Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Doron Feldman, M.D.,
(OI File No. H-15-1163-9),

Petitioner,

v.

The Inspector General

Docket No. C-16-81

Decision No. CR4672

Date: August 4, 2016

DECISION

Petitioner, Doron Feldman, M.D., is a physician who, until recently, practiced anesthesiology in Buffalo, New York, and environs. With others, he conspired to submit $1,460,000 in fraudulent invoices to the University of Rochester's Department of Anesthesiology. He was convicted of conspiracy to commit mail fraud and filing a false tax return, which are felonies. Based on these convictions, the Inspector General (IG) has excluded him for 15 years from participating in Medicare, Medicaid, and all federal health care programs, as authorized by section 1128(a)(3) of the Social Security Act (Act). Petitioner appeals the exclusion and challenges its length.

For the reasons discussed below, I find that the IG properly excluded Petitioner Feldman and that the fifteen-year exclusion falls within a reasonable range.

Background

In a letter dated August 31, 2015, the IG advised Petitioner Feldman that, because he had been convicted of a felony offense related to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct in connection with the delivery of a

healthcare item or service, the IG was excluding him from participating in Medicare, Medicaid, and all federal health care programs for a period of 15 years. The letter explained that section 1128(a)(3) of the Act authorizes the exclusion. IG Exhibit (Ex.) 1.

Petitioner timely requested review, and the case was assigned to my colleague, Judge Joseph Grow. With his departure from the Civil Remedies Division, the case was reassigned to me.

The parties have submitted written arguments (IG Br.; P. Br.). With his brief, the IG submitted twelve exhibits (IG Exs. 1-12). In the absence of any objections, I admit into evidence IG Exs. 1-12.

Petitioner's submissions are confusing because he did not comply with this tribunal's orders or Civil Remedies Division procedures for marking and submitting documents. With his hearing request, Petitioner attached documents captioned Exs. A and B. Ex. B is a lengthy compilation of separate documents, and its pages are not numbered sequentially. As separate filings, Petitioner also submitted a December 1, 2015 letter from the New York Department of Health with an attached determination and order from the State Board for Professional Medical Conduct. In the absence of objections, I admit them into evidence but, because they are not properly marked, will refer to them by name and date.

The "Order and Schedule for Filing Briefs and Documentary Evidence," issued by Judge Grow, directs the parties to answer the specific questions set forth in the "short-form briefs" provided. Among those questions, the parties are asked whether an in-person hearing is necessary, and, if so, to name the proposed witnesses; describe their proposed testimony; explain "why that testimony relates to" the party's arguments; and explain why the proposed testimony does not duplicate evidence already submitted. Order and Schedule for Filing Briefs and Documentary Evidence at 2, 3; Informal Brief of Petitioner ¶ IV; Informal Brief of IG ¶ III) (February 24, 2015).

The IG responded that an in-person hearing is not necessary. IG Br. at 16.

Petitioner, on the other hand, claims that an in-person hearing is necessary and proposes his own testimony. He does not specify what that testimony might include except to say that he would "provide details about mitigating factors" and would answer questions. P. Br. at 4. He also mentions that he is awaiting the New York Licensing Authority's final decision regarding his medical license and complains about the effect a 15-year exclusion will have on his ability to practice medicine (although it is not clear that his testimony would address the latter issues). *Id.*

As discussed below, Petitioner proposes testimony about issues that are irrelevant because the "mitigating factors" that he refers to are, in fact, not mitigating. I must exclude irrelevant or immaterial evidence. 42 C.F.R. § 1001.2007(d); *Roy Crosby Stark*, DAB No. 1746 (2000); *George Iturralde, M.D.*, DAB No. 1374 (1992); *Leonard R. Friedman, M.D.*, DAB No. 1281 (1991). I would exclude the testimony that Petitioner proposes, and an in-person hearing would serve no purpose. I therefore decide this case based on the written record.

Discussion

1. Petitioner Feldman must be excluded from program participation because he was 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. Act § 1128(a)(3).[1]

Section 1128(a)(3) 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, including the performance of management or administrative services relating to the delivery of such items or services. *See* 42 C.F.R. § 1001.101(c).

Here, Petitioner Feldman was a physician practicing as an anesthesiologist in Buffalo, New York. He was part of a practice called CGF Anesthesia Associates, P.C., which provided anesthesia services at various hospitals and medical facilities, including the University of Rochester-affiliated hospitals. IG Ex. 3 at 3; IG Ex. 10 at 7, 8. Through a sophisticated scheme, he, another physician, and Debra Butler, the program administrator for the University of Rochester Department of Anesthesiology, conspired to defraud the university's anesthesiology department by "disguising documentation to allow for payments" to himself and his co-conspirators; they submitted fraudulent invoices, requesting payment for services that were never provided. IG Ex. 10 at 42; IG Ex. 3 at 3; IG Ex. 4 at 3. The conspiracy cost the department $1,460,000 in fraudulent payments. IG Ex. 3 at 3; IG Ex. 4 at 4.

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

In a related matter, Petitioner Feldman filed false tax returns for the years 2008 through 2012. Specifically, he submitted to CGF fraudulent requests for reimbursement of expenses, which lowered the taxable income he received from CGF. IG Ex. 9.[2]

On June 24, 2014, Petitioner Feldman pled guilty to one felony count of conspiracy to commit mail fraud, in violation of 18 U.S.C. § 1349. IG Ex. 3; IG Ex. 5 at 26-28.

On February 18, 2015, he pled guilty to one felony count of filing a false tax return for the year 2012, in violation of 26 U.S.C. § 7206(1). IG Ex. 9 at 3.

In a judgment dated March 2, 2015, the federal court adjudicated Petitioner Feldman guilty of conspiracy to commit mail fraud and filing a false tax return. IG Ex. 11 at 1. The court sentenced him to 24-months imprisonment for each count, to be served concurrently. IG Ex. 11 at 2. The court explicitly found that the University of Rochester suffered a total loss of $1,460,000 and ordered Petitioner to pay in restitution $992,939.98 of that $1,460,000. It also ordered him to pay $157,561 to the Internal Revenue Service. IG Ex. 11 at 5.

Petitioner was thus convicted of felonies relating to fraud in connection with the delivery of a health care item or service and must be excluded from participating in federal healthcare programs under section 1128(a)(3).

Characterizing his criminal case as a "billing dispute," Petitioner points out that his activities did not involve government programs, patient care, or drugs but center around "the amount of money, if any, that the hospital should pay for administrative work performed." P. Br. at 2. Of course, Petitioner was not convicted because of a "billing dispute." He was convicted because he committed felony fraud. And section 1128(a)(3) does not require any relationship to a government program, patient care, or drugs. It applies to any felony conviction for fraud or other financial misconduct in connection with the delivery of a health care item or service, including management and administrative services.

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[2] Petitioner Feldman also reported fraudulent farm losses, lowering his taxable income further. Together, the schemes resulted in a total of $157,561 in tax losses. IG Ex. 9. However, I find no breakdown between the losses attributable to the health-care-related tax fraud and those attributable to farm-loss tax fraud. I therefore do not rely on tax losses to justify increasing Petitioner's period of exclusion but, as the discussion below shows, Petitioner's health-care-related fraud resulted in losses that easily meet the standard for aggravation.

2. Based on the aggravating factors and the absence of any mitigating factor, a 15-year exclusion is reasonable.

Petitioner must be excluded for at least five years. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(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 three 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; and 3) the sentence imposed by the court included incarceration. 42 C.F.R. § 1001.102(b)(1), (2), (5). The presence of an aggravating factor or factors, not offset by any mitigating factor or factors, justifies lengthening the mandatory period of exclusion.

<u>Program financial loss (42 C.F.R. § 1001.102(b)(1)).</u> Because one can infer an entity's financial loss based on the amount of restitution paid, restitution has long been considered a reasonable measure of that loss. Where, as here, however, the court's judgment explicitly determines the entity's loss, I need not rely on the restitution amount to infer the amount of the loss. The court has firmly established that amount, and I will not disturb the court's finding. *See* 42 C.F.R. § 1001.2007(d) (precluding a collateral attack on the court's judgment "where the facts were adjudicated and a final decision was made").

The sentencing court found that Petitioner's crime cost the University of Rochester losses totaling $1,460,000. IG Ex. 11 at 5. This represents a significant financial loss – 292 times greater than the $5,000 threshold for aggravation – and the IG may justifiably increase significantly Petitioner's period of exclusion based on that factor. *See Jeremy Robinson*, DAB No. 1905 (2004); *Donald Burstein, PhD*, DAB No. 1865 (2003).

Petitioner argues that, in fact, the hospital suffered no financial impact because he "completely repaid" the "alleged loss." P. Br. at 3. First, the loss was not just alleged; it was real. That Petitioner was caught, convicted, and ordered to repay most of it, which he did, does not eliminate the entity's loss as an aggravating factor. The amount of loss – whether repaid or not – reflects the magnitude of Petitioner's crime and must be considered. Indeed, many, if not most, excluded individuals in Petitioner's situation can show that they paid the court-ordered restitution. If this meant that their crimes caused no financial losses, the regulation would effectively have no meaning.

Petitioner also suggests that the financial loss is of no significance because it does not represent a loss to a government program. P. Br. at 3. The regulation that defines aggravating factors does not limit itself to financial losses to government programs. It considers aggravating losses of $5,000 or more "to a [g]overnment program or *to one or more entities*." 42 C.F.R. § 1001.102(b)(1) (emphasis added).

Length of criminal conduct (42 C.F.R. § 1001.102(b)(2)). In pleading guilty, Petitioner conceded that his criminal activity began "in or about September 2007" and continued until "in or about December 2009." IG Ex. 5 at 23, 27. Thus, the acts that resulted in Petitioner's conviction were committed over a period more than double the one year necessary to constitute an aggravating factor. *See Robinson*, DAB No. 1905 at 12, citing *Burstein*, DAB No. 1865 at 12 (finding that wrongful acts committed over "slightly more" than a year justified increasing the period of exclusion).

Incarceration (42 C.F.R. § 1001.102(b)(5)). The sentence imposed by the criminal court included two years (24 months) incarceration followed by two years of supervised release. IG Ex. 11 at 2-3. This is significant jail time, which underscores the seriousness of Petitioner's felonious conduct. As the court explained when it imposed the sentence, "I have to indicate through this sentence the seriousness of this offense." IG Ex. 10 at 47.

No mitigating factors. The regulations consider 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). Characterizing the mitigating factor as "in the nature of an affirmative defense," the Departmental Appeals Board has ruled that the petitioner has the burden of proving any mitigating factor by a preponderance of the evidence. *Barry D. Garfinkel, M.D.*, DAB No. 1572 at 8 (1996).

Obviously, because Petitioner's crime resulted in financial losses far in excess of $1,500, the first factor does not apply here. Nor does Petitioner claim any mental, physical, or emotional condition that reduced his culpability.

Petitioner suggests that the third mitigating factor applies because he "fully cooperated" with the government's investigation, pled guilty, and remitted all funds. He claims that he assisted the hospital and "other parties" by identifying the vulnerabilities that allowed him and his cohorts to commit their fraud. P. Br. at 4. Petitioner is entitled to no special consideration simply because he cooperated with authorities in his own case. The

regulation requires that his cooperation result in *others* being convicted or excluded, *additional cases* being investigated, or a civil money penalty being imposed. Petitioner must show that he provided information that resulted in the investigation of a *new* target. *Marcia C. Smith*, DAB No. 2046 at 9-11 (2006).

Petitioner also points to statements from the sentencing judge and the actions taken by the State Board for Professional Medical Conduct to argue that his period of exclusion should be reduced. P. Br. at 3. After sentencing him to jail time, the judge told Petitioner "there's no reason you can't come out of jail and be in a situation where you can return to your profession at some point and be a constructive member of this community." IG Ex. 10 at 50. The State Board suspended his license for five years – but four of those years were stayed – commencing on the day of his release from prison. The Board also limited his ability to bill or hold an administrative position. November 23, 2015 Determination and Order. Neither the sentencing judge's statement nor the medical board's actions are mitigating factors. Indeed, "any other adverse action" by a federal, state, or local government agency or board is an *aggravating* factor, if based on the same set of circumstances that serve as the basis for imposing the exclusion. 42 C.F.R. § 1001.102(b)(9). That the IG opted not to invoke this factor does not render it mitigating.

Thus, no mitigating factor offsets the aggravating factors present in this case.

Finally, Petitioner asks that his exclusion be made retroactive to the date he stopped practicing medicine. P. Br. at 2. As a matter of law, an exclusion becomes effective 20 days after the date of the IG's notice of exclusion. 42 C.F.R. § 1001.2002. I have no authority to review the timing of the IG's determination to impose an exclusion or to alter retroactively the date the exclusion was imposed. *Kailash C. Singhvi*, DAB No. 2138 at 4-5 (2007).

Conclusion

The IG 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 (2000), citing 57 Fed. Reg. 3298, 3321 (1992). The record in

this case establishes that Petitioner committed a crime over a long period of time that caused its victim a significant financial loss and earned him two years in prison. Based on these aggravating factors, and, in the absence of any mitigating factors, I find that the 15-year exclusion falls within a reasonable range.

/s/
Carolyn Cozad Hughes
Administrative Law Judge