Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Hussein Awada, M.D.,
(OI File No. 5-11-40776-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-700

Decision No. CR4736

Date: November 15, 2016

DECISION

Petitioner, Hussein Awada, M.D., is a physician who, until recently, was licensed to practice in Michigan. He conspired to distribute more than 80,000 prescriptions for controlled substances to individuals recruited by his co-conspirator. At the same time, he billed Medicare, Medicaid, and Blue Cross/Blue Shield massive amounts (more than $2.3 million) for unnecessary services or for services that he did not provide. He was convicted of aiding and abetting healthcare fraud and of conspiracy to possess with intent to distribute controlled substances. Based on these convictions, the Inspector General (IG) has excluded him for twenty-three years from participating in Medicare, Medicaid, and all federal health care programs, as authorized by sections 1128(a)(1) and 1128(a)(4) of the Social Security Act (Act). Petitioner concedes that he must be excluded for a minimum period of five years but challenges the length of his exclusion.

For the reasons discussed below, I find that the twenty-three-year exclusion falls within a reasonable range.

Background

In a letter dated May 31, 2016, the IG advised Petitioner Awada that, because he had been convicted of a criminal offense related to the delivery of an item or service under Medicare or a state healthcare program *and* of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, the IG was excluding him from participating in Medicare, Medicaid, and all federal health care programs for a period of twenty-three years. The letter explained that sections 1128(a)(1) and 1128(a)(4) of the Act authorize the exclusion. IG Exhibit (Ex.) 1.

Petitioner timely requested review.

The parties have submitted written arguments. (IG Br.; P. Br.). With his brief, the IG submitted five exhibits (IG Exs. 1-5). Petitioner submitted five exhibits (P. Exs. 1-5). In the absence of any objections, I admit into evidence IG Exs. 1-5 and P. Exs. 1-5.

Neither party asserts that an in-person hearing is necessary. I.G. Br. at 11; P. Br. at 16. The parties agree that that Petitioner Awada was convicted of crimes related to the delivery of an item or service under Medicare or a state healthcare program and related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, and must therefore be excluded from program participation for at least five years. IG Br. at 1-2; P. Br. at 1-2.

Discussion

Based on the aggravating factors and one mitigating factor, a twenty-three-year exclusion is reasonable.[1]

Section 1128(a)(1) mandates that the Secretary of Health and Human Services exclude an individual who has been 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* 42 C.F.R. § 1001.101(c).

Section 1128(a)(4) mandates that the Secretary of Health and Human Services exclude from program participation any individual or entity convicted of a felony criminal offense "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." *See* 42 C.F.R. § 1001.101(d).

In this case, Petitioner Awada was licensed to practice medicine and to administer controlled substances in the State of Michigan. IG Ex. 5 at 7. Although the record does

[1] I make this one finding of fact/conclusion of law.

not detail the particulars of his crimes, it seems that he engaged in two separate felonious schemes. For more than a year, he and others distributed prescriptions for controlled substances (Oxycodone and Roxicodone) to individuals who were actively recruited by one of his accomplices. Needless to say, no medical need justified the prescriptions. Petitioner himself actively ran this "pill mill," contributing to the opiate epidemic "in a very large way." IG Ex. 3 at 2; P. Ex. 3 at 13.

At the same time, Petitioner fraudulently billed Medicare, Medicaid, and Blue Cross/Blue Shield for health services that he did not provide, or, worse, he provided unnecessary services just so he could justify his billings. In doing so, he abused more than 100 of his patients, subjecting them to invasive and unnecessary tests on a monthly basis. P. Ex. 3 at 2, 13-15.

Petitioner Awada pled guilty in federal district court to one felony count of conspiracy to possess with intent to distribute controlled substances, in violation of 18 U.S.C. §§ 846, 841(a)(1) and (b)(1)(C). He also pled guilty to one felony count of health care fraud, aiding and abetting, in violation of 18 U.S.C. §§ 1347 and 2. IG Ex. 2 at 1; *see* IG Ex. 3 at 1-3. The court entered judgment against him on November 16, 2015. IG Ex. 2 at 1. The Court sentenced him to 84-months imprisonment for each count, to be served concurrently, and ordered him to pay $2,348,000 in restitution ($848,000 to Blue Cross/Blue Shield and $1,500,000 to the Medicare trust fund). IG Ex. 2 at 6.

