DEPARTMENT OF HEALTH AND HUMAN SERVICES

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Kelvin Washington a/k/a/ Kelvin Jerome Washington,
(OI File No.: 6-08-40491-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-1323

Decision No. CR3372

Date: September 19, 2014

DECISION

Petitioner, Kelvin Washington, a/k/a Kelvin Jerome Washington, appeals the determination of the Inspector General (I.G.) for the U.S. Department of Health & Human Services to exclude him from participating in Medicare, Medicaid, and other federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)) for a period of 10 years. For the reasons explained below, I find that there is a legitimate basis for the I.G. to exclude Petitioner and that an exclusion period of 10 years is reasonable based on three aggravating factors and no mitigating factors.

I. Background and Procedural History

On February 28, 2013, the I.G. notified Petitioner that he was being excluded from participating in Medicare, Medicaid, and other federal health care programs pursuant to section 1128(a)(1) of the Act. The I.G. cited as the basis for the exclusion Petitioner's conviction in the United States District Court, Southern District of Texas, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. The I.G. based the length of Petitioner's exclusion (five years above the statutory five-year minimum exclusion period for mandatory exclusion) on three aggravating factors: (1) the acts resulting in his conviction caused, or were intended to cause, a financial loss to a government program of $5,000 or more; (2) the acts resulting

in his conviction were committed over a period of one year or more, from about 2003 to about 2007; and (3) the court's sentence included incarceration. I.G. Exhibit (Ex.) 1.

On August 12, 2013, Petitioner, appearing *pro se*, requested a hearing before an administrative law judge (ALJ). The case was assigned to me for hearing and decision on September 20, 2013. Due to Petitioner's incarceration and illness, I was not able to convene a prehearing conference in this case until March 5, 2014, at which time I found Petitioner's original hearing request noncompliant with the regulations and gave Petitioner a chance to file a hearing request compliant with the regulations. March 6, 2014 Summary of Pre-hearing Conference and Order; 42 C.F.R. § 1005.2(d).

Petitioner filed an amended hearing request on April 10, 2014. In it he admits that he "was convicted of [M]edicare fraud and related charges on or about December 8, 2011 in the United States District Court of the Southern District of Texas, Houston Division." In my Order scheduling briefing in the case, which I issued on June 3, 2014, I found that while Petitioner maintains in his hearing request that he is actually innocent of the criminal offense for which he was convicted, I do not have the authority to consider his claim because it is a collateral attack on his conviction.[1] 42 C.F.R. § 1001.2007(d). In addition, as Petitioner did not dispute that he was convicted of a criminal offense under section 1128(a)(1) of the Act, I found that I must sustain at least a five-year exclusion. However, because the I.G. excluded Petitioner for 10 years, I informed the parties that I may consider whether or not the length of Petitioner's exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(1), (2). I then set a briefing schedule for the parties to brief that issue.

The I.G. filed a brief (I.G. Br.) and three exhibits (I.G. Exs. 1-3) on June 24, 2014. Petitioner filed a brief (P. Br.) on July 29, 2014. Petitioner did not attach any exhibits. The I.G. filed a reply (I.G. Reply) on August 14, 2014. Absent any objection I admit I.G. Exs. 1-3 into the record.

In my June 3, 2014 Order, I directed the parties to indicate in their briefs whether a video hearing would be necessary and, if so, to describe the testimony the party wishes to present, the names of the witnesses it would call, and a summary of each witness' proposed testimony. Neither party indicated an in-person hearing is necessary, and neither party offered any witness testimony. I.G. Br.; P. Br.; I.G. Reply. I therefore decide this case based on the written record.

[1] In his subsequent brief, Petitioner continues to "maintain [his] innocence" of the crime for which he was convicted. At no time, however, has Petitioner denied the conviction.

II. Discussion

A. Applicable Law

Section 1128(a)(1) of the Act requires the Secretary of the U.S. Department of Health & Human Services (Secretary) to exclude from participation in federal health care programs "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under [Medicare] or under any State health care program." *See also* 42 C.F.R. § 1001.101(a). The Secretary delegated this authority to the I.G. 48 Fed. Reg. 21662 (May 13, 1983).

Exclusion pursuant to section 1128(a)(1) of the Act is mandatory and the I.G. must impose the exclusion for a minimum period of five years. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); *see* 42 C.F.R. § 1001.102(a). The I.G. may increase the period of exclusion based on the presence of certain aggravating factors that the Secretary has established by regulation. 42 C.F.R. § 1001.102(b). Here, the I.G. relies on three aggravating factors to enhance the period of Petitioner's exclusion beyond the minimum mandatory period:

> (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. (The entire amount of financial loss to such programs or entities, including any amounts resulting from similar acts not adjudicated, will be considered regardless of whether full or partial restitution has been made);
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> (2) The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more;
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> * * * *
>
> (5) The sentence imposed by the court included incarceration[.]

42 C.F.R. § 1001.102(b)(1), (2), (5).

Where, as here, the I.G. determines that one or more aggravating factors may support increasing an exclusion period beyond the five-year minimum, the I.G. may only then consider certain specified mitigating factors "as a basis for reducing the period of exclusion to no less than 5 years." 42 C.F.R. § 1001.102(c).

The right to an ALJ hearing and judicial review of the final action of the Secretary are provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that is the basis for the exclusion. 42 C.F.R. § 1001.2007(c), (d). Petitioner bears the

burden of proof, and the burden of persuasion, on any affirmative defenses or mitigating factor, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(c). An ALJ reviews the length of an exclusion *de novo* to determine whether it falls within a reasonable range considering any aggravating and mitigating factors. *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491, at 5 (2012) (citing *Joseph M. Rukse, Jr., R.Ph.*, DAB No. 1851, at 10-11 (2002)).

B. Issues

Under 42 C.F.R. § 1001.2007(a)(1), the scope of my review is limited to two issues:

> Whether there is a basis for the I.G. to exclude Petitioner from participation in Medicare, Medicaid, and other federal health care programs; and
>
> Whether the length of the exclusion is unreasonable.

Here I have found that there is an undisputed and legitimate basis to exclude Petitioner, and I thus decide only whether the length of the exclusion is unreasonable.

C. Findings of Fact and Conclusions of Law

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

The record reflects that Petitioner was employed as an administrator at a nursing home in Sugar Land, Texas, which participated in the Medicare and Medicaid programs. On July 14, 2011, a 10-count Indictment was filed in the United States District Court, Southern District of Texas, accusing Petitioner of violating the anti-kickback and health care statutes. I.G. Ex. 3. The Indictment alleged that Petitioner solicited and accepted kickbacks from an ambulance company in exchange for fraudulently securing ambulance transport prescriptions for dialysis patients. I.G. Ex. 3, at 1, 6. The Indictment alleged specifically that: Petitioner's criminal conduct began in 2003 and continued through 2007 (I.G. Ex. 3, at 6); the ambulance transport prescriptions secured by Petitioner resulted in false billings to Medicare of approximately $1,231,148 and payment to the ambulance company by Medicare and Medicaid of $438, 665.65 (I.G. Ex. 3, at 6, 17); and Petitioner received, for his part in the criminal scheme, 23 checks from the ambulance company totaling approximately $22,200, as well as approximately $1,500 in cash. I.G. Ex. 3, at 7. Based on this Indictment, Petitioner was found guilty after a jury trial of violating 18 U.S.C. §§ 2 and 1347 (six counts, health care fraud, aiding and abetting); 18 U.S.C. § 371 (one count, conspiracy to defraud the United States and to receive and pay health care kickbacks and to commit health care fraud); and 42 U.S.C. § 1320a-7b(b)(1)(A) (three counts, payment and receipt of health care kickbacks). I.G. Ex. 2. Restitution was determined to be in the amount of $480,564.75 ($400,152.64 to

Medicare and $80,412.11 to Medicaid). I.G. Ex. 2, at 6. Petitioner was also sentenced to 24 months of imprisonment. I.G. Ex. 2, at 3.

These facts establish the presence of three aggravating factors by a preponderance of the evidence. I address these three aggravating factors below.

a. The acts resulting in Petitioner's conviction caused a loss to Medicare and Medicaid of $480,564.75.

The I.G. may increase the length of exclusion if the acts resulting in the underlying conviction caused, or were intended to cause, a 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 court documents show that the District Court ordered restitution of $480,564.75 to Medicare and Medicaid as a result of Petitioner's criminal conduct. I.G. Ex. 2, at 6. It is well established that restitution is a recognized measure of program loss. *See, e.g., Craig Richard Wilder*, DAB No. 2416, at 9 (2011). Petitioner's crimes caused Medicare and Medicaid financial losses much greater than the $5,000 threshold required to trigger this particular aggravating factor. Thus, the I.G. has established the presence of this aggravating factor.

b. The acts resulting in Petitioner's conviction occurred over a period of one year or more.

The I.G. may increase the length of exclusion if the acts resulting in the underlying conviction occurred over a period of one year or more. 42 C.F.R. § 1001.102(b)(2). The acts that formed the basis of Petitioner's conviction began in 2003 and continued through 2007, a period significantly exceeding the minimum one year period required to trigger this particular aggravating factor. I.G. Ex. 3, at 4, 6; I.G. Ex. 2. Thus, the I.G. has established the presence of this aggravating factor.

c. The District Court's sentence included incarceration.

The I.G. may increase the length of exclusion if the court's sentence includes a period of incarceration. 42 C.F.R. § 1001.102(b)(5). Here, the District Court sentenced Petitioner to 24 months in prison based on his convictions in violation of 18 U.S.C. § 371, 42 U.S.C. § 1320(a)-7b(b)(1)(A), and 18 U.S.C. §§ 1347 and 2. I.G. Ex. 2, at 1-3. Petitioner is currently incarcerated under the District Court's sentence. Thus, the I.G. has established the presence of this aggravating factor.

d. No mitigating factors justify reducing the period of exclusion.

Because I find that aggravating factors are present in this case that justify an exclusion of longer than five years, I next consider whether any mitigating factors authorized in the regulations are present to reduce the exclusion period to no less than the minimum

five years. 42 C.F.R. § 1001.102(c). Petitioner asserts no mitigating factors authorized to be mitigating factors by the regulations in this case. P. Br. Accordingly, I find that no mitigating factors exist which would justify reducing the period of exclusion.

2. Based on the three aggravating factors, and the absence of any mitigating factors, an exclusion period of 10 years is within a reasonable range.

As noted by the Departmental Appeals Board (Board) in *Sheth*,

> The protective purpose of the exclusion statutes 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." *Donald A. Burstein, Ph.D.*, DAB No. 1865, at 12 (2003), citing *Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003), *cert. denied*, 123 S. Ct. 2652 (2005); *Mannochio v. Kusserow*, 961 F.2d 1539, 1543 (11th Cir. 1992).

Sheth, DAB No. 2491, at 5. An ALJ reviews the length of an exclusion de novo in order to determine whether the exclusion falls within a reasonable range given the aggravating and mitigating factors and the circumstances underlying them. *Sheth*, DAB No. 2491, at 5 (and cases cited therein). The Board in *Sheth* cited to the ALJ decision when describing what constituted a reasonable range, stating that, "[a] 'reasonable range' refers to a range of exclusion periods that is more limited than the full range authorized by the statute [i.e., from a minimum of five years to a maximum of permanent] and that is tied to the circumstances of the individual case." *Sushil Aniruddh Sheth*, DAB CR2540, at 6 (2012) (and cases cited therein). Thus, to determine whether an exclusion period is within a reasonable range, an ALJ must weigh any aggravating and mitigating factors by evaluating the aggravating factors and mitigating factors and making a case-specific determination of the weight to be accorded each factor based on a "qualitative assessment" of the factors in the case. *Sheth*, DAB No. 2491, at 5 (and cases cited therein).

