Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Samir F. Zaky, D.P.M.,
(OI File No. 1-09-40066-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-945

Decision No. CR3425

Date: October 21, 2014

DECISION

Petitioner, Samir F. Zaky, D.P.M., was a podiatrist, licensed to practice in the State of Connecticut. He was convicted on fourteen felony counts of health care fraud and fourteen felony counts of making false statements relating to a health care matter. Based on his convictions, the Inspector General (I.G.) has excluded him for ten years from participating in the Medicare, Medicaid, and all federal health care programs, as authorized by section 1128(a)(1) of the Social Security Act (Act). Petitioner now challenges the exclusion. For the reasons discussed below, I find that the I.G. properly excluded Petitioner and that the ten-year exclusion falls within a reasonable range.

I. Background

Petitioner Zaky practiced as a podiatrist under the name of Affiliated Podiatrists, LLC, for which he was the principal and only agent. In that capacity, he participated in the Medicare program. I.G. Exhibit (Ex.) 4 at 1. He was charged in federal district court with fourteen counts of health care fraud and fourteen counts of making false statements relating to a health care matter, in violation of 18 U.S.C. §§ 1347 and 1035. I.G. Ex. 4. On June 14, 2013, a jury convicted him on all counts. I.G. Exs. 2, 3. Specifically, the

jury found that Petitioner Zaky provided routine foot care (e.g., clipping toe nails) to Medicare beneficiaries but billed the program for a more complicated and expensive surgical procedure. I.G. Ex. 4 at 2.

In a letter dated March 31, 2014, the I.G. notified Petitioner that he was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of ten years, because he had been convicted of a criminal offense related to the delivery of an item or service under the Medicare or state health care program. The letter explained that section 1128(a)(1) of the Act authorized the exclusion. I.G. Ex. 1. Petitioner requested review, and the matter is before me.

Each party submitted a written argument (I.G. Br.; Petitioner (P.) Br.). The I.G. submitted four exhibits (I.G. Exs. 1- 4) and a reply brief (I.G. Reply). Petitioner submitted 10 exhibits (P. Exs. 1-10) and a sur-reply (P. Reply). In the absence of any objection, I admit into evidence I.G. Exs. 1-4 and P. Exs. 1-2 and 10.

The I.G. objects to my admitting P. Exs. 3-9. The I.G. argues that the documents, which describe Medicare-reimbursable services and their codes, are irrelevant, because they address facts underlying Petitioner's conviction, and Petitioner's conviction is not reviewable here. I agree. As discussed below, Petitioner may not use this forum to attack collaterally his conviction. 42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000). The documents are therefore irrelevant, and, by regulation, I must exclude irrelevant or immaterial evidence. 42 C.F.R. § 1005.17(c). I therefore decline to admit these documents.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary, and, if so, "to provide the written direct testimony of any proposed witness in writing and under oath or affirmation." I also directed the party "to explain why the testimony is relevant" and why any witness's "proposed testimony does not duplicate something that is already stated in an exhibit." Order and Schedule for Filing Briefs and Documentary Evidence at 3 (May 29, 2014). The I.G. indicates that an in-person hearing is not necessary and submits no declarations from proposed witnesses. I.G. Br. at 6.

Petitioner, on the other hand, asserts that an in-person hearing is necessary, and asks that I subpoena ten witnesses, including federal investigators and agents, the United States Attorney and assistant U.S. attorneys who, he charges, falsified federal documents, resulting in his purportedly wrongful conviction. Again, Petitioner's criminal conviction may not be attacked collaterally in this forum, and I must exclude irrelevant or immaterial evidence. 42 C.F.R. §§ 1001.2007(d), 1005.17(c). I am therefore obligated to exclude the testimony that Petitioner proposes, so an in-person hearing would serve no purpose.

II. Issues

The issues before me are: 1) was Petitioner Zaky 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), thus providing a basis for excluding him from program participation; and 2) if so, is the length of the exclusion (ten years) reasonable.

III. Discussion

A. Petitioner Zaky must be excluded from program participation because he 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).[1]

Under section 1128(a)(1) of the Act, the Secretary of Health and Human Services must exclude an individual who has been convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. *See also* 42 C.F.R. § 1001.101(a).

Petitioner concedes, as he must, that he was convicted of a criminal offense, but he claims that the I.G. and his agents and attorneys falsified documents and engaged in other wrongful conduct in order to obtain the conviction. Federal regulations explicitly preclude such a collateral attack on Petitioner's conviction:

> When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it, either on substantive or procedural grounds, in this appeal.

42 C.F.R. § 1001.2007(d); *Cash*, DAB No. 1725; *Chander Kachoria, R.Ph.*, DAB No. 1380 at 8 (1993) (citing *Olufemi Okonuren, M.D.*, DAB No. 1319 (1992)) ("There is no reason to 'unnecessarily encumber the exclusion process' with efforts to reexamine the fairness of state convictions."); *Young Moon, M.D.*, DAB CR1572 (2007).

