

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Hicham Abdulkarim El-Horr,  
(OI File No. 5-10-40778-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-722

Decision No. CR4775

Date: January 23, 2017

**DECISION**

The Inspector General (IG) of the United States Department of Health and Human Services excluded Hicham Abdulkarim El-Horr, M.D. (Petitioner), for 28 years from participation in all federal health care programs based on Petitioner's conviction under federal law for health care fraud conspiracy. Although Petitioner does not dispute the basis of the exclusion, he requested a hearing to dispute the length of the exclusion. As explained below, the IG has proven, and Petitioner does not dispute, the following aggravating factors related to his conviction that warrant a substantial exclusion: loss to the Medicare program of \$2,073,108.16; criminal conduct that lasted more than four years; incarceration for six years; and termination of Petitioner's Medicaid provider agreement. However, as also explained below, Petitioner did not prove that any mitigating factors exist in this case. Therefore, I conclude that the 28-year exclusion period is not unreasonable and, consequently, affirm the IG's exclusion determination.

**I. Case Background and Procedural History**

In a letter dated May 31, 2016, the IG notified Petitioner that he was excluding Petitioner from participating in Medicare, Medicaid, and all federal health care programs under

42 U.S.C. § 1320a-7(a)(1) for a period of 28 years. IG Exhibit (Ex.) 1. The IG based the exclusion on Petitioner's conviction of a criminal offense in the United States District Court for the Eastern District of Michigan (District Court) related to the delivery of an item or service under Medicare or a state health care program, including the performance of management or administrative services relating to the delivery of items or services, under any such program. IG Ex. 1 at 1. The IG identified four aggravating factors as a basis for increasing the exclusion period from five to 28 years: (1) Petitioner's criminal conduct caused a loss to a government program of \$5,000 or more and the court ordered Petitioner to pay restitution of approximately \$2,073,100; (2) the acts resulting in Petitioner's conviction were committed over a period of one year or more, from approximately August 2008 to September 2012; (3) the District Court's sentence of Petitioner included a term of incarceration of 72 months; and (4) Petitioner was the subject of other adverse actions based on the same set of circumstances when the Michigan Department of Licensing and Regulatory Affairs suspended his license to practice as a medical doctor and the Michigan Department of Health and Human Services terminated his Medical Assistance Provider Enrollment Agreement in the Medicaid program. IG Ex. 1 at 1-2.

Petitioner, through counsel, requested a hearing before an administrative law judge to dispute the length of the exclusion as unreasonable. After I was assigned to hear and decide this case, on August 17, 2016, I held a prehearing conference by telephone with counsel for the parties, the substance of which is summarized in my August 17, 2016 Order and Schedule for Filing Briefs and Documentary Evidence (Order). At the prehearing conference, Petitioner conceded that there was a basis for exclusion, but maintained that the length of exclusion was unreasonable. Order ¶ 2. Under 42 C.F.R. § 1005.15(c), I informed the parties that I placed the burden of proof on the IG for all issues except mitigating factors and affirmative defenses, for which Petitioner had the burden. Order ¶ 9.

In accordance with the Order, the IG filed a brief (IG Br.) on October 5, 2016, with IG Exs. 1 through 9. Petitioner filed a brief (P. Br.) on October 27, 2016, with no exhibits attached. The IG filed a reply brief (IG Reply) on November 30, 2016.

## **II. Issue**

The only issue in this case is whether the 28-year duration of the exclusion is unreasonable.

## **III. Decision on the Record**

Petitioner did not object to any of the IG's nine proposed exhibits. Therefore, I admit all of the IG's proposed exhibits into the record. Order ¶ 10; 42 C.F.R. § 1005.8(c); Civil Remedies Division Procedures § 14(e).

The IG does not wish to offer any witnesses to testify at a hearing in this case and, consequently, does not believe a hearing is necessary to decide this case. IG Br. at 10. During the August 17, 2016 prehearing conference, Petitioner indicated that he may want to testify at a hearing. Order ¶ 5. I directed Petitioner to submit written direct testimony to me with his prehearing exchange and required the IG to request to cross-examine Petitioner if the IG wanted the opportunity to do so. Order ¶ 5; 42 C.F.R. § 1005.16(b); Civil Remedies Division Procedures §§ 16(b), 19(b). However, Petitioner did not submit written direct testimony or indicate in his brief that he wanted witnesses to testify in this proceeding. Accordingly, because there is no need for an in-person hearing, I issue this decision based on the written record. Order ¶ 5; Civil Remedies Division Procedures § 19(d).

#### **IV. Jurisdiction**

I have jurisdiction to hear and decide this case. 42 U.S.C. § 1320a-7(f)(1); 42 C.F.R. §§ 1001.2007(a)(1)-(2), 1005.2(a).

#### **V. Findings of Fact, Conclusions of Law, and Analysis<sup>1</sup>**

- 1. Petitioner was convicted of a criminal offense related to the delivery of a health care item or service under the Medicare program, therefore, exclusion is required under 42 U.S.C. § 1320a-7(a)(1).***

The IG must exclude an individual from participation in federal health care programs if the individual was convicted of a criminal offense related to the delivery of a health care item or service under the Medicare program. 42 U.S.C. § 1320a-7(a)(1). Petitioner pled guilty to health care fraud conspiracy under 18 U.S.C. § 1349 to violate 18 U.S.C. § 1347 based on Petitioner's actions, in concert with others, to bill the Medicare program for physician home visits that were never made, ultimately resulting in payment of false or fraudulent claims of \$2,073,108.16. IG Ex. 4 at 6-9; IG Ex. 5 at 2-4; IG Ex. 6 at 1. Petitioner admits that he was convicted of a criminal offense that falls within the meaning of 42 U.S.C. § 1320a-7(a)(1). Order ¶ 2. Therefore, the IG has proven that there is a factual and legal basis for Petitioner's exclusion.

- 2. Petitioner must be excluded for a minimum of five years.***

An exclusion imposed pursuant to 42 U.S.C. § 1320a-7(a)(1) must be for at least five years. 42 U.S.C. § 1320a-7(c)(3)(B).

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<sup>1</sup> My findings of fact and conclusions of law appear in bold and italics.

**3. *The IG has proven four aggravating factors exist to support an exclusion period beyond the five-year statutory minimum.***

The regulations establish aggravating factors that the IG may consider to lengthen the period of exclusion beyond the five-year minimum for a mandatory exclusion. 42 C.F.R. § 1001.102(b). If an aggravating factor justifies a length of exclusion longer than five years, then I may consider mitigating factors as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c). In this case, the IG advised Petitioner in the exclusion notice that there were four aggravating factors that justified excluding him for more than five years. IG Ex. 1 at 1-2. These factors are listed in 42 C.F.R. § 1001.102(b)(1), (2), (5) and (9).

**a. *The IG established the aggravating factor stated in 42 C.F.R. § 1001.102(b)(1) – financial loss to a government program of \$5,000 or more.***

The IG provided evidence that demonstrates the acts resulting in Petitioner's criminal conviction caused a financial loss to a government program of \$5,000 or more. *See* 42 C.F.R. § 1001.102(b)(1). Petitioner pled guilty to the federal criminal offense of health care fraud conspiracy. Petitioner caused the submission of approximately \$4.2 million in false and fraudulent claims to Medicare of which Medicare paid Petitioner and his company \$2,073,108.16. IG Ex. 5 at 3. The District Court ordered Petitioner to pay restitution totaling \$2,073,108.16 to the Department of Health and Human Services, the department that administers the Medicare program. IG Ex. 5, IG Ex. 6 at 1 and 5.

It is well-established that an amount ordered as restitution constitutes proof of the amount of financial loss to a government program. *See e.g., Juan de Leon, Jr.*, DAB No. 2533, at 5 (2013); *Craig Richard Wilder, M.D.*, DAB No. 2416 (2011) (restitution is a reasonable measure of program loss). Therefore, the IG has sustained its burden of proving financial loss to a government program of \$5,000 or more.

