

**Department of Health and Human Services  
DEPARTMENTAL APPEALS BOARD  
Civil Remedies Division**

Bret Ostrager,  
(OI File No. 2-09-4A518-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-581

Decision No. CR4950

Date: October 12, 2017

**DECISION**

The Inspector General (IG) of the United States Department of Health and Human Services excluded Bret Ostrager, D.O. (Petitioner), for ten years from participation in Medicare, Medicaid, and all federal health care programs pursuant to sections 1128(a)(1) and (a)(3) of the Social Security Act (Act).

Although Petitioner does not dispute the basis of the exclusion, he requested a hearing to dispute the length of the exclusion. As explained below, the IG has proven, and Petitioner does not dispute, the following aggravating factors related to his conviction that warrant a substantial exclusion: criminal conduct that lasted from February 2011 until April 2013; incarceration for more than three years; and suspension of his medical license by the New York State Board for Professional Medical Conduct. The mitigating factors cited by Petitioner, even if true, cannot be properly considered under the applicable regulations. Therefore, I conclude that the ten-year exclusion period imposed in this matter is not unreasonable and, consequently, affirm the IG's determination.

**I. Case Background and Procedural History**

On February 28, 2017, the IG notified Petitioner of his exclusion from participation in Medicare, Medicaid, and all federal health care programs under 42 U.S.C. §§ 1320a-

7(a)(1) and (a)(3) for a period of ten years. IG Brief (IG Br.), Exhibit (Ex.) 1.<sup>1</sup> The IG based the exclusion on Petitioner's conviction of a criminal offense in the United States District Court for the District of New Jersey (District Court) related to the delivery of an item or service under 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 program. *Id.* at 1.

The IG also based the exclusion on Petitioner's felony conviction of a criminal offense related 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 related to the delivery of such items or services, or with respect to any act or omission in a health care program (other than Medicare and a State health care program) operated by, or financed in whole or in part, by any Federal, State or local government agency. *Id.*

The IG identified three aggravating factors as a basis for increasing the exclusion period from five to ten years: (1) the criminal acts resulting in Petitioner's conviction were committed over a period of more than one year, from approximately February 2011 to April 2013; (2) the District Court's sentence included a term of incarceration, in this case 37 months; and (3) Petitioner was the subject of other adverse actions based on the same set of circumstances, specifically when the New York State Department of Health's Administrative Review Board for Professional Medical Conduct suspended his license to practice as a medical doctor. *Id.* at 2.

Petitioner, through counsel, requested a hearing before an administrative law judge to dispute the length of the exclusion. This case was originally assigned to Administrative Law Judge Scott Anderson. On May 17, 2017, Judge Anderson held a prehearing conference by telephone with counsel for the parties, the substance of which is summarized in his May 18, 2017 Order Summarizing Prehearing Conference (Order). At the prehearing conference, Petitioner conceded that there was a basis for exclusion, but maintained that the length of exclusion was unreasonable. Order ¶ 1. On June 2, 2017, this case was transferred to me to hear and decide this case.

In accordance with Judge Anderson's Acknowledgment, Prehearing Order, and Notice of Prehearing Conference (Prehearing Order), the IG filed a brief on June 25, 2017, with exhibits marked as IG Exhibits 1 through 7. Petitioner filed a brief (P. Br.) on July 27, 2017, with exhibits marked as Petitioner's Exhibits 1 and 2. The IG filed a reply brief (IG Reply) on August 18, 2017.

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<sup>1</sup> Document 7 in the official case file maintained in the DAB E-file system; for clarity and simplicity, I will cite to the exhibits attached by the parties to their respective briefs by the exhibit numbers indicated by the parties, not the document numbers assigned by DAB.

## II. Issue

The only issue in this case before me is whether the ten-year duration of the exclusion is unreasonable.

## III. Decision on the Record

Neither party has objected to any of the proposed exhibits. I therefore admit all of the proposed exhibits into the record. 42 C.F.R. § 1005.8(c); Civil Remedies Division Procedures § 14(e); Prehearing Order ¶ 12.

Both parties indicated that a hearing is not necessary in this case and that they did not have any witnesses to offer. IG Br. at 7-8; P. Br. at 4. Accordingly, I will decide this case on the briefs submitted and the exhibits of record.

## IV. Jurisdiction

I have jurisdiction to hear and decide this case. 42 U.S.C. § 1320a-7(f)(1); 42 C.F.R. §§ 1001.2007(a)(1)-(2), 1005.2(a).

## V. Findings of Fact, Conclusions of Law, and Analysis<sup>2</sup>

***1. Exclusion is required because Petitioner was convicted of a criminal offense related to the delivery of a health care item or service under the Medicare program under 42 U.S.C. § 1320a-7(a)(1).***

The IG must exclude an individual from participation in federal health care programs if the individual was convicted of a criminal offense related to the delivery of a health care item or service under the Medicare program. 42 U.S.C. § 1320a-7(a)(1). Here, there is plainly evidence to support the determination that Petitioner was convicted of such an offense.

Petitioner pled guilty to three separate counts: (1) conspiracy to violate the Federal Anti-Kickback Statute and Travel Act in violation of 18 U.S.C. § 371; (2) receipt of illegal remuneration in violation of the Federal Anti-Kickback Statute and Travel Act in violation of 42 U.S.C. § 1320a-7b(b)(1)(A); and (3) use of the mail and facilities in interstate commerce and interstate travel to promote, carry on, and facilitate commercial bribery in violation of 18 U.S.C. §§ 1952 (a)(1) and (3). IG Ex. 3 at 1. Petitioner's convictions were based on his actions, in concert with others, to refer his patients to a laboratory for testing of their blood specimens in exchange for monthly bribe payments. IG Ex. 2 at 4; IG Ex. 4 at 1-2.

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<sup>2</sup> My findings of fact and conclusions of law appear in bold and italics.

Further, Petitioner concedes that he was convicted of a criminal offense that falls within the meaning of 42 U.S.C. § 1320a-7(a)(1). P. Br. at 2; Order ¶ 1. The IG has therefore proven a factual and legal basis for Petitioner's exclusion.

***2. Exclusion is otherwise required because Petitioner was convicted of a felony criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service under 42 U.S.C. § 1320a-7(a)(3).***

The IG must also exclude an individual from participation in federal health care programs where an individual is convicted of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. 42 C.F.R. § 1320a-7(a)(3). The evidence here supports exclusion on that alternate basis as well.

As described above, Petitioner pled guilty to charges related to his referral of his patients' blood testing in exchange for monthly bribe payments. IG Ex. 2 at 4; IG Ex. 4 at 1-2. Such conduct clearly constitutes a criminal offense related to the forms of financial misconduct contemplated by the Act. And, Petitioner again concedes that he was convicted of a criminal offense that falls within the meaning of 42 U.S.C. § 1320a-7(a)(3). P. Br. at 2; Order ¶ 1. The IG has therefore proven a factual and legal basis for Petitioner's exclusion under this prong as well.

***3. Petitioner must be excluded for a minimum of five years.***

An exclusion imposed pursuant to 42 U.S.C. § 1320a-7(a)(1) or 42 U.S.C. § 1320a-7(a)(3) must be for at least five years. 42 U.S.C. § 1320a-7(c)(3)(B).

***4. The IG has proven three aggravating factors exist to support an exclusion period beyond the five-year statutory minimum.***

The regulations establish aggravating factors that the IG may consider to lengthen the period of exclusion beyond the five-year minimum for a mandatory exclusion. 42 C.F.R. § 1001.102(b). In this case, the IG advised Petitioner in the exclusion notice of three aggravating factors that justified excluding him for more than five years. IG Ex. 1 at 2. These factors are listed in 42 C.F.R. §§ 1001.102(b)(2), (5), and (9). I must uphold the IG's determination as to the length of exclusion so long as it is not unreasonable. 42 C.F.R. § 1001.2007(a)(1)(ii). Here, as outlined below, the IG's determination is reasonable.

***a. The IG established the aggravating factor stated in 42 C.F.R. § 1001.102(b)(2) – the criminal acts resulting in Petitioner’s conviction lasted a period of one year or more.***

The IG asserted that Petitioner’s criminal acts were committed over a period of one year or more. *See* 42 C.F.R. § 1001.102(b)(2). The Superseding Indictment, to which Petitioner pled guilty, charged Petitioner with conspiracy to violate the Federal Anti-Kickback Statute and Travel Act that lasted more than one year. IG Ex. 2 at 4. The Indictment and Petitioner’s plea agreement indicates that he accepted bribes for the referral of blood specimens to a laboratory between February 2011 and April 2013. IG Ex. 2 at 4; IG Ex. 4 at 1-2. Petitioner does not dispute the IG’s characterization of facts under this aggravating factor. P. Br. at 2. Therefore, the evidence before me establishes that the acts resulting in Petitioner’s conviction occurred over a period of one year or more.

***b. The IG established the aggravating factor stated in 42 C.F.R. § 1001.102(b)(5) – the sentence imposed against Petitioner included a period of incarceration.***

The IG asserted that Petitioner’s criminal conviction resulted in a sentence of incarceration. *See* 42 C.F.R. § 1001.102(b)(5). The record shows that the District Court sentenced Petitioner to 37 months of incarceration. IG Ex. 3 at 2. Again, Petitioner has not disputed this factor. P. Br. at 2. Therefore, the evidence of record shows that Petitioner was sentenced to 37 months of incarceration based on his criminal conduct.

***c. The IG established the aggravating factor stated in 42 C.F.R. § 1001.102(b)(9) –Petitioner was subject to an adverse action by a State agency based on the same set of circumstances that serves as the basis for imposition of the exclusion.***

The IG asserted in the exclusion notice that Petitioner was subject to an adverse action from a state board based on the same set of circumstances that serve as the basis for the imposition of the exclusion. *See* 42 C.F.R. § 1001.102(b)(9). The record shows that the New York State Department of Health’s Administrative Review Board for Professional Medical Conduct found that Petitioner’s conduct, which resulted in his convictions, constituted professional misconduct and suspended Petitioner’s license to practice medicine in the State of New York. IG Ex. 7. Petitioner does not dispute the application of this regulatory factor. P. Br. at 2. Therefore, the record shows that Petitioner was subject to an adverse action by a state board based on the same set of circumstances that serve as the basis for the exclusion.

**5. *Petitioner did not prove any mitigating factors exist in this case upon which I may rely to reduce the exclusion period.***

Petitioner did not dispute the existence of the three aggravating factors cited by the IG. P. Br. at 2. However, he nevertheless contends that the exclusion period should be reduced, noting that New York's Administrative Review Board "unanimously held" that: Petitioner showed remorse; that there was an absence of patient harm or unnecessary medical expenditure; that he made efforts to improve his medical knowledge while incarcerated; and that the Petitioner had the capacity to provide medical care to an underserved community. P. Br. at 3; P. Ex. 1 at 5-6.

As an initial matter, I note Petitioner argues that the regulations do not require application of aggravating factors but only allow for their application. P. Br. at 3, *citing* 42 C.F.R. § 102(b). He cites the above mitigating factors as reasons the exclusionary period should not have been lengthened in the first place. *Id.* Petitioner improperly relies on this regulation, which sets forth the IG's discretionary authority to increase the exclusionary period, but does not address *my* authority to reduce the exclusionary period determined by the IG under those factors. As the IG properly observed in his reply brief, the Departmental Appeals Board has consistently found that I cannot substitute my own judgment for that of the IG, once he has determined an exclusionary period based on the appropriate regulatory factors. IG Reply at 2, *citing* *Gracia L. Mayard, M.D.*, DAB No. 2767 (2017); *Juan de Leon*, DAB No. 2533 at 5 (2013); *Craig Richard Wilder, M.D.*, DAB No. 2416 at 8 (2011).

