Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Civil Remedies Division

Bola Elemuren, MD Professional Association,
(OI File No. 6-13-40135-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-594

Decision No. CR4954

Date: October 17, 2017

DECISION

The Inspector General (IG) of the U.S. Department of Health and Human Services excluded Petitioner, Bola Elemuren, MD Professional Association, from participation in Medicare, Medicaid, and all other federal health care programs for ten years pursuant to sections 1128(a)(1) and (a)(3) of the Social Security Act (Act) (42 U.S.C. §§ 1320a-7(a)(1) and (a)(3)). Petitioner now challenges the exclusion. For the reasons stated below, I conclude that the IG had a basis for excluding Petitioner from program participation and that the ten-year exclusion period is not unreasonable. Therefore, I affirm the IG's exclusion determination.

I. Case Background and Procedural History

Petitioner is a professional association that provided medical services to patients, including Tricare[1] and Texas Medicaid beneficiaries, in the Central Texas area. IG Exhibit (Ex.) 3 at 3-4.[2] On March 3, 2016, Petitioner was charged in a criminal

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[1] Tricare is a federally funded health benefits program for active and retired members of the uniformed services and their family members. IG Ex. 3 at 3.
[2] Document 7c in the official case file maintained in the DAB E-file system; for clarity and simplicity, I will cite to the exhibits attached by the parties to their respective briefs

information in the United States District Court for the Western District of Texas (District Court) with one count of Misprision of a Felony in violation of 18 U.S.C. § 4. IG Ex. 2. Petitioner concurrently signed a plea agreement in which it agreed to plead guilty to the charge. IG Ex. 3 at 1. On September 1, 2016, pursuant to Petitioner's plea, the District Court entered Judgment adjudicating Petitioner guilty of one count of Misprision of a Felony. IG Ex. 4 at 1. The District Court sentenced Petitioner to five years of probation and ordered Petitioner to pay restitution in the amount of $977,736 to the Defense Health Agency – Resource Management Division. *Id.* at 2, 6.

In a letter dated February 28, 2017, the IG notified Petitioner that, pursuant to 42 U.S.C. §§ 1320a-7(a)(1) and (a)(3), it was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of ten years. IG Ex. 1.

Petitioner, through counsel, timely requested a hearing before an administrative law judge to dispute the exclusion. This case was originally assigned to Administrative Law Judge Scott Anderson. On May 17, 2017, Judge Anderson held a prehearing conference by telephone with counsel for the parties, the substance of which is summarized in the May 17, 2017 Order Summarizing Prehearing Conference (Order). On June 7, 2017, this case was transferred to me to hear and decide this case.

In accordance with Judge Anderson's Acknowledgement, Prehearing Order, and Notice of Prehearing Conference (Prehearing Order), the IG filed a brief (IG Br.) on June 23, 2017, with IG Exs. 1 through 4. Petitioner filed a brief (P. Br.) on August 4, 2017, with P. Exs. A and B. The IG filed a reply brief (IG Reply) on August 18, 2017.

II. Decision on the Record

Neither party objected to any of the proposed exhibits. Therefore, I admit all of the proposed exhibits into the record. Prehearing Order ¶ 12; 42 C.F.R. § 1005.8(c); Civil Remedies Division Procedures § 14(e).

Both parties indicated that a hearing is not necessary in this case and that they did not have any witnesses to offer. IG Br. at 22; P.Br. at 3. Accordingly, I will decide this case on the briefs submitted and the exhibits of record.

III. Issues

The issues in this case are limited to determining if the IG has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care

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by the exhibit numbers indicated by the parties, not the document numbers assigned by DAB.

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 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[3]

1. 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 first relied on section 1320a-7(a)(1) as the legal basis to exclude Petitioner. The IG must exclude an entity from participation in Medicare, Medicaid, and all other federally-funded health care programs if that entity "has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program." 42 U.S.C. § 1320a-7(a)(1); 42 C.F.R. § 1001.101(a). Thus, the elements the IG must prove to sustain Petitioner's exclusion pursuant to section 1320a-7(a)(1) in this case are: (1) Petitioner was convicted of a criminal offense; and (2) Petitioner's offense was related to the delivery of an item or service under Medicare or a State health care program. *See id.*

The IG has clearly established through documentary evidence that Petitioner was convicted of a criminal offense. An entity is considered "convicted" when a judgment of conviction has been entered by a federal, state, or local court, or a plea of guilty or no contest has been accepted in a federal, state, or local court. 42 U.S.C. § 1320a-7(i)(1), (3). On September 1, 2016, pursuant to Petitioner's plea, the District Court entered Judgment adjudicating Petitioner guilty of one count of Misprision of a Felony in violation of 18 U.S.C. § 4. IG Ex. 4 at 1. The District Court sentenced Petitioner to five years of probation and ordered Petitioner to pay restitution in the amount of $977,736 to the Defense Health Agency – Resource Management Division. *Id.* at 2, 6. Based on these facts, I conclude that, for purposes of exclusion, Petitioner was "convicted" of a criminal offense.

I further find the IG has established 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*

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

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).
Here, Petitioner pled guilty to Misprision of a Felony in violation of 18 U.S.C. § 4. In doing so, Petitioner stipulated that it had knowledge that its employees made false billings to Tricare and Medicaid, and made and used materially false, fictitious and fraudulent statements "in connection with the delivery of health care benefits, items, and services." IG Ex. 3 at 7-8.

Submitting a false claim to Medicaid is "related to" the delivery of an item or service under the Medicaid 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).

Indeed, in its plea agreement with the government, Petitioner specifically conceded the criminal acts that resulted in its conviction were "in connection with the delivery of health care benefits, items, and services." IG Ex. 3 at 7-8. 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). For these reasons, the record fully supports Petitioner's mandatory exclusion.

2. Petitioner was convicted of a felony criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct in connection with the delivery of a health care item or service, therefore, exclusion is required under 42 U.S.C. § 1320a-7(a)(3).

The IG also relied on section 1320a-7(a)(3) as an alternative legal basis to exclude Petitioner. Under that provision, the Secretary must exclude an individual from participation in Medicare, Medicaid, and all other federally-funded health care programs if that individual:

> [H]as 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 1320a-7(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.

42 C.F.R. § 1320a-7(a)(3). The four essential elements necessary in this case to support exclusion are: (1) the entity to be excluded must have been convicted of a felony offense; (2) the felony conviction must have been related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the felony offense must be in connection with the delivery of a health care item or service; and (4) the felonious conduct must have occurred after August 21, 1996. *Id.*

The evidence in the present case establishes unequivocally that Petitioner was convicted of a felony as described in 42 U.S.C. § 1320a-7(a)(3). *See* IG Ex. 2, 3. Petitioner pled guilty to a felony that occurred between 2008 and 2013. IG Ex. 3. And, as discussed above, Petitioner's conviction clearly relates to fraud; in its plea agreement, Petitioner explicitly states that the purpose and object of Petitioner's scheme was "to provide false, fictitious, and misleading information, statements and representations regarding claims submitted to TRICARE and the Texas Medicaid Program" in order to obtain money. *Id.* at 4. Petitioner had knowledge that its employees were incorrectly using billing codes and submitting claims for services that were not performed. *Id.*

Finally, the facts also establish that Petitioner's felony conviction is in connection with a health care item or service. It is well established that submission of false, fictitious or misleading claims 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.").

Petitioner does not dispute that it was convicted of the offenses for which exclusion is required, that the offense for which it was convicted was in connection with the delivery of a health care item or service, or that the offense it was convicted of is a felony related to fraud. Therefore, I conclude that the IG has proved the essential elements required for exclusion under 42 U.S.C. § 1320a-7(a)(3).

3. Petitioner's claim that it received a constructive waiver of exclusion is without merit.

Petitioner asserts there is no basis for the IG's exclusion determination because the government's consideration of mitigating circumstances in the sentencing phase of the underlying criminal matter amounted to a constructive grant of a waiver. P. Br. at 2.

Specifically, Petitioner claims that it was in fact granted a waiver from the ten-year exclusion because "the personnel responsible for administering the Federal or State health care program invoked in this case waived the exclusion of Petitioner by conferring with the government prosecutor to cause him to write a Brief to the Court to advance the facts discussed in same to warrant the waiver." *Id.* at 3.

Petitioner is plainly incorrect; as the IG observed in his reply, the applicable regulations require Petitioner to seek waiver of an exclusion in writing ". . .from an individual *directly responsible for administering* the Federal health care program." IG Reply at 2, *citing* 42 C.F.R. § 1001.1801(a) (emphasis mine). Mere consultation by a federal prosecutor with a victim agency does not trigger a waiver request by that victim agency. Instead, the administrator of a Federal health care program who determines that exclusion would impose a hardship on beneficiaries of that program, may *request* the Secretary of Health and Human Services, after consulting with the IG, grant a waiver of the exclusion. *See* 42 U.S.C. § 1320a-7(c)(3)(B). Even then, the IG may grant a state health care program's request to waive an exclusion only "if the individual or entity is the sole community physician or the sole source of essential specialized services in a community." *Id.*

In this case, there is no evidence that the administrator of any of the affected health care programs sought a waiver or consulted with the IG. The government's brief in support of Petitioner's plea agreement cannot be construed as a request for waiver to the Secretary from "the administrator of a Federal health care program." *Id.* Nor can mere consultation by the government with a victim agency in a criminal proceeding amount to a request by that victim agency to the Secretary to grant a waiver. I find no waiver request was made, considered, or ultimately granted by the IG in this matter.

4. I have no authority to order the IG to grant Petitioner a waiver.

Even if I were inclined to the merits of Petitioner's arguments in this regard, "[t]he decision to grant, deny, or rescind a request for a waiver is not subject to administrative or judicial review." 42 C.F.R. § 1001.1801(f); 42 C.F.R. § 1320a-7(c)(3)(B). Thus, even if the government's brief to the District Court in support of Petitioner's plea agreement could be liberally construed as a valid exclusion waiver request, the IG's determination with respect to any waiver request is not reviewable in this or any other forum.

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

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

6. *The IG has established two 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 February 28, 2017 exclusion notice that there were two aggravating factors that justified excluding it for more than five years. First, the acts resulting in the conviction caused, or were intended to cause, a financial loss to a government program of $50,000 or more; and second, the acts resulting in the conviction occurred over a period of one year or more. IG Ex. 1; 42 C.F.R. § 1001.102(b)(1), (2). In support of its determination that these two aggravating factors were applicable, the IG cited the District Court's restitution order of $977,700 against Petitioner, and that the acts resulting in Petitioner's conviction lasted from April 2008 through January 2013. IG Ex. 1 at 2.

a. *The IG established financial loss to a government program of $50,000 or more, as required by 42 C.F.R. § 1001.102(b)(1).*

The IG has provided evidence that adequately demonstrates Petitioner's acts which resulted in its criminal conviction caused a financial loss to a government program of $50,000 or more. Here, Petitioner pled guilty to a criminal charge which established it had knowledge that false, fictitious, and fraudulent statements were made in connection with payment of health care benefits, items, and services to federal or state healthcare programs. IG. Ex. 3 at 4. These admissions formed the basis of the District Court's order requiring Petitioner to pay restitution totaling $977,736.00 to the Defense Health Agency's Resource Management Division. IG Ex. 4 at 6. 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).

Financial loss is a significant aggravating factor that compels a period of exclusion longer than the five-year minimum. Indeed, loss is an "exceptional aggravating factor" when 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 approaches $1,000,000, which is substantially greater than the minimum needed to support an increase to the exclusion period; the significant loss amount strongly supports a lengthy exclusion. The IG has sustained its burden of proving financial loss to a government program of $50,000 or more.

b. The IG established Petitioner's conviction arose from acts that lasted a period of one year or more, as required by 42 C.F.R. § 1001.102(b)(2).

As evidence that Petitioner's criminal acts lasted one year or more, the IG offered the charges filed by the government against Petitioner, as well as the Petitioner's plea agreement by which the criminal case against Petitioner was resolved. *See* IG Ex. 1; IG Ex. 3 at 4. As part of its plea agreement, Petitioner admitted that the criminal acts that led to its conviction took place from April 1, 2008 and continued through January 28, 2013. IG. Ex. 3 at 4. In its brief before me, Petitioner does not contest this aggravating factor. Therefore, the evidence before me incontrovertibly establishes that the acts resulting in Petitioner's conviction occurred over a period of one year or more.

7. Petitioner has not demonstrated any mitigating factors exist in this case upon which I may rely to reduce the exclusion period.

Because I have concluded that aggravating factors are present in this case, the applicable regulations required me to next consider whether any mitigating factors exist that would offset those aggravating factors. *See* 42 C.F.R. § 1001.102(c). The regulations specifically outline what factors may be considered in mitigation. *See id*. In this case, none of Petitioner's arguments for mitigation properly relate to those regulatory mitigating factors. I am accordingly unable to consider them.

Specifically, Petitioner asserts that pursuant to 42 C.F.R. § 1001.102(c)(2),[4] the ten-year exclusion is unreasonable because "the government agencies responsible for administering the Federal health care program related in this matter were consulted by the government prosecutor and they advanced facts that Petitioner 'performs legitimate patient care in an underserved area' and that the closure of [P]etitioner's clinic would result in a hardship for the community in that area." P. Br. at 2. Under that regulatory provision, however, the exclusion can only be reduced if "[t]he record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional, or physical condition before or during the commission of the offense that reduced the individual's culpability." 42 C.F.R. § 1001.102(c).

While respectively laudable and unfortunate, Petitioner's provision of patient care to an underserved community and the loss of medical services resulting from the closure of its clinic simply do not satisfy this mitigating factor, which requires Petitioner to establish

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[4] Petitioner cites to "42 C.F.R. § 1001.102(e)2" in its Informal Brief. P. Br. at 3. As that section does not exist, I assume Petitioner made a typographical error and intended to refer to § 1001.102(c)(2), although I have considered Petitioner's argument under all three potential categories of mitigation, none of which are directly applicable.

evidence of a mental, emotional, or physical condition that reduced its culpability. *See id.* The other regulatory mitigation factors, which require Petitioner to show either a loss amount less than $5,000 or evidence of cooperation with federal or state authorities resulting in action taken against others in protection of relevant programs, are equally inapplicable in this case. *See* 42 C.F.R. §§ 1001.102(c)(1), (3). Accordingly, I find that Petitioner has not met his burden to establish any mitigating factors that would justify reducing the period of exclusion imposed by the IG.

8. A ten-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 OIG 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 OIG is appropriate, given the OIG's vast experience in implementing exclusions under these authorities.

57 Fed. Reg. 3321 (Jan. 29, 1992).

In making my determination, the quality of the aggravating (or mitigating) factors is of greater significance than the mere number of the factors 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.

Id. at 3314-15.

The crime for which Petitioner was convicted required knowledge of fraudulent submission of claims to government health programs, as well as concealment of those criminal acts, resulting in a loss to the victim agencies of $977,736. IG Ex. 4 at 6. This amount of loss, nearly $1,000,000, is significantly more than the $50,000 threshold for the loss to be considered aggravating. *See* 42 C.F.R. § 1001.102(b)(1). Establishment of loss amounts substantially greater than the minimum amount triggering consideration as an aggravating factor 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).

In further aggravation, Petitioner engaged in criminal conduct that lasted for more than a year and resulted in the generation and submission of numerous false claims to Medicare over this time. Petitioner's prolonged criminal conduct demonstrates a high level of untrustworthiness and shows its involvement was not simply a mistake or a brief criminal interlude.

For these reasons, I conclude the IG has satisfactorily established the existence and the significant weight of these aggravating factors. Petitioner's crime had a substantial financial impact on the Medicaid program. Accordingly, the length of exclusion imposed by the IG is not unreasonable.

VI. Conclusion

I affirm the IG's determination to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for a period of ten years.

/s/____________________
Bill Thomas
Administrative Law Judge