

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Kailash C. Singhivi, M.D.,)	Date: August 2, 2007
)	
Petitioner,)	
)	
- v. -)	Docket No. C-07-273
)	Decision No. CR1632
The Inspector General.)	
_____)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Kailash C. Singhivi, M.D., from participation in Medicare, Medicaid, and all federal health care programs, as defined in section 1128B(f) of the Social Security Act (Act), for a period of five years.

I. Background

Petitioner is a physician practicing in the State of New York. On December 29, 2006, the I.G. notified Petitioner that he was being excluded, effective January 18, 2007, for a period of five years, from participating in Medicare and all other federally funded health care programs. The I.G. advised Petitioner that the exclusion was mandated by section 1128(a)(1) of the Act as a consequence of Petitioner's conviction of a criminal offense related to the delivery of an item or service under the program.

Petitioner requested a hearing by letter dated February 16, 2007, and the case was assigned to me for a hearing and decision. I held a pre-hearing conference by telephone on March 27, 2007. I advised the parties that it appeared that the case might be resolved based on their written submissions without an in-person hearing. The parties agreed.

The I.G. submitted a Motion for Summary Affirmance, with a supporting brief. The I.G. filed eight proposed exhibits which he identified as I.G. Exhibit (Ex.) 1 through I.G. Ex. 8. Petitioner then submitted an Opposition to the Inspector General Brief, with the I.G. then filing a Reply. With his brief Petitioner submitted an Order of Reinstatement of License, which I have designated as Petitioner (P.) Ex. 1. Neither party has objected to my receiving any of these exhibits into evidence. Therefore, I receive into evidence I.G. Ex. 1 through I.G. Ex. 8 and P. Ex. 1.

II. Issue

The parties agree that the I.G. has a basis upon which to exclude Petitioner from participation in Medicare, Medicaid, and all federal health care programs for a period of five years, leaving before me the sole issue of the timing of the imposition of the exclusion.

III. Applicable Statutory and Regulatory Background

Section 1128(a)(1) requires that the Secretary of Health and Human Services (Secretary) exclude an individual who has been convicted under federal or state law of a criminal offense relating to the delivery of an item or service under Medicare or a state health care program.¹ Individuals excluded under section 1128(a)(1) must be excluded for a period of not less than five years. Act, section 1128(c)(3)(B). On appeal of an exclusion to an ALJ, the only issues that can be raised are whether there is a basis for the exclusion and whether the length of the exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(1).

IV. Discussion

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading. I discuss each finding in detail.

¹ The term “state health care program” includes a state’s Medicaid program. Section 1128(h)(1) of the Act; 42 U.S.C. § 1320a-7(h)(1).

1. Petitioner was convicted of a criminal offense that warrants a five-year exclusion pursuant to section 1128(a)(1) of the Act.

On August 27, 2001, Petitioner pleaded guilty in the United States District Court for the Southern District of New York of one count each of health care fraud and payment of kickbacks, and two counts of conspiracy. I.G. Ex. 4, at 6-7.

Petitioner's sentencing hearing took place in District Court on April 19, 2006. I.G. Ex. 6. He was sentenced to time served and required to forfeit \$1,605,000 in restitution to the United States, and pay \$5,400 in fines and assessments. I.G. Ex. 7.

Petitioner does not dispute that he was convicted of crimes that trigger the imposition of the minimum mandatory five-year period of exclusion. Accordingly, I find that the I.G. had the authority to exclude Petitioner for five years from participation in Medicare, Medicaid, and other federal health care programs.

2. I do not have the authority to review the timeliness of the I.G.'s imposition of an exclusion.

After his conviction in 2001, Petitioner thereafter surrendered his licenses to practice medicine in New York, New Jersey, and Texas. I.G. Ex. 4, at 18. Effective December 3, 2002, Petitioner was excluded from participation in the New York state Medicaid program based on the surrender of his medical license. I.G. Ex. 5. As discussed above, Petitioner was sentenced on April 16, 2006, and the I.G. notified Petitioner on December 29, 2006, that he was being excluded for a period of five years.²

