Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Virgilio Lopez Opinion
(OI File No.: L-01-40271-9),

Petitioner

v.

The Inspector General.

Docket No. C-11-426

Decision No. CR2434

Date: September 21, 2011

DECISION

Petitioner, Virgil Lopez Opinion, was employed as a back-office assistant to a California physician. Petitioner participated in the physician's scheme to administer watered-down versions of medications to patients suffering from AIDS, HIV, and hepatitis. He was convicted on two felony counts of health care fraud and making false statements. Based on his convictions, the Inspector General (I.G.) excluded him from participation in Medicare, Medicaid, and all federal health care programs for a period of ten years, and he now appeals.

The parties agree that, based on his convictions, Petitioner Lopez Opinion is subject a minimum five-year exclusion from participation in federal health care programs under sections 1128(a)(1) and 1128(a)(3) of the Social Security Act (Act). They dispute the length of his exclusion. The I.G. proposes a 10-year exclusion, and Petitioner argues that any exclusion in excess of five years is unreasonable.

For the reasons set forth below, I find that a10-year exclusion is reasonable.

I. Background

By letter dated February 28, 2011, the I.G. notified Petitioner that he was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 10 years, because he had been convicted of a felony criminal offense related to: 1) the delivery of an item or service under the Medicare or state health care program; and 2) fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item of service. The letter explained that sections 1128(a)(1) and 1128(a)(3) of the Act authorize the exclusion.

Petitioner concedes that he was convicted and is subject to exclusion under these sections. P. Brief (Br.) at 2.

Each party submitted a written argument (I.G. Br.; P. Br.). The I.G. also submitted five exhibits (I.G. Exs. 1-5) and a reply brief (I.G. Reply). Petitioner submitted one exhibit (P. Ex. 1). In the absence of an objection, I admit into evidence I.G. Exs. 1-5 and P. Ex. 1.

The parties agree that this case can be resolved without an in-person hearing. Order and Schedule for Filing Briefs and Documentary Evidence at 2 (May 18, 2011); P. Br. at 7.

II. Issue

Because the parties agree that the I.G. has a basis upon which to exclude Petitioner from program participation, the sole issue before me is whether the length of the exclusion (10 years) is reasonable. 42 C.F.R. § 1001.2007.

III. Discussion

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).

Section 1128(a)(3)of the Act says that an individual or entity convicted of felony fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service must be excluded from participation in federal health care programs for a minimum of five years. 42 C.F.R. § 1001.101(c).

For more than ten years, Petitioner Opinion was employed as a “back office assistant” to Dr. George Steven Kooshian, an internist who treated patients with AIDS, HIV, and

hepatitis. I.G. Ex. 2 at 6. Petitioner's duties included preparing medications and injections for Dr. Kooshian's patients. P. Ex. 1 at 1. Acting on his employer's orders, Petitioner administered to patients suffering from AIDS, HIV, and hepatitis watered-down dosages (½ to ¼) of the drugs Epogen, Interferon, and immune gammaglobulin (IVIG). Sometimes, he administered plain saline or water instead of the ordered drug. Petitioner Opinion also fabricated injection logs to indicate, falsely, that he had given the full doses. He told at least one patient that he had administered IVIG, when, in fact, he had administered only saline and vitamins. Although he did not do the billing himself, Petitioner Opinion "knowingly and willfully aided and abetted" Dr. Kooshian in fraudulently billing the patient's health insurance companies, including the Medicare program, for drugs that were not administered. I.G. Ex. 2 at 7-8.

On July 20, 2005, Petitioner and his employer were indicted on 29 felony counts of conspiracy, health care fraud, making false statements related to health care matters, and aiding and abetting. I.G. Ex. 3. On September 21, 2009, Petitioner pled guilty, in United States District Court for the Central District of California, to one count of felony health care fraud, aiding and abetting and causing an act to be done, in violation of 18 U.S.C. § 1347; and one felony count of making false statements related to health care matters, in violation of 18 U.S.C. § 1035. I.G. Ex. 1.

The court sentenced Petitioner to three years probation and ordered him and his co-defendant Kooshian, jointly and severally, to pay $660,955 in restitution to the Medicare program. I.G. Ex. 1 at 1.

Based on the two aggravating factors and one mitigating factor presented in this case, the 10-year exclusion falls within a reasonable range.[1]

An exclusion under either section 1128(a)(1) or 1128(a)(3) of the Act 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 two that the I.G. 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; and 2) the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more. 42 C.F.R. § 1001.102(b). The presence of an aggravating

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

factor or factors, not offset by any mitigating factor or factors, justifies lengthening the mandatory period of exclusion.

