Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Srinivas Suram Reddy,
(OI File No. 5-11-40063-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-3838

Decision No. CR4652

Date: June 29, 2016

DECISION

The Inspector General (IG) of the Department of Health and Human Services excluded Srinivas Suram Reddy (Petitioner) from participating in Medicare, Medicaid, and all other federal health care programs for a minimum period of 20 years. Petitioner requested a hearing to dispute the exclusion. For the reasons explained below, I conclude that the IG has a basis for excluding Petitioner and that the 20-year exclusion period is not unreasonable in light of three aggravating factors present in this case.

I. Case Background and Procedural History

In a letter dated May 29, 2015, the IG notified Petitioner that, pursuant to 42 U.S.C. § 1320a-7(a)(1), he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 20 years effective June 18, 2015. IG Exhibit (Ex.) 1. The IG based the exclusion on Petitioner's conviction of a criminal offense in the United States District Court for the Eastern District of Michigan (District Court) related to the delivery of an item or service under 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. The IG cited three

aggravating factors as a basis for increasing the exclusion period from five to 20 years: (1) Petitioner's criminal conduct caused a loss to a government program of $5,000 or more; (2) the acts resulting in Petitioner's conviction were committed over a period of one year or more; and (3) the District Court's sentence of Petitioner included a term of incarceration. IG Ex. 1 at 1-2.

Petitioner requested a hearing with the Civil Remedies Division (CRD) to dispute the exclusion. Petitioner argued that the exclusion was improper because he never had or applied for a Medicare Provider Number and never ordered, treated, or billed anything to Medicare and was unaware of any illegal activity. Further, Petitioner argues that he is appealing his conviction.

The CRD Director administratively assigned this case to me for hearing and decision. On October 21, 2015, I convened a prehearing conference by telephone, the substance of which is summarized in my October 21, 2015 Order and Schedule for Filing Briefs and Documentary Evidence (Order). Pursuant to the Order, the IG electronically filed a brief (IG Br.) on December 2, 2015, with IG Exs. 1 through 10. After twice granting Petitioner extensions of time, Petitioner filed a brief (P. Br.) on May 12, 2016, with no exhibits attached. The IG filed a reply brief (IG Reply) on May 25, 2016.

II. Issues

This case presents the following issues:

1. Whether the IG was authorized to exclude Petitioner from Medicare, Medicaid, and other Federal Health Care Programs pursuant to 42 U.S.C. § 1320a-7(a)(1) based on a conviction of a criminal offense related to the delivery of an item or service; and

2. If there is a basis for the exclusion, whether a 20-year exclusion period is unreasonable.

III. Decision on the Record

Petitioner did not object to any of the IG's ten proposed exhibits. Therefore, I admit all of the IG's proposed exhibits into the record. Order ¶ 5; Civil Remedies Division Procedures § 14(e).

Neither party has expressly requested an in-person (video) hearing, listed any witnesses, nor explained why an in-person hearing would be necessary. Order ¶ 4; Civil Remedies Division Procedures §§ 16(b), 19(b). Accordingly, because there is no need for any in-person hearing, I issue this decision based on the written record. Order ¶ 4; Civil Remedies Division Procedures § 19(d).

IV. Jurisdiction

I have jurisdiction to hear and decide this case. 42 C.F.R. §§ 1001.2007(a)(1)-(2), 1005.2(a); *see also* 42 U.S.C. § 1320a-7(f)(1).

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

1. A jury found Petitioner guilty of engaging in a conspiracy to commit health care fraud from February 2010 to September 2011 as well as three substantive counts of health care fraud, and the District Court sentenced Petitioner to 42 months of incarceration and three years of probation following his release, and ordered him to pay $1,652,132.37 in joint and several restitution.

On August 25, 2011, a grand jury indicted Petitioner and 13 co-conspirators on one count of conspiracy to commit health care fraud (18 U.S.C. § 1349). IG Ex. 2. The grand jury returned a First Superseding Indictment on April 26, 2012, charging Petitioner with the same offense. IG Ex. 3. On February 6, 2014, an 11-count Second Superseding Indictment charged Petitioner with one count of conspiracy to commit health care fraud (18 U.S.C. § 1349) and three substantive counts of health care fraud (18 U.S.C. §§ 1347 and 2). IG Ex. 4. According to the record, Petitioner directly participated in a home health care fraud scheme from February 2010 until September 2011. IG Ex. 6 at 10; IG Ex. 7 at 7; IG Ex. 8 at 25-26, 28. The scheme involved Petitioner and various co-conspirators providing Medicare beneficiaries with cash and narcotic prescriptions as an inducement to sign documents making it appear as though they had received certain treatments when, in fact, those treatments were medically unnecessary and not provided. *See* IG Ex. 4; IG Ex. 6 at 6-8; IG Ex. 8 at 17-18. Petitioner, who is not a licensed physician, held himself out as a "doctor" to Medicare beneficiaries for the purpose of evaluating the Medicare beneficiaries for home health services. IG Ex. 4 at 9, 13-14; IG Ex. 7 at 5; IG Ex. 8 at 9-10.

