Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Sushil Aniruddh Sheth, M.D.,
(O.I. File No.: 5-05-40662-9),

Petitioner,

v.

The Inspector General.

Docket No. C-12-131

Decision No. CR2540

Date: May 14, 2012

DECISION

This case involves a physician who single-handedly concocted and implemented a Medicare fraud of enormous proportions. I consider here whether, based on his subsequent felony conviction, the Inspector General (I.G.) reasonably excluded him from participation in federal health care programs for a period that unquestionably exceeds his professional – and even his biological – life.

Petitioner, Sushil Aniruddh Sheth, was a cardiologist with a medical practice in the Chicago metropolitan area. He devised and executed a highly lucrative scheme to defraud Medicare and other health insurance programs. Eventually, he was caught. He pled guilty in United States District Court to felony health care fraud. Based on this conviction, the Inspector General has excluded him from participation in Medicare, Medicaid, and all federal health care programs for a period of 95 years, under section 1128(a)(1) of the Social Security Act (Act). Here, Petitioner concedes that he must be excluded, but he challenges the length of that exclusion.

For the reasons set forth below, I find the 95-year exclusion reasonable.

I. Background

Petitioner was a practicing cardiologist, with a clinical office and two "administrative offices" that were located in his residences. He had privileges at three Chicago-area hospitals. I.G. Ex. 3 at 3. Beginning no later than January 2002, he submitted claims to Medicare and other health insurance programs for services that he did not provide. I.G. Ex. 3 at 2-3. He claimed to have provided services to patients he never even met. He claimed to have provided services in the Chicago area at times when he was not even there. He claimed that he provided more than 24-hours worth of services in a single day. I.G. Ex. 3 at 4.

Exploiting his hospital staff privileges, he was able to expand his fraudulent patient-base by stealing confidential patient information (patient name, insurance provider, beneficiary identification number, dates of hospital stays, etc.) from the hospitals' patient records. Using this information, he hand-wrote notes that he then faxed to outside billing companies. He paid those billing companies to submit false claims to Medicare and other insurers. I.G. Ex. 3 at 4-5.[1]

He continued the scheme through December 2007 and amassed about $9 million in fraudulent reimbursement from the Medicare program and "other federal victims" and $4 million from private health insurers. I.G. Ex. 3 at 5.

On January 28, 2009, Petitioner Sheth was charged with felony health care fraud (18 U.S.C. § 1347). I.G. Ex. 4. On August 19, 2009, he pled guilty to the charge in federal district court. I.G. Exs. 2, 3. The court accepted his plea and entered judgment against him on August 10, 2010. I.G. Ex. 5. The court sentenced him to 60 months in prison and ordered him to pay a total of $12,376,310.47 in restitution to Medicare and a long list of private insurance programs. I.G. Ex. 5 at 2, 5-8.

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[1] The Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191, 110 Stat. 1936 (1996)) (HIPAA) protects patient privacy rights. A person who knowingly obtains or discloses individually identifiable health information in violation of the privacy rule may face a criminal penalty of up to $50,000 and one-year imprisonment, a criminal penalty of up to $100,000 and five-years imprisonment if the wrongful conduct involves false pretenses, and a criminal penalty of up to $250,000 and ten-years imprisonment if the wrongful conduct involves the intent to sell, transfer, or use identifiable health information for commercial advantage, personal gain, or malicious harm. Inasmuch as Petitioner stole and disseminated confidential patient information, his claim that he did not harm patients rings hollow, although, in setting the length of his exclusion, the I.G. did not cite patient harm as an aggravating factor. *See* 42 C.F.R. § 1001.102(b)(3).

In a letter dated September 30, 2011, the I.G. advised Petitioner that, because of his conviction, he was excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of 95 years. I.G. Ex. 1. The letter explained that section 1128(a)(1) of the Act authorizes the exclusion. Petitioner timely requested a hearing to challenge the length of his exclusion.

In compliance with my order, the I.G. has submitted an initial brief (I.G. Br.) and a reply brief (I.G. Reply). The I.G. also submitted seven exhibits (I.G. Exs. 1-7). Petitioner submitted a brief (P. Br.) and two exhibits (P. Exs. 1-2). In the absence of any objection, I admit into evidence I.G. Exs. 1-7 and P. Exs. 1-2.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary, and, if so, to describe the testimony the party wishes to present, the names of the witnesses it would call, and a summary of each witnesses' proposed testimony. I specifically directed the parties to explain why the testimony would be relevant. Order and Schedule for Filing Briefs and Documentary Evidence at 2, Attachment 1 (Informal Brief of Petitioner ¶ IV) and Attachment 2 (Informal Brief of I.G. ¶ III) (December 15, 2011). The I.G. indicated that an in-person hearing is not necessary. Petitioner did not respond to the question. In correspondence that accompanied his March 26, 2012 submission, he indicated that he hoped to produce "an expert witness." He did not, however, identify that witness (even in a most general way), describe the testimony he hoped to elicit, explain why that testimony relates to his arguments, or explain why that testimony does not duplicate evidence that is already in the record. Petitioner has thus not established that an in-person hearing would serve any purpose.

II. Issue

Petitioner concedes that he was convicted of an offense related to the delivery of an item or service under Medicare and is therefore subject to an exclusion of at least five years. P. Br. at 1. The sole issue before me is whether the length of the exclusion in excess of five years is reasonable.

III. Discussion

Based on the aggravating factors in this case and the absence of any mitigating factor, the 95-year exclusion falls within a reasonable range.[2]

Section 1128(a)(1) of the Act requires that the Secretary of Health and Human Services exclude an individual who has been convicted under federal or state law of a criminal

[2] I make this one finding of fact/conclusion of law.

offense related to the delivery of an item or service under Medicare or a state health care program. *See also* 42 C.F.R. § 1001.101.

An exclusion brought 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 regulations may not be used to decide whether an exclusion of a particular length is reasonable.

Among the factors that may serve as a basis 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 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 (42 C.F.R. § 1001.102(b)(1)). In his plea agreement, Petitioner conceded that, by billing for services that he did not perform, he "fraudulently obtained approximately $9,000,000 from the Medicare program as well as other federal victims . . . and approximately $4,000,000 from private health benefit programs . . . ." I.G. Ex. 3 at 5. The I.G. does not rely on this admission but points to the slightly lower amount of restitution ordered by the Court: $12,376,310.47.[3] Petitioner concedes that the court ordered him to pay that amount, and that restitution is considered a reasonable measure of program loss. P. Br. at 1, 5. He argues, however, that, unlike other criminals, he paid the restitution in full, so, in fact, the programs suffered no losses.

I have no idea how often excluded individuals actually pay their ordered restitution, and nothing in this record or any of the cases cited suggests how often that happens. But the issue is irrelevant. As the I.G. points out, the regulation explicitly precludes this defense. It says that the "entire amount of financial loss . . . including any amounts resulting from

[3] Restitution has long been considered a reasonable measure of program losses. *See Jason Hollady, M.D.*, DAB No. 1855 (2002). However, where, as here, the Petitioner specifically admitted to the court that his actions cost these programs more than the amount of restitution, it should not be necessary to consider less direct measures of the program losses. Nevertheless, I accept the I.G.'s finding as to the amount of program losses.

similar acts not adjudicated, will be considered *regardless of whether full or partial restitution has been made*." 42 C.F.R. § 1001.102(b)(1) (emphasis added).

At a minimum, then, Petitioner's crimes cost Medicare and other insurance programs financial losses that were more than *2,475 times greater* than the $5,000 threshold for aggravation, a phenomenal amount, particularly considering that those losses are attributable to just one person. The Departmental Appeals Board (Board) has characterized amounts substantially greater than the statutory standard as an "exceptional aggravating factor" that is entitled to significant weight. *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003). I agree. If even a small percentage of program participants were capable of this level of fraud, these programs could not long survive. I therefore consider the enormity of the programs' financial losses here an exceptionally aggravating factor that compels a period of exclusion many, many times longer than the five-year minimum.

Length of criminal conduct (42 C.F.R. § 1001.102(b)(2)). By his own admission, Petitioner's criminal activity began no later than January 2002 and continued through December 2007. I.G. Ex. 3 at 5. Thus, the acts that resulted in Petitioner's conviction and similar acts were committed over a period of about six full years or six times longer than necessary to constitute an aggravating factor.