Program financial loss. The district court ordered Petitioner Opinion to pay $660,955 in restitution to the Medicare program. I.G. Ex. 1 at 1. Restitution has long been considered a reasonable measure of program losses. *See Jason Hollady, M.D.*, DAB No. 1855 (2002). Petitioner concedes that the Medicare program suffered significant losses as a result of the fraudulent practices, but he denies having personally received any financial benefit. P. Ex. 1 at 2 (Opinion Decl. ¶4). However, the question is not how much the petitioner profited, but how much the program lost, and the program's financial losses here were substantial – more than 130 times greater than the threshold amount necessary to establish an aggravating factor – and thus justify lengthening the period of exclusion well beyond the minimum.

Length of criminal conduct. Petitioner Opinion pled guilty to criminal acts that were committed over a five-to-six year period. In his plea agreement, he admitted that "[b]eginning in or around 1995 and continuing to in or around February 2001, [he] aided and abetted Kooshian in committing health care fraud and making false statements relating to health care matters." I.G. Ex. 2 at 6. Petitioner acknowledges having "follow[ed] medical orders from a licensed physician from 1995-2001," but claims that his "scienter and knowing participation did not extend over the entire course of the relevant time period." P. Br. at 4. He also says that, until 2001, he believed that he was "not harming any patient by diluting medications, and there existed a sound medical basis for sub-dosing or switching medications for vitamins." P. Ex. 1 at 2 (Opinion Decl. ¶ 3).

That Petitioner did not intentionally harm patients is irrelevant to the issues before me. Petitioner Opinion is not charged with knowingly harming patients. Exclusion for that reason could have been brought under section 1128(a)(2) of the Act, which authorizes exclusion based on criminal offenses relating to neglect or abuse of patients. Nor has the I.G. lengthened the period of exclusion based on aggravating factors that relate to adverse impact on program beneficiaries (42 C.F.R. § 1001.102(b)(3)) or patient abuse or neglect (42 C.F.R. § 1001.102(b)(4)).

Further, the period of Petitioner's participation in criminal acts was resolved by the district court. Not only did Petitioner admit, in his plea agreement, to conduct that spanned a five-to-six year period, he pled guilty to counts two and twenty-eight of the indictment. I.G. Ex. 1 at 1. Count two incorporated paragraph 4 of the indictment, and paragraph 4 says that the illegal conduct occurred from about January 1995 through February 2001. I.G. Ex. 3 at 2, 11. Petitioner may not, in this forum, collaterally attack his 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 (2000); *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 CR 1572 (2007).

Thus, Petitioner engaged in criminal conduct five or six times longer than necessary to constitute an aggravating factor, costing the Medicare program significant losses. The I.G. could reasonably impose a period of exclusion much greater than the mandatory five-year minimum.

I now consider the one mitigating factor presented in this case.

Mitigating factor. 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 her 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 a mitigating factor as "in the nature of an affirmative defense," the Board has ruled that 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).

After years of assisting Dr. Kooshian in his fraud, Petitioner Opinion's "conscience was killing him," and he blew the whistle on the scheme by going to the press, which was how the U.S. Attorney's Office learned of the scheme. Petitioner then cooperated with the prosecutors, providing information and documentation. His level of cooperation was considerable and led to Dr. Kooshian's indictment and guilty plea. I consider it particularly praise-worthy that Petitioner came forward before law enforcement had any notion of the scheme, even though doing so meant that he was also indicted and convicted. His actions justify significantly decreasing the period of exclusion. However, that significant decrease is already reflected in the 10-year exclusion, which would have been substantially longer had Petitioner not cooperated.

Additional defense. Petitioner also asks that the effective date be changed from 2011 to 2006, because he was suspended from his work at that time and has not worked in the medical field since. As a matter of law, an exclusion becomes effective 20 days after the date of the I.G.'s notice of exclusion. 42 C.F.R. § 1001.2002. An administrative law

judge has no authority to review the timing of the I.G.'s determination to impose an exclusion or to alter retroactively the date of the imposition of the exclusion. *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *Samuel W. Chang, M.D.*, DAB No. 1198 (1990).

IV. Conclusion

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 (Jan. 29, 1992)). Here, Petitioner's crimes caused significant program financial losses, far above the regulatory threshold for aggravation. His crimes continued for more than five and probably six full years. I recognize that he cooperated fully with law enforcement and that his cooperation led to his employer's conviction. Nevertheless, based on the totality of the aggravating and mitigating factors, I find that the 10-year exclusion falls within a reasonable range.

/s/
Carolyn Cozad Hughes
Administrative Law Judge