A reasonable range of exclusion periods should reflect when there is substantial government loss in order to protect government programs from untrustworthy individuals. *See Burstein*, DAB No. 1865, at 12 (2003). Here, Petitioner's crimes resulted in significant financial losses to Medicare and Medicaid. As I discussed above, the District Court ordered restitution in the total amount of ***$***480,564.75. I.G. Ex. 2, at 6. The Board has characterized program loss amounts substantially greater than the $5,000 statutory threshold "as an 'exceptional aggravating factor' entitled to significant weight." *Sheth*, DAB No. 2491, at 7, citing *Jeremy Robinson*, DAB No. 1905, at 12 (2004);

Burstein, DAB No. 1865, at 12. The financial loss in this case to the government health care programs Medicare and Medicaid is far above the $5,000 threshold and supports a significant increase in the reasonable range of exclusion period that the I.G. may impose.

The record shows that Petitioner's criminal conduct took place from 2003 through 2007. As the Board has explained, the purpose of the aggravating factor addressing the length of criminal conduct "is to distinguish between petitioners whose lapse in integrity is short-lived from those who evidence a lack of such integrity over a longer period of time." *Burstein*, DAB No. 1865, at 8. Previously, the Board has accorded enough weight to sustain an exclusion of more than five years to the fact that underlying criminal conduct was committed for "slightly more" than one year. *Burstein*, DAB No. 1865, at 12. Here, as in *Burstein*, the length of Petitioner's criminal conduct shows a prolonged lack of integrity that was more than just "short-lived" and supports an increase from the five-year minimum exclusion period to 10 years.

The other proven aggravating factor relates to Petitioner's prison sentence of 24 months for his crimes. Petitioner's sentence represents substantial jail time which indicates the severity of the scheme in which Petitioner was involved. The Board once determined that a nine-month period of incarceration was "relatively substantial," and supported an eight-year exclusion period. *Jason Hollady, M.D.*, DAB No. 1855, at 12 (2002). Here, the length of Petitioner's incarceration was almost three times greater than that imposed in *Hollady*. Accordingly, this aggravating factor reasonably supports an increase to the 10-year exclusionary period.

Petitioner has not asserted that any of the authorized mitigating factors under 42 C.F.R. § 1001.102(c) is present in his case. P. Br. Nevertheless, he argues that excluding him for 10 years instead of five years is unreasonable and urges me to consider that "any exclusion period would place a tremendous hardship on my financial ability to sustain a decent quality of life for my family." P. Br. at 2. Petitioner also asserts "there is a great need for caring for the elderly which I love so deeply." P. Br. at 2.

The regulations specifically outline what factors may be considered mitigating and none of Petitioner's arguments relate to any of the mitigating factors. *See* 42 C.F.R. § 1001.102(c). Moreover, "the practical effect of a finite exclusion period on the individual's ability to participate in the Medicare program in the future is irrelevant to determining a reasonable exclusion period." *Sheth*, DAB No. 2491, at 18 (explaining that the Board "has repeatedly declined to consider an individual's age or financial or employment prospects in determining whether an exclusion period is reasonable," citing *Robinson*, DAB No. 1905, at 7; *see also Burstein*, DAB No. 1865, at 13.

In sum, the severity of the three aggravating factors and the absence of any mitigating factors support an increase in the length of Petitioner's exclusion period beyond the

five-year minimum. A 10-year exclusion period is within a reasonable range based upon the aggravating factors. Therefore, I sustain the I.G.'s exclusion of Petitioner for 10 years, effective March 20, 2013.

/s/
Joseph Grow
Administrative Law Judge