Petitioner also mentions that he appealed the conviction, although it appears that the appellate court may have ruled against him. *See* Petitioner's Motion to Attach Additional

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[1] My findings of fact and conclusions of law are set forth, in italics and bold, in the discussion captions of this opinion.

Evidence to the Record (September 2, 2014); *U.S. v. Zaky*, No. 13-3541-CR (2nd Cir. August 21, 2014) (Summary Order). In any event, the Act specifically provides that a pending appeal is irrelevant to whether an individual has been convicted: "[A]n individual . . . is considered to have been 'convicted' of a criminal offense . . . regardless of whether there is an appeal pending . . . ." Act § 1128(i)(1).

In yet another attack on his underlying conviction, Petitioner argues that he would not have been convicted but for the malfeasance of government agents, and therefore his criminal offense was not related to the delivery of an item or service under Medicare or a state health care program. His argument is without merit. Inasmuch as he was convicted of defrauding the Medicare program and making false statements "in connection with the delivery of and payment for health care benefits, items, and services involving Medicare," his crimes plainly meet the requirement that they be related to the Medicare program. *See* I.G. Exs. 2, 4.

Petitioner also argues that his exclusion should be waived because he was the sole practicing podiatrist in his community. P. Br. at 9. The waiver provision, 42 C.F.R. § 1001.1801(b), authorizes the I.G. to grant or deny a state health care program's request that an exclusion be waived "if the individual . . . is the sole community physician or the sole source of essential specialized services in a community." So a *state* health care official must present the request to the I.G. But "the decision to grant, deny, or rescind a request for a waiver is not subject to administrative or judicial review." 42 C.F.R. § 1001.1801(f); Act § 1128(c)(3)(B).

Finally, Petitioner raises some constitutional challenges, which I have no authority to review. *Donna Rogers*, DAB No. 2381 at 5 (2011); *see* 42 C.F.R. § 1005.4(c)(1).

Thus, Petitioner was convicted of a program-related crime and must be excluded for at least five years. I now consider whether the length of his exclusion beyond five years falls within a reasonable range.

B. Based on the aggravating factors present in this case, the ten-year exclusion falls within a reasonable range.

An exclusion under section 1128(a)(1) must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2). Federal regulations set forth criteria for lengthening exclusions beyond the five-year minimum. 42 C.F.R. § 1001.102(b). Evidence that does not pertain to one of the aggravating or mitigating factors listed in the regulations may not be used to decide whether an exclusion of a particular length is reasonable.

Among the factors that may serve as bases for lengthening the period of exclusion are two relied on by the I.G. in determining the length of Petitioner's exclusion: 1) the acts

resulting in the conviction, or similar acts, resulted in a financial loss to Medicare or state health care programs of $5,000 or more; and 2) the sentence imposed by the court included incarceration. 42 C.F.R. § 1001.102(b). The presence of an aggravating factor or factors not offset by any mitigating factor or factors justifies lengthening the mandatory period of exclusion.

Program financial loss (42 C.F.R. § 1001.102(b)(1)). Petitioner's actions resulted in program financial losses almost 27 times greater than the $5,000 threshold for aggravation. The sentencing judge ordered him to pay $134,139.60 in restitution. I.G. Ex. 3 at 2. Restitution has long been considered a reasonable measure of program losses. *Jason Hollady, M.D.*, DAB No. 1855 (2002). Because the financial losses were significantly in excess of the threshold amount for aggravation, the I.G. may justify a significant increase in Petitioner's period of exclusion. *See Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003).

Petitioner suggests that the ordered amount of restitution is incorrect because it includes more payments than alleged in the indictment. P. Br. at 8. As the I.G. points out, program financial loss is not so limited, but includes "similar acts" that caused a financial loss to the program. 42 C.F.R. § 1001.102(b)(1). Moreover, $134,139.60 represents the criminal court's assessment of program losses, and I again defer to the court's findings. 42 C.F.R. § 1001.2007(d).

Incarceration (42 C.F.R. § 1001.102(b)(5)). The criminal court sentenced Petitioner to a substantial period of incarceration – 41 months – which underscores the seriousness of his crimes. I.G. Ex. 3 at 1.

Petitioner does not claim that any mitigating factor justifies decreasing his period of exclusion. *See* 42 C.F.R. § 1001.102(c).

So long as the period of exclusion is within a reasonable range, based on demonstrated criteria, I have no authority to change it. *Cash*, DAB No. 1725 at 7 (citing 57 Fed. Reg. 3298, 3321 (1992)). In this case, Petitioner's crime demonstrates that he presents significant risks to the integrity of health care programs. He engaged in illegal conduct that cost the Medicare program a significant amount of money. He was sentenced to a lengthy period of time in jail. No mitigating factors offset these aggravating factors. I therefore find that the ten-year exclusion falls within a reasonable range.

IV. Conclusion

For these reasons, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid and all federal health care programs, and I sustain as reasonable the ten-year period of exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge