Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Richard L. Hogan
(OI File No. 5-08-40290-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-383

Decision No. CR3935

Date: June 3, 2015

DECISION

The Inspector General (IG) of the Department of Health and Human Services excluded Richard L. Hogan (Petitioner) from participating in Medicare, Medicaid, and all other federal health care programs for a minimum period of 18 years. Petitioner requested a hearing to dispute the exclusion. For the reasons explained below, I conclude that the IG has a basis for excluding Petitioner and that the 18-year exclusion period is not unreasonable in light of three aggravating factors present in this case.

I. Case Background and Procedural History

In a letter dated August 29, 2014, the IG notified Petitioner that, pursuant to 42 U.S.C. § 1320a-7(a)(1), he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 18 years effective September 18, 2014. IG Ex. 1. The IG based the exclusion on Petitioner's conviction of a criminal offense in the United States District Court for the Eastern District of Michigan (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. The IG cited three aggravating

factors as a basis for increasing the exclusion period from five to 18 years: (1) Petitioner's criminal conduct caused a loss to a government program of $5,000 or more; (2) the acts resulting in Petitioner's conviction were committed over a period of one year or more; and (3) the District Court's sentence of Petitioner included a term of incarceration. IG Ex. 1 at 1-2.

Petitioner, proceeding pro se, filed a request for a hearing with the Civil Remedies Division (CRD) to dispute the exclusion. Petitioner argued that the exclusion was improper because he is innocent of the underlying criminal offense and is appealing the criminal conviction. Petitioner attached to his hearing request a copy of his appellate brief in his criminal case. The CRD Director administratively assigned this case to me for hearing and decision. On January 7, 2015, I convened a prehearing conference by telephone, the substance of which is summarized in my January 16, 2015 Amended Order and Schedule for Filing Briefs and Documentary Evidence (Amended Order). During the prehearing conference, I accepted the document attached to Petitioner's hearing request as P. Ex. 1. Amended Order ¶ 4. Pursuant to the Amended Order, the IG electronically filed a brief (IG Br.) on February 13, 2015, with IG Exs. 1 through 5, and certified that he sent a copy to Petitioner by first-class mail. Petitioner, who is currently incarcerated, filed a brief by mail (P. Br.) on February 27, 2015, with no exhibits attached.[1] The IG filed a reply brief (IG Reply) on April 13, 2015.

II. Issues

This case presents the following issues:

1. Whether the IG has a basis to exclude Petitioner based on his conviction for an offense related to the delivery of an item or service under Medicare or a state health care program; and

2. If there is a basis for the exclusion, whether an eighteen-year exclusion period is unreasonable.

III. Decision on the Record

Petitioner did not object to any of the IG's five proposed exhibits. Therefore, I admit IG Exs. 1-5 into the record. The IG did not object to the document attached to Petitioner's hearing request, referred to as P. Ex. 1. Therefore, I admit P. Ex. 1 into the record.

[1] Petitioner labeled his brief as an exhibit, but for clarity I will refer to that document as his brief rather than as an evidentiary exhibit.

Neither party has expressly requested an in-person (video) hearing nor explained why an in-person hearing would be necessary. Amended Order ¶ 4. Accordingly, because there is no need for any in-person hearing, I issue this decision based on the written record.

IV. Jurisdiction

I have jurisdiction to decide the issues in 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. A jury found Petitioner guilty of engaging in a conspiracy to commit health care fraud from October 2009 to April 2012, and the District Court sentenced Petitioner to 60 months of incarceration and ordered him to pay $988,529.15 in restitution.

On December 11, 2012, a federal grand jury indicted Petitioner on one count of conspiracy to commit health care fraud (18 U.S.C. §§ 1347, 1349). IG Ex. 3. According to the indictment, Petitioner managed and assisted his co-conspirators in the management of New Century Adult Day Program Services (New Century), and his co-conspirators filed claims for payments for psychotherapy and related services that were not medically necessary and induced the referrals of Medicare beneficiaries to New Century through illegal kickbacks. IG Ex. 3 at 3-5. Petitioner allegedly performed these acts from about October 2009 to April 2012. IG Ex. 3 at 3. As a result of the conspiracy and the co-conspirators' criminal conduct, Medicare allegedly paid $983,652.36 in improper claims. IG Ex. 3 at 5.

On October 18, 2013, following a trial, a jury found Petitioner guilty of conspiracy to commit health care fraud. IG Ex. 4. The District Court sentenced Petitioner to 60 months of incarceration; two years of supervised release at the conclusion of his incarceration; an assessment of $100; and payment of $988,529.15 in restitution. IG Ex. 5. The District Court ordered that the restitution amount was to be paid to the United States Department of Health and Human Services. IG Ex. 5 at 5.

2. Petitioner was conviction of a criminal offense related to the delivery of a health care item or service under the Medicare program, therefore, exclusion is required under 42 U.S.C. § 1320a-7(a)(1).

The IG must exclude an individual from participation in any federal health care program if that individual was 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.

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

42 U.S.C. § 1320a-7(a)(1). Petitioner does not dispute that a jury convicted him of conspiracy to commit health care fraud. Instead, he argues that he is actually innocent of the offense, and that his conviction is currently under appeal and may have a successful outcome. P. Br. at 1-2. He disputes the IG's authority to exclude him while "there are still measures of relief available via appeal." P. Br. at 1.

For purposes of exclusion, individuals are deemed "convicted" of an offense "when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending . . . [.]" 42 U.S.C. § 1320a-7(i)(1). In the present matter, a jury found Petitioner guilty of conspiracy to commit health care fraud, and the District Court issued a judgment of conviction and sentenced Petitioner pursuant to that conviction. IG Ex. 5. It should be noted that for the purposes of section 1320a-7, the mere fact that a jury convicted Petitioner (IG Ex. 4) is sufficient to conclude that he was "convicted" without regard to a pending appeal. 42 U.S.C. § 1320a-7(i)(3).

Further, 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 quotes omitted).

The jury specifically found Petitioner guilty of conspiracy to commit health care fraud in violation of 18 U.S.C. §§ 1347 and 1349. By finding Petitioner guilty of conspiracy to commit health care fraud, the jury concluded beyond a reasonable doubt that he conspired to commit criminal conduct "in connection with the delivery of or payment for health care benefits, items, or services . . . ." 18 U.S.C. § 1347(a). Submitting a false claim to Medicare is "related to" the delivery of an item or service under the Medicare program. *See Travers v. Shalala*, 20 F.3d 993, 998 (9th Cir. 1994) (conviction for filing claims with the Medicaid program is "a program-related offense" and "such financial misconduct is exactly what Congress sought to discourage" through imposing exclusions); *Greene v. Sullivan*, 731 F. Supp. 835, 838 (E.D. Tenn. 1990) ("There is no question that Mr. Greene's crime [of filing false claims] resulted in a Medicaid overpayment and was a program-related crime triggering the mandatory exclusion under Section 1320a-7(a)."); *see also Manocchio v. Kusserow*, 961 F.2d 1539 (11th Cir. 1992) (Upholding a mandatory exclusion involving a conviction for Medicare fraud). It follows that conspiring to submit a false claim to Medicare is also "related to" the delivery of an item or service under the Medicare program. *Cf. Anderson v. Thompson*, 311 F. Supp. 2d 1121, 1126-27, 1131 (D. Kan. 2004) (affirming mandatory exclusion based on a conviction for conspiracy to violate the anti-kickback statute). Further, the fact that the

District Court ordered Petitioner to pay restitution to the Department of Health and Human Services (i.e., the federal department responsible for administering Medicare) is additional reason to conclude that Petitioner's criminal conviction is related to the delivery of items or services in the Medicare program. *Blessing Okuji*, DAB CR2343, at 5 (2011); *Alexander Nepomuceno Jamias*, DAB CR1480 (2006). 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). Therefore, the record fully supports Petitioner's mandatory exclusion. IG Exs. 2-5.

Petitioner's argument that the IG does not have the authority to exclude him while the appeal of his criminal conviction is pending is without merit. The statute in which Congress required the exclusion of individuals from the Medicare program expressly states that an individual is convicted of an offense "regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged." 42 U.S.C. § 1320a-7(i)(1). Thus, for purposes of the exclusion statute, Petitioner has been "convicted" of conspiracy to commit health care fraud even though his direct appeal is still pending. Also, I do not have the authority to stay the exclusion while Petitioner's appeal is pending. *See* 42 C.F.R. § 1005.4(c)(4). The effective date of an exclusion is established by regulation and I am bound to follow that provision. 42 C.F.R. §§ 1001.2002(b); 1005.4(c)(1). If Petitioner is successful in his appeal, he may seek reinstatement from the IG. 42 C.F.R. § 1001.3005(a)(1). In addition, Petitioner's claim that he is innocent of the crime for which he was found guilty is an impermissible collateral attack on his conviction that the regulations prohibit me from considering. 42 C.F.R. § 1001.2007(d).

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

Because I have concluded that a basis exists 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).

4. 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). Only if an aggravating factor justifies an exclusion longer than five years may mitigating factors be considered 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 August 29, 2014 exclusion notice that there were three aggravating factors that justified excluding him for more than five years: first,

the acts resulting in his convictions, or similar acts, caused, or were intended to cause, a financial loss to a government program of $5,000 or more; second, the acts resulting in the conviction occurred over a period of one year or more; and third, the sentence imposed by the court included incarceration. IG Ex. 1; 42 C.F.R. § 1001.102(b)(1), (2), (5). The IG cited the nearly three-year period that the conspiracy lasted, the District Court's restitution order of $988,529.15 against Petitioner, and his 60- month prison sentence as the factual basis for the existence of the three aggravating factors. IG Ex. 1 at 1-2.

a. The IG has established the aggravating factor stated in 42 C.F.R. § 1001.102(b)(1) -- financial loss to a government program of $5,000 or more.

The IG has provided evidence that demonstrates the acts resulting in Petitioner's criminal conviction caused a financial loss to a government program of $5,000 or more. *See* 42 C.F.R. § 1001.102(b)(1). A jury found Petitioner guilty of a conspiracy to submit false claims to Medicare, which resulted in $983,652.36 in fraudulently obtained payments from the Medicare program. IG Ex. 3 at 5. In addition, the record shows that the District Court sentenced Petitioner to pay restitution totaling $988,529.15 to the Department of Health and Human Services, the department that administers the Medicare program.[3] IG Ex. 5 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). Regardless of whether the restitution order is joint and several among Petitioner and his co-conspirators — although there is no evidence that it is — the District Court's sentence of Petitioner plainly establishes that he is responsible for the total restitution amount. IG Ex. 5 at 5-7; *see also United States v. Ingles*, 445 F.3d 830, 839 (5th Cir. 2006) (affirming joint and several restitution order where one co-defendant was ultimately responsible for more restitution than other co-defendant). In addition, the regulations provide that the *entire amount* of financial loss is

[3] The record does not contain evidence that clearly explains why the District Court's restitution order is more than the amount of government loss cited in the Indictment. *Compare* IG Ex. 5 at 6 *with* IG Ex. 3. The amount of the discrepancy ($4,876.79) is inconsequential when considering the substantial amount of overall loss that the government sustained as a result of Petitioner's conspiracy and criminal conduct. In terms of the aggravating factor at issue, the discrepancy is the difference between 197 times the $5,000 trigger for the aggravating factor, and 198 times that amount – both substantially over the minimum amount of loss required for the aggravating factor to apply.

what provides a basis for an aggravating factor. *See* 42 C.F.R. § 1001.102(b)(1) ("the entire amount of financial loss to . . . programs . . . will be considered regardless of whether full or partial restitution has been made."). Therefore, the IG has sustained its burden of proving financial loss to a government program of $5,000 or more.

