Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Spyros N. Panos, M.D.
(OI File No. 2-11-40573-9),

Petitioner,

v.

The Inspector General,
U.S. Department of Health and Human Services.

Docket No. C-15-3051

Decision No. CR4525

Date: February 8, 2016

DECISION

Petitioner, Spyros N. Panos, M.D., is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to sections 1128(a)(1) and (a)(3) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1), (a)(3)), effective May 20, 2015. Petitioner's exclusion for five years is required by section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)). An additional period of exclusion of 20 years, for a total exclusion of 25 years,[1] is not unreasonable based upon four aggravating factors established in this case and the absence of any mitigating factors.

I. Background

The Inspector General (I.G.) of the U.S. Department of Health and Human Services notified Petitioner by letter dated April 30, 2015, that he was being excluded from

---

[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 minimum period of exclusion.

participation in Medicare, Medicaid, and all federal health care programs for a minimum period of 25 years. The I.G. advised Petitioner that he was being excluded pursuant to sections 1128(a)(1) and (a)(3) of the Act based on his conviction in the United States District Court of the Southern District of New York (District Court), of a criminal offense related to the delivery of an item or service under Medicare or a state health care program and also 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, or with respect to any omission in a health care program (other than Medicare and a state health care program) operated by or financed in whole or in part by any federal, state, or local government entity. I.G. Exhibit (Ex.) 1.

Petitioner, through counsel, timely requested a hearing by letter dated June 25, 2015 (RFH). The case was assigned to me on July 17, 2015 to hear and decide. A prehearing conference was convened by telephone on August 20, 2015, the substance of which is memorialized in my order dated the same day. On September 9, 2015, Petitioner filed a written notice waiving an oral hearing. On September 21, 2015, the I.G. filed a motion for summary judgment, a brief in support of summary judgment (I.G. Br.), as well as I.G. exhibits 1 through 16. Petitioner filed a brief in opposition (P. Br.) on December 7, 2015. Petitioner also filed his 12-page affidavit (P. Aff.) attached to the brief. The I.G. filed a reply brief (I.G. Reply) on December 22, 2015. Petitioner did not object to any of the I.G.'s offered exhibits nor did the I.G. object to my consideration of Petitioner's affidavit. Thus, I.G. Exs. 1 through 16 and Petitioner's affidavit are admitted as evidence.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's rights to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services (the Secretary).

Pursuant to section 1128(a) of the Act, the Secretary must exclude from participation in any federal health care program any individual convicted under federal or state law of, among other things: a criminal offense related to the delivery of an item or service under Medicare or a state health care program; or a criminal offense consisting 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, or with respect to any act or omission in a health care program operated by or financed in whole or in part by any federal, state, or local government agency other than Medicare or

a state health care program. Act § 1128(a)(1), (a)(3). The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(a), (c).[2]

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. 42 C.F.R. § 1001.102(a). The Secretary has published regulations that establish aggravating factors that the I.G. may consider to extend the period of exclusion beyond the minimum five-year period, as well as mitigating factors that may be considered only if the minimum five-year period is extended. 42 C.F.R. § 1001.102(b), (c).

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

B. Issues

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).

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold, followed by the pertinent findings of fact and analysis.

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

2. **Petitioner's exclusion is required by sections 1128(a)(1) and (a)(3) of the Act.**

---

[2] Citations are to the 2014 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

There is no dispute that Petitioner timely filed his request for hearing on June 25, 2015, and that I have jurisdiction pursuant to section 1128(f) of the Act and 42 C.F.R. pt. 1005. Petitioner waived appearance at an oral hearing, electing to proceed on the documentary evidence and written argument. 42 C.F.R. § 1005.6(b)(5). The I.G. did not request that I convene an oral hearing. Accordingly, it is not necessary to follow summary judgment procedures and I proceed to a decision on the merits.

Petitioner does not dispute that there is a basis for his exclusion pursuant to sections 1128(a)(1) and (a)(3) of the Act. Petitioner is clear that he challenges only the reasonableness of the 25-year exclusion. RFH; P. Br. at 1. Petitioner does not dispute that he pled guilty to one count of health care fraud, in violation of 18 U.S.C. §§ 2 and 1347. Petitioner signed a plea agreement in which he acknowledged that he was pleading guilty to the charged offense because he committed the acts alleged in the criminal information. I.G. Ex. 9 at 4. Petitioner cannot now deny that by his guilty plea he admitted that from about 2006 through July 2011, he submitted and caused to be submitted false and fraudulent claims for surgical procedures to various health insurance providers including Medicare, the New York State Insurance Fund, and other private health insurers, which included false information concerning the surgical procedures performed. I.G. Ex. 4 at 4-5. Among the false representations that Petitioner admitted that he made or caused to be made to health insurance providers were that open surgeries had been performed when the procedures were done arthroscopically, that certain surgical techniques and procedures were performed when Petitioner did not actually perform them, and that loose bodies in excess of a certain size were removed when no loose bodies were removed or those that were removed were smaller than the thresholds for payment by the health insurance providers. I.G. Ex. 4 at 4. Petitioner also admitted by pleading guilty to the single count charged in the criminal information that as of December 2010, he tried to conceal his fraudulent activity by claiming the false claims were the result of mere clerical errors. He also admitted that his fraud resulted in the loss of over $2,500,000 from health insurance providers. I.G. Ex. 4 at 4.

The I.G. cites sections 1128(a)(1) and (a)(3) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides in relevant part:

> (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 for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 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 paragraph (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.

Act § 1128(a)(1), (a)(3).

For an exclusion pursuant to section 1128(a)(1), the plain language of the Act requires that the Secretary exclude from participation in Medicare, Medicaid, and all federal health care programs 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 within the meaning of section 1128(i) of the Act when the District Court accepted his guilty plea to one count of health care fraud and entered judgment on March 7, 2014. I.G. Ex. 11 at 1; P. Aff. ¶¶ 25-26. Pursuant to section 1128(i) of the Act, an individual is "convicted" of a criminal offense when, among other things, a plea of guilty has been accepted in a federal, state, or local court. Act § 1128(i)(3). Petitioner pled guilty to submitting false and fraudulent claims for payment to Medicare and New York's Medicaid program, as well as to private health insurance companies. I.G. Ex. 4; I.G. Ex. 11. Petitioner's submission to Medicare of fraudulent claims for payment is undeniably related to the delivery of a health care item or service under the Medicare program. Payment for services allegedly provided is related to the delivery of those services because payment is "inextricably intertwined" and "necessarily follows" from the delivery of services. *Jack W. Greene*, DAB No. 1078 at 7-8 (1989). Petitioner does not dispute this. P. Aff. ¶ 2. Accordingly, all three elements of section 1128(a)(1) of the Act are met, and there is a basis for Petitioner's exclusion under that section.

For an exclusion pursuant to section 1128(a)(3), the plain language of the Act requires that the Secretary exclude an individual or entity: (1) convicted of an offense under federal or state law; (2) the offense occurred after August 21, 1996 (the date of enactment of the Health Insurance Portability and Accountability Act of 1996); (3) the offense was committed 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 Medicare or Medicaid) operated by or financed in whole or in part by any federal, state, or local government agency; (4) the criminal offense was a felony; and (5) the offense was related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. As noted above, Petitioner does not dispute that he was convicted of a felony offense under federal law within the meaning of section 1128(i) of the Act when his guilty plea was accepted and judgment entered on March 7, 2014. Petitioner does not dispute that the offense for which he was convicted was committed after August 21, 1996. Petitioner was convicted of a criminal offense that directly involved fraud because it consisted of the submission of false or fraudulent claims for payment to non-governmental health insurance providers, and was therefore in connection with the delivery of health care items and services. I.G. Ex. 4 at 3-5. The payment for services that a physician provides is rationally linked to the actual delivery of those services. Indeed, Petitioner does not dispute this causal connection or that he was convicted of a felony offense that involved fraud. I.G. Ex. 4 at 3-5; P. Aff. ¶ 2, 35. Accordingly, all of the necessary elements of section 1128(a)(3) of the Act are met, and there is a basis for Petitioner's exclusion under that section as well.

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

I have concluded that a basis exists to exclude Petitioner pursuant to sections 1128(a)(1) and (a)(3) of the Act. Therefore, the I.G. must exclude Petitioner for a minimum period of five years pursuant to section 1128(c)(3)(B) of the Act. The I.G. has no discretion to impose a lesser period and I may not reduce the period of exclusion below five years. The remaining issue is whether it is unreasonable to extend Petitioner's exclusion by an additional 20 years.

My determination of whether the exclusionary period in this case is unreasonable turns on whether: (1) the I.G. has proven that there are aggravating factors; (2) Petitioner has proven that there are mitigating factors the I.G. failed to consider or that the I.G. considered an aggravating factor that does not exist; and (3) the period of exclusion is within a reasonable range.