Instead, where the IG has properly exercised his discretion to increase the exclusionary period, as he has done here, I may only reduce that period after considering the specific mitigating factors found at 42 C.F.R. § 1001.102(c):

- (1) The individual or entity was convicted of three or fewer misdemeanor offenses, and the entire amount of financial loss (both actual loss and intended loss) to Medicare or any other Federal, State or local governmental health care program due to the acts that resulted in the conviction, and similar acts, is less than \$1,500;
- (2) The record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional or physical condition before or during the commission of the offense that reduced the individual's culpability; or
- (3) The individual's or entity's cooperation with Federal or State officials resulted in –

- (i) Others being convicted or excluded from Medicare, Medicaid and all other Federal health care programs,
- (ii) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or
- (iii) The imposition against anyone of a civil money penalty or assessment under part 1003 of this chapter.

Petitioner has the burden to prove by a preponderance of the evidence that there is a mitigating factor or factors for me to consider. 42 C.F.R. § 1005.15(b)(1). Based on my consideration of the entire record, I conclude that Petitioner has failed to establish any mitigating factor that I am permitted to consider to reduce the period of his exclusion.

I recognize the factors cited by Petitioner in his informal brief were used by the New York State medical board to mitigate its decision from outright revocation to a suspension of Petitioner's medical license. However, none of these factors qualify as relevant mitigating factors under the regulations which are applicable here. Accordingly, I find that Petitioner has not met his burden to establish any mitigating factors that would justify reducing the period of exclusion.

***6. A ten-year exclusion period is not unreasonable.***

I must uphold the IG's determination as to the length of exclusion unless it is unreasonable. 42 C.F.R. § 1001.2007(a)(1)(ii). It is important to note that it is the quality of the aggravating (or mitigating) factors that is most important when considering the length of exclusion and not the sheer number of aggravating factors that are present in a given case. As the Secretary of Health and Human Services stated in the preamble to the final rule establishing the exclusion regulations:

We do not intend for the aggravating and mitigating factors to have specific values; rather, these factors must be evaluated based on the circumstances of a particular case. For example, in one case many aggravating factors may exist, but the subject's cooperation with the OIG may be so significant that it is appropriate to give that one mitigating factor more weight than all of the aggravating. Similarly, many mitigating factors may exist in a case, but the acts could have had such a significant physical impact on program beneficiaries that the existence of that one aggravating factor must be given more weight than all of the mitigating. The

weight accorded to each mitigating and aggravating factor cannot be established according to a rigid formula, but must be determined in the context of the particular case at issue.

57 Fed. Reg. at 3314-15 (1992).

The conspiracy Petitioner participated in lasted for more than two years, from February 2011 through April 2013. During this time he accepted multiple bribes related to the delivery of health care services. This prolonged criminal conduct demonstrates Petitioner's high level of untrustworthiness because it shows that his involvement was not simply a mistake or that he was temporarily involved in the scheme. Rather, he participated in a process designed to systematically defraud the Medicare program.

Petitioner's sentence of 37 months of incarceration for his crime constitutes another piece of aggravating evidence. IG Ex. 3 at 2. Petitioner was incarcerated for a substantial period of time, indicating the gravity of his offense.

Finally, the suspension of Petitioner's medical license based on his criminal acts further demonstrates that Petitioner lacks trustworthiness to participate in government health care programs.

I conclude that the three proven aggravating factors are entitled to significant weight. Petitioner's actions have endangered the Medicare Trust Fund's ability to pay for needed health care for the elderly and disabled in this country. The length of exclusion imposed by the IG is reasonable and warranted.

## **VI. Conclusion**

I affirm the IG's determination to exclude Petitioner for ten years from participating in Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(1).

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/s/  
Bill Thomas  
Administrative Law Judge