Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	Date: May 19, 2008
Tony R. Franklin, Ph.D.,	)	
	)	Docket No. C-08-40
Petitioner,	)	Decision No. CR1791
	)	
-v.-	)	
	)	
The Inspector General.	)	

DECISION

Petitioner, Tony R. Franklin, Ph.D., is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (the Act) (42 U.S.C. § 1320a-7(a)(1)), effective September 20, 2007, based upon his conviction of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. There is a proper basis for exclusion. Petitioner's exclusion for the minium period of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)). The presence of aggravating factors and no mitigating factors warrant extending the period of exclusion by five years for a total period of exclusion of ten years and that period is not unreasonable.

I. Background

The Inspector General for the Department of Health and Human Services (the I.G.) notified Petitioner by letter dated August 31, 2007, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of ten years,[1] pursuant to section 1128(a)(1) of the Act. The basis cited for

[1] Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

Petitioner's exclusion was his conviction in the U.S. District Court, Western District of Tennessee, Eastern Division, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. *See* Act, section 1128(a)(1); 42 U.S.C. § 1320a-7(a)(1); 42 C.F.R. § 1001.101(a).

Petitioner timely requested a hearing by letter dated October 10, 2007. The case was assigned to me for hearing and decision on November 21, 2007. On December 3, 2007, I convened a prehearing telephonic conference, the substance of which is memorialized in my Order dated December 4, 2007. During the prehearing conference, the parties agreed that this case may be decided upon the written submissions and agreed to waive the right to an oral hearing. I established a briefing schedule to which the parties agreed.

The I.G. filed his opening brief (I.G. Brief) on January 17, 2008, with I.G. Exhibits (I.G. Exs.) 1 through 4. Petitioner filed his undated brief in response (P. Brief) and it was received at the Civil Remedies Division (CRD) on March 17, 2008. Petitioner attached to his four-page response various documents that were not marked as exhibits, contrary to CRD procedures. I have marked the documents attached to Petitioner's submission as Petitioner's Exhibit (P. Ex.) 1 and I have numbered the pages consecutively 1 through 31. The I.G. filed a reply brief (I.G. Reply) on April 25, 2008. No objection has been made to the admissibility of any of the proposed exhibits and I.G. Exs. 1 through 4 and P. Ex. 1 are admitted.

II. Discussion

A. Findings of Fact

The following findings of fact are based upon the uncontested and undisputed assertions of fact in the pleadings and the exhibits admitted. Citations may be found in the analysis section of this decision if not included here.

1. The I.G. notified Petitioner by letter dated August 31, 2007, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for ten years, pursuant to section 1128(a)(1) of the Act.

2. Petitioner timely requested a hearing by letter dated October 10, 2007.

3. On January 16, 2007, Petitioner was convicted in the U.S. District Court, Western District of Tennessee, Eastern Division, of health care fraud in violation of 18 U.S.C. § 1347. I.G. Ex. 2, at 1.

4. On April 16, 2007, Petitioner was sentenced to confinement for five months, followed by supervised release for three years, and to pay total restitution of $63,332.14. I.G. Ex. 2, at 1, 3-4, 6.

5. Petitioner's misconduct occurred from June 11, 2001 to November 26, 2003.

B. Conclusions of Law

1. Petitioner's request for hearing was timely and I have jurisdiction.

2. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program within the meaning of section 1128(a)(1) of the Act.

3. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act.

4. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is five years and that period is presumptively reasonable.

5. Aggravating factors have been shown in this case.

6. Petitioner was sentenced to incarceration.

7. Petitioner's criminal offense resulted in loss to the government of $5000 or more.

8. Petitioner's misconduct occurred over a period of greater than one year.

9. No mitigating factors have been shown in this case.

10. The ten-year period of exclusion imposed by the I.G. is not unreasonable.

C. Issues

The Secretary of the Department of Health and Human Services (the Secretary) has by regulation limited my scope of review to two issues:

> Whether there is a basis for the imposition of the exclusion; and,

Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

D. Applicable Law

Petitioner's right to a hearing by an ALJ and judicial review of the final action of the Secretary is provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). Petitioner's request for a hearing was timely filed and I do have jurisdiction.

Pursuant to section 1128(a)(1) of the Act, the Secretary must exclude from participation in the Medicare and Medicaid programs any individual convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Pursuant to section 1128(i) of the Act, an individual is convicted of a criminal offense when: (1) a judgment of conviction has been entered against him or her in a federal, state, or local court whether an appeal is pending or the record of the conviction is expunged; (2) when there is a finding of guilt by a court; (3) when a plea of guilty or no contest is accepted by a court; or (4) when the individual has entered into any arrangement or program where judgment of conviction is withheld.

Congress specified in section 1128(c)(3)(B) of the Act that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years may mitigating factors be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

E. Analysis

1. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act.

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides:

> (a) MANDATORY EXCLUSION. – The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):

> (1) Conviction of program-related crimes. – 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.

