Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Margie Ellen Hollingsworth,

Petitioner,

v.

The Inspector General.

Docket No. C-13-709

Decision No. CR2992

Date: November 14, 2013

DECISION

The Inspector General (I.G.) of the Department of Health and Human Services notified Margie Ellen Hollingsworth (Petitioner) that she was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for 16 years. The I.G. based the length of exclusion on three aggravating factors. Petitioner appealed. I find that Petitioner is subject to mandatory exclusion; however, because the I.G. only proved the existence of two aggravating factors, I reduce the period of exclusion to 15 years.

I. Background

Petitioner was a Licensed Professional Counselor in Texas who pled guilty, in the United States District Court, Northern District of Texas, Lubbock Division (District Court), to violating 18 U.S.C. § 1035. I.G. Exhibit (Ex.) 2. In a March 29, 2013 letter, the I.G. notified Petitioner that, under 42 U.S.C. § 1320a-7(a)(1), she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 16 years. I.G. Ex. 1. The I.G. based the exclusion on Petitioner's conviction of a criminal offense 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.

Petitioner, proceeding *pro se*, filed an appeal of the I.G's exclusion with the Civil Remedies Division (CRD). The CRD Director assigned this case to me for hearing and decision,[1] and on May 22, 2013, I convened a telephonic prehearing conference, the substance of which is summarized in my May 24, 2013 Order and Schedule for Filing Briefs and Documentary Evidence (Order). Pursuant to the Order, the I.G. filed a brief (I.G. Br.) on June 25, 2013, with I.G. Exs. 1 through 5. Petitioner filed a response (P. Br.) on August 3, 2013, with no exhibits attached. In her response, however, Petitioner asserted that she had requested an extension of time within which to file her response, but was filing as much as she could in advance of the deadline to file the response. P. Br. at 1. I issued an order on August 14, 2013, indicating that the CRD had not received Petitioner's extension request and granting Petitioner additional time to supplement her response. Also on August 14, 2013, the I.G. filed a reply brief (I.G. Reply). The CRD has not received any supplemental material from Petitioner. Because Petitioner did not file an objection to the I.G.'s exhibits, I admit I.G. Exs. 1-5 into the record.

The I.G. did not offer any witnesses to testify in this case and indicated that an in-person hearing is unnecessary. I.G. Br. at 5. Petitioner, however, indicated that she believed an in-person hearing is necessary. She offered numerous proposed witnesses and provided a description of the testimony that these witnesses would offer. P. Br. at 3-5. Each of Petitioner's proposed witnesses would offer testimony designed to undermine the validity of her conviction. *See* P. Br. at 3-5. Because "the basis for the underlying conviction . . . is not reviewable and [the petitioner] may not collaterally attack it either on substantive or procedural grounds in this appeal," and I am bound by the regulations to exclude irrelevant evidence, I must deny Petitioner's request for her witnesses to testify. 42 C.F.R. §§ 1001.2007(d), 1005.17(c). Therefore, I issue this decision on the basis of the written record.

II. Issues

Under 42 C.F.R. § 1001.2007(a)(1), the issues in this case are limited to:

1. Whether the I.G. has a basis to exclude Petitioner from participating in all federal health care programs under 42 U.S.C. § 1320a-7(a)(1); and

2. Whether the length of the exclusion is unreasonable.

---

[1] On May 9, 2013, Petitioner submitted a letter to the CRD staff attorney assigned to this case, Mr. Jowers, detailing her challenges to the exclusion. Mr. Jowers replied in a May 14, 2013 letter explaining that I would discuss some issues in her case at a prehearing conference, but that he could only discuss procedural matters with her. The I.G. subsequently submitted Petitioner's letter as I.G. Ex. 5.

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

A. Petitioner pled guilty to one felony count of making false statements involving health care matters, in violation 18 U.S.C. § 1035.

On December 14, 2011, an 18-count indictment filed in the District Court charged Petitioner with: Counts 1 through 12, Health Care Fraud, in violation of 18 U.S.C. § 1347 and; Counts 13 through 18, False Statements Involving Health Care Matters, in violation of 18 U.S.C. § 1035. I.G. Ex. 3.

According to the indictment, Petitioner, a Licensed Professional Counselor, filed claims for payments for services that she did not render, filed claims for payment for services in a greater quantity than those actually rendered, and filed claims for payment for services that were not payable as she billed them. I.G. Ex. 3, at 3. Petitioner allegedly performed these acts from about January 2, 2004, to December 31, 2009. I.G. Ex. 3, at 3. According to the indictment, Counts 13 through 18, False Statements Involving Health Care Matters, specifically involved Petitioner "submit[ing] to Medicaid [claims] for payment for counseling services that were not rendered and that she knew to have not been rendered." I.G. Ex. 3, at 7.

Petitioner pled guilty to Count 18, making False Statements Involving Health Care Matters, in violation of 18 U.S.C. § 1035. I.G. Ex. 2, at 1. On October 19, 2012, the District Court accepted Petitioner's plea, entered judgment against her, and dismissed Counts 1-17 at the behest of the United States. I.G. Ex. 2, at 1. The District Court sentenced Petitioner to: 46 months of incarceration; three years of supervised release at the conclusion of her incarceration; and payment of $556,704.12 in restitution, as well as a $6,000 fine. I.G. Ex. 2. The District Court ordered Petitioner's restitution amount to be disbursed to the Texas Medical Assistance Program (I.G. Ex. 2), Texas' Medicaid program.[3] I.G. Ex. 3.

B. Petitioner's conviction requires exclusion under 42 U.S.C. § 1320a-7(a)(1) because her criminal conduct related to the delivery of an item or service under Medicaid.

An individual must be excluded from participation in any federal health care program if the 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. 42 U.S.C.

---

[2] My findings of fact and conclusions of law are set forth in italics and bold font.

[3] Medicaid is a state health care program under 42 U.S.C. § 1320a-7(a)(1). 42 U.S.C. § 1320a-7(h)(1); 42 C.F.R. § 1001.2(a) (defining "State health care program[s]" to include Medicaid programs).

§ 1320a-7(a)(1). Petitioner contests that her conviction requires exclusion under section 1320a-7(a)(1). P. Br. at 1-2. She argues that her conviction is under appeal, and she disputes the elements of her conviction. P. Br. at 1-2.

Individuals are considered "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, the District Court issued a judgment of conviction. I.G. Ex. 2. Further, for the purposes section 1320a-7, the fact that Petitioner pled guilty and this plea was accepted by a court (I.G. Ex. 2, at 1) is sufficient to conclude that she was "convicted." 42 U.S.C. § 1320a-7(i)(3).

Petitioner's conviction was related to the delivery of an item or service under Texas' Medicaid program. In order for Petitioner's conviction to support her exclusion under 42 U.S.C. § 1320a-7(a)(1), there must be a "nexus" between her conduct and the delivery of an item or service of health care. *See, e.g., James O. Boothe*, DAB No. 2530, at 5 (2013). The statute under which Petitioner pled guilty, 18 U.S.C. §1035, implicates the delivery of an item or service of health care on its face. I.G. Ex. 2. Section 1035 of Title 18 states:

> **(a)** Whoever, in any matter involving a health care benefit program, knowingly and willfully—
>
> **(1)** falsifies, conceals, or covers up by any trick, scheme, or device a material fact; or
>
> **(2)** makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry,
>
> in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 5 years, or both.

The fact that Petitioner pled guilty to a violation of 18 U.S.C. § 1035 appears to demonstrate that there is a "nexus" between Petitioner's criminal conduct and the delivery of an item or service of health care. However, relying solely on the statutory provision that Petitioner was convicted of violating is not conclusive as to whether Petitioner's conviction is related to the delivery of an item or service under a state health care program. *See, e.g.*, *Dewayne Franzen*, DAB No. 1165 (1990). Therefore, I must review the record to determine whether it supports the conclusion that such a nexus exists.

The indictment states that Count 18, to which Petitioner pled guilty, involved Petitioner "submit[ing] to Medicaid a claim for payment for counseling services that were not

rendered and that she knew not to have been rendered." I.G. Ex. 3, at 7-8. Submitting a false claim to Medicaid is "related" to the delivery of an item or service under a state health care program. *Jack W. Greene*, DAB No. 1078 (1989), *aff'd, Green v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990); *Michael Travers, M.D.*, DAB No. 1237 (1991), *aff'd, Travers v. Sullivan*, 791 F. Supp. 1471, 1481 (E.D. Wash. 1992) and *Travers v. Shalala*, 20 F.3d 993 (9th Cir. 1994). Therefore, I conclude that the record fully supports Petitioner's mandatory exclusion. I.G. Exs. 1-3.

Petitioner raises numerous challenges to her exclusion, almost all of which constitute collateral attacks on her conviction. For instance, Petitioner argues: the victim of the count to which Petitioner pled guilty was not a victim; Petitioner actually performed much of the work for which she fraudulently billed Medicaid; an individual in the Office of the Attorney General of Texas had a grudge against her; witnesses who would have testified on her behalf died before they could testify; the state of Colorado refused to act on the allegations against her Colorado counseling license; investigators did not understand how counseling works and did not properly consider the facts of her therapy; and she received instructions that she should bill for all time worked and any overpayments would be handled through recoupment. *See* I.G. Ex. 5; P. Br. at 1-5. I have considered Petitioner's arguments and determined that they either amount to impermissible collateral attacks on her conviction, which can play no role in the case before me, or are otherwise irrelevant. 42 C.F.R. § 1001.2007(d).

Petitioner has also argued that her conviction is currently on appeal based on ineffective assistance of counsel and that there may be a favorable outcome. If Petitioner is successful in her appeal, then she can seek reinstatement from the I.G. 42 C.F.R. 1001.3005(a)(1). However, a pending appeal has no effect on the present proceeding. *See* 42 U.S.C. § 1320a-7(i)(1) (an individual against whom a judgment of conviction has been entered is still consider "convicted" for purposes of section 1320a-7 even if an appeal of that judgment is pending).

C. 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 period of five years. 42 U.S.C. § 1320a-7(c)(3)(B).

D. The I.G. proved that two aggravating factors exist in this case that justify lengthening the period of exclusion beyond the five-year statutory minimum.

The remaining issue is whether it is unreasonable to extend Petitioner's period of exclusion by an additional eleven years. 42 C.F.R. § 2007(a)(1). My determination of whether the exclusionary period in this case is unreasonable includes an analysis as to whether: (1) the I.G. has proven that there are aggravating factors; and (2) Petitioner has

proven that there are mitigating factors the I.G. failed to consider or that the I.G. considered an aggravating factor that does not exist. 42 C.F.R. § 1001.102.

The regulations establish aggravating factors that the I.G. 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 I.G. advised Petitioner in the March 29, 2013 exclusion notice that there were three aggravating factors that justify excluding her for more than five years:

1. The acts resulting in the conviction, or similar acts, that caused, or were intended to cause, a financial loss to a government program or to one or more entities of $5,000 or more. 42 C.F.R. § 1001.102(b)(1). The I.G. stated that the District Court ordered Petitioner to pay restitution of approximately $556,700.
2. The sentence imposed by the court included incarceration. 42 C.F.R. § 1001.102(b)(5). The I.G. stated that the District Court sentenced Petitioner to 46 months of incarceration.
3. Petitioner was the subject of other adverse action by any Federal, State, or local government agency or board, where the adverse action was based on the same set of circumstances that served as the basis of the exclusion. 42 C.F.R. § 1001.102(b)(9). The I.G. stated that the Texas State Board of Examiners of Professional Counselors (State Board) revoked Petitioner's license to practice as a Professional Counselor.

I.G. Ex. 1.

1. The I.G. has proven the aggravating factor at 42 C.F.R. § 1001.102(b)(1) (financial loss to a government program of $5,000 or more).

The I.G. proved that the acts resulting in Petitioner's criminal conviction, or similar acts, caused a financial loss to a government program of $5,000 or more. *See* 42 C.F.R. § 1001.102(b)(1). The record shows that the District Court sentenced Petitioner to pay restitution totaling $556,704.12 to the Texas Medical Assistance Program, Texas' Medicaid program (I.G. Ex. 2, at 4-5), which is the same amount the government originally identified Petitioner as having billed and been paid based on fraudulent claims. I.G. Ex. 3, at 3. It is well-established that an amount ordered as restitution constitutes proof of the amount of financial loss. *See e.g., Juan de Leon, Jr.*, DAB No. 2533, at 5 (2013); *Craig Richard Wilder*, DAB No. 2416, at 9 (2011).

Petitioner argues that the facts do not support the restitution amount and that her counsel's ineffectiveness prevented her from challenging the restitution amount. P. Br. at 2-3. She disputes the restitution amount based on the fact that she only pled guilty to one count in the 18-count indictment and that there has been $89,000 in recoupments. P. Br. at 3. Petitioner's argument disputing the amount of restitution ordered by the District Court is an impermissible collateral attack on her underlying conviction, which I cannot entertain. 42 C.F.R. § 1001.2007(d); *Craig Richard Wilder*, DAB No. 2416, at 9. Further, even if Petitioner's assertion that $89,000 has been recouped from her is accurate, it is not relevant to the determination of financial loss. *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 I.G. has sustained its burden of proving financial loss to a government program of $5,000 or more.

2. The I.G. has proven the aggravating factor at 42 C.F.R. § 1001.102(b)(5) (sentence imposed by the court included incarceration).

The record clearly demonstrates, and Petitioner does not dispute, that the District Court sentenced Petitioner to 46 months of imprisonment. I.G. Ex. 2, at 2; P. Br. at 2-3. *See* 42 C.F.R. § 1001.102(b)(5). I conclude that the I.G. has proven this aggravating factor.

3. The I.G. did not prove the aggravating factor at 42 C.F.R. § 1001.102(b)(9) (a Federal, State, or local government agency or board took adverse action based on the same set of circumstances that served as the basis for imposition of the exclusion).

The I.G. did not prove that Petitioner has been subject to an adverse action "based on the same set of circumstances that serves as the basis for imposition of the exclusion." *See* 42 C.F.R. § 1001.102(b)(9). Petitioner challenged the I.G.'s application of this factor, arguing that her Texas Professional Counselor license had been suspended only while she was incarcerated, rather than revoked. P. Br. at 2. She offered, in challenging the application of this factor, that the Office of the Attorney General of Texas "never complained [to the State Board] and or supplied [Petitioner's] notes" to the State Board. P. Br. at 2. The State Board initially considered whether Petitioner's license was subject to revocation pursuant 22 Tex. Admin. Code § 681.164(c) and (d)(6).[4] I.G. Ex. 2, at 2. The actual order revoking Petitioner's license, however, cites to Tex. Occ. Code Ann. § 53.021(b), which is a general provision (not specific to licensed counselors) requiring a

[4] The "Professional Licensing & Certification Unit Complaint Tracking Form" states that the jurisdiction for the initial determination was an alleged violation of 22 Tex. Admin. Code § "681.164(c) . . . (6) the felony offense of fraud." I.G. Ex. 2, at 2. The correct citation for the relevant provision quoted is 22 Tex. Admin. Code § 681.164(d)(6).

licensing authority to revoke the license of any licensee incarcerated for a felony offense. I.G. Ex. 4, at 8.

The "set of circumstances that served as the basis for Petitioner's exclusion" was her *conviction* for violating 18 U.S.C. § 1035, which was related to items or services provided under Medicaid. I.G. Ex. 1, at 1. The circumstance that led the State Board to revoke Petitioner's license was her *incarceration*. Admittedly, Petitioner was incarcerated because she pled guilty to violating 18 U.S.C. § 1035. But if Petitioner had *not* been incarcerated as a result of violating 18 U.S.C. § 1035, the State Board could not have revoked her license pursuant to Tex. Occ. Code Ann. § 53.021(b), while the I.G. could still have excluded her. Therefore, a separate set of circumstances underlie the Petitioner's exclusion and the State Board's revocation of her license.

The nuanced application of section 1001.102(b)(9) to this case is warranted when reading that section as a whole. It would not be reasonable to lengthen the period of exclusion unless the facts showed that there was an increased likelihood that the excluded individual's trustworthiness to participate in federal health care programs was further eroded. The direct application of a statute simply requiring the State Board to revoke the licenses of individuals convicted of a felony and incarcerated does not add to Petitioner's untrustworthiness. However, had the State Board revoked Petitioner's license under 22 Tex. Admin. Code § 681.164(c) and (d)(6), that would have sufficed to prove the aggravating factor because that basis shows that the the State Board's action would have been based on Petitioner violating a criminal law that "directly relate[s] to the duties and responsibilities of a licensee." An adverse action on this ground would have shown that the State Board considered Petitioner's conduct and found that it violated its rules related to a licensee's conduct. However, simply applying section 1001.102(b)(9) by rote to any adverse action imposed by a government agency or board arising out of a felony conviction and incarceration would simply result in lengthening exclusions for no discernible reason.

