Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Craig Richard Wilder
(CCN: L-09-40321-9),

Petitioner

v.

The Inspector General.

Docket No. C-10-960

Decision No. CR2374

Date: May 24, 2011

DECISION

Petitioner, Craig Richard Wilder, M.D., is a physician licensed to practice in the State of California, who became embroiled in a massive scheme to defraud the Medicare and Medi-Cal programs.[1] He pled guilty in a California State Court to one count of health benefits fraud and two counts of grand theft, felonies that the court subsequently reduced to misdemeanors. Based on his convictions, the Inspector General (I.G.) has excluded him from participation in Medicare, Medicaid, and all federal health care programs for a period of 35 years, under section 1128(a)(1) of the Social Security Act (Act). Petitioner here challenges that exclusion.

For the reasons set forth below, I find that the I.G. is authorized to exclude Petitioner and that a 35-year exclusion is reasonable.

[1] Medi-Cal is California's Medicaid program.

I. Background

Petitioner was California physician who participated in a massive scheme to defraud the Medicare and Medi-Cal programs. He was charged in a multi-count indictment, and, under the terms of a plea agreement dated April 4, 2008, he pled guilty in California State Court to one count of felony health benefits fraud, two counts of felony grand theft, and one count of felony failure to file tax returns. I.G. Exhibits (Exs.) 2, 4.

As part of the plea agreement, the Court delayed sentencing for one year so that Petitioner could meet the terms of his probation, which included cooperating with the law enforcement officials investigating and prosecuting related criminal activities. Based on his successful completion of probation, the agreement allowed him to ask the court to reduce his felony convictions to misdemeanors. IG Ex. 2 at 1-2, 4. On June 5, 2009, the Court reduced his felony convictions to misdemeanors, placed him on summary probation for 36 months, and ordered him to pay more than $4 million in restitution to the Medicare and Medi-Cal programs. I.G. Exs. 3, 5.

In a letter dated June 30, 2010, the IG advised Petitioner that, because of his convictions, he was excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of 35 years. I.G. Ex. 1. The letter explained that section 1128(a)(1) of the Act authorizes the exclusion. Petitioner timely requested a hearing to challenge his exclusion.

Each party submitted an initial brief (I.G. Br.; P. Br.). The I.G. submitted a reply (I.G. Reply) and a supplemental response with one attachment (I.G. Supp.). The I.G. also submitted eight exhibits (I.G. Exs. 1-8). On Petitioner's behalf, prosecutors have submitted additional documents, which we have marked as Petitioner's Exhibits (P. Exs.) 1-4.[2] In the absence of any objection, I admit into evidence I.G. Exs. 1-8 and P. Exs. 1-4.

I directed the parties to indicate in their briefs whether an in-person hearing is necessary, and, if so, to "describe the testimony it wishes to present, the names of the witnesses it would call, and a summary of each witnesses' proposed testimony." I specifically directed the parties to explain why the testimony would be relevant. Order and Schedule for Filing Briefs and Documentary Evidence, Attachment 1 (Informal Brief of Petitioner ¶ IV) and Attachment 2 (Informal Brief of I.G. ¶ III) (November 8, 2010). The I.G. indicates that an in-person hearing is not necessary. Petitioner, on the other hand, contends that an in-person hearing is necessary, lists the witnesses he intends to call, and explains the purpose of their testimony. Petitioner's listed witnesses are individuals

[2] P. Ex. 1 is a January 27, 2011 memorandum from Gary Mogil to Timothy Fives. P. Ex. 2 is an August 26, 2010 Report of Investigation. P. Ex. 3 is a February 25, 2011 letter from Attorney James R. Terzian to Deputy District Attorney Amy Suehiro. P. Ex. 4 is an April 15, 2010 letter from Amy Suehiro.

involved in the prosecution of related cases with whom Petitioner cooperated. Petitioner contends, generally, that these witnesses have specific knowledge of the case and that their testimony would show that he was himself a victim of fraud perpetrated by his former confederates.

Petitioner has not established that an in-person hearing would serve any purpose. The I.G. does not challenge, and I wholly accept, his witnesses' factual assertions.

II. Issues

The issues before me are: 1) whether Petitioner 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), thus providing a basis for excluding him from program participation; and 2) if so, whether the length of the exclusion (35 years) is reasonable.

III. Discussion

A. Petitioner must be excluded for five years because he was convicted of a criminal offense related to the delivery of an item or service under the Medicare or a state health program, within the meaning of section 1128(a)(1) of the Social Security Act. [3]

Section 1128(a)(1) of the Act mandates that the Secretary of Health and Human Services 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. *See* 42 C.F.R. § 1001.101(a). Here, on its face, Petitioner's conviction establishes that he was convicted of health benefits fraud and theft, because he "made fraudulent claims for payment of a healthcare benefit" and "did unlawfully take money" from the Medicare and Medi-Cal programs. I.G. Ex. 3 at 1; I.G. Ex. 4 at 2-3. He must therefore be excluded from program participation.

Petitioner nevertheless points out that he was ultimately convicted of misdemeanors and that, pursuant to his plea agreement, he may continue working as a doctor. P. Br. at 1. First, section 1128(a)(1) does not require a felony conviction as a prerequisite to exclusion. That section mandates exclusion based on *any* level of criminal conviction -- felony or misdemeanor -- so long as it relates to the delivery of an item or service under Medicare or a state health care program. That his criminal conviction did not itself preclude him from practicing medicine is simply irrelevant.

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

B. Based on the aggravating factors and the one mitigating factor presented in this case, a 35-year exclusion is reasonable.

An exclusion brought 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 regulation may not be used to decide whether an exclusion of a particular length is reasonable.

Among the factors that may serve as a basis for lengthening the period of exclusion are the three that the I.G. relies on in this case: 1) the acts resulting in the conviction, or similar acts, caused a government program or another entity financial losses 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 individual was convicted of other offenses besides those forming the basis for his exclusion. 42 C.F.R. § 1001.102(b). 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. The sentencing court ordered Petitioner to pay the Medicare and Medi-Cal programs $4,002,312.14 in restitution. I.G. Ex.2 at 2; I.G. Ex. 3 at 3; I.G. Ex. 5 at 1. Restitution has long been considered a reasonable measure of program losses. *See Jason Hollady, M.D.*, DAB No. 1855 (2002). Here, Petitioner's crimes cost the healthcare programs financial losses many times greater than the $5,000 threshold for aggravation. The Departmental Appeals Board (Board) has characterized amounts substantially greater than the statutory standard as an "exceptionally aggravating factor" that is entitled to significant weight. *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, PhD.*, DAB No. 1865 (2003). I agree and consider that the substantial program loss more than justifies a significant increase in the period of exclusion.

Petitioner suggests that he was not responsible for this entire amount, although he unwittingly accepted responsibility for it. He points out that, from June through August 2005, without his knowledge, Alla Chernov (the alleged mastermind of the entire fraud) and Greg Antoine, Petitioner's own business agent, continued to bill Medicare, using Petitioner's still valid provider number. They deposited Medicare payments, totaling $278,506, into Petitioner's account, withdrew the money, and divided the proceeds. P. Ex. 2. Petitioner was completely unaware of their actions.

This episode illustrates that Petitioner involved himself with some loathsome characters, but it neither eliminates nor even diminishes the amount of program financial loss attributable to Petitioner's own crimes. First, I may not disturb the trial court's findings. *See* 42 C.F.R. § 1001.2007(d*); Joann Fletcher Cash*, DAB No. 1725 (2000). Moreover,

even if I could disregard the court's findings, deducting $278,506 from the court-ordered restitution leaves $3,723,806 in total program losses, which is still substantially more than the $5,000 necessary for aggravation.

Length of criminal conduct. The acts that resulted in Petitioner's conviction and similar acts were committed over a period of two years. According to the court documents, Petitioner's criminal activity began on or about January 1, 2003, and lasted through December 31, 2004. I.G. Ex. 4 at 2-3.

Conviction for other offenses. Along with his convictions for health benefits fraud and grand theft, Petitioner was convicted of failing to file tax returns and was ordered to pay restitution of $353,804.59 to the Franchise Tax Board. I.G. Ex. 2 at 1-2; I.G. Ex. 3; I.G. Ex. 6.

