128(a)(1) of the Act mandates Petitioner's exclusion.

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). All three of the aggravating factors relied on by the I.G. in determining to enhance the period to 15 years have been proven, and no mitigating factors recognized by regulation have been pleaded by Petitioner or proven by the evidence before me. The length of the proposed enhancement is within a reasonable range, and is therefore not unreasonable.

III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the mandatory exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any "individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program." Title XVIII of the Act is the Medicare program. The terms of section 1128(a)(1) are restated in regulatory language at 42 C.F.R. § 1001.101(a). This statutory provision makes no distinction between felony convictions and misdemeanor convictions as predicates for mandatory exclusion.

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a Federal . . . court, regardless of whether there is an appeal pending . . . ", section 1128(i)(1) of the Act; or "when there has been a finding of guilt against the individual . . . by a Federal . . . court," section 1128(i)(2) of the Act. 42 U.S.C. § 1320a-7(i)(1) and (2). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(1) is mandatory and the I.G. must impose it for a minimum period of five years. Section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision.

The minimum mandatory period of exclusion is subject to enhancement in some limited circumstances and on the I.G.'s proof of narrowly-defined aggravating factors set out at 42 C.F.R. § 1001.102(b)(1)-(9). In this case, the I.G. seeks to enhance the period of Petitioner's exclusion to 15 years, and relies on the three aggravating factors listed at 42 C.F.R. § 1001.102(b)(1), (b)(2), and (b)(5).

If the I.G. determines to enhance the period of exclusion by relying on any of those aggravating factors, a petitioner may attempt to limit or nullify the proposed enhancement through proof of certain specifically-defined mitigating factors set out at 42 C.F.R. § 1001.102(c)(1)-(3). In this case, no mitigating factor has been pleaded or appears in the record before me, and thus none of them requires extended discussion.

The standard of proof in this case is a preponderance of the evidence. Petitioner bears the burden of proof and persuasion on any affirmative defenses or mitigating factors and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b).

IV. Findings and Conclusions

I find and conclude as follows:

1. On a jury verdict of guilty on December 7, 2006, in the United States District Court for the Eastern District of Pennsylvania, Petitioner Deborah Morris was found guilty on 34 counts of violating 18 U.S.C. § 1347, Health Care Fraud; 14 counts of violating 18 U.S.C. § 1341, Mail Fraud and 18 U.S.C. § 2, Aiding and Abetting; and one count of violating 18 U.S.C. § 1035, False Statements Related to Health Care Matters. I.G. Exs. 5, at 11; 3, at 1.

2. Final adjudication of guilt and judgment of conviction based on that verdict were entered against Petitioner, and sentence was imposed on her, in the United States District Court on October 23, 2007. She was sentenced to a prison term of 60 months to be followed by a three-year term of supervised probation, was assessed $4900, and was ordered to pay restitution to The Centers for Medicare & Medicaid Services in the sum of $278,507.05. I.G. Ex. 3, at 4.

3. The adjudication of guilt, judgment of conviction, and sentence based on Petitioner's violations of 18 U.S.C. §§ 1035, 1341 and 2, and 1347, as described in Findings 1 and 2 above, constitute a "conviction" related to the delivery of an item or service under the Medicare program, within the meaning of sections 1128(a)(1) and 1128(i)(1) and (2) of the Act, and 42 C.F.R. § 1001.2.

4. Because of her conviction, Petitioner was subject to, and the I.G. was required to impose, a period of exclusion from Medicare, Medicaid, and all other federal health care programs of not less than five years. Act, sections 1128(a)(1) and 1128(c)(3)(B).

5. The acts resulting in Petitioner's conviction caused a financial loss to the Medicare program of approximately $278,507.05. I.G. Exs. 3, 4.

6. Because the acts resulting in Petitioner's conviction caused a financial loss to a Government program of more than $5,000, the aggravating factor set out in 42 C.F.R. § 1001.102(b)(1) is present.

7. The acts resulting in Petitioner's conviction, as described in Findings 1 and 2 above, were committed over the period from on or about July 10, 1997, through on or about June 14, 2002. I.G. Exs. 3, 4.

8. Because the acts resulting in Petitioner's conviction were committed over a period of one year or more, the aggravating factor set out in 42 C.F.R. § 1001.102(b)(2) is present.

9. As the result of her conviction, as described in Findings 1 and 2 above, Petitioner was sentenced to incarceration for a term of 60 months. I.G. Ex. 3.

10. Because Petitioner was sentenced to a term of incarceration, the aggravating factor set out in 42 C.F.R. § 1001.102(b)(5) is present.

11. No mitigating factor set out in 42 C.F.R. § 1001.102(c)(1)-(3) is present.

12. The I.G.'s exclusion of Petitioner for a period of 15 years is supported by fact and law, is within a reasonable range, and is therefore not unreasonable. I.G. Exs. 1, 3, and 4; Findings 1-11, above.

