Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Eugene Domenico, Ph.D.,
(OI File No. H-15-4-1211-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-07

Decision No. CR4554

Date: March 23, 2016

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Eugene Domenico, Ph.D., from participation in Medicare, Medicaid, and all other federal health care programs based on Petitioner's three misdemeanor convictions related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of any health care item or service pursuant to section 1128(b)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(b)(1)). For the reasons discussed below, I conclude that the IG has a basis for excluding Petitioner. I affirm the length of the four-year exclusion, effective August 20, 2015; because there are two aggravating factors that justify the length of the exclusion.

I. Background

In a letter dated July 31, 2015, 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 four years, effective 20 days from the date of the letter. Petitioner Exhibit (P. Ex.) 1. The IG explained that Petitioner's exclusion was based on his "misdemeanor conviction as defined in section 1128(i) (42 U.S.C. 1320a-7(i)), in the United States District Court for

the Western District of New York, of a misdemeanor offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of any health care item or service" pursuant to section 1128(b)(1) of the Act. P. Ex. 1 at 1. Under Section 1128(b)(1) of the Act, the IG may exclude an individual who has been convicted of a "criminal offense consisting of a misdemeanor related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct . . . in connection with the delivery of a health care item or service." 42 U.S.C. § 1320a-7(b)(1)(A)(i). In its July 31, 2015 letter, the IG informed Petitioner that he imposed a lengthier four-year exclusion based on the presence of two aggravating factors: 1.) The acts resulting in the convictions caused a financial loss of more than $5,000, in that Petitioner was ordered to pay $100,286.35 in restitution, and 2.) the New York State Office of the Medicaid Inspector General excluded Petitioner from participation in the Medicaid program. P. Ex. 1 at 2; IG Ex. 2 at 4.

Petitioner, who is represented by counsel, submitted a timely request for hearing that was both dated and received on October 1, 2015. On November 18, 2015, I presided over a telephonic pre-hearing conference, and shortly thereafter, on November 20, 2015, I issued an Order and Schedule for Filing Briefs and Documentary Evidence (Order) that memorialized the discussions in that conference and provided instructions to the parties regarding filings, deadlines, and other substantive matters.

Pursuant to my Order, the IG filed an informal brief (IG Br.) and a reply brief (IG Reply), along with four exhibits that are marked as IG Exhibits (Exs.) 1-4. Petitioner filed an informal brief (P. Br.) that referenced exhibits that had been appended to his request for hearing. Pursuant to a February 18, 2016 Order, Petitioner resubmitted these exhibits as P. Exs. 1-4 on February 22, 2016. The IG has objected to the admittance of P. Exs. 3 and 4, which consist of letters from various people, including Petitioner's friends, family members, patients, and colleagues, that had been submitted to the sentencing judge. The IG has argued these letters are irrelevant. IG Br. at 7. While I agree that much of the content of P. Exs. 3 and 4 is irrelevant to the issues before me, I nonetheless admit P. Exs. 3 and 4 because some of the letters reference an alleged mitigating factor. *See* P. Br. at 5-6; 42 C.F.R. § 1001.201(b)(3)(iv). I therefore admit IG Exs. 1-4 and P. Exs. 1-4, along with the parties' briefs. Neither party requested that I convene a hearing in person, and I am therefore deciding this case on the merits based on the parties' written filings.

II. Issues

The issue in this case is whether there is a legal basis under Section 1128(b) of the Act for the IG to exclude Petitioner from participation in Medicare, Medicaid, and other federal health care programs. If I find a legitimate basis for the exclusion, then I must consider whether a four-year exclusion is reasonable.

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[1]

1. ***Petitioner pleaded guilty to a three-count misdemeanor information charging that he committed three offenses of "Theft From a Health Care Benefit Program," in violation of 18 U.S.C. § 669(a), on or about December 21, 2009, January 15, 2010, and January 6, 2011.***

2. ***Petitioner's criminal offenses constitute theft in connection with the delivery of a health care item or service pursuant to section 1128(b)(1)(A)(i) of the Act.***

Section 1128(b)(1)(A)(i) of the Act authorizes the IG to impose an exclusion from all federal health care programs under certain conditions. Section 1128(b)(1) states:

> (b) PERMISSIVE EXCLUSION. – The Secretary may exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
>
> (1) CONVICTION RELATING TO FRAUD – Any individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law—
>
> (A) of a criminal offense consisting of a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct--
>
> (i) in connection with the delivery of a health care item or service . . . .

