Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Eugene Bolognese, D.C.,

Petitioner

v.

The Inspector General.

Docket No. C-10-223

Decision No. CR2130

Date: May 14, 2010

DECISION

In this case, the parties agree that Eugene Bolognese, D.C., was convicted of health care fraud and that he is therefore subject to a minimum five-year exclusion from participation in federal health care programs under § 1128(a)(3) of the Social Security Act (Act). They dispute the length of his exclusion. The Inspector General (I.G.) proposes a 15-year exclusion, and Petitioner argues that any exclusion in excess of five years is unreasonable.

For the reasons set forth below, I find that the imposition of a 15-year exclusion is reasonable.

I. Background

By letter dated September 30, 2009, the I.G. notified Petitioner that, because he had been convicted of a felony criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item of service, he was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 15 years. The letter explained that section 1128(a)(3) of the Act authorizes the exclusion.

Petitioner concedes that he was convicted and is subject to exclusion under section 1128(a)(3). P. Br. at 2.

Both parties have submitted written arguments (I.G. Br.; P. Br.) and exhibits. The I.G. has submitted 2 exhibits. (I.G. Exs. 1-2). Petitioner has submitted 8 exhibits (P. Exs. 1-8). The I.G. also submitted a reply brief (I.G. Reply).

Petitioner contends that an in-person hearing is necessary. However, as the following discussion establishes, the factual issues he seeks to address at an in-person hearing were resolved by the criminal proceeding, and he may not here collaterally attack that court's rulings. An in-person hearing is therefore not necessary – indeed, it would serve no purpose. *See* Order and Schedule for Filing Briefs and Documentary Evidence at 2 (January 27, 2010). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Livingston Care Ctr. v. U.S. Dep't of Health and Human Servs.*, 388 F. 3d 168, 173 (6th Cir. 2004) (hearing unnecessary because case turns on a question of law and presents no genuine dispute as to any material fact).

II. Issue

Because the parties agree that the I.G. has a basis upon which to exclude Petitioner from program participation, the sole issue before me is whether the length of the exclusion (15 years) is reasonable. 42 C.F.R. § 1001.2007.

III. Discussion

Section 1128(a)(3) of the Act requires that an individual or entity convicted of felony fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service must be excluded from participation in federal health care programs for a minimum of five years. *See* 42 C.F.R. § 1001.101(c).

The facts here are not in dispute. Petitioner was a chiropractor licensed to practice in the State of Connecticut. He owned and operated his own practice, which, at times, employed two physicians. I.G. Ex. 2, at 9. On January 22, 2009, he pled guilty to one count of felony health care fraud, in violation of 18 U.S.C. § 1347(1). I.G. Ex. 2.[1] Petitioner admitted that he knowingly and willfully executed a scheme and artifice to defraud Anthem Blue Cross/Blue Shield of Connecticut (Anthem BC/BS), a private health insurance company. He submitted claims to the insurer under the names of the

[1] In entering his plea, Petitioner was well-aware that his plea could lead to an exclusion from program participation, since his plea agreement spells that out. I.G. Ex. 2, at 6 ("[A]s a result of his conviction, the defendant may be excluded from participation as a provider in the Medicare and Medicaid programs.").

physicians he employed, even though those physicians did not provide the billed-for services. I.G. Exs. 1, 2. In this way: he obtained payment for services not rendered; he evaded caps on reimbursement for claims submitted by chiropractors; and the insurer reimbursed him at a higher rate than authorized for chiropractic services. I.G. Ex. 2, at 9. The parties agree that Petitioner is therefore subject to exclusion under section 1128(a)(3).

A. Based on the aggravating factors present in this case, the 15-year exclusion falls within a reasonable range.[2]

An exclusion under section 1128(a)(3) 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 regulation may not be used to decide whether an exclusion of a particular length is reasonable.

Among the factors that may serve as bases for lengthening the period of exclusion are three that the I.G. relies on in this case: 1) the acts resulting in the conviction, or similar acts, resulted in a financial loss to Medicare and state health care programs 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; and 3) the sentence imposed by the court included incarceration. 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.

Here, Petitioner agrees that these factors are present but argues that they do not justify an exclusion of more than five years, because "evidence as to his intent is weak, despite the plea." P. Br. at 3. I discuss below why Petitioner's argument does not satisfy regulatory requirements for mitigation. However, as a threshold matter, I note that federal regulations explicitly preclude any collateral attack on Petitioner's conviction.

> When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it, either on substantive or procedural grounds, in this appeal.

[2] My findings of fact and conclusions of law are set forth, in italics and bold, in the discussion captions of this opinion.

42 C.F.R. § 1001.2007(d); *Travers v. Sullivan*, 801 F. Supp. 394 (E.D. Wash. 1992) (finding petitioner may not collaterally attack the facts underlying his criminal conviction); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Chander Kachoria, R.Ph.*, DAB No. 1380, at 8 (1993) ("There is no reason to 'unnecessarily encumber the exclusion process' with efforts to reexamine the fairness of state convictions."); *Young Moon, M.D.*, DAB CR1572 (2007).

Program financial loss. Based on an audit he commissioned, Petitioner now claims that Anthem BC/BS lost only $169,034.30 as a result of his fraudulent billing practices. P. Ex. 1, at 4. Even if I were to accept this amount, it is substantially greater (more than 33 times greater) than the $5,000 threshold for aggravation and would be sufficient to justify a marked increase in his period of exclusion.

However, I may not accept this amount, since, as part of his plea agreement, Petitioner explicitly admitted that "the amount of the loss caused by [his] criminal scheme is $573,036." I.G. Ex. 2, at 9. The criminal court accepted his agreement and ordered him to pay that amount in restitution. I.G. Ex. 2, at 2. Restitution has long been considered a reasonable measure of program losses. *See Jason Hollady, M.D.*, DAB No. 1855 (2002). The program loss was thus adjudicated by the criminal court, and I am bound to accept the court's findings.

Length of criminal conduct. Petitioner is now claiming that the period of his improper billing "barely exceeds the one-year minimum period for establishing an aggravating factor based on duration." P. Br. at 4. Even if accepted, the one-year duration would justify an increase in the period of exclusion. But, again, the court proceedings established a longer period of illegal billing. As part of his plea agreement, Petitioner admitted that his scheme to defraud began on or about August 5, 2005, and continued until on or about December 12, 2007. I.G. Ex. 2, at 9.

Incarceration. Finally, the sentence imposed by the criminal court included a period of incarceration. Petitioner agrees that he was sentenced to six weeks incarceration followed by a 3-month stay in a residential "re-entry center." P. Ex. 1, at 5 (Bolognese Decl. ¶ 13). Petitioner characterizes the term of incarceration as "lenient," apparently suggesting that its relatively short length justifies a shorter period of exclusion. P. Br. at 4. But the fact of his incarceration for *any* period of time justifies increasing the length of his exclusion. *See Jason Hollady, M.D.*, DAB No. 1855, at 9-10 (finding irrelevant to the issue of whether petitioner's sentence included incarceration the fact that petitioner was put on a work release program a few days after the beginning of petitioner's sentence).

B. No mitigating factors justify decreasing the period of exclusion.

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) (emphasis added). Characterizing the mitigating factor as "in the nature of an affirmative defense," the Departmental Appeals 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 cooperation with government officials.

However, Petitioner alludes to a "psychological impairment of judgment" and offers an August 2008 letter (although no written declaration) from psychologist Richard B. Blum, Ph.D., to Petitioner's criminal attorney. P. Ex. 5. Dr. Blum opines that Petitioner's difficult childhood made him overly trusting. According to Dr. Blum, Petitioner's trusting nature plus the complicated billing procedures endemic to contemporary medical practice caused Petitioner's difficulties. Thus, Dr. Blum's opinion suggests that Petitioner was more victim than perpetrator of the fraudulent scheme.

But to establish a mitigating factor under 42 C.F.R. § 1001.102(c)(2), Petitioner must show that the criminal court *specifically determined* "that a mental, emotional, or physical condition reduced culpability for the crime." *Joseph M. Ruske, Jr., R.Ph.*, DAB No. 1851 (2002) (*citing Frank R. Pennington, M.D.*, DAB No. 1786 (2001)). Petitioner points to no portion of the criminal court record suggesting that the court accepted Dr. Blum's opinion or considered that Petitioner's trusting nature made him less responsible for his crime. In fact, the opposite is true. In accepting the plea agreement, the court found that Petitioner acted "knowingly and willfully." I.G. Ex. 2, at 1.

IV. Conclusion

The I.G. has the authority to impose exclusions for convictions relating to health care fraud. 42 C.F.R. § 1001.201(a). So long as the period of exclusion is within a reasonable range based on demonstrated criteria, I have no authority to change it. *Joann Fletcher Cash*, DAB No. 1725, at 7 (*citing* 57 Fed. Reg. 3298, 3321 (1992)). In this case, Petitioner's crime demonstrates that he presents a significant risk to the integrity of health care programs. The financial loss he caused greatly exceeds the regulatory threshold for

aggravation. His crime continued for more than two years and was serious enough to merit incarceration. I find that these aggravating factors, which are not offset by any mitigating factor, more than justify a 15-year exclusion. Therefore, the I.G. properly excluded Petitioner from participation in Medicare, Medicaid, and all federal health care programs, and I sustain as reasonable the 15-year exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge