Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Juan M. Rios, M.D.,
(OI File No. 7-12-40220-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-741

Decision No. CR3322

Date: August 8, 2014

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Juan M. Rios, M.D., from participating in Medicare, State Medicaid programs, and all other federally funded health care programs for a minimum period of 15 years. I base my decision on proof that Petitioner was convicted of a felony offense within the meaning of section 1128(a)(3) of the Social Security Act (Act) and on evidence relating to certain aggravating factors proven by the I.G. There is no evidence in this case relating to any potential mitigating factors.

I. Background

Petitioner, a physician, requested a hearing to challenge the determination that I recite in this decision's opening paragraph and the case was assigned to me. The I.G. filed a brief and five proposed exhibits, identified as I.G. Ex. 1 – I.G. Ex. 5. Petitioner filed a brief and no proposed exhibits. The I.G. offered a reply brief and a sixth exhibit, I.G. Ex. 6, as rebuttal to arguments that Petitioner made in his brief. I receive the I.G.'s exhibits, including I.G. Ex. 6, into evidence.

The I.G. did not request an in-person hearing. However, Petitioner requested one and offered his own testimony. Petitioner contends that his testimony is necessary in order to show how court-ordered restitution was calculated in the case that led to Petitioner's conviction. I do not find that Petitioner has offered a sufficient basis to introduce his testimony into the record and I deny his request.

First, in a pre-hearing order that I issued on March 24, 2014, I specifically directed each party to reduce any and all proposed testimony to writing. Petitioner did not comply with that order nor did he explain why he failed to do so. Second, Petitioner has not established that he is qualified to interpret the order of the court that sentenced him. The order of restitution is part of the judgment of conviction that was entered against Petitioner by the United States District Court for the Southern District of Illinois. I.G. Ex. 1. Petitioner is neither an official of that court nor is he vested with authority by the court to explain or interpret the court's records. Any testimony he would offer attempting to do so would be irrelevant by virtue of Petitioner's lack of qualification. Finally, even if Petitioner were qualified to testify concerning the restitution order, I would find his testimony to be irrelevant. The restitution that Petitioner was ordered to pay relates to an aggravating factor that addresses the financial impact of Petitioner's crimes. But restitution is not, in and of itself, at issue here. The issue, rather, is what financial impact Petitioner's crimes had and that is spelled out both in the indictment to which Petitioner pled guilty and to the plea agreement that Petitioner signed and in which he admitted his guilt.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues here are: whether Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(3) of the Act; and whether the 15-year exclusion imposed against him by the I.G. is reasonable.[1]

B. Findings of Fact and Conclusions of Law

Section 1128(a)(3) of the Act mandates the exclusion of any individual who is convicted of a felony, committed after August 21, 1996, that relates to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct, in connection with the

[1] In his brief the I.G. asserted incorrectly that he had imposed a 13-year exclusion. Subsequently, the I.G. advised me that he had erred and that he was seeking to affirm the 15-year exclusion that he had imposed originally against Petitioner. I afforded Petitioner the opportunity to object and Petitioner did so. I find no reason to limit the exclusion in this case due to the I.G.'s error. Therefore, I evaluate the reasonableness of a 15-year exclusion based on the factors that I discuss below.

delivery of a health care item or service. Stated simply this section is intended to mandate the I.G. to exclude anyone who is convicted of health care-related financial felonies directed against programs other than the Medicare and State Medicaid programs. Crimes directed against those programs are covered by another section of the Act, section 1128(a)(1).

The evidence in this case proves unequivocally that Petitioner was convicted of a felony as is described at section 1128(a)(3).[2] Petitioner pled guilty to Counts 1, 2, 3, 4 and 6 of a Superseding Indictment that had been issued against him. I.G. Ex. 1 at 1. Count 1 of the Indictment explicitly charged Petitioner with the federal felony offense of health care fraud. I.G. Ex. 4 at 1 – 4. In pleading guilty Petitioner admitted to the following facts:

- He devised a scheme to defraud health care benefit programs of between $400,000 and $1 million.

- In furtherance of his scheme, Petitioner ordered a series of 10 days of physical therapy sessions for all of his patients who were covered by a health insurance carrier knowing that many of his patients would not receive all of the services that were being billed.

