

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Diantha Miller
(O.I. File No. H-15-40585-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-4190

Decision No. CR4575

Date: April 8, 2016

DECISION

The Inspector General (IG) of the U.S. Department of Health and Human Services (HHS) notified Petitioner, Diantha Miller, that she was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of 10 years under 42 U.S.C. § 1320a-7(a)(3). Ms. Miller requested a hearing to dispute the exclusion. For the reasons stated below, I conclude that the IG has a basis for excluding Ms. Miller from program participation and that the 10-year exclusion is not unreasonable.

I. Background

By letter dated July 31, 2015, the IG notified Ms. Miller that she was being excluded from Medicare, Medicaid, and all other federal health care programs for a period of 10 years under 42 U.S.C. § 1320a-7(a)(3). The IG advised Ms. Miller that the exclusion was based on her felony conviction in the United States District Court for the Southern District of Alabama (U.S. District Court) of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct either: in connection with the delivery of a health care item or service, including the performance of management or administrative services relating to the delivery of such items or

services; or with respect to any act or omission in a health care program (other than Medicare and a state health care program) operated or financed by any federal, state, or local government agency. The IG excluded Ms. Miller in excess of the minimum statutory period of five years because of the following aggravating circumstances:

1. A federal court ordered Ms. Miller to pay approximately \$347,800 in restitution;
2. Ms. Miller committed criminal acts from about January 2007 to about December 2011;
3. A federal court sentenced Ms. Miller to 12 months and 1 day of incarceration; and
4. The Alabama State Medicaid Agency excluded Ms. Miller from participation in the Medicaid program.

IG Exhibit (Ex.) 1.

Ms. Miller, through counsel, requested a hearing on September 24, 2015, to dispute the exclusion. Hearing Request at 1. On November 16, 2015, I held a telephonic prehearing conference, the substance of which is summarized in my November 19, 2015 Order and Schedule for Filing Briefs and Documentary Evidence (Order). Pursuant to the Order, the IG filed his brief (IG Br.) and four exhibits (IG Exs. 1-4). Ms. Miller filed her brief (P. Br.) and two exhibits (P. Exs. 1-2)¹. The IG filed a reply brief.

II. Decision on the Record

In the absence of objection, I admit IG Exs. 1-4 and P. Exs. 1-2 into the record.

My Order informed the parties that I would issue a decision based on the written record unless a party requested a hearing in its brief and explained why one was necessary. Order ¶ 3. The parties indicated on their short form briefs that they did not believe a hearing was necessary and did not have any witness testimony to offer. IG Br. at 12; P. Br. at 5. Therefore, I issue this decision on the basis of the written record.

¹ Ms. Miller filed both her brief and evidentiary documents on January 29, 2016. Ms. Miller did not mark her exhibits in the manner required by my November 19, 2015 Order and Civil Remedies Division Procedures § 14. Ms. Miller refiled properly marked exhibits on February 12, 2016. All references to Ms. Miller's exhibits in this decision are to the subsequently filed properly marked exhibits.

III. Issues

The issues in this case are limited to determining if the IG has a basis for excluding Ms. Miller from participating in Medicare, Medicaid, and all other federal health care programs and, if so, whether the length of the exclusion imposed by the IG is unreasonable. *See* 42 C.F.R. § 1001.2007(a)(1).

IV. Jurisdiction

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

V. Findings of Fact, Conclusions of Law, and Analysis

My findings of fact and conclusions of law are set forth below in bold and italics.

- A. A jury convicted Ms. Miller of three felony offenses related to health care fraud that she committed from January 2007 to about December 2011, and the U.S. District Court sentenced Ms. Miller to imprisonment for 12-months and one day, and ordered Ms. Miller to pay \$347,868.26 in restitution to Blue Cross/Blue Shield of Alabama.***

Ms. Miller, a certified registered nurse practitioner, and her co-defendant, Lawrence Carpenter, M.D., were co-owners of a dermatology clinic known as the Laser Skin Care Center of Mobile. IG Ex. 2 at 1. On April 24, 2014, a federal grand jury indicted Ms. Miller and Dr. Carpenter on one count of Conspiracy to Commit Healthcare Fraud in violation of 18 U.S.C. § 1349 and two counts of Health Care Fraud and Aiding and Abetting in violation of 18 U.S.C. § 1347. IG Ex. 2 at 2-5, 7. Specifically, the grand jury charged Ms. Miller with fraudulently billing her services and those of other physician extenders under Dr. Carpenter's National Provider Identification (NPI) number in order to increase reimbursement amounts from insurance providers, and fraudulently altering billing codes when reimbursement had been denied, and then resubmitting the altered bills for reimbursement. IG Ex. 2 at 3-5. The grand jury further charged that Ms. Miller's fraudulent insurance billing continued from about January 2007 to about December 2011. IG Ex. 2 at 2-4.

On October 30, 2014, following a trial, a jury found Ms. Miller guilty of all three counts outlined in the Indictment and the U.S. District Court convicted her of those felony charges. IG Ex. 3 at 1; P. Ex. 2 at 1-2. The U.S. District Court sentenced Ms. Miller to 12 months and one day of incarceration for each count with the terms to be served concurrently, followed by a three-year term of supervised release; assessed a \$300 fee; and ordered to pay \$347,868.26 to Blue Cross/Blue Shield of Alabama, a private health

insurer. IG Ex. 3 at 2-6; P. Ex. 2 at 3-6. The U.S. District Court ordered that Ms. Miller pay the \$347,868.26 in restitution jointly and severely with Dr. Carpenter. IG Ex. 3 at 6; P. Ex. 2 at 7.

On March 3, 2015, the U.S. District Court issued an Amended Judgment in a Criminal Case in which Dr. Carpenter was convicted, following a guilty plea, to violating one count of Misprison of a Felony in violation of 18 U.S.C. § 4. P. Ex. 1 at 1. Although the U.S. District Court continued to order that Dr. Carpenter pay restitution in the amount of \$347,868.26 to Blue Cross/Blue Shield of Alabama, the court limited the amount of restitution that Dr. Carpenter had to pay to \$208,000.00. P. Ex. 1 at 2-3.

B. The IG proved each of the required elements under 42 U.S.C. 1320a-7(a)(3); therefore, there is a basis to exclude Ms. Miller.

The IG is excluding Ms. Miller based on 42 U.S.C. § 1320a-7(a)(3), which requires the IG to exclude

[a]ny individual or entity that has been convicted for an offense which occurred after ... [August 21, 1996], under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in [section 1128(a)(1)]) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

The evidence in the present case establishes unequivocally that Ms. Miller was convicted of a felony as is described in 42 U.S.C. § 1320a-7(a)(3). IG Exs. 2, 3. A jury found Ms. Miller guilty of all three counts in the Indictment, which explicitly charged Ms. Miller with the felony offenses of health care fraud that were committed between January 2007 and December 2011. IG Exs. 2, 3. The conduct underlying her conviction involved “fraudulently billing” under a physician’s NPI number and “fraudulently altering billing codes.” IG Ex. 2 at 3-5. It is well established that submission of false billing is related to the delivery of health care items or services for purposes of exclusion. *See Joann Fletcher Cash*, DAB No. 1724, at 3 (2000) (citing supporting cases); *Jack W. Greene*, DAB No. 1078 (1989) *aff’d*, *Green v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990) (concluding that a conviction for submitting a false bill is “directly related to the delivery of the item or service.”). Further, there is no doubt that the criminal acts for which Ms. Miller was convicted occurred after August 21, 1996. IG Ex. 2 at 3-5. Finally, the crime

of Health Care Fraud and Aiding and Abetting in violation of 18 U.S.C. § 1347 and the crime of Conspiracy to Commit Health Care Fraud in violation of 18 U.S.C. § 1349 are felonies under federal law. IG Ex. 2 at 7; 18 U.S.C. § 3559(a)(4).

Ms. Miller does not dispute that she was convicted of offenses for which exclusion is required (P. Br. at 2); that the conduct that formed the basis of her conviction occurred after August 21, 1996 (P. Br. at 2); that the offenses for which she was convicted were in connection with the delivery of a health care item or service (Conspiracy to Commit Health Care Fraud; Health Care Fraud and Aiding and Abetting) (P. Br. at 2,3); and that the offenses she was convicted of are felonies and relate to fraud (P. Br. at 2).

Therefore, I conclude that the IG has proved the essential elements required for exclusion under 42 U.S.C. § 1320a-7(a)(3) and Ms. Miller is subject to mandatory exclusion.

C. The presence of four aggravating factors and the absence of any mitigating factors justify excluding Ms. Miller for a period of 10 years.

The minimum mandatory period of exclusion under 42 U.S.C. § 1320a-7(a)(3) is five years. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. § 1001.102(a). Because I have concluded that a basis exists to exclude Ms. Miller pursuant to 42 U.S.C. § 1320a-7(a)(3), Ms. Miller must be excluded for a minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B). The IG may lengthen that term if certain aggravating factors exist. *See* 42 C.F.R. § 1001.102. The IG added five years to Ms. Miller's exclusion based on the presence of four aggravating factors detailed at 42 C.F.R. § 1001.102(b)(1)-(9): 42 C.F.R. §§ 1001.102(b)(1) (the acts resulting in the conviction caused a financial loss to an entity of \$5,000 or more); (b)(2) (the acts resulting in the conviction were committed over a period of one year or more); (b)(5) (the sentence imposed by the court included incarceration); and (b)(9) (an adverse action taken by a state government agency was based on the same circumstances that served as the basis for imposing the exclusion). Ms. Miller argues that a 10-year exclusion is unreasonable, but that a five-year period would be appropriate. P. Br. at 2, 4.

I must uphold the length of exclusion as long as it is not unreasonable. 42 C.F.R. § 1001.2007(a)(1)(ii). This means that: "So long as the amount of time chosen by the [IG] is within a reasonable range, based on demonstrated criteria, the ALJ has no authority to change it under this rule. We believe that the deference § 1001.2007(a)[] grants to the [IG] is appropriate, given the [IG]'s vast experience in implementing exclusions under these authorities." 57 Fed. Reg. 3298, 3321 (Jan. 29, 1992).

1. Ms. Miller's criminal conduct caused a financial loss of \$347,868.26 to Blue Cross/Blue Shield of Alabama.

The IG has shown that the acts resulting in Ms. Miller's conviction caused a loss to an entity of \$5,000 or more. 42 C.F.R. § 1001.102(b)(1). The record shows that the U.S. District court ordered Ms. Miller to pay \$347,868.26 in restitution to a single insurance company, Blue Cross/Blue Shield of Alabama. IG Ex. 3 at 5, 6; P. Ex. 2 at 6, 7. It is well established that an amount ordered as restitution constitutes proof of the amount of financial loss. *See e.g., Juan de Leon, Jr.*, DAB No. 2533, at 5 (2013).

Ms. Miller disputes the IG's claim that she was ordered to pay restitution that was 60 times greater than the statutory minimum for an aggravating factor to apply. Ms. Miller asserts that the amended judgment in Dr. Carpenter's criminal case shows that he was ordered to pay \$208,000.00 in restitution to Blue Cross/Blue Shield of Alabama, which accounts for 60% of the total restitution amount jointly owed; therefore, Ms. Miller is only responsible for the remaining \$139,868.26. P. Br. at 3; P. Ex. 1.

I disagree with Ms. Miller's argument. Although the U.S. District Court amended the maximum amount of restitution Dr. Carpenter had to pay, Ms. Miller has not provided evidence to establish the amount she was ordered to pay to Blue Cross/Blue Shield of Alabama was reduced or that the loss to Blue Cross/Blue Shield was less than \$347,868.26. *See* IG Ex. 3 at 5, 6; P. Ex. 2 at 6, 7 (showing Ms. Miller was ordered to pay \$347,868.26 jointly and severally with her co-defendant). Regardless of whether the restitution order for Dr. Carpenter is joint and several between Ms. Miller and Dr. Carpenter, the U.S. District Court's judgment pertaining to Ms. Miller plainly established that she is responsible jointly for the total restitution amount. IG Ex. 3 at 5; *see also United States v. Ingles*, 445 F.3d 830, 838-39 (5th Cir. 2006) (affirming joint and several restitution order where one co-defendant was ultimately responsible for more restitution than other co-defendant). Additionally, Ms. Miller's argument does not take into account the fact that the regulations provide that the entire amount of restitution is what provides a basis for an aggravating factor. *See* 42 C.F.R. 1001.102(b)(1) ("the entire amount of financial loss to . . . programs or entities . . . will be considered regardless of whether full or partial restitution has been made.").

I consider the size of the financial loss in the present case a significant aggravating factor that compels a period of exclusion longer than the five-year minimum. Loss is an "exceptional aggravating factor" when, as here, the loss is "very substantially greater than the statutory standard." *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003). The financial loss in this case, which is substantially greater than the minimum needed to support an increase to the exclusion period, strongly supports a lengthy exclusion. *See Anderson v. Thompson*, 311 F.Supp.2d 1121, 1130 (D. Kan. 2004) (considering a loss more than 40 times the amount of loss necessary to find an aggravating factor as helping to justify a 15-year exclusion).

2. Ms. Miller committed her criminal acts from about January 2007 to about December 2011.

The IG has shown that the acts resulting in Ms. Miller's conviction were committed over a period of one year or more. 42 C.F.R. §§ 1001.102(b)(2). Ms. Miller challenges the duration of her criminal conduct by arguing that the IG has not proven that her criminal conduct occurred from January 27, 2007 through December 2011, as alleged in the Indictment. She argues that outside of the Indictment and the conviction, the IG has not presented any documents or other evidence that supports the time frame of her criminal conduct. P. Br. at 3-4. Ms. Miller argues further that the judgment does not reference a time frame and that the findings of the jury "simply states she was found guilty of the three (3) charges as stated above." P. Br. at 3 citing P. Ex. 2 at 1.

The Indictment described Ms. Miller's conduct as lasting from on or about January 2007 to on or about December 2011, and the jury found Ms. Miller guilty of all three counts "as charged" in the Indictment. IG Ex. 3 at 1; P. Ex. 2 at 1-4. Consistent with the dates listed in the Indictment, the Judgment in a Criminal Case issued by the U. S. District Court indicates that the "Date Offense Concluded" for all three counts was December 31, 2011." IG Ex. 3 at 1; P. Ex. 2 at 2. Based on these court documents, I conclude that there is sufficient evidence that Ms. Miller was adjudged to have committed criminal acts that spanned nearly five years.

The purpose of the aggravating factor at 42 C.F.R. § 1001.102(b)(2) "is to distinguish between petitioners whose lapse in integrity is short-lived from those who evidence a lack of such integrity over a longer period of time." *Donald A. Burstein, Ph.D.*, DAB No. 1865, at 8 (addressing criminal conduct that occurred over a 14-month period). The fact that Ms. Miller engaged in illegal conduct for approximately five times longer than the minimum one year required for aggravation means that this aggravating factor provides strong support for a lengthy exclusion. *See Anderson*, 311 F.Supp.2d at 1130.

3. The U. S. District Court sentenced Ms. Miller to 12-months and one day of incarceration.

The IG has also proved that the U.S. District Court sentenced Ms. Miller to incarceration. 42 C.F.R. § 1001.102 (b)(5). The court sentenced Ms. Miller to a period of incarceration of 12-months and one day. I.G. Ex. 3 at 2; P. Ex. 2 at 3.

Ms. Miller challenges the IG's reliance on the aggravating factor of 42 C.F.R. § 1001.102 (b)(5) to increase the length of her exclusion period. P. Br.at 4. She claims that although she was sentenced to incarceration, she served a large portion of that time in a half-way house where she was allowed to perform work release. P. Br.at 4. She relies on the

decision in *Jason Hollady*, DAB No. 1855 (2002) to support her position that her participation in work release decreases her period of incarceration and also the weight this factor should be given by the IG. P. Br.at 4.

A review of *Hollady* shows that it supports the IG's interpretation of the regulations and not Ms. Miller's argument. That decision states:

The fact that Petitioner was on a work release program is irrelevant, however, to the issue of whether his sentence included incarceration. The term "incarceration" is defined in the regulations to mean "imprisonment or any type of confinement with or without supervised release, including, but not limited to, community confinement, house arrest and home detention." 42 C.F.R. § 1001.2. Thus, the evidence regarding work release does not undercut the ALJ's finding that the I.G. proved that the aggravating factor of "incarceration" existed.

Similarly, the alleged fact that Petitioner may not in fact have served the full nine-month period of incarceration to which he was sentenced is irrelevant in determining whether the aggravating factor existed. Under the regulation, the aggravating factor exists if the "sentence imposed by the court included incarceration." 42 C.F.R. § 1001.102(b)(5).

DAB No. 1855 at 6. Although the *Hollady* decision did discuss the reduction of the petitioner's exclusion from 10 years to 8 years, this was based on the IG's failure to prove that the petitioner's criminal conduct lasted one year or more, as required by 42 C.F.R. § 1001.102(b)(2). *Hollady*, DAB No. 1855 at 8-9.

I conclude that the IG has proven that Ms. Miller was sentenced to incarceration of 12 months and a day. Consistent with *Hollady*, I conclude that even though Ms. Miller served a large portion of her sentence in a half-way house where she was allowed to perform work release, this fact is irrelevant to her sentence of incarceration. Therefore, I determine that the aggravating factor at 42 C.F.R. § 1001.102(b)(5) provides further support for the IG's determination to increase Ms. Miller's exclusion beyond the five-year minimum period to 10 years. *See Stacy Ann Battle, DDS*, DAB No. 1843 (2002) (finding that four months in a halfway house, followed by four months home confinement, justified lengthening the petitioner's exclusion period).

4. The Alabama Medicaid Agency excluded Ms. Miller from participating in the state Medicaid program as a provider of medical services based on her criminal conviction in the U.S. District Court.

The IG has shown that a state government agency took an adverse action against Ms. Miller based on the same set of circumstances that served as the basis for her exclusion. IG Ex. 4 at 1; 42 C.F.R. § 1001.102 (b)(9). Although Ms. Miller was not an active Medicaid provider, she was excluded from becoming one by the Alabama Medicaid Agency effective October 30, 2014, for an indefinite period, based on the same conviction that provides a basis for her exclusion. IG Ex. 4 (“found guilty of two counts of healthcare fraud and one count of conspiracy in federal court in the Southern District of Alabama . . . suspension is consistent with action to be taken by the [HHS IG] under Section 1128 of the Social Security Act.”).

5. Ms. Miller did not prove the existence of any factors to mitigate the length of exclusion.

When an aggravating factor justifies an exclusion longer than five years, mitigating factors may be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c). Here, Ms. Miller does not claim the existence of any mitigating factors that would justify a reduction in the length of exclusion imposed by the IG. P. Br. at 5.

V. Conclusion

The IG has a basis to exclude Ms. Miller from participating in Medicare, Medicaid, and all federal health care programs. The 10-year length of exclusion is not unreasonable given the aggravating factors present in this case and the lack of any mitigating factors. Therefore, I affirm the IG’s determination to exclude Ms. Miller for 10 years.

/s/
Scott Anderson
Administrative Law Judge