42 U.S.C. § 1320a-7(b)(1)(A). The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.201(a). Section 1128(c)(3)(D) of the Act provides that an exclusion imposed under section 1128(b)(1) of the Act will be for a period of three years, unless the Inspector General determines, in accordance with

---

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

regulations, that a shorter period is appropriate because of mitigating circumstances or that a longer period is appropriate because of aggravating circumstances. 42 C.F.R. § 1001.201(b)(2) and (3).

The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that provides the basis of the exclusion. 42 C.F.R. § 1001.2007(c), (d). Petitioner bears the burden of proof and the burden of persuasion on any affirmative defenses or mitigating factors, and the IG bears the burden on all other issues. 42 C.F.R. § 1005.15(b).

The IG argues that it properly excluded Petitioner from all federal health care programs based on his convictions for offenses involving theft from a health care program. A three-count information filed on October 1, 2014 in the United States District Court for the Western District of New York charged that Petitioner, on separate occasions in December 2009, January 2010, and January 2011, "knowingly and willfully and without authority intentionally misapplied to the use of a person other than the rightful owner, money and funds of BlueCross BlueShield, a health care benefit program as defined in Title 18, United States Code, Section 24(b), in that [Petitioner] submitted a claim to BlueCross BlueShield seeking payment for a 45-50 minute face to face individual psychotherapy session for patient '[redacted in original document],' when, in fact, [Petitioner] provided no such service on that date, and as a result, received money from BlueCross BlueShield to which he was not entitled." IG Ex. 3.

On the same day that the information was filed, Petitioner, along with his counsel, signed a 14-page plea agreement with the United States Attorney's Office in which he "agree[d] to plead guilty to a three count misdemeanor Information which charges in each count a violation of Title 18, United States Code, Section 669(a) (Theft from a Health Care Benefit Program)." IG Ex. 1 at 1. Petitioner acknowledged the elements of the offenses to which he was pleading guilty, which were set forth as follows in the plea agreement:

> a. [Petitioner] intentionally misapplied assets belonging to a health care benefit program, to wit: BlueCross BlueShield of Western New York;
>
> b. and that [Petitioner] acted knowingly and willfully.

IG Ex. 1 at 2. In the plea agreement, Petitioner stated that he was a licensed clinical social worker who was a participating provider with BlueCross BlueShield, and that while participating as a provider he "devised a scheme" whereby he improperly submitted claim forms that resulted in him "improperly obtaining reimbursement from BlueCross BlueShield for which he was not entitled." IG Ex. 1 at 3. With regard to the three separate counts in the information charging him with violating 18 U.S.C. § 669(a), Petitioner stated that on each occasion, he was reimbursed $80 "for the non-rendered services which [Petitioner] converted for his own use." IG Ex. 1 at 3-4. The plea

agreement addressed the total amount of loss to the health insurer, in that it stated the following: "The government and defendant agree that the total loss amount for relevant conduct purposes is $100,286.35."[2] IG Ex. 1 at 4. Petitioner further agreed that "the Court shall require restitution in the amount of $100,286.35 to be paid to the victims as part of [Petitioner's] sentence." IG Ex. 1 at 8. Petitioner also agreed to the following provision in the plea agreement: "As a condition of this plea, the defendant, EUGENE DOMENICO, acknowledges that $100,286.35 United States currency (hereinafter "currency") was seized from him by law enforcement officials on or about December 18, 2012." IG Ex. 1 at 11. Petitioner agreed that he would "no longer contest the civil forfeiture of $100,286.35 of the seized United States currency." IG Ex. 1 at 11.

On April 1, 2015, Petitioner was sentenced on all three counts to a two-year term of probation for each count, to run concurrently. IG Ex. 2 at 2; *see* P. Ex. 2. Petitioner was ordered to pay a $10,000 fine and $100,286.35 in restitution to BlueCross BlueShield of Western New York. IG Ex. 2 at 4.

Petitioner does not deny that he was convicted of the criminal offenses addressed above, yet he contends that he was not convicted of an offense for which exclusion is authorized. P. Br. at 2 (stating "Yes" in response to the question asking "Do you disagree with the I.G.'s argument?") Petitioner's contention that the IG was not authorized to exclude him is not supported by the relevant facts or the law: Petitioner's conviction clearly meets the elements set forth in section 1128(b)(1)(A)(i) of the Act, and even the title of 18 U.S.C. § 669(a), "Theft or embezzlement in connection with health care," accurately describes the nature of the offense conduct. Petitioner admitted that he intentionally misapplied assets belonging to a health care benefit program and did so "knowingly and willfully." IG Ex. 1 at 2. Petitioner further admitted that he obtained payment and reimbursement after submitting claim forms when he "had not provided services." IG Ex. 1 at 3-4. Petitioner was convicted of "theft" from a health care program, pursuant to 18 U.S.C. § 669(a), and the total amount of loss to the health care program was in excess of $100,000. IG Ex. 1 at 4.

---

[2] "Relevant conduct" is addressed in Section 1B1.3 of the United States Sentencing Guidelines (U.S.S.G.), which states in pertinent part that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." Thus, while Petitioner pleaded guilty to three offenses totaling $240 in loss to the health program, for sentencing purposes, the recommended sentencing range obtained from application of the U.S.S.G. was based on a "total loss amount for relevant conduct purposes [of] $100,286.35." IG Ex. 1 at 4; *see* IG Ex. 1 at 5 (plea agreement noting an "8 offense level increase" was warranted based on the "total loss (including relevant conduct) was in excess of $70,000 (namely $100,286.35)").

I conclude that the IG had a basis to exclude Petitioner pursuant to section 1128(b)(1)(A)(i) of the Act. All elements required to exclude an individual under that section of the Act are present here. Petitioner was convicted within the meaning of 1128(i) of the Act when the District Court accepted his guilty plea to three separate instances of theft that occurred well after August 21, 1996. I.G. Exs. 1 at 3-4 and 2 at 1. Furthermore, Petitioner's offenses were in connection with the delivery of a health care item or service, in that Petitioner was convicted of charging for services he claimed to have provided as a licensed clinical social worker but did not provide. IG Ex. 1, 3. While Petitioner was afforded substantial leniency by the criminal justice system, his receipt of a sentence sparing him incarceration does not render him a trustworthy individual for purposes of having access to the public fisc and treating health care program beneficiaries. *See Henry L. Gupton*, DAB No. 2058 at 7 (2007) (explaining that while an IG exclusion aims to protect beneficiaries of health care programs and the federal fisc, a criminal law proceeding involves "punishment, rehabilitation, and the deterrence of future misconduct"). The IG had a proper basis to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.

3. Petitioner's exclusion for a period of four years is not unreasonable.

The period of exclusion under section 1128(b)(1) is three years, unless aggravating or mitigating factors justify lengthening or shortening that period. Act § 1128(c)(3)(D); 42 C.F.R. § 1001.201(b)(1). Only the mitigating factors authorized by 42 C.F.R. § 1001.201(b)(3) may be considered in order to reduce the period of exclusion. 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. § 1001.201(b)(2). The notice letter states that the IG considered two aggravating factors in deciding that the length of Petitioner's exclusion should be extended to four years. Petitioner does not identify any mitigating factor authorized by the regulation that the IG failed to consider or that I should consider. I conclude therefore that the four-year exclusion is not unreasonable, as explained below.

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. *Id.* § 1001.201(b)(2)(i). Second, Petitioner was subject to another adverse action based on the same circumstances that support the exclusion.[3] *Id.* § 1001.201(b)(2)(vi).

---

[3] I observe that the IG exercised leniency in not finding a third aggravating factor pursuant to section 1001.201(b)(2)(ii), in that the acts that resulted in the three convictions were committed over a period of one year or more. *See* IG Ex. 2 at 1.

Petitioner raises a vague dispute regarding the loss to health insurer BlueCross BlueShield of New York as a result of his criminal conduct. While he stated in his plea agreement that the health insurer lost $100,286.35 as a result of his "relevant conduct," he now disputes that figure, stating:

> This amount was extrapolated after reviewing various interoffice records in connection with Dr. Domenico's billing procedures. To be clear, this was an estimation, not an exact calculation. As noted above, the services were always provided. The issue was how Dr. Domenico billed the services he provided. Dr. Domenico did not dispute the calculations as part of his plea agreement with the government. Although it is likely the amount exceeds $5,000, it certainly is less than $100,286.35. Dr. Domenico was required to accept the government's calculation as part of the agreement that reduced all charges to misdemeanors. [4]

P. Br. at 4. Petitioner's argument is disingenuous. First, Petitioner unambiguously acknowledged the following in the plea agreement: "I fully agree with the contents of this agreement. I am signing this agreement voluntarily and of my own free will." IG Ex. 1 at 4. In agreeing to a total loss of $100,286.35 as a result of his criminal conduct, Petitioner exposed himself to the possibility of significantly greater prison time, as the base offense level for his offense was 6 (IG Ex. 1 at 4), and the significant amount of loss to BlueCross BlueShield increased the offense level by 8 levels. IG Ex. 1 at 4; *see* U.S.S.G. § 2B1.1 and Sentencing Table. Petitioner fails to reconcile why he would "fully agree" with the contents of the plea agreement, which included an amount of loss that exposed him to the possibility of incarceration, when he now contends that the amount of loss "likely" exceeded $5,000 but "certainly is less than $100,286.35." P. Br. at 4. I also observe that Petitioner's acceptance of the plea agreement obligated him to pay $100,286.35 in restitution; it is difficult to understand why Petitioner would agree to pay $100,286.35 in restitution if he believed the actual loss could have been closer to $5,000. Finally, I point out that Petitioner has not put forth any specific figure specifying the precise amount of the loss. Absent any other figure that is supported by probative evidence, I have no reason to question that the loss was other than $100,286.35, which is the amount Petitioner agreed to in his plea agreement. IG Ex. 1. The amount of loss involved was roughly forty times the $5,000 amount listed in 42 U.S.C. § 1001.201(b)(2)(i), and the IG properly considered the substantial loss to the health insurer be an aggravating factor.

---

[4] Petitioner pleaded guilty to separate misdemeanor offenses under 18 U.S.C. § 669(a). A misdemeanor offense under section 669(a) involves a loss under $100. The maximum period of incarceration for a misdemeanor offense is one year, whereas the maximum sentence of incarceration for a felony conviction is 10 years. 18 U.S.C. § 669(a).

With respect to the magnitude of his criminal scheme, and thereby the resulting amount of loss, Petitioner argues in his brief that he would "sometimes" bill for a separate session on a date in which he did not treat a patient so that he could be reimbursed for purportedly lengthy face-to-face sessions he had with his patients.[5] P. Br. at 2 ("The investigation in this matter centered around Dr. Domenico's practice of sometimes billing a 90-minute session as a 45-minute visit on the day the session took place and a 45-minute follow-up visit the next day."); P. Br. at 3 ("Therefore, in order to accommodate some patients and better serve others, Dr. Domenico sometimes extended patient treatment to 90-minute sessions.") This practice is not reflected in Petitioner's plea agreement or judgment of conviction. *See* IG Exs. 1 and 2. While the sentencing judge expressed an opinion that Petitioner's case was "different" and he declined to impose a sentence of incarceration, the sentencing judge nonetheless ordered that Petitioner pay a significant fine of $10,000 for his misdemeanor offenses and serve two years of probation. IG Ex. 2; P. Ex. 2. I also observe that each offense to which Petitioner pleaded guilty involved a loss to BlueCross BlueShield of $80. IG Ex. 1 at 3-4. While not making any finding or conclusion regarding the number of acts involved in the relevant conduct cited in the plea agreement, I observe that based on the total loss of $100,286.35 for which restitution was ordered, Petitioner would have had to have billed BlueCross BlueShield 1,253 times for services he did not provide if each individual; billing entry was for only $80.[6] Such a figure does not provide support to Petitioner's allegation in his brief that he only "sometimes" engaged in improper billing.

