Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Akube Wuromoni Ndoromo a.k.a.
Akiuber Ndoromo James, (#28507-016),

Petitioner,

v.

The Inspector General.

Docket No. C-09-540

Decision No. CR2092

Date: March 16, 2010

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Akube Wuromoni Ndoromo, a.k.a. Akiuber Ndoromom James, from participating in Medicare, Medicaid, and other federally funded health care programs for a period of 25 years.

I. Background

On May 29, 2009 the I.G. notified Petitioner that he had determined to exclude him from participation in Medicare, Medicaid, and other federally funded health care programs for a period of 25 years because he had been convicted of a criminal offense as is described at section 1128(a)(1) of the Social Security Act (Act). The I.G. informed Petitioner that the length of the exclusion, 25 years, was based on evidence relating to three aggravating circumstances: the acts resulting in his conviction caused a financial loss to a government program of more than $5000; the acts were committed over a period of one year or more; and the sentence imposed by the court included incarceration. I.G. Ex. 1.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. Neither party requested that I convene an in-person hearing to receive testimony. Each party filed a brief. The I.G. filed six proposed exhibits which he identified as I.G. Ex. 1 – I.G. Ex. 6. Petitioner did not file any proposed exhibits. The I.G. filed a reply brief.

II. Issue, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. Exclusion of Petitioner is mandated by section 1128(a)(1) of the Act; and

2. An exclusion of 25 years is reasonable.

B. Findings of fact and conclusions of law

1. *Petitioner's exclusion is mandated by section 1128(a)(1) of the Act because Petitioner was convicted of a criminal offenses related to the delivery of items or services under the District of Columbia Medicaid program.*

Section 1128(a)(1) of the Act mandates that the I.G. exclude any individual who is convicted of a criminal offense related to the delivery of an item or service under Medicare or a State health care program. In this case Petitioner's exclusion is mandated by the fact that he was convicted of a criminal offenses related to the delivery of items or services by the United States District Court for the District of Columbia.

An Indictment was filed in the United States District Court for the District of Columbia against Petitioner on January 25, 2006. I.G. Ex. 3. A Superseding Indictment was filed in the United States District Court for the District of Columbia on February 1, 2006, charging Petitioner with: count one, Health Care Fraud, in violation of 18 U.S.C. § 1347; counts two through five, Wire Fraud, in violation of 18 U.S.C. § 1343;[1] counts six through 18, False Statements Regarding Health Care Matters, in violation of 18 U.S.C. § 1035(a)(2);[2] and counts 19 through 26, Money Laundering, in violation of 18 U.S.C. § 1957. *Id.*

[1] Petitioner was not convicted of these offenses since the four counts of Wire fraud were not presented to the jury.

[2] Counts seventeen and eighteen were also not presented to the jury, so Petitioner was not convicted of these two counts.

The Superseding Indictment describes Petitioner's underlying crime. Petitioner was president, Chief Executive Officer and owner of Voice of Social Concern, Inc. (VSCA), a business incorporated in the District of Columbia. I.G. Ex. 4. Petitioner was also residing at VSCA's business address. VSCA was a Medicaid transportation provider since January 10, 2001 and became a transportation provider under the Medicaid program for Mentally Retarded and Developmentally Disabled individuals on or about July 2002. Petitioner signed the Medicaid Transportation Applications as President and Chief Executive Officer of VSCA. Between January 2002 and continuing through December 2004 Petitioner individually and through VSCA defrauded Medicaid by preparing and submitting false claims to Medicaid that included services that were not provided for: Medicaid beneficiaries who were deceased, Medicaid beneficiaries who had never used VSCA's services; Medicaid beneficiaries who had discontinued VSCA's services; and Medicaid beneficiaries who had used VSCA's services but through false claims had inflated the services provided. I.G. Ex. 4. VSCA also submitted false claims for services where VSCA was not the authorized transportation provider for certain Medicaid beneficiaries and when the transportation services were not authorized because the Medicaid beneficiary was not in need of transportation services or the destination was not one for which transportation was authorized by Medicaid. *Id*. Further, Petitioner solicited or caused others to solicit Medicaid beneficiaries whether or not they were in need of transportation services in order to obtain their Medicaid numbers so that these Medicaid numbers could be used to submit fraudulent claims. *Id.*

A jury found Petitioner guilty on counts one, six through 16, and 19 through 26 on March 30, 2007. I.G. Ex. 5. A judgment of conviction and sentence was entered against Petitioner on November 14, 2008. I.G. Ex. 6. Petitioner was sentenced to: 57 months of incarceration; 36 months of supervised release; pay an assessment fee of $2000; and pay restitution to CMS's Division of Accounting of $1,299,768.89 and to the DC Department of Health of $557,043.81, totaling $1,856,812.70. I.G. Ex. 6.

The indictment is clear as to the nature of the crime to which Petitioner was found guilty. It explicitly provides that in relation to the health care fraud charge:

> Between in or about January 2002 and continuing through in or about December 2004, in the District of Columbia and elsewhere, the defendants [Petitioner and VSCA, Inc.] knowingly and willfully devised and executed a scheme and artifice to defraud a health care benefit program, namely Medicaid, and to obtain from Medicaid, money under the custody and control of Medicaid, by fraudulent pretenses, representations, and promises, namely false claims, in connection with the delivery of, and payment for, health care benefits, items, and services.

I.G. Ex. 4, at 8.

Further, the indictment explicitly provides in relation to the making of false statements relating to health care matters that:

> [Defendants] in a matter involving a health care benefit program, knowingly and willfully made material false, fictitious, and fraudulent statements and representations and made and used materially false writings and documents knowing the same to contain materially false, fictitious, and fraudulent statements and entries in connection with the delivery of and payment for health care benefits, items, and services . . . .

