Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Donald Kent Blaine,
(OI File No. 4-09-40801-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-1070

Decision No. CR3427

Date: October 20, 2014

DECISION

Petitioner, Donald Kent Blaine, was employed by his wife's company, Respi-Test, which provided in-home oximetry testing. He was convicted on one felony count of making false statements in a health care matter. Based on his conviction, the Inspector General (I.G.) has excluded him for twenty years 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). Petitioner concedes that he is subject to exclusion but challenges its length. For the reasons discussed below, I find that the I.G. properly excluded Petitioner Blaine and that the twenty-year exclusion falls within a reasonable range.

I. Background

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 (which includes Medicaid). 42 C.F.R. § 1001.101(a).

In a letter dated February 28, 2014, the I.G. notified Petitioner that he was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of twenty years because he had been convicted of a criminal offense related to the delivery of an item or service under the Medicare or a state health care program. The letter explained that section 1128(a)(1) of the Act authorizes the exclusion. I.G. Ex. 1.

Petitioner concedes that he was convicted and is subject to exclusion under section 1128(a)(1). P. Br. at 1-2; *see* Order and Schedule for Filing Briefs and Documentary Evidence at 1 (May 29, 2014). The parties agree that this case does not require an in-person hearing. I.G. Br. at 9; P. Br. at 9. Each party submitted an initial brief (I.G. Br.; P. Br.). The I.G. submitted two exhibits (I.G. Exs. 1-2) and a reply brief (I.G. Reply). In the absence of an objection, I admit into evidence I.G. Exs. 1-2.

II. Issue

Because the parties agree that the I.G. has a basis upon which to exclude Petitioner from program participation, the sole issue before me is whether the length of the exclusion (twenty years) is reasonable.

III. Discussion

Petitioner Blaine was the Medicare billing agent for his wife's company, Respi-Test. P. Br. at 5. In that capacity, he billed Medicare, Medicaid, and various private insurers for sleep studies. P. Br. at 5-6. However, the company did not perform sleep studies; it provided less comprehensive and less expensive oximetry testing services. P. Br. at 4-5. Petitioner Blaine was charged in a multi-count criminal indictment, and, on July 11, 2013, pled guilty in Federal District Court for the Eastern District of North Carolina to one felony count of making a false statement in a health care matter, in violation of 18 U.S.C. § 1035. I.G. Ex. 2 at 1, 2. The court sentenced him to 60 months (5 years) in prison, and ordered him to pay $4,782,569.90 in restitution. I.G. Ex. 2 at 11.

> ***Based on the aggravating factors in this case, and the absence of any mitigating factor, the twenty-year exclusion falls within a reasonable range.***[1]

Aggravating factors. 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 regulations may not be used to decide whether an exclusion of a particular length is reasonable.

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

Among the factors that may serve as bases for lengthening the period of exclusion are the two that the I.G. cites to justify the period of exclusion in this case: 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 sentence imposed by the court included incarceration. 42 C.F.R. § 1001.102(b)(1) and (5). The presence of an aggravating factor or factors not offset by any mitigating factor or factors justifies lengthening the mandatory period of exclusion.

Petitioner concedes the aggravating factors but argues that they are insufficient to justify extending the period of exclusion beyond the mandatory five years. P. Br. at 2.

Financial loss to Medicare and Medicaid programs (42 C.F.R. § 1001.102(b)(1)). Petitioner's actions resulted in program financial losses many times greater than the $5,000 threshold for aggravation. The sentencing judge ordered him to pay a whopping $4,782,569.90 in restitution to the victims of his crime. Of this amount, he was to pay $3,259,420.01 to the Medicare and Medicaid programs ($2,035,311.78 to Medicare and $1,224,108.23 to Medicaid), with the rest payable to a long list of private insurers. I.G. Ex. 2 at 5-7.

Petitioner challenges the alleged amount of program losses. He concedes that the company "upcoded," i.e., billed for services that were more complicated and expensive than the ones provided, but argues that the company, nevertheless, provided beneficial services that had some value. In his view, the amount of program losses should be reduced by the value of the services provided. He offers no evidence as to what that value might have been. In any event, the criminal court determined the amount of restitution, presumably after the parties presented their evidence and arguments, and I defer to the court's findings.

Restitution has long been considered a reasonable measure of program losses. *Jason Hollady, M.D.*, DAB No. 1855 (2002). I consider the enormity of the program's financial losses here an exceptionally aggravating factor that compels a period of exclusion significantly longer than the five-year minimum. *See Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003).

Petitioner also asserts that approximately $300,000 has already been paid in restitution, and suggests that this justifies decreasing the period of exclusion. P. Br. at 7. His argument fails because the regulations direct me to consider the entire amount of financial loss "regardless of whether full or partial restitution has been made." 42 C.F.R. § 1001.102(b)(1).

Incarceration (42 C.F.R. § 1001.102(b)(5)). The criminal court sentenced Petitioner to a substantial period of incarceration – 60 months – which underscores the seriousness of his crimes. I.G. Ex. 3 at 1.

Any period of incarceration, no matter how short, justifies increasing the period of exclusion. Generally, the longer the jail time, the greater the increase, because a lengthy sentence evidences a more serious offense. *See Jeremy Robinson*, DAB No. 1905; *Jason Hollady, M.D.*, DAB No. 1855 at 12 (characterizing a nine-month incarceration as "relatively substantial"); *Stacy Ann Battle, DDS.*, DAB No. 1843 (2002) (finding that 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). Indeed, that the court sentenced Petitioner Blaine to such a lengthy period of incarceration defeats all of his arguments that he was merely an ill-informed employee whose only real crime was following the instructions given by others (such as his wife), who were in a better position to know that they were violating the law.

No mitigating factors. 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).

Obviously, because Petitioner's felony conviction involved program financial losses many times greater than $5,000, the first factor does not apply here. Nor does Petitioner claim any mental, physical, or emotional condition that reduced his culpability.

Petitioner claims that, in an incident apparently unrelated to his crimes, he and his wife discovered that one of the company's respiratory therapists falsified test results. They informed the home health agency that had requested the services and the North Carolina Respiratory Care Board. The company also retested the affected patients and reimbursed insurers.

"It is entirely Petitioner's burden" to show that his cooperation resulted in others being convicted or excluded, or additional cases being investigated or excluded, or a civil money penalty being imposed. *Stacey R. Gale*, DAB No. 1941 at 9 (2004). Section 1001.102(c)(3) "should be viewed narrowly (i.e., that it is designed to accommodate 'only significant cooperation')." *Marcia C. Smith*, DAB No. 2046 at 10 (2006). The regulation is "designed to authorize mitigation for significant or valuable cooperation that yielded positive results for the state or federal government in the form of a *new case* actually being opened for investigation. . . ." *Marcia C. Smith*, DAB No. 2046 at 9, *citing Stacey R. Gale*, DAB No. 1941 at 11 (emphasis in the original).

Petitioner has described a situation in which the company was obligated to report its employee's actions and return any money it received for the fraudulent testing. Its failure to do so would have been yet another crime. I am not sure that declining to commit a wholly separate crime would ever qualify as a mitigating factor. But I need not consider that issue because Petitioner has not shown that his cooperation resulted in a conviction, exclusion, investigation, or civil money penalty. He has therefore not established a mitigating factor to offset the significant aggravating factors cited by the I.G.

So long as the period of exclusion is within a reasonable range, based on demonstrated criteria, I have no authority to change it. *Jeremy Robinson*, DAB No. 1905 at 5; *Joann Fletcher Cash*, DAB No. 1725 at 7 (2000), *citing* 57 Fed. Reg. 3298, 3321 (1992). In this case, Petitioner's crime demonstrates that he presents significant risks to the integrity of health care programs. He engaged in illegal conduct that cost health care programs an enormous amount of money. He was sentenced to a lengthy period of time in prison. No mitigating factors offset these aggravating factors.

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 twenty-year period of exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge