

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Robert Kolbusz, M.D.,
(OI File No. 5-07-4-0118-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-463

Decision No. CR4700

Date: September 8, 2016

DECISION

Petitioner, Robert Kolbusz, M.D., was a physician, licensed to practice in the State of Illinois, who fabricated patient diagnoses and falsified medical records so that he could bill Medicare and private insurers for treating nonexistent conditions. He was convicted on three felony counts of mail fraud and three felony counts of wire fraud. Based on his convictions, the Inspector General (IG) has excluded him for 30 years from participating in Medicare, Medicaid, and all federal health care programs, as provided for in section 1128(a)(1) and 1128(a)(3) of the Social Security Act (Act). Petitioner now challenges the length of the exclusion. For the reasons discussed below, I find that the IG properly excluded Petitioner and, given the enormity of his crimes, that the 30-year exclusion falls within a reasonable range.

Background

By letter dated January 29, 2016, the IG notified Petitioner Kolbusz that he was excluded from participating in Medicare, Medicaid, and all federal health care programs for a period of 30 years, because he had been convicted of criminal offenses related to: 1) the delivery of an item or service under the Medicare or state health care program; and 2)

fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item of service. The letter explained that sections 1128(a)(1) and 1128(a)(3) of the Act authorize the exclusion. IG Ex. 1.

Petitioner concedes that he was convicted and is subject to exclusion under sections 1128(a)(1) and 1128(a)(3). Order and Schedule for Filing Briefs and Documentary Evidence at 2 (May 3, 2016); P. Brief (Br.) attachment at 1.

Each party submitted a written argument (IG Br.; P. Br.). The IG also submitted eight exhibits (IG Exs. 1-8) and a reply brief (IG Reply). Petitioner submitted three exhibits (P. Exs. 1-3) and two attachments (P. Atts. 1-2). In the absence of an objection, I admit into evidence IG Exs. 1-8 and P. Exs. 1-3 and P. Atts. 1-2.

The parties agree that this case does not require an in-person hearing. IG Br. at 17; P. Br. at 4.

Issue

Because the parties agree that the IG has a basis upon which to exclude Petitioner from program participation, the sole issue before me is whether the length of the exclusion (30 years) is reasonable. 42 C.F.R. § 1001.2007.

Discussion

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. 42 C.F.R. § 1001.101(a).

Section 1128(a)(3) says that an individual or entity convicted of felony fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service must also be excluded from participation in federal health care programs. 42 C.F.R. § 1001.101(c).

In this case, Petitioner was a dermatologist who owned and operated a clinic in Downers Grove, Illinois. IG Ex. 7 at 1; *see* IG Ex. 3 at 1. From 2003 until 2010, he submitted false claims to Medicare and private insurers, billing for treatments that he did not provide to patients who did not suffer from the conditions he described. To justify the billings, he manufactured medical records, including operating reports, ascribing the fictitious diagnoses and treatments to his actual patients. IG Ex. 7 at 4-5. The scheme was lucrative, costing Medicare and the private insurers millions of dollars. IG Ex. 7 at 5-12.

A federal jury convicted Petitioner Kolbusz on three felony counts of mail fraud, in violation of 18 U.S.C. § 1341, and three felony counts of wire fraud, in violation of 18 U.S.C. §1343. IG Ex. 3 at 1. The court entered judgment on August 28, 2015.

The court sentenced Petitioner Kolbusz to 84 months (7 years) in prison, followed by two years of supervised release, and ordered him to pay \$3,764,381.69 in restitution. IG Ex. 3 at 2-3, 6.

Based on the aggravating factors in this case, and the absence of any mitigating factor, the 30-year exclusion falls within a reasonable range.¹

Aggravating factors. An exclusion under either section 1128(a)(1) or 1128(a)(3) 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 (42 C.F.R. § 1001.102(c)) 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 the four that the IG cites to justify the period of exclusion in this case: 1) the acts resulting in the conviction, or similar acts, resulted in a financial loss to a government program or other entity of \$5,000 or more; 2) the acts resulting in the conviction, or similar acts, were committed over a period of one year or more; 3) the sentence imposed by the court included incarceration; and 4) the convicted individual has been the subject of any other adverse action by any federal, state, or local government agency or board, if the adverse action is based on the same set of circumstances that serves as a basis for the 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.

Financial loss to Medicare and Medicaid programs (42 C.F.R. § 1001.102(b)(1)). Petitioner's actions resulted in program financial losses many, many times greater than the \$5,000 threshold for aggravation. The sentencing judge ordered him to pay a whopping \$3,764,381.69 in restitution to the victims of his crime. Of this amount, he was to pay \$1,087,865.27 to the Medicare Trust fund; \$2,651,517.97 to private insurers; and the rest (\$24,998.45) to a long list of patient victims. IG Ex. 3 at 6-10.

¹ I make this one finding of fact/conclusion of law.

