Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Barry Kaplowitz, M.D.
(OI File No. M-11-40374-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-149

Decision No. CR4587

Date: April 15, 2016

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Barry Kaplowitz, M.D., from participation in Medicare, Medicaid, and all other federal health care programs based on Petitioner's federal felony conviction related to the delivery of a health care item or service under Medicare or a state health care program. For the reasons discussed below, I conclude that the IG has a basis for excluding Petitioner because he was convicted of the offense of making false statements in health care matters in violation of 18 U.S.C. § 1035(a)(2). I affirm the 20-year exclusion period because the IG has proven two aggravating factors, and there are no mitigating factors present. I also affirm that the effective date of Petitioner's exclusion is October 20, 2015.

I. Background

By letter dated September 30, 2015, the IG notified Petitioner that, pursuant to section 1128(a)(1) of the Social Security Act, 42 U.S.C. § 1320a-7(a)(1), he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a

minimum period of 20 years, effective 20 days from the date of the letter. IG Exhibit (Ex.) 1 at 1. In the letter, the IG informed Petitioner of the factual basis for the exclusion, stating:

> This exclusion is due to your conviction as defined in section 1128(i) (42 U.S.C. 1320a-7(i)), in the United States District Court, Southern District of Florida, Miami Division, of a criminal offense related to the delivery of an item or service under the Medicare or a State health care program, including the performance of management or administrative services relating to the delivery of items or services, under any such programs.

IG Ex. 1 at 1. The IG extended the exclusion period from the statutory minimum of five years to 20 years based on the presence of two aggravating factors. IG Ex. 1 at 1-2. As for the two aggravating factors, the IG found: (1) The loss to the Government or other entity as a result of Petitioner's criminal acts was greater than $5,000; and (2) The sentence the District Court imposed included 60 months of incarceration. IG Ex. 1 at 1-2; 42 C.F.R. § 1001.102(b)(1) and (5). The IG did not consider any mitigating factors. IG Ex. 1; *see* 42 C.F.R. § 1001.102(c).

Petitioner, through counsel, timely filed a request for hearing before an administrative law judge on December 2, 2015. On December 21, 2015, I convened a prehearing conference by telephone pursuant to 42 C.F.R. § 1005.6, during which I clarified the issues of the case and established a schedule for the submission of prehearing briefs and exhibits. The schedule and summary of the prehearing conference was memorialized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order), dated December 22, 2015.

Pursuant to the Order, the IG filed an Informal Brief (IG Br.) along with five proposed exhibits (IG Exs. 1-5). Petitioner thereafter filed his Informal Brief (P. Br.) and six proposed exhibits (P. Exs. 1-6). The IG then filed a reply brief (IG Reply). The IG has objected to Petitioner's six exhibits on the basis that these submissions are irrelevant and immaterial. IG Reply at 2-3. The IG's objections are not without merit. I find, however, that Petitioner's exhibits are sufficiently relevant and material to the circumstances surrounding his conviction and my determination as to whether the IG's exclusion falls within a reasonable range, and I admit them. *See Jeremy Robinson*, DAB No. 1905 at 2 (2004) ("'[T]he circumstances of a particular case' drive the weight that a decisionmaker can give the aggravating and mitigating factors." (quoting 57 Fed. Reg. 3298, 3314 (January 29, 1992))). I therefore admit the parties' briefs and exhibits into the record. Both parties agreed that an in-person hearing was not necessary for me to decide this case. IG Br. at 7; P. Br. at 9-10. Therefore, I am deciding this case based on the written submissions and documentary evidence. *See* Order § V.

II. Issues

The regulations limit the issues in this case to whether there is a basis for exclusion, and, if so, whether the length of the exclusion that the IG has imposed is unreasonable. 42 C.F.R. § 1001.2007(a)(1)-(2).

III. Jurisdiction

I have jurisdiction to decide this case. 42 U.S.C. § 1320a-7(f)(1); 42 C.F.R. § 1005.2.

IV. Findings of Fact, Conclusions of Law, and Analysis[1]

1. Petitioner's conviction for the offense of false statements in connection with health care matters mandates his exclusion from all federal health care programs for a minimum of five years.

The Social Security Act (Act) requires the exclusion of any individual or entity from participation in all federal health programs based on four types of criminal convictions. 42 U.S.C. § 1320a-7(a). In this case, the IG relied on section 1320a-7(a)(1) as the legal basis to exclude Petitioner, which states:

> (a) Mandatory exclusion
>
> The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1320a–7b(f) of this title):
>
> (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.

Id. § 1320a-7(a)(1).

The IG argues that Petitioner's exclusion is required based on his conviction for the offense of false statements in health care matters pursuant to 42 U.S.C. § 1320a-7(a)(1). IG Br. at 1-3. Petitioner does not dispute that exclusion is warranted or that his felony conviction was for a criminal offense related to the delivery of an item or service under Medicare. P. Br. 1-2; *see* 42 U.S.C. § 1320a-7(a)(1). Petitioner concedes that a five-year

[1] My findings of fact and conclusions of law are set forth in italics and bold font.

exclusion is required and states that "the only issue . . . in this matter is whether the 20-year period of exclusion is unreasonable." P. Br. at 3. As discussed below, I agree with the parties that exclusion is mandated.

On May 8, 2014, the United States Attorney for the Southern District of Florida filed an 11-count indictment alleging that Petitioner and/or three co-defendants committed various crimes involving the Medicare program, to include conspiracy to commit health care fraud and wire fraud, wire fraud, health care fraud, false statements relating to health care matters, conspiracy to defraud the United States and pay and receive health care kickbacks, and the payment of kickbacks in connection with a federal health care benefit program, yielding gross proceeds totaling $39 million. IG Ex. 3. Following a jury trial, Petitioner was found guilty *only* of Count 8 of the indictment, making false statements relating to health care matters. The jury found he was not guilty of the offenses of wire fraud and conspiracy to commit health care fraud and wire fraud, and the jury was unable to reach a verdict regarding the offenses of health care fraud. IG Ex. 4 at 1-2. All counts, other than Count 8 pertaining to false statements, were dismissed without prejudice on the motion of the United States. IG Ex. 5 at 1. Although the United States Sentencing Guidelines contained in the United States Sentencing Commission's Guidelines Manual (USSG) provided an advisory sentencing range of 121 to 151 months of incarceration for Petitioner's offense (*see* P. Ex. 2 at 1), Petitioner was sentenced to serve 60 months in prison, which is the maximum sentence of incarceration allowed by law for the offense.[2] IG Ex. 5 at 1; *see* IG Ex. 3 at 23 and 18 U.S.C. § 1035(a)(2). In addition to the maximum period of incarceration that was imposed, supervised release was ordered for a period of three years following Petitioner's release from imprisonment. IG Ex. 5 at 3. The District Court ordered that Petitioner abide by a number of special conditions during his post-release period of supervised release, to include:

> **Health Care Business Restriction -** The defendant shall not own, directly or indirectly, or be employed, directly or indirectly, in any health care business or service, which submits claims to any private or government insurance company, without the Court's approval.
>
> * * *
>
> **Relinquishment of Licensure** – Upon request of the appropriate regulatory agency, the defendant shall relinquish his/her license to said

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[2] Pursuant to the USSG, "the sentence may be imposed at any point within the applicable guideline range, provided that the sentence . . . is not greater than the statutorily authorized maximum sentence." USSG § 5G1.1(c)(1). In this case, the 121 to 151 months guideline range *exceeded* the maximum penalty of five years that was authorized by statute, and therefore, the sentence imposed could not exceed the maximum statutory penalty of five years. *See* 18 U.S.C. § 1035(a)(2).

> agency. The defendant is on notice that such relinquishment is permanent and will be considered disciplinary action.

IG Ex. 5 at 4 (emphasis in original). Finally, Petitioner was ordered to pay $2,946,322 in restitution, which is also the "Total Amount of Loss," to the Centers for Medicare and Medicaid Services. The judgment indicated that Petitioner had joint and several liability for this debt with various co-defendants who were listed by name. IG Ex. 5 at 5-6.

