Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Muhammad Bajwa,
(O.I. File No.: 2-07-40751-9)

Petitioner,

v.

The Inspector General.

Docket No. C-12-76

Decision No. CR2520

Date: March 28, 2012

DECISION

This matter is before me in review of the Inspector General's (I.G.'s) determination to exclude Petitioner *pro se* Muhammad Bajwa from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years. The I.G.'s determination is based on the terms of section 1128(a)(3) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(3). The undisputed material facts of this case mandate the imposition of a five-year exclusion. Accordingly, I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

In the summer of 2007, Petitioner Muhammad Bajwa and several others devised and carried out a scheme to solicit and collect bribes and kickbacks by steering medical patients to certain facilities for diagnostic testing.

Authorities learned of this activity, and on February 25, 2009 the Federal Grand Jury sitting for the United States District Court for the Eastern District of New York handed up a Superseding Indictment charging Petitioner and three others with three felonies, including in Count Two of the Superseding Indictment the felony offense of Soliciting

and Receiving Remuneration in Connection with Federal Health Care Programs, in violation of 42 U.S.C. § 1320a-7(b)(1)(B) and 18 U.S.C. §§ 2 and 3551. Represented by counsel, Petitioner reached a plea agreement with the United States on September 4, 2009. By the terms of that agreement Petitioner pleaded guilty to Count Two of the Superseding Indictment. Although the date of the guilty plea does not appear in the record before me, it is clear that Petitioner's plea was accepted: on December 17, 2010, Petitioner appeared with counsel in the United States District Court and was sentenced to a four-month term of imprisonment followed by a three-year term of supervised probation, and was assessed $100.

As required by the terms of 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. On August 31, 2011, the I.G. notified Petitioner that he was being excluded pursuant to the terms of section 1128(a)(3) of the Act for the mandatory minimum period of five years.

Acting *pro se*, Petitioner timely sought review of the I.G.'s action by letter dated October 26, 2011. I convened a telephonic prehearing conference on November 16, 2011, 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 November 17, 2011, I established a schedule for the submission of documents and briefs. All briefing is now complete, and the record in this case closed on March 6, 2012.

There are four exhibits in this case. The I.G. proffered four exhibits marked I.G. Exhibits 1 through 4 (I.G. Exs. 1-4), and they are admitted without objection. Petitioner proffered no exhibits of his own. His October 26, 2011 request for hearing was accompanied by an attached document, but by the explicit terms of paragraph 7 of the Order of November 17, 2011, that document is not part of the evidentiary record on which I decide this case.[1]

II. Issues

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

[1] This document appears to be the first page of a Certificate of Relief from Disabilities awarded to Petitioner by an official of the State of New York. If it were part of the record before me, it would not alter my decision, since it purports to relieve Petitioner only of the consequences of his conviction imposed by the laws of the State of New York. It cannot affect this exclusion based on federal law. *Janet Wallace, L.P.N.*, DAB No. 1326 (1992); *see also Desaline Gittens*, DAB CR2404 (2011), at 7, n.4.

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)(3) of the Act; and

2. 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)(3) of the Act. A five-year term of exclusion is the minimum established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B), and is therefore not unreasonable.

III. Controlling Statutes and Regulations

Section 1128(a)(3) of the Act, 42 U.S.C. § 1320a-7(a)(3), 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, 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 [section 1128(a)](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 related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." The terms of section 1128(a)(3) are restated in similar language at 42 C.F.R. § 1001.101(c).

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

An exclusion based on section 1128(a)(3) 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). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision.

IV. Findings and Conclusions

I find and conclude as follows:

1. On his accepted plea of guilty in the United States District Court for the Eastern District of New York, Petitioner Muhammad Bajwa was found guilty of one felony count

of Soliciting and Receiving Remuneration in Connection with Federal Health Care Programs, in violation of 42 U.S.C. § 1320a-7(b)(1)(B). I.G. Exs. 2, 3, 4.

2. Judgment of conviction was entered against Petitioner and he was sentenced on his guilty plea in the United States District Court on December 17, 2010. I.G. Ex. 4.

3. The judgment of conviction, finding of guilt, and accepted pleas of guilty described above in Findings 1 and 2 constitute a "conviction" within the meaning of sections 1128(a)(3) and 1128(i)(1), (2), and (3) of the Act, and 42 C.F.R. § 1001.2.

4. There is a nexus and a common-sense relationship between the felony offenses of which Petitioner was convicted, as noted above in Findings 1, 2, and 3 above, and fraud and financial misconduct in connection with the delivery of a health care item or service. I.G. Exs. 2, 3, 4.

5. Petitioner's conviction as noted above in Findings 1, 2, 3, and 4 constitutes a basis for the I.G.'s exclusion of Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. Act § 1128(a)(3); 42 U.S.C. § 1320a-7(a)(3).

6. The five-year period of Petitioner's exclusion is the mandatory minimum period provided by law, and is therefore not unreasonable. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2).

7. 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 four essential elements necessary to support an exclusion based on section 1128(a)(3) of the Act are: (1) the individual to be excluded must have been convicted of a felony offense; (2) the felony offense must have been based on conduct relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the felony offense must have been for conduct in connection with the delivery of a health care item or service, *or* the felony offense must have been with respect to any act or omission in a health care program operated by or financed in whole or in part by any federal, state, or local government agency; and (4) the felonious conduct must have occurred after August 21, 1996. *Kevin J. Bowers*, DAB No. 2143 (2008); *Andrew D. Goddard*, DAB No. 2032 (2006); *Kenneth M. Behr*, DAB No. 1997 (2005); *Erik D. DeSimone, R.Ph.*, DAB No. 1932 (2004); *Jeremy Robinson*, DAB No. 1905 (2004); *see also Breton Lee Morgan, M.D.*, DAB No. 2264 (2009).

Petitioner does not deny that he was convicted of the felony offense described in Count Two of the Superseding Indictment and does not dispute that his felonious conduct occurred after August 21, 1996. He does not dispute the relation of the conduct underlying his conviction to fraud or financial misconduct, and does not deny that his criminal conduct occurred in connection with the delivery of a health care item or service. Petitioner's Answer Brief at 1. Thus, there appears to be no challenge to the I.G.'s proof of the essential elements set out above. I find that the I.G. has proven those elements. I.G. Exs. 2, 3, 4.

Petitioner's sole argument in this appeal is an effort to minimize the seriousness of his offense and his role in the broader scheme, and thereby to reduce or avoid entirely the five-year period of exclusion. The five-year period of exclusion proposed in this case is the minimum required by section 1128(c)(3)(B) of the Act. As a matter of law it is not unreasonable, and neither the Board nor I can reduce it. 42 C.F.R. § 1001.2007(a)(2); *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002).

Petitioner appears here *pro se.* 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 Petitioner's pleadings for any contentions that might raise a valid defense to the I.G.'s Motion, but have found nothing that could be so construed.

Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts. *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 and unambiguous. They support summary disposition as a matter of settled law. The Decision issues accordingly.

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 Muhammad Bajwa from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years, pursuant to the terms of section 1128(a)(3) of the Act, is sustained.

/s/
Richard J. Smith
Administrative Law Judge