**b. *The IG established the aggravating factor stated in 42 C.F.R. § 1001.102(b)(2) – the criminal acts resulting in Petitioner's conviction lasted a period of one year or more.***

The IG asserted that Petitioner's criminal acts were committed over a period of one year or more. 42 C.F.R. § 1001.102(b)(2). The Superseding Indictment, to which Petitioner pled guilty, charged Petitioner with health care fraud conspiracy that lasted more than one year. IG Ex. 4 at 6. Petitioner admitted in his plea agreement that "[b]eginning in approximately August 2008, and continuing through approximately September 2012,

[Petitioner] willfully conspired with others to commit health care fraud . . . .” IG Ex. 5 at 2. In this proceeding, Petitioner did not dispute this. Therefore, the evidence before me establishes that the acts resulting in Petitioner’s conviction occurred over a period of one year or more.

***c. The IG established the aggravating factor stated in 42 C.F.R. § 1001.102(b)(5) – the sentence imposed against Petitioner included a period of incarceration.***

The IG asserted that Petitioner’s criminal conviction resulted in a sentence of incarceration. 42 C.F.R. § 1001.102(b)(5). The record shows that the District Court sentenced Petitioner to 72 months of incarceration. IG Ex. 6 at 2. In this proceeding, Petitioner did not dispute this. Therefore, the evidence of record shows that Petitioner was sentenced to 72 months of incarceration based on his criminal conduct.

***d. The IG established the aggravating factor stated in 42 C.F.R. § 1001.102(b)(9) –Petitioner was subject to an adverse action by a State agency based on the same set of circumstances that serves as the basis for imposition of the exclusion.***

The IG asserted in its exclusion notice that Petitioner was subject to adverse actions from a state agency and a state board based on the same set of circumstances that serve as the basis for the imposition of the exclusion. 42 C.F.R. § 1001.102(b)(9). However, in its brief, the IG only argued that one of the adverse actions it identified in the exclusion notice, i.e., termination from the Michigan Medicaid program, was the basis for this aggravating factor. IG Br. at 9. The record shows that the Michigan Department of Health and Human Services terminated Petitioner’s Medicaid Provider Agreement based on the same conviction that serves as the basis for the present exclusion. IG Ex. 7. In this proceeding, Petitioner did not dispute this. Therefore, the record shows that Petitioner was subject to an adverse action by a state agency based on the same set of circumstances that serve as the basis for the exclusion.

***4. Petitioner did not prove that any mitigating factors exist in this case.***

Because I found that aggravating factors are present in this case, I next consider whether there are any mitigating factors under 42 C.F.R. § 1001.102(c) to offset the aggravating factors. The regulations specifically outline what factors I may consider as mitigating.

Although Petitioner did not dispute the existence of any of the four aggravating factors cited by the IG, Petitioner contends that the exclusion period should be reduced due to the existence of the mitigating factor at 42 C.F.R. § 1001.102(c)(3)(i) involving cooperation with Federal or State law enforcement officials.

At the prehearing conference in this case, I assigned Petitioner the burden of proof with regard to all mitigating factors and affirmative defenses he raises. Order ¶ 9; 42 C.F.R. § 1005.15(d). The standard of proof is the preponderance of evidence. 42 C.F.R. § 1001.2007(c). Therefore, I must determine whether Petitioner has shown by a preponderance of the evidence that he provided sufficient cooperation to federal law enforcement to constitute a mitigating factor under the regulations. The relevant regulatory provision states:

- (3) The individual's or entity's cooperation with Federal or State officials resulted in—
- (i) Others being convicted or excluded from Medicare, Medicaid and all other Federal health care programs,
  - (ii) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or
  - (iii) The imposition against anyone of a civil money penalty or assessment under part 1003 of this chapter.

42 C.F.R. § 1001.102(c)(3).

The preamble to the final rule first establishing this mitigating factor states:

We believe, however, that only significant cooperation should be considered mitigating, and the imposition of a sanction as a result of cooperation establishes that the cooperation was significant.

57 Fed. Reg. 3298, 3315 (Jan 29, 1992).<sup>2</sup> This response to a public comment makes clear that in order to qualify as a mitigating factor, cooperation must be “significant,” and cooperation that results in the imposition of a sanction is significant. A later final rule modifying section 1001.102(c)(3) clarified the type of evidence needed to prove cooperation and lowered the threshold for validation of cooperation to be in the form of opening an investigation:

While we expect this mitigating factor to be taken into consideration only in those situations where the law

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<sup>2</sup> Although this statement was made in response to a public comment related to the same mitigating factor for permissive exclusions, I find the language instructive for mandatory exclusions as well. *See Stacey R. Gale*, DAB No. 1941, at 8 (2004) (citing the preamble regarding when cooperation should be mitigating in a mandatory exclusion).

enforcement agency validated the person's information by opening up a case investigation or by issuing a report, we nevertheless believe that this additional factor will afford the OIG greater flexibility in identifying and addressing issues related to program waste, fraud and abuse.

63 Fed. Reg. 46676, 46681 (Sept. 2, 1998).

In the present case, Petitioner provided no evidence to support his claim that he cooperated with law enforcement and that such cooperation resulted in new investigations, reports identifying Medicare program vulnerabilities, other convictions, or the imposition of exclusions or civil money penalties. The indictment for health care fraud conspiracy named as defendants, in addition to Petitioner, the physician who owned and operated House Calls Physicians, PLLC, (HCP) a participating Medicare provider, Petitioner's brother, a physician who purportedly provided physician home visits to patients of HCP, his sister, who was the office manager and biller for HCP, and another individual who also acted as an office manager at HCP. IG Ex. 4 at 1-7. All four individuals were named as part of the conspiracy to unlawfully enrich themselves by submitting false and fraudulent claims to Medicare for physician home visits and other services. IG Ex. 4 at 6. Petitioner presented no evidence other than a mere statement to suggest that he provided any information or cooperation to authorities that resulted in persons other than his co-defendants from being convicted or excluded. As a result, I do not find that Petitioner established the existence of a mitigating factor.

Petitioner also contends that the length of his exclusion is unreasonable because his conviction is his first offense and he is remorseful. However, neither of these factors qualifies as relevant mitigating factors under the regulations. Accordingly, I find that Petitioner has not met his burden to establish that any mitigating factors would justify reducing the period of exclusion.

***5. A 28-year exclusion period is not unreasonable.***

I must uphold the IG's determination as to the length of exclusion unless it is unreasonable. 42 C.F.R. § 1001.2007(a)(1)(ii). It is important to note 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 the Secretary of Health and Human Services 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 OIG 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 3314-15.

The conspiracy to which Petitioner was a part ultimately resulted in a \$2,073,108.16 loss to Medicare. Furthermore, the District Court ordered Petitioner to pay restitution in this amount. IG Ex. 6 at 5. The amount of loss represents 414 times more than the \$5,000 threshold for the loss to be considered aggravating. *See* 42 C.F.R. § 1001.102(b)(1). Restitution in an amount so substantially greater than the regulatory standard is sufficient to support a significantly increased length of exclusion. *See Anderson v. Thompson*, 311 F. Supp. 2d 1121 at 1130 (2004) (considering a "program-related loss [that] was more than forty times the amount of loss necessary to find an aggravating factor" as helping to justify a 15-year exclusion). The District Court's restitution order against Petitioner demonstrates that his role in the conspiracy was a significant factor in a scheme that resulted in a very substantial amount of loss.

In addition, the conspiracy Petitioner participated in lasted for more than four years. There were many false claims being produced and submitted to Medicare over this time. The prolonged criminal conduct demonstrates Petitioner's high level of untrustworthiness because it shows that his involvement was not simply a mistake or that he was temporarily involved in the scheme. Rather, he had a systematic process in place to defraud the Medicare program.

Petitioner's sentence of 72 months of incarceration for his crime constitutes another piece of aggravating evidence. IG Ex.6 at 2. Petitioner's sentence represents a substantial period of time, which indicates the gravity of his offense.

Finally, the termination of Petitioner's Medicaid provider agreement based on his criminal acts further demonstrates that Petitioner lacks trustworthiness to participate in government health care programs.

I conclude that the four proven aggravating factors are entitled to significant weight, and that the amount of program loss, the length of time Petitioner engaged in criminal conduct, and the length of Petitioner's incarceration are particularly aggravating.



Petitioner's actions have endangered the Medicare Trust Fund's ability to pay for needed health care for the elderly and disabled in this country. Based on his conduct, I conclude that Petitioner is not trustworthy to participate in any federal health care programs. Therefore, the length of exclusion imposed by the IG is reasonable and warranted.

## **VI. Conclusion**

I affirm the IG's determination to exclude Petitioner for 28 years from participating in Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(1).

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/s/  
Scott Anderson  
Administrative Law Judge