

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Tatyana Usyk,

Petitioner,

v.

The Inspector General.

Docket No. C-15-612

Decision No. CR3811

Date: April 24, 2015

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Tatyana Usyk, from participating in Medicare and other federally funded health care programs. However, I reduce the exclusion imposed by the I.G. from 10 years to seven years in light of the substantial cooperation that Petitioner gave to prosecuting authorities.

I. Background

Petitioner requested a hearing to challenge the I.G.'s determination to exclude her. The I.G. filed a brief, a reply brief, and seven exhibits that are identified as I.G. Ex. 1 – I.G. Ex. 7. Petitioner filed a brief and no exhibits. I admit the I.G.'s exhibits into the record. Neither party requested an in-person hearing.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether: the I.G. is mandated to exclude Petitioner; and the 10-year exclusion imposed by the I.G. is reasonable.

B. Findings of Fact and Conclusions of Law

The I.G. excluded Petitioner pursuant to the provisions of section 1128(a)(3) of the Social Security Act (Act). This section mandates the exclusion of any individual who is convicted of a felony occurring after August 21, 1996, 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 a State Medicaid program, operated by or financed in whole or in part by any federal, state, or local government agency, relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

The evidence offered by the I.G. and not rebutted by Petitioner proves that, on November 14, 2013, Petitioner pled guilty to a federal felony offense consisting of conspiracy to commit health care fraud. I.G. Ex. 2. She was part of an elaborate and, for a time, highly successful conspiracy to defraud health care insurers by providing claims to those insurers for items or services that were not provided at all or that were not medically necessary. I.G. Ex. 3. Petitioner worked as a receptionist for two medical clinics that systematically filed fraudulent claims with health insurers. *Id.* Her role in the scheme was to coach patients to report to these clinics for medically unnecessary treatments. Her responsibilities included making certain that patients reported for the unnecessary treatments. *Id.*

Petitioner's plea and conviction describe all of the elements of a conviction mandating exclusion under section 1128(a)(3). She was convicted of a felony that occurred after August 21, 1996. The conviction plainly related to delivery of health care items or services because Petitioner's admitted role in the conspiracy was to assure that patients of the two clinics that employed her were present for medical services, albeit unnecessary, that were subsequently billed to health insurers. Her criminal offense related to fraud because it was part of a fraudulent billing scheme that caused health insurers to make payments.

Petitioner argues that she was not convicted of a felony within the meaning of section 1128(a)(3) because she is not a provider or supplier of health care items or services. Nothing in this section requires an individual to be a health care provider or supplier in order to be subject to its reach. It plainly applies to any individual who is convicted of a felony described in that section.

The I.G. is required to exclude Petitioner for a minimum of five years. Act § 1128(c)(3)(B). Here, the I.G. opted to exclude Petitioner for a period of 10 years. That raises the question of whether the length of the exclusion is reasonable.

The purpose of any exclusion is remedial. The intent is not to punish, but to assure that trust funds and their beneficiaries and recipients are protected from individuals who are untrustworthy. The Secretary has published regulations, which identify the criteria that

may be used in determining whether any exclusion is reasonable. These criteria are described as “aggravating” and “mitigating” factors. The regulations do not establish a formula for measuring the length of an exclusion. Rather, the aggravating and mitigating factors function very much as rules of evidence. Evidence that falls within an aggravating or mitigating factor may be weighed to decide an individual’s trustworthiness and whether an exclusion is reasonable.

In this case the evidence proves the existence of two aggravating factors. Moreover, the evidence relating to aggravating factors shows that Petitioner was part of a conspiracy to commit very serious and calculated fraud, fraud that establishes her to be untrustworthy. An exclusion of 10 years would be reasonable given this evidence of aggravation. First, Petitioner’s crimes caused financial damages to health insurers of well over \$1 million. 42 C.F.R. § 1001.102(b)(1). Evidence proving the impact of Petitioner’s crime consists of her being sentenced to pay restitution in excess of \$1.2 million. I.G. Ex. 4; I.G. Ex. 5.¹ Second, she committed her crime over a period of nearly four years. I.G. Ex. 3 at 3; 42 C.F.R. § 1001.102(b)(2). The aggravating evidence, viewed in its totality, shows that Petitioner was willfully contributing to a massive fraud scheme for a protracted period of time. Ten years is certainly reasonable in light of that.

However, there is mitigating evidence in this case that offsets, at least in part, the evidence of aggravation. Petitioner’s substantial cooperation with prosecuting authorities contributed to the conviction of other individuals. That evidence must be weighed against the aggravating evidence and it militates in favor of a somewhat reduced exclusion. Based on all of the evidence – aggravating and mitigating – I find an exclusion of seven years is reasonable in this case.

Petitioner provided extensive cooperation with prosecuting authorities. Her cooperation was noted at the time of her sentencing and it was the reason that Petitioner avoided incarceration for her crime. I.G. Ex. 7 at 4-5.

In order to be mitigating, cooperation must result in: other individuals being convicted or excluded from Medicare and all other federal health care programs; additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program weaknesses or vulnerabilities; or other individuals or entities being

¹ Although the amount of the fraud committed by the conspiracy was huge, it would be unfair to Petitioner to attribute all of that fraud to her. She was plainly a very small cog in a very large conspiracy. Her sentence to pay restitution reflects her role in that collective activity but it does not suggest that she personally committed fraud of in excess of \$1 million. Suffice it to say that Petitioner contributed to the scheme’s overall impact without attempting to quantify her personal responsibility.

