

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Linda Eileen Rosenberg, M.D.,
(OI File No. 5-11-40810-9)
Petitioner,

v.

The Inspector General.

Docket No. C-15-3113

Decision No. CR4538

Date: March 8, 2016

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Linda Eileen Rosenberg, M.D. from participating in Medicare and other federally funded health care programs for a period of seven years.

I. Background

Petitioner, a physician, requested a hearing in order to contest the I.G.'s determination to exclude her. The I.G. determined that Petitioner was convicted of crimes that are defined at sections 1128(a)(1) and (4) of the Social Security Act (Act). Initially, the I.G. determined to exclude Petitioner for a period of 10 years, but subsequently he reduced the length of exclusion to seven years based on the presence of mitigating evidence. Petitioner contends that she should not be excluded for more than the five-year minimum mandatory exclusion period. *See* Act, section 1128(c)(3)(B).

The I.G. filed a brief and seven exhibits that he identified as I.G. Ex. 1 – I.G. Ex. 7 and moved for summary judgment. Petitioner filed a brief with six attachments labeled “A” through “F.” The I.G. filed a reply brief along with an additional exhibit that he identified as I.G. Ex. 8. I receive the parties’ exhibits into the record.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether an exclusion of seven years is reasonable.

B. Findings of Fact and Conclusions of Law

The I.G. styled his brief as a motion for summary judgment. It is unnecessary that I decide whether summary judgment is appropriate here inasmuch as neither the I.G. nor Petitioner has offered the testimony of any proposed witnesses. Consequently, I decide the case based on the parties' written exchanges without addressing the question of whether the criteria for summary judgment are met.

The sole issue before me is whether the seven-year exclusion imposed by the I.G. is reasonable. Petitioner stipulated that she was convicted of crimes that fall within the mandatory exclusion provisions of sections 1128(a)(1) and (4) of the Act.

I find that an exclusion of seven years is reasonable. Petitioner's crimes were serious and the aggravating evidence proves her to be untrustworthy to provide care to program beneficiaries and recipients of program funds. An exclusion of seven years fairly reflects the degree of untrustworthiness manifested by Petitioner.

Petitioner was convicted of engaging in a protracted conspiracy to receive kickbacks for the referral of Medicare patients in violation of federal law. I.G. Ex. 5. Her scheme included receiving monthly kickbacks of \$1500 for a period of more than four years in return for submitting patients' blood work to a laboratory. I.G. Ex. 2 at 3. She engaged in an additional conspiracy to receive kickbacks totaling about \$34,000 in return for referring patients for magnetic resonance imaging examinations. *Id.* Additionally, Petitioner was convicted of knowingly and intentionally dispensing Hydrocodone, a controlled substance, to a patient. *Id.* at 6. Petitioner was sentenced to 46 months' imprisonment for her crimes. I.G. Ex. 5 at 2.

Five years is the minimum mandatory exclusion period for an individual who is convicted of crimes described under any of the subsections of section 1128(a). Act, section 1128(c)(3)(B). The I.G. may impose an exclusion of more than five years in instances where evidence shows that, on balance, an individual is so untrustworthy as to merit an exclusion that is longer than the minimum mandatory period. Regulations establish criteria for determining the length of exclusions beyond the five-year minimum mandatory period. Those criteria are set forth at 42 C.F.R. § 1001.102. The regulation defines certain aggravating and mitigating factors. These factors operate as rules of evidence for deciding what is relevant to the issue of length of an exclusion period.

Evidence that falls within one of the regulation's defined aggravating factors may be considered as evidence justifying extending an exclusion beyond the minimum period. Evidence that falls within one of the regulation's mitigating factors may be considered as evidence that offsets aggravating evidence if present.

Here, the I.G. proved the presence of two aggravating factors. First, the evidence proves that Petitioner committed crimes over a period of more than one year. 42 C.F.R. § 1001.102(b)(2). Second, Petitioner was sentenced to incarceration – 46 months' imprisonment – for her crimes. 42 C.F.R. § 1001.102(b)(5).

The mere presence of these factors does not in and of itself justify lengthening Petitioner's exclusion period beyond the five-year minimum. But, the evidence relating to those factors shows that her crimes were serious and establishes a high degree of untrustworthiness on Petitioner's part. The undisputed facts of this case are that Petitioner engaged in a very protracted conspiracy, one that extended for more than four years. That alone justifies extending the exclusion beyond the minimum period because it proves concerted unlawful behavior. The length of Petitioner's incarceration – 46 months – is also a reason for finding her to be untrustworthy.

Petitioner argues that, in fact, the period of incarceration that was imposed against her may have been excessive, citing federal sentencing guidelines as a basis for her argument. But that assertion does not gainsay the fact that she was sentenced to a lengthy period of imprisonment, one that in the discretion of the sentencing judge, reflected the seriousness of Petitioner's crimes.

Petitioner asserts that she should be given credit for evidence relating to a mitigating factor. She contends that her cooperation with prosecuting authorities led to the conviction and sentencing of two other individuals. 42 C.F.R. § 1001.102(c)(3).

The I.G. acknowledges this evidence in his reply brief and cites it as the basis for reducing the original 10-year exclusion period to a period of seven years. I find that determination to be reasonable. It acknowledges that Petitioner assisted the government in bringing other culpable individuals to justice. But, nevertheless, the mitigating evidence does not negate in its entirety the evidence of untrustworthiness established by Petitioner's protracted participation in a criminal conspiracy.

/s/

Steven T. Kessel
Administrative Law Judge