Petitioner would visit Medicare beneficiaries in their homes or the houses of patient recruiters whose job it was to round up people willing to sell their Medicare information for access to cash and drugs. IG Ex. 7 at 14; IG Ex. 8 at 14, 50-51; *see also* IG Ex. 6 at 5-6, 10. Petitioner made these visits on behalf of two licensed physicians who would not take the time to see the patients and complete the necessary paperwork, but who billed for the visits under their names and then referred the patients to home health agencies in exchange for kickbacks. *See* IG Ex. 6 at 4-7; IG Ex. 7 at 4-5. Petitioner would fill out progress notes, face-to-face encounter forms and other documents used to falsely certify the patient's homebound status for purposes of receiving physical therapy and other home health services. IG Ex. 6 at 6-7; IG Ex. 7 at 5; IG Ex. 8 at 9-10, 17, 20-23, 50-51.

[1] My findings of fact and conclusions of law appear in bold and italics.

The evidence at trial showed that Petitioner knew these patients had walked, driven or biked to the recruiter's homes and were not homebound. *See* IG Ex. 6 at 7; IG Ex. 7 at 5. Petitioner issued prescriptions for Viocin, Oxycontin, Soma, Xanax, codeine cough syrup, and other controlled substances that had been pre-signed by the licensed physicians. IG Ex. 6 at 6; IG Ex. 7 at 4; IG Ex. 8 at 39, 52-53. Based on Petitioner's actions, patients would be referred for medically unnecessary home health care under the names of licensed physicians and the services were billed to Medicare. IG Ex. 6 at 6-7. Petitioner also assisted his co-conspirators in creating authentic looking fake physical therapy records. IG Ex. 6 at 8; IG Ex. 7 at 5; IG Ex, 8 at 26.

On January 15, 2015, following a trial, a jury found Petitioner guilty of conspiracy to commit health care fraud and three substantive counts of health care fraud. IG Ex. 7 at 1; IG Ex. 9 at 1. The District Court sentenced Petitioner to 42 months of incarceration on each of the four counts to be served concurrently; three years of probation; an assessment of $400; and payment of $1,652,132.37 in restitution jointly and severally with Petitioner's co-defendants to the United States Department of Health and Human Services. IG Ex. 8 at 57-58; IG Ex. 9 at 3-9. A forfeiture money judgment in the same amount was filed against Petitioner on January 27, 2015, and the District Court entered a final judgment of conviction on February 11, 2015. IG Exs. 9-10.

2. Petitioner was convicted of a criminal offense related to the delivery of a health care item or service under the Medicare program, therefore, exclusion is required under 42 U.S.C. § 1320a-7(a)(1).

The IG must exclude an individual from participation in any federal health care program if that individual was 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 U.S.C. § 1320a-7(a)(1). Petitioner does not dispute that a jury convicted him of conspiracy to commit health care fraud and three substantive counts of health care fraud. Instead, he argues that he is innocent of the criminal offenses, and his conviction is currently under appeal and may have a successful outcome. P. Br. at 1, 3. He requests a stay of exclusion proceedings pending the outcome of the appeal of his conviction. P. Br. at 1.

For purposes of exclusion, individuals are deemed "convicted" of an offense "when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending . . . ." 42 U.S.C. § 1320a-7(i)(1). In the present matter, a jury found Petitioner guilty of conspiracy to

commit health care fraud and three substantive counts of health care fraud. IG Ex. 7 at 1; IG Ex. 9 at 1. The District Court issued a judgment of conviction and sentenced Petitioner pursuant to that conviction. IG Ex. 8 at 57-58; IG Ex. 9. Therefore, Petitioner was convicted of a criminal offense.[2]

Further, Petitioner's conviction was for an offense "related to" the delivery of an item or service under Medicare. The term "related to" simply means that there must be a nexus or common sense connection. *See Quayum v. U.S. Dep't of Health and Human Servs.*, 34 F. Supp. 2d 141, 143 (E.D.N.Y. 1998); *see also Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (describing the phrase "related to" in another part of section 1320a-7 as "deliberately expansive words," "the ordinary meaning of [which] is a broad one," and one that is not subject to "crabbed and formalistic interpretation") (internal quotes omitted).

The jury specifically found Petitioner guilty of conspiracy to commit health care fraud in violation of 18 U.S.C. § 1349 and three counts of health care fraud in violation of 18 U.S.C. §§ 1347 and 2. By finding Petitioner guilty of conspiracy to commit health care fraud, the jury concluded beyond a reasonable doubt that he conspired to commit criminal conduct "in connection with the delivery of or payment for health care benefits, items, or services . . . ." 18 U.S.C. § 1347(a). Submitting a false claim to Medicare is "related to" the delivery of an item or service under the Medicare program. *See Travers v. Shalala*, 20 F.3d 993, 998 (9th Cir. 1994) (conviction for filing claims with the Medicaid program is "a program-related offense" and "such financial misconduct is exactly what Congress sought to discourage" through imposing exclusions.); *Greene v. Sullivan*, 731 F. Supp. 835, 838 (E.D. Tenn. 1990) ("There is no question that Mr. Greene's crime [of filing false claims] resulted in a Medicaid overpayment and was a program-related crime triggering the mandatory exclusion under Section 1320a-7(a)."); *see also Manocchio v. Kusserow*, 961 F.2d 1539 (11th Cir. 1992) (Upholding a mandatory exclusion involving a conviction for Medicare fraud). It follows that conspiring to submit a false claim to Medicare is also "related to" the delivery of an item or service under the Medicare program. *Cf. Anderson v. Thompson*, 311 F. Supp. 2d 1121, 1126-27, 1131 (D. Kan. 2004) (affirming mandatory exclusion based on a conviction for conspiracy to violate the anti-kickback statute). Further, the fact that the District Court ordered Petitioner to pay restitution to the Department of Health and Human Services (i.e., the federal department responsible for administering Medicare) is an additional reason to conclude that Petitioner's criminal conviction is related to the delivery of items or services in the Medicare program. *Blessing Okuji*, DAB CR2343, at 5 (2011); *Alexander Nepomuceno Jamias*, DAB CR1480 (2006). The District Court summarized the evidence in Petitioner's criminal case in its order denying judgment of

[2] It should be noted that for the purposes of section 1320a-7, the mere fact that a jury convicted Petitioner is sufficient to conclude that he was "convicted" without regard to a pending appeal. 42 U.S.C. § 1320a-7(i)(3).

acquittal and concluded that a rational jury could find Petitioner guilty. IG Ex. 7 at 4-5, 10-14. The District Court stated during sentencing that Petitioner completed forms that were the type a licensed physician needed to provide and that another physician signed the forms. IG Ex. 8 at 50-52. Accordingly, I conclude that the criminal conduct for which Petitioner was convicted was related to the delivery of a health care item or service under the Medicare program. *See* 42 U.S.C. § 1320a-7(a)(1). Therefore, the record fully supports Petitioner's mandatory exclusion. IG Exs. 4-8.

Petitioner asserts that he was not responsible for billing Medicare, which was done by other employees of the home health agency who were primarily responsible for the criminal conduct in this matter. Petitioner states his role in this matter was limited to an 18-month period (February 2010 – August 2011) where he took patient histories and occasionally certified some patients were home bound. Petitioner states that he never certified patients for physical therapy. Petitioner asserts the home health agency took the information about patients he collected and committed the fraud. P. Br. at 2; Hearing Request at 1; IG Ex. 8 at 40, 43, 45, 47. Petitioner's assertions as to his innocence of criminal conduct are impermissible collateral attacks on his conviction, which the regulations prohibit me from considering. 42 C.F.R. § 1001.2007(d).

Petitioner's argument that the IG exclusion proceedings should be stayed until the outcome of the appeal of his conviction is unavailing. P. Br. at 1. The statute in which Congress required the exclusion of individuals from the Medicare program expressly states that an individual is convicted of an offense "regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged." 42 U.S.C. § 1320a-7(i)(1). Thus, for purposes of the exclusion statute, Petitioner has been "convicted" even though his direct appeal is still pending. Also, I do not have the authority to stay the exclusion while Petitioner's appeal is pending. *See* 42 C.F.R. § 1005.4(c)(4). The regulations establish the effective date of exclusion and I am bound to follow the regulations. 42 C.F.R. §§ 1001.2002(b); 1005.4(c)(1). If Petitioner is successful in his appeal, he may seek reinstatement from the IG. 42 C.F.R. § 1001.3005(a)(1).

3. Petitioner must be excluded for a minimum of five years.

Because I have concluded that a basis exists to exclude Petitioner pursuant to 42 U.S.C. § 1320a-7(a)(1), Petitioner must be excluded for a minimum of five years. 42 U.S.C. § 1320a-7(c)(3)(B).

4. The IG has established three aggravating factors in this case that support an exclusion period beyond the five-year statutory minimum.

The regulations establish aggravating factors that the IG may consider to lengthen the period of exclusion beyond the five-year minimum for a mandatory exclusion. 42 C.F.R.

§ 1001.102(b). If an aggravating factor justifies a length of exclusion longer than five years, then I may consider mitigating factors as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

In this case, the IG advised Petitioner in the May 29, 2015 exclusion notice that there were three aggravating factors that justified excluding him for more than five years: first, the acts resulting in his convictions, or similar acts, caused, or were intended to cause, a financial loss to a government program of $5,000 or more; second, the acts resulting in the conviction occurred over a period of one year or more; and third, the sentence imposed by the court included incarceration. IG Ex. 1; 42 C.F.R. § 1001.102(b)(1), (2), (5). The IG cited as the factual basis for the existence of the three aggravating factors that the conspiracy to commit health care fraud lasted from July 2008 through September 2011 and Petitioner's direct participation in the conspiracy lasted from February 2010 through September 2011, the District Court's joint and several restitution order of $1,652,132.37 against Petitioner and his co-conspirators, and Petitioner's 42-month prison sentence. IG Ex. 1 at 1-2.

a. The IG established the aggravating factor stated in 42 C.F.R. § 1001.102(b)(1) – financial loss to a government program of $5,000 or more.

The IG provided evidence that demonstrates the acts resulting in Petitioner's criminal conviction caused a financial loss to a government program of $5,000 or more. *See* 42 C.F.R. § 1001.102(b)(1). A jury found Petitioner guilty of a conspiracy to submit false claims to Medicare and three substantive counts of health care fraud. In addition, the record shows that the District Court ordered Petitioner to pay joint and several restitution totaling $1,652,132.37 to the Department of Health and Human Services, the department that administers the Medicare program. IG Ex. 8 at 58, IG Ex. 9 at 6-9; IG Ex. 10. It is well-established that an amount ordered as restitution constitutes proof of the amount of financial loss to a government program. *See e.g.*, *Juan de Leon, Jr.*, DAB No. 2533, at 5 (2013). Regardless of whether the restitution order is joint and several among Petitioner and his co-conspirators, the District Court's sentence of Petitioner plainly establishes that he is responsible for the total restitution amount. IG Ex. 8 at 57-58; IG Ex. 9 at 4, 6-9; *see also United States v. Ingles*, 445 F.3d 830, 839 (5th Cir. 2006) (affirming joint and several restitution order where one co-defendant was ultimately responsible for more restitution than other co-defendant). In addition, the regulations provide that the *entire amount* of financial loss 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 . . . will be considered regardless of whether full or partial restitution has been made."). Therefore, the IG has sustained its burden of proving financial loss to a government program of $5,000 or more.

b. The IG established the aggravating factor stated in 42 C.F.R. § 1001.102(b)(2) – the criminal acts resulting in Petitioner's conviction lasted a period of one year or more.

The IG offered the Indictment that charged Petitioner with conspiracy to commit health care fraud as well as his conviction of that offense as evidence that his criminal acts lasted one year or more. *See* IG Ex. 4 at 10. The jury convicted Petitioner of that offense. Moreover, the record indicates Petitioner's direct participation in criminal acts occurred for more than a year. IG Ex. 6 at 10; IG Ex. 7 at 7; IG Ex. 8 at 25-26, 28. Petitioner admits that he worked for 18 months for the provider with whom he carried out his conspiracy. P. Br. at 2. Therefore, the evidence before me establishes that the acts resulting in Petitioner's conviction occurred over a period of one year or more.

c. The IG established the aggravating factor stated in 42 C.F.R. § 1001.102(b)(5) – the sentence imposed against Petitioner included a period of incarceration.

The record demonstrates, and Petitioner does not dispute, that the District Court sentenced Petitioner to 42 months of imprisonment. IG Ex. 8 at 57; IG Ex. 9 at 3. I conclude, therefore, that the IG has proven this aggravating factor. *See* 42 C.F.R. § 1001.102(b)(5).

d. There are no mitigating factors in this case.

Because I found that aggravating factors are present in this case, I next consider whether there are any mitigating factors under 42 C.F.R. § 1001.102(c) to offset the aggravating factors. The regulations specifically outline what factors may be considered mitigating and none of Petitioner's arguments relate to any of those mitigating factors. *See* 42 C.F.R. § 1001.102(c).

Petitioner argues that he should not be excluded for more than five years and that his exclusion should be reduced from 20 years. Petitioner asserts mitigating factors exist: he is a United States Citizen; went to college in the United States; went to medical school in India; while awaiting a residency in the United States, Petitioner worked as an assistant under a licensed physician to take patient histories from patients of an home health agency; Petitioner was sent out to examine patients, took vitals and filled out papers, and the provider's billers were responsible for all billing. P. Br. at 2-3. However, none of these factors qualify as relevant mitigating factors under the regulations.[3] Accordingly,

[3] The sentencing transcript shows that Petitioner possibly cooperated with law enforcement authorities (IG Ex. 8 at 55-56) in another criminal case. However, Petitioner has not argued this should mitigate the length of exclusion and the record is insufficient to show mitigation is warranted under 42 C.F.R. § 1001.102(c)(3).

I find that Petitioner has not met his burden to establish that any mitigating factors would justify reducing the period of exclusion.

5. A 20-year exclusion period is not unreasonable.

I must uphold the IG's determination as to the length of exclusion if 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. 3327, 3321 (Jan. 29, 1992). It is important to note that it is the quality of the aggravating (or mitigating) factors that is most important when considering the length of exclusion and not the sheer number of aggravating factors that are present in a given case. As the Secretary of Health and Human Services stated in the preamble to the final rule establishing the exclusion regulations:

> We do not intend for the aggravating and mitigating factors to have specific values; rather, these factors must be evaluated based on the circumstances of a particular case. For example, in one case many aggravating factors may exist, but the subject's cooperation with the OIG may be so significant that it is appropriate to give that one mitigating factor more weight than all of the aggravating. Similarly, many mitigating factors may exist in a case, but the acts could have had such a significant physical impact on program beneficiaries that the existence of that one aggravating factor must be given more weight than all of the mitigating. The weight accorded to each mitigating and aggravating factor cannot be established according to a rigid formula, but must be determined in the context of the particular case at issue.

57 Fed. Reg. at 3314-15.

The conspiracy of which Petitioner was a part ultimately resulted in a $1,652,132.37 loss to Medicare. Furthermore, the District Court ordered Petitioner to pay joint and several restitution of $1,652,132.37. IG Ex. 8 at 31-33, 57-58; IG Ex. 9 at 6-9. The amount of loss represents more than 330 times the $5,000 threshold for the loss to be considered aggravating. *See* 42 C.F.R. § 1001.102(b)(1). Restitution in an amount so substantially greater than the regulatory standard is sufficient to support a significantly increased length of exclusion. *See Anderson*, 311 F. Supp. 2d at 1130 (considering a "program-related loss [that] was more than forty times the amount of loss necessary to find an aggravating factor" as helping to justify a 15-year exclusion). While Petitioner does not

appear to have directly submitted the fraudulent claims to Medicare, he was part of the conspiracy that facilitated those false claims. *See* IG Ex. 4. The District Court's restitution order against Petitioner demonstrates that his role in the conspiracy was a significant factor in a scheme that resulted in a very substantial amount of loss.

In addition, the conspiracy Petitioner participated in lasted for more than a year. There were many false claims being produced and submitted to Medicare over this time. The prolonged criminal conduct demonstrates Petitioner's high level of untrustworthiness because it shows that his involvement was not simply a mistake or that he was temporarily involved in the scheme.

Petitioner's sentence of 42 months of incarceration for his crime constitutes the final piece of aggravating evidence. IG Ex. 8 at 57; IG Ex. 9 at 3. Petitioner's sentence represents a substantial period of time, which indicates the seriousness of his offense.

I conclude that the three proven aggravating factors are entitled to significant weight, and that the amount of program loss and Petitioner's length of incarceration are particularly aggravating. Petitioner's crime had a substantial financial impact on the Medicare program. Based on the record before me, Petitioner is not trustworthy to participate in federal health care programs and, therefore, the length of exclusion imposed by the IG is not unreasonable.

VI. Conclusion

I affirm the IG's determination to exclude Petitioner for 20 years from participating in Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(1).

/s/
Scott Anderson
Administrative Law Judge