These aggravating factors show that Petitioner poses a significant threat to program integrity and justifies a significant period of exclusion. He was part of an enormous fraud. His participation lasted for two years and cost the Medicare and Medi-Cal programs millions of dollars. I recognize that others may have played substantially greater roles in initiating and implementing this major plunder of federal and state healthcare programs. Petitioner was just one of a dozen or so physicians who conspired with clinic owners Alla Chernov and Boris Sokol to enrich themselves by defrauding the state and federal healthcare programs. But Petitioner admittedly obtained multiple provider numbers for multiple locations simultaneously. With these numbers, the clinics billed the programs substantial amounts of money to which they were not entitled. Petitioner kept 20-25% of the ill-gotten gains and paid the remaining 75-80% to Chernov and Sokol. P. Ex. 1 at 1-2; I.G. Ex. 7 at 2. As I recently observed in a similar case, this level of program fraud would not have been possible without the active participation of licensed physicians. That one corrupt physician could cause such significant losses to federal and state healthcare programs underscores the importance of keeping the unscrupulous out of the program. *See Callie Hall Herpin*, DAB CR2333 at 4 (2011).

I now consider the one mitigating factor presented in this case.

Mitigating factor. 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 a petitioner had a mental, physical, or emotional condition that reduced her 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 a mitigating factor as "in the nature of an affirmative defense," the Board has ruled that 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).

As part of his plea agreement, Petitioner Wilder was required to "fully cooperate with law enforcement officials in their investigation and prosecution of health care fraud, unlawful remuneration, and any other criminal activities of which he has knowledge . . .." I.G. Ex. 2 at 4. The parties agree that Petitioner cooperated with law enforcement and, indeed, his level of cooperation has been extraordinary and led to the conviction of seven of his confederates so far. However, in setting the period of exclusion, the I.G. specifically considered Petitioner's level of cooperation. P. Br. at 5; I.G. Ex. 8. The period of exclusion would have been substantially longer had he not cooperated. I.G. Supp. at 2.

Petitioner complains that the period of exclusion effectively covers the life span of his career and greatly impedes his ability to practice medicine in the U.S. This may be true, but it does not make the period of exclusion unreasonable. As I pointed out in *Herpin*, the I.G. must offset the period of exclusion based on Petitioner's cooperation with law enforcement, but that factor does not have greater impact simply because Petitioner's underlying crime was so substantial. *Herpin*, DAB CR 2333 at 5. If the underlying crimes are so aggravated as to justify a lengthy period of exclusion, a provider may well find himself facing an exclusion that effectively spans his productive years, even where, as here, a mitigating factor has significantly reduced the total period of exclusion.

Additional defenses. Petitioner raises some additional arguments. He complains that he has been singled out; of the many physicians involved in the fraud, only he has been excluded. In fact, since the statute mandates exclusion whenever an individual or entity has been convicted of a program-related crime, the I.G. is bound by law to exclude the convicted participants. As here, the onset of exclusion may be delayed for a variety of reasons, but the certainty of exclusion remains.

Petitioner also asks that the effective date be changed from 2010 to 2005. As a matter of law, an exclusion becomes effective 20 days after the date of the I.G.'s notice of exclusion. 42 C.F.R. § 1001.2002. An administrative law judge has no authority to review the timing of the I.G.'s determination to impose an exclusion or to alter retroactively the date of the imposition of the exclusion. *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *Samuel W. Chang, M.D.*, DAB No. 1198 (1990).

IV. Conclusion

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)). Here, Petitioner's crimes caused significant program financial losses, far above the regulatory threshold for aggravation. His crimes continued for two years. Nor were these his only criminal activities; he was also guilty of failing to file tax returns. I recognize that he cooperated with law enforcement, that his level of cooperation went well beyond that required by his plea agreement, and that his

cooperation led to multiple criminal convictions. Nevertheless, based on the totality of the aggravating and mitigating factors, I find that the 35-year exclusion falls within a reasonable range.

/s/
Carolyn Cozad Hughes
Administrative Law Judge