Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Naseem Minhas
(OI File No. 5-11-40798-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-619

Decision No. CR4956

Date: October 19, 2017

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Naseem Minhas, from participation in Medicare, Medicaid, and all other federal health care programs based on Petitioner's conviction of a criminal offense related to the delivery of a health care item or service under Medicare or a state health care program. For the reasons discussed below, I conclude that the IG has a basis for excluding Petitioner because he was convicted of conspiracy to commit health care fraud involving the Medicare program, which is a conviction for a criminal offense related to the delivery of an item or service under Medicare or a state health care program. I affirm the 30-year exclusion period because the IG has proven four aggravating factors, and there are no mitigating factors present. I also affirm that the effective date of Petitioner's exclusion is April 20, 2017.

I. Background

In a letter dated March 31, 2017, the IG excluded Petitioner from participation in Medicare, Medicaid, and all federal health care programs as defined in section 1128B(f) of the Social Security Act (Act) (42 U.S.C. § 1320a-7b(f)) for a minimum period of 30

years, effective 20 days from the date of the letter. IG Exhibit (Ex.) 1 at 1. The IG explained that Petitioner's exclusion was based on a "conviction as defined in section 1128(i) (42 U.S.C. [§] 1320a-7(i)), in the United States District Court, Eastern District of Michigan, of a criminal offense related to the delivery of an item or service under the Medicare or a State health care program, including the performance of management or administrative services relating to the delivery of items or services, under any such program." IG Ex. 1 at 1. The IG explained that Petitioner was excluded pursuant to section 1128(a)(1) of the Act, which mandates the exclusion of any individual who is convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or any state health care program. IG Ex. 1 at 1; 42 U.S.C. § 1320a-7(a)(1). The IG informed Petitioner that the exclusion was for "a minimum period of 30 years." IG Ex. 1 at 1; *see* 42 U.S.C. § 1320a-7(c)(3)(B). The IG extended the exclusion period from the statutory minimum of five years to 30 years based on the presence of four aggravating factors. IG Ex. 1 at 1-2. As for the aggravating factors, the IG found the following: 1) The acts resulting in the conviction, or similar acts, that caused, or were intended to cause, a financial loss to a Government program or one or more entities of $5,000 or more; 2) The acts that resulted in the conviction, or similar acts, were committed from January 2009 to November 2013; 3) Petitioner was sentenced to 54 months of incarceration; and 4) Petitioner was subject to other adverse actions based on the same circumstances that formed the basis for his exclusion. IG Ex. 1 at 1-2; 42 C.F.R. § 1001.102(b). The IG did not consider any mitigating factors. IG Ex. 1; *see* 42 C.F.R. § 1001.102(c).

Petitioner filed a timely request for hearing dated April 8, 2017, that was received on April 17, 2017. On May 31, 2017, pursuant to 42 C.F.R. § 1005.6, I presided over a telephonic pre-hearing conference, and on June 2, 2017, I issued an Order and Schedule for Filing Briefs and Documentary Evidence (Order).

Pursuant to my Order, the IG filed an informal brief (IG Br.) and a reply brief, along with five exhibits (IG Exs. 1-5). Petitioner, who is not represented by counsel, filed an informal brief (P. Br.) and seven exhibits. Petitioner's first six exhibits, which were marked as Petitioner (P.) Exs. A through F, contain arguments rather than evidence. In fact, there is essentially no substantive or narrative discussion in Petitioner's informal brief, but rather, his substantive discussion, along with responses to questions posed in the informal brief template, is contained in P. Exs. A through F. Therefore, I will not admit P. Exs. A through F as evidentiary exhibits, but rather, I will consider them, collectively, to be an extension of his informal brief. Petitioner's remaining proposed exhibit, P. Ex. G, contains various irrelevant documents. Nonetheless, because this is the only evidence Petitioner has submitted in support of his arguments, I will admit the documents as P. Ex. 1.

