

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Ali S. Makki, M.D.,  
(O.I. File No.: 5-04-40169-9),

Petitioner,

v.

The Inspector General.

Docket No. C-12-17

Decision No. CR2517

Date: March 20, 2012

**DECISION**

Petitioner, Ali S. Makki, M.D., is a physician licensed to practice in Michigan. He was convicted of felony health care fraud and other crimes. Because of the fraud conviction, the Inspector General (I.G.) has excluded him for thirteen years from participation in the Medicare, Medicaid, and all federal health care programs, as authorized by section 1128(a)(1) of the Social Security Act (Act). Petitioner now appeals. For the reasons discussed below, I find that the I.G. properly excluded Petitioner and that the 13-year exclusion falls within a reasonable range.

**I. Background**

Petitioner Makki operated a medical office in Dearborn, Michigan. He pled guilty to knowingly submitting false and fraudulent claims to the Medicare program and was convicted in federal district court of health care fraud (18 U.S.C. § 1347), as well as making a material false statement in an immigration document (18 U.S.C. § 1546(a)) and making or subscribing a false income tax return (18 U.S.C. § 7206(1)). I.G. Exhibit (Ex.) 3. The District Court entered judgment against him on September 30, 2010. I.G. Ex. 3 at 1.

In a letter dated August 31, 2011, the I.G. notified Petitioner that he was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 13 years, because he had been convicted of a criminal offense related to the delivery of an item or service under the Medicare or state health care program. The letter explained that section 1128(a)(1) of the Act authorizes the exclusion. I.G. Ex. 1.

Petitioner concedes that he was convicted and is subject to exclusion under section 1128(a)(1). P. Br. at 3.

The parties agree that this case does not require an in-person hearing. Order and Schedule for Filing Briefs and Documentary Evidence at 2 (October 26, 2011). Each party submitted an initial brief (I.G. Br.; P. Br.). The I.G. submitted four exhibits (I.G. Exs. 1-4) and Petitioner submitted one exhibit (P. Ex. 1). The I.G. submitted a reply brief (I.G. Reply). In the absence of an objection, I admit into evidence I.G. Exs. 1-4 and P. Ex. 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 (13 years) is reasonable.

## **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).

In this case, Petitioner operated a medical practice and participated in the Medicare program. He knowingly submitted “false and fraudulent” claims to the Medicare program for x-rays that “were both not rendered and inadequately rendered.” Because of his fraud, the Medicare program paid him approximately \$113,777 to which he was not entitled. I.G. Ex. 2 at 3; I.G. Ex. 4 at 1.

On June 30, 2010, Petitioner was charged with one count of health care fraud, in violation of 18 U.S.C. § 1347; one count of making a material false statement in an immigration document, in violation of 18 U.S.C. § 1546(a); and one count of filing a false income tax return, in violation of 26 U.S.C. § 7206(1). I.G. Ex. 4. On July 8, 2010, he signed an agreement with prosecutors, pleading guilty to all three counts. I.G. Ex. 2. The federal district court for the Eastern District of Michigan accepted his plea and imposed judgment against him on September 30, 2010. I.G. Ex. 3. The court sentenced Petitioner to 24 months in prison followed by three years of supervised release. The court found

that Petitioner's crimes cost the Medicare program \$113,777.00. It credited Petitioner with having repaid the program \$46,541.65, and ordered him to pay an additional \$67,235.35 in restitution. The court also ordered Petitioner to pay a \$15,000 fine and \$300 assessment. I.G. Ex. 3 at 3, 6, 7.

***Based on the aggravating factors in this case and the absence of any mitigating factor, the 13-year exclusion falls within a reasonable range.<sup>1</sup>***

An exclusion under section 1128(a)(1) 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). Evidence that does not pertain to one of the aggravating or mitigating factors listed in the regulation may not be used to decide whether an exclusion of a particular length is reasonable.

Among the factors that may serve as bases for lengthening the period of exclusion are four that the parties agree are present in this case: 1) the acts resulting in the conviction, or similar acts, resulted in a financial loss to Medicare and state health care programs of \$5,000 or more; 2) the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more; 3) the sentence imposed by the court included incarceration; and 4) the individual was convicted of other offenses besides those that formed the basis for his exclusion. 42 C.F.R. § 1001.102(b)(1),(2),(5) and (9). The presence of an aggravating factor or factors not offset by any mitigating factor or factors justifies lengthening the mandatory period of exclusion.

Financial loss to Medicare (42 C.F.R. § 1001.102(b)(1)). Petitioner's actions resulted in a program financial loss well in excess of \$5,000. The district court found, and Petitioner concedes, that his fraud cost the Medicare program \$113,777. I.G. Ex. 3 at 6. Because the financial losses were significantly in excess of the threshold amount for aggravation (almost 27 times greater), the I.G. may justifiably increase significantly the period of exclusion. *See Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein*, PhD., DAB No. 1865 (2003).

Duration of crime (42 C.F.R. § 1001.102(b)(2)). Petitioner pled guilty to criminal acts that were committed over a period of more than five years, beginning in about July 2004 and continuing until September 18, 2009, more than five times longer than necessary to constitute an aggravating factor. I.G. Ex. 2 at 3; I.G. Ex. 4 at 1.

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<sup>1</sup> I make this one finding of fact/conclusion of law.

Incarceration (42 C.F.R. § 1001.102(b)(5)). The sentence imposed by the criminal court included two years in prison, which is substantial. I.G. Ex. 3 at 3. *See Jeremy Robinson*, DAB No. 1905 at (2004) (characterizing a nine-month incarceration as “relatively substantial.”).

Other offenses (42 C.F.R. § 1001.102(b)(9)). As noted above, Petitioner was convicted of two other felonies in addition to the health care fraud upon which his exclusion is based:

- He made false statements on an immigration document. Knowing the statement to be false, he nevertheless certified to the Immigration and Naturalization Service (INS), under penalty of perjury, that an immigrant suffered from “severe depression.” That fact was material to the INS’s determining whether the individual could be excused from certain testing requirements for naturalization.
- He filed a false income tax return. Under penalty of perjury, he signed and submitted his 2003 tax return knowing that it significantly understated his income. He did not report all of the cash receipts from his business.

I.G. Ex. 2 at 3-4; I.G. Ex. 4 at 2-3.

No mitigating factors offset the aggravating factors. *See* 42 C.F.R. § 1001.102(c).

Petitioner does not deny the existence of the aggravating factors nor claim the existence of any mitigating factor. Instead, he minimizes the seriousness of his crime, claiming that all of the x-rays he performed were necessary and suggesting that inadequate billing procedures (and thus his billing company) were to blame. He also points out that he has been paying restitution; that the sentencing court imposed the minimum sentence allowable under federal sentencing guidelines, and that his medical license was suspended for only six months and one day.<sup>2</sup> P. Ex. 1. He argues that a 5-year exclusion would “meet the policy guidelines” and be in the government’s interests.

Felony Medicare fraud is, of course, a very serious crime, and Petitioner’s criminal conviction definitively establishes that he knowingly submitted false claims, including claims for x-rays that he did not provide. He may not challenge that finding in this forum. 42 C.F.R. § 1001.2007(d). Even if no mitigating circumstance were present, he would be subject to a *minimum* five-year exclusion.

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<sup>2</sup> I note that suspension of his medical license could have been considered an aggravating factor under 42 C.F.R. § 1001.102(b)(9) as an adverse action by a state board based on the same set of circumstances that served as the basis for imposing the exclusion.

And this case presents four significantly aggravating factors: Petitioner was responsible for program losses 27 times greater than the threshold for aggravation; he engaged in misconduct five times longer than required for aggravation; he was incarcerated for a significant amount of time; and he committed two additional felonies that show his willingness to lie and cheat. I consider those additional convictions powerful evidence that he is untrustworthy.

#### **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 17, *citing* 57 Fed. Reg. 3298, 3321 (1992). In this case, Petitioner's crime demonstrates that he presents a significant risk to the integrity of health care programs. I therefore sustain as reasonable the 13-year exclusion.

/s/

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Carolyn Cozad Hughes  
Administrative Law Judge