Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Enitan Osagie Isiwele,
(OI File No. 6-08-40093-9),

Petitioner,

v.

The Inspector General.

Docket No. C-11-703

Decision No. CR2531

Date: April 24, 2012

DECISION

Based on his conviction for health care fraud and conspiracy, the Inspector General (I.G.) excluded Petitioner, Enitan Osagie Isiwele, from participation in the Medicare, Medicaid, and all federal health care programs, as authorized by section 1128(a)(1) of the Social Security Act (Act). On March 11, 2011, I issued a decision affirming the 17-year exclusion. *Enitan Osagie Isiwele*, DAB CR2339 (2011). Petitioner appealed to the Departmental Appeals Board (Board). While the appeal was pending, one of the factors relevant to the length of the exclusion (the length of his jail sentence) changed, and the I.G. cut the period of exclusion from 17 to 15 years. The Board has now remanded the case to me so that I may consider whether this new period of exclusion is reasonable, in light of the reduced prison sentence. *Enitan Osagie Isiwele*, DAB No. 2405 (2011).[1]

[1] The parties have submitted briefs (I.G. Br.; P. Br.) and the I.G. also filed a reply (I.G. Reply). Petitioner continues to demand discovery and an in-person hearing. For reasons set forth in my earlier decision, I have denied his requests. *Isiwele*, DAB CR2339 at 2; *See also* Order and Schedule for Filing Briefs and Documentary Evidence at 1-2 (December 13, 2011).

For the reasons discussed below, I find that the 15-year exclusion falls within a reasonable range.

Background

As a threshold matter, I incorporate into this decision the findings of fact, conclusions of law, and reasoning of my earlier decision, except: 1) that portion of the decision labeled "Incarceration (42 C.F.R. § 1001.102(b)(5))," consisting of two paragraphs; and 2) the conclusion, consisting of one paragraph. *Isiwele*, DAB CR2339 at 5, 6.

Section 1128(a)(1) of the Act mandates that the Secretary of Health and Human Services exclude an individual who 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).

Petitioner, doing business as Galaxy Medical Supply, was a supplier of durable medical equipment in the State of Texas. He participated in the Medicare and Medicaid programs. After Hurricanes Rita and Katrina hit the Gulf Coast, the Centers for Medicare and Medicaid Services (CMS), which administers those programs, authorized an expedited claims process for replacing program beneficiaries' previously-prescribed equipment and supplies that were destroyed by the natural disasters. This meant that suppliers could be paid for these types of claims "without all the normally required paperwork and safeguards." Petitioner exploited that reduced oversight to bill the Medicare and Medicaid programs for equipment he did not provide.

He was indicted on multiple counts of submitting "false and fraudulent claims" to the Medicare and Medicaid programs, in violation of 18 U.S.C. § 1347, and two counts of conspiracy to pay or receive illegal remunerations, in violation of 18 U.S.C. § 371. I.G. Ex. 4. Specifically, according to the indictment, he obtained patient information from door-to-door solicitors and used that information to bill Medicare and Medicaid for power wheelchairs and accessories for individuals who did not qualify for them and had never possessed them. In billing, he falsely claimed that this equipment replaced equipment lost as a result of a natural disaster. Petitioner stood trial in federal district court for the Eastern District of Texas, and, on March 19, 2009, a jury convicted him on sixteen counts of healthcare fraud and one count of conspiracy to pay illegal remunerations. The district court entered judgment against him on April 9, 2010. *Isiwele*, DAB CR2339 at 3-4.

Thus, the court documents establish that Petitioner was convicted of offenses related to the delivery of items or services under the Medicare and Medicaid programs, and he must be excluded from program participation. *See Isiwele*, DAB CR2339 at 4, for discussion of why Petitioner may not use this forum, to challenge his conviction.

Issue

The sole issue before me on remand is whether the 15-year exclusion is reasonable in light of Petitioner's reduced period of incarceration.[2]

Discussion

Based on the aggravating factors present in this case, and the absence of any mitigating factor, the 15-year exclusion falls within a reasonable range. [3]

Petitioner was convicted of offenses related to the delivery of items or services under the Medicare and Medicaid programs, and he must be excluded from program participation for a minimum period of five years. Act, §§ 1128(a)(1); 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 the following: 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; 2) the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more; and 3) the sentence imposed by the court included incarceration. 42 C.F.R.

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[2] Petitioner claims that, "without notice," I conducted a prehearing conference call on December 9, 2011. P. Br. at 5. In fact, the conference call had to be rescheduled several times, and, each time, this office provided Petitioner with appropriate notice: our acknowledgment letter, dated August 19, 2011 advised the parties that the call was scheduled for September 13, 2011 at 2:30 p.m. Eastern Time; a letter dated August 25, 2011 advised the parties that the call was rescheduled for September 19, 2011 at 2:30 p.m. Eastern Time; an order dated September 21, 2011 directed Petitioner to show cause, on or before October 14, 2011, why I should not dismiss his case for abandonment since he was unavailable and had provided us no contact information; a letter dated November 29, 2011 advised the parties that another prehearing conference was scheduled for December 9, 2011 at 2:00 p.m. Eastern Time and asked that prison officials make Petitioner available to participate in the call. Petitioner was available and participated in the call. He did not complain about inadequate notice. Order and Schedule for Filing Briefs and Documentary Evidence (December 13, 2011).