Because the State Board revoked Petitioner's license based upon the fact that she was incarcerated, rather than the fact that she was convicted of an offense that specifically demonstrated her unsuitability to be a licensed counselor, I conclude that the I.G. did not prove the existence of the aggravating factor at 42 C.F.R. § 1001.102(b)(9) by a preponderance of the evidence.[5]

4. 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

---

[5] Pursuant to 42 C.F.R. § 1005.15(c), I informed the parties at the prehearing conference that the I.G. had the burden of proving the existence of aggravating factors. Order ¶ 2(h).

factors. In her brief, Petitioner asserts that: her conviction is under appeal; Colorado refused to revoke her license; her court-ordered restitution amount bears no relationship to the offense to which she pled guilty; and she received ineffective assistance of counsel. P. Br. at 2-3. However, 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). Accordingly, I find that no mitigating factors exist which would justify reducing the period of exclusion.

E. Because the I.G. has only proven that two aggravating factors exist in this case, I find that a 15-year exclusion, reduced from 16 years, is reasonable.

As discussed above, I found that the I.G. proved by a preponderance of the evidence the existence of two aggravating factors, but did not prove the existence of a third aggravating factor. Because I found that an aggravating factor considered by the I.G. in its exclusion notice is not proved, then some downward adjustment of the period of exclusion should be expected absent some circumstances that indicate no such adjustment is appropriate. *Gary Alan Katz, R. Ph.*, DAB No. 1842 (2002); *Jason Hollady, M.D., a/k/a Jason Lynn Hollady*, DAB No. 1855 (2002). Accordingly, given that the I.G. did not prove one of the three aggravating factors on which the I.G. relied in imposing the 16-year exclusion, I must reassess the appropriate period of exclusion in this case. In doing so, it is necessary that I weigh the aggravating factors that the I.G did prove. My evaluation does not follow a specific formula for weighing those factors, but rather considers the weight to be accorded each factor based on the circumstances surrounding them in this case. *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491 (2012).

As previously discussed, the District Court ordered Petitioner to pay restitution of $556,704.12. I.G. Ex. 2, at 5. Despite dismissing 17 of the 18 counts for which Petitioner was indicted, the District Court held Petitioner financially responsible for the *full* amount that she fraudulently billed the Texas Medical Assistance Program. I.G. Ex. 3, at 3. The District Court ordered Petitioner to pay more than 110 times the $5,000 threshold for the loss to be considered aggravating. I.G. Ex. 2, at 5; 42 C.F.R. § 1001.102(b)(1). Restitution in an amount so substantially greater than the statutory standard is an "exceptional[ly] aggravating factor" that is entitled to significant weight. *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003).

Petitioner's sentence of 46 months of incarceration for her crimes constitutes the other piece of aggravating evidence. I.G. Ex. 2, at 2. The statute to which Petitioner pled guilty, 18 U.S.C. § 1035, allows for a sentence of up to sixty months in prison; Petitioner's 46-month sentence represents more than three-fourths of that maximum. 18 U.S.C. § 1035; I.G. Ex. 2, at 2. A prison sentence of as little as nine months is considered to be relatively substantial. *Jason Hollady, M.D.*, DAB No. 1855, at 12

(2002). Petitioner's sentence represents very substantial jail time, which clearly indicates the seriousness of her offense.

I find that the two proven aggravating factors are entitled to significant weight. Petitioner's crime had a substantial financial impact on Medicaid. Her crime resulted in a lengthy term of imprisonment, nearly the maximum allowable under the statute. Ample evidence exists that Petitioner is an untrustworthy individual who should be excluded for a lengthy period. However, in light of the fact that the I.G. did not prove one of the aggravating factors, I will reduce the exclusion period to 15 years.

I am only reducing the period of exclusion by one year because the two proven aggravating factors are of such a significant nature that they provide a basis for an exclusion lasting well beyond the five-year minimum. I conclude that the fact that the State Board revoked Petitioner's license under a general provision, rather than one specific to her misconduct, does not merit a substantial reduction in Petitioner's exclusion. This is particularly true where, by Petitioner's own admission, the State Board acted as it did for reasons disconnected from a specific judgment about Petitioner's misconduct. *See* P. Br. at 2. Petitioner is a threat to Medicaid and excluding her from participating in federal healthcare programs for less than 15 years would be insufficient to safeguard those programs.

Based on the evidence of record and with consideration of the I.G.'s original exclusion determination, I conclude that a 15-year period of exclusion is reasonable.

IV. Conclusion

For the foregoing reasons, I sustain the I.G.'s determination to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(1). I hereby order Petitioner excluded for a period of 15 years commencing on the date that the I.G.'s exclusion originally took effect. *See* 42 C.F.R. § 1005.20(b).

/s/
Scott Anderson
Administrative Law Judge