Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Enitan Osagie Isiwele
(OI File No. 6-08-40093-9),

Petitioner

v.

The Inspector General.

Docket No. C-10-974

Decision No. CR2339

Date: March 11, 2011

DECISION

Petitioner, Enitan Osagie Isiwele, was convicted on multiple counts of health care fraud and one count of conspiracy to defraud the United States. Because of his convictions, the Inspector General (I.G.) has excluded him for seventeen years from participation 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 appeals. For the reasons discussed below, I find that the I.G. properly excluded Petitioner and that the 17-year exclusion falls within a reasonable range.

I. Background

Petitioner was a supplier of durable medical equipment who was convicted of health care fraud (18 U.S.C. § 1347) and conspiracy to defraud the United States (18 U.S.C. § 371). I.G. Exs. 2, 4. The District Court entered judgment against him on April 9, 2010. I.G. Ex. 3.

In a letter dated August 31, 2010, the I.G. notified Petitioner that he was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of

17 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 authorizes the exclusion. I.G. Ex. 1.

Each party submitted an initial brief (I.G. Br.; P. Br.). The I.G. submitted four exhibits (I.G. Exs. 1-4), and Petitioner submitted six exhibits (P. Exs. 1-6). The I.G. submitted a reply brief (I.G. Reply). Petitioner also moved to compel discovery, which the I.G. opposed. I discuss below why Petitioner is not entitled to the discovery he seeks.

In the absence of an objection, I admit into evidence I.G. Exs. 1-4 and P. Exs 1-6.

I directed the parties to indicate in their briefs whether an in-person hearing is necessary and, if so, to "describe the testimony that [it] wishes to present and provide the name of any witness and a summary of each witness' proposed testimony." I specifically directed the parties to explain why the testimony would be relevant. Order and Schedule for Filing Briefs and Documentary Evidence, Attachment 1 (Informal Brief of IG ¶ III) and Attachment 2 (Informal Brief of Petitioner ¶ IV) (October 4, 2010). The I.G. indicates that an in-person hearing is not necessary. Petitioner, on the other hand, contends that an in-person hearing is necessary, lists the witnesses he intends to call, and explains the purpose of their testimony. Petitioner's listed witnesses are individuals who assisted in the prosecution of his criminal case. He contends that he "disputed the authenticity . . . of [their] testimony and documents, and intends to introduce evidence contradicting their assertions." P. Br. at 5. As the following discussion explains, the issues he seeks to address through these witnesses were resolved by the federal district court, and that court's judgment may not be collaterally attacked in this forum. 42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000). By regulation, I must exclude irrelevant or immaterial evidence. 42 C.F.R. § 1005.17(c). I am therefore obligated to exclude the testimony that Petitioner proposes, so an in-person hearing would serve no purpose.

For the same reason, I deny Petitioner's motion to compel discovery. Petitioner seeks billing records and related documents, purportedly generated by and in the possession of the individuals who prosecuted his criminal case and/or their investigators. With respect to the production of these documents, he says, "[t]he Petitioner asserted his innocence of all charges and has repeated complaints as the evidence showed numerous irregularities in the criminal proceeding." Petitioner's Motion to Compel Discovery at 2 (Jan. 7, 2011). The rule governing discovery here authorizes me to deny a motion compelling discovery if I find that the discovery sought is irrelevant. 42 C.F.R. § 1005.7(e)(2). Petitioner seeks documents that, in his view, will undermine his criminal conviction, but, because he is barred from attacking his conviction in this forum, those documents are irrelevant. I therefore deny his motion.

II. Issues

The issues before me are: 1) whether Petitioner 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), thus providing a basis for excluding him from program participation; and 2) if so, whether the length of the exclusion (17 years) is reasonable.

Petitioner raises Constitutional issues, which I have no authority to review.

III. Discussion

A. Petitioner 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).[*]

Section 1128(a)(1) of the Act mandates that the Secretary of Health and Human Services 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. 42 C.F.R. § 1001.101(a).

In this case, Petitioner, doing business as Galaxy Medical Supply, was a supplier of durable medical equipment in the State of Texas. He participated in the Medicare and Medicaid programs. After Hurricanes Rita and Katrina hit the Gulf Coast, the Centers for Medicare and Medicaid Services (CMS), which administers those programs, authorized an expedited claims process for replacing program beneficiaries' previously-prescribed equipment and supplies that were destroyed by the natural disasters. I.G. Ex. 4 at 3-4. This meant that suppliers could be paid for these types of claims "without all the normally required paperwork and safeguards." I.G. Ex. 4 at 4. Petitioner apparently took advantage of the reduced oversight, and he was indicted on multiple counts of submitting "false and fraudulent claims" to the Medicare and Medicaid programs, in violation of 18 U.S.C. § 1347, and two counts of conspiracy to pay or receive illegal remunerations, in violation of 18 U.S.C. § 371. I.G. Ex. 4. According to the indictment, he obtained patient information from door-to-door solicitors and used that information to bill Medicare and Medicaid for power wheelchairs and accessories for individuals who did not qualify for them and had never possessed them. In billing, he falsely claimed that this equipment replaced equipment lost as a result of a natural disaster. I.G. Ex. 4 at 4. Petitioner stood trial in federal district court for the Eastern District of Texas, and, on

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

March 19, 2009, a jury convicted him on sixteen counts of healthcare fraud and one count of conspiracy to pay illegal remunerations. I.G. Ex. 2. The district court entered judgment against him on April 9, 2010.

Thus, the court documents establish that Petitioner was convicted of offenses related to the delivery of item or services under the Medicare and Medicaid programs, and he must be excluded from program participation.

Petitioner, however, maintains that he is innocent of all charges and complains of "numerous irregularities" in his criminal prosecution. P. Br. at 2. He offers as evidence copies of requests for replacement wheelchairs, purportedly signed by program beneficiaries, and suggests that these documents show that his billing was legitimate. P. Exs. 1, 2, 3.

Federal regulations explicitly preclude any 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); *Joann Fletcher Cash*, DAB No. 1725; *Chander Kachoria, R.Ph.*, DAB No. 1380 at 8 (1993) ("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 was convicted of program-related crimes and must be excluded for a minimum period of five years. I now consider whether the length of the exclusion, in excess of five years, falls within a reasonable range.

B. Based on the aggravating factors present in this case, the 17-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 regulation 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 the following: 1) the acts resulting in the conviction, or similar acts, resulted in a financial loss to Medicare and state health care programs 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). The presence of an aggravating factor or factors not offset by any mitigating factor or factors justifies lengthening the mandatory period of exclusion.

Here, three aggravating factors justify significantly increasing the period of exclusion beyond the five-year minimum:

Financial loss to Medicare (42 C.F.R. § 1001.102(b)(1)). Petitioner's actions resulted in a program financial loss well in excess of $5,000. The district court ordered him to pay $201,397.34 in restitution to CMS. I.G. Ex. 3 at 6. 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 (approximately forty times greater), the I.G. may justifiably increase significantly the period of exclusion. *See Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein*, Ph.D., DAB No. 1865 (2003).

Duration of crime (42 C.F.R. § 1001.102(b)(2)). Based on the charges on which he was convicted, Petitioner engaged in the acts that resulted in his conviction from on or about June 2005 until April 2008. I.G. Ex. 4 at 4, 6.

Incarceration (42 C.F.R. § 1001.102(b)(5)). The sentence imposed by the criminal court included a significant period of incarceration. The criminal court sentenced Petitioner to more than eight years (97 months) in prison for each count, to be served concurrently. I consider this significant jail time, which underscores the seriousness of his crimes. I.G. Ex. 3 at 2.

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)). In this case, Petitioner's crime demonstrates that he presents a significant risk to the integrity of health care programs. His fraudulent scheme lasted for almost three years, costing the Medicare and Medicaid programs a large amount of money. His actions were egregious enough to merit a significant period of incarceration. Based on these factors, I find that the 17-year exclusion falls within a reasonable range.

The parties agree that no mitigating factors offset the aggravating factors. I.G. Br. at 5; P. Br. at 4.

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 17-year exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge