Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Juan DeLeon, Jr.
(OI File No. H-6-10-40587-9),

Petitioner,

v.

The Inspector General.

Docket No. C-12-1261

Decision No. CR2793

Date: May 22, 2013

DECISION

Petitioner, Juan DeLeon, Jr., appeals the determination of the Inspector General (I.G.) for the U.S. Department of Health and Human Services to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)) for a period of 20 years. For the reasons explained below, I find that there is a basis for the I.G. to exclude Petitioner and that an exclusion period of 20 years is reasonable based on three aggravating factors and one mitigating factor.

I. Background and Procedural History

The following facts are undisputed. Petitioner owned and managed United DME, Inc., a durable medical equipment supplier that sold power wheelchairs, diabetic supplies, and incontinence supplies. On September 29, 2011, Petitioner was convicted of conspiracy to commit health care fraud, health care fraud, and aggravated identity theft for offenses committed from July 2008 through April 2010. Petitioner was sentenced to serve ten years incarceration and ordered to pay $750,000 in restitution to federal and state health care programs. In a letter dated July 31, 2012, the I.G. notified Petitioner that he was being excluded from participating in Medicare, Medicaid, and all federal health care programs effective August 20, 2012. The I.G. based the exclusion on Petitioner's

aforementioned conviction in the United States District Court, Southern District of Texas, of a criminal offense 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. I.G. Exhibit (Ex.) 1. The I.G. excluded Petitioner for 25 years, 20 years above the statutory minimum exclusion period for mandatory exclusions, based on the presence of three aggravating factors: (1) the acts resulting in his conviction caused, or were intended to cause, a financial loss to a Government program of $5,000 or more; (2) the acts resulting in his conviction were committed over a period of one year or more; and (3) the court's sentence of Petitioner included incarceration. I.G. Ex. 1.

Petitioner, appearing *pro se*, filed a timely request for a hearing before an administrative law judge (ALJ). The Civil Remedies Division received the request on September 10, 2012, and assigned the case to me for possible hearing and written decision. I convened a prehearing conference by telephone on November 5, 2012, the substance of which I summarized in my Order and Schedule for Filing Briefs and Documentary Evidence issued on November 6, 2012. Then, on December 5, 2012, the I.G. notified Petitioner that "[o]n the basis of new information about your substantial cooperation, we are reducing the period of your exclusion to 20 years." I.G. Ex. 2. The I.G. explained that "[t]his revision does not alter or modify in any way the conditions of your exclusion as explained in the July 31, 2012 letter to you." I.G. Ex. 2.

Petitioner subsequently requested the production of documents from the I.G. pursuant to 42 C.F.R § 1005.7(a), and the I.G. filed objections to Petitioner's discovery requests. Petitioner then filed a letter, which I construed as a motion for an order compelling discovery pursuant to 42 C.F.R. § 1005.7(e)(1). On January 29, 2013, the I.G. filed a motion for summary judgment and a brief in support (I.G. Br.) and five proposed exhibits (I.G. Exs. 1-5). After reviewing the I.G.'s objections, arguments, and exhibits, I convened a telephone conference on February 13, 2013 to discuss the relevancy of Petitioner's discovery requests and the I.G.'s objections to them. On February 20, 2013, I issued an Order Denying Petitioner's Motion to Compel Discovery and Amending Schedule for Filing Briefs and Documentary Evidence, after concluding that Petitioner had not met his burden of showing that discovery should be allowed with regard to his specific document requests. In that Order, I amended the deadlines for the filing of briefs and documentary evidence and explained that Petitioner could make any arguments and offer his own evidence regarding the extent of his cooperation with federal authorities or any other relevant factor affecting his exclusion period.

Petitioner filed an informal brief (P. Br.) and with five proposed exhibits (P. Exs. 1-5) on March 11, 2013. The I.G. filed a reply brief (I.G. Reply) on March 26, 2013. There were no formal objections to any of the exhibits. I therefore admit into evidence I.G. Exs. 1-5 and P. Exs. 1-5. The I.G. has filed a motion for summary judgment and believes the case can be decided on the written record. Petitioner indicated in his brief that an in-person

