Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Igal Staw, M.D.,	)	Date: July 20, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-172
	)	Decision No. CR1977
The Inspector General.	)	
	)	

DECISION

Petitioner, Igal Staw, M.D., is excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to sections 1128(a)(1) and 1128(a)(3) of the Social Security Act (Act) (42 U.S.C. §§ 1320a-7(a)(1), 1320a-7(a)(3)), effective November 20, 2008. Petitioner's exclusion for five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)) and an additional period of exclusion of five years, for a total minimum period of exclusion of ten years, is not unreasonable based upon the two aggravating factors in this case.[*]

I. Background

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated October 31, 2008, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum of ten years, pursuant to sections 1128(a)(1) and 1128(a)(3) of the Act. The I.G. advised Petitioner that the 1128(a)(1) exclusion was based on his conviction in the United States District Court, District of Connecticut, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program; and that the section 1128(a)(3) exclusion was based on Petitioner's conviction of the same offense – a felony conviction

[*] 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.

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. The I.G. further notified Petitioner that his exclusion would be for ten years based on the presence of two aggravating factors: (1) the loss to a government program of $5000 or more; and (2) the acts resulting in the conviction were committed over a period of one year or more.

Petitioner timely requested a hearing by letter dated December 29, 2008. Petitioner's request for hearing included six attachments marked A through F. The case was assigned to me on January 2, 2009, for hearing and decision. On January 28, 2009, I convened a prehearing telephonic conference, the substance of which is memorialized in my Order dated January 28, 2009.

The I.G. filed a motion for summary judgment and supporting brief on March 13, 2009 (I.G. Brief), with I.G. exhibits (I.G. Ex.) 1 through 7. On May 19, 2009, Petitioner filed his brief in opposition to the I.G.'s motion for summary judgment (P. Brief). Petitioner did not file any exhibits with his brief, but he refers to the exhibits that were attached to his request for hearing. On June 2, 2009, the I.G. filed a reply brief (I.G. Reply) with I.G. Ex. 8. No objections have been made to any of the offered exhibits and I.G. exhibits 1 through 8 and Petitioner's exhibits (P. Ex.) A through F are admitted as evidence.

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. On December 11, 2007, Petitioner entered into a plea agreement with the United States Attorney for the District of Connecticut, agreeing to plead guilty to a one-count information charging him with health care fraud in violation of Title 18 U.S.C. § 1347(l). I.G. Ex. 4.

2. Petitioner admitted as part of his plea agreement that the criminal acts that formed the basis of the charge occurred from on or about June 1, 2004 through on or about June 1, 2006. I.G. Ex. 4, at 7; I.G. Ex. 6, at 1.

3. On May 23, 2008, Petitioner was convicted, pursuant to his guilty plea, by the United States District Court, District of Connecticut of one count of health care fraud in violation of Title 18 U.S.C. § 1347(l). I.G. Ex. 7; P. Ex. B.

4. Petitioner was sentenced to two years probation and ordered to pay restitution of $171, 225.81 to private insurance companies, Medicare, and the state Medicaid program, each of which incurred a loss as a result of Petitioner's scheme. I.G. Ex. 6, at 2, 6-7; I.G. Ex. 7; P. Ex. B.

5. The loss to the federal Medicare program resulting from Petitioner's scheme was $9,808.96 and the loss to the Connecticut Medicaid program was $11,696.54. I.G. Ex. 6, at 6.

6. Petitioner does not deny that the charges to which he pled guilty arose from his work as a physician and his filing of claims for reimbursement to private health care insurers, Medicare, and Medicaid for physician office visits. I.G. Ex. 4.

7. The acts that resulted in Petitioner's conviction, or similar acts, resulted in financial loss of $5000 or more to a government program or to one or more entities.

8. The acts that resulted in conviction, or similar acts, were committed over a period of one year or more.

9. The I.G. notified Petitioner by letter dated October 31, 2008, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of ten years, based on the authority set out in sections 1128(a)(1) and 1128(a)(3) of the Act. I.G. Ex. 1; P. Ex. A.

B. Conclusions of Law

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

2. I have no jurisdiction to act upon Petitioner's request for waiver of his exclusion and the Secretary's decision as to whether waiver is appropriate is not reviewable.

3. There are no disputed issues of material fact and summary judgment is appropriate.

4. Petitioner was "convicted" within the meaning of section 1128(i) of the Act.

5. 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.