Incarceration (42 C.F.R. § 1001.102(b)(5)). The sentence imposed by the criminal court included incarceration. The district court sentenced Petitioner to five years (60 months) in prison. I consider this significant jail time, and it underscores the seriousness of his crime. I.G. Ex. 5 at 2; P. Br. at 1.

Other adverse actions (42 C.F.R. § 1001.102(b)(9)). By consent order dated March 26, 2010, the State of Illinois Department of Financial and Professional Regulation indefinitely suspended Petitioner's medical license. I.G. Ex. 6. It based the action on the allegations underlying his guilty plea. I.G. Ex. 6 at 3-4. In a notice dated August 3, 2010, the Medical Board of California advised Petitioner that his California medical license was suspended based on the Illinois suspension. I.G. Ex. 7. Thus, based on the circumstances that underlay his conviction, two state boards imposed additional adverse actions against Petitioner.

No mitigating factors. 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 the 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 12 (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.

Petitioner claims, however, that, "as part of [his] plea agreement," he was "fully forthcoming" and therefore cooperated with law enforcement. He also complains that, because he had no co-defendants or confederates, he was simply not in a position to provide testimony leading to the conviction of others. Nevertheless, he provided law enforcement with information that would help them "more promptly identify and hopefully eliminate this criminal pattern of conduct." P. Br. at 5.

Inasmuch as the underlying purpose of this factor is to help law enforcement and protect program integrity, Petitioner is entitled to no special consideration simply because he possessed no information implicating others.

"It is entirely Petitioner's burden" to show that his cooperation resulted in others being convicted or excluded, or additional cases being investigated, or a civil money penalty being imposed. *Stacey R. Gale*, DAB No. 1941 at 9 (2004). Answering questions posed by investigators in his own case is not a mitigating factor. Petitioner must show that he provided information that resulted in the investigation of a *new* target. *Marcia C. Smith*, DAB No. 2046 at 9-11 (2006). Here, Petitioner concedes that his "cooperation" did not lead to any specific conviction, exclusion, or the imposition of additional penalties.

Thus, no mitigating factor offsets the significant aggravating factors present in this case.

Based on the aggravating factors and the absence of mitigating factors, then, I must determine whether the exclusion period imposed by the I.G. falls within a reasonable range. So long as that period falls within a reasonable range, my role is not to second-guess the I.G.'s judgment. *Jeremy Robinson*, DAB No. 1905 at 5 (ALJ review must reflect the deference accorded to the I.G. by the Secretary). A "'reasonable range' refers to a range of exclusion periods that is more limited than the full range authorized by the statute [i.e., from a minimum of five years to a maximum of permanent] and that is tied to the circumstances of the individual case." *Joseph M. Rukse, Jr., R.Ph.*, DAB No. 1851 at 11 (2002), *citing Gary Alan Katz, R.Ph.*, DAB No. 1842 at 8 n.4 (2002).

I understand Petitioner's complaint that, as a practical matter, the I.G. has effectively excluded him permanently from program participation. However, the Board has consistently ruled – albeit in reviewing substantially shorter periods of exclusion – that an exclusion of finite duration is not the functional equivalent of a permanent exclusion, and I may not consider mitigating such factors as the individual's age, finances, or

employment prospects and their impact on the excluded individual's chances of returning to program participation. *Jeremy Robinson*, DAB No. 1905; *Donald A. Burstein, Ph.D.*, DAB No. 1865 at 13; *Joann Fletcher Cash*, DAB No. 1725 at 19 (2000).

In any event, given the nature of the aggravating factors here, a permanent exclusion would not have been out of line. Petitioner caused enormous financial losses to health insurance programs; his criminal conduct lasted six times longer than the threshold for aggravation; he was sentenced to five years in prison; and he was subject to two adverse actions by different state boards.

Petitioner nevertheless cites other cases in which the I.G. imposed shorter periods of exclusion, and argues that his "comparative analysis" shows that the exclusion period is "extreme and excessive." P. Br. at 11-12. I do not find such comparisons particularly helpful. At best, they are of limited value; at worst, they are misleading.