hearing was necessary to decide his case. However, Petitioner stated that the testimony he wished to offer at an in-person hearing is "about procedure to correct billing errors" and the witnesses whose testimony he wants to offer are himself and the I.G. P. Br. at 4. Petitioner states that the oral testimony of these witnesses relates to his arguments regarding "correction of billing errors and given history" and "procedure to correct billing errors and intent of the law." P. Br. at 4. When asked to explain why the proposed testimony does not duplicate something already stated in an exhibit, Petitioner states that "[t]he basis of the conviction is simply black and white. While the intent to defraud is a factor in the law which was not given at trial." P. Br. at 4. Thus, it appears that the testimony Petitioner wishes to present at a hearing serves only to attack the merits of his conviction for healthcare fraud in federal court. Under the relevant regulations, Petitioner's underlying conviction is not reviewable or subject to collateral attack before me. 42 C.F.R. § 1001.2007(d). Considering the testimony Petitioner wishes to present can only be viewed as a collateral attack on substantive or procedural grounds on his underlying conviction, and therefore is not relevant to the issues before me, an in-person hearing is not necessary. Accordingly, I base this decision on the written record of the documentary evidence that the parties submitted.

II. Discussion

A. Applicable Law

The Act requires that the Secretary of the U.S. Department of Health and Human Services (Secretary) exclude from participation in all federal health care programs any "individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under [Medicare] or under any State health care program." Act § 1128(a)(1) (42 U.S.C. § 1320a-7(a)(1)); *see also* 42 C.F.R. § 1001.101(a).

An exclusion made pursuant to section 1128(a)(1) is mandatory. The I.G. must impose such a mandatory exclusion for a minimum period of five years. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); *see* 42 C.F.R. § 1001.102(a). The I.G. may increase an exclusion period based on the presence of certain aggravating factors that the Secretary has established by regulation. 42 C.F.R. § 1001.102(b). Here, the I.G. relied on three aggravating factors to enhance the period of Petitioner's exclusion beyond the minimum mandatory period:

> (1) The acts resulting in the conviction, or similar acts, that caused, or were intended to cause, a financial loss to a Government program or to one or more entities of $5,000 or more. (The entire amount of financial loss to such programs or entities, including any amounts resulting from similar acts not adjudicated, will be considered regardless of whether full or partial restitution has been made);

> (2) The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more;
>
> * * *
>
> (5) The sentence imposed by the court included incarceration[.]

42 C.F.R. § 1001.102(b)(1), (2), (5); *see* I.G. Ex. 1, at 1-2.

Where, as here, the I.G. determines that one or more aggravating factors may support increasing an exclusion period beyond the five-year minimum, the I.G. may then consider certain enumerated mitigating factors "as a basis for reducing the period of exclusion to no less than 5 years." 42 C.F.R. § 1001.102(c). Petitioner has argued, and the I.G. has conceded, that the following mitigating factor is present in this case:

> (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).

Rights to an ALJ hearing and judicial review of the final action of the Secretary are provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). An ALJ reviews the length of an exclusion *de novo* to determine whether it falls within a reasonable range considering any aggravating and mitigating factors. *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491, at 5 (2012) (citing *Joseph M. Rukse, Jr., R.Ph.*, DAB No. 1851, at 10-11 (2002)).

B. Issues

This case presents two issues:

1. Whether there is a basis for the I.G. to exclude Petitioner from participation in Medicare, Medicaid, and all federal health care programs; and

2. Whether the length of the exclusion is unreasonable.

C. Findings of Fact and Conclusions of Law

1. ***There is a basis for the I.G. to exclude Petitioner pursuant to section 1128(a)(1) of the Act.***

The essential elements necessary to support an exclusion based on section 1128(a)(1) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense, whether felony or misdemeanor; and (2) the criminal offense is related to the delivery of an item or service under Medicare or any state health care program.

a. *Petitioner does not contest that he was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act.*

An individual is "convicted" of a criminal offense when: (1) a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; (2) there has been a finding of guilt in a federal, state, or local court; (3) a plea of guilty or no contest has been accepted in a federal, state, or local court; or (4) an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. Act § 1128(i) (42 U.S.C. § 1320a-7(i)); *see also* 42 C.F.R. § 1001.2.

Petitioner does not dispute that, on September 29, 2011, he was found guilty, after a plea of not guilty and a full trial, of one count of conspiracy to commit healthcare fraud, three counts of healthcare fraud, and one count of aggravated identity theft. I.G. Ex. 4. The court sentenced Petitioner to be imprisoned for ten years followed by a three-year term of supervised release, to pay an assessment of $500, and to pay restitution of $750,000 ($375,000 of this amount to Medicare). I.G. Ex. 4. These events qualify as a conviction under the Act. Act §§ 1128(i)(1), (i)(2).

b. *Petitioner does not dispute that his offense was related to the delivery of an item or service under Medicare.*

Petitioner also does not dispute that his conviction was related to the delivery of an item or service under Medicare. Petitioner's conviction was based on his submission of false and fraudulent claims for services to Medicare and Medicaid. I.G. Ex. 3, at 5-10. It is evident that a "nexus" exists between his criminal acts and the purported delivery of an item or service under Medicare. *See, e.g.*, *Berton Siegel*, *D.O.*, DAB No. 1467 (1994). The fact that the court ordered Petitioner to pay restitution to Medicare in the amount of $375,000 confirms that his offense was program-related.

c. *I am unable to consider collateral attacks on Petitioner's underlying conviction.*

Petitioner maintains his innocence and states that he disagrees that he was convicted of a criminal offense "given that the offense is a daily occurrence that is correctable and is done so regularly." P. Br. at 2. Petitioner claims that he "did not do the billing at all and any errors were corrected as soon as noted." P. Br. at 2. Petitioner claims that he has presented documentation showing "that examples used to convict were never brought to my attention purposefully" and "false statements made by the agent which can be verified by FBI reports." P. Br at 2. Petitioner also argues he has not received copies of certain documents he has requested from the I.G., which could undermine the basis for his conviction. P. Br. at 2-4.

However, Petitioner's arguments all attack the validity of his conviction, and Petitioner does not dispute that he was in fact convicted. Under the regulations, Petitioner's underlying conviction is not reviewable or subject to collateral attack before me, whether on substantive or procedural grounds. 42 C.F.R. § 1001.2007(d). The Board has repeatedly affirmed this categorical preclusion. *See, e.g.*, *Lyle Kai, R.Ph.*, DAB No. 1979, at 8 (2005) ("Excluding individuals based on criminal convictions 'provides protection for federally funded programs and their beneficiaries and recipients, without expending program resources to duplicate existing criminal processes.'" (internal citation omitted)). Thus, I do not consider Petitioner's arguments attacking his predicate conviction.

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

The I.G., acting on behalf of the Secretary, must exclude an individual or entity convicted of an offense related to the delivery of a health care item or service under Medicare or a state health care program. Act § 1128(a)(1) (42 U.S.C. § 1320a-7(a)(1)); 42 C.F.R. § 1001.101(a). An exclusion made pursuant to section 1128(a)(1) of the Act must be for a minimum period of five years. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); 42 C.F.R. § 1001.102(a). As explained above, Petitioner does not dispute that he was convicted of offenses, conspiracy to commit health care fraud, health care fraud, and aggravated identity theft, which are related to the delivery of a health care services under the Medicare program. Accordingly, there is a basis for the I.G. to exclude Petitioner and that exclusionary period must be a minimum of five years.

2. *The exclusion of Petitioner for 20 years is within a reasonable range.*

To determine whether an exclusion period is within a reasonable range, an ALJ must weigh any aggravating and mitigating factors in the case, and evaluate the quality of the circumstances surrounding the factors. *Vinod Chandrashekhar Patwardhan, M.D.*, DAB

No. 2454, at 6 (2012) (citing *Jeremy Robinson,* DAB No. 1905, at 11 (2004)). The regulations provide several factors that the I.G. may consider as aggravating and a basis for lengthening an exclusion period. 42 C.F.R. § 1001.102(b). In this case, the I.G. established the presence of three aggravating factors by a preponderance of the evidence. If an aggravating factor justifies an increase to the length of an exclusion, the I.G. may then consider various mitigating factors as a basis to reduce the exclusion period to no less than five years. 42 C.F.R. § 1001.102(c). I have determined that the severity of the three aggravating factors supports an increase in the length of Petitioner's exclusion period beyond the five-year minimum. One mitigating factor is also present in this case, which the IG considered and reasonably used as a basis to decrease the penalty. These factors are addressed below.

a. *The acts resulting in Petitioner's conviction caused, or were intended to cause, a loss to a government program or to one or more entities of $5,000 or more.*

The I.G. may increase the length of an exclusion if the acts resulting in the underlying conviction caused, or were intended to cause, a loss to a government program or to one or more entities of $5,000 or more. 42 C.F.R. § 1001.102(b)(1). The District Court ordered Petitioner to pay $750,000 in restitution to Medicare and the Texas Health and Human Services Commission as a result of the loss to the government that Petitioner's offenses caused. I.G. Ex. 4, at 4. This government loss is substantially higher (approximately 150 times) than the minimum loss needed to trigger this particular aggravating factor. Thus, the I.G. has demonstrated sufficiently that the acts resulting in Petitioner's conviction resulted in a loss to a government program of $5,000 or more.

Governmental loss is an "exceptional aggravating factor" when, as here, the loss is "very substantially greater than the statutory minimum." *Robinson*, DAB No. 1905, at 11. On its own, the governmental loss here, 150 times greater the minimum needed to support an increase to the exclusion period, must be afforded such substantial weight as to support a significant increase to the reasonable range of exclusion periods that the I.G. may impose. The reasonable range of exclusion periods must reflect the substantial government loss as well as the need to protect government programs from untrustworthy individuals. *See Donald A. Burstein, Ph.D.,* DAB No. 1865, at 12 (2003). The 20-year exclusion period imposed here is within a reasonable range because it is large enough to reflect the scope of government loss and ensure that government programs are protected for a significant period from an individual proven to be untrustworthy when participating in such programs. *See Michael D. Miran, et al.*, DAB No. 2469, at 5-6 (2012) (upholding 13-year exclusion based on $257,946 loss to government program and one additional aggravating factor); *Robinson*, DAB No. 1905, at 12 (upholding a 15-year exclusion based on a $205,000 loss to government program and two additional aggravating factors).

b. *The acts resulting in Petitioner's conviction were committed over a period of one year or more.*

The I.G. may increase the length of an exclusion if the acts resulting in the underlying conviction occurred over a period of one year or more. 42 C.F.R. § 1001.102(b)(2). The District Court found Petitioner guilty of each count in the Indictment, which stated the length of the conspiracy to commit health care fraud as July 2008 through April 2010 (approximately one year and nine months). I.G. Ex 3, at 5. Therefore, Petitioner's involvement in the scheme was for more than one year, which is enough evidence to establish the presence of this aggravating factor.

The purpose of this aggravating factor "is to distinguish between petitioners whose lapse in integrity is short-lived from those who evidence a lack of such integrity over a longer period . . . ." *Burstein*, DAB No. 1865, at 8. The length of the fraudulent billing scheme in this case and Petitioner's prolonged involvement in that scheme, demonstrates Petitioner's lack of integrity was more than just "short-lived." Previously, the Board has accorded enough weight to sustain a 15-year exclusion to the fact that underlying criminal conduct was committed for "slightly more" than one year. *Burstein*, DAB No. 1865, at 12. Here, as in *Burstein*, the length of Petitioner's conduct shows prolonged lack of integrity that supports the increase from the five-year minimum exclusion period to twenty years.

c. *The court's sentence of Petitioner included incarceration.*

The I.G. may increase the length of an exclusion if the court's sentence includes a period of incarceration. 42 C.F.R. § 1001.102(b)(5). Here, the District Court for the Southern District of Texas sentenced Petitioner to 10 years in prison based on his conviction relating to health care fraud. I.G. Ex. 4, at 2. Petitioner is currently incarcerated under the District Court's sentence. Thus, the I.G. has established the presence of this aggravating factor.

A prison sentence of 10 years for a financial crime demonstrates the severity of the fraudulent billing scheme in which Petitioner was involved. The Board has determined that a nine-month period of incarceration was "relatively substantial," and supported an eight-year exclusion period. *Jason Hollady, M.D.*, DAB No. 1855, at 12 (2002). Here, the length of incarceration was more than thirteen times that imposed in *Hollady*. Accordingly, this aggravating factor bears substantial weight, and supports an increase well beyond the five-year minimum exclusion period to twenty years.

d. *Petitioner's cooperation with Federal or State officials resulted in another being convicted.*

Here, there is a mitigating factor because the excluded individual's "cooperation with Federal or State officials resulted in . . . [o]thers being convicted or excluded from Medicare, Medicaid, and all other Federal health care programs . . . ." 42 C.F.R. . § 1001.102(c)(3)(i). To establish this mitigating factor, Petitioner must show that he cooperated with federal or state officials and that his cooperation resulted in others being convicted, additional cases investigated, or the imposition of a civil monetary penalty. *See Stacey R. Gale*, DAB No. 1941, at 12 (2004). Moreover, the Board has stated that only significant cooperation should be considered mitigating. *Id.* Petitioner argues that six durable medical equipment suppliers in Texas were prosecuted "by no coincidence given my extensive cooperation with the authorities." P. Br at 3.

The I.G. disputes the extent of Petitioner's cooperation and contends that Petitioner has provided no evidence to support his statement. I.G. Reply at 5. Nonetheless, the I.G. concedes that Petitioner did provide some cooperation in this case. I.G. Br. at 12. The I.G.'s second amended notice of exclusion acknowledged that Petitioner cooperated with federal or state authorities and that Petitioner's participation in consensual monitoring later resulted in another individual's conviction. I.G. Ex. 2; I.G. Ex. 5, at 2-3. Accordingly, the I.G. reduced its original proposed exclusionary period by five years. I.G. Ex. 2.

e. *Petitioner's cooperation does not justify further reduction of the exclusionary period.*

There is no "rigid formula" for the I.G. or an ALJ to determine an exact exclusion period when weighing and evaluating aggravating and mitigating factors. *Patwardhan*, DAB No. 2454, at 6. Rather, the ALJ must review the factors *de novo* to determine whether the exclusion imposed is within a "reasonable range" of exclusion periods. *Ruske*, DAB No. 1851, at 11 (citing *Gary Alan Katz, R.Ph.*, DAB No. 1842, at 8 n.4 (2002)). A "reasonable range" is "a range of exclusion periods that is more limited than the full range authorized by the statute and that is tied to the circumstances of the individual cases." *Robinson*, DAB No. 1905, at 5 (quoting *Ruske*, DAB No. 1851, at 11).

It is undisputed that Petitioner has cooperated with authorities and that Petitioner's participation in consensual monitoring later resulted in another individual's conviction. I.G. Br. at 12; I.G. Ex. 2; I.G. Ex. 5 at 2-3. Petitioner argues that his cooperation was more extensive and should reduce the period of exclusion to less than 20 years. *See* P. Br. at 3. Petitioner contends his cooperation led to the prosecution of six durable medical equipment companies in the Rio Grande Valley. P. Br. at 3. However, the evidence Petitioner offers does not support this assertion. More importantly, Petitioner does not present any evidence or argument which supports Petitioner's position that the I.G. did

not appropriately factor Petitioner's cooperation with federal or state authorities when determining Petitioner's period of exclusion.

The I.G.'s second amended notice of exclusion acknowledged Petitioner's substantial cooperation and reduced Petitioner's period of exclusion from 25 to 20 years. I.G. Ex. 2. Nothing in 42 C.F.R. § 1001.102 or the Act assigns the specific weight to be given to aggravating or mitigating evidence. Additionally, the regulations vest discretion in the I.G. to determine the length of exclusion as long as it is within a reasonable range. I do not have the authority to alter the length of the exclusion, as long as the time chosen is based on demonstrated criteria and within a reasonable range. *Robinson,* DAB No. 1905, at 3; *Barry D. Garfinkel, M.D.*, DAB No. 1572, at 11 (1996).

The weight of the evidence in this case supports a long period of exclusion. Moreover, the I.G. has reduced Petitioner's exclusion by five years due to the mitigating factor of his cooperation with law enforcement authorities. Petitioner's cooperation with the government may recoup a small amount of the trustworthiness he lost by participating in the billing scheme. *See Craig Richard Wilder*, DAB No. 2416, at 13 (2011) ("In evaluating the trustworthiness of Petitioner, it is reasonable to infer that Petitioner's extraordinary cooperation demonstrates that he is not so untrustworthy . . . ."). However, it would be shortsighted to overlook that Petitioner's cooperation came after the fraudulent billing scheme had been stopped and the government incurred a massive loss. I find that this mitigating factor has been accorded enough weight to eliminate substantially longer periods of exclusion from the overall reasonable range of exclusion periods. The I.G. was not obligated to further reduce Petitioner's period of exclusion to less than 20 years due to this mitigating factor as Petitioner's cooperation was appropriately factored into its amended determination.

III. Conclusion

For the foregoing reasons, the I.G. has a basis to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs. After considering all three aggravating factors and the mitigating factor, an exclusion of 20 years is within a reasonable range. Therefore, I sustain the I.G.'s exclusion of Petitioner for 20 years, effective August 20, 2012.

/s/
Joseph Grow
Administrative Law Judge