Count 8 of the indictment, which was the sole count resulting in a conviction, states the following:

> **COUNT 8**
> **False Statements Relating to Health Care Matters**
> **(18 U.S.C. § 1035)**
>
> 1. Paragraphs 1 through 24 of the General Allegations section of this Indictment are realleged and incorporated by reference as though fully set forth herein.
>
> 2. In or about late January, 2011, in Miami-Dade and Broward Counties, in the Southern District of Florida, and elsewhere, the defendant,
>
> **BARRY KAPLOWITZ,**
>
> in any manner involving a health care benefit program, knowingly and willfully made a materially false, fictitious, and fraudulent writing and document, knowing the same to contain a materially false, fictitious, and fraudulent statement and entry, in connection with the delivery and payment for health care benefits, items, and services, that is, the defendant signed a document falsely certifying that, beginning on January 13, 2011, intensive outpatient services would be furnished under his care with a written plan to be reviewed every thirty days, when in truth and in fact, and as the defendant then and there well knew, such services would not be and were not furnished under his care beginning on January 13, 2011 with a written plan to be reviewed every 30 days.
>
> In violation of Title 18, United States Code, Sections 1035(a)(2) and 2.

IG Ex. 3 at 13-14.

The offense of false statements in health care matters, pursuant to 18 U.S.C. § 1035(a)(2), states:

> (a) Whoever in any matter involving a health care benefit program, knowingly and willfully—
>
> * * *
>
> (2) makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain materially false, fictitious, or fraudulent statement or entry . . . in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 5 years, or both.

While Petitioner does not dispute that his conviction mandates exclusion pursuant to section 1128(a)(1), he argues that his felony conviction, prison sentence, and requirement to pay $2,946,322 in restitution is comparatively unfair considering that a nurse practitioner who was not charged with any offenses "committed Medicare fraud while under [his] supervision." P. Br. at 8. However, Petitioner "does not deny his actions or his conviction," and he states that "he would certainly not have assumed that risk in exchange for the grand total of $1,250.00 per month" he received for the services that resulted in his conviction. P. Br. at 8-9. Petitioner was convicted of making false statements related to health care matters, and his false statements resulted in a loss of more than $2.9 million to the Medicare program. He was unquestionably convicted of a criminal offense related to the delivery of a health care item or service. 42 U.S.C. § 1320a-7(a)(1); *see* 18 U.S.C. § 1035(a)(2).

2. *A 20-year minimum exclusion is not unreasonable based on the presence of two aggravating factors and no mitigating factors.*

As previously discussed, the Act requires a minimum exclusion period of five years when the exclusion is mandated under section 1320a-7(a). 42 U.S.C. § 1320a-7(c)(3)(B). The IG increased the minimum exclusion period from five years to 20 years based on his consideration of two aggravating factors. IG Ex. 1 at 1-2. The IG has the discretion to impose an exclusion longer than the minimum period when there are aggravating factors present. *See* 42 C.F.R. § 1001.102.

The IG asserts that the presence of two aggravating factors warrants an exclusion for 20 years, and neither the IG nor Petitioner has argued that there are any mitigating factors present that may be considered as a basis for reducing the period of exclusion to no less than five years. *See* 42 C.F.R. § 1001.102(a)-(c). The first aggravating factor is that the

loss to a Government program or other entity as a result of Petitioner's criminal conduct was greater than $5,000. *Id.* § 1001.102(b)(1); IG Ex. 5 at 5. Second, Petitioner was sentenced to a period of incarceration for 60 months. 42 C.F.R. § 1001.102(b)(5); IG Ex. 5 at 2. Petitioner "does not dispute the imposition of the 60-month period of incarceration, and he is not permitted, in this forum, to dispute the amount of restitution that has been assigned to him." P. Br. at 3 (citing 42 C.F.R. § 1001.2007(d)). Petitioner argues that "the 20-year period of exclusion is unreasonable" and requests that I "reduce it to five (5) years to run concurrently with the period of incarceration." P. Br. at 3.