b. The IG has 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 offered the Indictment that charged Petitioner with conspiracy to commit health care fraud as well as his conviction of that offense as evidence that his criminal acts lasted one year or more. *See* IG Ex. 3. The Indictment states that the conspiracy lasted for nearly two-and-a-half years, from October 2009 through April 2012. IG Ex. 3 at 3. The jury convicted Petitioner of that offense. Moreover, Petitioner acknowledged in his criminal appeal that he was involved with New Century since May 2010, which would be approximately two years of criminal conduct. P. Ex. 1 at 3. Therefore, the evidence before me establishes that the acts resulting in Petitioner's conviction occurred over a period of one year or more.

c. The IG has 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 record demonstrates, and Petitioner does not dispute, that the District Court sentenced Petitioner to 60 months of imprisonment. IG Ex. 5 at 2. Indeed, Petitioner is assigned to the Federal Correctional Institute–Elkton in Lisbon, Ohio, pursuant to the sentence that the District Court imposed.[4] Amended Order ¶ 4. I conclude, therefore, that the IG has proven this aggravating factor. *See* 42 C.F.R. § 1001.102(b)(5).

d. There are no mitigating factors in this case.

Because I found that aggravating factors are present in this case, I next consider whether there are any mitigating factors under 42 C.F.R. § 1001.102(c) to offset the aggravating factors. The regulations specifically outline what factors may be considered mitigating and none of Petitioner's arguments relate to any of those mitigating factors. *See* 42 C.F.R. § 1001.102(c). Petitioner has not argued that any mitigating factors exist. Accordingly, I find that Petitioner has not met his burden to establish that any mitigating factors would justify reducing the period of exclusion.

---

[4] During the pendency of this case, Petitioner has been residing in and receiving mail through the Federal Medical Center in Butner, North Carolina. Petitioner represented during the prehearing conference in this case that he would likely be returned to the Federal Correctional Institute–Elkton in the future. *See* Amended Order ¶ 4.

5. An 18-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 []IG 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 []IG is appropriate, given the []IG's vast experience in implementing exclusions under these authorities." 57 Fed. Reg. 3327, 3321 (Jan. 29, 1992). 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 []IG 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 3314-3315.

Based on the jury's guilty verdict, the conspiracy of which Petitioner was a part ultimately resulted in a $983,652.36 loss to Medicare. Furthermore, the District Court ordered Petitioner to pay restitution of $988,529.15. IG Ex. 5 at 6. The amount of loss represents more than 197 times the $5,000 threshold for the loss to be considered aggravating. *See* 42 C.F.R. § 1001.102(b)(1). Restitution in an amount so substantially greater than the regulatory standard is sufficient to support a significantly increased length of exclusion. *See Anderson*, 311 F. Supp. 2d at 1130 (considering a "program-related loss [that] was more than forty times the amount of loss necessary to find an aggravating factor" as helping to justify a 15-year exclusion). While Petitioner does not appear to have directly submitted the fraudulent claims to Medicare, he was part of the

conspiracy that facilitated those false claims. *See* IG Ex. 3. The District Court's restitution order against Petitioner demonstrates that his role in the conspiracy was a significant factor in a scheme that resulted in a very substantial amount of loss.

In addition, the conspiracy Petitioner participated in lasted for at least two years. There were many false claims being produced and submitted to Medicare over this time. The 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. He conspired over an extended period to defraud the Medicare program repeatedly, which is a significant factor that supports an increase to the exclusion period.

Petitioner's sentence of 60 months of incarceration for his crime constitutes the final piece of aggravating evidence. IG Ex. 5 at 3. Petitioner's sentence represents a substantial period of time, which indicates the seriousness of his offense.

I conclude that the three proven aggravating factors are entitled to significant weight, and that the amount of program loss and Petitioner's length of incarceration are particularly aggravating. Petitioner's crime had a substantial financial impact on the Medicare program. Based on the record before me, Petitioner is not trustworthy to participate in federal health care programs and, therefore, the length of exclusion imposed by the IG is not unreasonable.

VI. Conclusion

For the foregoing reasons, I affirm the IG's determination to exclude Petitioner for 18 years from participating in Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(1).

/s/
Scott Anderson
Administrative Law Judge