

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

Theodore E. Deininger,  
(OI File No. 7-14-40200-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-571

Decision No. CR4991

Date: December 13, 2017

**DECISION**

The Inspector General (IG) of the U.S. Department of Health and Human Services excluded Petitioner, Theodore E. Deininger, from participation in Medicare, Medicaid, and all other federal health care programs for ten years pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)). Petitioner now challenges the exclusion. For the reasons stated below, I conclude that the IG had a valid basis for excluding Petitioner from program participation and that the ten-year exclusion period is not unreasonable. I therefore affirm the IG's exclusion determination.

**I. Case Background and Procedural History**

On January 31, 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) for a period of ten years. IG Brief, Exhibit (Ex.) 1.<sup>1</sup> The IG based the exclusion on Petitioner's conviction in the United States District Court for the Eastern District of Missouri (District Court) of a criminal offense related to the delivery of an item or

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<sup>1</sup> Document 6b in the official case file maintained in the DAB E-file system; for clarity and simplicity, I will cite to the exhibits by the exhibit numbers indicated by the parties in their respective briefs, not the document numbers assigned by DAB.

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 identified three aggravating factors as a basis for increasing the exclusion period from five to ten years: (1) the acts resulting in the conviction caused or were intended to cause loss to a government program or one or more entities of more than \$5,000 (in this case, approximately \$150,000); (2) the criminal acts resulting in Petitioner's conviction were committed over a period of more than one year, from approximately October 2010 to July 2012; and (3) the District Court's sentence included a term of incarceration, in this case 15 months. *Id.* at 2.

Petitioner filed a timely request for 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 24, 2017, Judge Anderson held a prehearing conference by telephone with the parties, the substance of which is summarized in his May 26, 2017 Order and Schedule for Filing Briefs and Documentary Evidence. On June 9, 2017, this case was transferred to me.

In accordance with Judge Anderson's scheduling orders, the IG filed his informal brief (IG Br.) on July 10, 2017, with exhibits designated IG Exhibits 1 through 4. Petitioner filed his informal brief (P. Br.) on September 27, 2017. The IG waived filing a reply brief on October 19, 2017.

## **II. Issues**

The issues in this case are limited to determining if the IG has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs and, if so, whether the length of the exclusion imposed by the IG is unreasonable. *See* 42 C.F.R. § 1001.2007(a)(1).

## **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. *See* 42 C.F.R. § 1005.8(c); Civil Remedies Division Procedures § 14(e).

Both parties have indicated they do not believe a hearing is necessary in this matter. IG Br. at 6; P. Br at 4. Neither party has offered any witnesses. 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>

***A. 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.

On December 18, 2015, Petitioner pled guilty to four separate counts of health care fraud, admitting he knowingly participated in a scheme to defraud Medicare and Medicaid. IG Ex. 2 at 2. Specifically, Petitioner, a certified prosthetist, purchased used prosthetic devices, fit them to patients while concealing their used nature, purchased and returned new prosthetic devices, and submitted claims to Medicare and Medicaid falsely representing he had provided new prosthetics to the affected patients. *Id.* at 7-10.

It is clear Petitioner was convicted of a criminal offense. It is equally clear that the offense of conviction related to his fraudulent scheme to defraud Medicare and Medicaid by falsely claiming to have provided new prosthetic devices to Medicare and Medicaid patients. Accordingly, the IG has proven a factual and legal basis for Petitioner's exclusion.

***B. Petitioner must be excluded for at least five years.***

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

***C. 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

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

aggravating factors that justified excluding him for more than five years. IG Ex. 1 at 2. These factors are listed at 42 C.F.R. §§ 1001.102(b)(1), (2) and (5). 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.

***1. The IG established the aggravating factor stated in 42 C.F.R. § 1001.102(b)(1) – the criminal acts resulting in Petitioner's conviction resulted in significant losses to the government.***

The IG asserted Petitioner's offenses caused losses to federal health care programs in excess of \$5,000.<sup>3</sup> IG Br. at 4, citing 42 C.F.R. § 1001.102(b)(1). This conclusion is supported by both the plea agreement that resolved Petitioner's criminal case, in which he explicitly agreed that the loss to Medicare and Medicaid from his criminal scheme was \$150,000, and the judgment of the District Court, which ordered him to pay a total of \$150,000 in restitution to Medicare and Medicaid. IG Ex. 2 at 10; IG Ex. 3 at 6. The evidence before me establishes that the acts resulting in Petitioner's conviction caused a loss of \$150,000, well beyond the regulatory threshold for this aggravating factor regardless of whether I applied the \$5,000 or the \$50,000 threshold amount.

***2. 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. IG Br. at 5, citing 42 C.F.R. § 1001.102(b)(2). The IG asserts the acts that resulted in Petitioner's conviction were committed from October 2010 to July 2012. *Id.*<sup>4</sup> In fact, the indictment to which Petitioner pled guilty charged Petitioner with acts in furtherance of his scheme to defraud Medicare and Medicaid beginning in or around 2007 and continuing to in or around 2014. IG Ex. 4 at 6. Petitioner agreed in his plea agreement that the actions he took to further his fraudulent scheme occurred from 2007 to 2014. IG Ex. 2 at 7. Even under the IG's more restrictive reading of the regulation, Petitioner's conduct that directly resulted in fraudulent billing to federal health care programs occurred over a period of almost two years, from October 2010 to July 2012. *Id.* at 10. The evidence before me therefore establishes that the acts resulting in Petitioner's conviction occurred over a period of one year or more.

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<sup>3</sup> As the IG points out in his brief, the amount necessary to trigger this aggravating factor was \$5,000 at the time of Petitioner's exclusion on January 31, 2017, but increased as of February 13, 2017 to \$50,000. IG Br. at 4 n. 4, citing 82 Fed. Reg. 4100, 4112 (Jan. 12, 2017). I note the loss amount caused by Petitioner's criminal acts, approximately \$150,000, is well over either threshold.

<sup>4</sup> The IG erroneously cited page ten of Exhibit 3, which consists of only eight pages. I assume he meant to cite Ex. 2 at page ten, which discusses these dates.

**3. *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. IG Br. at 5, citing 42 C.F.R. § 1001.102(b)(5). The evidence of record clearly demonstrates that the District Court sentenced Petitioner to 15 months of incarceration. IG Ex. 3 at 2. The IG has therefore established application of this aggravating factor was appropriate.

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

Where the IG has properly exercised its discretion to increase the exclusionary period, as it 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).

Here, Petitioner did not dispute the identification of the three aggravating factors cited by the IG. P. Br. at 3. However, he contends that mitigating factors exist that would justify reduction of the exclusion period, stating that his “misbilling” took place over five years ago, and that his company had a “bad quality control system in place.” P. Br. at 3-4. Petitioner characterized his criminal conduct as “four bad claims over a twenty-seven year career,” justifying a reduced exclusion period. *Id.* at 4.

Petitioner’s asserted reasons for mitigation are not recognized by the governing regulations. *See* 42 C.F.R. § 1001.102(c). I therefore cannot consider them, whatever their merit. Accordingly, I find that Petitioner has not met his burden to establish any mitigating factors that would justify reducing the period of exclusion.

***5. 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, 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.

In this case, the quality of these factors militates in favor of the extended period of exclusion selected by the IG. Petitioner enacted a scheme to defraud the Medicare and

Medicaid programs by buying used prosthetics, which he provided to patients while charging the government for new equipment he bought and returned, pocketing the difference. This conduct took place for years and was not merely four isolated incidents of “misbilling,” as he now prefers to describe it. P. Br. at 4. Rather, Petitioner participated in a criminal scheme designed to defraud the Medicare and Medicaid programs and reduce the quality of care provided to those programs’ patients, who because of his fraudulent conduct, received used prosthetic equipment. The severity of Petitioner’s misconduct, which he now attempts to minimize, is reflected in his 15-month sentence of incarceration and in the \$150,000 loss amount to federal health care programs caused by his misconduct.

In sum, consideration of these factors leads me to conclude the three proven aggravating factors are entitled to significant weight. Petitioner sought to defraud the Medicare Trust Fund, meant for the elderly and disabled in this country, for his own personal gain. 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