Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Laura Leyva,
(OI File No. M-14-40037-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-3181

Decision No. CR4516

Date: January 29, 2016

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Laura Leyva, from participating in Medicare, Medicaid, and all other federally funded health care programs for a period of at least 10 years.

I. Background

The I.G. excluded Petitioner for a 10-year minimum period based on her conviction of a criminal offense that falls within the reach of section 1128(a)(1) of the Social Security Act (Act) and on the alleged presence of evidence relating to three aggravating factors identified at 42 C.F.R. § 1001.102, which governs the length of exclusions imposed pursuant to section 1128(a)(1) of the Act. Petitioner did not contest the I.G.'s authority to exclude her but challenged the length of the exclusion. Petitioner asserts that her exclusion should be reduced to the five-year minimum period that is mandated for exclusions imposed pursuant to section 1128(a)(1). *See* Act § 1128(c)(3)(B).

The I.G. filed a brief and a reply brief, and five proposed exhibits, identified as I.G. Ex. 1 - I.G. Ex. 5. Petitioner did not oppose my receiving any of the I.G.'s proposed exhibits

and I receive them into the record. Petitioner filed a brief and seven proposed exhibits, identified as P. Ex. 1 - P. Ex. 7. The I.G. objected to my receiving most of these exhibits on the ground that they are incomplete, irrelevant, or both. I overrule the I.G.'s objections and receive P. Ex. 1 - P. Ex. 7 into evidence. I find these exhibits to be relevant to the issue of the Petitioner's trustworthiness to provide care, or, if not relevant, I find their admission not to be prejudicial to the I.G.

Neither side offered testimony and, therefore, I decide the case based on the parties' written exchanges of evidence and arguments.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether a 10-year exclusion is reasonable.

B. Findings of Fact and Conclusions of Law

Section 1128(a)(1) of the Act mandates the I.G. to exclude any individual who is convicted of a criminal offense related to the delivery of an item or service under Medicare or a state Medicaid program. The minimum exclusion that must be imposed against anyone convicted of such a crime is five years. Act § 1128(c)(3)(B).

Petitioner was convicted of a section 1128(a)(1) crime. She pled guilty in a Florida federal district court to the crimes of conspiracy to commit health care fraud and conspiracy to commit money laundering. I.G. Ex. 4. Specifically, Petitioner pled guilty to engaging in a conspiracy that began in around June 2007 and that continued through November 2009 involving other individuals and two companies in which Petitioner served as president and in other executive capacities. I.G. Ex. 2 at 8-10. That conspiracy involved a number of specific enabling acts, including: filing false Medicare claims; causing patient recruiters to be paid for obtaining personal health care information of Medicare beneficiaries in order for false claims to be submitted to Medicare; and paying co-conspirators in exchange for falsified medical records for the purpose of falsely claiming reimbursement from Medicare. *Id.* at 11-12.

The I.G. asserts that the evidence warrants exclusion for at least 10 years. According to the I.G. the evidence establishes the presence of three aggravating factors that, pursuant to applicable regulations, justifies lengthening the period of Petitioner's exclusion. The I.G. asserts that these alleged aggravating factors consist of the following:

- The acts resulting in Petitioner's conviction caused a financial loss to a government program of $5,000 or more. 42 C.F.R. § 1001.102(b)(1). As supporting evidence the I.G. cites the fact that the sentencing court ordered

Petitioner to pay restitution to the Centers for Medicare & Medicaid Services (CMS), the agency that administers the Medicare program, in an amount in excess of $200,000. I.G. Ex. 4 at 5.

- The acts resulting in Petitioner's conviction were committed over a period of one year or more. 42 C.F.R. § 1001.102(b)(2). The I.G. asserts that Petitioner pled guilty to a conspiracy that included acts extending over a period of more than two years, from June 2007 to November 2009. I.G. Ex. 4 at 1.

- Petitioner was sentenced to a period of incarceration. 42 C.F.R. § 1001.102(b)(5). Here, the I.G. relies on Petitioner's sentence that included time served in prison from the date of her arrest until the date of her sentencing plus eight months of home detention. I.G. Ex. 4 at 2, 4.

The evidence offered by the I.G. overwhelmingly establishes the presence of three aggravating factors. Petitioner asserts, however, that the evidence, when viewed in its entirety, either does not establish the presence of aggravating factors or shows that her crimes are far less significant than the I.G. alleges.

The gravamen of Petitioner's argument is that she was at most a bit player in the conspiracy. She contends that she realized no personal financial benefit from the crimes, that these crimes were the brainchild of, and executed by, other persons, and that her only offense was to destroy some documents related to the conspiracy when she realized that she and her companies were under investigation. These minimal crimes, according to Petitioner, were of so little significance that the judge who sentenced her essentially found her to be without culpability. *See* P. Ex. 1 at 5-6.

But, while it may be true that Petitioner's role in the conspiracy was minor, she nonetheless was a participant in that conspiracy and by participating she participated in a scheme to defraud Medicare. That is made evident by her guilty plea. She explicitly pleaded guilty to involvement in a two-year conspiracy to defraud the program. She cannot now retract that plea and assert that she is actually not guilty of her admitted crime. *See* 42 C.F.R. § 1001.2007(d) (prohibiting collateral attack, on substantive or procedural grounds, of an underlying criminal conviction serving as the basis for the exclusion.).

Moreover, the impact of her participation in that conspiracy was not, as she claims, de minimis. Destruction of documents in order to obstruct a criminal investigation is a serious crime. By her own admission Petitioner willfully impeded an investigation, obviously seeking to protect herself and others from the reach of the law. Furthermore, although the sentencing judge found Petitioner to be less culpable than others she also clearly found that Petitioner's crimes were serious. That is reflected both in the amount

of the restitution to CMS that Petitioner was sentenced to pay – more than $200,000 – and in the fact that Petitioner was sentenced to a fairly lengthy period of incarceration.

The regulations do not establish a formula for deciding the length of exclusions. The aggravating and mitigating factors established by the regulations function as rules of evidence. Evidence that relates to an aggravating or mitigating factor is relevant. Evidence that does not relate to one of these factors is not relevant and may not be considered. Ultimately, the question that is to be determined in weighing evidence that does relate to an aggravating or mitigating factor is: what does that evidence say about an individual's trustworthiness to provide care to program beneficiaries and to deal with program funds?

Here, the evidence as to aggravation is persuasive proof that Petitioner is not trustworthy. Her participation in a criminal conspiracy, the financial impact of her crime, and the fact that the trial judge sentenced her to incarceration, persuades me that she is not an individual who is a good risk to deal with program monies or beneficiaries. An exclusion of 10 years is not unreasonable given this evidence.

Petitioner points to other evidence, which she says offsets the evidence relevant to the aggravating factors. She asserts, first, that she should be given credit for her cooperation with prosecuting authorities. Cooperation can be a mitigating factor but only where it leads to the conviction of others or to other specific administrative actions. 42 C.F.R. § 1001.102(c)(3). Petitioner did not prove that whatever cooperation she may have offered led to any of the requisite outcomes. Therefore, her assertion that her cooperation should be considered in mitigation is irrelevant.

Petitioner has offered also a number of statements from associates and other individuals attesting to her character and her good works. These statements are also irrelevant because they do not relate to any mitigating factor.

/s/
Steven T. Kessel
Administrative Law Judge