4. Four aggravating factors are present that justify extending the minimum period of exclusion to 25 years.

The I.G. notified Petitioner that four aggravating factors are present in this case that justify an exclusion of more than five years: (1) the acts resulting in Petitioner's conviction caused, or were intended to cause, a loss of $5,000 or more to a government program or entity as shown by the District Court's restitution order of $2,658,544.11 against Petitioner; (2) the acts resulting in Petitioner's conviction occurred over a period of one year or more, as Petitioner admitted in his guilty plea that his criminal conduct

occurred from 2006 through July 2011; (3) the sentence imposed by the court included incarceration of 54 months; and (4) Petitioner has been subject to an adverse action by a federal, state, or local government agency or board, and the adverse action is based on the same set of circumstances that served as the basis for the imposition of the exclusion because he was excluded from the New York Medicaid program as a result of his conviction and Petitioner surrendered his New York medical license to resolve disciplinary actions related to the underlying criminal conduct. I.G. Ex. 1 at 2. The aggravating factors that the I.G. cites are four aggravating factors recognized by the regulations that may serve as a basis for the I.G. to extend the period of exclusion. 42 C.F.R. § 1001.102(b)(1), (b)(2), (b)(5), (b)(9).

Petitioner admitted as part of his plea agreement to defrauding at least $2,500,000 from health insurers including Medicare and the New York Medicaid program. I.G. Ex. 9 at 2. The District Court entered a restitution order of $2,658,544.11 against Petitioner. I.G. Ex. 12 at 1. There can be no question that based on the amount of loss to which Petitioner admitted and the restitution ordered, Petitioner's criminal conduct caused losses to Medicare and Medicaid substantially above $5,000. Petitioner argues that he has already made full restitution. P. Aff. ¶ 2. Payment of restitution, however, does not negate the presence of this clearly established aggravating factor. The regulation notes that the "entire amount of financial loss to such programs or entities . . . will be considered *regardless of whether full or partial restitution has been made*." 42 C.F.R. § 1001.102(b)(1) (emphasis added). Therefore, it is irrelevant in this exclusion action whether Petitioner has made full restitution. The aggravating factor has been established based on Petitioner's admission in his guilty plea and the court's restitution order.

Petitioner pled guilty to engaging in a scheme to defraud Medicare and other health insurance providers during the period of 2006 through July 2011. I.G. Ex. 4 at 4; I.G. Ex. 9 at 1. The facts Petitioner admitted by pleading guilty clearly demonstrate that his criminal conduct lasted one year or more. Petitioner now argues that his role in the scheme to defraud health insurers lasted only two years rather than the five-and-a-half years the I.G. cites. P. Br. at 1; P. Aff. ¶¶ 2, 19, 35. However, Petitioner cannot attempt to re-litigate the facts of his underlying criminal conduct to which he has already pled guilty. The regulations strictly prohibit such a collateral attack. 42 C.F.R. § 1001.2007(d). Even if I considered Petitioner's argument, his plea agreement, in which he acknowledged he was pleading guilty because he was actually guilty of the offense alleged (I.G. Ex. 9 at 4), bears substantially more weight than his unsupported claim that he was not involved in the criminal scheme for as long as he previously admitted. Moreover, Petitioner is not disputing the presence of the aggravating factor, just the overall severity of that factor. He indeed concedes that his criminal conduct lasted at least two years, which is sufficient to establish the presence of the aggravating factor. 42 C.F.R. § 1001.102(b)(2).

Petitioner does not dispute that he was sentenced to imprisonment for a period of 54 months. I.G. Ex. 11 at 2. Based on the evidence before me, I conclude the third aggravating factor cited by the I.G. is established. 42 C.F.R. § 1001.102(b)(5).

Petitioner also does not dispute that as a result of his conviction the New York Office of the Medicaid Inspector General excluded him from participation in the New York Medicaid program. I.G. Ex. 13. Petitioner does not dispute that he surrendered his medical license to the New York State Board for Professional Medical Conduct after he had been charged with professional misconduct and he acknowledged that he could not successfully defend at least one of the misconduct allegations. I.G. Ex. 2, I.G. Ex. 5. Petitioner was therefore subject to two adverse actions taken by two separate boards that were based on the same set of circumstances that are the basis for Petitioner's exclusion.[3] Accordingly, the evidence before me establishes the fourth aggravating factor cited by the I.G. 42 C.F.R. § 1001.102(b)(9).

I conclude that the I.G. established four aggravating factors, and the I.G. was authorized by the Secretary to rely upon these factors as a basis for extending Petitioner's exclusion by 20 years.

5. Petitioner has not proven by a preponderance of the evidence any mitigating factors established by regulation.

If any of the aggravating factors authorized by 42 C.F.R. § 1001.102(b) 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). The only authorized mitigating factors that I may consider are listed in 42 C.F.R. § 1001.102(c):

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

---

[3] The I.G. submitted evidence that the Virginia Department of Health Professions suspended Petitioner's medical license in that state as a result of the surrender of his New York medical license. I.G. Ex. 16. The I.G. also submitted evidence that Petitioner surrendered his licenses in Connecticut and Pennsylvania. I.G. Exs. 14-15. However, the actions by the Virginia, Connecticut, and Pennsylvania licensing authorities are not cited by the I.G. as aggravating. I.G. Br. at 15; I.G. Ex. 1 at 2.

> 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, 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) 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 being 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.

Petitioner has the burden to prove by a preponderance of the evidence that there is a mitigating factor for me to consider. 42 C.F.R. § 1005.15(b)(1).

Petitioner argues there are two mitigating factors that the I.G. did not consider when increasing the period of his exclusion: first, Petitioner was suffering from alcoholism and depression and had bladder cancer at the time of the underlying scheme to defraud; and second, he provided information to the government about the underlying scheme to defraud, which "helped secure a $5,000,000 civil forfeiture settlement" against his former employer. P. Br. at 1; P. Aff. ¶¶ 2, 24. The fact that Petitioner was suffering from alcoholism and depression as well as bladder cancer at the time he participated in the underlying scheme to defraud Medicare and other health insurance providers is, by itself, not a mitigating factor in this case. For me to consider Petitioner's conditions as a "mental, emotional, or physical condition," the record from the criminal proceedings must demonstrate that the District Court determined such a condition to exist and that it reduced Petitioner's overall culpability. 42 C.F.R. § 1001.102(c)(2). There is no evidence that the District Court made such a determination. In fact, the plea agreement that Petitioner signed discusses his culpability with regard to the "offense level" for the Sentencing Guidelines, but does not reference Petitioner's alcoholism, depression, or bladder cancer. It appears from the language of the plea agreement that neither the government nor Petitioner considered his conditions to reduce his culpability at the time

of his guilty plea or sentencing. I.G. Ex. 9. The regulation does not allow me to consider any of Petitioner's medical conditions that he raised for the first time in this forum. Therefore, Petitioner has not established the presence of this mitigating factor.

In addition, simply providing information to the government about a scheme to defraud that the government is already investigating is not the type of "cooperation" recognized as a mitigating factor by the regulation. 42 C.F.R. § 1001.102(c)(3). Petitioner has not presented any evidence that his alleged "cooperation" had any of the results described in the regulation. Aside from Petitioner's claim that his assistance resulted in a civil forfeiture action against his former employer, there is no actual evidence in the record that supports this assertion. Even if there was supporting evidence, a civil forfeiture action, presumably taken pursuant to 18 U.S.C. § 981 *et seq.*, is not a "civil money penalty or assessment under part 1003," and therefore not a mitigating factor in this case. 42 C.F.R. § 1001.102(c)(3). Petitioner has not established the presence of this mitigating factor.

Accordingly, I conclude that Petitioner has failed to establish any mitigating factor that I am permitted to consider to reduce the period of his exclusion.

6. Exclusion for 25 years is not unreasonable in this case.

The applicable regulation broadly states that the ALJ must determine whether the length of exclusion imposed is "unreasonable." 42 C.F.R. § 1001.2007(a)(1). The Board, however, has made clear that the role of the ALJ in exclusion cases is to conduct a de novo review of the facts related to the basis for the exclusion and the existence of aggravating and mitigating factors identified at 42 C.F.R. § 1001.102 and to determine whether the period of exclusion imposed by the I.G. falls within a reasonable range. *Juan De Leon, Jr.*, DAB No. 2533 at 3 (2013); *Craig Richard Wilder, M.D.*, DAB No. 2416 at 8 (2011); *Joann Fletcher Cash*, DAB No. 1725 at 17, n.9 (2000). The Board has explained that, in determining whether a period of exclusion is "unreasonable," the ALJ is to consider whether such period falls "within a reasonable range." *Cash*, DAB No. 1725 at 17, n.9. The Board cautions that whether the ALJ thinks the period of exclusion too long or too short is not the issue. The ALJ may not substitute his or her 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 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. Thus, the Board has by these various prior decisions significantly limited my authority under the applicable regulation to judge the reasonableness of the period of exclusion.

In this case, after de novo review, I have concluded that a basis for exclusion exists and that the evidence establishes the four aggravating factors that the I.G. relied on to impose the 25-year exclusion. Petitioner has not established that the I.G. failed to consider any mitigating factor or considered an aggravating factor that did not exist. I conclude that a period of exclusion of 25 years is in a reasonable range and not unreasonable considering the existence of four aggravating factors and the absence of any mitigating factors. No basis exists for me to reassess the period of exclusion.

III. Conclusion

For all of the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum of 25 years, effective May 20, 2015.

/s/
Keith W. Sickendick
Administrative Law Judge