The IG states that an in-person hearing is not necessary for me to decide this case. IG Br. at 12. Petitioner has requested an in-person hearing to obtain the testimony of an individual he identifies as "Mr. Rathur," who he reported could testify regarding Petitioner's "professional conduct" and provide "his first hand observations of [Petitioner's] clinical conduct." P. Br. (Exs. E and F). While Petitioner proposes this testimony, I point out that Petitioner has not availed himself of the opportunity to submit written direct testimony, nor has Petitioner indicated that he was unable to obtain the written direct testimony of an essential witness, as discussed in section 6(b) of my Order. *See Lena Lasher, aka Lena Contang, aka Lena Congtang,* DAB No. 2800 at 4 (2017) (discussing that when neither party submits written direct testimony as directed, "no purpose would be served by holding an in-person hearing"). In offering the parties an opportunity to submit written direct testimony, I explained that I would not accept direct testimony given for the purpose of attacking "any underlying conviction, civil judgment imposing liability, determination by another government agency, or any prior determination where the facts were determined and a final decision was made, if the conviction, judgment, or determination is the basis for the exclusion." Order, § 6(b). In my Order, I also informed the parties of the following with respect to direct testimony:

> Direct testimony must be marked as an exhibit and submitted with a party's documentary exhibits. 42 C.F.R. § 1005.16(b). Any written direct testimony must be in the form of an affidavit or declaration that complies with 28 U.S.C. § 1746. A live hearing, if necessary, will only be for cross-examination of a witness or witnesses who provided direct testimony, if it is deemed necessary. Any request for cross-examination should be submitted no later than the date the IG's reply brief is due . . . .

Order, § 6(b). To the extent that Petitioner challenges the facts underlying his conviction for conspiracy to commit health care fraud, his request for a hearing to obtain Mr. Rathur's testimony is for the purpose of making a collateral attack on his conviction; any testimony about Petitioner's "professional conduct" and "clinical conduct" would only serve to further his efforts to collaterally attack his conviction. I will decide this case on the written submissions and documentary evidence. *See* Order, § 6(b).

II. Issues

Whether there is a basis for exclusion, and if so, whether the length of the exclusion that the IG has imposed is unreasonable. 42 C.F.R. § 1001.2007(a)(1).

III. Jurisdiction

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

IV. Findings of Fact, Conclusions of Law, and Analysis[1]

1. Petitioner was convicted of an offense related to the delivery of a health care item or service under the Medicare program, which is an offense pursuant to section 1128(a)(1) of the Act that subjects him to a mandatory exclusion from all federal health care programs for a minimum of five years.

Section 1128(a)(1) requires a mandatory exclusion from all federal health care programs under certain conditions.[2] Section 1128(a)(1) states:

> (a) Mandatory exclusion
>
> The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
>
> (1) Conviction of program-related crimes--
>
> Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program.

See 42 U.S.C. § 1320a-7(a)(1).

As a preliminary matter, Petitioner stated during the May 31, 2017 pre-hearing conference that he did *not* contest that he has a conviction that mandates exclusion and that he had requested a hearing *only* to contest the length of the exclusion. *See* Order, § 2. However, Petitioner, in his informal brief, disputed that he was convicted of a criminal offense and that the offense mandates exclusion. P. Br. (Ex. C).

The IG contends that he excluded Petitioner from all federal health care programs based on Petitioner's conviction for an offense that was related to the delivery of a health care

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

[2] While there are slight differences in the wording of Section 1128 of the Act and its codification at 42 U.S.C. § 1320a-7, the two authorities are substantively identical and I refer to them interchangeably. I further note that the Secretary of the Department of Health and Human Services (Secretary) has delegated to the IG the authority "to suspend or exclude certain health care practitioners and providers of health care services from participation in these programs." 48 Fed. Reg. 21662 (May 13, 1983); *see also* 42 C.F.R. § 1005.1.

item or service under Medicare or a state health care program. IG Br. at 3-4; *see* IG Ex. 1. As explained below, I find that Petitioner was convicted of a criminal offense for purposes of the Act that mandates exclusion from all federal health care programs.

On or about April 11, 2016, Petitioner, with the advice of counsel, entered into a plea agreement with the United States Attorney's Office for the Eastern District of Michigan in which he agreed to enter a guilty plea to Count 1 of an indictment charging him with committing conspiracy to commit health care fraud in violation of 18 U.S.C. § 1349.[3] IG Ex. 3 at 1. The plea agreement reported that the elements of the offense of conspiracy to commit health care fraud are that "two or more persons, in some way or manner, came to a mutual understanding to try and accomplish a common and unlawful plan . . . " and that "the defendant, knowing the unlawful purpose of the plan, willfully joined in it." IG Ex. 3 at 1-2. The plea agreement reported that Petitioner was the beneficial owner of Tricounty Home Care Services, Inc., a home health care agency, and that he and his co-conspirators "created patient files for Tricounty that documented physical therapy services provided to Medicare beneficiaries, when, in fact, the services were either unnecessary or had not taken place." IG Ex. 3 at 3. According to the plea agreement, not only did Petitioner pay "cash kickbacks" to a physician and patient recruiters, but he also, as a physical therapist, "personally signed patient files stating that he supervised physical therapy sessions that never occurred" and "then billed Medicare for the services that were either not necessary or not provided." IG Ex. 3 at 3. The plea agreement stated that "[t]he false and fraudulent claims submitted to Medicare by Tricounty total approximately $4,054,070.33." IG Ex. 3 at 3. Petitioner agreed "to the entry of a forfeiture money judgment against him in favor of the United States for the amount of $4,054,070.33, representing the total value of the property subject to forfeiture for Defendant's violation of Count I of the Indictment." IG Ex. 3 at 8 (emphasis omitted).

On September 21, 2016, a United States District Judge sentenced Petitioner to a 54-month term of incarceration. IG Ex. 2 at 2. The sentencing judge ordered, *inter alia*, that Petitioner pay restitution in the amount of $4,054,070.33 to the U.S. Department of Health and Human Services. IG Ex. 2 at 5.

I find that Petitioner has been convicted of a criminal offense relating to the delivery of an item or service under both Medicare and Medicaid. 42 C.F.R. § 1001.2; *see* IG Exs. 2, 3. Pursuant to section 1128(i)(3) of the Act, an individual is considered to have been convicted of a criminal offense "when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court." 42 U.S.C. § 1320a-7(i)(3). On April 11, 2016, Petitioner entered into a plea agreement in which he admitted guilt to conspiracy to commit health care fraud in violation of 18 U.S.C. § 1349. IG Ex. 3 at 1-2. On September 21, 2016, a United States District Judge imposed judgment based on Petitioner's guilty plea to the count of conspiracy to commit health

[3] The IG did not submit the indictment as an exhibit.

care fraud. IG Ex. 2. While Petitioner disputes his conviction and the facts underlying the offense, he may not do so in this forum. 42 C.F.R. § 1001.2007(d). The Departmental Appeals Board recently summarized its history of declining to review challenges to criminal convictions, stating:

> The Board has long held that such "collateral attacks" on the validity of criminal convictions on which exclusions are based are forbidden by regulation. Section 1001.2007(d) states that when an exclusion "is based on the existence of a criminal conviction or a civil judgment imposing liability by Federal, State or local court" (or "on a determination by another Government agency, or any other prior determination where the facts were adjudicated and a final decision was made"), then "the basis for the underlying conviction, civil judgment or determination ***is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal***" (emphasis added). *See, e.g., Michael J. Vogini, D.O.*, DAB No. 2584, at 8 (2014) ("Petitioner pled guilty to and was convicted of Count 14 and may not now collaterally attack that conviction"); *Lyle Kai, R.Ph.*, DAB No. 1979, at 5 (2005) ("'the basis for the underlying conviction . . . is not reviewable and the individual . . . may not collaterally attack it . . . .' 42 C.F.R. § 1001.2007(d)"); *Peter J. Edmonson*, DAB No. 1330, at 4 (1992) . . . . A petitioner who "believes there are serious flaws" in the state's action on which the exclusion is based thus "must challenge it 'in the appropriate forum.'" *Marvin L. Gibbs, Jr., M.D.*[, DAB No. 2279] at 10 [2009], citing *Leonard Friedman, M.D.*, DAB No. 1281 (1991). Per section 1001.2007(d), this is not the appropriate forum for Petitioner to air his grievances about the propriety of his conviction.

