Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Wayne Vincent Wilson, M.D.,
(OI File No. 4-12-40563-9),

Petitioner,

v.

The Inspector General

Docket No. C-17-178

Decision No. CR4890

Date: July 11, 2017

DECISION

Petitioner, Wayne Vincent Wilson, M.D. (Petitioner or Dr. Wilson), was a family physician in the state of North Carolina. In October 2015 Petitioner was convicted of two counts of health care fraud. Based on this conviction, the Inspector General (I.G.) excluded Petitioner for ten years from participating in Medicare, Medicaid, and all federal health care programs, as authorized by Section 1128(a)(1) of the Social Security Act (Act). Petitioner requested review of the I.G.'s decision to exclude him for ten years. For the reasons set forth below, I find that the I.G. properly excluded Petitioner and that the ten-year exclusion falls within a reasonable range.

I. Background

Dr. Wilson was a licensed family practice physician who owned and operated a medical practice in Hickory, North Carolina. I.G. Exhibit (Ex.) 2 at 1; *see also* I.G. Ex. 4 at 1.

Dr. Wilson participated in Medicare and Medicaid as a supplier.[1] *Id.* On August 25, 2015, the U.S. Attorney filed a criminal information in the United States District Court for the Western District of North Carolina (federal court) charging Dr. Wilson with two counts of health care fraud, in violation of 18 U.S.C. sections 2 and 1347. I.G. Ex. 2 at 1, 4. Specifically, the information charged that, from 2007 to approximately June 2014, Dr. Wilson had defrauded Medicare and the North Carolina Division of Medical Assistance (Medicaid) by submitting claims for services that he did not actually provide to patients. I.G. Ex. 2 at 2-3. On or about August 20, 2015, Dr. Wilson entered into a plea agreement with the U.S. Attorney. I.G. Ex. 3. As part of that agreement, Dr. Wilson stipulated that he had engaged in the conduct charged in the information. I.G. Ex. 4. Pursuant to the plea agreement, on October 5, 2015, Dr. Wilson pled guilty to both counts of the information. I.G. Ex. 5. On May 4, 2016, a federal district judge adjudicated Dr. Wilson guilty of two counts of health care fraud and sentenced him to, among other things, eighteen months' imprisonment and to pay restitution to Medicare and Medicaid in the total amount of $210,260.66. I.G. Ex. 6.

In a letter dated September 30, 2016, the I.G. notified Petitioner he was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of ten years, because he had been convicted 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. Ex. 1. The letter explained that section 1128(a)(1) of the Act authorized the exclusion. *Id.* Petitioner requested a hearing (RFH), and the case was assigned to me.

I issued an Order and Schedule for filing Briefs and Documentary Evidence (Briefing Order). Pursuant to that order, each party submitted written argument. *See* I.G. Brief (Br.); Petitioner's (P.) Br. The I.G. submitted seven exhibits, and Petitioner submitted one exhibit. *See* I.G. Exs. 1-7; P. Ex. 1. Neither party objected to the exhibits offered by the opposing party. Therefore, in the absence of objection, I admit into evidence I.G. Exs. 1-7 and P. Ex. 1. The parties agree that an in person hearing is not required. I.G. Br. at 8; P. Br. at 4. I therefore decide this case based on the parties' written submissions.

II. Issues

The issues before me are:

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[1] The information describes Dr. Wilson as a "provider" (I.G. Ex. 2 at 1); however, as a physician, he was technically a "supplier" of services to Medicare and Medicaid beneficiaries. *See, e.g.*, Act, § 1861(d).

Whether Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program, within the meaning of section 1128(a)(1) of the Act, such that he is required to be excluded from program participation and, if so;

Whether a ten-year exclusion is reasonable.

III. Discussion

A. Petitioner must be excluded from program participation because he was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program within the meaning of section 1128(a)(1) of the Act.[2]

Under Section 1128(a)(1) of the Act, the Secretary of Health and Human Services must exclude from participating in any federal health care program 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. Act § 1128(a)(1); *see also* 42 C.F.R. § 1001.101(a).

Dr. Wilson concedes that he was convicted of a criminal offense. P. Br. at 1. This is beyond debate as he pled guilty to two counts of health care fraud and the federal court accepted his plea and adjudicated him guilty. *See* I.G. Exs. 5, 6; *see also* Act § 1128(i)(2), (3) (an individual is "convicted" where there has been a finding of guilt against the individual by a court or the court accepts the individual's plea of guilty).

The I.G. argues that Petitioner's conviction for health care fraud is related to the delivery of an item or service under Medicare or a state health care program within the meaning of section 1128(a)(1) of the Act. I.G. Br. at 3-4. Petitioner does not dispute that he was convicted of an offense for which exclusion is required. P. Br. at 2.

Dr. Wilson was convicted of committing health care fraud by filing claims for reimbursement from Medicare and the North Carolina Medicaid program for services that were not provided as claimed. *See* I.G. Exs. 2, 6. Convictions for defrauding a protected health care program by submitting false claims for services rendered to program beneficiaries are related to the delivery of items or services under the programs. *See Travers v. Shalala*, 20 F.3d 993, 998 (9th Cir. 1994); *see also Clemenceau Theophilus Acquaye*, DAB No. 2745 at 4-5 (2016); *Joann Fletcher Cash*, DAB No. 1725 (2000);

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[2] My findings of fact and conclusions of law appear in bold italic type.

Srinivas Suram Reddy, DAB CR4652 at 5 (2016) (conviction for health care fraud in violation of 18 U.S.C. §§ 1347 and 2 is related to the delivery of an item or service under Medicare or Medicaid within the meaning of section 1128(a)(1)); *Fiaz M. Afzal, M.D.*, DAB CR3911 at 2 (2015).

I therefore conclude that Dr. Wilson was convicted of criminal offenses related to the delivery of items or services under Medicare or a state health care program within the meaning of section 1128(a)(1) of the Act. Accordingly, the I.G. was required to exclude him from program participation for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2). However, the I.G. may exclude an individual for a period longer than five years if certain aggravating factors are present. 42 C.F.R. § 1001.102(b). In the present case, the I.G. has excluded Petitioner for ten years.

B. The ten-year exclusion imposed by the I.G. falls within a reasonable range.

If the I.G. imposes an exclusion longer than five years based on the presence of aggravating factors, I may consider whether certain mitigating factors exist that may justify shortening the exclusion to not less than five years. 42 C.F.R. § 1001.102(c). 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. In the following sections of this decision, I consider whether, in light of the aggravating and mitigating factors (if any) that may be present, the length of Petitioner's exclusion falls within a reasonable range.

1. The I.G. has proved three aggravating factors.

The I.G. has the burden to prove any aggravating factors. 42 C.F.R. § 1005.15(b)(2). The I.G. argued three aggravating factors are present here.

> (1) The acts resulting in the conviction, or similar acts, caused, or were intended to cause, a financial loss to a government agency or program or to one or more other entities of $5,000 or more (42 C.F.R. § 1001.102(b)(1)); [3]

[3] Effective February 13, 2017, the aggravating factor at 42 C.F.R. § 1001.102 (b)(1) requires a financial loss of $50,000, rather than $5,000. 82 Fed. Reg. 4100, 4112 (January 12, 2017). However, the higher threshold does not apply in this case as both Petitioner's conviction and the I.G.'s notice of exclusion predate February 2017. *See* I.G. Ex. 1 at 1; I.G. Ex. 6 at 1. Moreover, even if the higher threshold applied, the aggravating factor would be established, since the program losses in this case totaled over $200,000.

> (2) The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more (42 C.F.R. § 1001.102(b)(2));
>
> (3) The sentence imposed by the court included incarceration (42 C.F.R. § 1001.102(b)(5)).

I.G. Br. at 4-5. I agree that the evidence offered by the I.G. establishes these aggravating factors. Moreover, Petitioner does not dispute that the aggravating factors identified by the I.G. are present in his case. P. Br. at 2-3.

As to the first aggravating factor, the federal court sentenced Dr. Wilson to make restitution to Medicare in the amount of $2,148.08 and to the North Carolina Fund for Medical Assistance (Medicaid) in the amount of $208,112.58. I.G. Ex. 6 at 5. Thus, Petitioner was required to make restitution to federal and state health care programs in a total amount of $210,260.66. *Id.* Restitution has long been considered a reasonable measure of program losses. *See, e.g.*, *Hussein Awada, M.D.*, DAB No. 2788 at 7 (2017). Thus, as measured by the restitution for which he was held responsible, Petitioner's actions resulted in program financial losses over 40 times greater than the $5,000 threshold for aggravation. Because the financial losses were so far in excess of the threshold amount for aggravation, the I.G. may justify a significant increase in Petitioner's period of exclusion. *Awada*, DAB No. 2788, at 7; *see also Jeremy Robinson*, DAB No. 1905 at 12 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 at 12 (2003).

Regarding the second aggravating factor, the criminal acts for which Dr. Wilson was convicted occurred from in or about 2007, until in or about June, 2014.[4] *See* I.G. Ex. 2 at 1; *see also* I.G. Ex. 4 at 3. It is an aggravating factor if the criminal acts continued for one year or more. Here, Dr. Wilson's acts occurred over a period of approximately three and a half years, at a minimum, or as many as seven years, as measured by the total duration of the fraudulent scheme. Therefore, as with the amount of program losses, the lengthy period over which the acts were committed supports the I.G.'s decision to increase the length of Petitioner's exclusion significantly. *Awada*, DAB No. 2788 at 8 (an individual who engages in a lengthy course of criminal conduct "poses a far greater threat to federal health care programs and beneficiaries than an individual 'whose lapse in integrity is short-lived'" (quoting *Burstein*, DAB No. 1865 at 8)).