Restitution has long been considered a reasonable measure of program losses. *Jason Hollady, M.D.*, DAB No. 1855 (2002). I consider the enormity of the program's financial losses here an exceptionally aggravating factor that compels a period of exclusion significantly longer than the five-year minimum. *See Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003).

Petitioner does not challenge the amount of program losses but argues that, in the absence of published guidelines correlating the dollar amounts to lengths of exclusions, the IG's determination is arbitrary and capricious. I disagree. As the regulations reflect, the amount of the program losses reflects, in part, the seriousness of the individual's crime and thus the level of threat he poses to program integrity. While the process is inexact, so long as the IG reasonably translates the aggravating factor into an increase in the period of exclusion, I must affirm its determination. Moreover, that one corrupt physician could cause losses of three to four million dollars underscores the importance of excluding the unscrupulous. Health care programs simply cannot withstand this level of fraud.

Petitioner also points to the sentencing court's orders for restitution and forfeiture (IG Exs. 3 and 4) suggesting that he has already been punished financially and has repaid the programs. First, an exclusion is remedial rather than punitive; its purpose is to protect program integrity and program beneficiaries. In any event, that Petitioner had to return the money he stole can hardly be considered additional punishment. Finally, in deciding whether a period of exclusion is reasonable, the regulations direct me to consider the financial loss "regardless of whether full or partial restitution has been made." 42 C.F.R. § 1001.102(b)(1).

Duration of crime (42 C.F.R. § 1001.102(b)(2)). Petitioner's criminal acts were committed over a period of approximately seven years – beginning in 2003 and continuing into 2010 – which is significantly longer than one year necessary for aggravation. IG Ex. 7 at 4. The Departmental Appeals Board has "accorded weight sufficient to sustain a 15-year exclusion to the fact that wrongful acts were committed for even just 'slightly more' than the one-year minimum standard." *Jeremy Robinson*, DAB No. 1905 at 12, *citing Donald A. Burstein, Ph.D.*, DAB No. 1865 at 12.

Incarceration (42 C.F.R. § 1001.102(b)(5)). The criminal court sentenced Petitioner to a substantial period of incarceration – 84 months (7 years). IG Ex. 3 at 2.

Any period of incarceration justifies increasing the period of exclusion. Generally, the longer the jail time, the greater the increase, because a lengthy sentence evidences a more serious offense. *See Jeremy Robinson*, DAB No. 1905 at 12 (characterizing a nine-month incarceration as "relatively substantial."); *Jason Hollady, M.D.*, DAB No. 1855 at 12 (2002); *Stacy Ann Battle, DDS.*, DAB No. 1843 (2002) (finding that four months in a

halfway house, followed by four months home confinement justifies lengthening the period of exclusion); *Brenda Mills, M.D.*, DAB CR1461, *aff'd* DAB No. 2061 (2007) (finding that six months home confinement justifies increase in length of exclusion).

Other adverse actions (42 C.F.R. § 1001.102(b)(9)). Based on the circumstances underlying this exclusion, the Division of Professional Regulation of the Illinois Department of Financial and Professional Regulation indefinitely suspended Petitioner's license to practice medicine. IG Ex. 5.

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 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).

Obviously, because Petitioner's felony conviction involved program financial losses many, many times greater than \$5,000, the first factor does not apply here. Nor does Petitioner claim any mental, physical, or emotional condition that reduced his culpability. He also does not claim to have cooperated with federal or state officials.

Instead, Petitioner points to remarks made by the sentencing judge who explained that he considered 84 months incarceration sufficient to punish the offense, impress upon the defendant respect for the law, protect the public from further crimes by him, and deter others. The judge opined that the 324-405 months (27 to 33+ years) called for by sentencing guidelines would be "grossly inappropriate." P. Att. 2 at 2. I do not consider these remarks mitigating.

Discovery request. With his submissions, Petitioner requests, for the first time, that the IG provide him with copies of the cases cited in the IG's brief. Had Petitioner made this request at the time of the prehearing conference, I'd likely have directed the IG to do so, as a courtesy. However, providing the cited cases would not have changed the outcome here, and, at this point, directing the IG to produce them would unduly delay these proceedings. 42 C.F.R. § 1005.7(e)(2)(iii).

Conclusion

So long as the period of exclusion is within a reasonable range, based on demonstrated criteria, I have no authority to change it. *Jeremy Robinson*, DAB No. 1905 at 5; *Joann Fletcher Cash*, DAB No. 1725 at 7 (2000), *citing* 57 Fed. Reg. 3298, 3321 (1992). In this case, Petitioner's crimes demonstrate that he presents a significant risk to the integrity of health care programs. He billed for procedures that were unnecessary, costing insurance

programs, including Medicare, over 3.7 million dollars. Even more reprehensible, to cover his tracks, he falsified patient records. He continued this illegal conduct for about seven years, which is a very long time. His conduct was such that the sentencing judge sent him to prison for seven years. He lost his medical license. Based on these aggravating circumstances, and the absence of any mitigating circumstances, a 30-year exclusion falls within a reasonable range.

/s/

Carolyn Cozad Hughes
Administrative Law Judge