

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Charles Okoye, M.D.,  
(OI File No. L-10-40617-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-3180

Decision No. CR4495

Date: December 21, 2015

**DECISION**

Petitioner, Charles Okoye, M.D., appeals the determination of the Inspector General for the U.S. Department of Health and Human Services (I.G.) to exclude him from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)) for 13 years. For the reasons explained below, I find that there is a legitimate basis for the I.G. to exclude Petitioner and that an exclusion period of 13 years is reasonable based on four aggravating factors and the absence of any mitigating factors.

**I. Case Background**

The following facts are undisputed unless otherwise noted. Petitioner was a licensed physician in the State of California who operated his own clinic, Charlton Main Medical Clinic. Petitioner's Brief (P. Br.) at 3; I.G. Exhibit (Ex.) 3 at 7. In February 2013, a grand jury returned a Second Superseding Indictment charging Petitioner, along with five co-defendants, with one count of Conspiracy to Commit Health Care Fraud; 17 counts of Health Care Fraud and Aiding and Abetting; and three counts of Illegal Remunerations for Health Care Referrals, in violation of 18 U.S.C. §§ 1349, 1347, 2(b), and 42 U.S.C. 1320a-7b(b)(2). I.G. Ex. 2. Petitioner entered into a plea agreement with the U.S. Attorney's Office for the Central District of California, which he signed on July 28,

2014.<sup>1</sup> I.G. Ex. 3. Based on the plea agreement, Petitioner pled guilty to one count of the Second Superseding Indictment for Conspiracy to Commit Health Care Fraud in violation of 18 U.S.C. § 1349. *Id.* at 1-2. Petitioner's guilty plea was accepted and adjudicated. I.G. Ex. 4.

The Indictment to which Petitioner pled guilty states that:

[I]n or about November 2008 and in or about November 2011 [Petitioner] a licensed physician and enrolled Medicare provider, referred more than 200 Medicare beneficiaries to Adelco [Adelco Medical Distributors, Inc. was a durable medical equipment (DME) supplier enrolled in the Medicare program] for DME, primarily power wheelchairs ("PWCs"), from his medical clinic . . . [Petitioner] also billed Medicare for services he allegedly provided to approximately 150 of those beneficiaries.

I.G. Ex. 2 at 2-3. The Indictment states further that Petitioner created:

fraudulent patient files that included PWC prescriptions and false statements in face-to-face examination forms . . . purporting to support the medical need for the DME, even though [Petitioner] knew the beneficiaries did not medically need PWCs and even though [Petitioner] never even examined some of the beneficiaries . . . . [Petitioner] would direct the patients to Adelco to fill the prescriptions, knowing that Adelco would bill Medicare for the provision of that DME.

I.G. Ex. 2 at 6-7; *see also* I.G. Ex. 3 at 8.

The plea agreement outlines the conduct that formed the basis of Petitioner's guilty plea and his subsequent conviction. I.G. Ex. 3. As part of his plea agreement Petitioner admitted that he was involved in a conspiracy to commit health care fraud. *Id.* at 4-5. Petitioner admitted that he referred approximately 204 Medicare beneficiaries to Adelco for power wheelchairs for which claims for services were billed to Medicare. *Id.* at 8. Petitioner admitted that Adelco billed Medicare for DME claims for the Medicare beneficiaries whom he referred to Adelco, and Medicare paid Adelco approximately \$824,566 for those claims. *Id.* at 9.

The plea agreement shows that Petitioner was also involved in other fraudulent DME referrals. Specifically, Petitioner admitted that at the same time he was referring Medicare beneficiaries to Adelco, he also was prescribing medically unnecessary DME,

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<sup>1</sup> On August 20, 2014, the parties amended paragraph 4.b. of the agreement. However, that amendment relates to the date Petitioner may petition for reinstatement of his medical license and does not otherwise change other parts of the agreement.

such as power wheelchairs for another DME supply company, Esteem Medical Supply. *Id.* Petitioner admitted that during the time period at issue he referred 21 Medicare beneficiaries to Esteem for DME, and in turn, Esteem billed Medicare and Medicare paid about \$76,625 on those claims. *Id.* at 9. The terms of the plea agreement included Petitioner paying the ordered restitution for the loss to the Medicare program. *Id.* at 5.

On December 8, 2014, Petitioner entered his guilty plea, and on the same day the U.S. District Court for the Central District of California accepted it and entered judgment of conviction against him. I.G. Ex. 4. The court sentenced Petitioner to 24 months of incarceration; three years of supervised release following his term in prison; payment of a \$100 special assessment; and restitution in the amount of \$931,118.96 to the Centers for Medicare & Medicaid Services (CMS), the federal agency that operates the Medicare program. *Id.* at 1-2. Petitioner was held jointly and severally liable with Petitioner's co-defendant for the restitution to the extent that his co-defendant was subsequently determined liable for the same victim losses. *Id.* at 4.

The I.G. notified Petitioner by letter dated April 30, 2015, that he was being excluded, pursuant to section 1128(a)(1) of the Act, from participating in Medicare, Medicaid, and all federal health care programs for a period of 13 years. The I.G. advised Petitioner that the exclusion was based on his conviction in the U.S. District Court, Central District of California, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. The I.G. based the length of Petitioner's exclusion (eight years above the statutory five-year minimum exclusion period for mandatory exclusion) on four aggravating factors: (1) the acts resulting in his conviction caused, or were intended to cause, a financial loss to a government program of \$5,000 or more; (2) the acts resulting in his conviction were committed over a period of one year or more; (3) the court's sentence included incarceration; and (4) Petitioner had been the subject of other adverse action by a state government agency and the adverse action was based on the same set of circumstances that served as the basis for imposition of the exclusion. I.G. Ex. 1.

Petitioner timely filed a request for hearing. I convened a prehearing conference with the parties, which I summarized in my August 18, 2015 Order and Schedule for Filing Briefs and Documentary Evidence (Scheduling Order). Pursuant to that Scheduling Order, I asked the parties to answer the questions on the short-form briefs sent to them, together with any additional arguments and supporting documents they wished to present. The I.G. filed his short-form brief (I.G. Br.) together with five exhibits (I.G. Exs. 1-5). Petitioner filed a short-form brief together with one exhibit (P. Ex. 1). The I.G. filed a reply (I.G. Reply). Neither party objected to the exhibits the opposing party filed, and I admit I.G. Exs. 1-5 and P. Ex. 1 into the record.

In my Scheduling Order, I directed the parties to indicate in their briefs whether a hearing would be necessary and, if so, to describe the testimony the parties wished to present, the names of the witnesses they would call, and a summary of each witness's proposed

testimony. Neither party indicated a hearing is necessary, and neither party offered any witness testimony. I therefore decide this case based on the written record.

## **II. Discussion**

### **A. Issue**

Petitioner did not challenge the I.G.'s basis for exclusion. Therefore, the only issue before me is whether, pursuant to subsection 1128(a) of the Act and implementing regulations, the I.G.'s exclusion of Petitioner from Medicare, Medicaid, and all federal health care programs for 13 years is reasonable based on the prescribed aggravating and mitigating factors.

### **B. Findings of Fact and Conclusions of Law**

#### ***1. The parties do not dispute that the I.G. had a legitimate basis to exclude Petitioner under section 1128(a)(1) of the Act.***

The I.G. must exclude an individual where an individual has been convicted of a criminal offense, and the criminal offense is related to the delivery of an item or service under Medicare or a state health care program. Act § 1128(a)(1); *see also* 42 C.F.R. § 1001.101(a).

Here, on December 8, 2014, Petitioner pled guilty before the U.S. District Court, Central District of California, to one count of Conspiracy to Commit Health Care Fraud in violation of 18 U.S.C. § 1349. I.G. Exs. 3, 4. The court accepted Petitioner's guilty plea and entered judgment against him. I.G. Ex. 4. The finding of guilt and judgment of conviction based upon Petitioner's accepted guilty plea constitutes a conviction. *See* Act § 1128(i). Further, a conviction is related to the delivery of an item or service under Medicare or Medicaid if there is a common sense connection or nexus between the offense and the delivery of an item or service under Medicare or Medicaid. *Berton Siegel, D.O.*, DAB No. 1467 (1994). Petitioner does not dispute that the criminal offense for which he was convicted, involving the billing of unnecessary medical equipment to the Medicare program, related to the delivery of health care items under Medicare. P. Br. at 1.

#### ***2. The I.G. must exclude Petitioner for a minimum of five years.***

Five years is the minimum authorized period for a mandatory exclusion pursuant to Section 1128(a). Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)). Because there is no dispute that a basis exists to exclude Petitioner pursuant to sections 1128(a)(1) of the Act (42 U.S.C. § 1320a-7(a)(1)), Petitioner must be excluded for a minimum period of five years. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)).

***3. The I.G. proved that four aggravating factors exist in this case that justify lengthening the period of exclusion beyond the five-year statutory minimum.***

The regulations establish aggravating factors that the I.G. may consider to lengthen the period of exclusion beyond the five-year minimum for a mandatory exclusion. 42 C.F.R. § 1001.102(b). Only if an aggravating factor justifies an exclusion longer than five years may mitigating factors be considered 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 I.G. established the presence of four aggravating factors. I address these four aggravating factors below.

***a. The acts resulting in Petitioner's conviction caused a loss to a government program of \$5,000 or more.***

The I.G. may increase the length of an exclusion if the acts resulting in the underlying conviction caused, or were intended to cause, a loss to a government program or to one or more entities of \$5,000 or more. 42 C.F.R. § 1001.102(b)(1). The amount of any restitution made will not be used to offset the amount of financial loss used in considering this aggravating factor. *Robert Seung-Bok Lee*, DAB No. 2614, at 5 (2015). The U.S. District Court for the Central District of California ordered Petitioner to pay \$931,118.96 in restitution to CMS based on the loss to the Medicare program that resulted from Petitioner's criminal conduct. I.G. Ex. 4 at 1.

Petitioner does not deny that he was ordered to pay restitution and that he agreed to reimburse CMS in the amount of \$931,118.96. P. Br. at 2. However, Petitioner argues that the amount he agreed to pay is "grossly overstated" because it represents not just the fraudulent claims billed to Medicare but all claims he billed to the program in the three-year period at issue here. *Id.* at 2. Petitioner relies on the sentencing memorandum he provided to the court prior to sentencing to support an assertion that the restitution amount he was ordered to pay also represents claims that were legally submitted to Medicare, and therefore, the total amount of restitution should not be considered as an aggravating factor in increasing his period of program exclusion. P. Br. at 2; P. Ex. 1. A review of Petitioner's sentencing memorandum shows that Petitioner admitted that he "was and is willing to accept responsibility for his conduct, including the obligation to repay restitution in the amount of \$931,118." P. Ex. 1 at 5 (emphasis in original). In the memorandum Petitioner states that he "has agreed to pay full restitution in the amount of \$931,118.06, even though this amount represents an inflated loss calculation." *Id.* at 7 ¶ 4; 8-9. The Petitioner has not come forward, however, with his calculation of the actual loss involving the fraudulent claims. The U.S. District Court received Petitioner's memorandum prior to deciding Petitioner's sentence, and the presiding judge ordered Petitioner to pay CMS the full restitution of \$931,118.96. I.G. Ex. 4 at 1.

Petitioner's underlying conviction is not reviewable or subject to collateral attack before me, whether on substantive or procedural grounds. 42 C.F.R. § 1001.2007(d). The Departmental Appeals Board (Board) has affirmed that an attempt to contest the restitution figure is an impermissible collateral attack under 42 C.F.R. § 1001.2007(d) because a plea agreement is a final disposition of the matter. *Michael D. Miran*, DAB No. 2469, at 4 (2012); *see also Lyle Kai, R.Ph.*, DAB No. 1979, at 8(2005) (“Excluding individuals based on criminal convictions ‘provides protection for federally funded programs and their beneficiaries and recipients, without expending program resources to duplicate existing criminal processes.’” (internal cite omitted)). Thus, I may not consider Petitioner's arguments attacking his predicate conviction, including the restitution amount to which he agreed.

It is well established that restitution is a recognized measure of program loss. *See, e.g., Craig Richard Wilder*, DAB No. 2416, at 9 (2011). Additionally, governmental loss is an “exceptional aggravating factor” when, as here, the loss is “very substantially greater than the statutory minimum.” *Jeremy Robinson*, DAB No. 1905, at 11(2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865, at 12 (2003). The restitution here, approximately 187 times greater than the \$5,000 minimum needed to support an increase to the exclusion period, must be afforded substantial weight in support of a significant increase to the mandatory minimum period of exclusion.

***b. The acts resulting in Petitioner's conviction occurred over a period of one year or more.***

The I.G. may increase the length of an exclusion if the acts resulting in the underlying conviction occurred over a period of one year or more. 42 C.F.R. § 1001.102(b)(2). The acts that formed the basis of Petitioner's conviction began in November 2008 and continued through November 2011, a period significantly exceeding the minimum one-year period required to trigger this aggravating factor. I.G. Exs. 3, at 6; 2, at 2-3.

The purpose of this aggravating factor “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 . . . .” *Donald A. Burstein, Ph.d.*, DAB No. 1865, at 8 (2003). In *Burstein*, the Board accorded enough weight to sustain a 15-year exclusion to the fact that the underlying criminal conduct was committed for “slightly more” than one year. *Burstein* at 12. The record before me shows that Petitioner knowingly caused the submission of fraudulent claims for services to the Medicare program for approximately three years. I.G. Ex. 3 at 4-5. Petitioner also admitted that during that three-year period he was also knowingly engaged in the same conduct with another DME company, Esteem Medical Supply; he received illegal remunerations for the referrals from the owner of that company; and Esteem billed Medicare \$128,221 for DME claims that were related to 21 Medicare beneficiaries Petitioner referred to Esteem. I.G. Ex. 3 at 9. Here, the length of

Petitioner's conduct shows prolonged lack of integrity that supports the I.G.'s decision to increase the exclusion period to more than the minimum five years.

Petitioner requests that I consider that for over 12 years, prior to November 2008, he practiced medicine without engaging in illegal conduct, and prior to his participation in the kickback scheme, he operated his own clinic for 9 years providing medical services to poor and underinsured patients in an "ethnically diverse area" in Los Angeles. P. Br. at 3. Petitioner submitted nine letters attesting to his character for my consideration. P. Ex. 1 at 19-30. However, I simply do not have the authority to reduce the I.G.'s period of exclusion based upon equitable considerations, such as for a person's good conduct or good character. *See Donna Rogers*, DAB No. 2381, at 6 (2011).

***c. The court's sentence of Petitioner included incarceration.***

The I.G. may increase the length of an exclusion if the court's sentence includes a period of incarceration. 42 C.F.R. § 1001.102(b)(5). Incarceration is defined as "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. Here, the U.S. District Court for the Central District of California sentenced Petitioner to 24 months in prison and a three-year period of supervised release to follow based on his conviction for conspiracy to commit health care fraud. I.G. Exs. 3, 4.

The I.G. has established the presence of this aggravating factor. A sentence of two years for a crime demonstrates the severity of Petitioner's conviction. Petitioner does not challenge the I.G.'s reliance on this aggravating factor to lengthen his period of exclusion. P. Br. at 2-4. Accordingly, this aggravating factor also supports the I.G.'s decision of an increase beyond the five-year minimum exclusion period.

***d. Petitioner was the subject of other adverse action by a State agency which was based on the same circumstances that resulted in Petitioner's conviction.***

The I.G. may increase the length of an exclusion if the individual has been the subject of any other adverse action by any State government agency, if the adverse action is based on the same set of circumstances that serves as the basis for imposition of the exclusion. 42 C.F.R. § 1001.201(a)(9). Here, the California Department of Health Care Services, which administers the Medi-Cal program (the California Medicaid program), also suspended Petitioner based on Petitioner's conviction for conspiracy to commit health care fraud on December 8, 2014, in the U.S. District Court for the Central District of California. I.G. Ex. 5 at 1. Therefore, Petitioner was the subject of an adverse action of a state government agency that was based on the same set of circumstances that forms the basis for imposing the exclusion. I.G. Ex. 4. This state action was a legitimate basis upon which the I.G. may lengthen Petitioner's exclusion beyond the mandatory minimum

of five years. Petitioner does not challenge the I.G.'s reliance on this aggravating factor to lengthen his period of exclusion. P. Br. at 2-4.

***e. No mitigating factors justify reducing the period of exclusion.***

Petitioner has conceded that none of the authorized mitigating factors under 42 C.F.R. § 1001.102(c) are present in his case. P. Br. at 4. Nevertheless, he argues that although he deserves to be punished for his crime, a 13-year exclusion is unreasonable. P. Br. at 4. Petitioner asserts that: he did not realize his conduct was illegal; once he realized his conduct was illegal he voluntarily ceased his participation in the wrongful conduct three years before he was arrested; he accepted responsibility for his actions and signed the plea agreement; after he stopped his involvement in the conspiracy he continued to provide medical services to patients without making false claims; and he has already served time in prison and agreed to surrender his license. P. Br. at 3-4. Petitioner wants to be allowed to apply for reinstatement after the five-year minimum period. *Id.* at 4. However, the regulations specifically outline what factors may be considered mitigating, and none of Petitioner's arguments relates to any of those mitigating factors. *See* 42 C.F.R. § 1001.102(c).

***4. Based on the four aggravating factors in this case, and the absence of any mitigating factors, an exclusion of 13 years is within a reasonable range.***

To determine whether an exclusion period is within a reasonable range, an ALJ must weigh any aggravating and mitigating factors in the case and evaluate the quality of the circumstances surrounding the factors. *Vinod Chandrashekar Patwardhan, M.D.*, DAB No. 2454, at 6 (2012) (citing *Jeremy Robinson*, DAB No. 1905, at 11 (2004)). There is no "rigid formula" for the I.G. or an ALJ to determine an exact exclusion period when weighing and evaluating aggravating and mitigating factors. *Id.* at 6. Rather, the ALJ must review the factors de novo to determine whether the exclusion imposed is within a "reasonable range" of exclusion periods. *Jospeh M. Rukse, Jr., R.Ph.*, DAB No. 1851, at 11, (citing *Gary Alan Katz, R.Ph.*, DAB No. 1842, at 8 n.4 (2002)). A "reasonable range" is "a range of exclusion periods that is more limited than the full range authorized by the statute and that is tied to the circumstances of the individual cases." *Robinson*, DAB No. 1705, at 5 (quoting *Rukse*, DAB No. 1851, at 11).

Petitioner's crimes resulted in significant financial losses to the Medicare program. As I discussed above, the U.S. District Court ordered Petitioner to pay \$931,118.96 in restitution to CMS. I.G. Ex. 4 at 1. The Board has characterized program loss amounts substantially greater than the \$5,000 statutory threshold "as an 'exceptional aggravating factor' entitled to significant weight." *Sushil Anniruddh Sheth, M.D.*, DAB No. 2491, at 7 (2012), citing *Robinson*, at 12; *Donald A. Burstein, Ph.D.*, DAB No. 1865, at 12 (2003).



The financial losses here alone support the significant increase to the minimum period of exclusion that the I.G. imposed.

Petitioner's criminal conduct also took place over a three-year period. Previously, the Board has accorded enough weight to sustain a 15-year exclusion to the fact that underlying criminal conduct was committed for "slightly more" than one year. *Burstein*, DAB No. 1865 at 12. Here, as in *Burstein*, the length of Petitioner's criminal conduct shows prolonged lack of integrity that was more than just "short-lived" and, as I have noted above, supports an increase from the five-year minimum exclusion period to 13 years.

Another proven aggravating factor relates to Petitioner's prison sentence of 24 months for his crimes. Petitioner's sentence represents substantial jail time which indicates the severity of the scheme in which Petitioner was involved. The Board once determined that a nine-month period of incarceration was "relatively substantial," and supported an eight-year exclusion period. *Jason Hollady*, M.D., DAB No. 1855, at 12 (2002). Here, the length of Petitioner's incarceration was almost three times that imposed in *Hollady*. Accordingly, this aggravating factor bears substantial weight and supports an increase beyond the five-year minimum exclusion period to 13 years.

As noted above, Petitioner was the subject of another adverse action of the California Department of Health Care Services when it suspended Petitioner's program participation in the Medi-Cal program. I.G. Ex. 4. The state agency based the program suspension on the same set of circumstances that serve as the basis for imposition of the federal exclusion. This aggravating factor also supports an increase beyond the five-year minimum exclusion period to 13 years.

Accordingly, I find that the severity of the four aggravating factors and the absence of any mitigating factors support an increase in the length of Petitioner's exclusion period beyond the five-year minimum. A 13-year exclusion period is within a reasonable range based upon the aggravating factors. Petitioner's exclusion became effective on May 20, 2015, which is 20 days from the date of the I.G.'s notice of exclusion. *See* 42 C.F.R. § 1001.2002(b).

### **III. Conclusion**

For the foregoing reasons, the I.G. has a basis to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs. After considering all four aggravating factors and the absence of any mitigating factors, an exclusion of 13 years is

within a reasonable range. Therefore, I sustain the I.G.'s exclusion of Petitioner for 13 years, effective May 20, 2015.

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/s/  
Joseph Grow  
Administrative Law Judge