Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Lilia Gorovits, M.D.,
(OI File No. 3-06-40317-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-70

Decision No. CR4825

Date: April 11, 2017

DECISION

The Inspector General (I.G.) of the United States Department of Health and Human Services excluded Lilia Gorovits, M.D. (Dr. Gorovits or Petitioner) from participating in Medicare, Medicaid, and all other federal health care programs for a period of two years based on her criminal conviction of an offense in connection with the interference with or obstruction of any investigation into a criminal offense as described in section 1128(a) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)). Petitioner sought review of the duration of the exclusion. For the reasons stated below, I affirm the I.G.'s exclusion determination.

I. Background and Procedural History

By letter dated September 30, 2016, the I.G. notified Dr. Gorovits that she was being excluded, effective 20 days from the date of the letter, from participation in Medicare, Medicaid, and all federal health care programs under section 1128(b)(2) of the Act (42 U.S.C. § 1320a-7(b)(2)) for a period of two years. The I.G. stated that he was taking this action based on Dr. Gorovits's conviction in the United States District Court for the

Eastern District of Pennsylvania (federal court) of a criminal offense in connection with the interference with or obstruction of any investigation into a criminal offense as described in section 1128(a) or 1128(b) of the Act. I.G. Exhibit (Ex.) 1.

On October 28, 2016, Petitioner timely requested a hearing before an administrative law judge. In her request for hearing, Petitioner asserted that the two-year period of exclusion is unreasonable because of her "substantial and active cooperation with the Federal government" and asked for a reduction in the length of her exclusion.

On November 17, 2016, I held a pre-hearing telephone conference, the substance of which is summarized in my November 18, 2016 Order and Schedule for Filing Briefs and Documentary Evidence (Order). *See* 42 C.F.R. § 1005.8. Among other things, I directed the parties to file short-form briefs. Order ¶ 7.b. In accordance with the Order, the I.G. filed a brief (I.G. Br.) and five exhibits (I.G. Exs. 1-5). Petitioner filed a brief (P. Br.) and one exhibit (P. Ex. 1). The I.G. filed a reply brief (I.G. Reply).

The parties agree that this case does not require an in-person hearing. I.G. Br. at 8; P. Br. at 10.

II. Issues

The issues I must address are whether the I.G. had a basis for excluding Petitioner and whether the length of the exclusion is unreasonable. Act § 1128(b)(2), (c)(3)(D) (42 U.S.C. § 1320a-7(b)(2), (c)(3)(D)); 42 C.F.R. § 1001.2007(a)(1).

III. Jurisdiction

I have jurisdiction to adjudicate this case. Act § 1128(f)(1) (42 U.S.C. § 1320a-7(f)(1)); 42 C.F.R. § 1005.2.

IV. Findings of Fact, Conclusions of Law, and Analysis

My findings of fact and conclusions of law are set forth in italics and bold font.

Neither party objected to any of the proposed exhibits; therefore, I admit them all into the record. 42 C.F.R. § 1005.8(c); Order ¶ 8; Civil Remedies Division Procedures § 14(e).

A. The I.G. had a basis to exclude Petitioner under section 1128(b)(2) of the Act (42 U.S.C. § 1320a-7(b)(2)) due to her March 11, 2016 conviction in federal court for obstructing a criminal investigation of health care offenses in violation of 18 U.S.C. § 1518.

The I.G. excluded Dr. Gorovits based on section 1128(b)(2) of the Act (42 U.S.C. § 1320a-7(b)(2)). I.G. Ex. 1. The statute authorizes the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of "[a]ny individual or entity convicted, under Federal or State law, in connection with the interference with or obstruction of any investigation into any criminal offense described in [section 1128(b)(1) or section 1128(a) of the Act]." The terms of section 1128(b)(2) are restated in similar regulatory language at 42 C.F.R. § 1001.301(a). The Act provides, in pertinent part, that an individual is convicted "when a judgment of conviction has been entered against the individual . . . by a Federal, State, or local court" or "when a plea of guilty . . . by the individual . . . has been accepted by a Federal, State, or local court." Act § 1128(i) (42 U.S.C. § 1320a-7(i)); *see also* 42 C.F.R. § 1001.2. Criminal offenses described in section 1128(a) of the Act include those related to the delivery of an item or service under the Medicare or Medicaid programs. Act § 1128(a)(1) (42 U.S.C. 1320a-7(a)(1)).

A criminal information filed in federal court on December 23, 2014, charged Petitioner with obstructing an investigation into her alleged violations of the federal anti-kickback statute, codified at 42 U.S.C. § 1320a-7b(b). I.G. Ex. 2. The information charged that Petitioner obstructed the investigation by falsely stating to federal investigators that she was not offered and did not receive money in exchange for the referral of Medicare and Medicaid beneficiaries for hospice services. I.G. Ex. 2 at 3-4. On March 11, 2016, Petitioner pled guilty to one count of obstruction of criminal investigations of health care offenses in violation of 18 U.S.C. § 1518. I.G. Ex. 5 at 1. The court accepted Petitioner's guilty plea, adjudged her guilty, and sentenced her to, among other things, three years of probation, including a ten-month period of home confinement. I.G. Ex. 5 at 1-3. Petitioner therefore was convicted, under federal law, in connection with the interference with or obstruction of an investigation into a criminal offense described in section 1128(a) of the Act.[1] Act § 1128(b)(2), (i) (42 U.S.C. § 1320a-7(b)(2), (i)). I conclude, based on these facts and Petitioner's admission in her brief (P. Br. at 2), that the I.G. had a basis to exclude Petitioner under section 1128(b)(2) of the Act.

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[1] Offering or receiving kickbacks in exchange for referrals of Medicare or Medicaid beneficiaries is a criminal offense related to the delivery of an item or service under a federal health care program within the meaning of section 1128(a) of the Act. *See, e.g.*, *Young Okoro Anyanwu*, DAB CR3269 at 5 (2014).

B. One aggravating factor and one mitigating factor are present in this case.

Section 1128(c)(3)(D) of the Act (42 U.S.C. § 1320a-7(c)(3)(D)) provides that an exclusion under section 1128(b)(2) of the Act "shall be 3 years, unless the Secretary [of Health and Human Services] determines in accordance with published regulations that a shorter period is appropriate because of mitigating circumstances or that a longer period is appropriate because of aggravating circumstances." The regulation governing exclusions under section 1128(b)(2) of the Act restates this in substantially similar language and provides that the benchmark three-year term may be lengthened or shortened if there are aggravating or mitigating factors present. 42 C.F.R. § 1001.301(b)(1), (2), and (3).

1. Petitioner's sentence included incarceration.

As relevant here, one of the applicable aggravating factors is established when "[t]he sentence imposed by the court included incarceration." 42 C.F.R. § 1001.301(b)(2)(iv). The regulation defines "Incarceration" as "imprisonment or any type of confinement with or without supervised release, including . . . community confinement, house arrest and home detention." 42 C.F.R. § 1001.2. After accepting Petitioner's guilty plea and adjudging her guilty of one count of obstruction of criminal investigations of health care offenses in violation of 18 U.S.C. § 1518, the federal court sentenced Petitioner to, among other things, ten months of home confinement. I.G. Ex. 5 at 1, 3. Home confinement falls under the regulatory definition of "incarceration," 42 C.F.R. § 1001.2; *see also David K. Rosenthal, M.D.*, DAB CR1119 (2003) ("Even home confinement constitutes 'incarceration' within the plain meaning of the regulation."). Additionally, home confinement was part of the sentence imposed on Petitioner by the court. Therefore, the aggravating factor found at 42 C.F.R. § 1001.301(b)(2)(iv) is present here.

2. Petitioner cooperated with federal officials.

One of the applicable mitigating factors may be established when:

> (ii) The individual's . . . cooperation with Federal or State officials resulted in—
>
> > (A) Others being convicted or excluded from Medicare, Medicaid and all other Federal health care programs,
> >
> > (B) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or

> (C) The imposition of a civil money penalty against others . . . .

42 C.F.R. § 1001.301(b)(3)(ii).

According to the government's motion for a sentencing departure in Petitioner's criminal case, Petitioner provided the government "substantial assistance in the investigation and prosecution of others," and this assistance "has been used by the government to obtain civil recoveries of fraudulent payments made by Medicare and Medicaid . . . ." I.G. Ex. 3 at 1, 3. Petitioner thus cooperated with government officials, and her cooperation led to the government investigating additional cases of fraud against Medicare and Medicaid. Therefore, the mitigating factor found at 42 C.F.R. § 1001.301(b)(3)(ii) is established here.

The parties agree that the aggravating factor found at 42 C.F.R. § 1001.301(b)(2)(iv) and the mitigating factor found at 42 C.F.R. § 1001.301(b)(3)(ii) are present in this case. I.G. Br. at 5-6; P. Br. at 2, 4-5. The source of the parties' disagreement is the weight to be accorded these factors in determining the appropriate length of Petitioner's exclusion. In the following section, I explain why I sustain the I.G.'s imposition of a two-year exclusion.

