Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

KIRPA, LLC,

Petitioner,

v.

The Inspector General

Docket No. C-14-588

Decision No. CR3247

Date: May 30, 2014

DECISION

Petitioner, KIRPA, LLC, is a Missouri-based company that operates a medical clinic that was convicted of health care fraud. Based on this conviction, the Inspector General (I.G.) has excluded the company for ten years from participating 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 challenges 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

Petitioner KIRPA is a limited liability company, which was organized in the State of Missouri by Prithvi P. Singh, M.D., for the purpose of operating a medical clinic. I.G. Exs. 2, 3; I.G. Ex. 4 at 3. The company did business as Singh Medical Specialists. Dr. Prithvi Singh, his wife, and daughter, all physicians, provided services to company patients. I.G. Ex. 4 at 3. Kaven Singh, the son of Dr. Prithvi Singh, was the company's registered agent and one of its managers. I.G. Ex. 4 at 3.

The company pled guilty to one felony count of health care fraud, and, on July 11, 2013, the United States District Court for the Eastern District of Missouri entered its judgment of guilty. As part of its judgment, the court ordered the company to pay a total of $832,717.82 ($405,372.61 + $427,345.21) in restitution to the Medicare and Missouri Medicaid programs. I.G. Exs. 4, 9.

In a letter dated December 31, 2013, the I.G. notified Petitioner that it was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of ten years, because it 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 requested review, and the matter is before me for resolution.

Neither party submits any witness testimony, and they agree than an in-person hearing is not necessary. I.G. Br. at 15; P. Br. at 3. The I.G. submitted an initial brief (I.G. Br.) and nine exhibits (I.G. Exs. 1-9). Petitioner submitted an initial brief (P. Br.) and a reply to the I.G.'s brief. In the absence of any objection, I admit into evidence I.G. Exs. 1-9.

II. Issues

The issues before me are: 1) was Petitioner convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program, within the meaning of section 1128(a)(1), thus providing a basis for excluding it from program participation; and 2) if so, is the length of the exclusion (ten years) reasonable.

III. Discussion

A. Petitioner must be excluded from program participation, because it was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program, within the meaning of section 1128(a)(1).[1]

Under section 1128(a)(1) of the Act, the Secretary of Health and Human Services must exclude an entity that 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] My findings of fact and conclusions of law are set forth, in italics and bold, in the discussion captions of this opinion.

Petitioner seems to concede that the company was convicted of an offense for which exclusion is required. (P. Br. at 2). Inasmuch as the company was convicted of Medicare fraud, it was unquestionably convicted of a criminal offense related to that program.

Nevertheless, Petitioner suggests that the company should not be held responsible, because Dr. Prithvi Singh "was the main perpetrator of the wrongdoing." Dr. Prithvi Singh has since died, and the punishment of exclusion is therefore borne by (unnamed) individuals "who committed no wrongdoing." P. Br. at 2. The main problem with Petitioner's argument is that Dr. Prithvi Singh, the individual, was not convicted of a criminal offense; the company was, and, as such, the company is subject to exclusion.

Moreover, as the plea agreement establishes, the fraud involved multiple company employees, who were part of a larger scheme to defraud both the Medicare and Medicaid programs by: 1) claiming physician-levels of reimbursement for services that were not provided by physicians; 2) billing for home visits provided by a medical assistant – which can only be paid if the *physician* sees the patient – even though the physician was not present; 3) inflating the amount of time the company's nurse practitioners spent providing services; 4) billing for services that were not medically necessary; 5) billing for tests that were not medically necessary and were neither reviewed, read, or interpreted by qualified medical staff; and 6) concealing from patients and insurers that the tests were medically unnecessary and improperly billed. I.G. Ex. 4 at 6-9. And, according to the plea agreement, the criminal conduct continued until August 2012, a year *after* Dr. Prithvi Singh's death. I.G. Ex. 4 at 1, 3.

Thus, Petitioner – the company – was convicted of a program-related crime and must be excluded for at least five years. I now consider whether the length of its exclusion, beyond five years, falls within a reasonable range.

B. Based on the aggravating factors present in this case, the ten-year exclusion falls within a reasonable range.

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 two relied on by the I.G. in determining the length of Petitioner's exclusion: 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; and 2) the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more. 42 C.F.R.

§ 1001.102(b). The presence of an aggravating factor or factors not offset by any mitigating factor or factors justifies lengthening the mandatory period of exclusion.

Program financial loss (42 C.F.R. § 1001.102(b)(1)). Petitioner's actions resulted in program financial losses of more than $832,700, which is many times greater than the $5,000 threshold for aggravation. I.G. Ex. 4 at 9. Restitution has long been considered a reasonable measure of program losses. *Jason Hollady, M.D.*, DAB No. 1855 (2002). Because the financial losses were significantly in excess of the threshold amount for aggravation, the I.G. may justifiably increase significantly Petitioner's 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 was convicted of criminal acts that were committed over a period of almost four years, from October 2008 through August 2012. I.G. Ex. 4 at 1.

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

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 a mitigating factor as "in the nature of an affirmative defense," the Departmental Appeals Board has ruled that 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 raises a number of arguments in support of reducing his period of exclusion. First, as noted above, Petitioner asserts that the principal wrong-doer is dead and thus no longer affiliated with the company. Second, the company agreed to pay restitution, and has been doing so, but will not be able to continue if its program participation ends, and it goes out of business. Third, the company provides care to the poor and underprivileged in a medically underserved community. None of these are considered mitigating factors. 42 C.F.R. § 1001.102(c).

I recognize that 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.

So long as the period of exclusion is within a reasonable range, based on demonstrated criteria, I have no authority to change it. *Joann Fletcher Cash*, DAB No. 1725 at 7 (2000), *citing* 57 Fed. Reg. 3298, 3321 (1992). In this case, Petitioner's crime demonstrates that it presents significant risks to the integrity of health care programs. It engaged in illegal conduct that cost the Medicare program a significant amount of money. Its criminal conduct lasted more than a year. No mitigating factors offset the aggravating factors. I therefore find that the ten-year exclusions falls within a reasonable range.

IV. Conclusion

For these reasons, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid and all federal health care programs, and I sustain as reasonable the period of exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge