Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Young Okoro Anyanwu
(OI File No. 6-09-40621-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-250

Decision No. CR3269

Date: June 20, 2014

DECISION

The Inspector General (I.G.) of the United States Department of Health and Human Services excluded Petitioner, Young Okoro Anyanwu, from participating in Medicare, Medicaid, and all other health care programs pursuant to 42 U.S.C. § 1320a-7(a)(1) for a period of 10 years effective November 20, 2013. Petitioner requested a hearing before an administrative law judge to dispute the exclusion. For the reasons explained below, I conclude that the I.G. has a basis to exclude Petitioner due to his criminal convictions for health care fraud, conspiracy to pay and receive illegal remuneration, and paying illegal remuneration. Further, based on the existence of two significantly aggravating factors and the absence of any mitigating factors, I affirm the I.G.'s determination to exclude Petitioner for 10 years.

I. Case Background

In a letter dated October 31, 2013, the I.G. notified Petitioner that, pursuant to 42 U.S.C. § 1320a-7(a)(1), he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 10 years effective November 20, 2013. I.G.

Ex. 1. The I.G. based the exclusion on Petitioner's conviction of a criminal offense in the United States District Court for the Middle District of Louisiana (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. The I.G. also cited two aggravating factors: (1) Petitioner's criminal conduct caused a loss to a Government program of $5,000 or more, and (2) the court's sentence of Petitioner included a term of incarceration. I.G. Ex. 1.

Petitioner, proceeding pro se, filed a request for a hearing with the Civil Remedies Division (CRD) to dispute the exclusion. The CRD Director administratively assigned this case to me for hearing and decision, and on December 18, 2013, I convened a prehearing conference by telephone, the substance of which is summarized in my December 20, 2013 Order and Schedule for Filing Briefs and Documentary Evidence (Order). Pursuant to the Order, the I.G. electronically filed a brief (I.G. Br.) on January 27, 2014, with I.G. Exs. 1 through 5, and certified that he sent a copy to Petitioner by first-class mail. Petitioner, who is currently incarcerated, apparently did not receive a copy of the I.G.'s brief, and, presuming that the I.G. had not filed its prehearing brief, submitted a motion to dismiss the case for "want of prosecution." Because the I.G. had indeed filed his prehearing brief, I denied Petitioner's request, but directed the I.G. to re-serve his brief on Petitioner ensuring that all prison policies for sending mail were followed and extended the deadline for Petitioner to file his brief and for the I.G. to file his reply. The I.G. reserved his brief and Petitioner subsequently filed a brief (P. Br.) on March 17, 2014, with no exhibits attached. The I.G. filed a reply brief (I.G. Reply) on April 29, 2014. Petitioner then filed a response (P. Response) to the I.G.'s reply brief on May 8, 2014. The I.G. did not file an objection to my consideration of Petitioner's response. Thus, while not part of my Order, I will accept Petitioner's response into the record. I consider the record closed as of May 8, 2014.

II. Decision on the Record

Petitioner did not object to any of the I.G.'s proposed exhibits. Therefore, I admit I.G. Exs. 1-5 into the record.

Neither party expressly requested a video hearing and, in any event, neither party explained why an in-person hearing would be necessary. Order ¶ 4. Because no hearing is necessary, I issue this decision based on the written record.

III. Issues

This case presents the following issues:

1. Whether the I.G. has a basis to exclude Petitioner based on his conviction for an offense related to the delivery of an item or service under Medicare or a state health care program; and

2. If there is a basis for the exclusion, whether a 10 year exclusion period is unreasonable.

IV. Jurisdiction

I have jurisdiction to decide the issues in this case. 42 C.F.R. §§ 1001.2007(a)(1)-(2), 1005.2(a); *see also* 42 U.S.C. § 1320a-7(f)(1).

V. Findings of Fact, Conclusions of Law, and Analysis

1. *Petitioner pled guilty to two counts of health care fraud, one count of conspiracy to pay illegal remuneration, and one count of paying illegal remuneration, and the District Court issued a Judgment in a Criminal Case based on Petitioner's guilty plea.*

On July 7, 2010, a federal grand jury indicted Petitioner on 15 counts of health care fraud (18 U.S.C. § 1347), one count of conspiracy to pay and receive illegal remuneration (18 U.S.C. § 371), and one count of paying illegal remuneration (42 U.S.C. § 1320a-7b). I.G. Ex. 2. According to the indictment, Petitioner owned and operated Lobdale Medical Services and, along with his co-conspirators, filed claims for payments for durable medical equipment that was not medically necessary and induced the referrals of Medicare beneficiaries to Lobdale Medical Services through illegal kickbacks. I.G. Ex. 2, at 5-10. Petitioner allegedly performed these acts from about October 2008 to April 2009. I.G. Ex. 2, at 11.

Petitioner agreed to plead guilty to two counts of health care fraud (Counts 3 and 12), one count of conspiracy to pay and receive illegal remuneration (Count 16), and one count of paying illegal remuneration (Count 17), and entered that guilty plea in the District Court on August 13, 2012. I.G. Exs. 3-4.[1] The District Court accepted Petitioner's plea, entered judgment against him, and dismissed the remaining counts upon the

[1] The Plea Agreement reached between Petitioner and the United States indicates that there was an agreed-upon factual summary attached thereto and filed with the District Court. *See* I.G. Ex. 3, at 7. That factual summary, however, was not submitted as evidence in this case.

Government's request. I.G. Exs. 4-5. The District Court sentenced Petitioner to 36 months of incarceration; two years of supervised release at the conclusion of his incarceration; and payment of $485,552.48 in restitution. I.G. Ex. 5. The District Court ordered Petitioner's restitution amount to be disbursed to the Centers for Medicare & Medicaid Services (CMS) as well as BlueCross BlueShield of Louisiana. I.G. Ex. 5, at 6.

2. *Petitioner's convictions require exclusion under 42 U.S.C. § 1320a-7(a)(1) because his criminal conduct related to the delivery of a health care item or service under the Medicare or Medicaid programs.*

An individual must be excluded from participation in any federal health care program if the individual was 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 U.S.C. § 1320a-7(a)(1). Petitioner argues that his conviction is currently under appeal and may have a successful outcome, and he disputes the legality of the proceedings leading to and following his guilty plea. P. Br. at 2-4.

Individuals are "convicted" of an offense "when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending . . . [.]" 42 U.S.C. § 1320a-7(i)(1). In the present matter, the District Court issued a judgment of conviction and sentenced Petitioner pursuant to that conviction. I.G. Ex. 5. Moreover, for the purposes section 1320a-7, the fact that Petitioner pled guilty and that plea was accepted by a court (I.G. Ex. 4) is also sufficient to conclude that he was "convicted." 42 U.S.C. § 1320a-7(i)(3).

As noted above, Petitioner pled guilty to two counts of causing "false or fraudulent claims to be submitted to Medicare" on January 22, 2009 (Count 3) and on February 17, 2009 (Count 12) in violation of 18 U.S.C. § 1347.[2] By pleading guilty to health care

[2] 18 U.S.C. § 1347 provides in relevant part:

> (a) Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice —
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> (1) to defraud any health care benefit program; or
>
> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,

fraud, Petitioner acknowledged that his criminal conduct was done "in connection with the delivery of or payment for health care benefits, items, or services . . . ." 18 U.S.C. § 1347(a). Petitioner also pled guilty to conspiring to pay and actually paying illegal kickbacks and bribes for referrals of Medicare beneficiaries to his company in violation of 42 U.S.C. § 1320a-7b(b)(2)(A).[3] Submitting a false claim to Medicare is, of course, "related to" the delivery of an item or service under the Medicare program. *See Jack W. Greene*, DAB No. 1078 (1989), *aff'd, Green v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990); *Michael Travers, M.D.*, DAB No. 1237 (1991), *aff'd, Travers v. Sullivan*, 791 F. Supp. 1471, 1481 (E.D. Wash. 1992) and *Travers v. Shalala*, 20 F.3d 993 (9th Cir. 1994).[4] In addition, paying unlawful kickbacks and bribes (and conspiring to do so) for the referral of Medicare beneficiaries is "related to" the delivery of a health care item or service under the Medicare program because it results in improper furnishing of durable medical equipment paid for by the Medicare program. *See* I.G. Ex. 2, at 11-12. Accordingly, I conclude that the criminal conduct for which Petitioner was convicted was related to the delivery of a health care item or service under the Medicare program. *See* 42 U.S.C. § 1320a-7(a)(1). The record fully supports Petitioner's mandatory exclusion. I.G. Exs. 2-5.

Although "Petitioner acknowledged during the prehearing conference that the U.S. District Court for the Middle District of Louisiana entered a conviction against him and that the conviction was for a crime related to the delivery of an item or service under the Medicare or Medicaid programs" (Order ¶ 1), Petitioner raises numerous challenges to his exclusion. Petitioner now claims that his guilty plea was "coerced by an

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> in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both . . . .

[3] 42 U.S.C. § 1320a-7b(b)(2)(A) states:

> Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person —
>
> > (A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program . . .
>
> shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

[4] Administrative decisions cited in this decision are accessible on the internet at: http://www.hhs.gov/dab/decisions/index.html.

unscrupulous lawyer" because that lawyer warned Petitioner that an individual from Africa, like Petitioner, would not fare well before a Louisiana jury. P. Response at 1. Petitioner has also argued that his conviction is currently on appeal and therefore not "final." P. Br. at 3. Further, Petitioner argues that the District Court judge who sentenced Petitioner and his wife has ordered additional briefing in a habeas corpus proceeding involving Petitioner's wife, who was Petitioner's co-defendant. According to Petitioner, this means that the District Court judge "has called into question the entire proceeding." P. Br. at 2. Petitioner also asserts that there are pending post-conviction proceedings that should be resolved prior to the adjudication of this case. P. Br. at 5.

I have considered Petitioner's arguments and determined that they either amount to impermissible collateral attacks on his conviction, which can play no role in the case before me, or are otherwise irrelevant because they address his wife's convictions, not his own. 42 C.F.R. § 1001.2007(d). Whatever tactical discussions Petitioner's lawyer had and the truth or falsity of his warnings to Petitioner are not relevant in this proceeding. Further, if Petitioner is successful in his appeal, he may seek reinstatement from the I.G. 42 C.F.R. 1001.3005(a)(1). However, a pending appeal has no effect on determining whether Petitioner was "convicted" for purposes of the present proceeding. *See* 42 U.S.C. § 1320a-7(i)(1) (an individual against whom a judgment of conviction has been entered is still consider "convicted" for purposes of section 1320a-7 even if an appeal of that judgment is pending).

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

I have concluded that a basis exists to exclude Petitioner pursuant to 42 U.S.C. § 1320a-7(a)(1), therefore Petitioner must be excluded for a minimum of five years. 42 U.S.C. § 1320a-7(c)(3)(B).

4. *The I.G. has established two aggravating factors in this case that support an exclusion period beyond the five-year statutory minimum.*

The regulations establish aggravating factors that the I.G. may consider to lengthen the period of exclusion beyond the five-year minimum for a mandatory exclusion. 42 C.F.R. § 1001.102(b). Only if an aggravating factor justifies an exclusion longer than five years may mitigating factors be considered 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 I.G. advised Petitioner in the October 31, 2013 exclusion notice that there were two aggravating factors that justified excluding him for more than five years: first, the acts resulting in his convictions, or similar acts, caused, or were intended to cause, a financial loss to a Government program of $5,000 or more, and second, the sentence imposed by the court included incarceration. I.G. Ex. 1; 42 C.F.R. § 1001.102(b)(2), (5).

The I.G. cited to the restitution order of approximately $485,500 against Petitioner as well as his 36 month prison sentence. I.G. Ex. 1, at 1-2.

i. *The I.G. has 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 I.G. has 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 two specific instances of submitting false Medicare claims, one for $5,235 (Count 3), and one for $7,650 (Count 12). I.G. Ex. 2, at 8, 10. In addition, the record shows that the District Court sentenced Petitioner to pay restitution totaling $485,552.48 to CMS and BlueCross BlueShield of Louisiana. I.G. Ex. 5, at 6. 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*, DAB No. 2416, at 9 (2011). Regardless of whether the restitution order is joint and several among Petitioner and his co-conspirators — although there is no evidence that it is — the District Court's sentence of Petitioner plainly establishes that he is responsible for the total restitution amount. I.G. Ex. 5, at 6; *see also United States v. Ingles*, 445 F.3d 830, 839 (5th Cir. 2006) (affirming joint and several restitution order where one co-defendant was ultimately responsible for more restitution than other co-defendant). In addition, the regulations provide that the *entire amount* of restitution is what provides a basis for an aggravating factor. *See* 42 C.F.R. § 1001.102(b)(1) ("the entire amount of financial loss to . . . programs . . . will be considered regardless of whether full or partial restitution has been made."). Therefore, the I.G. has sustained its burden of proving financial loss to a government program of $5,000 or more.

ii. *The I.G. has 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 record demonstrates, and Petitioner does not dispute, that the District Court sentenced Petitioner to 36 months of imprisonment. I.G. Ex. 5, at 3. Indeed, Petitioner is currently incarcerated in the Federal Prison Camp in Florence, Colorado, pursuant to the sentence that the court imposed. *See* P. Br. at 1. I conclude, therefore, that the I.G. has proven this aggravating factor. *See* 42 C.F.R. § 1001.102(b)(5).

iii. *There are no mitigating factors 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 may be considered mitigating

and none of Petitioner's arguments relate to any of those mitigating factors. *See* 42 C.F.R. § 1001.102(c). Petitioner has not argued that any mitigating factors exist. Accordingly, I find that Petitioner has not met his burden to establish any mitigating factors that would justify reducing the period of exclusion.

5. *A 10-year exclusion period is not unreasonable.*

I must next assess whether the I.G.'s determination to exclude Petitioner for 10 years is unreasonable based upon the established aggravating factors and no mitigating factors. *See* 42 C.F.R. § 1001.2007(a). My evaluation does not follow a specific formula for weighing those factors, but rather considers the weight to be accorded each factor based on the circumstances surrounding them in this case. *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491 (2012).

The District Court ordered Petitioner to pay restitution of $485,552.48. I.G. Ex. 5, at 6. Even though the court dismissed several counts for which Petitioner was indicted, the District Court held Petitioner financially responsible for the full amount that he and his co-conspirators fraudulently billed the Medicare program. I.G. Ex. 5, at 6. In fact, Petitioner agreed to pay the full amount of restitution as part of his plea agreement. I.G. Ex. 3, at 6. The District Court's restitution order against Petitioner represents an amount more than 97 times 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 an "exceptional aggravating factor" entitled to significant weight when assessing the reasonableness of the length of exclusion. *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003).

Petitioner's sentence of 36 months of incarceration for his crimes constitutes the other piece of aggravating evidence. I.G. Ex. 5, at 3. A prison sentence of as little as nine months is considered to be relatively substantial. *Jason Hollady, M.D.*, DAB No. 1855, at 12 (2002). Petitioner's sentence is four times longer than that and represents a substantial period of time, which indicates the seriousness of his offenses.

I find that the two proven aggravating factors are entitled to significant weight. Petitioner's crime had a substantial financial impact on the Medicare program. His crimes resulted in a lengthy term of imprisonment. Ample evidence exists that Petitioner is an untrustworthy individual who should be excluded for a lengthy period. A 10-year exclusion is not unreasonable.

VI. Conclusion

For the foregoing reasons, I affirm the I.G.'s determination to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs for 10 years pursuant to 42 U.S.C. § 1320a-7(a)(1).

/s/
Scott Anderson
Administrative Law Judge