C. A two-year exclusion is not unreasonable.

Although my review of the length of Petitioner's exclusion is *de novo*, I may not "substitute [my] judgment for that of the I.G. or . . . determine what period might be 'better.'" *Robert Kolbusz, M.D.*, DAB No. 2759 at 5 (2017) (citing *inter alia*, *Craig Richard Wilder*, DAB No. 2416 at 8 (2011)). Rather, I consider only "whether the period of exclusion imposed by the I.G. was within a reasonable range . . . ." *Wilder*, DAB No. 2416 at 8; *see also* 57 Fed. Reg. 3298, 3321 (Jan. 29, 1992). In conducting my review, I "weigh the aggravating and mitigating factors" and "evaluate the quality of the circumstances surrounding th[o]se factors." *Vinod Chandrashekhar Patwardhan, M.D.*, DAB No. 2454 at 6 (2012).

Petitioner contends that a proper weighing of the factors reveals that a two-year period of exclusion is unreasonable. P. Br. at 2-10. By contrast, the I.G. argues that the two-year period of exclusion is not unreasonable because it falls within a reasonable range and is consistent with past decisions from appellate panels of the Departmental Appeals Board (DAB) and other administrative law judges. I.G. Br. at 6-8; I.G. Reply at 2-5. After reviewing the record; applicable statutes, regulations, and prior decisions; and the parties' arguments, I am unable to conclude that a two-year period of exclusion does not fall within a reasonable range.

Because Petitioner's sentence included incarceration (home confinement), an aggravating factor under the regulations, the I.G. was authorized to impose an exclusion longer than the three-year benchmark pursuant to 42 C.F.R. § 1001.2007(b)(2)(iv). Petitioner contends that because the I.G. imposed a below-benchmark period of exclusion, he did not consider the aggravating factor of incarceration in setting the length of her exclusion and cannot rely on it now. P. Br. at 4. I find this argument unpersuasive.

The I.G.'s letter notifying Petitioner of her exclusion explicitly states that the I.G.'s "records contain evidence of the following aggravating circumstances: 1. The sentence imposed by the court included incarceration. The court sentenced you to 10 months Home Confinement with electronic monitoring." I.G. Ex. 1 at 1. Thus, as a factual matter, the I.G. clearly did consider Petitioner's sentence to home confinement in setting the length of her exclusion. Furthermore, as a legal matter, Petitioner cites no authority for the proposition that when the I.G. imposes a below-benchmark exclusion, he may not consider aggravating factors.[2] To the contrary, my reading of the Act and regulations satisfies me that the I.G. is authorized to impose an exclusion of less than three years, even where he has found that an aggravating factor exists.

The sections of the Act and regulation applicable here only explicitly state that aggravating factors form an appropriate basis for imposing a longer exclusion and that mitigating factors justify a shorter exclusion. Nothing in their language prevents the I.G. from considering both aggravating and mitigating factors in the same case. *See* Act § 1128(c)(3)(D) (42 U.S.C. § 1320a-7(c)(3)(D)); 42 C.F.R. § 1001.301(b). Indeed, the preamble to the rule implementing the I.G.'s exclusion authority under section 1128 of the Act explicitly contemplates that both aggravating and mitigating factors will be considered in setting the length of an exclusion in any given exclusion case. 57 Fed. Reg. 3298, 3314-15 (January 29, 1992) ("For example, in one case many aggravating factors may exist, but the subject's cooperation with the OIG may be so significant that it is appropriate to give the one mitigating factor more weight than all of the aggravating. Similarly, many mitigating factors may exist in a case, but the acts could have had such a significant physical impact on program beneficiaries that the existence of that one

[2] While her brief is not entirely clear on this point, Petitioner may be arguing that, pursuant to section 1128(c)(3)(D) of the Act (42 U.S.C. § 1320a-7(c)(3)(D)), aggravating factors are *only* relevant if the I.G. imposes an exclusion longer than three years. *See* P. Br. at 2-4. If that is Petitioner's position, I disagree. As noted above, section 1128(c)(3)(D) provides that an exclusion under section 1128(b)(2) of the Act (42 U.S.C. § 1320a-7(b)(2)) shall be for three years, "unless the Secretary determines in accordance with published regulations that a shorter period is appropriate because of mitigating circumstances or that a longer period is appropriate because of aggravating circumstances." Nothing in this language suggests that any aggravating factors present in a case become irrelevant simply because the I.G. decides to impose an exclusion of less than three years based on one or more mitigating circumstances.

aggravating factor must be given more weight than all of the mitigating."). Thus, as a legal matter, the I.G. was permitted to consider both the aggravating factor of incarceration and the mitigating factor of cooperation in setting the length of Petitioner's exclusion. I conclude, therefore, that the I.G. may rely on the aggravating factor of incarceration to support his argument that the length of Petitioner's exclusion is not unreasonable.

In any event, even assuming *arguendo* that the I.G. did not initially consider Petitioner's home confinement in setting the length of her exclusion, Petitioner does not explain why that should preclude my *de novo* review of whether the aggravating factor of incarceration is established in this case. I would therefore consider the fact that Petitioner was sentenced to ten months of home confinement as an aggravating factor in this case even if the I.G. did not consider it in initially setting the length of Petitioner's exclusion.

Petitioner argues that, if I consider the aggravating factor of her incarceration (as defined in 42 C.F.R. § 1001.2) at all, I should accord it minimal weight. P. Br. at 10. She notes that although she could have been sentenced to a 15-21 month period of imprisonment for her conviction for obstruction of justice,[3] the court sentenced her to only ten months of home confinement. P. Br. at 7-8. According to Petitioner, the fact that she was sentenced to home confinement rather than imprisonment proves that she is not untrustworthy. P. Br. 8-10. In my view, Petitioner's sentence to home confinement reflects the court's judgment that she was not so untrustworthy that she must be confined in a penal institution. However, Petitioner pled guilty to obstructing a federal criminal investigation by lying to federal investigators. That offense, by its nature, is a crime of dishonesty. Despite Petitioner's cooperation with the government, the federal court still sentenced her to a period of home confinement for that crime. The reduced sentence does indicate that her cooperation rehabilitated her trustworthiness in the court's eyes somewhat, but not sufficiently to merit no incarceration. I concur in that assessment and find that Petitioner's sentence of home confinement establishes that she is at least somewhat untrustworthy notwithstanding her cooperation, and I reject Petitioner's contention that I should accord that factor minimal weight.

Petitioner next contends that her cooperation with federal authorities was substantial and justifies a greater-than-one-year reduction in the length of her exclusion. She points to the prosecution's motion for a sentencing departure, which details her cooperation with the government and states that she provided "substantial assistance in the investigation

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[3] *See* P. Ex. 1 (attachment to P. Br.). I note that the excerpt of the sentencing guidelines proffered by Petitioner was effective in November 2016, which is after the date of Petitioner's conviction and sentencing. Nevertheless, the substance of the guidance remained unchanged from that in effect when Petitioner was sentenced. *See* United States Sentencing Commission, *Guidelines Manual*, § 3E1.1 at 233-34, 404 (Nov. 2015).

and prosecution of others," as evidence that her cooperation was substantial. P. Br. at 5-8; I.G. Ex. 3 at 1. Petitioner also relies on the fact that the federal court reduced her sentence from a possible 15-21 months of incarceration to ten months of home confinement, which she characterizes as a "substantial reduction of [her] sentence." P. Br. at 8.

The I.G. does not explicitly contest Petitioner's characterization of her cooperation as "substantial," and I agree that it was substantial. The fact that the court imposed a reduced sentence, combined with the prosecution's description of Petitioner's cooperation, establishes that her cooperation was substantial. Yet, even though I accept that Petitioner's cooperation was substantial, I am not convinced that a two-year period of exclusion is outside a reasonable range. I find that reducing the period of Petitioner's exclusion to two years from the three-year statutory benchmark (a 33% reduction) reasonably reflects the value of Petitioner's cooperation.

Furthermore, had she not cooperated, Petitioner likely would have been subject to an exclusion period greater than three years because of the presence of the aggravating factor of her home confinement. I am unable to speculate how long Petitioner may have been excluded in the absence of her cooperation. Thus, I am unable to quantify precisely how much Petitioner's exclusion was reduced based on her cooperation in this case. Nonetheless, it is certainly possible that the reduction was greater than one year (for example, if the I.G. increased Petitioner's exclusion from three to four years based on the aggravating factor of incarceration, her cooperation would have resulted in a reduction of two years – or 50%).

In sum, Petitioner's arguments do not persuade me that the two-year period of exclusion imposed by the I.G. is not within a reasonable range. To the contrary, in light of my foregoing analysis, I conclude that a two-year period of exclusion falls within a reasonable range and is thus not unreasonable.

V. Conclusion

For the reasons stated above, I affirm the I.G.'s determination to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for a period of two years as permitted by section 1128(b)(2) and (c)(3)(D) of the Act (42 U.S.C. § 1320a-7(b)(2) and (c)(3)(D)) and 42 C.F.R. § 1001.301.

/s/

Leslie A. Weyn
Administrative Law Judge