Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Enyibuaku Rita Uzoaga,
(OI File No. 6-09-4-0475-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-889

Decision No. CR4873

Date: June 21, 2017

DECISION

Petitioner, Enyibuaku Rita Uzoaga, M.D. (Petitioner or Dr. Uzoaga), is a physician who was licensed to practice in the State of Texas. She was convicted on one count of conspiracy to commit health care fraud and six counts of health care fraud. Based on these convictions, the Inspector General (I.G.) excluded her for fifteen years from participating in the Medicare, Medicaid, and all federal health care programs, as authorized by section 1128(a)(1) of the Social Security Act (Act).[1] Petitioner now challenges the exclusion. For the reasons discussed below, I find that the I.G. properly excluded Petitioner and that the fifteen-year exclusion falls within a reasonable range.

[1] The current version of the Social Security Act can be found at *https://www.ssa.gov/OP_Home/ssact/ssact-toc.htm*. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp. Table.

I. Background

Dr. Uzoaga was a licensed physician in Houston, Texas, who practiced under the name of Family Physician, P.A. I.G. Exhibit (Ex.) 3 at 5. Dr. Uzoaga was enrolled in Medicare and Medicaid as a provider.[2] I.G. Ex. 3 at 15. She was indicted in the United States District Court for the Southern District of Texas (federal court) on one count of conspiracy to commit health care fraud and six counts of health care fraud, in violation of 18 U.S.C. §§ 2, 1347, and 1349. I.G. Ex. 3. On November 3, 2015, a jury convicted her on all counts. I.G. Ex. 4. Specifically, the jury found that Dr. Uzoaga had engaged in a scheme in which she repeatedly billed Medicare and Medicaid for diagnostic vestibular testing of beneficiaries, when that testing was not performed, was not medically necessary, or was not performed by a medically licensed person or under the supervision of a physician. *See, e.g.*, I.G. Ex. 3 at 7.

In a letter dated July 29, 2016, the I.G. notified Petitioner that she was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of fifteen years, because she had been convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. I.G. Ex. 1. The letter explained that section 1128(a)(1) of the Act authorized the exclusion. *Id.* Petitioner requested review, and the matter is before me.

Each party submitted a written argument (I.G. Br.; Petitioner (P.) Br.[3]). The I.G. submitted five exhibits (I.G. Exs. 1-5). Petitioner did not offer any exhibits. Petitioner did not object to any of the I.G.'s proposed exhibits. Therefore, in the absence of objection, I admit into evidence I.G. Exs. 1-5.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary, and, if so, to submit the testimony of any proposed witness as "written direct testimony in the form of an affidavit or declaration." Order and Schedule for Filing Briefs and Documentary Evidence (Briefing Order) ¶ 7.c.ii (January 5, 2017). I also explained that I would hold a hearing only if a party offered witness testimony that is relevant and non-cumulative and the opposing party requested cross-examination.

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[2] The indictment describes Dr. Uzoaga as a "provider"; however, as a physician, she was technically a "supplier" of services to Medicare and Medicaid beneficiaries. Act § 1861(d).

[3] Both the I.G. and Petitioner submitted responses to the questions posed in the "Informal Brief" forms provided by my office. However, Petitioner's brief, as electronically filed, does not include her responses to the questions posed on page 2 of the "Informal Brief of Petitioner" form. As described below, I issued an Order to Show Cause in which I informed Petitioner of the omission, among other things, and instructed her to submit the missing page. She did not do so.

Briefing Order ¶ 9. The I.G. indicates that an in-person hearing is not necessary and submitted no declarations from proposed witnesses. I.G. Br. at 15.

Petitioner, on the other hand, asserts that an in-person hearing is necessary, and requests to testify on her own behalf. P. Br. at 3. However, Petitioner did not submit her written direct testimony as required by my Briefing Order. Further, I reminded Petitioner of the need to submit the written direct testimony of any proposed witness, including Petitioner herself, in an Order to Show Cause issued March 15, 2017 (Show Cause Order). My show cause order also pointed out several other problems with Petitioner's brief and warned Petitioner that, if she did not correct the problems identified in the show cause order, I would impose sanctions. Show Cause Order at 2. Among other things, I informed Petitioner that I would not convene a hearing if Petitioner did not produce the written direct testimony of any witness and the I.G. did not request cross-examination. *Id.* Petitioner did not respond to the show cause order. Thus, there is no proposed testimony of any witness nor a request for cross-examination. Therefore, I will not convene a hearing in this case. Further, as explained more fully below, I accept certain of the I.G.'s arguments as uncontested, based on Petitioner's failure to respond to the show cause order.

II. Issues

The issues before me are:

> 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) of the Act, such that she is required to be excluded from program participation and, if so;
>
> Whether a fifteen-year exclusion is reasonable.

III. Discussion

A. Petitioner must be excluded from program participation because she 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) of the Act .[4]

Under section 1128(a)(1) of the Act, the Secretary of Health and Human Services must exclude an individual who has been convicted under federal or state law of a criminal

[4] My findings of fact and conclusions of law appear in bold italic type.

offense related to the delivery of an item or service under Medicare or a state health care program. Act § 1128(a)(1); *see also* 42 C.F.R. § 1001.101(a).

Petitioner concedes that she was convicted of a criminal offense. P. Br. at 1. This is beyond debate as a jury found her guilty on all seven counts charged in the indictment and the federal court entered judgment based on the jury's verdict. *See* I.G. Exs. 4, 5; *see also* Act § 1128(i)(1), (2) (an individual is "convicted" where a court has entered a judgment of conviction or where there has been a finding of guilt against the individual).

The I.G. argues that Petitioner's convictions for conspiracy to commit health care fraud and committing health care fraud are related to the delivery of an item or service under Medicare or a state health care program within the meaning of section 1128(a) of the Act. I.G. Br. at 7-9. Petitioner failed to address whether or not her conviction is for a program-related crime as defined in section 1128(a) of the Act.[5] Thus, the I.G.'s argument is unopposed on the present record. In any event, even had Petitioner argued that her conviction was not program-related, I would conclude otherwise.

Dr. Uzoaga was convicted of conspiring to commit and committing health care fraud by filing claims for reimbursement from Medicare and the Texas Medicaid program for services that were not provided as claimed or that were provided by unlicensed personnel. *See* I.G. Exs. 3, 4. Convictions for conspiracy to defraud a protected program, as well as those for defrauding such a program by submitting false claims for services purportedly rendered to program beneficiaries, are related to the delivery of items or services under the programs. *See, e.g.*, *Douglas Schram, R.Ph.*, DAB No. 1372 (1992); *see also Clemenceau Theophilus Acquaye*, DAB No. 2745 at 4-5 (2016).

Petitioner argues that she lacked the intent to commit the offenses charged and that her convictions "will soon be resolved in appeal [sic]." P. Br. at 4. These arguments are unavailing.

Petitioner's argument that she should not be excluded because she lacked the intent to commit the crimes charged fails for two reasons. First, Petitioner's intent, or lack thereof, is not material to the question of whether she may be excluded. Second, even if Petitioner's intent were material, Petitioner's conviction established that she acted with intent to defraud and she may not collaterally attack her conviction in this proceeding.

[5] Page 2 of the blank "Informal Brief of Petitioner" form that my office sent to Petitioner includes the question "Were you convicted of an offense for which exclusion is required?" The record does not include Petitioner's answer to this question because, as noted previously, Petitioner failed to submit her responses to page 2 of the Informal Brief form, even after being reminded of the need to do so.

As to the first point, to establish a basis for excluding an individual pursuant to section 1128(a)(1), the I.G. need not prove that the individual intended to commit fraud, or even that the individual intended to commit a crime. *Dewayne Franzen*, DAB No. 1165 (1990). Rather, it is sufficient that the individual's acts cause the individual to be convicted of an offense and that the offense is related to the delivery of an item or service under the Medicare or Medicaid program. *Id.* As I have discussed above, Petitioner's conviction was related to the delivery of items or services under Medicare and Medicaid.

As to the second point, that Petitioner acted with the intent to defraud the programs was an element of the crimes of which she was convicted. *See, e.g.*, I.G. Ex. 3 at 6, 19 (Dr. Uzoaga "did knowingly, intentionally, and willfully" conspire and agree; Dr. Uzoaga "did knowingly and willfully" execute a scheme to defraud). By finding her guilty on all counts, the jury, of necessity, found that Petitioner acted with the required intent. Petitioner's argument to the contrary thus represents an improper collateral attack on her convictions. Federal regulations explicitly preclude such attacks:

> When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it, either on substantive or procedural grounds in this appeal.

42 C.F.R. § 1001.2007(d); *see also Joanne Fletcher Cash*, DAB No. 1725 (2000); *Chander Kachoria, R.Ph.*, DAB No. 1380 (1993). Because such collateral attacks are not permitted, any testimony by Petitioner that she did not intend to defraud Medicare or Medicaid would be irrelevant to these proceedings.

Similarly irrelevant is Petitioner's contention that her convictions will soon be resolved based on her appeal.[6] For purposes of exclusion, the term "conviction" is defined by federal law (i.e. section 1128 of the Act). The statutory definition specifically provides that a pending appeal has no effect on whether an individual has been convicted: "[A]n individual . . . is considered to have been 'convicted' of a criminal offense when a judgment of conviction has been entered against the individual . . . regardless of whether there is an appeal pending . . . ." Act § 1128(i)(1).

For the reasons stated, Petitioner was convicted of criminal offenses related to the delivery of items or services under Medicare or a state health care program, within the meaning of section 1128(a)(1) of the Act. Therefore, the I.G. was required to exclude her

[6] After Petitioner filed her written argument, the United States Court of Appeals for the Fifth Circuit issued a per curiam opinion affirming Dr. Uzoaga's conviction. *U.S. v. Uzoaga*, No. 16-20211 (5th Cir. March 13, 2017).

from program participation for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a). However, the I.G. may exclude an individual for a period longer than five years if certain aggravating factors are present. 42 C.F.R. § 1001.102(b). If the I.G. imposes an exclusion longer than five years, I may consider whether certain mitigating factors exist that may justify shortening the exclusion to not less than five years. 42 C.F.R. § 1001.102(c). Evidence that does not pertain to one of the aggravating or mitigating factors listed in the regulations may not be used to decide whether an exclusion of a particular length is reasonable. In the following sections of this decision, I consider whether, in light of the aggravating and mitigating factors (if any) that may be present, the length of Petitioner's exclusion falls within a reasonable range.

B. The I.G. has established three aggravating factors.

As noted, the presence of an aggravating factor or factors not offset by any mitigating factor or factors justifies lengthening the mandatory period of exclusion. The I.G. argues that three aggravating factors are present in this case:

1) The acts resulting in the conviction, or similar acts, resulted in a financial loss to Medicare or a state health care program of $5,000 or more (42 C.F.R. § 1001.102(b)(1));
2) The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more (42 C.F.R. § 1001.102(b)(2));
3) The sentence imposed by the court included incarceration (42 C.F.R. § 1001.102(b)(5)).

See I.G. Br. at 9-14; *see also* I.G. Ex. 1. I agree that these aggravating factors are established on the record before me. Moreover, I conclude that Petitioner has waived any arguments she may have had disputing the existence of any aggravating factor, based on her failure to respond to my show cause order.[7] Show Cause Order at 2.

As to the first aggravating factor, the federal court sentenced Dr. Uzoaga to make restitution to Medicare in the amount of $316,984.50 and to Medicaid in the amount of $72,310.49. I.G. Ex. 5 at 6. Thus, Petitioner was required to make restitution in a total amount of $389,294.99. *Id.* Restitution has long been considered a reasonable measure

[7] Page 2 of the blank "Informal Brief of Petitioner" form includes the question "Do you disagree with the I.G.'s identification of aggravating factors in your case?" Because Petitioner did not submit page 2 of the Informal Brief, the record does not include Petitioner's answer to this question. Further, in answer to the follow-up questions regarding aggravating factors, Petitioner entered "N/A" which I take to mean "not applicable." *See* P. Br. at 2 (page 2 of Petitioner's brief as submitted corresponds to page 3 of the blank "Informal Brief of Petitioner" form).

of program losses. *Jason Hollady, M.D.*, DAB No. 1855 (2002). Thus, as measured by the restitution for which she was held responsible, Petitioner's actions resulted in program financial losses over 75 times greater than the $5,000 threshold for aggravation. Because the financial losses were so far in excess of the threshold amount for aggravation, the I.G. may justify a significant increase in Petitioner's period of exclusion. *See, e.g., Juan de Leon, Jr.*, DAB No. 2533 at 5 (2013), *citing Sushil Aniruddh Sheth, M.D.*, DAB No. 2491 at 7 (2012); *Jeremy Robinson*, DAB No. 1905 at 12 (2004); and *Donald A. Burstein, Ph.D.*, DAB No. 1865 at 12 (2003).

