Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Gail Ray Dignam,

Petitioner,

v.

The Inspector General.

Docket No. C-13-285

Decision No. CR3024

Date: December 20, 2013

DECISION

The Inspector General (I.G.) of the Department of Health and Human Services notified Gail Ray Dignam (Petitioner) that she was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for ten years. Petitioner appealed. For the reasons stated below, I conclude that Petitioner is subject to mandatory exclusion and that the ten-year exclusion is not unreasonable.

I. Background

From July 2004 until September 2007, Petitioner was the director of the Governor's Program on Abstinence (GPA) in the state of Louisiana. I.G. Exhibit (Ex.) 5, at 5. Based on her conduct in that position, Petitioner was found guilty, in the United States District Court, Middle District of Louisiana (District Court), of violating 18 U.S.C. § 1341. I.G. Ex. 2, at 1. In a November 30, 2012 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 ten 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 a request for hearing with the Departmental Appeals Board, Civil Remedies Division (CRD). The CRD Director assigned this case to me and, on February 13, 2013, I convened a telephonic prehearing conference, the substance of which is summarized in my February 15, 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 March 26, 2013, with I.G. Exs. 1 through 6. Petitioner filed an unopposed request for an extension of time to file her prehearing brief and proposed exhibits, which I granted. Petitioner subsequently filed a timely brief (P. Br.) with three exhibits marked as P. Exs. A through C. On July 16, 2013, the I.G. filed a reply brief (I.G. July 16 Reply Br.). On or about July 21, 2013, Petitioner requested leave to file an addendum to her brief and exhibits. I granted this motion and, on September 23, 2013, Petitioner filed a supplemental brief (P. Supp. Br.) with seven exhibits attached.[1] On October 24, 2013, the I.G. submitted a reply (I.G. Oct. 24 Reply Br.) along with an unredacted copy of P. Ex. D-1.

II. Evidentiary Rulings

The I.G. objected to P. Exs. A and B, which are excerpts from the Federal Sentencing Guidelines Manual, as irrelevant because they do not relate to any mitigating factor cognizable under the regulations. I.G. July 16 Reply Br. at 4. The I.G. also objected to P. Exs. A-1, B-3, C-4, D-1, E-18, G-8, and K-1 because the I.G. believes that the only purpose of these exhibits is to collaterally attack the validity of Petitioner's conviction. (I.G. Oct. 24 Reply Br. at 5-6).

Petitioner's Exs. A and B are related to Petitioner's argument that the length of her incarceration should not be the basis for increasing her exclusion. P. Br. at 2-3. Because the I.G. relies on Petitioner's incarceration as an aggravating factor in this case, P. Exs. A and B are not irrelevant. Further, I consider Petitioner's other exhibits to provide background information related to the GPA and the criminal conviction. Therefore, I admit P. Exs. A, B, C, A-1, B-3, C-4, D-1, E-18, G-8, and K-1 into the record.[2]

Petitioner objected to all of the I.G.'s exhibits because "the evidence does not establish that the exclusion range is reasonable." P. Br. at 2. The I.G.'s exhibits include the I.G.'s exclusion letter, Petitioner's judgment of conviction, Petitioner's indictment, the

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[1] Petitioner, somewhat confusingly, marked these exhibits as follows: A-1, B-3, C-4, D-1, E-18, G-8, and K-1.

[2] As the I.G. points out, Petitioner references "attachment I – 1" as proof that Petitioner made arrangements to pay restitution. P. Supp Br. at 7. The I.G. never received this document (I.G. Oct 24 Reply Br. at 6) and neither did CRD. However, as the I.G. argues, payment of restitution is not relevant to this case. *See* 42 C.F.R. § 1001.201(b)(2)(i).

transcript of Petitioner's sentencing hearing, and documents related to the program she administered in the state of Louisiana. All of these documents are relevant to the I.G.'s basis for excluding Petitioner and to his decision to lengthen the term of exclusion to ten years. Therefore, I admit I.G. Exs. 1-6 into the record.

III. Decision on the Record

The I.G. offered no witnesses and indicated that an in-person hearing is unnecessary. I.G. Br. at 6. Petitioner did not offer any witnesses to testify at a hearing. Therefore, an in-person hearing is not necessary and I issue this decision on the basis of the written record.

IV. Issues

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.

V. Jurisdiction

I have jurisdiction over this case and to decide the issues stated above. 42 U.S.C. § 1320a-7(f); 42 C.F.R. §§ 1001.2007(a), 1005.2(a).

VI. Findings of Fact, Conclusions of Law, and Analysis[3]

A. Petitioner was found guilty of two felony counts of mail fraud related to a scheme to improperly obtain funds for Petitioner and Petitioner's family from the Louisiana Governor's Program on Abstinence, in violation 18 U.S.C. § 1341.

On February 17, 2010, an indictment was filed in the District Court charging Petitioner with two-counts of mail fraud in violation of 18 U.S.C. § 1341. I.G. Ex. 3. The indictment alleged that Petitioner:

> devised and intended to devise a scheme and artifice to defraud the State of Louisiana and to obtain money from the GPA by means of materially false and fraudulent pretenses, representations, and promises. [Petitioner] directed a substantial amount of the money obtained from the GPA to . . . her son.

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

I.G. Ex. 3, at 2. Petitioner pled not guilty to the charges and the District Court held a jury trial. I.G. Ex. 2, at 1; *see also* I.G. Ex. 6, at 4, 8. Petitioner was found guilty on both counts. I.G. Ex. 2, at 1. The District Court sentenced Petitioner to 70 months incarceration, and ordered Petitioner to pay a $200 assessment and $4,500 in restitution. I.G. Ex. 2, at 2, 5.

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 a State health care program.

An individual must be excluded from participation in any federal health care program, as defined in 42 U.S.C. § 1320a-7b(f), 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. § 1320a-7(a)(1). Petitioner disagrees that her conviction requires exclusion under section 1320a-7(a)(1). P. Br. at 1-2.

1. Petitioner was convicted of a criminal offense for the purposes of 42 U.S.C. § 1320a-7(a)(1).

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 in Criminal Case indicating Petitioner was found guilty of two counts of Mail Fraud under 18 U.S.C. § 1341. I.G. Ex. 2, at 1. Petitioner does not dispute that she was convicted of a criminal offense. P. Br. at 1. Therefore, I conclude that Petitioner was convicted of a criminal offense for the purposes of exclusion under 42 U.S.C. § 1320a-7(a)(1).

2. Petitioner's criminal offense related to the delivery of an item or service under a State health care program.

In order for Petitioner's conviction to support her exclusion, Petitioner's conviction must be "related to the delivery of an item or service . . . under any State health care program." 42 U.S.C. § 1320a-7(a)(1). The term "related to" means that there must be a "nexus" between Petitioner's conduct and the delivery of an item or service under a State health care program. *See, e.g., James O. Boothe*, DAB No. 2530, at 5 (2013).[4] However, Petitioner appears to dispute that her criminal conviction relates to the delivery of items or services under a State health care program. P. Br. at 2. A review of the record indicates otherwise.

[4] Administrative decisions cited in this decision are accessible on the internet at: http://www.hhs.gov/dab/decisions/index.html.

"To perform its mission, the GPA relied on contractors to provide abstinence education services in Louisiana" who were "hired . . . to design, create and distribute educational materials, conduct training sessions and workshops for teachers, and conduct abstinence-related programs for school-age children, among other things." I.G. Ex. 3, at 1; *see also* I.G. Ex. 5, at 7. Petitioner executed an elaborate scheme that involved awarding contracts to an entity she created, called Friends 4 Teens (F4T), and arranging for invoices from F4T to be submitted to and paid by the GPA, even though work had not been performed. I.G. Exs. 3, at 2-4; 5, at 9-13; 6, at 16, 27. Petitioner's son was paid by F4T. I.G. Ex. 3, at 5; 5, at 11-12; *see also* I.G. Ex. 6, at 17 (referring to this activity as helping her son to get a job). Therefore, there is a nexus between the criminal offense of mail fraud and the services that the GPA paid for, but F4T did not provide.

Further, it is beyond doubt that the GPA was a State health care program for purposes of 42 U.S.C. § 1320a-7(a)(1). The GPA was a program established and funded under 42 U.S.C. § 710, which is part of title V of the Social Security Act. I.G. Exs. 4; 5, at 7; *see also* I.G. Ex. 3, at 1; P. Ex. E-18; *see also* P. Ex. G-8. Petitioner admits this. P. Br. at 1. For purposes of exclusion, any program receiving funds under title V of the Social Security Act is a "State health care program." 42 U.S.C. § 1320a-7(h)(2); 42 C.F.R. § 1001.2 (definition of *State health care program*). Therefore, the GPA is a State health care program under the exclusion statute.

Based on the foregoing, I conclude that the I.G. proved that Petitioner's exclusion from Medicare, Medicaid, and all other federal health care programs is required under 42 U.S.C. § 1320a-7(a)(1).

C. The ten-year period of exclusion imposed on Petitioner is not unreasonable.

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). However, an individual may be excluded for a period in excess of the minimum if the I.G. proves by a preponderance of evidence that there is one or more aggravating factors present as specified in 42 C.F.R. § 1001.2(b). If Petitioner proves the existence of one or more mitigating factors as specified in 42 C.F.R. § 1001.2(c), then the length of exclusion may be reduced, but not to less than five years.[5] I determine the existence of aggravating and mitigating factors de novo. However, I must uphold the length of exclusion imposed by the I.G. if it is not unreasonable. 42 C.F.R. § 1001.2007(a)(1)(ii).

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[5] In exclusion cases brought under 42 U.S.C. § 1320a-7(a) and 42 C.F.R. § 1001.101, the administrative law judge assigns the burden of proof. *See* 42 C.F.R. § 1005.15(c). I notified the parties of their respective burdens related to aggravating and mitigating factors at the prehearing conference. Order at 2.

1. The I.G. proved the existence of the aggravating factor at 42 C.F.R. § 1001.102(b)(5) (sentence imposed by the court included incarceration).

In its letter excluding Petitioner, the I.G. indicated that he was lengthening Petitioner's exclusion to ten years because Petitioner was sentenced to a 70-month period of incarceration. The record demonstrates, and Petitioner does not dispute, that the District Court sentenced Petitioner to 70 months of imprisonment. I.G. Exs. 2, at 2; 6, at 25. Therefore, I conclude that the I.G. proved the aggravating factor at 42 C.F.R. § 1001.102(b)(5).

Petitioner argues that "[s]ince petitioner's conviction does not meet the pre-requisite of fraud crimes in connection with delivery of a service[,] [s]ection 1001.102 is inapplicable." P. Br. at 2. However, nowhere in 42 C.F.R. § 1001.102 does it state that an individual must be convicted of fraud for an exclusion to last more than the statutory minimum five-year duration.

2. Petitioner failed to prove the existence of any mitigating factors under 42 C.F.R.§ 1001.102(c).

Because I found that an aggravating factor is present in this case, I must consider whether there are any mitigating factors under 42 C.F.R. § 1001.102(c) to offset the aggravating factor. In her brief, Petitioner asserts that "mitigating factors exist within the meaning of section 1001.102(c)(3)(ii)" with a citation to P. Ex. C. The mitigating circumstance at section 1001.102(c)(3)(ii) states that "[t]he [excluded] individual's . . . cooperation with Federal or State officials resulted in . . . [a]dditional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses."

Petitioner has not proven that there is a basis for finding that this mitigating circumstance exists. Petitioner's Ex. C is a letter from the director of the Office of Community Programs for the state of Louisiana to the Louisiana Legislative Auditor reviewing the GPA. The letter indicates that many changes were made to the GPA following Petitioner's tenure as director; however, the document does not indicate that Petitioner cooperated with the appropriate law enforcement agency to identify program vulnerabilities and weaknesses. To the contrary, when the Louisiana Legislative Auditor determined that Petitioner had acted improperly related to the contracts Petitioner approved as director of the GPA, Petitioner "would not meet with Louisiana legislative auditor (LLA) representatives to discuss these findings." I.G. Ex. 5, at 10. In a June 12, 2009 letter, the Louisiana Legislative Auditor requested Petitioner's comments on his

draft report concerning the investigation into the GPA. Petitioner merely stated that: "I do not agree with your findings or your allegations." I. G. Ex. 5, at 24. Therefore, I conclude that Petitioner has not met her burden of proving that a mitigating factor exists in this case.

3. The evidence of records shows that Petitioner is untrustworthy and that a ten-year exclusion is not unreasonable.

After determining the existence of aggravating and mitigating factors, an administrative law judge must conduct the following evaluation in order to determine whether to uphold the length of exclusion:

> The evaluation does not rest on the specific number of aggravating or mitigating factors or any rigid formula for weighing those factors, but rather on a case-specific determination of the weight to be accorded each factor based on a qualitative assessment of the circumstances surrounding the factors in that case. . . . The protective purpose of the exclusion statute is an overarching consideration when assessing the factors: 'It is well-established that section 1128 exclusions are remedial in nature, rather than punitive, and are intended to protect federally-funded health care programs from untrustworthy individuals'. . . . An [administrative law judge's] . . . review of an exclusion period to determine whether it is unreasonable must reflect the deference owed the I.G . . . [and] [a]n [administrative law judge] may not substitute his or her judgment for that of the I.G. or determine a "better" exclusion period.

Sushil Aniruddh Sheth, M.D., DAB No. 2491, at 5 (2012) (citations omitted).

In the present matter, the only aggravating factor to consider is that Petitioner will serve 70 months in prison. I.G. Ex. 2, at 2. The length of Petitioner's incarceration is a significant indicator that Petitioner's crimes were particularly egregious. In exclusion cases, 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 was nearly eight times longer.

In addition to the length of sentence, it is important to consider the underlying reason for the sentence. The District Court gave the following reasons for Petitioner's sentence.

> [The GPA] had very limited funds. And it was not appropriate by your conduct to have diverted those funds away from programs to where they were doing what they were supposed to do and to line up a job or money to go into accounts which you controlled. You caused the state to lose money, precious money for that particular project. And unfortunately, as the

> Government pointed out, you have a track record of going in to Charitable Institutions or groups and in diverting money from those groups and their intended purposes and diverting it to you or your family's bank accounts. And the evidence at the trial was compelling that you did this knowingly and that you understood what it was going to do. You created numerous accounts to hide your activities, and it took serious investigation to uncover that activity.

I.G. Ex. 6, at 27. The Court's statements show that Petitioner knowingly engaged in the fraud and created an elaborate scheme to steal public funds. *See* I.G. Ex. 3, at 2. Further, as the District Court indicated, Petitioner previously engaged in improper conduct in order to obtain funds from the GPA while working with a contractor for the GPA. Petitioner's previous misconduct, separate and apart from the conduct in the criminal case, caused $189,026.32 in loss to the government; the District Court expressly considered this loss when sentencing Petitioner. I.G. Ex. 6, at 9-11; *see also* I.G. Exs. 5, at 13-14; 6, at 23. There is no doubt that the duration of Petitioner's sentence was directly based on her misconduct.

Petitioner argues that there is little significance to the length of imprisonment because "the federal criminal system is a system set up by points . . . [t]hus any defendant with the same underlying facts and circumstances as petitioner would have received the same 70-month sentence." P. Br. at 2-3. Petitioner submitted as exhibits, copies of provisions from the 2012 Federal Sentencing Guidelines Manual. P. Ex. A, B. Petitioner indicates that the advisory range for her sentence under the Federal Sentencing Guidelines was from 70 to 87 months.

Although it is true that the District Court sentenced Petitioner based on the Federal Sentencing Guidelines and to "the lower end of the Guidelines sentence" (I.G. Ex. 6, at 27), this is not necessarily a reason to reduce the length of an exclusion, especially when there is lengthy incarceration. *See Dr. Frank R. Pennington, M.D.*, DAB No. 1786 (2001) (even when the lowest term of imprisonment is imposed under sentencing guidelines, it is appropriate to "considering the fact and length of the incarceration as an appropriate measure of the relative severity of the offense"); *Gary Alan Katz, R.Ph.*, DAB No. 1842 n.5 (2002) ("the [exclusion] regulations making incarceration an aggravating factor reasonably assume that a sentence of incarceration will be imposed pursuant to the applicable laws and sentencing guidelines").

Further, Petitioner argues, at length, that her conviction resulted from ignorance regarding proper government contracting procedures and her decision to follow the procedures used by the previous GPA director, as well as having "incorrect standards of conduct and no internal control system in place at the time the questioned conduct occurred." P. Supp. Br. at 2-7, 10. Petitioner also asserts that Louisiana officials decided

not to prosecutor her, that she took appropriate corrective action, but that "it was not considered quick enough by the Federal Prosecutors." P. Supp. Br. at 9-10.

Petitioner's argument goes to the merits of her criminal conviction and her culpability. Petitioner attempts to recast herself simply as an individual who made mistakes and, but for zealous federal prosecutors, she would not have been convicted. As indicated in the regulations, I cannot consider such arguments.

> When the exclusion is based on the existence of a criminal conviction . . . imposing liability by Federal . . . court . . . the basis for the underlying conviction is not reviewable [by the administrative law judge] and the [excluded] individual may not collaterally attack it either on procedural or substantive grounds in this appeal.

42 C.F.R. § 1001.2007(d).

Significantly, Petitioner made the same argument during her sentencing hearing. I.G. Ex. 6, at 15-16. In response to Petitioner's assertion that she simply did not do a good job managing the GPA, the District Court stated: "This trial was about . . . your active creation of bank accounts and entities that took money from the program. . . ." I.G. Ex. 6 at 16. The District Court further stated to Petitioner: "You must have realized that you can't forge people's names, that you can't set up and make documents that aren't what they're represented to be. And even during this trial I am convinced that you were less than truthful in your testimony." I.G. Ex. 6, at 19.

Although Petitioner states that she "is taking full responsibility for the wrongdoing" (P. Supp. Br. at 10), Petitioner's stated view that her misconduct was simply that of maladministration of the GPA's contracts shows that she is unwilling to take responsibility for her actions. It is particularly significant that the District Court did not believe that Petitioner was truthful during her sworn testimony at the trial. Petitioner, with her past history of fraud and abuse of public moneys, is clearly not trustworthy.

The criminal prosecutor summed Petitioner's case well:

> [T]his was a corruption case . . . at a pretty high level of state government. And it went on for years. And it cost tens of thousands of dollars in actual loss, not intended loss, but actual loss that was paid as a result of fraud that was funneled to the [Petitioner's] family members by the [Petitioner].

I.G. Ex. 6, at 22. There is ample evidence that Petitioner is an untrustworthy individual who is a threat to federal programs. She should be excluded for a lengthy period. Based on the evidence of record and with consideration of the I.G.'s original exclusion determination, I conclude that a ten-year period of exclusion is not unreasonable.

VII. Conclusion

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

/s/
Scott Anderson
Administrative Law Judge