[3] I make this one finding of fact/conclusion of law.

§ 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.

Determining the appropriate length of an exclusion is not an exact science. I must weigh the aggravating and mitigating factors and, based on those factors, determine the level of risk Petitioner poses to program integrity. I then consider whether the period of exclusion set by the I.G. falls within a reasonable range. *Joann Fletcher Cash*, DAB No. 1725 at 16-17 (*citing* 57 Fed. Reg. 3298, 3321(1992)).

The Board's remand did not alter my previous ruling regarding two aggravating factors, program financial losses and the length of the period of illegal conduct. Nevertheless, Petitioner continues to challenge my earlier findings with respect to these issues: 1) he claims that the Medicare program suffered no financial losses because of his crimes, and argues that the criminal court relied on faulty evidence to reach its conclusions with respect to restitution; and 2) he claims that, notwithstanding his conviction for crimes that began in June 2005 and continued until April 2008, his crimes did not last for more than a year. P. Br. at 16-17. He says that the court and jury reached their conclusions based on "the government's deliberate deception of the court and jury by the presentation of known false evidence. . . ." P. Br. at 16. Petitioner's challenges must fail. I am bound by the criminal court's adjudication of these issues, and may not review their underlying bases. 42 C.F.R. § 1001.2007(d); *see Isiwele*, DAB CR2339 at 4.

<u>Incarceration (42 C.F.R. § 1001.102(b)(5))</u>. The sentence imposed by the criminal court included a significant period of incarceration. Initially, the criminal court sentenced Petitioner to more than eight years (97 months) in prison for each count, to be served concurrently. Petitioner appealed the conviction and the sentence. The U.S. Court of Appeals for the Fifth Circuit affirmed the conviction but vacated the sentence and remanded the matter to the district court to clarify how it determined and applied the amount of the loss resulting from the fraud, which is one of the factors used to increase the "base offense level" under the U.S. Sentencing Guidelines. *U.S. v. Isiwele*, 635 F.3d 196, 202 (5th Cir. 2011); P. Appeal Ex. 1, at 9. Thereafter, the district court issued an amended judgment, sentencing Petitioner to six and a half years in prison (78 months) for each count, to be served concurrently. I.G. Att. A.

Any period of confinement, no matter how short, triggers the application of this aggravating factor and justifies increasing the period of exclusion. *See Jason Hollady, M.D.*, DAB No. 1855 at 9-10 (finding that a few days in jail, followed by fewer than nine months of work release, justifies an increase in the period of exclusion); *Stacy Ann Battle, D.D.S.*, DAB No. 1843 (2002) (finding four months in a halfway house followed by four months home confinement justifies lengthening the period of exclusion); *Brenda Mills, M.D.,* DAB CR1461, *aff'd,* DAB No. 2061 (2007) (finding that six months home confinement justifies increase in length of exclusion). A longer period of incarceration generally justifies an even greater increase in the period of exclusion, because it

evidences a more serious offense. Incarceration for more than one year, for example, suggests a felony conviction rather than a less-serious misdemeanor. *See* 18 U.S.C. 3559; *Jeremy Robinson*, DAB No. 1905 (2004) (finding that incarceration in the federal penitentiary for one year and one day "merits weight sufficient," with remaining factors, to support a 15-year exclusion).

In this case, I see no reason why a 19-month decrease in the length of Petitioner's incarceration, which was based on a fairly technical provision in the federal sentencing guidelines, makes Petitioner any less of a threat to program integrity. Six-and-a-half years still represents a lengthy period of incarceration. As the Board noted in *Gary Alan Katz, R. Ph.*, DAB No. 1842 (2002), "Incarceration for an indeterminate period with a minimum of one year and a maximum of seven is significant in itself and certainly justifies a longer period of exclusion than if there was no incarceration or incarceration of a lesser type or shorter period." *Gary Alan Katz* at 10. There, the criminal court sentenced Pharmacist Katz to a prison term of one to seven years, because state law required the sentencing judge to impose an indeterminate sentence. In reviewing Pharmacist Katz's program exclusion, the Administrative Law Judge (ALJ) apparently cited the seven-year maximum as evidence of how serious Pharmacist Katz's crimes had been. On appeal, the Board found it improper for the ALJ to assess the seriousness of the offense by looking solely at the maximum possible sentence. In fact, the Board speculated that the court's setting the minimum sentence at one year was more significant, because it reflected the court's judgment rather than the operation of law. Ultimately, however, the Board held that the indeterminate sentence *should not substantially affect* the weight to be given this aggravating factor.

Here, Petitioner's crimes demonstrate that he presents a significant risk to the integrity of health care programs. He callously used a regional crisis as an opportunity to defraud health care programs. His fraudulent scheme lasted for almost three years, costing the Medicare and Medicaid programs a large amount of money. His actions were egregious enough to merit a sentence of six-and-a-half years in prison, which represents significant jail time. Based on these factors, I find that the 15-year exclusion falls within a reasonable range.

As noted in my earlier decision, no mitigating factors offset the aggravating factors.

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 15-year exclusion.

/s/

Carolyn Cozad Hughes
Administrative Law Judge