Petitioner has not denied that the New York State Office of the Medicaid Inspector General excluded him from participation in that program as a result of his criminal conviction. IG Ex. 4. As such, the IG properly considered this factor. 42 C.F.R. § 1001.201(b)(2)(vi).

4. Petitioner has not asserted any basis for mitigation that is contemplated by the regulations.

The regulations list a limited number of mitigating factors that may be a basis for reducing a period of exclusion. Pursuant to section 1001.201(b)(3)(iv), the IG can find a mitigating factor is present if "[a]lternative sources of the type of health care items or

---

[5] To the extent that Petitioner appears to be attempting to attack the basis of his underlying conviction, I note that the basis for his conviction is not reviewable. 42 C.F.R. 1001.2007(d).

[6] The frequency of billing, if true, is even more remarkable if one considers that the period at issue was between December 2009 and January 2011.

services furnished by the individual or entity are not available." In support of Petitioner's argument for mitigation, he contends that that he is "one of only a few psychotherapists in the Lockport area." P. Br. at 5. Petitioner submitted numerous statements that he feels provide support to his argument that the length of his exclusion should be shortened, and Petitioner asserts that the evidence shows that he is "one of only a few providers in all of Western New York who specialize in caring for law enforcement and the poor, particularly with those who suffer from Post Traumatic Stress Disorder." P. Br. at 5; *see* P. Exs. 3 and 4 (containing dozens of letters from patients, concerned citizens, and family members requesting leniency from the sentencing District Court judge). Petitioner points out that a local police chief stated that "there 'are very few health professionals out there who are trained to deal with law enforcement officers.'" P. Br. at 5, citing P. Ex. 3 at 11.

Petitioner's plea agreement indicates that he is a licensed clinical social worker (IG Ex. 1 at 2), and he reports in his brief that he is a psychotherapist. P. Br. at 2. Petitioner has not submitted any evidence showing that there are no other licensed clinical social workers or psychotherapists available in his region, nor has he shown that there are no other mental health professionals, such as, but not limited to, psychiatrists and psychologists, who can provide mental health services to patients, to include those with post-traumatic stress disorder (PTSD) and/or patients who are members of the law enforcement community. In fact, Petitioner has acknowledged that he is "one of only a few psychotherapists in the Lockport area," and that there are "a few" providers in Western New York who specialize in caring for the law enforcement community. P. Br. at 5. As Petitioner has not shown that other sources "are not available," he has not shown that services for patients, to include those with PTSD and who serve in law enforcement, are not otherwise available. 42 C.F.R. § 1001.201(b)(3).

Petitioner also asserts that his specialization in treating "the poor" and "underserved" is a mitigating factor. P. Br. at 5. The regulations do not account for such a mitigating factor, so long as other sources of treatment are available. 42 C.F.R. § 1001.201(b)(3)(iv). Petitioner also explains that his area is "suffering a rise in opiate addiction and overdose epidemic," and he is "one of only a few" approved addiction counselors. P. Br. at 5. Petitioner also indicates that he has suicidal patients who would be without care if the exclusion is affirmed. P. Br. at 5. Petitioner has not shown that he is the only psychotherapist or licensed clinical social worker in his geographic area, or that other mental health professionals could not provide care to the poor, substance abusers, and people who have expressed suicidal ideation. 42 C.F.R. § 1001.201(b)(3)(iv). In fact, Petitioner acknowledges there are other psychotherapists in his area, and he concedes that there are "a few" other approved addiction counselors in the Lockport community and Niagara County. P. Br. at 5. Finally, while Petitioner contends that he treats the poor and underserved, he has also been excluded from the New York State Office of the Medicaid Inspector General, which presumably serves a number of the poor and underserved patients that Petitioner described in his brief. CMS Ex. 4. Thus, even prior to the instant

IG exclusion at issue, Petitioner was already excluded from participation in New York's Medicaid program.

V. Conclusion

For the foregoing reasons, I affirm the IG's exclusion of Petitioner from participation in Medicare, Medicaid, and all other federal health care programs for a period of four years, effective August 20, 2015.

/s/
Leslie C. Rogall
Administrative Law Judge