Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Robert Hadley Gross
(OI File No. 6-14-4-0105-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-676

Decision No. CR4784

Date: February 10, 2017

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Robert Hadley Gross, 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 health care fraud involving both the Medicare and the Texas Medicaid programs, which is a conviction for a criminal offense related to the delivery of an item or service under Medicare or a state health care program. I affirm the 28-year exclusion period because the IG has proven four aggravating factors, and there are no mitigating factors present. I also affirm that the effective date of Petitioner's exclusion is May 19, 2016.

I. Background

In a letter dated April 29, 2016, the IG excluded Petitioner from participation in Medicare, Medicaid, and all federal health care programs as defined in section 1128B(f) of the Social Security Act (Act) (42 U.S.C. § 1320a-7b(f)) for a minimum period of 28

years, effective 20 days from the date of the letter. IG Exhibit (Ex.) 1 at 1. The IG explained that Petitioner's exclusion was based on a "conviction as defined in section 1128(i) (42 U.S.C. [§] 1320a-7(i)), in the United States District Court, Northern District for Texas, San Angelo Division, 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 program." IG Ex. 1 at 1. The IG explained Petitioner was excluded pursuant to section 1128(a)(1) of the Act, which mandates the exclusion of any individual who is convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or any state health care program. 42 U.S.C. § 1320a-7(a)(1). The IG informed Petitioner that the exclusion was for "a minimum period of 28 years." IG Ex. 1 at 1; *see* 42 U.S.C. § 1320a-7(c)(3)(B). The IG extended the exclusion period from the statutory minimum of five years to 28 years based on the presence of four aggravating factors. IG Ex. 1 at 1-2. As for the aggravating factors, the IG found the following: 1) The acts resulting in the conviction, or similar acts, that caused, or were intended to cause, a financial loss to a Government program or one or more entities of $5,000 or more; 2) The acts that resulted in the conviction, or similar acts, were committed from January 2009 to June 2014; 3) Petitioner was sentenced to 71 months of incarceration; and 4) Petitioner was subject to other adverse actions based on the same circumstances that formed the basis for his exclusion. IG Ex. 1 at 1-2; 42 C.F.R. § 1001.102(b). The IG did not consider any mitigating factors. IG Ex. 1; *see* 42 C.F.R. § 1001.102(c).

Petitioner filed a timely request for hearing on June 23, 2016, that was received on June 28, 2016. On July 27, 2016, pursuant to 42 C.F.R. § 1005.6, I presided over a telephonic pre-hearing conference, and on July 29, 2016, I issued an Order and Schedule for Filing Briefs and Documentary Evidence (Order).

Pursuant to my Order, the IG filed an informal brief and a reply brief, along with four exhibits (IG Exs. 1-4).[1] Petitioner filed an informal brief (P. Br.) and 11 exhibits (P. Exs. 1-11).[2] In the absence of any objections, I admit the parties' exhibits into the record.

[1] The IG filed IG Ex. 6 in response to Petitioner's submission of a partial copy of the same document as P. Ex. 2. I note that the IG had previously filed a complete copy of the same document as pages 8-19 of IG Ex. 3. Further, while the IG marked that document as IG Ex. 6, I observe that there is no IG Ex. 5. I see no need to admit IG Ex. 6, as it is duplicative of IG Ex. 3.

[2] Petitioner, who is not represented by counsel, failed to file an exhibit list as required by the Civil Remedies Division Procedures (CRDP). CRDP § 14. Notwithstanding, I have admitted Petitioner's exhibits into the record.

Both parties agreed that an in-person hearing is not necessary for me to decide this case. IG Br. at 6; P. Br. at 14. Therefore, I am deciding this case on the written submissions and documentary evidence. *See* Order § 5.

II. Issues

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 adjudicate 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 was convicted of an offense related to the delivery of a health care item or service under both the Medicare and the Texas Medicaid programs, which is an offense pursuant to section 1128(a)(1) of the Act that subjects him to a mandatory exclusion from all federal health care programs for a minimum of five years.

Section 1128(a)(1) requires a mandatory exclusion from all federal health care programs under certain conditions.[4] Section 1128(a)(1) 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)):

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

[4] While there are slight differences in the wording of Section 1128 of the Act and its codification at 42 U.S.C. § 1320a-7, the two authorities are substantively identical and I refer to them interchangeably. I further note that the Secretary of the Department of Health and Human Services (Secretary) has delegated to the IG the authority "to suspend or exclude certain health care practitioners and providers of health care services from participation in these programs." 48 Fed. Reg. 21662 (May 13, 1983); *see also* 42 C.F.R. § 1005.1.

> (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 any State health care program.

See 42 U.S.C. § 1320a-7(a)(1).

The IG contends that he excluded Petitioner from all federal health care programs based on Petitioner's conviction for an offense that was related to the delivery of a health care item or service under Medicare or a state health care program. IG Br. at 1; *see* IG Exs. 2-3. Petitioner disputes in his informal brief that he was convicted of a criminal offense, or that the criminal offense for which he was convicted requires exclusion. P. Br. at 1-9. As explained below, I find that Petitioner was convicted of a criminal offense for purposes of the Act that mandates exclusion from all federal health care programs.

On or about October 15, 2014, a grand jury in the Northern District of Texas, San Angelo Division, returned a true bill of indictment that charged that Petitioner committed 52 counts of health care fraud against the Medicare and Texas Medicaid programs, in violation of 18 U.S.C. § 1347, between approximately January 2009 and June 20, 2014. IG Ex. 2. The 52-count indictment detailed dozens of instances of fraudulent billing against the Medicare and Medicaid programs in which Petitioner billed for services that he did not perform. IG Ex. 2. Counts 1 through 6 of the indictment charged that Petitioner fraudulently and repeatedly used improper used billing codes when he sought reimbursement for services. For example, on April 30, 2014, Petitioner treated 38 different residents at a facility in the span of 52 minutes, and requested reimbursement through the submission of billing codes that reflected that Petitioner had 34 separate 15-minute sessions and four separate 25-minute treatment sessions with the facility's residents in those 52 minutes. IG Ex. 2 at 23-24. With respect to Counts 7 through 52, the indictment charged that Petitioner billed for psychiatric services provided to dozens of patients who were deceased at the time he purportedly provided psychiatry services. IG Ex. 2 at 34-35. On July 17, 2015, Petitioner, with the advice of counsel, entered into a plea agreement with the United States Attorney's Office for the Northern District of Texas in which he agreed to enter a guilty plea to Count 11 of the indictment and agreed that the restitution "owing and payable to the United States in this case is $1,832,869.21." IG Ex. 3 at 10. Petitioner agreed to pay the full amount of restitution through the forfeiture of specified assets. IG Ex. 3 at 13-17.

On December 16, 2015, a United States District Judge sentenced Petitioner to a 71-month term of incarceration. IG Ex. 3 at 2. The sentencing judge imposed a fine of $100,000 and ordered Petitioner to pay restitution in the amount of $1,832,869.21. IG Exs. 3 at 3,

5. The sentencing order directed that restitution would be paid to both the Centers for Medicare & Medicaid Services and the Texas Medicaid program. IG Ex. 3 at 5.

I find that Petitioner has been convicted of a criminal offense relating to the delivery of an item or service under both Medicare and Medicaid. 42 C.F.R. § 1001.2; *see* IG Ex. 3. Pursuant to section 1128(i)(3) of the Act, an individual is considered to have been convicted of a criminal offense "when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court." 42 U.S.C. § 1320a-7(i)(3). On July 17, 2015, Petitioner entered into a plea agreement in which he admitted guilt to health care fraud in violation of 18 U.S.C. § 1347, as charged in Count 11 of the indictment. IG Ex. 3 at 8-19. On December 16, 2015, a United States District Judge imposed judgment based on Petitioner's guilty plea to the count of health care fraud. IG Ex. 3 at 1. While Petitioner disputes his conviction and the facts underlying the offense, he may not do so in this forum. 42 C.F.R. § 1001.2007(d). The Departmental Appeals Board recently summarized its history of declining to review challenges to criminal convictions, stating:

> The Board has long held that such "collateral attacks" on the validity of criminal convictions on which exclusions are based are forbidden by regulation. Section 1001.2007(d) states that when an exclusion "is based on the existence of a criminal conviction or a civil judgment imposing liability by Federal, State or local court" (or "on a determination by another Government agency, or any other prior determination where the facts were adjudicated and a final decision was made"), then "the basis for the underlying conviction, civil judgment or determination ***is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal***" (emphasis added). *See, e.g., Michael J. Vogini, D.O.*, DAB No. 2584, at 8 (2014) ("Petitioner pled guilty to and was convicted of Count 14 and may not now collaterally attack that conviction"); *Lyle Kai, R.Ph.*, DAB No. 1979, at 5 (2005) ("'the basis for the underlying conviction . . . is not reviewable and the individual . . . may not collaterally attack it . . . .' 42 C.F.R. § 1001.2007(d)"); *Peter J. Edmonson*, DAB No. 1330, at 4 (1992) . . . . A petitioner who "believes there are serious flaws" in the state's action on which the exclusion is based thus "must challenge it 'in the appropriate forum.'" *Marvin L. Gibbs, Jr., M.D.*[, DAB No. 2279] at 10 [2009], citing *Leonard Friedman, M.D.*, DAB No. 1281 (1991). Per section 1001.2007(d), this is not the appropriate forum for Petitioner to air his grievances about the propriety of his conviction.

Clemenceau Theophilus Acquaye, DAB No. 2745 at 7 (2016). Petitioner has a criminal conviction for health care fraud and as such, he is subject to exclusion. Congress, through enactment of the Act, determined that an individual who has been convicted of a criminal offense related to the delivery of an item or service under Medicare or a state

health care program must be excluded from federal health care programs for no less than five years, and it afforded neither the IG nor an administrative law judge the discretion to impose an exclusion of a shorter duration. 42 U.S.C. § 1320a-7(c)(3)(B). I cannot shorten the length of the exclusion to a period of less than five years because I do not have authority to "find invalid or refuse to follow Federal statutes or regulations." 42 C.F.R. § 1005.4(c)(1). Petitioner therefore has a criminal conviction for health care fraud that mandates exclusion for a minimum period of five years.

2. A 28-year minimum exclusion is not unreasonable based on the presence of four aggravating factors and no mitigating factors.

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, exclusion is required under section 1320a-7(a)(1), and therefore Petitioner must be excluded for a minimum of five years. The IG increased the minimum exclusion period from five years to 28 years based on his consideration of four aggravating factors. IG Ex. 1 at 1-2; *see* IG Ex. 5. 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.

The IG asserts that the presence of four aggravating factors warrants an exclusion for 28 years. The first aggravating factor is that the loss to a Government program or other entity as a result of Petitioner's criminal conduct was greater than $5,000. 42 C.F.R. § 1001.102(b)(1). Second, the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more, occurring from about January 2009 to June 2014. 42 C.F.R. § 1001.102 (b)(2). Third, the sentence imposed included incarceration, specifically, 71 months of incarceration. 42 C.F.R. § 1001.102(b)(5). Fourth, Petitioner was subject to other adverse actions based on the same circumstances that form the basis for his exclusion. 42 C.F.R. § 1001.102(b)(9). While Petitioner disputes the application of aggravating factors and the imposition of a 28-year exclusion, he does so by broadly discussing various exclusion cases but does not specifically argue that the IG improperly applied each of the aggravating factors to his case.

Petitioner was ordered to pay $1,832,869.21 in restitution. IG Ex. 3 at 5. Pursuant to 42 C.F.R. § 1001.2007(d), Petitioner cannot use these proceedings to challenge the amount of restitution imposed. In fact, Petitioner *agreed* to that same amount of restitution in his plea agreement, and further agreed that, pursuant to the United States Sentencing Guidelines, he would be subject to a "2-level enhancement because the amount of loss is more than $1,000,000.00 in a health care program." IG Ex. 3 at 10. Likewise, the order of judgment by the United States District Judge stated that the total amount of loss was $1,832,869.21. IG Ex. 3 at 5. As the IG points out, the financial loss to the Medicare program was more than 200 times (in fact, more than 360 times) the $5,000 minimum

amount that triggers consideration of the aggravating factor.[5] IG Br. at 5. The nearly $2 million in restitution ordered clearly supports that the large amount of loss is a significant aggravating factor. *See Jeremy Robinson*, DAB No. 1905 at 12 (2004) (determining that loss of 41 times the minimum amount required for aggravating factor supported a 15-year exclusion); *Juan De Leon, Jr.*, DAB No. 2533 (2013) (sustaining 20-year exclusion based on three aggravating factors including financial loss of $750,000, criminal conduct over 20 months, and sentence including incarceration, as well as one mitigating factor of government cooperation); *Craig Richard Wilder*, DAB No. 2416 at 9 (2011) (establishing an 18-year exclusion based on three aggravating factors including financial loss of over $4,000,000, criminal conduct over two years, and other convictions, as well as one mitigating factor of government cooperation).

With respect to the length of the acts that resulted in Petitioner's felony conviction, Petitioner was charged with health care fraud involving the Medicare and Texas Medicaid programs from January 2009 through June 2014. IG Ex. 2 at 7. The aforementioned restitution of approximately $1.8 million represents the proceeds of the lengthy period of health care fraud. The IG properly considered the length of acts that resulted in Petitioner's felony conviction to be an aggravating factor in this case. *See Vinod Chandrashekhar Patwardhan, M.D.*, DAB No. 2454 at 7 (2012) (determining that three-year duration of conduct was an aggravating factor).

With regard to the length of Petitioner's incarceration, the uncontroverted evidence demonstrates that Petitioner was sentenced to a significant period of incarceration for his commission of health care fraud. On December 16, 2015, a United States District Judge imposed judgment and ordered that Petitioner be committed to the custody of the United States Bureau of Prisons for a term of 71 months. IG Ex. 3 at 1. The IG properly considered the 71-month length of imprisonment to be an aggravating factor in this case. *See Jason Hollady, M.D., a/k/a Jason Lynn Hollady*, DAB No. 1855 at 12 (2002) (stating that even a nine-month period of incarceration was "relatively substantial").

With respect to other adverse actions, the Texas Medical Board indefinitely suspended Petitioner's medical license on January 6, 2016, as a result of his felony indictment and guilty plea. The suspension of Petitioner's medical license was based on the same facts underlying his conviction and exclusion, and therefore is properly considered an adverse action that is an aggravating factor pursuant to 42 C.F.R. § 1001.102(b)(9). IG Ex. 4.

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[5] I recognize the recent publication of a Final Rule amending 42 C.F.R. § 1001.102(b)(1), which increased from $5,000 to $50,000 the amount of loss to a government program or other entities that is required for consideration of an aggravating factor based on the amount financial loss caused by the acts resulting in a conviction or similar acts. The Final Rule indicates that the regulatory amendment is effective February 13, 2017. 82 Fed. Reg. 4100, 4103, 4112 (Jan. 12, 2017).

Evidence of aggravation may be offset by evidence of mitigation if it relates to one of the factors set forth at 42 C.F.R. § 1001.102(c). I am not able to consider evidence of mitigation unless one or more of the enumerated aggravating factors listed in 42 C.F.R. § 1001.102(b) justifies an exclusion of longer than five years. 42 C.F.R. § 1001.102(c). Petitioner argues that there is mitigating evidence in this case and that a shorter period of exclusion is warranted based on the application of a mitigating factor. I have examined Petitioner's arguments and the evidence that he offered in support, and I find no probative evidence to substantiate one of the regulatory mitigating factors.

In arguing that a mitigating factor is present pursuant to 42 C.F.R. § 1001.102(c), Petitioner misguidedly argues that he "was given a 3 level upward departure for his participation and compliance with the government" and that he paid a $297,000 civil penalty. P. Br. at 13. With respect to Petitioner's purported cooperation, it is unclear to me how someone who assisted the government would receive an "upward departure" from the sentencing guidelines, as claimed by Petitioner, as such an *upward* departure would expectedly yield an *increased* period of incarceration. Further, Petitioner has presented no evidence of the type of cooperation addressed in section 1001.102(c)(3), such as a government motion for downward departure or for a reduction in sentence based on substantial assistance. *See, e.g.*, Fed. R. Crim. P. 35. Rather, Petitioner's plea agreement references a 3-level "reduction" in the *offense level*, and not a "departure" from the advisory sentencing guidelines. IG Ex. 3 at 10. Pursuant to Section 3E1.1(a)-(b) of the United States Sentencing Guidelines, a reduction of up to 3 levels to the offense level is offered to any defendant who "clearly demonstrates acceptance of responsibility for his offense . . . ," in other words, who pleads guilty rather than being found guilty at trial. There is simply no evidence that Petitioner cooperated with law enforcement and received a "departure" from the advisory sentencing guidelines, as he alleges. Petitioner also argues, in an apparent effort to show that a mitigating factor is present pursuant to 42 C.F.R. § 1001.102(c)(iii), that *he* paid an approximately $297,000 "civil penalty" through "civil forfeiture." P. Br. at 13. Petitioner's payment of a "civil penalty" of his own is not a mitigating factor; rather, a proper mitigating factor would be present if cooperation with law enforcement resulted in the imposition of a civil monetary penalty, pursuant to 42 C.F.R. Part 1003, against someone else.

The 28-year period of Petitioner's exclusion is not unreasonable based on the four aggravating factors present in this case. The amount of loss caused by Petitioner's criminal conduct is very substantial, and is more than 360 times higher than the current threshold $5,000 amount of loss necessary to trigger consideration of this aggravating factor. In addition, Petitioner's criminal activity lasted for more than four years, he was sentenced to a period of 71 months of incarceration, and his medical license was indefinitely suspended based on the same facts underlying his conviction. While Petitioner discusses other cases involving individuals excluded by the IG, he does not cite any individuals who have been excluded under circumstances similar to his own. Petitioner committed a very serious crime, and he was punished with a lengthy sentence

of incarceration and ordered to pay restitution amounting to nearly $2 million to repay the government programs from which he stole. Petitioner engaged in his scheme for more than four years, and he was later indefinitely suspended from practicing medicine by his state's medical board. Unlike the cases offered by Petitioner in his brief, there are *no* mitigating factors to weigh against the *four* significant aggravating factors. I conclude that the IG's imposition of a minimum period of exclusion for 28 years is not unreasonable. 42 C.F.R. § 1001.2007(a).

3. The effective date of Petitioner's exclusion is May 19, 2016.

The effective date of the exclusion, May 19, 2016, is 20 days after the date of the IG's April 29, 2016 letter and is established by regulation (42 C.F.R. § 1001.2002(b)); I am bound by that regulation. 42 C.F.R. § 1005.4(c)(1).

V. 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 28 years, effective May 19, 2016.

/s/
Leslie C. Rogall
Administrative Law Judge