Finally, regarding the third aggravating factor, the federal court sentenced Petitioner to a substantial period of incarceration – eighteen months. I.G. Ex. 6 at 2. The length of Petitioner's incarceration underscores the seriousness of his crimes. *See Awada*, DAB No. 2788 at 11-12.

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[4] The specific acts to which Dr. Wilson pled guilty occurred on August 27, 2008 and on February 20, 2012. *See, e.g.*, I.G. Ex. 2 at 4.

Accordingly, I find that the I.G. has established the presence of three aggravating factors that justify imposing an exclusion significantly above the five-year threshold. I next consider whether there are any mitigating factors that may serve to justify a shorter period of exclusion.

2. Petitioner has not proved any mitigating factors.

In his hearing request and his brief, Petitioner argues that I should set his exclusion at less than ten years based on his age, his status as a veteran, and his cooperation with federal officials. *See* RFH at 4, 5; P. Br. at 3. Petitioner has the burden to prove any mitigating factors. 42 C.F.R. § 1005.15(b)(1). I may only consider the mitigating factors set forth in the regulations. 42 C.F.R. § 1001.102(c); *see also Awada*, DAB No. 2788 at 8. Neither age nor veteran status is a mitigating factor under the regulations.

The regulations do provide that cooperation with government officials may be a mitigating factor under the following circumstances:

> The individual's or entity's cooperation with Federal or State officials resulted in—
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> (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). Thus, if Petitioner produced evidence that his assistance to government officials resulted in additional cases being investigated, I may consider that factor in deciding whether the length of Petitioner's exclusion is reasonable.

To meet his burden to prove the factor set forth in 42 C.F.R. § 1001.102(c)(3)(ii), Petitioner must show that his cooperation actually led to the investigation of additional cases. *See Stacey R. Gale*, DAB No. 1941 (2004); *see also Godfrey Eze Uwudia*, DAB CR2308 at 7 (2011). Cooperation alone is insufficient to establish the mitigating factor. *Gale*, DAB No. 1941; *see also Awada*, DAB No. 2788 at 13.

Petitioner represents that he cooperated with federal prosecutors by providing documents regarding a medical equipment company that submitted false prescriptions to his practice and subsequently made false claims to the Medicare program. *See* P. Ex. 1. Petitioner alleges that this cooperation led to the investigation of additional cases of Medicare fraud.

P. Br. at 3. Petitioner has failed to provide any evidence of his cooperation beyond his own written statement. *See* P. Ex. 1. Petitioner offered no other documentary evidence to corroborate his statement, such as a letter from prosecutors. Further, Petitioner did not submit his statement in the form of an affidavit or declaration under penalty of perjury as I directed in my Briefing Order. *See* Briefing Order ¶ 7.c.ii. Moreover, even accepting as true Petitioner's representation that he provided documents to prosecutors, Petitioner states only that the evidence he provided would "support an investigation" of the DME supplier—not that such an investigation actually occurred. P. Ex. 1 at 3. Therefore, Petitioner has not met his burden to prove the mitigating factor identified at 42 C.F.R. § 1001.102(c)(3)(ii).

3. Based on the presence of three aggravating factors and the absence of any mitigating factor, a ten-year exclusion is within a reasonable range.

The I.G. has broad discretion in determining the length of an exclusion. *See, e.g.*, *Awada*, DAB No. 2788 at 5. So long as the period of exclusion imposed by the I.G. is within a reasonable range, based on demonstrated criteria, I have no authority to change it. *Cash*, DAB No. 1725 at 16-17 (citing 57 Fed. Reg. 3298, 3321 (1992)); *see also Jeremy Robinson*, DAB No. 1905 at 5 (2004). Exclusions imposed pursuant to section 1128 and its implementing regulations serve to protect the integrity of federal health care programs from untrustworthy individuals. *See, e.g.*, *Awada*, DAB No. 2788 at 5. The conduct for which Dr. Wilson was convicted and the restitution and incarceration to which he was sentenced demonstrate that he presents significant risks to the integrity of health care programs, justifying a lengthy exclusion. *See Cash*, DAB No. 1725; *see also Awada*, DAB No. 2788. Dr. Wilson's fraud resulted in financial losses to Medicare and the North Carolina Medicaid program that, taken together, greatly exceed the minimum required for aggravation. His illegal conduct persisted for more than three years, which similarly is significantly greater than the minimum period required to establish the aggravating factor. Finally, Dr. Wilson was sentenced to a substantial period of incarceration. These aggravating factors demonstrate that Dr. Wilson manifests a high degree of untrustworthiness. No mitigating factors offset these aggravating factors.

The I.G. excluded Dr. Wilson for ten years, which is twice as long as the minimum exclusion required by law. Since two of the aggravating factors exceed the threshold for aggravation by far more than twice over, I cannot conclude that the exclusion imposed by the I.G. is excessive. I therefore find that a ten-year exclusion falls within a reasonable range.

IV. Conclusion

For the reasons explained above, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid and all federal health care programs, and I sustain as reasonable the ten-year period of exclusion.

/s/
Leslie A. Weyn
Administrative Law Judge