Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Eric Senat, M.D.,
(OI File No.: H-14-4-2782-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-1689

Decision No. CR4320

Date: October 14, 2015

DECISION

Dr. Eric Senat requested a hearing to dispute a 13-year exclusion from participation in Medicare, Medicaid, and all federal health care programs that the Inspector General for the Department of Health and Human Services (IG) imposed on him. Dr. Senat conceded that he is subject to exclusion based on his felony criminal conviction for an offense related to fraud or other financial misconduct involving the delivery of a health care item or service, and that various circumstances surrounding his conviction serve as aggravating factors to lengthen his exclusion beyond the statutorily required five-year minimum period. However, Dr. Senat asserts that the length of exclusion ought to be reduced based on his cooperation with law enforcement during his prosecution, prompt payment of restitution, previous services provided to under privileged patients, and the sentencing judge's decision to impose a term of incarceration for a period below the minimum directed by federal sentencing guidelines. Because Dr. Senat did not prove the existence of any mitigating factors enumerated in the regulations and the IG proved that four aggravating factors are present in this case, Dr. Senat's 13-year exclusion is not unreasonable. Therefore, I affirm that exclusion.

I. Background and Procedural History

In a January 30, 2015 letter, the IG informed Dr. Senat that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of 13 years pursuant to 42 U.S.C. § 1320a-7(a)(3). The IG advised Dr. Senat that the exclusion was based on his felony conviction in the United States District Court for the Southern District of New York (U.S. District Court) of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct either: in connection with the delivery of a health care item or service, including the performance of management or administrative services relating to the delivery of such items or services; or with respect to any act or omission in a health care program (other than Medicare and a state health care program) operated or financed by any federal, state, or local government agency. The IG imposed an exclusion in excess of the minimum statutory period of five years because of the following aggravating circumstances:

1. A federal court ordered Dr. Senat to pay approximately $324,700 in restitution to multiple private insurance companies;

2. Dr. Senat committed criminal acts from about March 2006 to about January 2013;

3. A federal court sentenced Dr. Senat to 15 months of incarceration; and

4. The Office of Workers' Compensation Program debarred Dr. Senat from participation in the Federal Workers Compensation program.

IG Exhibit (Ex.) 1 at 1-2.

On March 19, 2015, Dr. Senat, through counsel, requested a hearing to dispute the length of the exclusion. Dr. Senat argued that the 13-year exclusion period is unreasonable because there are mitigating factors present, which should reduce the exclusion period to five years. Dr. Senat identified the following three mitigating factors:

1. Dr. Senat's cooperation with federal authorities resulted in the investigation of another case;

2. Dr. Senat is one of the few African American Board Certified Orthopedic Surgeons in his community, and serves many disadvantaged people; and

3. Dr. Senat "had an emotional condition before or during the commission of the offense that reduced his culpability."

Request for Hearing at 3.

On April 15, 2015, I held a telephonic prehearing conference in this case, the substance of which I summarized in my April 17, 2015 Order and Schedule for Filing Briefs and Documentary Evidence. *See* 42 C.F.R. § 1005.6. The IG filed his brief together with nine exhibits (IG Exs. 1-9). Dr. Senat submitted his brief (P. Br.) together with two exhibits (P. Exs. 1-2). The IG submitted a reply brief (IG Reply).

II. Decision on the Record

Neither party objected to any of the proposed exhibits in this case. Therefore, I admit all of them into the record.

Dr. Senat requested that I permit him to testify at a hearing in this case. P. Br. at 7-9. Although the IG objected to this (IG Reply at 3-4), I gave Dr. Senat 21 days "to submit his complete, written direct testimony as an exhibit in lieu of in-person testimony. *See* 42 C.F.R. § 1005.16(b)." July 27, 2015 Order. However, Dr. Senat has not submitted his written direct testimony or any request for additional time to submit that testimony. As a result, I consider the record closed in this case and issue this decision based on the written record. *See* Civil Remedies Division Procedures § 19(d).

III. Issues

The issues in this case are limited to determining if there is a basis for exclusion and, if so, whether the length of the exclusion imposed by the IG is unreasonable. 42 C.F.R. § 1001.2007(a)(1).

IV. Jurisdiction

I have jurisdiction to adjudicate this case. 42 U.S.C. § 1320a-7(f)(1); 42 C.F.R. § 1005.2.

V. Findings of Fact, Conclusions of Law, and Analysis[1]

A. Dr. Senat pled guilty to one count of Health Care Fraud in violation of 18 U.S.C. § 1347, and the U.S. District Court sentenced Dr. Senat to serve 15 months in prison and ordered him to pay $324,726.05 in restitution.

Dr. Senat was a physician licensed to practice medicine in New York State commencing in 1987. IG Ex. 2 at 1; IG Ex. 9 at 5, 7-8, 10, 14. On February 5, 2014, the United States Attorney for the Southern District of New York filed an Information with the U.S. District Court charging Dr. Senat with one count of Health Care Fraud under 18 U.S.C. § 1347. IG Ex. 3. On February 5, 2014, Dr. Senat signed a plea agreement and pled

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

guilty to the charge in the Information, and the U.S. District Court accepted the plea. IG Ex. 4 at 6, 24-25, and 37. On July 31, 2014, the U.S. District Court sentenced Dr. Senat to 15 months in prison and, on August 6, 2014, ordered Dr. Senat to pay restitution in the amount of $324,726.05 to numerous victims, including the United States Department of Labor, Office of Workers' Compensation Programs. IG Ex. 6; IG Ex. 7 at 29. On August 6, 2014, the U.S. District Court also entered its written Judgment in a Criminal Case. IG Ex. 5.

B. The IG proved each of the required elements under 42 U.S.C. § 1320a-7(a)(3); therefore, there is a basis to exclude Dr. Senat.

The IG excluded Dr. Senat based on 42 U.S.C. § 1320a-7(a)(3). The essential elements necessary in this case to support the IG's exclusion are: (1) Dr. Senat must have been convicted of a federal felony offense; (2) the felonious conduct must have occurred after August 21, 1996; and 3) the felony offense must have been based on conduct relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. 42 C.F.R. § 1001.101(c).

Dr. Senat does not dispute that the IG's exclusion under 42 U.S.C. § 1320a-7(a)(3) is warranted. P. Br. at 2 ("I do not disagree with the I.G.'s argument that I must be excluded for my conviction for Health Care Fraud."); *see also* Request for Hearing at 1 (seeking a hearing only on the issue as to whether the length of exclusion is too long).

In addition to Petitioner's concession that exclusion is warranted, the record supports the IG's determination that a mandatory exclusion under 42 U.S.C. § 1320a-7(a)(3) must be imposed. Dr. Senat was convicted of a criminal offense and that offense was a felony. An individual is "convicted" of a criminal offense "when a judgment of conviction has been entered against the individual . . . by a Federal . . . court"; "when there has been a finding of guilt against the individual . . . by a Federal . . . court"; or "when a plea of guilty . . . by the individual . . . has been accepted by a Federal . . . court." 42 U.S.C. § 1320a-7(i). In the present case, the record shows that Dr. Senat has had a judgment of conviction entered against him (IG Ex. 5), that the U.S. District Court made a finding of guilt against him (IG Ex. 5 at 1), and that Dr. Senat's plea of guilt was accepted by the U.S. District Court. IG Ex. 4 at 6, 24-25, 37. Further, Dr. Senat was convicted of violating 18 U.S.C. § 1347, which is a Class D felony because a violation of that statute has a maximum term of imprisonment of ten years. 18 U.S.C. §§ 1347, 3559(a)(4).

Dr, Senat's criminal conduct occurred between 2006 and 2013. IG Ex. 3 at 1; IG Ex. 4 at 33; IG Ex. 7 at 27. Therefore, the conduct occurred after August 21, 1996.

Dr. Senat's offense involved fraud or other financial misconduct, in connection with the delivery of a health care item or service. The charge to which Dr. Senat pled guilty stated his conduct as follows:

> From at least in or about March 2006 through at least in or about January 2013, in the Southern District of New York and elsewhere, ERIC SENAT, the defendant, knowingly and willfully did execute, and attempt to execute, a scheme and artifice to defraud a health care benefit program, and to obtain, by means of false and fraudulent pretenses, representations, and promises, money and property owned by, and under the custody and control of, a health care benefit program, in connection with the delivery of and payment for health care benefits, items, and services, to wit, SENAT fraudulently billed health care benefit programs for medical treatment that he did not perform.

IG Ex. 3 at 1. As stated more specifically in his own words while pleading guilty to the charge against him:

> I certified that I had personally performed medical procedures when I did not perform those procedures myself. I then submitted bills for those procedures to healthcare benefit programs with the intent that the bills be paid. I knew at the time that I did this -- I knew at the time that I did this that it was unlawful. This occurred between 2006 and 2013. . . . The procedures were performed by my physician's assistant.

IG Ex. 4 at 32-33.

Therefore, I conclude that Dr. Senat is subject to a mandatory exclusion under 42 U.S.C. § 1320a-7(a)(3).