Petitioner does not dispute that the loss to Medicare as a result of his criminal conduct was $2,946,322, but argues that "he has been assigned as restitution the value of services" that an unindicted nurse practitioner who he supervised "provided and/or failed to provide." P. Br. at 3-4. Petitioner argues that his "conduct in this matter consisted of failing to adequately supervise mental health services provided by [the nurse practitioner]," and this nurse practitioner "committed Medicare fraud by failing to provide the services for which she billed Medicare and signing blank treatment forms." P. Br. at 3-4. Petitioner points out that he "has paid a tremendous price, both personally and professionally" (P. Br. at 8), while the nurse practitioner was not indicted or convicted of any crime and remains licensed. P. Br. at 4 (citing P. Exs. 2 and 5). Regardless of whether a nurse practitioner who allegedly committed fraud unfairly escaped prosecution, Petitioner acknowledges, pursuant to 42 C.F.R. § 1001.2007(d), that he cannot challenge the amount of restitution in these proceedings. P. Br. at 1. The order of judgment clearly stated that the total amount of loss was $2,946,322. IG Ex. 5. at 5. As the IG points out, the financial loss to the Medicare program was more than 580 times the $5,000 minimum amount that triggers consideration of the aggravating factor. IG Br. at 4-5. The nearly $3 million in restitution ordered clearly supports that the large amount of loss is a significant aggravating factor. *See Jeremy Robinson*, DAB No. 1905 at 12 (determining that loss of 41 times the minimum amount required for aggravating factor supported a 15-year exclusion); *Juan De Leon, Jr.,* DAB No. 2533 (2013) (sustaining 20-year exclusion based on three aggravating factors including financial loss of $750,000, criminal conduct over 20 months, and sentence including incarceration, as well as one mitigating factor of government cooperation); *Craig Richard Wilder*, DAB No. 2416 at 9 (2011) (establishing an 18-year exclusion based on three aggravating factors including financial loss of over $4,000,000, criminal conduct over two years, and other convictions, as well as one mitigating factor of government cooperation).

Furthermore, Petitioner was sentenced to the *maximum* period of incarceration for the offense of false statements in health care matters pursuant to 18 U.S.C. § 1035(a)(2). The period of incarceration, 60 months, is quite significant, especially considering that Petitioner was a first-time criminal offender. *See* P. Br. at 8; P. Ex. 2 at 6. Nonetheless, the five-year sentence imposed was approximately half the amount of incarceration listed as the reasonable sentencing range of 121-151 months provided for in the USSG. IG Ex. 5 at 2; P. Ex. 2 at 1; *see* USSG § 2B1.1 and Sentencing Table. While Petitioner was

convicted of a single count involving false statements, the conduct was so significant that it exposed him, as a first-time offender, to the *maximum* sentence afforded by law. 18 U.S.C. § 1035(a)(2). The IG properly considered the lengthy period of incarceration to be an aggravating factor in this case. *See Jason Hollady, M.D.*, DAB No. 1855 at 12 (2002) (stating that a nine-month period of incarceration was "relatively substantial").

The IG did not consider any mitigating factors in this case, and Petitioner concedes that no mitigating factors exist. P. Br. at 9; *see* 42 C.F.R. § 1001.102(c). Therefore, there is no basis to mitigate the aggravating factors that the IG considered.

In summary, the 20-year period of Petitioner's exclusion is not unreasonable based on the two aggravating factors present in this case. The amount of loss caused by Petitioner's criminal conduct is extraordinary, in that it is well more than 500 times higher than the threshold $5,000 amount of loss necessary to trigger consideration of this aggravating factor. In addition, Petitioner was ordered to be incarcerated for the maximum 60-month duration allowed by law. A 20-year period of exclusion is reasonable owing to the gravity of the financial loss to Medicare and the length of incarceration imposed. Petitioner's criminal conduct resulted in a loss of nearly $3 million to the Medicare program and demonstrates his untrustworthiness in dealing with health care programs. While Petitioner was acquitted of more serious charges involving health care and wire fraud, his conviction for making false statements nonetheless demonstrates a lack of integrity. Congress clearly did not limit exclusions to only those individuals who committed fraud themselves, and sought to exclude individuals who were convicted of criminal offenses that are related to the delivery of an item or service under the Medicare program. 42 U.S.C. § 1320a-7(a)(1). I therefore conclude that the 20-year period of exclusion is not unreasonable.

V. Effective Date of Exclusion

The effective date of the exclusion, October 20, 2015, is established by regulation, and I am bound by that provision. 42 C.F.R. §§ 1001.2002(b), 1005.4(c)(1).

VI. Conclusion

For the foregoing reasons, I affirm the IG's decision to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of 20 years, effective October 20, 2015.

/s/

Leslie C. Rogall
Administrative Law Judge