The statute requires the Secretary to exclude from participation any individual or entity: (1) convicted of a criminal offense; (2) where the offense is **related** to the delivery of an item or service; and (3) the delivery of the item or service was under Medicare or a state health care program. Petitioner does not dispute that he was convicted of a criminal offense within the meaning of section 1128(i) of the Act. Petitioner also does not dispute that the conviction was related to the delivery of an item or service under Medicare or a state health care program. Petitioner agrees that the exclusion is supported based upon his felony conviction of one count of health care fraud. P. Brief at 2, para. 3.

The evidence shows that on January 16, 2007, Petitioner was found guilty pursuant to his plea to Count 1 of a superseding indictment that alleged Health Care Fraud, a violation of 18 U.S.C. § 1347. The judgment indicates that the offense concluded on January 11, 2001. I.G. Ex. 2, at 1. On April 16, 2007, Petitioner was sentenced to confinement for five months followed by supervised release for three years. I.G. Ex. 2, at 1, 3-4. Petitioner was also ordered, as part of his sentence, to pay total restitution of $63,332.14. I.G. Ex. 2, at 6. Pursuant to his plea agreement the remaining counts of the superseding indictment were dismissed. I.G. Ex. 4, at 4.

Petitioner explains that he did not intend to commit fraud and that the basis for the criminal allegations against him resulted from mistakes. He indicates that he accepted a plea arrangement as he was out of money to defend himself in court. P. Brief at 1-3. However, Petitioner indicates that he accepts responsibility for his conduct and his conviction. I understand that his argument is not an attempt to attack his conviction but rather to offer an explanation. Even if, Petitioner intended to challenge his conviction, the law is clear that where the basis for an exclusion is the existence of a criminal conviction I may not review the basis for the conviction, and Petitioner may not collaterally attack the conviction on either procedural or substantive grounds. 42 C.F.R. § 1001.2007(d).

I conclude that there is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act.

2. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is five years.

Petitioner does not dispute that the minimum period of an exclusion pursuant to section 1128(a)(1) is five years, as mandated by section 1128(c)(3)(B), due to his conviction of one count of health care fraud. P. Brief at 2, para. 3. I have found there is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) and he must be excluded for the minimum period of five years.

3. Exclusion for a minimum period of five years is mandated by the Act and extension of the period of exclusion by five years, for a total period of ten years, is not unreasonable in this case.

The I.G. states that the period of exclusion in this case was extended by five years based on the presence of three aggravating factors: (1) restitution of $63,332.14 payable to the federal health care program, reflecting that amount of damages to the program; (2) conduct spanning more than eight years; and (3) incarceration. I.G. Brief at 1-2, 10-11.

Section 1001.102(b) of 42 C.F.R. establishes the aggravating factors which may be considered to increase a period of exclusion beyond the statutory minimum of five years. The aggravating factors applicable to this case based upon the allegations for the I.G. are: loss to the government of $5000 or more; the acts that resulted in conviction occurred over a period of one year or more; and the sentence included incarceration. 42 C.F.R. §§ 1001.102(b)(1), (2), and (5). Petitioner does not deny that he was sentenced to incarceration, that he was ordered to pay more than $5000 in restitution, or that the amount of restitution ordered reflects that his misconduct resulted in a loss to the government or $5000 or more. Petitioner does dispute the I.G. allegation that the conduct for which he was convicted spanned from 1996 until 2004.[2] However, Petitioner admits

[2] The I.G. allegation is based upon the superseding indictment. I.G. Ex. 3. Generally, charging documents such as an information, a complaint, and an indictment must be supported by evidence only amounting to "probable cause." A higher standard of proof is applicable in this case. The I.G. is obliged to show an aggravating factor by a preponderance of the evidence. 42 C.F.R. §§ 1005.15(b)(2) and (d). Thus, the indictment alone is insufficient proof of the existence of an aggravating factor when contested by the Petitioner. Neither the judgment (I.G. Ex. 2) nor the plea agreement (I.G. Ex. 4) provide any details of the offense to which Petitioner pled guilty. The I.G. did not provide a transcript of the plea providence inquiry, which might have provided the additional evidence.

that the first incident of incorrect billing was June 11, 2001 and the last November 26, 2003, which is more than one year and sufficient to establish the aggravating factor. P. Brief at 2.

Section 1001.102(c) of 42 C.F.R. provides that only if any of the aggravating factors justify a period of exclusion longer than five years may mitigating factors be considered as a basis for reducing the period of the exclusion to no less than five years. The following factors may be considered as mitigating and a basis for reducing the period of exclusion:

> (1) [t]he individual or entity was convicted of 3 or fewer misdemeanor offenses, and the entire amount of financial loss to Medicare and the State health care programs due to the acts that resulted in the conviction, and similar acts, is less than $1500; (2) [t]he record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional, or physical condition before or during the commission of the offense that reduced the individual's culpability; or (3) [t]he individual's or entity's cooperation with Federal or State officials resulted in – (i) [o]thers being convicted or excluded from Medicare, Medicaid, or all other Federal health care programs, (ii) [a]dditional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or (iii) [t]he imposition against anyone of a civil money penalty or assessment under part 1003 of this chapter.

Evidence which does not relate to an aggravating factor or a mitigating factor is irrelevant to determining the length of an exclusion. The burden is upon Petitioner to show the presence of mitigating factors. The I.G. bears the burden of proving the existence of aggravating factors. 42 C.F.R. § 1005.15; *John (Juan) Urquijo*, DAB No. 1735 (2000).

Petitioner does not argue in his brief that any of the mitigating factors permitted by the regulation are present in his case. His exhibit includes his personal statement (P. Ex. 1, at 1-3); his resume and curriculum vitae (P. Ex. 1, at 4-9, 11-14); a letter dated February 22, 2008, which states his work schedule (P. Ex. 1, at 10); copies of his Tennessee and Alabama licenses as a psychologist, valid through February 28, 2010 and October 15, 2008, respectively (P. Ex. 1, at 15); his statement to the Tennessee Board of Examiners in Psychology dated June 6, 2007 (P. Ex. 1, at 16-18); his statement to the President of the United States dated June 6, 2007 (P. Ex. 1, at 19-22); and letters of support to various addressees (P. Ex. 1, at 23-31). Petitioner's evidence reflects honorable service to his country and to his community. Petitioner's evidence also reflects health problems that

may have contributed to the conduct for which he was prosecuted and convicted. However, my discretion is limited to consideration of only those mitigating factors described in the regulation. I have carefully reviewed the evidence and I cannot find that any mitigating factor permitted to be considered has been shown to exist in this case.

The Departmental Appeals Board (the Board) has made clear that the role of the ALJ in cases such as this is to conduct a "*de novo*" review as to the facts related to the basis for the exclusion and the facts related to the existence of aggravating and mitigating factors identified at 42 C.F.R. § 1001.102. *See Joan Fletcher Cash*, DAB No. 1725 (www.hhs.gov/dab/decisions/dab1725.html) (2000), n.6 (n.9 in the original decision and West Law™), and cases cited therein. The regulation specifies that I must determine whether the length of exclusion imposed is "unreasonable" (42 C.F.R. § 1001.2007(a)(1)). The Board has explained that in determining whether a period of exclusion is "unreasonable," I am to consider whether such period falls "within a reasonable range." *Cash*, DAB No. 1725, n.6. The Board cautions that whether I think the period of exclusion too long or too short is not the issue. I am not to substitute my judgment for that of the I.G. and may only change the period of exclusion in limited circumstances. In *Urquijo,* the Board made clear that if the I.G. considers an aggravating factor to extend the period of exclusion and that factor is not later shown to exist on appeal, or if the I.G. fails to consider a mitigating factor that is shown to exist, then the ALJ may make a decision as to the appropriate extension of the period of exclusion beyond the minimum. *Urquijo*, DAB No. 1735. In *Gary Alan Katz, R.Ph.*, DAB No. 1842 (2002), the Board suggests that when it is found that an aggravating factor considered by the I.G. is not proved before the ALJ, then some downward adjustment of the period of exclusion should be expected absent some circumstances that indicate no such adjustment is appropriate. The *Katz* panel did not elaborate upon the weight to be given individual aggravating factors, or how my *de novo* review and assessment of the weight to be given to proven aggravating factors is related to the weight the I.G. assigned those same factors.

Pursuant to the Act and the regulations, where there is a basis for a mandatory exclusion under section 1128(a) of the Act, there is an automatic exclusion for a minimum period of five years. Act, section 1128(c)(3)(B); 42 C.F.R. § 1001.102(a). Pursuant to 42 C.F.R. § 1001.102(d), one prior conviction for conduct that would cause mandatory exclusion under section 1128(a) of the Act increases the minimum period of exclusion to ten years and two prior convictions automatically causes permanent exclusion. The five-year and ten-year minimum exclusions may only be extended if one or more of the aggravating factors specified at 42 C.F.R. § 1001.102(b) are present. The regulations do not limit the additional period of exclusion that may imposed based upon the presence of aggravating factors. The regulations also do not specify how much of an extension is warranted by

the existence of an aggravating factor. The Board has indicated that it is not the number of aggravating factors that is determinative; rather, it is the quality of the circumstances, whether aggravating or mitigating, which is controlling in analyzing these factors. *Barry D. Garfinkel, M.D.*, DAB No. 1572 (1996).

In this case, the evidence does not show that the I.G. considered an aggravating factor that did not exist or failed to consider a mitigating factor that did exist. Considering all the evidence, I conclude that exclusion for the mandatory five years with an extension of five years, a minimum exclusion totaling ten years, is not unreasonable.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid and all federal health care programs for a period of ten years, effective September 20, 2007, 20 days after the August 31, 2007 I.G. notice of exclusion.

/s/
Keith W. Sickendick
Administrative Law Judge