Clemenceau Theophilus Acquaye, DAB No. 2745 at 7 (2016). Petitioner has a criminal conviction for conspiracy to commit health care fraud and as such, he is subject to exclusion. Congress, through enactment of the Act, determined that an individual who has been convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program must be excluded from federal health care programs for no less than five years, and it afforded neither the IG nor an administrative law judge the discretion to impose an exclusion of a shorter duration. 42 U.S.C. § 1320a-7(c)(3)(B). I cannot shorten the length of the exclusion to a period of less than five years because I do not have authority to "find invalid or refuse to follow Federal statutes or regulations." 42 C.F.R. § 1005.4(c)(1). Petitioner has a criminal conviction for conspiracy to commit health care fraud, and he admitted that his crime involved billing Medicare for services that were not necessary or were not performed; therefore, exclusion is mandated for a minimum period of five years based on section 1128(a)(1).

2. A 30-year minimum exclusion is not unreasonable based on the presence of four aggravating factors and no mitigating factors.

The Act requires a minimum exclusion period of five years when the exclusion is mandated under section 1320a-7(a). 42 U.S.C. § 1320a-7(c)(3)(B). In this case, exclusion is required under section 1320a-7(a)(1), and therefore Petitioner must be excluded for a minimum of five years. The IG increased the minimum exclusion period from five years to 30 years based on his consideration of four aggravating factors. IG Ex. 1 at 1-2. The IG has the discretion to impose an exclusion longer than the minimum period when there are aggravating factors present. *See* 42 C.F.R. § 1001.102.

The IG asserts that the presence of four aggravating factors warrants an exclusion for 30 years. IG Br. at 5. The first aggravating factor is that the loss to a Government program or other entity as a result of Petitioner's criminal conduct was greater than $5,000. IG Br. at 5; 42 C.F.R. § 1001.102(b)(1). Second, the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more, occurring from about January 2009 to November 2013. IG Br. at 6; 42 C.F.R. § 1001.102 (b)(2). Third, the sentence imposed included incarceration, specifically, 54 months of incarceration. IG Br. at 6; 42 C.F.R. § 1001.102(b)(5). Fourth, Petitioner was subject to other adverse actions based on the same circumstances that form the basis for his exclusion. IG Br. at 6; 42 C.F.R. § 1001.102(b)(9). Petitioner argues that an exclusion of no more than five years is warranted because his conviction was due to "entrapment," that he had ineffective assistance of legal counsel during the criminal proceedings, that he entered into a plea agreement because he could face 20 years of incarceration if he was convicted at trial, and that he had a "minimal clinical role in this case." P. Br. (Exs. A, B, F). However, Petitioner has not presented evidence, or even argument, that the IG improperly applied any of the four aggravating factors to his case.

Petitioner was ordered to pay $4,054,070.33 in restitution. IG Ex. 2 at 5. Pursuant to 42 C.F.R. § 1001.2007(d), Petitioner cannot use these proceedings to challenge the amount of restitution imposed. In fact, Petitioner *agreed* to that same amount of restitution in his plea agreement. IG Ex. 3 at 7. Likewise, the order of judgment by the United States District Judge stated that the total amount of loss was $4,054,070.33. IG Ex. 2 at 5. As the IG points out, the financial loss to the Medicare program was more than 800 times the $5,000 minimum amount that triggers consideration of the aggravating factor.[4] IG Br. at 5-6. The more than $4 million in restitution ordered clearly supports that the large amount of loss is a significant aggravating factor. *See Robert Hadley Gross, M.D.*, DAB No. 2807 at 7-8 (2017) (upholding a 28-year exclusion based on the same four

[4] I recognize that, effective February 13, 2017, the minimum amount of loss that will trigger consideration of this aggravating factor is $50,000. 42 C.F.R. § 1001.2007(d). 82 Fed. Reg. 4100, 4103, 4112 (Jan. 12, 2017).

aggravating factors as are applicable here, to include a loss of $1,832,869.21, which is less than half the amount of the more than $4 million loss in the present case).

With respect to the length of the acts that resulted in Petitioner's felony conviction, Petitioner was convicted of conspiracy to commit health care fraud involving the Medicare program from January 2009 through November 2013. IG Ex. 3 at 2 (plea agreement); *see also* IG Ex. 4 at 9. The aforementioned restitution of more than $4 million represents the proceeds of the lengthy period of conspiracy to commit health care fraud. The IG properly considered the length of acts that resulted in Petitioner's felony conviction to be an aggravating factor in this case. *See Vinod Chandrashekhar Patwardhan, M.D.*, DAB No. 2454 at 7 (2012) (determining that three-year duration of conduct was an aggravating factor).

With regard to the length of Petitioner's incarceration, the uncontroverted evidence demonstrates that Petitioner was sentenced to a substantial period of incarceration for his commission of conspiracy to commit health care fraud. On September 21, 2016, a United States District Judge imposed judgment and ordered that Petitioner be committed to the custody of the United States Bureau of Prisons for a term of 54 months. IG Ex. 2 at 2. The IG properly considered the 54-month length of imprisonment to be an aggravating factor in this case. *See Jason Hollady, M.D., a/k/a Jason Lynn Hollady*, DAB No. 1855 at 12 (2002) (stating that even a nine-month period of incarceration was "relatively substantial").

With respect to other adverse actions, on December 27, 2017, the Disciplinary Subcommittee for the State of Michigan's Department of Licensing and Regulatory Affairs, Bureau of Professional Licensing, Board of Physical Therapy, suspended Petitioner's physical therapist license as a result of his conviction for conspiracy to commit health care fraud. IG Ex. 5. The suspension of Petitioner's physical therapist license was based on the same facts underlying his conviction, and therefore is properly considered an adverse action that is an aggravating factor pursuant to 42 C.F.R. § 1001.102(b)(9). IG Ex. 5.

Evidence of aggravation may be offset by evidence of mitigation if it relates to one of the factors set forth at 42 C.F.R. § 1001.102(c). I am not able to consider evidence of mitigation unless one or more of the enumerated aggravating factors listed in 42 C.F.R. § 1001.102(b) justifies an exclusion of longer than five years. 42 C.F.R. § 1001.102(c). I construe that Petitioner argues there is mitigating evidence in this case and that a shorter period of exclusion is warranted based on the application of a mitigating factor. I have examined Petitioner's arguments and the evidence that he offered in support, and I find no probative evidence to substantiate one of the regulatory mitigating factors.

The 30-year period of Petitioner's exclusion is not unreasonable based on the four aggravating factors present in this case. The amount of loss caused by Petitioner's

criminal conduct is very substantial, and is more than 800 times higher than the threshold $5,000 amount of loss necessary to trigger consideration of this aggravating factor (and 80 times the recently increased $50,000 threshold amount of loss). In addition, Petitioner's criminal activity lasted for well more than four years, he was sentenced to a period of 54 months of incarceration, and his physical therapist license was suspended based on the same facts underlying his conviction. Petitioner generally argues that a lengthy exclusion is "unfair" and "very unreasonable," and that he "should be spared to practice as a physical therapist after finishing my sentencing [of imprisonment]." P. Br. (Exs. B, C, D). Although Petitioner argues that he has no past history of misconduct, no prior criminal history, and there is "no history of any adverse physical, mental or financial impact on any of my Medicare or Medicaid beneficiar[ies]," he does not articulate that any *regulatory* mitigating factor is present. P. Br. (Ex. D); *see* 42 C.F.R. § 1001.102(c). Petitioner committed a very serious crime, and he was punished with a lengthy sentence of incarceration and ordered to pay restitution amounting to more than $4 million to repay the Medicare program from which he stole. Petitioner engaged in his scheme for more than four years, and he was later suspended from being a licensed physical therapist by his state's medical board. There are *no* mitigating factors to weigh against the *four* significant aggravating factors. I conclude that the IG's imposition of a minimum period of exclusion for 30 years is not unreasonable. 42 C.F.R. § 1001.2007(a).

3. The effective date of Petitioner's exclusion is April 20, 2017.

The effective date of the exclusion, April 20, 2017, is 20 days after the date of the IG's March 31, 2017 letter and is established by regulation (42 C.F.R. § 1001.2002(b)); I am bound by that regulation. 42 C.F.R. § 1005.4(c)(1).

V. Conclusion

For the foregoing reasons, I affirm the IG's decision to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of 30 years, effective April 20, 2017.

_____/s/____
Leslie C. Rogall
Administrative Law Judge