

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Sircy Sacerio,
(OI File No.: H-14-42509-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-2880

Decision No. CR4478

Date: December 3, 2015

DECISION

Petitioner, Sircy Sacerio, a registered chiropractic assistant licensed in the State of Florida, participated in an elaborate scheme to defraud insurance companies by staging automobile accidents and submitting to the insurers false claims of injury and treatment. She was convicted on multiple felony counts of conspiracy to commit mail fraud and mail fraud. Pursuant to section 1128(a)(3) of the Social Security Act (Act), the Inspector General (IG) has excluded her from participating in the Medicare, Medicaid, and all federal health care programs for a period of 15 years.

For the reasons discussed below, I find that the IG is authorized to exclude Petitioner and that the fifteen-year exclusion falls within a reasonable range.

Background

In a letter dated April 30, 2015, the IG advised Petitioner Sacerio that, because she had been convicted of a felony offense related to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct in connection with the delivery of a health care item or service, the IG was excluding her from participating in Medicare,

Medicaid, and all federal health care programs for a period of 15 years. The letter explained that section 1128(a)(3) of the Act authorizes the exclusion. IG Exhibit (Ex.) 1.

Petitioner requested review. She concedes that she was convicted and is subject to exclusion under section 1128(a)(3), but challenges the length of the exclusion. Hearing Request (May 28, 2015); Order and Schedule for Filing Briefs and Documentary Evidence at 2 (July 21, 2015).

The parties have submitted their written arguments (IG Br.; P. Br.). With his brief, the IG submitted five exhibits (IG Exs. 1-5). The IG also submitted a reply. In the absence of any objections, I admit into evidence IG Exs. 1-5.

The parties agree that an in-person hearing is not necessary. IG Br. at 8; P. Br. at 4.

Issue

Because the parties agree that the IG has a basis upon which to exclude Petitioner from program participation, the sole issue before me is whether the length of the exclusion (15 years) is reasonable. 42 C.F.R. § 1001.2007.

Discussion

Section 1128(a)(3) mandates that the Secretary of Health and Human Services exclude an individual who has been convicted of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. *See* 42 C.F.R. § 1001.101(c).

In January 2009, Petitioner Sacerio and her minor son were in a “staged” automobile accident. Although not injured, she fraudulently claimed that she and her son suffered moderate to severe pain as a result and were “treated” at the Karow Chiropractic Center, an active participant in the fraudulent scheme. IG Ex. 2 at 18; IG Ex. 4 at 2, 4. In June 2010, she and her husband participated in another “staged accident.” Again, she and her husband claimed that they were in severe pain as a result of the accident and again they were treated at the Karow Center. They required no such treatment and, although they may have gone to the Karow Center, in many instances, the claimed treatment was not provided. IG Ex. 2 at 23, 25, 29; IG Ex. 4 at 4, 5.

In January 2009, Petitioner Sacerio went to work for the Karow Center, where she was ostensibly employed as a receptionist and office assistant for its owner, Kenneth Karow. IG Ex. 4 at 2. While employed there, she participated in an elaborate insurance scam, which involved recruiting insured individuals to stage automobile accidents. With the assistance of the conspirators, the individuals falsely claimed injuries, and the Karow Center submitted insurance claims for services that were not necessary and which, in any

event, the Karow Center generally did not provide. Among Petitioner's duties, she prepared and submitted false claims to the insurance companies. IG Exs. 2, 3, 4.

On August 21, 2013, Petitioner Sacerio, her employer, and an array of co-conspirators were indicted. Petitioner was charged with one count of conspiracy to commit mail fraud (18 U.S.C. § 1349) and nine counts of mail fraud (18 U.S.C. § 1341). IG Ex. 2 at 13, 17. She pled guilty to the conspiracy charge and five of the mail fraud counts. IG Exs. 3, 5. The court sentenced her to 48 months in prison and ordered her to pay **\$1,146,824.26** in restitution. IG Ex. 5 at 2, 5.

Based on the aggravating factors in this case and the absence of any mitigating factor, the 15-year exclusion falls within a reasonable range.¹

An exclusion brought under section 1128(a)(3) 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 regulation may not be used to decide whether an exclusion of a particular length is reasonable.

Among the factors that may serve as a basis for lengthening the period of exclusion are the two that the I.G. relies on in this case: 1) the acts resulting in the conviction, or similar acts, caused a government program or another entity financial losses of \$5,000 or more; and 2) the sentence imposed by the court included incarceration. 42 C.F.R. § 1001.102(b).² The presence of an aggravating factor or factors, not offset by any mitigating factor or factors, justifies lengthening the mandatory period of exclusion.

Program financial loss (42 C.F.R. § 1001.102(b)(1)): In her plea agreement, Petitioner conceded that she would be required to pay restitution to the victims of her crimes and that the estimated amount of that restitution was between \$1,000,000 and \$2,000,000. IG Ex. 3 at 3. The sentencing court subsequently ordered her to pay \$1,146,824.26 in restitution. Restitution has long been considered a reasonable measure of program losses. *See Juan de Leon, Jr.*, DAB No. 2533 at 5 (2013); *Jason Hollady, M.D.*, DAB No. 1855

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

² Petitioner Sacerio worked full-time at the Karow Center for about four years (2009-2013), and the fraud lasted for more than six years (October 2006 through December 2012), suggesting that her crimes lasted for about three years. Nevertheless, the IG does not cite the duration of Petitioner's conduct as an aggravating factor. 42 C.F.R. § 1001.102(b)(2) ("the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more").

(2002). At a minimum, then, Petitioner's crimes cost insurers significant financial losses – many times greater than the \$5,000 threshold for aggravation – and the IG may justifiably increase significantly Petitioner's period of exclusion. *See Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003).

Petitioner complains that she was not directly responsible for billing, suggesting that others should be held accountable. P. Br. at 3. Inasmuch as Petitioner was convicted of conspiracy, the fact that others were implicated is hardly surprising, but I find it irrelevant. *Petitioner's* crimes caused the program losses, without regard to the roles others may have played in helping her commit those crimes.

Incarceration (42 C.F.R. § 1001.102(b)(5)). The sentence imposed by the criminal court included incarceration. The district court sentenced Petitioner to four years in prison. I consider this significant jail time, and it underscores the seriousness of her crime. IG Ex. 5 at 2.

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 her 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). Characterizing the mitigating factor as “in the nature of an affirmative defense,” the Board has ruled that a petitioner has the burden of proving any mitigating factor by a preponderance of the evidence. *Barry D. Garfinkel, M.D.*, DAB No. 1572, at 8 (1996).

Obviously, because Petitioner's felony conviction involved program financial losses many times greater than \$1,500, the first factor does not apply here. Nor does Petitioner claim any mental, physical, or emotional condition that reduced her culpability. She does not claim to have cooperated with law enforcement.

Thus, no mitigating factor offsets the significant aggravating factors present in this case.

Based on the aggravating factors and the absence of mitigating factors, then, I must determine whether the exclusion period imposed by the IG falls within a reasonable range. So long as that period falls within a reasonable range, my role is not to second-guess the IG's judgment. *Jeremy Robinson*, DAB No. 1905, at 5 (2004) (ALJ review must reflect the deference accorded to the IG by the Secretary). A “reasonable range” refers to a range of exclusion periods that is more limited than the full range authorized by the statute [i.e. from a minimum of five years to a maximum of permanent] and that is tied to the circumstances of the individual case.” *Joseph M. Rukse, Jr. R.Ph.*, DAB No. 1851, at 11 (2002), *citing Gary Alan Katz, R.Ph.*, DAB No. 1842, at 8 n.4 (2002). Here,