² In the record of the proceedings before me there does not appear to be a clear indication as to why there was a delay in the imposition of sentence in Petitioner's criminal case (except as explained below). I note, however, that section 1128(a) of the Act mandates that the Secretary exclude from participation in any federal health care program individuals and entities convicted of program related crimes. The statute directs the Secretary to exclude certain individuals and entities, but is silent as to when such exclusion is to take place. It merely establishes "conviction" as a condition precedent to the Secretary's exclusion action. On the other hand, the promulgating regulations provide at 42 C.F.R. § 1001.102 that an exclusion imposed [under section 1128(a) of the Act] shall not be for less than five years. This regulation further provides that, if certain aggravating factors that justify an exclusion for longer than five years are found to be present in the case, the Secretary may then take into consideration specific mitigating factors to reduce the exclusion period to no less than five years. It is also worthy of note that certain of these aggravating and mitigating factors do not become evident until such

Petitioner maintains that the only issue presented here is the timeliness of the I.G.'s determination to exclude him. Petitioner questions why the I.G. did not exclude him either after his conviction in August 2001, or after the surrender of his medical licenses later in that year, or after he was excluded from the New York state Medicaid program in 2002. Petitioner inquires why the I.G. waited nearly five years after his guilty plea to exclude him when it clearly had the authority and opportunity to exclude him at a much earlier date. If the I.G. had done so, Petitioner contends, his period of exclusion would be nearing its end. Petitioner argues that the net effect of the I.G.'s action is that he will be excluded from participation in federal health care programs to 2012, some 10 years after he surrendered his medical licenses. Petitioner refers to the thousands of hours of community services he performed after the surrender of his licenses and his cooperation with authorities in the investigation of others involved in fraudulent activities. In the light of such rehabilitative behavior and cooperation, Petitioner considers the action of the I.G. to be unduly harsh, excessively punitive and highly prejudicial.

Notwithstanding the possible merits of Petitioner's arguments, I simply do not have the authority to grant the relief Petitioner is seeking. The timeliness of the I.G.'s imposition of an exclusion is not reviewable under the regulations. There is no statute of limitations governing the I.G.'s imposition of exclusion pursuant to section 1128(a)(1) of the Act. Equitable considerations aside, there is nothing in either the Act or regulations that would preclude the I.G. from excluding Petitioner when it excluded him.

time as the convicted individual or entity is sentenced. In this regard, I should point out that the convicted individual's or entity's cooperation with federal or state officials that result in others being convicted or excluded from Medicare, Medicaid, and all other federal health care programs, is considered under the regulations to be a mitigating factor that could offset the impact of aggravating factors. *See* 42.C.F.R. § 1001.102(c)(3). Pertinent to this is the reference in the sentencing transcript that Petitioner cooperated with federal law enforcement officials over a period of time prior to sentencing. I infer that Petitioner's cooperation played a role not only in the sentence imposed by the court, but also in the exclusion period imposed by the I.G., which in this case was limited to the minimum period mandated by law. I.G. Ex. 6, at 3, 5. This mitigating factor was not evident immediately upon conviction.

Petitioner's arguments amount to equitable claims given his failure to show that his exclusion is barred by a statute of limitations or by equivalent regulatory requirement.

This is not the proper forum for Petitioner to raise these arguments.³ I am without authority to consider these claims. Implementing regulations at 42 C.F.R. Parts 1001 and 1005 do not allow me to set aside an exclusion on grounds of fairness or untimeliness.

V. Conclusion

I sustain the determination of the I.G. to exclude Petitioner from participation in Medicare, medicaid, and other federal health care programs for a period of five years.

/s/

Jose A. Anglada
Administrative Law Judge

³ Two recent United States Districts Courts in Illinois have examined the question of the timeliness of the imposition of an exclusion and have reached varying conclusions. In *Connell v. Secretary of Health and Human Services*, Slip Copy, 2007 WL 1266575 (S.D.Ill.), the Court reversed an ALJ's affirmation of the I.G.'s exclusion of a pharmacist for five years pursuant to section 1128(a)(1) of the Act. The Court rejected the ALJ's finding that the I.G.'s timing of the exclusion was discretionary and therefore unreviewable. The Court remanded the case to the Secretary to evaluate the reasonableness of a 35-month delay between the pharmacist's criminal conviction and the imposition of his exclusion, directing the Secretary to consider the relevant circumstances, including the complexity of the issues considered, the volume of materials reviewed, any justification for delay, and the adverse impact on the pharmacist. *But see Sririam v. Leavitt*, No. 06 C 5738 (N.D. Ill. June 14, 2007), where the Court rejected an argument by a convicted physician that his five-year exclusion from federal health care programs was unreasonably delayed until after his sentencing, finding that the physician had expressly waived this argument before an ALJ and therefore could not resuscitate it before the Court.