Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Michael D. Miran,
Esta Miran, and
Michael D. Miran, Ph.D. Psychologist P.C.
(O.I. File No. 2-04-40429-9),

Petitioner,

v.

The Inspector General.

Docket No. C-11-808

Decision No. CR2512

Date: March 6, 2012

DECISION

Petitioners, Michael D. and Esta Miran, are husband-and-wife psychologists who participated in the Medicare and Medicaid programs through their corporation, Michael D. Miran Ph.D. Psychologist P.C. (Miran P.C.). All were convicted of health care fraud, and, based on their convictions, the Inspector General (I.G.) has excluded them from participation in the Medicare, Medicaid, and all federal health care programs for periods of thirteen years (Petitioners Michael and Esta Miran) and fourteen years (Miran P.C.). Social Security Act (Act) § 1128(a)(1). Here, Petitioners challenge those exclusions.

For the reasons set forth below, I find that that the I.G. is authorized to exclude these Petitioners and that the periods of exclusion fall within a reasonable range.

I. Background

Petitioners Michael and Esta Miran are clinical psychologists who operated a practice, Miran P.C., in the State of New York. On July 29, 2010, Petitioner Michael Miran pled guilty in New York state court to one count of second degree offering a false instrument for filing (NY Penal Law § 175.30). I.G. Exs. 2, 9. On the same day, Petitioner Esta Miran pled guilty to one count of first degree offering a false instrument for filing (NY Penal Law § 175.35). I.G. Exs. 4, 10. Their professional corporation, Petitioner Miran P.C., pled guilty to one count of second degree grand larceny (NY Penal Law § 155.40(1)). I.G. Exs. 6, 11.

The court accepted their pleas and entered judgments against them. I.G. Exs. 2, 4, 6.

In letters dated August 31, 2011, the I.G. notified Petitioners Michael and Esta Miran that they were excluded from participation in Medicare, Medicaid, and all federal health care programs for minimum periods of 13 years, because they had been convicted of criminal offenses related to the delivery of an item or service under the Medicare or state health care program. The letters explained that section 1128(a)(1) of the Act authorizes the exclusion. I.G. Exs. 1, 3. On the same day the I.G. notified Petitioner Miran P.C. that it was excluded from program participation for a minimum period of 14 years, because it had been convicted of a criminal offense related to the delivery of an item or service under the Medicare or state health care program, also citing section 1128(a)(1). I.G. Ex. 5.

By letter dated September 16, 2011, Petitioners requested review of their exclusions. I.G. Ex. 7.

The I.G. moved to dismiss, arguing that Petitioners' hearing request did not raise an appealable issue. Petitioners opposed dismissal. I denied the I.G.'s motion, finding that Petitioners raised the two issues reviewable in this forum: whether they had been convicted within the meaning of section 1128(a)(1) and whether their periods of exclusion were reasonable. *See* Ruling and Closing of the Record (Feb. 7, 2012).

The I.G. also submitted an initial brief (I.G. Br.), 14 exhibits (I.G. Exs. 1-14), and a Reply Brief (I.G. Reply).

Petitioners submitted the following: a letter dated November 25, 2011, opposing the I.G.'s Motion to dismiss, with six exhibits attached (P. Opp. Exs. 1-6); a response to the I.G.' s brief (P. Response) with five exhibits attached (P. Exs. 1-5); Petitioner's Informal Brief (P. Brief) and a response to the I.G.'s reply brief (P. Sur-reply).

I admit into evidence I.G. Exs. 1-14, P. Opp. Exs 1-6, and P. Exs. 1-5.

The parties agree that this case should be resolved without an in-person hearing. I.G. Br. at 10; P. Br. at 5-6.

II. Issues

The issues before me are 1) whether Petitioners were convicted of criminal offenses related to the delivery of an item or service under Medicare or a state health care program within the meaning of section 1128(a)(1), thus providing bases for excluding them from program participation, and 2) if so, whether the lengths of the exclusions (13 and 14 years) are reasonable.

III. Discussion

A. Petitioners must be excluded from program participation, because each was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program within the meaning of section 1128(a)(1).[1]

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).

In this case, Petitioners Michael and Esta Miran are psychologists licensed to practice in the State of New York. Operating through their corporation, Miran P.C., they participated in the Medicare and Medicaid programs.[2] They were indicted on multiple felony counts of grand larceny, scheme to defraud, falsifying business records, offering false instruments for filing and unauthorized practice. I.G. Ex. 8.

Petitioner Michael Miran pled guilty to "Offering a False Instrument for Filing in the Second Degree, a class 'A' misdemeanor," described in the plea agreement as a "lesser included offense of Count 5 of the Indictment" (offering a false instrument for filing in the first degree). I.G. Ex. 9 at 2. Petitioner Esta Miran pled guilty to "Offering a False Instrument for Filing in the First Degree . . . as charged in Count 5 of the Indictment." I.G. Ex. 10 at 2. Count 5 of the Indictment charges that Petitioner's Michael and Esta Miran knowingly submitted claims to the New York State Medicaid program that "falsely

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

[2] As discussed below, court documents – which are controlling – belie Petitioners' claim that they did not participate in the Medicaid program.

stated" that Michael Miran provided group psychotherapy to an individual Medicaid recipient. I.G. Ex. 8 at 6.

Petitioner Miran P.C. pled guilty to "Grand Larceny in the Second Degree, a class 'C' felony" as charged in Count 2 of the Indictment. I.G. Ex. 11 at 2. Count 2 of the Indictment charges that Michael and Esta Miran, acting as managerial agents of Miran P.C., "knowingly" submitted numerous claims to the Medicare program, falsely representing that covered services were provided to eligible individuals. Relying on the false representations, the Medicare program paid Miran P.C. $143,299.72 to which it was not entitled. I.G. Ex. 8 at 3.

Thus, the court documents establish that all three Petitioners were convicted of offenses related to the delivery of items or services under the Medicare and/or Medicaid programs, and must be excluded from program participation.

Petitioners, however, argue that they are not subject to exclusion because the New York Attorney General lacked the authority to prosecute them in the first place, and they have appealed their convictions based on that jurisdictional issue. Because their appeals are pending, they claim that their convictions are "conditional" and will not be "final" unless affirmed by the appellate court. P. Opp. Br. at 3-4.

First, Petitioners' suggestion that the state attorney general had no authority to prosecute Petitioners Michael and Esta Miran is puzzling. Petitioners assert that "[t]he Mirans treated no State Medicaid patients"; "[t]he Mirans provided no State Medicaid services"; and "[t]he Mirans never billed for a State Medicaid service." P. Br. at 2. Yet, the indictment and their plea agreements explicitly say that they are charged and convicted of crimes against the "New York State Medicaid program." I.G. Ex. 8 at 6; I.G. Ex. 9 at 2; I.G. Ex. 10 at 2. They agree, and are ordered, to repay $114,647.21 to the New York State Medicaid program. I.G. Ex. 9 at 2; I.G. Ex. 10 at 2.[3] Only Miran P.C.'s conviction involved Medicare fraud.

In any event, Petitioners waived all rights to appeal except to challenge the state attorney general's authority to bring the charges. Otherwise, they agreed that their pleas would be "complete and final disposition[s]" of the criminal matters. I.G. Ex. 9, at 3; I.G. Ex. 10 at 3; I.G. Ex. 11 at 3.[4] Moreover, nothing in any plea agreement suggests that the guilty

[3] As part of the plea agreements, Petitioners Michael and Esta Miran even acknowledge that the matters will be referred to the Department of Health and Human Services for their exclusion from program participation. I.G. Ex. 9 at 3; I.G. Ex. 10 at 3.

[4] Petitioner Miran P.C. also acknowledges, as part of its plea agreement, that the matter will be referred to the Department of Health and Human Services for its exclusion from program participation. I.G. Ex. 11 at 3.

plea is "conditional." Certificates of conviction confirm that the court accepted those pleas. I.G. Exs. 2, 4, 6. Thus, their convictions are like any other conviction that has been appealed. It is a "conviction" within the meaning of section 1128, because the statute specifically provides that "an individual or entity is considered to have been 'convicted'" when a court has entered a judgment of conviction "regardless of whether there is an appeal pending . . . ." Act § 1128(i)(1).

Petitioners also suggest that I should consider whether their Medicare billing practices were, in fact, criminal acts. P. Opp. Br. at 4. I have no authority to do so. The regulations explicitly preclude any collateral attack on an underlying 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.

42 C.F.R. § 1001.2007(d); *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).

Thus, Petitioners were convicted of program-related crimes and must be excluded for at least five years. I now consider whether the lengths of their exclusions, beyond five years, fall within a reasonable range.

B. Based on the aggravating factors present in this case, the periods of exclusion (13 and 14 years) fall within a reasonable range.

An exclusion under section 1128(a)(1) 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 following: 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 convicted individual or entity has been the subject of any other adverse

action by any federal, state, 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.

Here, two aggravating factors – program financial loss and other adverse action – justify significantly increasing all three petitioners' periods of exclusion beyond the five-year minimum. An additional aggravating factor – length of criminal conduct – justifies adding at least one additional year to the period of exclusion imposed on Petitioner Miran P.C.

Program financial loss. Petitioners' actions resulted in program financial losses well in excess of $5,000. In their plea agreements, Petitioners conceded that the Medicare and Medicaid programs paid them a total of $257,946.93 to which they were not entitled – $143,299.72 to the Medicare program and $114,647.21 to the Medicaid program. They agreed, and the court ordered them, jointly and severally, to repay that amount in restitution. I.G. Ex. 9 at 4; I.G. Ex. 10 at 4; I.G. Ex. 11 at 4. Restitution has long been considered a reasonable measure of program losses. *Jason Hollady, M.D.*, DAB No. 1855 (2002). Because the financial losses were significantly in excess of the threshold amount for aggravation (more than 50 times), the I.G. may justifiably increase significantly their periods of exclusion. *See Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, PhD.*, DAB No. 1865 (2003).

Other adverse action. Because they were convicted of crimes "relating to or resulting from the furnishing or billing for medical care, services, or supplies," the New York State Office of the Medicaid Inspector General excluded all three of the Petitioners from participation in the state Medicaid program. I.G. Exs. 12, 13, 14. Thus, based on the circumstances that underlay their convictions, Petitioners were the subjects of adverse actions by a state agency. Petitioners argue that I should not consider this an aggravating factor because the state agency had no authority to exclude them from participation in the Medicaid program. P. Br. at 5. Again, however, the regulations governing these proceedings do not allow me to review the state's actions on either substantive or procedural grounds.[5]

Length of criminal conduct. Miran P.C. admitted that its criminal conduct lasted for three years, from May 28, 2003 until May 26, 2006, three times as long as necessary to justify increasing the period of exclusion. I.G. Ex. 11 at 4.

[5] Any challenge to the state I.G.'s authority must be made through the state agency's own review process, which is explained in the notice letters. I.G. Exs. 12, 13, 14.

C. 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). Characterizing a mitigating factor as "in the nature of an affirmative defense," the Departmental Appeals 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).

Obviously, because Petitioners' convictions involved program financial losses many times greater than $1,500, the first factor does not apply here. Nor do Petitioners claim any mental, physical, or emotional condition that reduced culpability. They do not allege that they cooperated with government officials.

Instead, Petitioners argue that patients will be harmed because Petitioner Michael Miran provides unique treatments that are otherwise unavailable in the area. P. November 25, 2011 letter at 2. The regulations authorize the I.G. to grant a state health care program's request to waive an exclusion "if the individual or entity is the sole community physician or the sole source of essential specialized services in a community." However, "[t]he decision to grant, deny, or rescind a request for a waiver is not subject to administrative or judicial review." 42 C.F.R. § 1001.1801(f); Act § 1128(c)(3)(B). Thus, any such request for waiver must be made directly to the I.G. by the state health care program, not by Petitioners, and the I.G.'s determination with respect to any waiver is not reviewable in this or any other forum.

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, Petitioners' crimes demonstrate that they present significant risks to the integrity of health care programs. They engaged in illegal conduct that cost the Medicare and Medicaid programs large amounts of money and caused the state agency to exclude them from program participation. Miran P.C.'s criminal conduct lasted for three years. No mitigating factors offset the aggravating factors. I therefore find that the 13 and 14-year exclusions fall within a reasonable range.

IV. Conclusion

For these reasons, I conclude that the I.G. properly excluded Petitioners from participation in Medicare, Medicaid and all federal health care programs, and I sustain as reasonable the periods of exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge