Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Andrew Louis Barrett,
(OI File No. 2-12-40153-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-537

Decision No. CR5020

Date: February 5, 2018

DECISION

The Inspector General (IG) of the U.S. Department of Health and Human Services excluded Petitioner, Andrew Louis Barrett, from participation in Medicare, Medicaid, and all other federal health care programs for at least 23 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 basis for excluding Petitioner from program participation and that the 23-year exclusion period is not unreasonable. I therefore affirm the IG's exclusion 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) for a period of at least 23 years. IG Brief (IG Br.) Exhibit (Ex.) 1.[1] The IG based the exclusion on Petitioner's conviction for a criminal offense in the United

[1] Document 9a 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.

States District Court for the Eastern District of New York (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 identified three aggravating factors as a basis for increasing the exclusion period from five to 23 years: (1) the criminal acts resulting in Petitioner's conviction caused or were intended to cause financial loss to a government program or other entities of at least $5,000, in this case approximately $2,700,000; (2) the District Court's sentence included a term of incarceration, in this case 43 months; and (3) Petitioner was the subject of another adverse action based on the same set of circumstances, specifically when the New York State Office of Medicaid Inspector General excluded him from participation in the Medicaid program. *Id.* at 2.

Petitioner 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 22, 2017 Order Summarizing Prehearing Conference (Summary Order). At the prehearing conference, Petitioner's counsel, Jeffrey Granat, stated that he intended to represent Petitioner in only a limited capacity, which did not include filing a prehearing brief on his behalf. Summary Order at 1. He requested that Judge Anderson stay the proceedings for approximately three years, until Petitioner's release from prison. Judge Anderson determined a stay to be inappropriate and denied Petitioner's request; I concur with his reasoning. *Id.* at 1-2. Judge Anderson acknowledged Petitioner's state of incarceration and indicated Petitioner could request additional time to submit his prehearing exchange if necessary. *Id.* at 2.

Following the prehearing conference, Mr. Granat withdrew from representation of Petitioner, but requested continued access to the DAB E-file system in order to assist Petitioner and his family if needed; Judge Anderson granted his request, subject to Petitioner's objection. *Id.* On June 2, 2017, this case was transferred to me to hear and decide.

The IG timely filed his brief on July 10, 2017, with exhibits marked as IG Exhibits 1 through 8. After I granted him additional time, Petitioner, proceeding *pro se*, filed a brief (P. Br.) on October 11, 2017, with exhibits marked as Petitioner's Exhibits 1 through 11. The IG filed a reply brief (IG Reply) on November 3, 2017. Petitioner subsequently requested leave to file a sur-reply, which I denied on December 8, 2017.

II. Decision on the Record

A. Exhibits

Petitioner did not object to any of the IG's exhibits; I therefore admit IG exhibits 1 through 8. The IG objected to all of Petitioner's exhibits, asserting Petitioner submitted them for the exclusive purpose of collaterally attacking his conviction, making them irrelevant and inadmissible. IG Reply at 8. While I agree that admitting these documents would be improper to allow Petitioner to attack the conviction underlying his exclusion, it appears from Petitioner's exchange that he submitted them in the context of addressing mitigating factors he believed would support reducing the length of his exclusion. P. Br. at 3-7. Accordingly, I will address the probative value of this evidence in my analysis of mitigating factors. I therefore overrule the IG's objection and admit all of the proposed exhibits by both parties into the record. Apr. 19, 2017 Acknowledgment, Prehearing Order, and Notice of Prehearing Conference (Prehearing Order) ¶ 12; 42 C.F.R. § 1005.8(c); Civil Remedies Division Procedures § 14(e).

B. Hearing

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 13; P. Br. at 7. Accordingly, I will decide this case on the briefs submitted and the exhibits of record.

III. 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).

IV. Jurisdiction

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

V. Findings of Fact, Conclusions of Law, and Analysis[2]

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

The IG relied on section 1320a-7(a)(1) of the Act as the legal basis to exclude Petitioner. The IG must exclude an entity from participation in Medicare, Medicaid, and all other federally-funded health care programs if that entity "has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program." 42 U.S.C. § 1320a-7(a)(1); 42 C.F.R. § 1001.101(a). Thus, to sustain Petitioner's exclusion pursuant to section 1320a-7(a)(1) in this case, the IG must prove: (1) Petitioner was convicted of a criminal offense; and (2) Petitioner's offense was related to the delivery of an item or service under Medicare or a State health care program. *See id.*

The IG has clearly established through documentary evidence that Petitioner was convicted of a criminal offense. An entity is considered "convicted" when a judgment of conviction has been entered by a federal, state, or local court, or a plea of guilty or no contest has been accepted in a federal, state, or local court. 42 U.S.C. § 1320a-7(i)(1), (3). On September 9, 2016, pursuant to Petitioner's plea, the District Court entered Judgment adjudicating Petitioner guilty of one count of Health Care Fraud in violation of 18 U.S.C. § 1347 and one count of Tax Fraud in violation of 26 U.S.C. § 7206(l). IG Ex. 4 at 1. Petitioner concedes he was convicted of a criminal offense. P. Br. at 1. Based on these facts, I conclude that, for purposes of exclusion, Petitioner was convicted of a criminal offense.

I further find the IG has established Petitioner's conviction was for an offense "related to" the delivery of an item or service under Medicare. The term "related to" simply means that there must be a nexus or common sense connection. *See Quayum v. U.S. Dep't of Health and Human Servs.*, 34 F. Supp. 2d 141, 143 (E.D.N.Y. 1998); *see also Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (describing the phrase "related to" in another part of section 1320a-7 as "deliberately expansive words," "the ordinary meaning of [which] is a broad one," and one that is not subject to "crabbed and formalistic interpretation") (internal quotation marks omitted).

Here, Petitioner pleaded guilty to one count of Health Care Fraud, identified as count one of the superseding indictment. IG Ex. 4 at 1. Count one of the superseding indictment accused Petitioner of willfully and knowingly executing a scheme to defraud Medicare and Medicaid by making materially false pretenses, representations, and promises to

[2] My findings of fact and conclusions of law appear in bold and italics.

induce payment by those entities "in connection with the delivery of and payment for health care benefits, items and services." IG Ex. 3 at 9-10.

Petitioner specifically conceded the criminal acts that resulted in his conviction were "in connection with the delivery of health care benefits, items, and services." *See id*; IG Ex. 2 at 1, 12. He continues to concede he was appropriately excluded on that basis. *See* P. Br. at 2. Accordingly, I conclude that the criminal conduct for which Petitioner was convicted was related to the delivery of a health care item or service under the Medicare program. *See* 42 U.S.C. § 1320a-7(a)(1). The record fully supports Petitioner's mandatory exclusion.

2. Petitioner must be excluded for a minimum of five years.

Because I have concluded that the IG has proven a basis to exclude Petitioner pursuant to 42 U.S.C. § 1320a-7(a)(1), Petitioner must be excluded for a minimum of five years. 42 U.S.C. § 1320a-7(c)(3)(B).

3. The IG has established three aggravating factors in this case that 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). If an aggravating factor justifies a length of exclusion longer than five years, then I may consider mitigating factors as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

In this case, the IG advised Petitioner in the February 28, 2017 exclusion notice that there were three aggravating factors that justified excluding him for more than five years: (1) the criminal acts resulting in Petitioner's conviction caused or were intended to cause financial loss to a government program or other entities of at least $5,000,[3] in this case approximately $2,700,000; (2) the District Court's sentence included a term of incarceration, in this case 43 months; and (3) Petitioner was the subject of another adverse action based on the same set of circumstances, specifically when the New York State Office of Medicaid Inspector General excluded him from participation in the Medicaid program. IG Ex. 1 at 2.

[3] The IG's February 28, 2017 exclusion notice erroneously indicated the loss amount necessary to trigger this aggravating factor was $5,000. IG Ex. 1 at 2. In fact, the triggering amount increased on February 13, 2017 from $5,000 to $50,000. *See* 82 Fed. Reg. 4100, 4112 (Jan. 12, 2017). However, I note the loss amount caused by Petitioner's criminal acts, approximately $2,700,000, is well over either threshold.

a. The IG established financial loss to a government program of $50,000 or more, as required by 42 C.F.R. § 1001.102(b)(1).

The IG has provided evidence sufficient to demonstrate Petitioner's acts resulting in his criminal conviction caused a financial loss to a government program of $50,000 or more. Here, Petitioner pled guilty to a criminal charge and admitted that his criminal conduct induced Medicare and Medicaid to make payments in connection to the delivery of health services. IG Ex. 2 at 1; IG Ex. 3 at 9-10. As part of his plea, Petitioner explicitly admitted that the loss caused by his conduct resulting in his conviction for health care fraud resulted in a loss to Medicare and Medicaid of $2.7 million. IG Ex. 2 at 4.

These admissions formed the basis of the District Court's order requiring Petitioner to pay restitution totaling $1,906,200 to Medicaid, and $793,800 to Medicare. IG Ex. 4 at 5. It is well-established that an amount ordered as restitution constitutes proof of the amount of financial loss to a government program. *See, e.g.*, *Juan de Leon, Jr.*, DAB No. 2533 at 5 (2013); *Craig Richard Wilder*, DAB No. 2416 (2011). The IG has sustained its burden of proving financial loss to a government program of $50,000 or more.

b. The IG established Petitioner's sentence included a period of incarceration.

The IG has demonstrated sufficient facts for me to conclude Petitioner's criminal conviction resulted in a sentence of incarceration. *See* 42 C.F.R. § 1001.102(b)(5). The evidence of record clearly demonstrates that the District Court sentenced Petitioner to 43 months of incarceration. IG Ex. 4 at 2. The IG has therefore established application of this aggravating factor was appropriate.

c. The IG established Petitioner was the subject of another adverse action by another government agency based on the same set of circumstances forming the basis of the exclusion.

The IG properly determined an aggravating circumstance arose as the result of an adverse action taken against Petitioner by another government entity based on the same set of circumstances for which he was excluded. *See* 42 C.F.R. § 1001.102(b)(9). Specifically, the IG has submitted documentary evidence showing the New York State Office of Medicaid Inspector General excluded Petitioner from participating in the New York State Medicaid program because he was charged with a criminal offense under New York law that related to or resulted from either furnishing or billing for medical care, services or supplies, or the performance of management or administrative services to the same. IG Ex. 6. The IG has therefore established application of this aggravating factor was appropriate.

7. Petitioner has not demonstrated any mitigating factors upon which I may rely to reduce the exclusion period.

Because I have concluded that aggravating factors are present in this case, the applicable regulations require me to next consider whether any mitigating factors exist that would offset those aggravating factors. *See* 42 C.F.R. § 1001.102(c). The regulations specifically outline what factors may be considered in mitigation. *See id*. In this case, Petitioner's arguments for mitigation generally do not relate to those regulatory mitigating factors. I am accordingly unable to consider them.

Specifically, Petitioner allots a considerable portion of his prehearing brief to an attempt to establish the greater culpability of another individual for the actions that resulted in his criminal conviction. To the extent Petitioner is attempting a collateral attack on his conviction, his claim to mitigation is without merit. *See* 42 C.F.R. § 1001.2007(d). Whether another individual bears more or less blame for the criminal conduct in which Petitioner participated is irrelevant. As established by the IG, Petitioner pleaded guilty to and was convicted of charges that demonstrated he was part of a scheme to defraud Medicare and Medicaid. His precise level of involvement in a criminal scheme, in comparison to anyone else, is not a mitigating factor under the governing regulations. The exhibits Petitioner submitted do not establish any mitigating circumstances I am authorized to consider, and again appear to either attack his own conviction or place greater blame at the feet of one of his co-conspirators. I give them no weight in my decision.

The only argument Petitioner makes that I can even consider is his claim that he participated in a "sting" operation conducted by the Food & Drug Administration (FDA), which purportedly led to the arrest and conviction of other individuals. P. Br. at 5-6. This is a valid mitigating factor I can consider. *See* 42 C.F.R. § 1001.102(c)(3).[4] However, Petitioner bears the burden of demonstrating any mitigating factors by a preponderance of the evidence. 42 C.F.R. §§ 1005.15(c), (d); Prehearing Order ¶ 5. Here, he has failed to do so. Petitioner claims he cooperated in an undercover operation with the FDA, but provides no documentary evidence corroborating that claim. He claims the District Court, in sentencing him, took his alleged cooperation into account, but again provides no corroborating documentary evidence. His description of his cooperation is self-serving and undocumented. And, while Petitioner identified an FDA agent in his prehearing brief he claims could verify the circumstances of his mitigation claim, he did not identify this agent as a potential witness, provide a summary of his testimony, or even indicate he believed a hearing was necessary in this matter. P. Br. at

[4] Specifically, cooperation with government officials that results 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 42 C.F.R. Part 1003.

6-7. In sum, Petitioner has not met his burden of proof as to this or any other mitigating factor that would justify reducing the period of exclusion imposed by the IG.

8. A 23-year exclusion period is not unreasonable.

I must uphold the IG's determination as to the length of exclusion if it is not unreasonable. 42 C.F.R. § 1001.2007(a)(1)(ii). This means that:

> So long as the amount of time chosen by the OIG is within a reasonable range, based on demonstrated criteria, the ALJ has no authority to change it under this rule. We believe that the deference § 1001.2007(a) grants to the OIG is appropriate, given the OIG's vast experience in implementing exclusions under these authorities.

57 Fed. Reg. 3298, 3321 (Jan. 29, 1992).

In making my determination, the quality of the aggravating (or mitigating) factors is of greater significance than the mere number of the factors 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.

Id. at 3314-15.

Here, the quality of the aggravating factors proven by the IG demonstrates a longer exclusion period to be reasonable. A federal court convicted Petitioner for participating in a scheme to defraud Medicare and Medicaid that resulted in losses to those victim agencies of approximately $2.7 million. IG Ex. 2 at 4. This amount of loss, approaching $3,000,000, is significantly more than the $50,000 threshold to be considered

aggravating. *See* 42 C.F.R. § 1001.102(b)(1). Financial loss is an "exceptional aggravating factor" when the loss is "very substantially greater than the statutory standard." *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003). A loss amount substantially greater than the minimum triggering amount is sufficient to support a significantly increased length of exclusion. *See Anderson v. Thompson*, 311 F. Supp. 2d 1121, 1130 (D. Kan. 2004) (considering a "program-related loss [that] was more than forty times the amount of loss necessary to find an aggravating factor" in justifying a 15-year exclusion). Here, the $2.7 million loss to Medicare and Medicaid caused by Petitioner amounts to approximately 54 times the loss necessary to constitute an aggravating factor.[5]

In addition, Petitioner engaged in a sophisticated criminal scheme that involved defrauding several federal agencies and, despite lasting approximately two years, netted him almost $3 million. His actions resulted in a significant sentence of incarceration. The state of New York, upon becoming aware of his conduct, excluded him from participation in the New York State Medicaid program. IG Exs. 6-7. I must also consider these aggravating circumstances in determining the reasonableness of the IG's exclusion period determination.

Petitioner asserts the exclusion selected by the IG was not reasonable, citing the amount of time he was excluded by the sentencing judge in his criminal case, and attempting to distinguish other cases of exclusion cited by the IG. P. Br. at 8-13.

I find Petitioner's arguments unpersuasive. The District Court that sentenced Petitioner did not determine a three-year exclusion period appropriate, as Petitioner contends. Instead, the District Court made abstention from contact with Medicare or Medicaid one of the many conditions with which Petitioner was required to comply as a part of a three-year period of supervised release to follow his term of incarceration. IG Ex. 4 at 4. The sentencing court's purpose in setting conditions for supervised release is to supervise and assist individuals in their reintegration into the community following incarceration. *See* U.S. Sentencing Commission, *Federal Offenders Sentenced to Supervised Release* (July 2010) at 1, *available at* https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2012/2_Federal_Offenders_Sentenced_to_Supervised_Release.pdf. The sentencing court's purpose was not to determine an appropriate period of exclusion. Congress vested that power in the Secretary of Health and Human Services, who delegated it to the IG. *See* 42 U.S.C. § 1320a-7(a)(1); 42 C.F.R. § 1001.101.

[5] I have not discussed the tax fraud count to which Petitioner pleaded guilty, as the IG did not appear to rely upon it as a basis for exclusion, but I note in the context of discussing the severity of this particular aggravating factor that Petitioner caused a loss to the Internal Revenue Service of an additional $736,192. *See* IG Ex. 4 at 5.

Petitioner's attempt to characterize the IG's selection of an exclusion period as arbitrary and capricious by comparing his case to those of other excluded individuals is equally unavailing. The Board has observed that "the reasonableness of exclusion periods must be made on a case-by-case basis, and, similarities notwithstanding, the facts of each case are unique to that case." *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491 at 15 (2012). Merely pointing out surface discrepancies with other IG exclusion cases is insufficient to show the IG's determination in this case is unreasonable.

Ultimately, I do not have the authority to substitute my own judgment for that of the IG, or impose a period of exclusion that seems more reasonable to me. *See de Leon, Jr.*, DAB No. 2533 at 5; *Wilder*, DAB No. 2416 at 8. Based on the seriousness of the aggravating factors described above, I conclude the IG has satisfactorily established that Petitioner's criminal conduct had a substantial financial impact on the Medicaid program and demonstrates his untrustworthiness to participate in federal health care programs. Accordingly, the length of exclusion imposed by the IG is not unreasonable.

VI. Conclusion

For the reasons discussed above, I affirm the IG's determination to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for a period of 23 years.

/s/
Bill Thomas
Administrative Law Judge