Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Zahid Imran, M.D.,
(OI No. 6-11-40736-9),

Petitioner,

v.

The Inspector General

Docket No. C-15-1908

Decision No. CR4465

Date: November 25, 2015

DECISION

In this case, I again consider the appropriate period of program exclusion for someone who participated in Medicare fraud of massive proportions.

Petitioner, Zahid Imran, M.D. was a physician licensed to practice in the State of Louisiana. He pled guilty in United States District Court to felony conspiracy to commit health care fraud. Pursuant to section 1128(a)(1) of the Social Security Act (Act), the Inspector General (I.G.) has excluded him from participating in Medicare, Medicaid, and all federal health care programs for a period of 48 years. Petitioner Imran appeals. He concedes that he must be excluded but challenges the length of that exclusion.

For the reasons set forth below, I find that the 48-year exclusion falls within a reasonable range.

Background

Petitioner Imran was a physician who served as owner, director, officer, and manager of two community mental health centers in Baton Rouge, Louisiana. He was also the medical director at one of the centers. I.G. Ex. 4 at 5-6; I.G. Ex. 5 at 5. These community mental health centers purportedly offered partial hospitalization programs.[1]

From about 2005 through October 2011, Petitioner Imran and his colleagues submitted claims to the Medicare program for services they did not provide. Among other offenses, Petitioner Imran admitted patients who did not qualify for partial hospitalization and for whom those services were not medically necessary. I.G. Ex. 4 at 9; I.G. Ex. 5 at 5. He signed false statements, claiming that he had provided treatment that he did not provide. I.G. Ex. 4 at 10, 13; I.G. Ex. 5 at 5-6. He falsified documents, *including patient treatment notes* and attendance records, so that false claims could be submitted to the Medicare program. I.G. Ex. 5 at 6.

On May 2, 2013, Petitioner Imran was charged with one count of felony conspiracy to commit health care fraud (18 U.S.C. § 1349) and three counts of felony health care fraud (18 U.S.C. §§ 1347 and 2). I.G. Ex. 4. He pled guilty to the conspiracy charge; the court accepted his plea and entered judgment against him on August 25, 2014. I.G. Ex. 6. The court sentenced him to 86 months in prison, and ordered him to pay a whopping *$23,817,779* in restitution to the Centers for Medicare & Medicaid Services, which administers the Medicare program. I.G. Ex. 6 at 2, 5.

In a letter dated January 30, 2015, the I.G. advised Petitioner Imran that, because of his conviction, he was excluded from participating in Medicare, Medicaid, and all federal health care programs for a minimum period of 48 years. I.G. Ex. 1. The letter explained that section 1128(a)(1) of the Act authorizes the exclusion. Petitioner appealed.

In compliance with my orders, the I.G. has submitted an initial brief (I.G. Br.) and a reply brief (I.G. Reply). The I.G. also submitted eight exhibits (I.G. Exs. 1-8). Petitioner submitted a brief (P. Br.) and one exhibit (P. Ex. 1). In the absence of any objection, I admit into evidence I.G. Exs. 1-8 and P. Ex. 1.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary, and, if so, to "describe the testimony that [it] wishes to present and provide the name of any witness and a summary of each witness's proposed testimony." I specifically directed the parties to explain why the testimony would be relevant. Order

[1] A "partial hospitalization program" allows for the delivery of mental health and related services in hospitals and community mental health centers. It is "a distinct and organized intensive ambulatory treatment service offering less than 24-hour-daily care other than in an individual's home or in an in-patient or residential setting." Act § 1861(ff)(3)(A).

and Schedule for Filing Briefs and Documentary Evidence at 3, Attachment 1 (Informal Brief of Petitioner ¶ IV) and Attachment 2 (Informal Brief of I.G. ¶ III) (June 9, 2015). The I.G. responded that an in-person hearing is not necessary. I.G. Br. at 9.

Petitioner, on the other hand, claims that an in-person hearing is necessary and that he has testimony that he wants to offer. However, contrary to the instructions in my order, he did not identify any particular witness other than himself ("The party requesting the in-person hearing must describe the testimony that the party wishes to present and provide the name of any witness and a summary of each witness's proposed testimony."). Order at 3. According to Petitioner, because of his incarceration, he and his attorney have not had an opportunity to confer regarding the identification and availability of witnesses. However, Petitioner and others with medical expertise "would testify . . . that the vast majority of the submitted and paid claims were legitimate and covered under the Medicare program." P. Br. at 5.

In fact, as discussed below, the criminal court has already determined that Petitioner was complicit in submitting a significant number of erroneous claims to the Medicare program and those erroneous claims cost the program nearly *$24 million*. Because I may not look behind those findings, Petitioner's proposed testimony would be irrelevant. I must exclude irrelevant or immaterial evidence. 42 C.F.R. § 1001.2007(d); *Roy Cosby Stark*, DAB No. 1746 (2000); *George Iturralde, M.D.*, DAB No. 1374 (1992); *Leonard R. Friedman, M.D.*, DAB No. 1281 (1991). I would therefore exclude the testimony that Petitioner proposes, and an in-person hearing would serve no purpose. I therefore decide this case based on the written record.

Issue

Petitioner concedes that he was convicted of an offense related to the delivery of an item or service under Medicare and is therefore subject to an exclusion of at least five years. Order and Schedule for Filing Briefs and Documentary Evidence at 2; Request for Hearing. The sole issue before me is whether the length of the exclusion in excess of five years is reasonable.

Discussion

> ***Based on the aggravating factors in this case and the absence of any mitigating factor, the 48-year exclusion falls within a reasonable range.***[2]

[2] I make this one finding of fact/conclusion of law.

Section 1128(a)(1) of the Act requires that the Secretary of Health and Human Services exclude an individual who has been 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 C.F.R. § 1001.101.

An exclusion brought under section 1128(a)(1) 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 regulations 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 four 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; 2) the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more; 3) the sentence imposed by the court included incarceration; and 4) the convicted individual has been the subject of any other adverse action by any federal, state, or local government agency or board, if the adverse action is based on the same set of circumstances that serves as the basis for the exclusion. 42 C.F.R. § 1001.102(b). 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 his plea agreement, Petitioner conceded that the community mental health centers through which the conspirators worked submitted claims to the Medicare program that totaled approximately $258,582,075 and that a "*significant portion* of these claims was fraudulent" because either 1) the center did not provide the service for which it billed; 2) the services were not medically necessary or the beneficiary did not qualify for them; or 3) the beneficiary came to the mental health center to receive an illegal kickback. I.G. Ex. 5 at 6 (emphasis added). The sentencing court subsequently ordered Petitioner Imran to pay *$23,817,779* in restitution.[3] 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 (2002).

[3] That the amount of restitution represents about 9% of total billings ($258,582,075) arguably supports Petitioner's claim that the "vast majority" of claims submitted were legitimate. But $23,817,779 is a great deal of money, and the fact that Petitioner also submitted a lot of legitimate claims in no way mitigates the enormity of his theft. "I stole less than 10%" is hardly a creditable defense.

At a minimum, then, Petitioner's crimes cost Medicare staggering financial losses – thousands of times greater than the $5,000 threshold for aggravation. The Departmental Appeals Board (Board) has characterized amounts substantially greater than the statutory standard as an "exceptionally aggravating factor" that is entitled to significant weight. *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003). I agree. If even a small percentage of program participants were capable of this level of fraud, the Medicare program could not long survive. I therefore consider the enormity of the program's financial losses here an exceptionally aggravating factor that compels a period of exclusion many, many times longer than the five-year minimum.

Petitioner nevertheless argues that denying him the right to present evidence regarding the program financial loss constitutes a denial of his due process rights. First, I have no authority to review Constitutional claims.

Second, Petitioner admitted in his plea agreement that "a significant portion" of the total billings ($258,582,075) was fraudulent. By any standard, "a significant portion" of **$258 million** represents an exceptionally aggravating level of fraud. Moreover, during the criminal proceedings, Petitioner was afforded an opportunity to challenge the amount of program loss. Instead, he conceded the significant program losses. *See* P. Br. at 3 ("Dr. Imran waived any right to appeal his restitution award in the plea agreement.").

Finally, as the I.G. points out, the sentencing court was likely conservative in setting the restitution amount. According to the pre-sentencing report, the government and Defendant Imran stipulated "that the proper calculation of loss . . . based on the defendant's participation in the conspiracy . . . is more than $50,000,000 but not more than $200,000,000." P. Ex. 1 at 23-24.

Length of criminal conduct (42 C.F.R. § 1001.102(b)(2)). By his own admission, Petitioner's criminal activity began "from in or around 2005" and continued "through October 2011." I.G. Ex. 5 at 5. Thus, the acts that resulted in Petitioner's conviction and similar acts were committed over a period of about six full years or six times longer than necessary to constitute an aggravating factor.

Incarceration (42 C.F.R. § 1001.102(b)(5)). The sentence imposed by the criminal court included incarceration. The district court sentenced Petitioner to more than seven years (86 months) in prison. I consider this significant jail time, and it underscores the seriousness of his crime. I.G. Ex. 6 at 2.

Other adverse actions (42 C.F.R. § 1001.102(b)(9)). Petitioner Imran was the subject of two additional adverse actions based on the circumstances underlying this exclusion.

- Effective March 13, 2014, the Louisiana Department of Health and Hospitals excluded him from participating in the state Medicaid program. I.G. Ex. 7.

- In a stipulation and agreement dated September 3, 2014, Petitioner Imran voluntarily surrendered his medical license while a formal complaint was pending against him before the Louisiana State Board of Medical Examiners. I.G. Ex. 8.

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 his 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 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 his culpability. He 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 I.G. falls within a reasonable range. So long as that period falls within a reasonable range, my role is not to second-guess the I.G.'s judgment. *Jeremy Robinson*, DAB No. 1905 at 5 (2004) (Administrative law judge review must reflect the deference accorded to the I.G. 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 minimum 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).

I understand Petitioner's complaint that, as a practical matter, the I.G. has effectively excluded him permanently from program participation. P. Br. at 4. However, the Board has consistently ruled that an exclusion of finite duration is not the functional equivalent of a permanent exclusion, and I may not consider mitigating such factors as the individual's age, finances, or employment prospects and their impact on the excluded individual's chances of returning to program participation. *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D*, DAB No. 1865 at 13 (2003); *Joann Fletcher Cash*, DAB No. 1725 at 23 (2000).

Moreover, given the nature of the aggravating factors here, a permanent exclusion would not have been out of line. Petitioner caused enormous financial losses to the Medicare program; his criminal conduct lasted six times longer than the threshold for aggravation; he was sentenced to more than seven years in prison; and he was subject to two adverse actions by different state boards.

Finally, the I.G. may reasonably determine that longer periods of exclusion are necessary, not only to protect federal funds, but "to [staunch] increasing amount of health care fraud." *Robinson*, DAB No. 1905 at 6 n.8. As I have noted elsewhere, the statistics on Medicare fraud are sobering:

> The National Health Care Anti-Fraud Association, an organization composed of both public and private health insurers and regulators, conservatively estimates that 3% of all health care spending in the United States is lost due to fraud. If such an estimate is accurate, health care fraud cost our economy a staggering $68 billion in 2007, the most recent year for which figures are available.

Christopher George Collins, DAB CR2515 at 6 (2012). Lengthy periods of exclusion are an appropriate means by which the I.G. can attempt to protect the integrity of the Medicare program from the worst offenders, and the evidence here establishes that Petitioner Imran is among the worst offenders.

Conclusion

I recognize that 48 years is a substantial period of exclusion and should be limited to those posing a grave threat to program integrity. Petitioner Imran poses such a threat. He was a cunning and successful fraudster who cost the Medicare program massive amounts of money over a long period of time. Based on all of the circumstances discussed above, I find that a 48-year exclusion falls within a reasonable range.

/s/
Carolyn Cozad Hughes
Administrative Law Judge