- Petitioner was not always present when physical therapy services were being provided and, furthermore, many of these services were provided by unqualified individuals. However, Petitioner billed for the services as if a qualified individual had provided them.

- Petitioner directed the creation of false medical bills, approved submission of false medical bills to insurance carriers, and requested payment for services that he knew that neither he nor any member of his staff had provided.

- Petitioner provided false physical therapy progress notes to insurance carriers in order to further his scheme.

I.G. Ex. 3 at 1 – 2. Petitioner also admitted, as an essential element of his crime, that his fraudulent scheme was in connection with the delivery or payment for health care benefits, items or services. I.G. Ex. 2 at 5.

These admitted facts establish all of the elements of an 1128(a)(3) crime. They establish that Petitioner was convicted of a felony, that the felony involved fraud perpetrated

[2] Petitioner was charged with, and pled guilty to perpetrating a scheme that began in 1995 and that continued through 1999. Obviously, some of the crimes that Petitioner committed transpired before August 21, 1996. But, others occurred after that date.

against health care insurers, and that the crime was committed in connection with the delivery of health care items or services.

Petitioner acknowledges that he was convicted of a felony but asserts that the I.G. failed to prove that the facts show that he committed any crime in connection with the delivery of a health care item or service. Petitioner asserts that his actions were: "peripheral, non-specific[,] and never supported by any factual basis." Petitioner's brief at 2.[3] Amplifying on that assertion, Petitioner argues that the I.G. has not offered evidence establishing the nature of his crimes and that, absent such evidence, there can be no basis for finding that he committed any crimes in connection with the delivery of health care items or services.

I disagree, emphatically. The facts that Petitioner *admitted to* are ample basis for concluding that he committed crimes of a financial nature that were in connection with health care items or services.

Now, Petitioner seems to be arguing that he was not really guilty of these crimes, or that he pleaded guilty for the purposes of obtaining closure, but in the absence of any evidence proving his actual guilt. Evidently, he would litigate before me the basis for his conviction. That is impermissible. 42 C.F.R. § 1001.2007(d). The authority to exclude pursuant to section 1128(a)(3) derives from Petitioner's conviction. The issue of his guilt was settled when Petitioner pled guilty. The elements of Petitioner's crime were established by the indictment to which he pled guilty and by Petitioner's plea agreement in which he explicitly admitted all of the elements of his crimes and the details of many of them.

The minimum exclusion period that must be imposed against an individual who is convicted of a crime within the meaning of section 1128(a)(3) is five years. Act, section 1128(c)(3)(B). Here, the I.G. imposed an exclusion of at least 15 years and Petitioner has challenged the length of that exclusion. I therefore must decide whether an exclusion of greater than five years – at least 15 years in this case – is reasonable.

The purpose of any exclusion imposed by the I.G. is remedial. The intent is to assure that federally funded programs and the beneficiaries and recipients of program funds are protected from individuals who have established by their conduct that they are untrustworthy. The issue that I must decide in any case where the length of exclusion is at issue is: how long an exclusion is reasonably necessary, given the facts of the case, to protect the programs and their beneficiaries and recipients?

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[3] Petitioner did not consecutively number the pages in his entire Informal Brief. Citations are to the page number in the written brief, which Petitioner named his "Reply Brief."

The Secretary of the United States Department of Health and Human Services has published regulations governing the length of exclusions imposed for more than the minimum five-year period. These regulations function as rules of evidence that determine what evidence is relevant to the issue of trustworthiness. For exclusions imposed pursuant to section 1128(a)(3) of the Act, the relevant regulation is found at 42 C.F.R. § 1001.102. Subsection (b) of this regulation enumerates various aggravating factors, which if present, may be used to lengthen an exclusion beyond the five-year minimum period. Subsection (c) enumerates various mitigating factors, which if present, may be used to offset aggravating evidence and, possibly, to reduce an exclusion down to as few as five years.

The I.G. offered evidence that establishes the following aggravating factors:

- Petitioner's crimes resulted in a loss to a government program or other entities of at least $5,000. 42 C.F.R. § 1001.102(b)(1). In support, the I.G. relies on evidence that Petitioner was ordered to pay restitution of more than $300,000. I.G. Ex. 1 at 5. That is certainly the case, but even more significant, Petitioner *admitted* to devising a scheme to defraud health insurers of between $400,000 and $1 million. I.G. Ex. 3 at 1 – 2.

  Petitioner attempts now to minimize the impact of his crimes by asserting that the restitution figures were, in effect, fictitious numbers that were imposed on him by the sentencing court and that these numbers may have "double counted" the financial impact of some of his crimes. Petitioner's brief at 4. However, it is unnecessary for me to look at the fine print of the restitution order given Petitioner's admission of the financial impact of his crimes.

- Petitioner committed the acts that resulted in his conviction, or similar acts, over a period of one year or longer. 42 C.F.R. § 1001.102(b)(2). In fact, Petitioner admitted to perpetrating his scheme beginning in 1995 and through 1999, a period of more than four years. I.G. Ex. 3 at 1 – 2.[4]

- Petitioner was incarcerated as a result of his conviction. 42 C.F.R. § 1001.102(b)(5). Petitioner was sentenced to a term of 30 months' imprisonment

[4] The fact that Petitioner may have engaged in criminal activity prior to August 21, 1996 is no bar to my considering those crimes as aggravating evidence. There is a de facto "statute of limitations" in the Act barring exclusion for crimes that were committed prior to August 21, 1996. But, that bar does not relate to the issue of trustworthiness. It has long been settled that evidence that relates to trustworthiness may be considered even if that evidence does not relate, strictly speaking, to the acts that are the statutory basis for exclusion.

for his criminal scheme to defraud health insurers and other entities. I.G. Ex. 1 at 2.

Additionally, the I.G. asserts that there is evidence that establishes the presence of a fourth aggravating factor. According to the I.G., Petitioner was the subject of an adverse action (revocation of his State medical license and controlled substance license) that was based on the same facts that underlie his criminal conviction. That, according to the I.G., establishes the presence of the aggravating factor identified at 42 C.F.R. § 1001.102(b)(9).

Petitioner concedes that his State licenses to practice medicine and prescribe controlled substances were revoked and does not deny that these revocations are the consequence of an adverse action. But, he contends that there is no proof that the revocations are based on the same facts as are the basis for his criminal conviction. Petitioner's brief at 5.

The I.G. rebutted that assertion with I.G. Ex. 6. That exhibit is a Complaint filed against Petitioner in the Illinois Department of Professional Regulation that charges him with the identical crimes to which he pled guilty. Subsequently, the Department of Professional Regulation adopted an order revoking Petitioner's physician's license and license to prescribe controlled substances. I.G. Ex. 5. It is evident that the order revoking these licenses is premised on the complaint and on the facts underlying Petitioner's conviction.[5]

I find that the evidence that relates to the aggravating factors established by the I.G. is ample basis for finding the 15-year minimum exclusion to be reasonable. Petitioner is a highly untrustworthy individual. He devised and perfected a scheme to defraud health insurers. He perpetrated that scheme over a period of at least four years. He stole, or sought to steal, between $400,000 and $1 million. That is evidence of concerted, willful, and calculated criminal activity by Petitioner and it justifies as entirely reasonable the I.G.'s exclusion determination.

Petitioner makes several arguments concerning his exclusion that I find to be either irrelevant or without merit. He reiterates that he is not really guilty of the crimes that he admitted previously and to which he pled guilty. He asserts that he hasn't treated Medicare beneficiaries for years and thus presents no danger to the program. He argues that his relatively advanced age (67) should be considered as a factor that works to his benefit. He contends that his skill and the quality of care that he provides have never been an issue. He asserts that he is an excellent doctor and that the community should

[5] I note that Petitioner's loss of his physician's license due to an adverse finding would be an independent ground to exclude him – possibly indefinitely – even if the license revocation is based on facts entirely separate from those which underlie his criminal conviction. Act, section 1128(b)(4).

not be deprived of his skills and the services he provides. He argues that the effect of his exclusion will be to prevent him from earning the money he must pay as restitution. Petitioner's brief at 5 – 7.

None of these assertions relate to any of the regulatory mitigating factors and they are, therefore, irrelevant. *See* 42 C.F.R. § 1001.102(c). Moreover, and as I have stated, at least some of them are belied by the evidence. I am hard put to attach any credibility to Petitioner's professions of innocence given his previous admission of guilt.

/s/
Steve T. Kessel
Administrative Law Judge