13. There are no disputed issues of material fact and summary disposition is therefore appropriate in this matter. *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

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; and (2) the criminal offense must have been related to the delivery of an item or service under title XVIII of the Act (Medicare) or any state health care program. *Tamara Brown*, DAB No. 2195 (2008); *Thelma Walley*, DAB No. 1367; *Boris Lipovsky, M.D.*, DAB No. 1363 (1992). The I.G.'s proof of these two essential elements is patent in the record before me.

The first essential element, the fact of Petitioner's conviction, is established by District Court records that include the Indictment on which Petitioner stood trial (I.G. Ex. 4), the District Court's Criminal Docket sheet (I.G. Ex. 5), by which the overall history of the prosecution was recorded, and the District Court's Judgment in a Criminal Case (I.G. Ex. 3), upon which the details of Petitioner's sentence appear. While it is true, as Petitioner asserts and the District Court's records confirm (I.G. Ex. 5, at 11), that an appeal of the conviction is pending, section 1128(i)(1) of the Act directly addresses the matter by including in its definition of conviction cases "when a judgment of conviction has been entered against the individual . . . by a Federal . . . court, regardless of whether there is an appeal pending . . . ."

The second essential element, the relation of Petitioner's criminal conviction to the delivery of items or services under the Medicare program, appears in detailed recitations throughout I.G. Ex. 4. Those recitations explicitly and in punctilious detail describe how Petitioner billed Medicare for mental-health services neither she nor DNMA provided as described, by the use of false professional credentials, false provider identification numbers, and stolen patient-identity data including patients' birth-dates, Social Security numbers, and Medicare numbers. The submission of false claims to the Medicare and Medicaid programs has been consistently held to be a program-related crime within the reach of section 1128(a)(1). *Jack W. Greene*, DAB No. 1078 (1989), *aff'd sub nom. Greene v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990); *Julius Williams, III*, DAB CR1464 (2006); *Kennard C. Kobrin*, DAB CR1213 (2004); *Norman Imperial*, DAB CR833 (2001); *Egbert Aung Kyang Tan, M.D.*, DAB CR798 (2001); *Lorna Fay Gardner*, DAB CR648*, aff'd* DAB No. 1733 (2000); *Mark Zweig, M.D.*, DAB CR563 (1999); *Alan J. Chernick, D.D.S.*, DAB CR434 (1996). The required nexus and common-sense connection between the crimes of which Petitioner was convicted and the Medicare program is present here as a matter of fact. *Berton Siegel, D.O.*, DAB No. 1467 (1994).

The basis of Petitioner's resistance to the proposed exclusion is not always well-organized or articulated clearly, but the heart of it is that she protests her innocence of crime and denies the truth of the charges, the correctness of the verdict, and the validity of

the judgment of conviction in the United States District Court. Her reasons and arguments provide no support for her position in this forum. Any form of collateral attack on predicate convictions in exclusion proceedings is precluded by regulation at 42 C.F.R. § 1001.2007(d), and that preclusion has been affirmed repeatedly by the Departmental Appeals Board (Board). *Lyle Kai, R.Ph.*, DAB No. 1979 (2005); *Susan Malady, R.N.,* DAB No. 1816 (2002); *Dr. Frank R. Pennington, M.D.*, DAB No. 1786 (2001); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Paul R. Scollo, D.P.M.*, DAB No. 1498 (1994); *Chander Kachoria, R.Ph.*, DAB No. 1380 (1993).

Petitioner appears here *pro se*. Because of that fact I have taken additional care in reading her two briefs. In doing so, 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); *see Mark K. Mileski*, DAB No. 1945 (2004). I have searched them for any arguments or contentions that might go beyond a collateral attack on the District Court proceedings and raise a valid, relevant defense to the proposed exclusion. That search has been unproductive. I have found nothing that could be so construed.

Once a predicate conviction within the scope of section 1128(a) has been proven, exclusion for the minimum period of five years is mandatory. *Mark K. Mileski*, DAB No. 1945; *Salvacion Lee, M.D.*, DAB No. 1850 (2002); *Lorna Fay Gardner*, DAB No. 1733. The period of exclusion may be enhanced to more than five years if the I.G. proves the existence of certain aggravating factors listed at 42 C.F.R. § 1001.102(b)(1)-(9). In this case the I.G. has asserted the presence of three aggravating factors.

The first aggravating factor on which the I.G. relies is present when "[t]he acts resulting in the conviction, or similar acts . . . caused . . . a financial loss to a Government program . . . of $5,000 or more." 42 C.F.R. § 1001.102(b)(1). Petitioner was ordered to pay $278,507.05 in restitution to The Centers for Medicare and Medicaid Services as part of her sentence. I.G. Ex. 3, at 5. The law of this forum supports reliance on this adjudicated amount of restitution as *prima facie* proof of the amount of loss. *Thomas D. Harris*, DAB No. 1881 (2003); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003). But here it is unnecessary to rely on the amount of restitution as the only expression of the total loss caused by Petitioner's crimes, for the District Court's Judgment in a Criminal Case sets that amount out explicitly as the "Total Loss" in that case. That substantial and uncontested sum satisfies the requirement of 42 C.F.R. § 1001.102(b)(1). The I.G. has established this first aggravating factor.

The second aggravating factor asserted by the I.G. is specified at 42 C.F.R. § 1001.102(b)(2). That factor is present if "[t]he acts that resulted in the conviction, or similar acts, were committed over a period of one year or more." The Indictment on which Petitioner stood trial and was convicted precisely as charged demonstrates the factor. The first lines of Paragraph 14 of that Indictment read: "From on or about July 10, 1997 to on or about June 14, 2002, defendant DEBORAH MORRIS knowingly and willfully executed, or attempted to execute, a scheme or artifice to defraud the Medicaid program . . ." I.G. Ex. 4, at 3. The earliest false claim Petitioner submitted in execution of her scheme was dated February 6, 2001, and the latest was dated February 18, 2002. I.G. Ex. 4, at 9-10. The Indictment's final count charged that as part of her scheme, Petitioner testified falsely at her Medicare Enrollment hearing on June 14, 2002. I.G. Ex. 4, at 16. Petitioner's conviction as charged is sufficient to demonstrate the 59-month span of her crimes. The I.G. has established this second aggravating factor.

The third aggravating factor relied on by the I.G. is specified at 42 C.F.R. § 1001.102(b)(5). The I.G. alleges that Petitioner's sentence included incarceration. The court records are plain that Petitioner was sentenced to a prison term of 60 months. I.G. Ex. 3, at 2. She is serving it now. The I.G. has established this third aggravating factor.

Petitioner has made no attempt explicitly to assert the existence of any of the mitigating factors. Without disregard of the rule that assigns to her the burden of proving any mitigating factor by a preponderance of the evidence, I have extended that "extra measure of consideration" to searching everything submitted in this case for any suggestion that one or more of those mitigating factors might be brought into consideration. That search has revealed nothing that suggests any claim in mitigation. Since Petitioner was convicted of 49 felonies, 42 C.F.R. § 1001.102(c)(1) does not apply. Petitioner does not argue that her conduct in connection with the events in the criminal case was affected by a mental, emotional, or physical condition that led to her reduced culpability at the time of those events. No entries based on 18 U.S.C. §§ 4241 or 4242 appear in the District Court's Criminal Docket, nor does any notice related to FED. R. CRIM. P. 12.2. I.G. Ex. 5. Thus, 42 C.F.R. § 1001.102(c)(2) cannot be brought into consideration. And there is nothing in this evidence that points to her productive cooperation with official investigations of health care fraud, thereby invoking the mitigating factors set out at 42 C.F.R. § 1001.102(c)(3).

The I.G.'s discretion in weighing the importance of aggravating and mitigating factors in exclusion cases commands great deference when reviewed by Administrative Law Judges (ALJs). *Jeremy Robinson*, DAB No. 1905 (2004); *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); *Stacy Ann Battle, D.D.S., et al.*, DAB No. 1843 (2002). That deference requires that the ALJ not substitute her or his own view of what period of exclusion might be suitable in any given case for the view of the I.G. on the same evidence. In general,

the Board has insisted that ALJs may reduce an exclusionary period only when they discover some significant evidentiary failing in the aggravating factors upon which the I.G. relied, or when they discover evidence reliably establishing a mitigating factor not considered by the I.G. in setting the enhanced period. *Jeremy Robinson*, DAB No. 1905.

Where, as here, all of the aggravating factors on which the I.G. relied are present and there are no mitigating factors, a holding that the exclusion period chosen by the I.G. was unreasonable could be reached only through a substitution of views that the doctrine of deference forbids. The only question now before me is whether the exclusion period is within a reasonable range. In the instant case, the proposed 15-year period is commensurate with the range established as reasonable in *Russell Mark Posner*, DAB No. 2033 (2006); *Stacey R. Gale*, DAB No. 1941 (2004); *Jeremy Robinson*, DAB No. 1905; *Thomas D. Harris*, DAB No. 1881; *Fereydoon Abir, M.D.*, DAB No. 1764 (2001); *Joann Fletcher Cash*, DAB No. 1725; *Lawrence J. White, D.D.S.*, DAB CR1584 (2007); *Russell J. Ellicott, D.P.M.*, DAB CR1552 (2007); and *Stanley Junious Benn*, DAB CR1501 (2006).

Resolution of a case by summary disposition is appropriate when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *Michael J. Rosen, M.D.*, DAB No. 2096; *Thelma Walley*, DAB No. 1367. 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). The material facts in this case are undisputed, clear, and unambiguous. They support summary disposition as a matter of law. This Decision issues accordingly.

VI. Conclusion

For the reasons set out above, the I.G.'s Motion for Summary Affirmance should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Deborah Morris from participation in Medicare, Medicaid, and all other federal health care programs for a period of 15 years, pursuant to the terms of section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), is thereby affirmed.

/s/
Richard J. Smith
Administrative Law Judge