Id. at 10.

In addition, the indictment explicitly provides in relation to money laundering that:

> [Defendants] knowingly engaged and attempted to engage in the monetary transactions . . . by, through, and to a financial institution, affecting interstate commerce, in a criminally derived property . . . such property having been derived from a specified unlawful activity, that is health care fraud and wire fraud.

Id. at 12.

The crimes of health care fraud and false statements relating to health care matters, clearly meets the criteria of section 1128(a)(1). It is well-established that theft from the Medicaid program by falsely claiming reimbursement for items or services that were not provided as claimed constitutes a crime related to the delivery of a healthcare item or service. Making false statement relating to health care matters and money laundering of funds derived from health care fraud also constitute crimes related to the delivery of a health care item or service. *Aroostock E.N.T. Clinic, P.A.,* DAB CR1691 (2007); *Jeffrey Jerome Thigpen*, DAB CR1158 (2004); *Bruno Real Choiniere*, DAB CR1653 (2007); *Pura Ester Medina*, DAB CR1526 (2007).

Petitioner challenges the integrity, validity and the facts and circumstances of his underlying conviction. However, collateral attacks on Petitioner's underlying conviction, on either substantive or procedural grounds, are not reviewable in this forum. 42 C.F.R. § 1001.2007(d); *see also Mohammad A. Adas, M.D.* DAB CR1202 (2004). In addition, Petitioner raises constitutional challenges to his underlying conviction. I cannot address these issues as they are not within my jurisdiction.

Further, Petitioner challenges whether the acts that resulted in his conviction caused or intended to cause a financial loss to the government of $5000 because "the health care fraud as Count 1, has no amount in it." P. Response at 2. I address this argument below.

2. *An exclusion of 25-years is reasonable.*

The purpose of imposing an exclusion is remedial. The purpose of the Act is to protect federally funded health care programs and their beneficiaries and recipients from individuals and entities who are untrustworthy.

As a matter of law, an individual must be excluded for a minimum of five years if he or she is convicted of a crime for which section 1128(a)(1) mandates exclusion. Act, section 1128(c)(3)(B). The I.G. is authorized to exclude an individual beyond the minimum five year period where the evidence shows that individual to be so untrustworthy as to necessitate a longer exclusion. When the I.G. excludes an individual for more than five years that raises the issue of whether his determination is reasonable.

Regulations governing the imposition of exclusions define certain aggravating and mitigating factors to consider when evaluating the reasonableness of the length of exclusions. 42 C.F.R. § 1001.102(b), (c). Evidence of aggravating factors may justify imposing an exclusion longer than the five-year minimum. Evidence of mitigating factors may justify reducing the length of an exclusion but never below the five-year minimum.

The regulatory aggravating and mitigating factors establish what evidence is relevant to the length of exclusion. However, the regulations do not dictate how to weigh that evidence when deciding whether the length of an exclusion is reasonable.

Here, evidence relating to three aggravating factors strongly supports the I.G.'s determination to exclude Petitioner for 25 years. Petitioner did not submit any evidence or written argument relative to mitigating factors that I can consider. First, the evidence proves that Petitioner was convicted of a crime that caused a financial loss of $5000 or more to the Medicare program. 42 C.F.R. § 1001.102(b)(1). Petitioner was ordered to pay restitution to CMS's Division of Accounting of $1,299,768.89 and to the DC Department of Health of $557,043.81, totaling $1,856,812.70. I.G. Ex. 6. This amount far exceeds a financial loss to the program of more than $5000.

Second, Petitioner's crimes extended over a period of more than a year. 42 C.F.R. § 1001.102(b)(2). The indictment charges Petitioner with crimes that extended for a period of nearly three years from January 2002 through December 2004. I.G. Ex. 4.

Third, Petitioner's sentence included incarceration. 42 C.F.R. § 1001.102(b)(5). Petitioner was sentenced to 57 months of incarceration. I.G. Ex. 6.

Petitioner mistakenly argues that aggravating factors include "if there is [sic] injuries involve [sic], or if it results to [sic] death." P. Response at 2. The evidence as to aggravating factors is sufficient to support an exclusion of 25 years in this case because it

establishes Petitioner to be manifestly untrustworthy. Regardless of whether anyone was injured or died or whether Petitioner made restitution after he was caught, he engaged in a systematic large scale scheme to steal program monies over a lengthy period of time. The persistence and scale with which Petitioner conspired to defraud the Medicaid program establishes a pattern of criminal activity. The regulations specifically outline what factors may be considered mitigating, and none of Petitioner's arguments falls within that definition.[3] *See* 42 C.F.R. § 1001.102(c).

III. Conclusion

Based on my review of all of the evidence and argument advanced in this case, I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Akube Wuromoni Ndoromo, a.k.a. Akiuber Ndoromom James, from participating in Medicare, Medicaid, and other federally funded health care programs for a period of 25 years.

/s/
Alfonso J. Montaño
Administrative Law Judge

[3] The only factors that may be considered mitigating are: the individual was convicted of three or fewer misdemeanors and the entire financial loss to a federally funded health care program was less than $1500; the record in the criminal proceeding, including sentencing documents, demonstrates that the individual had a mental, emotional, or physical condition before or during the commission of the offense that reduced his culpability; or the individual's cooperation with federal or state officials resulted in others being convicted or excluded from Medicare or Medicaid, additional cases being investigated or reports identifying program weaknesses, or the imposition of a civil money penalty or assessment against anyone. 42 C.F.R. § 1001.102(c).