First, our sample is limited. In *Jeremy Robinson*, the Board faulted the Administrative Law Judge (ALJ) for comparing the petitioner's situation to only one other case.[4] In the Board's view, one case represented too small a sample to allow for a meaningful comparison. It pointed out that the ALJ might have considered other cases involving 15-year exclusions which could "inform" whether the exclusion falls within a reasonable range. But, even if we could consider every ALJ and Board decision, we are still looking at a small number compared to the total exclusions that the I.G. imposes, and we have no way of knowing if our sample accurately represents a cross-section of all cases. Certainly, few, if any, reported decisions involve exclusions this long, and few involve program losses comparable to the amount lost here. Perhaps the I.G. rarely imposes such exclusions, or perhaps the excluded party rarely appeals.[5] We simply lack the experience of these cases that the I.G. has. For this reason, we defer to his judgment and should exercise caution in comparing cases.

A second danger with case comparisons is that they often fail to consider the entire circumstances of the particular cases. Here, for example, Petitioner cites *Goldenheim, et al.*, DAB No. 2268 (2009) for the proposition that his exclusion is out of line. His argument has surface appeal: in *Goldenheim*, program financial losses attributable to the

[4] *Robinson* involved a15-year exclusion. The ALJ compared it to *William D. Neese*, M.D., DAB CR467 (1997), a 10-year exclusion. Neese defrauded Medicare of $600,000 over a period of two years and was sentenced to 18 months in jail; Robinson paid $205,000 in restitution for criminal activity that lasted three years and was sentenced to a year and a day in prison.

[5] The party may reason that an appeal serves no practical purpose. Even if he successfully persuades the judge to cut his lengthy exclusion in half, he could still not hope for reinstatement during his professional lifetime.

three individual petitioners were enormous -- nearly $35 million.[6] Yet, the I.G. proposed an exclusion of only 15 years (which the Board subsequently reduced to 12 years).

The circumstances of *Goldenheim* are not comparable to this case. Petitioners were corporate officers of a pharmaceutical company that introduced misbranded drugs into interstate commerce. Although no one alleged that the officers had personal knowledge of the wrongdoing, they were convicted as "responsible corporate officers" under the Food, Drug, and Cosmetic Act. Their crimes were misdemeanors, not felonies, and their exclusions were discretionary, not mandatory, so, unlike here, the I.G. was not obligated by statute to exclude them. *See* Act § 1128(b)(1). Moreover, *Goldenheim* represented the first appeal of an exclusion imposed against a "responsible corporate officer," so, for reasons wholly unrelated to whether the period of exclusion was reasonable, the I.G. might have opted to tread lightly.

Finally, as the Board pointed out in *Robinson*, the I.G. may reasonably determine that increasingly longer periods of exclusion are necessary, not only to protect federal funds, but "to staunch an increasing amount of health care fraud." DAB No. 1905 at 10 n.8. In this regard, I recently cited some sobering statistics:

> The National Health Care Anti-Fraud Association, an organization composed of both public and private health insurers and regulators, conservatively estimates that 3% of all health care spending in the United States is lost due to fraud. If such an estimate is accurate, health care fraud cost our economy a staggering $68 billion in 2007, the most recent year for which figures are available.

Christopher George Collins, DAB CR2515 at 6 (2012). If we reduce periods of exclusion because they are longer than those previously imposed under similar circumstances, we deprive the I.G. of a useful tool for deterring program fraud.

Additional defenses. Petitioner also asks that the effective date of his exclusion be changed to August 19, 2009, which is apparently the date the Medicare contractor cancelled his program participation and coincides with the date of his guilty plea. P. Br. at 9. As a matter of law, an exclusion becomes effective 20 days after the date of the I.G.'s notice of exclusion. 42 C.F.R. § 1001.2002. An ALJ has no authority to review the timing of the I.G.'s determination to impose an exclusion or to alter retroactively the date of the imposition of the exclusion. *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *Samuel W. Chang, M.D.*, DAB No. 1198 (1990).

[6] Losses attributable to the corporation numbered in the hundreds of millions of dollars.

Finally, I have no authority to review Petitioner's Eighth Amendment claims. *Susan Malady*, DAB No. 1816 (2002).

IV. Conclusion

I recognize that 95 years is a substantial period of exclusion and should be imposed on those posing a grave threat to program integrity. Petitioner Sheth poses such a threat. He was for many years a cunning and successful fraudster who single-handedly cost health insurance programs, particularly Medicare, massive amounts of money. Based on all of the circumstances discussed above, I find that a 95-year exclusion falls within a reasonable range.

/s/
Carolyn Cozad Hughes
Administrative Law Judge