C. The presence of four aggravating factors and the absence of any mitigating factors justify excluding Dr. Senat for a period of 13 years.

Because I have concluded that a basis exists to exclude Dr. Senat pursuant to 42 U.S.C. § 1320a-7(a)(3), Dr. Senat must be excluded for a minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B). While the IG must impose the five-year minimum mandatory term of exclusion, the IG is authorized to lengthen that term if certain aggravating factors exist. *See* 42 C.F.R. § 1001.102. Those aggravating factors are detailed at 42 C.F.R. § 1001.102(b)(1)-(9). The IG added eight years to Dr. Senat's exclusion based on the presence of four aggravating factors: 42 C.F.R.

§§ 1001.102(b)(1) (the acts resulting in the conviction caused a financial loss to a government program of $5,000 or more); (b)(2) (the acts resulting in the conviction were committed over a period of one year or more); (b)(5) (the sentence imposed by the court included incarceration); and (b)(9) (an adverse action taken by a federal agency, based on the same circumstances that serve as the basis for imposing the exclusion).

I must uphold the length of exclusion as long as it is not unreasonable. 42 C.F.R. § 1001.2007(a)(1)(ii). This means that: "So long as the amount of time chosen by the []IG is within a reasonable range, based on demonstrated criteria, the ALJ has no authority to change it under this rule. We believe that the deference § 1001.2007(a)[] grants to the []IG is appropriate, given the []IG's vast experience in implementing exclusions under these authorities." 57 Fed. Reg. 3298, 3321 (Jan. 29, 1992).

Dr. Senat does not dispute that the aggravating factors relied on by the IG exist. P. Br. at 3. Dr. Senat, however, argues that the IG has placed too much weight on these factors resulting in a length of exclusion that is too long. P. Br. at 3-6. Both parties recognize that it is the quality of the aggravating (or mitigating) factors that is most important when considering the length of exclusion, and not the sheer number of aggravating factors that are present in a given case. As stated in the preamble to the final rule establishing the exclusion regulations:

> We do not intend for the aggravating and mitigating factors to have specific values; rather, these factors must be evaluated based on the circumstances of a particular case. For example, in one case many aggravating factors may exist, but the subject's cooperation with the []IG may be so significant that it is appropriate to give that one mitigating factor more weight than all of the aggravating. Similarly, many mitigating factors may exist in a case, but the acts could have had such a significant physical impact on program beneficiaries that the existence of that one aggravating factor must be given more weight than all of the mitigating. The weight accorded to each mitigating and aggravating factor cannot be established according to a rigid formula, but must be determined in the context of the particular case at issue.

57 Fed. Reg. at 3314-3315.

As indicated by the analysis below, I conclude that each of the aggravating factors present in this case is significant. Further, there are no mitigating factors cognizable under the regulations. Therefore, based on the cumulative significant aggravating factors, I cannot conclude that the IG's determination to impose a 13-year exclusion is unreasonable.

1. Dr. Senat's criminal acts caused a loss of $324,726.05 to government programs and other entities.

The IG has sufficiently demonstrated that the acts resulting in Dr. Senat's conviction caused a loss to a government program and to other entities of $5,000 or more. 42 C.F.R. § 1001.102(b)(1). The record shows that the U.S. District Court ordered Dr. Senat to pay $324,726.05 in restitution to the United States Department of Labor's workers' compensation office, to the New York State Insurance Fund, and numerous private insurance programs. IG Ex. 5 at 5-6; IG Ex. 6. 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).

I consider the size of the financial loss here a significant aggravating factor that compels a period of exclusion longer than the five-year minimum. Loss is an "exceptional aggravating factor" when, as here, the loss is "very substantially greater than the statutory standard." *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003). The financial loss in this case, which is approximately 65 times greater the minimum needed to support an increase to the exclusion period, strongly supports a lengthy exclusion. *See Anderson v. Thompson*, 311 F.Supp.2d 1121, 1130 (D. Kan. 2004).

Dr. Senat asserts that I should consider his prompt repayment of full restitution as a mitigating factor. P. Br. at 4-5. It is true that he paid full restitution before he was even formally sentenced. P. Br. at 5; IG Ex. 7 at 19. However, I must consider the full amount of loss when determining the weight I will give to this aggravating factor without regard to any restitution payments. *See* 42 C.F.R. § 1001.102(b)(1).