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

7. Petitioner was convicted of a felony criminal offense of fraud within the meaning of section 1128(a)(3) of the Act.

8. There is a "nexus" or "common sense connection" between the crime of which Petitioner was convicted and the delivery of a health care item or service, i.e., Petitioner used his status as a licensed physician to perpetrate a crime that involved false representations that services to patients were provided as medical treatments and services during physician office visits.

9. The crime of which Petitioner was convicted was committed after the effective date of the Health Insurance Portability and Accountability Act of 1996, August 21, 1996.

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

11. 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. *See also* 42 C.F.R. § 1001.102(a).

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

13. Petitioner's misconduct occurred over a period of one year or more.

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

15. Extension of Petitioner's period of exclusion by five years for a total minimum period of exclusion of ten years is not unreasonable.

16. A ten-year exclusion falls within a reasonable range.

17. Petitioner's exclusion began on November 20, 2008, the twentieth day after the October 31, 2008 I.G. notice of exclusion. 42 C.F.R. § 1001.2002(b).

C. Issues

The issues in this case are:

> Whether there is a basis for Petitioner's exclusion from Medicare and other federally funded health care programs and, if so;
>
> Whether a ten-year exclusion is unreasonable.

D. Applicable Law

Petitioner's right to a hearing by an administrative law judge (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 any federal health care program any individual 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. Section 1128(a)(3) requires the Secretary to exclude an individual convicted of a felony "relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct" in connection with the delivery of a health care item or service. *See also* 42 C.F.R. § 1001.101(a) and (c).

A "conviction" for purposes of exclusion pursuant to sections 1128(a)(1) and 1128(a)(3) occurs: (1) when a judgment of conviction is entered by a federal, state, or local court, whether or not an appeal is pending or expungement has been ordered; (2) when there is a finding of guilt by a federal, state, or local court; (3) when a plea of guilty or no contest is accepted by a federal, state, or local court; or (4) when the offender enters a first offender, differed adjudication, or similar program that involves withholding of a judgment of conviction. Act § 1128(i).

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act will be for a period of not less than five years. The Secretary has published regulations that establish aggravating factors that may be considered by the I.G. to extend the period of exclusion beyond the minimum five-year period and mitigating factors that must be considered if the minimum five-year period is extended. 42 C.F. R. § 1001.102(b) and (c).

The standard of proof is a preponderance of the evidence and there may be no collateral attack of the conviction that is the basis of the exclusion. 42 C.F.R. § 1001.2007(c) and (d). Petitioner bears the burden of proof and persuasion on any affirmative defenses and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(c).

E. Analysis

1. Summary judgment is appropriate in this case.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The right to hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. § 1005.2 and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified in 42 C.F.R. § 1005.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). The ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12). Summary judgment is appropriate and no hearing is required where either: there are no disputed issues of material fact and the only questions that must be decided involve application of law to the undisputed facts; or, the

moving party must prevail as a matter of law even if all disputed facts are resolved in favor of the party against whom the motion is made. A party opposing summary judgment must allege facts which, if true, would refute the facts relied upon by the moving party. *See, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Medical Clinic*, DAB No. 1763 (2001); *Everett Rehabilitation and Medical Center*, DAB No. 1628, at 3 (1997) (in-person hearing required where non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also, New Millennium CMHC*, DAB CR672 (2000); *New Life Plus Center*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case. Petitioner does not dispute that he was convicted of a felony criminal offense, that his offense involved delivery of a health care item or service under Medicare or a state health care program, that he was convicted of felony health care fraud, that his offenses occurred after August 21, 1996, or that his fraud was in connection with the delivery of a health care item or service under programs other than Medicare or Medicaid, financed in whole or in part by federal, state, or local government. Petitioner argues that his exclusion is "arbitrary and capricious" and that he should be granted a waiver. Request for Hearing; P. Brief at 1. Petitioner's arguments must be resolved against him as matters of law. Accordingly, summary judgment is appropriate.

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

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

The I.G. cites sections 1128(a)(1) and 1128(a)(3) 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.
>
> * * * *
>
> (3) FELONY CONVICTION RELATING TO HEALTH CARE FRAUD. ─ Any individual or entity that has been

> convicted of 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 relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

The evidence shows, and Petitioner does not deny, that he was convicted of an offense that satisfies the elements of both provisions of the Act. The following undisputed facts are taken from the one-count information charging Petitioner; Petitioner's plea agreement; and the government's sentencing memorandum. Petitioner, a physician licensed to practice medicine in Connecticut, owned and operated two medical practices, Respiratory Associates and Health Extenders. From on or about June 1, 2004 through on or about June 1, 2006, Petitioner knowingly executed a scheme to defraud Medicare, the Connecticut Medicaid Program, Blue Cross/Blue Shield, HealthNet and other private health insurers. Petitioner submitted claims to federal and state health care programs and private insurers for nutritional counseling sessions, for physical therapy sessions, and for massage therapy sessions that were falsely represented to be physician office visits. Petitioner received reimbursement for services that were not covered items or were reimbursable at a lower rate per claim. I.G. Ex. 3, at 1-4; I.G. Ex. 4; I.G. Ex. 6, at 1-2, 6-7. Petitioner was subsequently charged with one count of health care fraud in violation of Title 18 U.S.C. § 1347 to which he pled guilty in the United States District Court and he was sentenced to probation for two years and ordered to pay restitution in the amount of $171,225.81. I.G. Ex. 7.

The elements that trigger a mandatory exclusion pursuant to section 1128(a)(1) of the Act are: (1) conviction of a criminal offense, misdemeanor or felony; and (2) the criminal offense must have been related to the delivery of an item or service under Medicare or any state health care program. The elements that trigger a mandatory exclusion pursuant to section 1128(a)(3) of the Act are: (1) conviction of a felony offense of fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (2) the offense must have occurred after August 21, 1996; and (3) the acts for which convicted must have been in connection with the delivery of a health care item or service or any act or omission in a federal, state, or locally operated or financed health care program not subject to mandatory exclusion under section 1128(a)(1). Petitioner does not dispute that his conviction satisfies the elements of both. The offense to which he pled guilty was health care fraud. By his plea, Petitioner admitted that his offenses occurred as charged between 2004 and 2006, thus after August 21, 1996. He admitted that he submitted false or fraudulent claims to Medicare, the state Medicaid program, and to multiple private insurers. Petitioner does not deny that his offense was in connection with the delivery of

an item or service under Medicare, Medicaid, or other health care program financed in whole or part by a federal, state, or local health care program. Petitioner does not deny that he was convicted or that he was convicted of a felony.

Petitioner argues that the I.G.'s decision to exclude him is "arbitrary and capricious." Request for Hearing; P. Brief at 1. Petitioner cites as the basis for his assertion, the comments of the judge who sentenced Petitioner that he did not believe that Petitioner's "violation reflected the kind of moral turpitude exhibited by others he has sentenced in other unrelated cases" and that his license should not be adversely affected. P. Brief at 2-3; P. Ex. C, at 31-32. This argument is without merit. Congress specified in sections 1128(a)(1) and 1128(a)(3) that the Secretary "shall exclude" individuals convicted of an offense such as that committed by Petitioner. Congress specified in section 1128(c)(3)(B) that the minimum period of exclusion will be five years. Congress did not grant the Secretary discretion to do otherwise, with one narrow exception discussed hereafter. Thus, the sentencing judge's thoughts on the seriousness of Petitioner's offenses has no bearing upon and are simply not relevant to the issue of whether Petitioner will be excluded. Petitioner also argues that he has been competent and dedicated. P. Brief at 5-6. However, Congress also did not authorize the Secretary to consider competence and dedication when deciding whether or not to exclude.

Section 1128(c)(3)(B) of the Act grants the Secretary limited authority to waive the mandatory five-year exclusion for "the sole community physician or sole source of essential specialized services in a community" if the administrator of a federal health care program determines that exclusion would impose a hardship on individuals entitled to benefits under Medicare and requests waiver by the Secretary who may, after consultation with the Inspector General, grant the waiver. Petitioner implies that he should be granted a waiver, arguing that he has been "the sole source of essential specialized services" to a community that has been designated a Health Professional Shortage Area. P. Brief at 1, 4-9. Petitioner offers no evidence that the administrator of a federal health care program has made the determination required by the Act. Furthermore, I have no jurisdiction to either grant the waiver or review a decision to grant or deny a waiver. Petitioner has pointed to no authority indicating that I may exercise the waiver authority and the Act expressly provides that the Secretary's decision whether or not to waive is not subject to review. Act § 1128(c)(3)(B).

Accordingly, I conclude that there is a basis for Petitioner's exclusion pursuant to sections 1128(a)(1) and 1128(a)(3).

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

5. Aggravating factors exist that justify extending the period of exclusion to ten years.

6. No mitigating factors established by the regulations have been shown.

7. Exclusion for ten years is not unreasonable in this case.

I have found there is a basis for Petitioner's exclusion. Therefore, I must consider whether a ten-year exclusion falls within a reasonable range.

a. Two aggravating factors justify lengthening the period of exclusion beyond the five-year statutory minimum.

The statute mandates a five-year minimum exclusion. Act § 1128(c)(3)(B). The Secretary has provided by regulation that the period of exclusion may be extended based on the presence of specified aggravating factors. 42 C.F.R. § 1001.102(b). The I.G. alleges that two aggravating factors are present in this case that justify an exclusion of more than five years: (1) Petitioner's criminal acts resulted in financial loss to one or more entities and the loss was $5000 or more; and (2) Petitioner's criminal conduct occurred over a period of one year or more. *See* 42 C.F.R. § 1001.102(b)(1) and (2).

The evidence shows that there are two aggravating factors. Petitioner's conduct resulted in financial losses to government health care programs and to private insurance companies in excess of $5000. Petitioner stipulated in his plea agreement to the amount of restitution. I.G. Ex. 6, at 6-7. The sentencing court made specific findings as to the dollar amount of losses sustained as a result of Petitioner's crimes based on the plea agreement and ordered Petitioner to pay restitution of $171,225.81. I.G. Ex. 7; P. Ex. C, at 30. Petitioner also admits that the loss to the Medicare program was $9,808.96. P. Brief at 4. Petitioner admitted by his guilty plea that his criminal acts occurred from about June 2004 through about June 2006, therefore, they were committed over a period of one year or more. I.G. Ex. 3, at 3.

b. No mitigating factors justify reducing the period of exclusion.

If any of the aggravating factors listed at 42 C.F.R. § 1001.102(b) are found to justify an exclusion of longer than five years, then mitigating factors may be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c). Pursuant to 42 C.F.R. § 1001.102(c), the following factors may be considered as mitigating and a basis for reducing the period of exclusion:

> (1) The individual or entity being excluded was convicted of 3 or fewer misdemeanor offenses, and the entire amount of financial loss . . . to Medicare or any other Federal, State or local governmental health care program due to the acts that

> resulted in the conviction, and similar acts, is less than $1,500;
>
> (2) The record in the criminal proceedings, including sentencing documents show that the court determined that the individual had a had a mental, emotional or physical condition before or during the commission of the offense that reduced the individual's culpability; or
>
> (3) The individual's or entity's cooperation with Federal or State officials resulted in –
>
> > (i) Others being convicted or excluded from Medicare, Medicaid, and all other Federal health care programs,
> >
> > (ii) Additional cases being investigated or reports issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or
> >
> > (iii) The imposition against anyone of a civil money penalty or assessment under part 1003 of this chapter.

These are the only mitigating factors that may be considered. Evidence that does not relate to an aggravating factor or a mitigating factor is irrelevant to determining the length of exclusion. The burden is upon Petitioner to show the presence of mitigating factors. 42 C.F.R. § 1005.15; *Dr. Darren James, D.P.M.*, DAB No. 1828 (2002). Petitioner has presented no evidence or argument that would tend to establish any of the permitted mitigating factors. Petitioner's felony conviction involved financial losses to the program significantly greater than $1500. As to the second factor, Petitioner does not claim that any medical condition was considered by the sentencing court as reducing his culpability. The third factor does not apply in the case before me as Petitioner neither argues nor offers evidence of any cooperation with government officials that would fulfill the requirements of that factor. 42 C.F.R. § 1001.102(c).

Petitioner does offer letters and other evidence attesting to his good character and service to the community. P. Ex. D; P. Ex. E. However, under the regulation, these are not mitigating factors that I am permitted to consider to reduce the period of exclusion. Accordingly, this case presents no mitigating factors to justify reducing the period of exclusion.

Appellate panels of the Board have 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 Joann Fletcher Cash*, DAB No. 1725 (http://www.hhs.gov/dab/decisions/dab1725.html), n.6 (2000) (n.9 in the original decision and Westlaw™), 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 DAB 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 DAB 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 *John (Juan) Urquijo,* DAB No. 1735 (2000), 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. In *Gary Alan Katz, R.Ph.*, DAB No. 1842 (2002), the DAB 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.

In this case, upon *de novo* review I have found that a basis for exclusion exists and that the evidence shows two aggravating factors as found by the I.G. when determining to impose the ten-year exclusion. Petitioner has not established that there are mitigating factors not considered by the I.G. Further, based upon all the evidence, a period of exclusion of ten years is in a reasonable range and, therefore, not unreasonable. Accordingly, there is no basis upon which I might reassess the period of exclusion.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of ten years, effective November 20, 2008, 20 days after the October 31, 2008, I.G. notice of exclusion.

/s/
Keith W. Sickendick
Administrative Law Judge