Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

William Britt Morris, D.M.D.
(OI File No. H-15-40033-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-3575

Decision No. CR4594

Date: April 28, 2016

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, William Britt Morris, D.M.D., from participation in Medicare, Medicaid, and all other federal health care programs based on Petitioner's conviction of a criminal offense related to the delivery of a health care item or service under Medicare or a state health care program. For the reasons discussed below, I conclude that the IG has a basis for excluding Petitioner because he was convicted of attempting to file a false claim with the Alabama Medicaid Agency and thereby was convicted of a criminal offense in connection with the delivery of an item or service under a state health care program. I affirm the 10-year exclusion period because the IG has proven one aggravating factor, and there are no mitigating factors present. I also affirm that the effective date of Petitioner's exclusion is June 18, 2015.

I. Background

By letter dated May 29, 2015, the IG notified Petitioner that, pursuant to section 1128(a)(1) of the Social Security Act, 42 U.S.C. § 1320a-7(a)(1), he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a

minimum period of 10 years, effective 20 days from the date of the letter. IG Exhibit (Ex.) 1 at 1. In the letter, the IG informed Petitioner of the factual basis for the exclusion, stating:

> This exclusion is due to your conviction as defined in section 1128(i) (42 U.S.C. 1320a-7(i)), in the Circuit Court of Montgomery County, Alabama, of a criminal offense related to the delivery of an item or service under the Medicare or a State health care program, including the performance of management or administrative services relating to the delivery of items or services, under any such programs.

IG Ex. 1 at 1. The IG extended the exclusion period from the statutory minimum of five years to 10 years based on the presence of one aggravating factor. IG Ex. 1 at 1-2. As for the aggravating factor, the IG found that "[t]he acts resulting in the conviction, or similar acts, that caused, or were intended to cause, a financial loss to a Government program or to one or more entities of $5,000 or more." IG Ex. 1 at 1; 42 C.F.R. § 1001.102(b)(1). The IG did not consider any mitigating factors. IG Ex. 1; *see* 42 C.F.R. § 1001.102(c).

Petitioner, through counsel, timely filed a request for hearing before an administrative law judge on July 31, 2015. On October 7, 2015, Administrative Law Judge Joseph Grow convened a prehearing conference by telephone pursuant to 42 C.F.R. § 1005.6, during which he clarified the issues of the case and established a schedule for the submission of prehearing briefs and exhibits.[1] The schedule and summary of the prehearing conference was memorialized in an Order and Schedule for Filing Briefs and Documentary Evidence (Order), dated October 8, 2015.

Pursuant to the Order, the IG filed an Informal Brief (IG Br.) along with four proposed exhibits (IG Exs. 1-4). Petitioner thereafter filed his Informal Brief (P. Br.) and seven proposed exhibits[2] (P. Exs. 1-7). The IG then filed a reply brief (IG Reply). In an Order dated January 21, 2016, Judge Grow granted Petitioner leave to file written direct testimony in lieu of in-person testimony, and Petitioner subsequently, on February 8, 2016, filed an affidavit containing his written direct testimony (P. Affidavit). On February 23, 2016, the IG submitted an objection to Petitioner's testimony, arguing that the testimony is immaterial and cumulative, and consisted of a collateral attack on the underlying criminal conviction. Petitioner filed a response to the objection on March 7, 2016. As Judge Grow recognized that the expected testimony "may raise an issue as to the loss amounts" and did not otherwise limit the content of the testimony, I conclude it is

---

[1] This case was reassigned to me on February 25, 2016.

[2] Petitioner also filed informal briefs on July 31, 2015 in conjunction with his request for hearing.

appropriate to admit Petitioner's written direct testimony. I also admit the aforementioned exhibits and briefs, along with the parties' filings related to the January 21, 2016 Order. CMS has not requested the opportunity to cross-examine Petitioner; therefore, I will decide this case based on the written submissions and documentary evidence. *See* Order ¶ V.

II. Issues

The regulations limit the issues in this case to whether there is a basis for exclusion, and, if so, whether the length of the exclusion that the IG has imposed is unreasonable. 42 C.F.R. § 1001.2007(a)(1)-(2).

III. Jurisdiction

I have jurisdiction to decide this case. 42 U.S.C. § 1320a-7(f)(1); 42 C.F.R. § 1005.2.

IV. Findings of Fact, Conclusions of Law, and Analysis[3]

> ***1. Petitioner's conviction of the offense of attempting to file a false claim with the Alabama Medicaid Agency is a conviction of a criminal offense related to the delivery of an item or service under a State health care program and requires an exclusion from Medicare, Medicaid, and all other federal health care programs for a minimum of five years.***

The Social Security Act (Act) requires the exclusion of any individual or entity from participation in all federal health programs based on four types of criminal convictions. 42 U.S.C. § 1320a-7(a). In this case, the IG relied on section 1320a-7(a)(1) as the legal basis to exclude Petitioner, which states:

> (a) Mandatory exclusion.—
>
> The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
>
> > (1) Conviction of program-related crimes.—
> >
> > Any individual or entity that 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.

---

[3] My findings of fact and conclusions of law are set forth in italics and bold font.

Id. § 1320a-7(a)(1).

The IG argues that, pursuant to 42 U.S.C. § 1320a-7(a)(1), Petitioner's exclusion is required based on his conviction for the offense of attempting to file a false claim with the Alabama Medicaid Agency. IG Br. at 2-5. Petitioner, in the final of the three informal briefs he submitted, did not dispute that exclusion is warranted or that his conviction was for a criminal offense related to the delivery of an item or service under Medicare.[4] P. Br. 1-3; *see* 42 U.S.C. § 1320a-7(a)(1). In fact, Petitioner stated that he "admits that a five (5) year exclusion is warranted, that is what he agreed to and has no issue with that length of time." P. Br. at 7. Petitioner goes on to explain that while he agrees that the five-year exclusion is warranted, "[h]e does, however, believe that the additional five (5) year enlargement is not reasonable." P. Br. at 7. As discussed below, I agree with the parties that exclusion is mandated.

In June 2014, the State of Alabama presented a 59-count indictment to a grand jury charging that Petitioner had committed 58 counts in violation of section 22-1-11(a) of the Alabama Code and one count in violation of section 13A-8-3 of the Alabama Code.[5,6]

---

[4] Petitioner filed two informal briefs on July 31, 2015 in conjunction with his request for hearing.

[5] While the indictment is signed by an Assistant Attorney General, the document submitted, on its face, does not indicate that a grand jury returned a true bill of indictment. However, the evidence otherwise demonstrates that Petitioner was indicted on all 59 counts. *See* IG Ex. 3.

[6] A violation of section 22-1-11(a) is a felony under Alabama law, regardless of the amount of money at issue, and is considered to be a Class C Felony based on the potential term of incarceration. Ala. Code §§ 22-1-11(a) (1975) and 13A-5-6(a)(3) (1975). Section 22-1-11(a) pertains to "[a]ny person who, with intent to defraud or deceive, makes, or causes to be made or assists in the preparation of any false statement, representation, or omission of a material fact in any claim or application for any payment, regardless of amount, from the Medicaid Agency, knowing the same to be false; or with intent to defraud or deceive, makes, or causes to be made, or assists in the preparation of any false statement, representation, or omission of a material fact in any claim or application for medical benefits from the Medicaid Agency, knowing the same to be false." A violation of section 13A-8-3, theft of property in the first degree, is a class B felony under Alabama law. Ala. Code. § 13A-8-3(d) (1975). Petitioner pleaded guilty to an attempt to commit the offense of filing a false claim with the Alabama Medicaid Agency, and an attempt to commit a Class C felony is a Class A misdemeanor in the State of Alabama. Ala. Code § 13A-4-2(d)(4) (1975).

Petitioner entered into an undated plea agreement with the State of Alabama, with the signatories including Petitioner's counsel, along with a prosecuting attorney and the Acting Alabama Medicaid Commissioner. P. Ex. 1. The plea agreement indicated that Petitioner had agreed to plead guilty to a single count of "Attempting to File a False Claim with the Alabama Medicaid Agency in violation of Ala. Code 1975 § 22-1-11, a Class A misdemeanor," and that the State of Alabama would make a motion for *nolle prosequi* as to the remaining counts alleged in the indictment.[7] P. Ex. 1. at 1. The plea agreement specified that "[r]estitution in the amount of $360,000.00 will be paid prior to the sentencing date of October 30, 2014 and will be paid by check drawn on the trust account of counsel for the defendant or by certified bank check and made payable to the Alabama Medicaid Agency." P. Ex. 1 at 1. The agreement further stated that the "Alabama Medicaid Agency agrees that the restitution amount stated above satisfies all claims that the Agency has for overpayments due from the defendant, as identified in the Agency's November 6, 2013 demand letter to the defendant."[8] P. Ex. 1 at 1. On September 11, 2014, Petitioner appeared in the Circuit Court of Montgomery County, Alabama (Circuit Court) and entered a plea of guilty to the charge of attempting to file a false claim with the Alabama Medicaid Agency. IG Ex. 3. On October 23, 2014, the Circuit Court ordered Petitioner to pay $360,000 in restitution to the Alabama Medicaid Agency no later than October 31, 2014, and the Alabama Medicaid Agency was listed as a "victim" on the same document. IG Ex. 4 at 1-2. Subsequently, on October 30, 2014, the Circuit Court sentenced Petitioner to pay $360,000 in restitution, which had already been paid in full, along with a 12-month period of incarceration, which was suspended, and a two-year term of probation.[9] P. Ex. 2 at 1.

Petitioner, in his most recent brief that was filed in response to the IG's brief, did not dispute that his conviction mandates exclusion pursuant to section 1128(a)(1) and did not

---

[7] While the plea agreement references an "amended indictment," neither party has submitted a proposed exhibit containing an amended indictment that pertains to the charge to which Petitioner ultimately pleaded guilty.

[8] Petitioner submitted a plea agreement that indicates that the restitution amount was based on a November 6, 2013 letter from the Alabama Medicaid Agency. He has contended that the November 6, 2013 letter involved an "audit" rather than any criminal wrongdoing. Petitioner has not submitted a copy of this letter as a proposed exhibit.

[9] Despite his criminal conviction, the Board of Dental Examiners of Alabama allowed Petitioner to retain his dental license but placed him on probation for five years and required that he pay a fine of $100,000 along with administrative costs of $5,000. P. Ex. 7. Petitioner's violations of the Alabama Dental Practice Act, as found by the Alabama Board of Dental Examiners, included the performance of various procedures on minor patients that were not indicated or were improperly performed. P. Ex. 7 at 1.

disagree that his "conviction was of a criminal offense related to the delivery of an item or service under Medicare or a State Medicaid program." P. Br. at 2. Petitioner was convicted of attempting to file a false claim with the Alabama Medicaid Agency, which is a state Medicaid program, and he was therefore undoubtedly convicted of a criminal offense related to the delivery of a health care item or service. 42 U.S.C. § 1320a-7(a)(1); *see* 18 U.S.C. § 1035(a)(2).

2. A 10-year minimum exclusion is not unreasonable based on the presence of one aggravating factor and no mitigating factors.

As previously discussed, the Act requires a minimum exclusion period of five years when the exclusion is mandated under section 1320a-7(a). 42 U.S.C. § 1320a-7(c)(3)(B). In this case, the IG increased the minimum exclusion period from five years to 10 years based on the existence of one aggravating factor. IG Ex. 1 at 1-2. The IG has the discretion to impose an exclusion longer than the minimum period when there are aggravating factors present. *See* 42 C.F.R. § 1001.102. Neither the IG nor Petitioner has argued that there are any mitigating factors as set forth in 42 C.F.R. § 1001.102(c) that may be considered as a basis for reducing the period of exclusion to no less than five years. The aggravating factor established in this case is that the loss to a Government program or other entity as a result of Petitioner's criminal conduct was $5,000 or more. *Id.* § 1001.102(b)(1); IG Br. at 5.

Petitioner argues that "the ten (10) year exclusion is not reasonable" and disputes the amount of financial loss attributable to his criminal conduct. P. Br. at 3-7; P. Affidavit. Petitioner explained that the indictment was based on three types of procedures: "crowns, frenectomies, and operculectomies." P. Br. at 5. With respect to the indictment that charged him with submitting false claims with respect to these three types of procedures, Petitioner stated:

> Significantly, the amount of these three (3) procedures is a rather modest part of the total of $360,000, approximately 20 to 25%. And, Dr. Morris was never charged with any fraud or misrepresentation as to the majority of the $360,000 recoupment amount.

P. Br. at 5. Petitioner further argues that "the creative math of the IG . . . of 72 times the regulatory threshold is plainly erroneous and emphasizes 'unreasonableness' rather than 'reasonableness.'" P. Br. at 5. Thus, in his brief, Petitioner concedes that up to 25%, or $90,000 of the restitution, was a result of the criminal conduct charged in the indictment.

Petitioner took seemingly inconsistent positions regarding his restitution in his written direct testimony filed on February 8, 2016. In his affidavit, he denied that *any* of the restitution was related to his criminal conduct, stating:

> Consequently, it is my position that the amount paid in restitution had nothing to do with the criminal charges and would have been due in any event.

P. Affidavit at 3. Yet, on the same page of his written direct testimony, Petitioner also stated:

> The procedures set out in the indictment involved crowns, operculectomies, and frenulectomies, all of which were actually performed and those procedures were included as part of the audit and a part of the claimed recoupment amount. Therefore, I would have been required to pay this amount whether criminal charges were brought or not.

P. Affidavit at 3. Petitioner also argued, through his written direct testimony, that the "only act resulting in that conviction was . . . an attempt to file a false claim form involving three (3) crowns" and that the amount at issue was "well under Five Thousand Dollars." P. Affidavit at 4-5.

Petitioner's arguments are not persuasive. First, while Petitioner ultimately pleaded guilty to a single misdemeanor count, the plea agreement clearly indicated that restitution in an amount of $360,000 was mandated. P. Ex. 1. While Petitioner feels the amount of loss is only the cost of the three crowns that were the subject of his guilty plea to a single count of attempting to file a false claim, he fails to recognize that he agreed to pay, and the Circuit Court imposed, $360,000 in restitution.

Petitioner has conceded that "20 to 25%," or up to $90,000 of the recoupment amount of $360,000 involves conduct that was detailed in the indictment. While Petitioner feels that up to $90,000 of claims that were the subject of a 59-felony count indictment amounts to a "rather modest" portion of the amount he was ordered to pay in restitution, I disagree that up to $90,000 is a "modest" amount of loss. P. Br. at 5. In fact, $90,000 is 18 times the threshold amount listed for consideration as an aggravating factor. 42 C.F.R. § 1001.102(b)(1); *see Robert Seung-Bok Lee,* DAB No. 2614 (2015), *Jeremy Robinson,* DAB No. 1905 (2004), *Donald A. Burstein, Ph.D.,* DAB No. 1865 (2003) (all stating that loss amounts substantially greater than the $5,000 statutory threshold is an "exceptional aggravating factor.") While the total amount of restitution was $360,000, as I will address more fully below, I conclude that even based on a loss of up to $90,000 to the Alabama Medicaid Agency, an agency that oversees medical care for low-income beneficiaries, a 10-year exclusion is warranted.

I recognize that the IG increased the exclusion period to 10 years based on an aggravating factor involving the full $360,000 amount of restitution. It is well-established that an amount ordered as restitution is a recognized measure of the amount of program loss. *See e.g., Juan de Leon, Jr.*, DAB No. 2533 at 5 (2013); *Craig Richard Wilder*, DAB No.

2416 at 9 (2011). The IG thus properly considered the full amount of $360,000 as an aggravating factor. Petitioner contends, however, in his testimony that "it is my position that the amount paid in restitution had nothing to do with the criminal charges and would have been due in any event." P. Affidavit at 3. Petitioner contends that the "majority" of the $360,000 restitution amount resulted from an "audit" rather than his criminal activity. P. Br. at 5-6; *see* P. Affidavit at 2. Petitioner argues that the recoupment of $360,000 "involved documentation issues or process issues and never did I receive any information or communication during the audit process where it was determined that I made a claim for a dental service that was not provided." P. Affidavit at 3. While Petitioner vigorously disputes the basis for restitution and argues that he agreed to pay restitution for overpayments resulting from poor documentation and other non-criminal reasons, he has not provided any *evidence* in support of his bald assertions, other than his unsupported testimony. For instance, Petitioner spoke at length about the Alabama Medicaid Agency's audit of his procedures that formed the basis of the restitution amount, yet he quizzically did not submit a copy of the audit or the November 6, 2013 demand letter that is referenced in both his written direct testimony and in the plea agreement. P. Affidavit at 2-3 and P. Ex. 1 at 1.

Restitution is addressed in the Alabama Code, Section 15-18-65, and that section states that "it is essential to be fair and impartial in the administration of justice, that all perpetrators of criminal activity or conduct be required to fully compensate all victims of such conduct or activity for any pecuniary loss, damage or injury as a direct or indirect result thereof." The term "restitution" is defined in the Alabama Code as "[f]ull, partial or nominal payment of pecuniary damages to the victim," and the term "criminal activities," as it pertains to restitution, is defined in the Alabama Code as "[a]ny offense with respect to which the defendant is convicted or any other criminal conduct admitted by the defendant." Ala. Code § 15-18-66(1) and (3) (1975). There is no provision in the Alabama Code that contemplates an imposition of restitution *in excess* of an amount that "fully" compensates a "victim" of "criminal activity or conduct." Ala. Code §§ 15-18-65 and 15-18-66(1) and (3). While Petitioner alleges that his agreement to pay restitution was based on non-criminal reasons outlined in a November 2013 demand letter and audit report, such an agreement, absent any documentary evidence of the basis for restitution, establishes that the amount of restitution ordered was presumed to have fully compensated the victim of Petitioner's criminal activity, i.e. the Alabama Medicaid Agency, for the pecuniary loss or damage it suffered "as a direct or indirect result" of Petitioner's criminal conduct." Ala. Code § 15-18-65 (1975).

While Petitioner disputes that the $360,000 he agreed to pay, and was ordered to pay, represents the amount of loss attributed to his criminal conduct and activity, he has not explained why he agreed to pay $360,000 in restitution as "[f]ull, partial or nominal payment of pecuniary damages" to the Alabama Medicaid Agency as a result of his criminal "conduct or activity" if he believes the "vast majority" of that amount of money was a result of "documentation issues or process issues" and *not* criminal activity. P.

Affidavit at 3. Petitioner was represented by counsel at the time of his plea agreement, and his counsel adeptly assisted him in successfully negotiating a guilty plea to a single misdemeanor offense in the face of an indictment of 59 felony counts. P. Ex. 1; IG Ex. 2. The sentencing order and plea agreement clearly stated that the restitution amount was $360,000. P. Exs. 1 and 2; *see* IG Ex. 4. Petitioner has not alleged that his agreement to pay $360,000 in restitution (P. Ex. 1), and the Circuit Court's imposition of $360,000 in restitution (IG Ex. 4 at 1), was contrary to law. While Petitioner now avers that only "20 to 25%" of the $360,000 amount of restitution was related to the criminal conduct that was charged in the indictment and the remaining amount was not in any way due to the charged criminal conduct, he has submitted no probative evidence demonstrating that $360,000 in restitution was ordered for a purpose other than full compensation of damages to the victim of his crimes, the Alabama Medicaid Agency.[10] IG Ex. 4 at 2.

As the IG points out, the amount of financial loss to the Medicare program was 72 times the $5,000 minimum loss amount that triggers consideration of the aggravating factor. IG Br. at 6. While Petitioner argues that only a portion of the restitution was attributable to the offenses that were charged in the indictment (P. Br. at 5), he also argues, in his reply to the IG's objection to his written direct testimony (P. Reply), that the "the only acts resulting in his conviction were the attempt to file a false claim for services, while performed by another, [that] totaled far less than One Thousand Five Hundred Dollars ($1,500)." P. Reply at 4. The $360,000 in restitution ordered clearly supports that the large amount of loss is a significant aggravating factor. *See Robinson*, DAB No. 1905 (determining that a restitution amount of $205,000, 41 times the minimum amount required for the aggravating factor, together with other aggravating factors, supported a 15-year exclusion); *Juan de Leon*, *Jr.*, DAB No. 2533 (sustaining a 20-year exclusion based on three aggravating factors including financial loss to federal and state programs of $750,000, criminal conduct over 20 months, and sentence including incarceration, as

---

[10] I note that the payment of restitution may be ordered to be made within a specified period of time "as a condition of suspension of execution of sentence or as a condition of probation." Ala. Code § 15-18-70 (1975). Furthermore, "[w]hen a defendant whose sentence has been suspended and placed on probation by the court, and ordered to make restitution, defaults in the payment thereof or of any installment, the court on motion of the victim or the district attorney or upon its own motion shall require the defendant to show cause why his default should not be treated as violation of a condition of his probation." Ala. Code 15-18-72(a) (1975). Thus, Petitioner's agreement that he would pay $360,000 in restitution to the Alabama Medicaid Agency, which was listed as a victim on the sentencing order, exposed him to the potential for incarceration if he did not pay the restitution as directed. I point this out because, if Petitioner felt a majority of the $360,000 amount due to the Alabama Medicaid Agency did not relate to his criminal activity, he simply could have paid the amount listed in the November 6, 2013 demand letter in lieu of agreeing to pay that amount through a restitution payment.

well as one mitigating factor of government cooperation); *but see Eugene Goldman, M.D.,* DAB No. 2635 at 8 (2015) (stating that determining the period of exclusion is case-specific and based on an evaluation of the aggravating and mitigating factors in the case); *Paul D. Goldenheim, M.D.,* DAB No. 2268 at 29 (2009) (stating that comparisons with other cases are not controlling and are of "limited utility"). While I recognize that the amount ordered in restitution creates only a presumption that the State of Alabama sentenced Petitioner in accordance with its law and the restitution amount served as full compensation to the victim of pecuniary damages resulting from Petitioner's criminal conduct, Petitioner has failed to provide any probative evidence rebutting that restitution was ordered as a result of criminal conduct that victimized the Alabama Medicaid Agency. Furthermore, Petitioner has not refuted the IG's assertion that the $360,000 in restitution was based on his charged criminal conduct and "similar acts," as is permitted by law. 42 C.F.R. § 1001.102(b)(1); *see Michael D. Miran,* DAB No. 2469 at 5 (2012) (noting both that the amount of restitution provided in a plea agreement "has long been considered a reasonable measure of program loss" and that an attempt to contest the restitution figure agreed to in a plea agreement is an impermissible collateral attack under 42 C.F.R. § 1001.2007(d)).

The IG did not consider any mitigating factors in this case, and Petitioner has not contended in his brief in response to the IG's brief that any of the regulatory mitigating factors are present.[11] *See* 42 C.F.R. § 1001.102(c). Therefore, there is no basis to mitigate the aggravating factor that the IG considered.

In summary, the 10-year period of Petitioner's exclusion is not unreasonable based on the aggravating factor present in this case. The amount of loss caused by Petitioner's criminal conduct is more than 70 times the threshold loss amount of $5,000 necessary to trigger consideration of this aggravating factor. Petitioner's criminal conduct resulted in a loss of $360,000 to the Alabama Medicaid program and demonstrates his untrustworthiness and lack of integrity in dealing with health care programs. I therefore conclude that the 10-year period of exclusion is not unreasonable. *See Robinson,* DAB No. 1905 at 3 (ALJ review must reflect the deference accorded to the IG by the Secretary).

V. Effective Date of Exclusion

The effective date of the exclusion, June 18, 2015, is established by regulation, and I am bound by that provision. 42 C.F.R. §§ 1001.2002(b), 1005.4(c)(1).

---

[11] Petitioner raised a mitigating factor based on 42 C.F.R. § 1001.102(c)(1) in conjunction with his request for hearing, but as previously discussed, the financial loss due to the acts that resulted in his conviction was greater than $1,500. Therefore, section 1001.102(c)(1) is not applicable.

VI. Conclusion

For the foregoing reasons, I affirm the IG's decision to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of 10 years, effective June 18, 2015.

/s/

Leslie C. Rogall
Administrative Law Judge