Dr. Senat also asserts that although he billed for physician services when physician assistants provided those services, patients were always provided with appropriate medical care and there was never an allegation that the medical services billed for were not provided. P. Br. at 5, 10. During sentencing, the U.S. District Court dealt with this issue as follows:

> Let me suggest this: To the extent there is a dispute, I am not sure I need to resolve it for this sentencing because no one is disputing that Dr. Senat's conduct was criminal, what he did by submitting for work that he himself did not do. Similarly there does not seem to be a dispute about the actual loss figure, intentional or intended. So the issue is: Is it bad because it is this species of fraud, or is it bad because it is this first and second species of fraud? So I understand that.

IG Ex. 7 at 16. I agree with the court that Dr. Senat committed fraud and whether it was fraud involving providing no services or for overbilling for the services provided, it is still fraud. Therefore, I do not attach importance to the argument Dr. Senat has made.

2. Dr. Senat committed his criminal acts from March 2006 to January 2013.

The IG has also demonstrated that 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 U.S. District Court accepted Dr. Senat's guilty plea to a Health Care Fraud offense that commenced at least in March 2006 and ended in January 2013. IG Ex. 3 at 1; IG Ex. 4 at 33; IG Ex. 7 at 27. Therefore, Dr. Senat's involvement in the scheme was for more than one year.

The purpose of this aggravating factor "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." *Donald A. Burstein, Ph.D.*, DAB No. 1865, at 8. The fact that Dr. Senat engaged in illegal conduct for a period of time that is six to seven times longer than the minimum one year required for aggravation means that this aggravating factor provides strong support for a lengthy exclusion. *See Anderson*, 311 F.Supp.2d at 1,130. During sentencing, the U.S. District Court was concerned by the length of Dr. Senat's criminal activity:

> This is not a buy-and-bust situation or a felony-possession situation. This was conscious involvement in obviously criminal activity over a period of nearly seven years from 2006 to 2013.

IG Ex. 7 at 27. I share this concern over Dr. Senat's prolonged lack of integrity and believe that this aggravating factor supports the 13-year exclusion in this case.

3. The U.S. District Court sentenced Dr. Senat to a 15-month term of incarceration.

The IG has also proven that the U.S. District Court sentenced Dr. Senat to incarceration. 42 C.F.R. § 1001.102(b)(5). The U.S. District Court sentenced Dr. Senat to 15 months of incarceration. IG Ex. 5 at 2; IG Ex. 7 at 29. Dr. Senat argues that it is significant that the U.S. District Court sentenced Dr. Senat to a term of imprisonment that was less than the minimum under the sentencing guidelines. P. Br. at 6.

It is true that the minimum period of incarceration for Dr. Senat's offense was 24 months and the U.S. District Court reduced the term to 15 months. IG Ex. 7 at 27, 29. Further, I believe this is important because the U.S. District Court's intentional deviation from the sentencing guidelines evidences the court's view that Dr. Senat's conduct, while serious,

was somehow less so than other defendants convicted of the same offense. *Cf. Anderson*, 311 F.Supp.2d at 1,130 (holding that a sentence determined under the U.S. Sentencing Guidelines "cannot be interpreted as the sentencing court's view of [the excluded individual's] character or untrustworthiness."). However, I must consider that despite this, a prison sentence of as little as nine months is relatively substantial for exclusion purposes. *Jason Hollady, M.D.*, DAB No. 1855, at 12 (2002). Dr. Senat's sentence is longer than that and represents a substantial period of time, which shows the seriousness of his offense. Accordingly, this aggravating factor provides further support for the IG's decision to increase the exclusion beyond the five-year minimum exclusion period to 13 years.

4. The United States Department of Labor excluded Dr. Senat from participating in the Federal Employees' Compensation Act program as a provider of medical services based on his criminal conviction in the U.S. District Court.

I conclude that an enlargement of the period of Dr. Senat's exclusion is also not unreasonable given the presence of the aggravating factor that the United States Department of Labor excluded him from being a medical provider in its Federal Employees' Compensation Act program. The exclusion notice expressly references Dr. Senat's conviction in the U.S. District Court as the reason for the exclusion. Further, the exclusion notice states that the conviction "was based on fraudulent activities relating to the [Federal Employees' Compensation Act.]" IG Ex. 8.

There is no doubt that the Labor Department's exclusion is an adverse action taken by a federal agency based on the same set of circumstances in the present case and that, as such, is an aggravating factor in this case. 42 C.F.R. § 1001.102(b)(9). In assessing this as an aggravating factor, I consider this exclusion significant because it is based on fraud in a federal program. Dr. Senat cannot be considered trustworthy to participate in federal health care programs when he was committing fraud in another federal program. *See Morgan v. Sebelius*, 694 F.3d 535, 538 (4th Cir. 2012) (The exclusion provision at 42 U.S.C. § 1320a-7(a)(3) "was specifically intended to protect federal programs from untrustworthy individuals" who had committed fraud.). Accordingly, the presence of this additional aggravating factor further justifies Dr. Senat's exclusion for an extended period of 13 years.

5. Dr. Senat did not prove the existence of any mitigating factors that would justify a reduction in the length of exclusion imposed by the IG.

If the IG proves that an aggravating factor listed in the regulations exists to warrant an exclusion of more than five years, then a petitioner may raise mitigating factors listed in the regulations to seek a reduction in the length of exclusion. 42 C.F.R. § 1001.102(c). Dr. Senat alleged that two mitigating factors listed in the regulations were present in his

case. Dr. Senat asserts that he cooperated with federal authorities and that this resulted in the investigation of another criminal case. Request for Hearing at 3. Dr. Senat attached a presentencing report to his hearing request as support for this mitigating factor and indicated that paragraph 8 of the report proves his cooperation. That paragraph states:

> The investigation of ERIC SENAT commenced after a separate investigation of a postal employee who was charged with worker's compensation fraud. According to the case agent, the Government planned on using SENAT as a witness in the worker's compensation fraud case because he treated the postal employee, who was his patient. The information he provided to the Government led investigators to inquire about his billing practices. SENAT's case is not related to the postal employee's workers' compensation fraud case.

Request for Hearing Supporting Document described in the Departmental Appeals Board E-Filing system as "Senat PSI" at 5 ¶ 8.

Dr. Senat appears to have refined this argument in his brief by asserting that his cooperation is evidenced by the cooperation he showed in his own criminal case. P. Br. at 6-7. It is true that the U.S. District Court noted the following:

> I note as well as counsel mentioned to me that restitution was paid in advance and that this matter was resolved without a tremendous effort on the part of the government as would have happened had the government been forced to indict the case and proceed to trial.

IG Ex. 7 at 28.

Under the regulations, it is a mitigating circumstance if an individual's cooperation results in additional cases being investigated. 42 C.F.R. § 101.102(c)(3)(ii). However, the passage that Dr. Senat points to in the presentencing report indicates that an investigation of a postal employee was commenced and Dr. Senat's cooperation may have led to the investigation of Dr. Senat's billing practices. Further, Dr. Senat's further cooperation led to his conviction. However, I agree with the IG that the regulations contemplate that mitigation occurs when an excluded individual cooperates with authorities to obtain the conviction of another person and not oneself. 42 C.F.R. §§ 1001.102(c)(3)(i) ("Others being convicted . . ."), 1001.102(c)(3)(ii) ("Additional cases being investigated . . ."). Therefore, Dr. Senat did not prove this mitigating factor.

Dr. Senat also asserted that he had "an emotional condition before or during the commission of the offense that reduces his culpability." Request for Hearing at 3. The regulation requires that the record of the criminal proceeding demonstrate the emotional condition that allegedly reduced the excluded individual's culpability. 42 C.F.R. § 1001.102(c)(2).

A review of the record indicates that far from documenting an emotional condition affecting Dr. Senat, Dr. Senat's counsel told the U.S. District Court in response to a question of Dr. Senat's health: "There are no emotional issues for which he is under a doctor's care. They are all physical issues." IG Ex. 4 at 9. Therefore, Dr. Senat did not prove this mitigating factor.

In addition, Dr. Senat has provided many letters related to his character and his professional conduct as a physician in order to support a reduction in the length of exclusion. P. Br. at 3, 9-10; P. Ex. 1. However, the regulations do not allow me to consider any other mitigating factors except those listed in the regulations. 42 C.F.R. § 1001.102(c). Therefore, I cannot consider Dr. Senat's general character, as relayed by other individuals, as a basis to reduce the length of exclusion.

Finally, Dr. Senat asserts that he is entitled to waiver of the exclusion because "he is one of the few African American Board Certified Orthopedic Surgeons in his community, and serves a number of needy and disadvantaged members of the community." Request for Hearing at 3. Although there is a provision for waiver of exclusion, I do not have the authority to grant such a waiver. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. § 1001.1801.

VI. Conclusion

For the foregoing reasons, the IG has a basis to exclude Dr. Senat from participating in Medicare, Medicaid, and all federal health care programs. The 13-year length of exclusion is not unreasonable given the aggravating factors present in this case and the lack of any mitigating factors. Therefore, I affirm the IG's determination to exclude Dr. Senat for 13 years.

/s/
Scott Anderson
Administrative Law Judge