

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Sylvia F. Redd,  
(OI File No.: H-12-42608-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-467

Decision No. CR2959

Date: October 22, 2013

**DECISION**

Petitioner, Sylvia F. Redd, appeals the determination of the Inspector General (I.G.) for the U.S. Department of Health and Human Services to exclude her from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)) for a period of 10 years. For the reasons discussed below, I find that there is a basis for the I.G. to exclude Petitioner and that a 10-year exclusion is reasonable based on the presence of three aggravating factors and no mitigating factors.

**I. Background and Procedural History**

The following facts are undisputed. Petitioner was a registered nurse licensed in Mississippi. I.G. Exhibit (Ex.) 3, at 1. Starting in September 2003, Petitioner, in conjunction with a licensed physician, began referring Medicare patients to a durable medical equipment (DME) supplier that sold power wheelchairs in exchange for monetary remuneration for the referrals. P. Br. at 3; P. Ex. 5. An April 20, 2010 grand jury indictment charged Petitioner and the physician as co-conspirators in a scheme to defraud the Medicare program. I.G. Ex. 3. On September 26, 2011, Petitioner was

convicted of one count of Conspiracy to Violate the Anti-Kickback Statute and Conspiracy to Steal Funds from Medicare in violation of 18 U.S.C. § 371. I.G. Ex. 2, at 1, 2. Petitioner was sentenced to serve 15 months incarceration, three years supervised release, and ordered to pay \$997,225.52 in restitution to the U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS). *Id.* at 6. In a letter dated December 31, 2012, the I.G. notified Petitioner that she was being excluded from participating in Medicare, Medicaid and all federal health care programs pursuant to section 1128(a)(1) of the Act. The I.G. based the exclusion on Petitioner's aforementioned conviction in the United States District Court, Southern District of Mississippi, of a criminal offense related to the delivery of an item or service under Medicare. I.G. Ex. 1. The I.G. excluded Petitioner for a period of 10 years, five years above the statutory minimum exclusion period for mandatory exclusions, based on the presence of three aggravating factors. I.G. Ex. 1.

Petitioner timely filed an appeal to her exclusion. The Civil Remedies Division received the request on February 25, 2013, and assigned the case to me for possible hearing and a written decision. I granted Petitioner's unopposed request to extend the scheduling of the prehearing conference. I held a prehearing telephone conference with the parties on June 3, 2013, the substance of which I summarized in my Order and Schedule for Filing Briefs and Documentary Evidence. During that prehearing conference, I explained to Petitioner that she was entitled to representation by counsel but that I could not appoint counsel for her. I also told her that if she should choose later to be represented by counsel, she need only have her attorney submit a Notice of Appearance to my office as soon as possible. Petitioner proceeded to represent herself.

Pursuant to my scheduling order, I asked the parties to answer the questions on short-form briefs sent to them, together with any additional arguments and supporting documents. The I.G. filed the short-form brief together with I.G. Exs. 1 -3. Petitioner submitted her brief (P. Br.) together with P. Exs. 1- 5. The I.G. submitted a reply brief (I.G. Reply). Absent objection, I admit I.G. Exs. 1-3 and P. Exs. 1-5.

Both parties indicated in their briefs that testimonial evidence was not needed. I.G. Br. at 6; P. Br. at 4. Therefore, an in-person hearing is not necessary, and I base this decision on the written record of the documentary evidence and arguments the parties submitted.

## **II. Discussion**

### **A. Issues**

The legal issues before me are limited to those set out at 42 C.F.R. § 1001.2007(a)(1):

1. Whether the I.G. was authorized to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Act; and
2. Whether the length of the 10-year length of the proposed period of exclusion is unreasonable.

## **B. Findings of Fact and Conclusions of Law**

### *1. Petitioner pleaded guilty to Conspiracy to Violate the Anti-Kickback Statute and Conspiracy to Steal Funds from Medicare.*

The I.G. is excluding Petitioner based on section 1128(a)(1) of the Act. The essential elements necessary to support this exclusion are: (1) the individual to be excluded must have been convicted of a criminal offense, whether felony or misdemeanor; and (2) the criminal offense is related to the delivery of an item or service under Medicare or any state health care program.

- a. Petitioner does not contest that she was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act.*

An individual is “convicted” of a criminal offense when: (1) a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; (2) there has been a finding of guilt in a federal, state, or local court; (3) a plea of guilty or no contest has been accepted in a federal, state, or local court; or (4) an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. Act § 1128(i) (42 U.S.C. § 1320a-7(i)); *see also* 42 C.F.R. § 1001.2.

Petitioner does not dispute that, on September 26, 2011, the United States District Court, Southern District of Mississippi accepted her plea of guilty to one count of Conspiracy to Violate the Anti-Kickback Statute and Conspiracy to Steal Funds from Medicare in violation of 18 U.S.C. § 371. These events qualify as a conviction under the Act.

- b. Petitioner does not dispute that her offense was related to the delivery of an item or service under Medicare.*

Petitioner also does not dispute that her conviction was related to the delivery of an item or service under Medicare. P. Br. at 2. Petitioner’s conviction was based on her involvement in a scheme to refer patients to a DME supplier of power wheelchairs to be paid for by Medicare even though the patients did not qualify. I.G. Ex. 2, at 1; *see also*

P. Ex. 5, at 2. Petitioner's role was to obtain intake information from the patients and then her co-conspirator, a physician, would sign a Certificate of Medical Necessity attesting that the patients qualified for a power wheelchair. The patients would then be referred to the DME supplier. In return, both Petitioner and her co-conspirator shared in a cash kickback provided to them by the DME supplier. I.G. Exs. 2, at 1, 2; 3, at 2, 3. It is clear that a nexus exists between Petitioner's criminal acts and the purported delivery of an item or service under Medicare. The fact that the court ordered Petitioner to pay restitution to Medicare also confirms that her offense was program-related. I.G. Ex. 2, at 6.

*c. Petitioner must be excluded for a minimum of five years.*

The I.G. must exclude an individual or entity convicted of an offense related to the delivery of a health care item or service under Medicare or a state health care program. Act § 1128(a)(1) (42 U.S.C. § 1320a-7(a)(1)); 42 C.F.R. § 1001.101(a). An exclusion made pursuant to section 1128(a)(1) of the Act must be for a minimum period of five years. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); 42 C.F.R. § 1001.102(a). As noted above, Petitioner does not dispute that she was convicted of the offense of Conspiracy to Violate the Anti-Kickback Statute and Conspiracy to Steal Funds from Medicare. The actions that formed the basis of Petitioner's conviction are clearly related to the delivery of a health care service under the Medicare program. Accordingly, there is a basis for the I.G. to exclude Petitioner and that exclusionary period must be for a minimum period of five years.

*2. Excluding Petitioner for 10 years is within a reasonable range.*

Petitioner seeks a reduction to her period of exclusion to the minimum statutory five-year period. P. Br. at 4-5. An Administrative Law Judge (ALJ) reviews the length of an exclusion *de novo* to determine whether it falls within a reasonable range considering any aggravating and mitigating factors. *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491, at 5 (2012) (citing *Joseph M. Rukse, Jr., R.Ph.*, DAB No. 1851, at 10-11 (2002)). To determine whether an exclusion period is within a reasonable range, an ALJ must weigh any aggravating and mitigating factors in the case, and evaluate the quality of the circumstances surrounding the factors. *Vinod Chandrashekar Patwardhan, M.D.*, DAB No. 2454, at 6 (2012) (citing *Jeremy Robinson*, DAB No. 1905, at 11 (2004)). The regulations provide several factors that the I.G. may consider as aggravating and a basis for lengthening an exclusion period. 42 C.F.R. § 1001.102(b). If an aggravating factor justifies an increase to the length of an exclusion, the I.G. may then consider various mitigating factors as a basis to reduce the exclusion period to no less than five years. 42 C.F.R. § 1001.102(c).

*a. The I.G. reasonably relied on three aggravating factors to enhance the length of Petitioner's exclusion period beyond the minimum five-year period.*

In this case, the I.G. reasonably relied on three aggravating factors to enhance the period of Petitioner's exclusion beyond the minimum mandatory period. The I.G. found that the acts resulting in Petitioner's conviction: (1) caused, or were intended to cause, a financial loss to a government program of \$5,000 or more; (2) were committed over a period of one year or more; and (3) the sentence the court imposed included incarceration. 42 C.F.R. § 1001.102(b)(1), (2) and (5); *see* I.G. Ex. 1.

Regarding the first aggravating factor, the U.S. District Court ordered Petitioner to pay \$997,225.52 in restitution to CMS as a result of the loss to the government that Petitioner's offenses caused. I.G. Ex. 2, at 6. Governmental loss is an "exceptional aggravating factor" when, as here, the loss is "very substantially greater than the statutory standard." *Jeremy Robinson*, DAB No. 1905, at 11 (2004). On its own, the governmental loss here, 199 times greater than the minimum needed to support an increase to the exclusion period, must be afforded such substantial weight.

Petitioner argues the full amount of the restitution should not be considered as an aggravating factor. P. Br. at 3-4. Petitioner claims that the court-ordered restitution is apportioned jointly and severally against her and the co-conspirators (both the physician and the owner of the DME supplier). *Id.* Petitioner accordingly claims less culpability to that of her co-conspirators maintaining that collectively her co-conspirators processed 244 claims, but she only processed paperwork for 24 patients, of which only 18 received wheelchairs. *Id.* at 5. The established facts underlying a conviction are not reviewable in this forum. 42 C.F. R. § 1001.2007(d). Petitioner's involvement in the scheme and her specific culpability have already been determined by the U.S. District Court and, therefore, cannot be re-adjudicated in this forum. The District Court judge determined Petitioner's sentence to include \$997,225.52 in restitution that was assigned jointly and severally with her co-conspirators. Based on this determination by the court, Petitioner is not automatically relieved from paying the full amount of the restitution if her co-conspirators fail to pay. Furthermore, the I.G. must consider the entire amount of financial loss to Medicare when determining whether to lengthen a period of exclusion. 42 C.F.R. § 1001.102(b)(1).

The I.G. also reasonably enhanced Petitioner's exclusion period considering the acts leading to her convictions occurred over a period of more than one year. Petitioner participated in the conspiracy and scheme to defraud Medicare from September 2003 through to July 2005 — for over a period of one-year and ten months. I.G. Ex 3, at 1. The length of Petitioner's involvement in the scheme demonstrates that her lack of integrity was more than just short-lived and supports an increase from the five-year minimum period of exclusion.

The I.G. also reasonably enhanced Petitioner's exclusion period because her sentence included incarceration. Specifically, Petitioner's sentence included a period of 15 months of incarceration. The Board previously determined that a nine-month period of incarceration was "relatively substantial," and supported an eight-year exclusion period. *Jason Hollady, M.D.*, DAB No. 1855, at 12 (2002). In this case, Petitioner's period of incarceration was six months longer. Accordingly, this aggravating factor bears substantial weight and supports an increase beyond the five-year minimum exclusion period.

*b. I am unable to consider the factors Petitioner argues in order to reduce her period of exclusion.*

Petitioner expresses remorse for her actions, claims that she has taken ownership for her involvement, and she has fulfilled her sentence. P. Br. at 3, 5-6. She notes that she voluntarily reported her guilty plea to the Louisiana State Board of Nursing, agreed to a license suspension, and asks that a 5-year exclusion run coterminous with her exclusion from the state Medicaid program. *Id.* at 4-5; P. Ex. 4, at 1.

Here I may only consider three mitigating factors, when: (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 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). Characterizing a mitigating factor as "in the nature of an affirmative defense," the Board has ruled that a 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).

Because Petitioner was convicted of a felony that 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 her culpability. She also does not allege that she cooperated with government officials so that others were investigated, convicted, excluded, or penalized. Therefore I find no legally-recognized mitigating factor that I may consider to reduce her exclusionary period.

### **III. Conclusion**

For the foregoing reasons, the I.G. has a basis to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs. After considering three aggravating factors and no mitigating factors, an exclusion of 10 years is within a

reasonable range. Therefore, I sustain the I.G.'s exclusion of Petitioner effective January 20, 2013.

\_\_\_\_\_  
/s/  
Joseph Grow  
Administrative Law Judge