Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jaswinder Rai Chhibber, M.D.,
(OI File No. 5-09-41058-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-169

Decision No. CR2816

Date: June 11, 2013

DECISION

Petitioner, Jaswinder Rai Chhibber, M.D., is a physician, licensed to practice in the State of Illinois. He was convicted on multiple counts of health care fraud and making false statements related to health care matters. Based on his convictions, the Inspector General (I.G.) has excluded him for ten years from participating in Medicare, Medicaid, and all federal health care programs, as provided for in sections 1128(a)(1) and 1128(a)(3) of the Social Security Act (Act). Petitioner now challenges the length of the exclusion. For the reasons discussed below, I find that the I.G. properly excluded Petitioner and that the ten-year exclusion falls within a reasonable range.

I. Background

By letter dated October 31, 2012, the I.G. notified Petitioner that he was excluded from participating in Medicare, Medicaid, and all federal health care programs for a period of ten years, because he had been convicted of criminal offenses related to: 1) the delivery of an item or service under the Medicare or state health care program; and 2) fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in

connection with the delivery of a health care item or service. The letter explained that sections 1128(a)(1) and 1128(a)(3) of the Act authorize the exclusion. I.G. Exhibit (Ex.) 1.

Petitioner concedes that he was convicted and is subject to exclusion under sections 1128(a)(1) and 1128(a)(3). Order and Schedule for Filing Briefs and Documentary Evidence at 2 (January 28, 2013); P. Brief (Br.) at 1, 3.

Each party submitted a written argument (I.G. Br.; P. Br.). The I.G. also submitted four exhibits (I.G. Exs. 1-4) and a reply brief (I.G. Reply). Petitioner submitted 124 exhibits (P. Exs. 1-124). In the absence of an objection, I admit into evidence I.G. Exs. 1-4 and P. Exs. 1-124.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary. Order and Schedule for Filing Briefs and Documentary Evidence (Informal Brief of Petitioner ¶ IV) and (Informal Brief of I.G. ¶ III). Neither party has indicated that an in-person hearing is necessary.[1]

II. Issue

Because the parties agree that the I.G. has a basis upon which to exclude Petitioner from program participation, the sole issue before me is whether the length of the exclusion (ten years) is reasonable. 42 C.F.R. § 1001.2007.

III. Discussion

Section 1128(a)(1) of the Act mandates that the Secretary of Health and Human Services exclude an individual who has been convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. 42 C.F.R. § 1001.101(a).

[1] I directed the parties to answer questions included in "informal" briefs that we provided to them. Among those questions, we asked whether an in-person hearing is necessary, and, if so, directed the party to name his witnesses, describe their proposed testimony, and explain how that testimony relates to the party's arguments and does not duplicate other evidence submitted. Petitioner did not answer the question. He titled his submission "Petitioner's Response in Support of Hearing," which suggests that he thinks an in-person hearing might be necessary. However, he did not otherwise claim that an in-person hearing is necessary; he did not list any witnesses of his own, and did not ask to cross-examine Special Agent Ed Leitelt, who submitted the only written declaration in support of the I.G.'s case. I.G. Ex. 3.

Section 1128(a)(3) says that an individual or entity convicted of felony fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service must also be excluded from participation in federal health care programs. 42 C.F.R. § 1001.101(c).

In this case, Petitioner was a Medicare provider who owned and operated a medical clinic in Chicago, Illinois. I.G. Ex. 2 at 1-2; I.G. Ex. 3 at 3. He was also an enrolled provider of services to Blue Cross Blue Shield of Illinois, a private health insurance company, which meant that Blue Cross agreed to pay him for the covered services he provided. I.G. Ex. 2 at 2; I.G. Ex. 3 at 4.

Petitioner was found guilty in federal district court on nine counts of health care fraud (5 counts), in violation of 18 U.S.C. § 1347, and making false statements (4 counts), in violation of 18 U.S.C. § 1035(a)(2). I.G. Ex. 4 at 1. Specifically, he billed Medicare and Blue Cross for procedures that he did not perform; he ordered and billed for medically-unnecessary tests; he ordered tests without first seeing the patients or knowing why they sought treatment; he billed for tests without reviewing their results; and, to justify unnecessary tests, he wrote phony diagnoses codes in patient charts, and he and his staff falsified patient medical records. I.G. Ex. 2.

The court sentenced him to 30 months in prison, followed by one year of supervised release, and fined him $15,900. I.G. Ex. 4 at 2-3, 5.

A. Based on the aggravating factors, the 10-year exclusion falls within a reasonable range.[2]

An exclusion under either section 1128(a)(1) or 1128(a)(3) must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2). Federal regulations set forth criteria for lengthening exclusions beyond the five-year minimum. 42 C.F.R. § 1001.102(b). Among the factors that may serve as bases for lengthening the period of exclusion are the two that the I.G. cites to justify the period of exclusion in this case: 1) the acts resulting in the conviction, or similar acts, were committed over a period of one year or more; and 2) the sentence imposed by the court included incarceration. 42 C.F.R. § 1001.102(b)(2) and (5).

Duration of crime (42 C.F.R. § 1001.102(b)(2)). The parties agree that Petitioner's criminal acts were committed over a period longer than one year, although they disagree over exactly how long that period was. Citing Count One of the indictment – one of the counts on which Petitioner was convicted – the I.G. maintains that Petitioner's criminal

[2] My findings of fact and conclusions of law are set forth, in italics and bold, in the discussion captions of this opinion.

scheme lasted for three years, seven months. I.G. Br. at 3; I.G. Reply at 2-3; I.G. Ex. 2 at 3. Petitioner, on the other hand, points to the remaining counts, especially Counts Two and Six (on which Petitioner was not convicted), and argues that, even accepting as true every allegation of the indictment, Petitioner's criminal acts spanned "only" one and a half years. P. Br. at 1; I.G. Ex. 2 at 11, 15. In making this argument, Petitioner has not considered every allegation of the indictment, but relies solely on the counts that describe specific instances of Petitioner's misconduct. Count One describes the entire criminal scheme and alleges that Petitioner "knowingly and willfully devised, intended to devise, and participated in a scheme to defraud health care benefit programs. . . ." His criminal activities began "no later than in or about **January 2007**, and continu[ed] through in or about **July 2010**. . . ." (emphasis added) I.G. Ex. 2 at 3. Thus, based on the explicit language of Count One, Petitioner's conduct lasted for about 3½ years.

Petitioner was convicted on Count One, but even if he were not, the I.G. might have been able to rely on the allegation. The scope of the regulation is not limited to the acts that resulted in the conviction, but also includes "similar acts."

Finally, even if I accepted Petitioner's argument (which I do not), I would still find the duration of Petitioner's crime an aggravating factor that justifies increasing the period of exclusion. The Departmental Appeals Board has "accorded weight sufficient to sustain a 15-year exclusion to the fact that wrongful acts were committed for 'slightly more' than the one-year minimum standard." *Jeremy Robinson*, DAB No. 1905 at 12 (2004), *citing Donald A. Burstein, Ph.D.*, DAB No. 1865 at 12 (2003).

Incarceration (42 C.F.R. § 1001.102(b)(5)). The sentence imposed by the criminal court included a significant prison sentence – 30 months. I.G. Ex. 3 at 3. *See Jeremy Robinson*, DAB No. 1905 at 12 (2004) (characterizing a nine-month incarceration as "relatively substantial."), *citing Jason Hollady, M.D.*, DAB No. 1855 at 12 (2002).

Thus, for more than three years, Petitioner Chhibber engaged in a criminal scheme to defraud the Medicare program and Blue Cross. The federal court sentenced him to significant jail time. These factors demonstrate the risk he poses to health care programs. The I.G. could therefore reasonably impose a period of exclusion considerably greater than the mandatory five-year minimum.

B. No mitigating factors justify decreasing the period of exclusion.

A mitigating factor or factors may offset aggravating factors. However, the regulations consider mitigating just three factors: 1) a petitioner was convicted of three or fewer misdemeanor offenses and the resulting financial loss to the program was less than $1,500; 2) the record in the criminal proceedings demonstrates that a petitioner had a mental, physical, or emotional condition that reduced his culpability; and 3) a petitioner's

cooperation with federal or state officials resulted in others being convicted or excluded, or additional cases being investigated, or a civil money penalty being imposed. 42 C.F.R. § 1001.102(c). Characterizing the mitigating factor as "in the nature of an affirmative defense," the Departmental Appeals Board has ruled that a petitioner has the burden of proving any mitigating factor by a preponderance of the evidence. *Barry D. Garfinkel, M.D.*, DAB No. 1572 at 8 (1996).

Petitioner was convicted of nine felony offenses, which he concedes cost health care programs more than $1,500. *See* P. Ex. 123 (Orman Decl. ¶ 2). He does not claim that any mental, physical, or emotional condition reduced his culpability. He does not claim to have cooperated with law enforcement.

Instead, Petitioner characterizes as "trivial" the dollar amount "involved in the 9 guilty counts." P. Br. at 2; *See* P. Ex. 123 (Orman Decl. ¶ 2).[3] He also points out that "only" four patients, not one of them a Medicare beneficiary, testified against him at trial; that he practiced in a dangerous and medically underserved neighborhood in Chicago; that his services are "irreplaceable"; and that neighborhood residents want him back.

These are not mitigating factors. By his own admission, the costs of Petitioner's crimes exceeded the threshold for mitigation. I find wholly irrelevant the number of former patients who testified against him at trial. (In any event, their testimony was apparently sufficient to lead to his conviction.)

With respect to the purported harm his exclusion will cause his former patients and the neighborhood in which he worked, the I.G. may grant a state health care program's request to waive an exclusion "if the individual or entity is the sole community physician or the sole source of essential specialized services in a community." However, "[t]he decision to grant, deny, or rescind a request for a waiver is not subject to administrative or judicial review." 42 C.F.R. § 1001.1801(f); Act § 1128(c)(3)(B). Thus, any such request for waiver must be made directly to the I.G. by the state health care program, not by Petitioner, and the I.G.'s determination with respect to any waiver is not reviewable in this or any other forum.

IV. Conclusion

So long as the period of exclusion is within a reasonable range, based on demonstrated criteria, I have no authority to change it. *Jeremy Robinson*, DAB No. 1905 at 5; *Joann Fletcher Cash*, DAB No. 1725 at 7 (2000), *citing* 57 Fed. Reg. 3298, 3321 (1992). In this case, Petitioner's crimes demonstrate that he presents a significant risk to the integrity of

[3] According to Petitioner, the dollar amount was $1,639.40. This figure is set forth in the declaration of counsel, who does not explain how he arrived at it nor offer any underlying evidence to support it.

health care programs. He billed the health care programs for tests that were unnecessary and for tests that were not even performed. Even more reprehensible, to cover his tracks, he falsified patient records. He continued this illegal conduct for a significant period of time, more than three years. His conduct was such that the sentencing judge sent him to prison for 2½ years. Based on these aggravating circumstances, and the absence of any mitigating circumstances, a ten-year exclusion falls within a reasonable range.

/s/
Carolyn Cozad Hughes
Administrative Law Judge