Department of Health And Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Hazem Garada, M.D.,	)	Date: January 23, 2007
	)	
Petitioner,	)	
	)	Docket No. C-06-401
- v. -	)	Decision No. CR1557
	)	
The Inspector General.	)	
	)	

DECISION ON REMAND

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Hazem Garada, M.D., from participating in Medicare and other federally funded health care programs for a period of at least 13 years.

I. Background

This case originally was before me as Petitioner's challenge of the I.G.'s March 31, 2005 determination to exclude him. On December 22, 2005 I issued a decision in which I upheld the determination. *Hazem Garada, M.D.*, DAB CR1384 (2005). I held that the I.G. proved that Petitioner was convicted of a criminal offense – fraud against Medicare and another health insurer – for which exclusion was mandated by sections 1128(a)(1) and (a)(3) of the Social Security Act (Act). I found that the length of the exclusion was justified based on the presence of aggravating factors and the absence of any mitigating factors.

Petitioner appealed my decision to the Departmental Appeals Board (Board). On April 25, 2006 an appellate panel of the Board remanded my decision to me with instructions that I provide Petitioner with an in-person hearing at which Petitioner could present evidence concerning his assertion that a mitigating factor was present in the case. *Hazem Garada, M.D.*, DAB No. 2027 (2006).

Pursuant to the panel's remand order I gave Petitioner the opportunity to request subpoenas of individuals who he believed had evidence that was relevant to his case. Petitioner filed a request which the I.G. opposed in part. On July 31, 2006 I ruled in favor of Petitioner's request that I subpoena two named individuals, Ms. Rachael Plazas and Mr. Scott A. Arnott. Ruling on Request for Subpoenas, July 31, 2006. I ruled against Petitioner's request that I subpoena other individuals because Petitioner did not describe any information that these individuals might possess that would be relevant to a mitigating factor. *Id.*

I convened an in-person hearing in Washington, D.C. on November 2, 2006 at which I received testimony from Petitioner, Mr. Arnott, and Kenneth Marty, a rebuttal witness called by the I.G. I left the record open at that hearing due to the failure of Ms. Plazas to appear and testify. On December 6, 2006 I completed the hearing, taking Ms. Plazas' testimony by telephone.[1]

At the November 2 hearing I received exhibits from the parties in addition to those which I had received previously. From the I.G. I received an exhibit which I identified as I.G. Ex. 10. From Petitioner I received an exhibit which I identified as P. Ex. 8.[2]

II. Issues, findings of fact and conclusions of law

A. Issue

The sole issue in this case is whether Petitioner proved the existence of mitigating evidence, identified at 42 C.F.R. § 1001.102(c)(3)(i)-(iii), that would justify reducing the duration of his exclusion.

B. Findings of fact and conclusions of law

In my original decision I made findings of fact and conclusions of law (Findings) which held that: (1) an in-person hearing was not warranted; (2) Petitioner was convicted of criminal offenses as described in sections 1128(a)(1) and (a)(3) of the Act; and (3) an exclusion of at least 15 years was reasonable. The Board appellate panel did not disturb my second Finding. It reversed my first Finding and remanded the case to me so that I

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[1] Prior to the November 2 hearing Petitioner agreed that the testimony of both Mr. Arnott and Ms. Plazas would be taken by telephone.

[2] Exhibits which I received prior to my first decision in this case remain in evidence.

might hear evidence concerning the possible presence of a mitigating factor. In doing so it did not find that I had erred in finding the presence of four aggravating factors. Consequently, I limit this decision *only* to deciding whether Petitioner offered mitigating evidence, the presence of which might be a basis for finding unreasonable the duration of the exclusion imposed by the I.G.'s exclusion. In addressing this issue I make an additional Finding, which I set forth below and discuss in detail.

1. Petitioner did not offer mitigating evidence that justifies reduction of the duration of his exclusion.

The mitigating factor alleged by Petitioner is set forth at 42 C.F.R. § 1001.102(c)(3)(i)-(iii). The regulation provides that the duration of an exclusion might be reduced if an excluded individual proves that his 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 . . . [42 C.F.R. Part 1003].

Id.

Petitioner made numerous allegations about his offers of cooperation with federal and State officials. All of his allegations must be evaluated pursuant to the criteria of 42 C.F.R. § 1001.102(c)(3)(ii) inasmuch as Petitioner does not allege that his cooperation resulted in others being convicted or excluded or that it has led to the imposition of a civil money penalty or assessment against anyone.

I am not persuaded that Petitioner's allegations and the evidence he offered to support them establish meaningful mitigating evidence. First, Petitioner asserted that he provided information to various authorities concerning immigration law violations by a number of individuals and/or activities by such individuals that might be construed as participation in or abetting certain terrorist organizations. Even assuming that to be true such information is irrelevant to establishing a mitigating factor because it does not relate to *program vulnerabilities or weaknesses.* The regulation is explicit. An offer by an excluded person to cooperate with prosecuting authorities is not relevant to the issue of

trustworthiness to provide care to Medicare beneficiaries or Medicaid recipients unless that offer relates to a health care program's vulnerability or weakness. True, the regulation does not define the word "program." But, its meaning is obvious from the context of the word within the regulation and within the broader regulations addressing exclusion.[3]

Second, Petitioner failed to prove that any information that he gave concerning possible program-related violations produced any positive results. The officials to whom Petitioner made offers of program-related cooperation looked at what he had to offer and concluded that the information was not worth pursuing.

The November 2-December 6, 2006 hearing received the testimony of three witnesses other than Petitioner. These individuals were: Scott Arnott, an official with the State of Virginia; Kenneth Marty, a criminal investigator with the Office of Investigations of the I.G.; and Rachael Plazas, an investigator for TriCenturion, a contractor that investigates complaints and provides support to law enforcement agencies. Although Mr. Arnott refused to attest to the substance of Petitioner's cooperation Petitioner admitted that his cooperation did not produce substantive results. Tr. at 10-11. Ms. Plazas testified that the I.G. and TriCenturion declined to investigate based on information provided to them by Petitioner. Tr. at 59. Mr. Marty testified that the I.G. declined to open an investigation based on information provider by Petitioner:

> Based on my investigation and my contact with . . . [Petitioner], his credibility was zero. He had lied to us repeatedly during the investigation and I had no reason to believe anything he said on that.

Tr. at 46.

The aggravating and mitigating factors that are set forth at 42 C.F.R. § 1001.102(b) and (c), including the mitigating factor at subsection (c)(3)(i)-(iii), function very much like rules of evidence. If evidence relates to an aggravating or mitigating factor it is deemed

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[3] The distinction between an offer of cooperation that is related to program vulnerabilities or weaknesses and an offer that addresses some other, non-program related, illegal conduct, is the basis for my denying Petitioner's requests for a subpoena of an individual whom Petitioner asserted was associated with the "West Virginia Joint Terrorism Task Force" and other individuals who might possess information about Petitioner's alleged non-program related cooperation. Ruling on Request for Subpoenas, July 31, 2006, at 2.

to be relevant to deciding the ultimate question of an excluded individual's trustworthiness. But, nothing in the regulation or the Act assigns weight to aggravating or mitigating evidence. How much weight should be assigned to that evidence depends on what it says about the excluded individual's trustworthiness to provide care.

Here, the evidence Petitioner offered about his cooperation offers no support for a conclusion that he is trustworthy to provide care. The evidence establishes that he offered cooperation to federal and State officials – after he had been charged with a crime and as part of a plea arrangement – but that the evidence was found not to be valuable by those who examined it. Nothing that Petitioner said or offered led anywhere. Given that, there is no reason for me to consider Petitioner's cooperation as providing grounds to reduce the duration of the exclusion imposed by the I.G.

Moreover, it is at least arguable that Petitioner's cooperation was insufficient even to qualify as mitigating evidence. As I read 42 C.F.R. § 1001.102(c)(3)(ii), the subsection requires that cooperation produce positive results in order to be deemed as mitigating evidence. The phrase "identifying program vulnerabilities or weaknesses" in that subsection applies on its face to the preceding phrases "additional cases being investigated" and "reports being issued." On the strength of this interpretation a mere offer of cooperation or the offer of information that turns out not to be useful would not be enough to meet the regulatory definition of a mitigating factor.[4]

Notwithstanding my reading of the regulation I have evaluated the cooperation offered by Petitioner as if the mere offer of cooperation along with information – regardless of its value – constitutes mitigating evidence. For the reasons I have discussed, I conclude that the information that Petitioner offered does not justify reducing the duration of his exclusion.

I reiterate what I stated in my original decision. Petitioner's criminal activity and the aggravating factors that I identified in my original decision provide ample support for the I.G.'s exclusion determination. The evidence offered by Petitioner does not provide a basis to reduce the duration of the exclusion below the 13-year term that the I.G. ultimately determined to impose.

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[4] The I.G. determined to reduce the duration of Petitioner's exclusion from at least 15 to at least 13 years based on the facts that Petitioner had offered cooperation and that files had been opened based on what he'd offered. That determination does not comport with my reading of the regulation. However, I am not questioning the I.G.'s exercise of discretion in this case.

The I.G. now argues that I should consider additional evidence concerning Petitioner's untrustworthiness that was not before me when I issued my original decision. Specifically, the I.G. asks that I consider evidence showing that Petitioner committed crimes in addition to those that were the basis for the I.G.'s exclusion determination and my original decision in this case. Specifically, Petitioner admitted to: providing prescription drugs to patients in exchange for sexual relations; engaging in a scheme with a pharmacist to supply the pharmacist with drug samples that would be sold for profit by the pharmacist, with the proceeds of the sales being split with Petitioner; and falsely and fraudulently accepting payment from the Immigration and Naturalization Service for critical medical tests that he did not, in fact, provide. I.G. Ex. 10, at 2-4. I do not consider this additional evidence as being relevant, for two reasons. First, the appellate panel's remand decision was strictly limited to the issue of whether Petitioner could establish mitigating evidence. Thus, basing my decision on the I.G's evidence of additional criminal activity by Petitioner would exceed the scope of the remand in this case. Second, the evidence offered by the I.G. is untimely. The I.G. offered no explanation for his failure to produce this evidence prior to my original decision.

/s/

Steven T. Kessel
Administrative Law Judge