Petitioner agrees that he must be excluded for at least five years. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2); P. Br. at 2. I now consider whether the length of the exclusion, beyond five years, falls within a reasonable range.

Among the factors that may serve as a basis for lengthening the period of exclusion are the four that the IG relies on in this case: 1) the acts resulting in the conviction, or similar acts, caused a government program or another entity financial losses of $5,000 or more; 2) the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more; 3) the sentence imposed by the court included incarceration; and 4) the convicted individual has been the subject of any other adverse action by any federal, state, or local government agency or board, if the adverse action is based on the same set of circumstances that serves as a basis for the exclusion. 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)). Restitution has long been considered a reasonable measure of program losses. *Jason Hollady, M.D.*, DAB No. 1855 (2002). Here, the sentencing judge ordered Petitioner to pay a whopping $2,348,000 in restitution to the victims of his crime – the Blue Cross/ Blue Shield insurance company and the Medicare program. I.G. Ex. 2 at 6. Thus, Petitioner's actions resulted in program financial losses many, many times greater than the $5,000 threshold

for aggravation. The enormity of these losses constitutes an exceptionally aggravating factor that compels a period of exclusion significantly longer than the five-year minimum. *See Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003).

Petitioner does not challenge the amount of program losses and concedes that the entire financial loss must be considered "regardless of whether full or partial restitution has been made." 42 C.F.R. § 1001.102(b)(1); P. Br. at 4. Nevertheless, he argues that I should not ignore the fact that he paid full restitution. I disagree. Petitioner did not return that money voluntarily. He repaid his victims – at least some of them; the losses suffered by his patient victims are more difficult to monetize – only *after* he was caught, convicted, and ordered to do so. *See* IG Ex. 2 at 8; P. Ex. 3 at 24-25 (indicating that forfeiture of his assets, to pay restitution, was part of the defendant's sentence and included in the final judgment). That he complied with the criminal court's order does not eliminate the loss as an aggravating factor. The amount of loss – whether repaid or not – reflects the magnitude of his crimes and must be considered. Indeed, many, if not most, excluded individuals in Petitioner's situation can show that they paid the court-ordered restitution. They either pay or suffer the consequences, which can be significant.

Moreover, an exclusion is supposed to protect program integrity and program beneficiaries. As the regulations recognize, the amount of program losses reflects, in part, the seriousness of the individual's crime and thus the level of threat he poses to program integrity. While the process is inexact, so long as the IG reasonably translates the aggravating factor into an increase in the period of exclusion, I must affirm his determination. That a corrupt physician and his schemes can cause health care programs millions of dollars in losses underscores the importance of excluding the unscrupulous. Health care programs simply cannot withstand this level of fraud.

Duration of crime (42 C.F.R. § 1001.102(b)(2)). Petitioner's criminal acts were committed over a period of approximately 14 months – beginning in December 2010 and continuing until February 2012. I.G. Ex. 3 at 2. The Departmental Appeals Board has sustained significant increases in the period of exclusion based on wrongful acts that were committed for even just "'slightly more' than the one-year minimum standard." *Jeremy Robinson*, DAB No. 1905 at 12 (2004), *citing Donald A. Burstein, Ph.D.*, DAB No. 1865 at 12 (2003).

Petitioner concedes that his criminal activity lasted for 14 months, but points to letters from grateful patients, and argues that I should also consider the "outstanding treatment and exemplary care" he gave to program beneficiaries during the period of his criminal activities. P. Br. at 8-9. First, I do not agree that Petitioner did not harm patients. As noted above, he subjected approximately 100 of them to unnecessary and sometimes invasive procedures. I consider that harmful. Moreover, as discussed below, I may

consider mitigating only those factors listed in the regulation. That, while he engaged in illegal activities, a physician also cared well for some of his patients is not a factor I may consider to offset this (or any other) aggravating factor. 42 C.F.R. § 1001.102(c).

Incarceration (42 C.F.R. § 1001.102(b)(5)). The criminal court sentenced Petitioner to a very substantial period of incarceration – seven years. I.G. Ex. 3 at 2.

While any period of incarceration justifies increasing the period of exclusion, the Board has repeatedly held that long periods of incarceration are relevant in determining whether a period of exclusion is reasonable. *Eugene Goldman, M.D., a/k/a Yevgeniy Goldman, M.D.*, DAB No. 2635 at 6 (2015). Generally, the longer the jail time, the longer the exclusion, because a lengthy sentence evidences a more serious offense. *See Jeremy Robinson*, DAB No. 1905 (2004) (citing *Jason Hollady, M.D.*, DAB No. 1855 at 12 (2002), where the Board characterized the nine-month incarceration as "relatively substantial"); *Stacy Ann Battle, D.D.S.*, DAB No. 1843 (2002) (finding that four months in a halfway house, followed by four months home confinement justifies lengthening the period of exclusion); *Brenda Mills, M.D.*, DAB CR1461, *aff'd* DAB No. 2061 (2007) (finding that six months home confinement justifies increase in length of exclusion).

Other adverse actions (42 C.F.R. § 1001.102(b)(9). Based on the circumstances underlying this exclusion, the Michigan Department of Licensing and Regulatory Affairs revoked Petitioner's license to practice medicine. IG Exs. 4, 5.

Mitigating factor. The regulations consider as mitigating just three factors: 1) a petitioner was convicted of three or fewer misdemeanor offenses and the resulting financial loss to the program was less than $1,500; 2) the record in the criminal proceedings demonstrates that a petitioner had a mental, physical, or emotional condition that reduced his culpability; and 3) a petitioner's cooperation with federal or state officials resulted in others being convicted or excluded, or additional cases being investigated, or a civil money penalty being imposed. 42 C.F.R. § 1001.102(c).

The parties agree that Petitioner Awada cooperated with law enforcement and his cooperation qualifies as a mitigating factor. Petitioner initially refused to take responsibility for his actions, forcing prosecutors to give one of his co-conspirators "a tremendous break" in return for the testimony that was essential in building a case against Petitioner. P. Ex. 3 at 14. After his arrest, however, Petitioner cooperated with law enforcement. In sentencing, the judge gave him "significant credit" for that cooperation; nevertheless he sentenced him to seven years in prison, which speaks volumes for the seriousness of his offenses. By the same token, I consider Petitioner's cooperation with law enforcement a mitigating factor, which justifies decreasing the period of exclusion. However, that decrease is already reflected in the 23-year exclusion, which would have been substantially longer had Petitioner not cooperated.

Petitioner also claims that his mental health issues constitute a mitigating factor. He suffers from a narcissistic personality disorder and bipolar disorder. However, the Court explicitly found that Petitioner's mental health issues do *not* excuse what he did, "which is very serious." P. Ex. 3 at 18. Because the court found that his mental condition did not reduce his culpability, this is not a mitigating factor.

For more than a year, Petitioner engaged in two separated felonies, which the sentencing court correctly characterized as "very, very serious." P. Ex. 3 at 19. His felonious conduct cost Medicare and Blue Cross/Blue Shield vast amounts of money. Because his crimes were so serious, the Court sentenced him to seven years in prison, and the state licensing board revoked his license to practice medicine. I recognize that he cooperated with law enforcement. Nevertheless, based on the totality of the aggravating and mitigating factors, I find that the 23-year exclusion falls within a reasonable range.

Conclusion

The I.G. properly excluded Petitioner from participating in Medicare, Medicaid, and other federal health care programs. So long as the period of exclusion is within a reasonable range, based on demonstrated criteria, I have no authority to change it. *Joann Fletcher Cash*, DAB No. 1725 at 7, *citing* 57 Fed. Reg. 3298, 3321 (1992). I find that the 23-year exclusion falls within a reasonable range.

/s/
Carolyn Cozad Hughes
Administrative Law Judge