Regarding the second aggravating factor, the criminal acts for which Dr. Uzoaga was convicted occurred from on or about January 1, 2005, until on or about December 31, 2010. *See, e.g.*, I.G. Ex. 3 at 6, 18. It is an aggravating factor if the criminal acts continued for one year or more. Here, Dr. Uzoaga's acts occurred over a period of more than five years. Therefore, as with the amount of program losses, the lengthy period over which the acts were committed supports the I.G.'s decision to increase the length of Petitioner's exclusion significantly.

Finally, regarding the third aggravating factor, the federal court sentenced Petitioner to a substantial period of incarceration – 42 months. I.G. Ex. 5 at 3. The lengthy period of Petitioner's incarceration underscores the seriousness of her crimes.

Accordingly, I find that the I.G. has established the presence of three aggravating factors that justify imposing an exclusion significantly above the five-year threshold. I next consider whether there are any mitigating factors that may serve to justify a shorter period of exclusion.

C. Petitioner has not established any mitigating factors.

In her brief, Petitioner argues that mitigating factors are present that I should consider in setting a shorter period of exclusion. Petitioner argues that she assisted the government in returning a fugitive to the United States and in locating another individual. P. Br. at 2. She represents that these actions "resulted in convictions and helped Medicaid." *Id.*

The regulations provide that a mitigating factor may be established under the following circumstances:

> The individual's or entity's cooperation with Federal or State officials resulted in—
>
> (i) Others being convicted or excluded from Medicare, Medicaid and all other Federal health care programs,
>
> (ii) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or

> (iii) The imposition against anyone of a civil money penalty or assessment under part 1003 of this chapter.

42 C.F.R. § 1001.102(c)(3). Thus, if Petitioner produced evidence that her assistance to government officials resulted in others being convicted, I could consider that factor in deciding whether the length of Petitioner's exclusion is reasonable.

As I stated in my Briefing Order, Petitioner has the burden to prove any affirmative defenses she may raise. Briefing Order ¶ 6.c. The alleged existence of a mitigating factor is such an affirmative defense. Further, in my order to show cause, I specifically informed Petitioner that she must produce evidence regarding this alleged mitigating factor or I would consider the defense waived. Show Cause Order at 1-2. However, Petitioner produced neither evidence nor testimony supporting her assertions that she cooperated with government officials and that her cooperation resulted in others being convicted. I therefore conclude that Petitioner has failed to meet her burden to show that a mitigating factor exists in this case.

D. Based on the presence of three aggravating factors and the absence of any mitigating factors, the fifteen-year exclusion imposed in this case falls within a reasonable range.

So long as the period of exclusion imposed by the I.G. is within a reasonable range, based on demonstrated criteria, I have no authority to change it. *Cash*, DAB No. 1725 at 7 (citing 57 Fed. Reg. 3298, 3321 (1992)). In this case, Dr. Uzoaga's convictions demonstrate that she presents significant risks to the integrity of health care programs. She engaged in illegal conduct that resulted in financial losses to both Medicare and the Texas Medicaid program that greatly exceed the minimum amount required for aggravation. Her illegal conduct persisted for more than five years, a duration significantly longer than the minimum period established by regulation. She was sentenced to a lengthy period of incarceration. These aggravating factors demonstrate that Dr. Uzoaga manifests a high degree of untrustworthiness, justifying a lengthy exclusion. No mitigating factors offset these aggravating factors. The I.G. excluded Dr. Uzoaga for fifteen years, which is three times longer than the minimum exclusion required by law. Since two of the aggravating factors exceed the threshold for aggravation by far more than three times, I cannot conclude that the exclusion imposed by the I.G. is excessive. I therefore find that the fifteen-year exclusion falls within a reasonable range.

IV. Conclusion

For the reasons explained above, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid and all federal health care programs, and I sustain as reasonable the fifteen-year period of exclusion.

/s/
Leslie A. Weyn
Administrative Law Judge