Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

John G. Cavalli, D.P.M.
(OI File No. 2-02-40-482-9),

Petitioner,

v.

The Inspector General.

Docket No. C-10-314

Decision No. CR2217

Date: August 13, 2010

DECISION

In this case, the parties agree that John G. Cavalli, D.P.M., was convicted of health care fraud related to the delivery of items or services under the Medicare program and that he is therefore subject to a minimum five-year exclusion from participation in federal health care programs under sections 1128(a)(1) and 1128(a)(3) of the Social Security Act (Act). They dispute the length of his exclusion. The Inspector General (I.G.) proposes a 10-year exclusion, and Petitioner argues that any exclusion in excess of five years is unreasonable.

For the reasons set forth below, I find that a10-year exclusion is reasonable.

I. Background

By letter dated October 30, 2009, the I.G. notified Petitioner that he was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 10 years, because he had been convicted of a felony criminal offense related to: 1) the delivery of an item or service under the Medicare or state health care program; and 2) fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item of service. The letter explained that sections 1128(a)(1) and 1128(a)(3) of the Act authorize the exclusion.

Petitioner concedes that he was convicted and is subject to exclusion under these sections. Order and Schedule for Filing Briefs and Documentary Evidence at 2 (Mar. 15, 2010); P. Brief (Br.) at 1.

Each party submitted a written argument (I.G. Br.; P. Br.). The I.G. also submitted five exhibits (I.G. Exs. 1-5) and a reply brief (I.G. Reply). In the absence of an objection, I admit into evidence I.G. Exs. 1-5.

The I.G. indicates that an in-person hearing is not necessary to resolve this case. Petitioner contends that an in-person hearing is "justified" but does not explain why. In my pre-hearing order, I observed that the case seemed to present no disputes of fact that would require in-person testimony. I directed the parties to indicate whether an in-person hearing is necessary and, if so, to "describe the testimony it wishes to present, the name of the witness it would call, and a summary of each witnesses' proposed testimony." I also directed the parties to explain why the testimony would be relevant. Order and Schedule for Filing Briefs and Documentary Evidence at 2 (Mar. 15, 2010). Petitioner has not satisfied the mandates of my order, because he names no witness and provides no explanation as to why an in-person hearing is necessary. Moreover, as the following discussion establishes, the material facts in this case were already resolved by the federal district court, and that court's judgment may not be collaterally attacked. 42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000). An in-person hearing is therefore not necessary – indeed, it would serve no purpose.

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 (10 years) is reasonable. 42 C.F.R. § 1001.2007.

III. Discussion

Section 1128(a)(1) of the Act mandates 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(a).

Section 1128(a)(3) says 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. 42 C.F.R. §§ 1001.101(c), 1001.102(a).

The facts here are not in dispute: Petitioner was a podiatrist, licensed to practice in the State of New Jersey. He had his own podiatry practice, for which he served as president and chief executive officer. I.G. Ex. 1 at 1, 13. On October 16, 2008, he pled guilty in federal district court for the District of New Jersey to one felony count of conspiracy to commit health care fraud, in violation of 18 U.S.C. § 1349. I.G. Ex. 3. Petitioner admitted that from "at least as early as" January 2003 until January 2005, he, personally and as part of a conspiracy with other named podiatrists, billed the Medicare program for services provided by unqualified and untrained (or inadequately trained) personnel, claiming that he rendered the services himself. I.G. Ex. 1 at 7-8, 15-16; *see* I.G. Ex. 4 at 1. He knowingly submitted claims for services that were not medically necessary and, thus, not eligible for Medicare reimbursement. He claimed to have provided more costly services than he actually provided, a practice referred to as "upcoding." I.G. Ex. 1 at 8-9, 16-18. He and his co-conspirators also obstructed Medicare's prepayment review process; he misrepresented the procedures he performed, and, knowing that the Medicare contractor was auditing his bills, he submitted claims under the provider numbers of his co-conspirators. I.G. Ex. 1 at 10-19.

The court sentenced Petitioner to twelve months and one day in prison, followed by three years supervised release, and ordered him to pay restitution in the amounts of: $87,870.93 to the Medicare program; $1,212.51 to Horizon Blue Cross/Blue Shield; and $3,800 to Aetna Life Insurance Company (total restitution $92,883.44). I.G. Ex. 3 at 2-3, 5.

A. Based on the aggravating factors present in this case, the 10-year exclusion falls within a reasonable range.[1]

An exclusion under either section 1128(a)(1) or 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 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

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

or local government agency or board, if the adverse action is based on the same set of circumstances that serves as a 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: The district court ordered Petitioner to pay $92,883.44 in restitution to the Medicare program and the private insurers. I.G. Ex. 3 at 5. Restitution has long been considered a reasonable measure of program losses. *See Jason Hollady, M.D.*, DAB No. 1855 (2002). Petitioner agrees that his fraud caused these financial losses but points out that the amount falls short of $1.4 million, the amount alleged in his indictment. P. Br. at 1. This may be so, but the undisputed financial loss is nevertheless substantial – more than 18 times greater than the threshold amount necessary to establish an aggravating factor – and thus justifies lengthening the period of exclusion.

Length of criminal conduct. Citing generally to his plea agreement, Petitioner argues that his "so-called fraud" occurred over only a five-month period. P. Br. at 1. Upon careful review of that document, I found no evidence to support his assertion. I.G. Ex. 4. Moreover, the count to which he pled guilty explicitly says that his illegal conduct lasted for two years, from January 2003 until January 2005, twice as long as necessary to justify increasing the period of exclusion. I.G. Ex. 1 at 14.

Incarceration. The sentence imposed by the criminal court included a period of incarceration for one year and one day. I.G. Ex. 3 at 2.

Other adverse action. As part of his plea agreement, Petitioner agreed to surrender his license to practice podiatry. I.G. Ex. 4 at 2. In a final consent order that the New Jersey Board of Medical Examiners issued on June 5, 2009, Petitioner surrendered his license to practice podiatry for a minimum of five years. I.G. Ex. 5. In the order, the Board notes that it earlier summoned him to explain his billing practices. Thereafter, he was indicted and convicted for billing fraud. The State Attorney General filed a six-count complaint against him for similar misconduct (e.g., fraudulent billing and fee splitting). In addition to the license revocation, the Board ordered Petitioner to pay a civil penalty of $60,000. I.G. Ex. 5 at 4. Thus, based on the circumstances that underlay his conviction, the state board imposed another adverse action.

These aggravating factors underscore the threat that Petitioner poses to program integrity. He engaged in fraud for at least two years, costing health insurance programs, particularly Medicare, a large amount of money. His actions were egregious enough to merit incarceration and loss of his license to practice podiatry. Based on these factors, I find that the ten-year exclusion falls within a reasonable range.

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 mental, physical, or emotional condition that reduced his culpability. He does not allege cooperation with government officials.

Instead, Petitioner raises other issues, arguing that he presents no danger to the public and that his patients loved him. He asserts that, since his conviction, he has acted responsibly. Under the statute and regulations, none of these factors are considered mitigating.

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 at least two years and was serious enough to merit incarceration and loss of his professional license. I find that these aggravating factors, which are not set off by any mitigating factor, more than justify a 10-year exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge