

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Reginald Eugene Smith,
(OI File No. 5-12-40194-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-164

Decision No. CR4640

Date: June 22, 2016

DECISION

Petitioner, Reginald Eugene Smith, was a licensed practical nurse in the State of Michigan who became embroiled in one of Detroit's home health agency kickback schemes. He was convicted on felony counts of conspiracy to commit health care fraud and conspiracy to offer, pay, solicit, and receive kickbacks. Based on his convictions, the Inspector General (IG) has excluded him for ten years from participating in the Medicare, Medicaid, and all federal health care programs, as authorized by section 1128(a)(1) of the Social Security Act (Act). Petitioner now challenges the exclusion.

For the reasons discussed below, I find that the IG properly excluded Petitioner and that the ten-year exclusion falls within a reasonable range.

Background

In a letter dated October 30, 2015, the IG notified Petitioner that he was excluded from participating in Medicare, Medicaid, and all federal health care programs for a period of ten years because he had been convicted of a criminal offense related to the delivery of an

item or service under Medicare or a state health care program. The letter explained that section 1128(a)(1) of the Act authorizes the exclusion. IG Ex. 1. Petitioner timely requested review.

Each party submitted a written argument (IG Br.; P. Br.). The IG submitted four exhibits (IG Exs. 1- 4) and a reply brief (IG Reply). Petitioner submitted two exhibits (P. Exs. 1-2). In the absence of any objection, I admit into evidence IG Exs. 1-4 and P. Exs. 1-2.

The parties agree that an in-person hearing is not necessary. IG Br. at 14; P. Br. at 4.

Discussion

1. Petitioner Smith must be excluded from program participation, because he was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program, within the meaning of section 1128(a)(1) of the Act.¹

Under section 1128(a)(1) of the Act, the Secretary of Health and Human Services must exclude an individual who has been 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 C.F.R. § 1001.101(a).

Here, Petitioner Smith was a “recruiter” for Angle’s Touch Home Health Agency, a Medicare-certified home health agency that claimed to provide in-home physical therapy, occupational therapy, speech pathology, and skilled nursing services to homebound Medicare beneficiaries. IG Ex. 3 at 4-5 (Indictment ¶¶ 10, 15). In fact, the home health agency defrauded the Medicare program by billing for services that were not necessary or were not provided to individuals who, in any event, did not need them. IG Ex. 3 at 7-10 (Indictment ¶¶ 20-32). Petitioner Smith participated in the scheme by recruiting Medicare beneficiaries as home health agency “patients,” even though those he recruited were not homebound and did not need home health services, as Petitioner well knew. IG Ex. 3 at 9 (Indictment ¶ 28). For each “patient” recruited, his co-conspirators paid him kickbacks and bribes. IG Ex. 3 at 9, 17-19 (Indictment ¶¶ 28, 46-54).

An indictment, filed in federal district court on March 6, 2014, charged Petitioner Smith and others with various felonies. Petitioner was charged with one count of conspiracy to commit health care fraud and one count of conspiracy to offer, pay, solicit, and receive

¹ My findings of fact and conclusions of law are set forth, in italics and bold, in the discussion captions of this opinion.

kickbacks (18 U.S.C. §§ 371, 1349). IG Ex. 3 at 6-10, 15-19 (Indictment ¶¶ 18-32, 40-54). On February 25, 2015, a jury convicted him on both counts. IG Ex. 2. The court subsequently entered judgment against him on those counts, sentenced him to 20 months in prison, and ordered him to pay the Medicare Trust Fund \$224,533.26 in restitution. IG Ex. 4.

Petitioner concedes, as he must, that he was convicted of a criminal offense, but he argues that “the conviction has been brought into question,” i.e. he has appealed, so any sanctions derived from that conviction “must be reviewed as well.” P. Br. Attachment 2-3 of 8; *see* P. Ex. 1. But the Act specifically provides that a pending appeal is irrelevant to whether an individual has been convicted: “[A]n individual . . . is considered to have been ‘convicted’ of a criminal offense . . . regardless of whether there is an appeal pending” Act § 1128(i); *see* 42 C.F.R. § 1001.2.

Petitioner also complains that he is being held responsible for the misconduct of others. P. Br. Attachment 3 of 8; *see* P. Ex. 1. Petitioner was convicted on two felony counts. He cannot, in this forum, claim innocence for any reason, including the misconduct of others. Federal regulations explicitly preclude such a collateral attack:

When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it, either on substantive or procedural grounds, in this appeal.

42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Chander Kachoria, R.Ph.*, DAB No. 1380 at 8 (1993) (“There is no reason to ‘unnecessarily encumber the exclusion process’ with efforts to reexamine the fairness of state convictions.”); *Young Moon, M.D.*, DAB CR1572 (2007).

Inasmuch as he was convicted of conspiracy to commit health care fraud and conspiracy to offer, pay, solicit, and receive kickbacks – which was part of the scheme to defraud Medicare – his crimes plainly meet the requirement that they be related to the Medicare program.

Petitioner was thus convicted of program-related crimes and must be excluded for at least five years. I now consider whether the length of his exclusion, beyond five years, falls within a reasonable range.

2. Based on the aggravating factors present in this case, the ten-year exclusion falls within a reasonable range.

An exclusion under section 1128(a)(1) must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2). Federal regulations set forth criteria for lengthening exclusions beyond the five-year minimum. 42 C.F.R. § 1001.102(b). Evidence that does not pertain to one of the aggravating or mitigating factors listed in the regulations may not be used to decide whether an exclusion of a particular length is reasonable.

Among the factors that may serve as bases for lengthening the period of exclusion are three relied on by the IG in determining the length of Petitioner's exclusion here: 1) the acts resulting in the conviction, or similar acts, resulted in a financial loss to Medicare or state health care programs of \$5,000 or more; 2) the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more; and 3) the sentence imposed by the court included incarceration. 42 C.F.R. § 1001.102(b)(1), (2), (5). The presence of an aggravating factor or factors not offset by any mitigating factor or factors justifies lengthening the mandatory period of exclusion.

Program financial loss (42 C.F.R. § 1001.102(b)(1)): Petitioner's actions resulted in program financial losses almost 45 times greater than the \$5,000 threshold for aggravation. The sentencing judge ordered him to pay \$224,533.26 in restitution. IG Ex. 4 at 5. Restitution has long been considered a reasonable measure of program losses. *Jason Hollady, M.D.*, DAB No. 1855 (2002). Because the financial losses were significantly in excess of the threshold amount for aggravation, the IG may justifiably increase significantly Petitioner's period of exclusion. *See Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003).

Length of criminal conduct (42 C.F.R. § 1001.102(b)(2)). Petitioner was convicted of offenses that began "in or about" July 2010 and continued through at least February 2012. IG Ex. 3 at 6, 15.² Thus, the acts that resulted in Petitioner's conviction and similar acts were committed over a period that well exceeded the one year necessary to constitute an aggravating factor. *See Jeremy Robinson*, DAB No. 1905 at 7, citing *Donald A. Burstein, Ph.D.*, DAB No. 1865 at 12 (finding that wrongful acts committed over "slightly more" than a year justified increasing the period of exclusion).

² I recognize that the face of the judgment indicates that Petitioner's criminal conduct continued until May 2013 (IG Ex. 4 at 1), but I could not find, in the indictment or judgment, any reference to Petitioner's individual acts occurring after February 2012. On the other hand, the conspiracy continued well beyond February 2012 (*see* IG Ex. 3 at 20; IG Ex. 4 at 1), and Petitioner, as a co-conspirator, can be held accountable for the illegal acts of his cohorts in furtherance of the conspiracy. But inasmuch as his part in the criminal enterprise exceeded the one year necessary to establish aggravation, I need not address this point.

Incarceration (42 C.F.R. § 1001.102(b)(5)). The criminal court sentenced Petitioner to a substantial period of incarceration – 20 months – which underscores the seriousness of his crimes. IG Ex. 4 at 2.

No mitigating factors. The regulations consider mitigating just three factors: 1) a petitioner was convicted of three or fewer misdemeanor offenses and the resulting financial loss to the program was less than \$1,500; 2) the record in the criminal proceedings demonstrates that the court determined that a petitioner had a mental, physical, or emotional condition that reduced his culpability; and 3) a petitioner's cooperation with federal or state officials resulted in others being convicted or excluded, or additional cases being investigated, or a civil money penalty being imposed. 42 C.F.R. § 1001.102(c). Characterizing the mitigating factor as "in the nature of an affirmative defense," the Departmental Appeals Board has ruled that a petitioner has the burden of proving any mitigating factor by a preponderance of the evidence. *Barry D. Garfinkel, M.D.*, DAB No. 1572 at 8 (1996).

Obviously, because Petitioner was convicted of felonies, the first factor does not apply here. Nor does this record suggest that Petitioner had a mental, physical, or emotional condition that reduced his culpability. I see no suggestion that he cooperated with federal or state officials in any respect.

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

Conclusion

Petitioner must be excluded for at least five years because he was convicted of felonies related to the delivery of items and services under Medicare.

So long as the period of exclusion is within a reasonable range, based on demonstrated criteria, I have no authority to change it. *Joann Fletcher Cash*, DAB No. 1725 at 7, citing 57 Fed. Reg. 3298, 3321 (1992). In this case, Petitioner's crime demonstrates that he presents significant risks to the integrity of health care programs. For an extended period of time, he engaged in illegal conduct that cost the Medicare program a significant amount of money. He was sentenced to a lengthy period of time in jail. No mitigating factors offset these aggravating factors.

