Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Mark Tuan Le
(OI File No. 4-12-40481-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-693

Decision No. CR4766

Date: December 30, 2016

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Mark Tuan Le, 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 North Carolina Medicaid programs, and thereby was convicted of a criminal offense in connection with the delivery of an item or service under Medicare or a state health care program. I affirm the 10-year exclusion period because the IG has proven three aggravating factors, and there are no mitigating factors present. I also affirm that the effective date of Petitioner's exclusion is May 18, 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 Act (42 U.S.C. § 1320a-7b(f)) for a minimum period of 15 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 for the Western District of North Carolina, 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 15 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 15 years based on the presence of three 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 2009 to 2013; and, 3) Petitioner was sentenced to 18 months of incarceration. IG Ex. 1 at 1-2. 42 C.F.R. § 1001.102(b). The IG did not consider any mitigating factors. IG Exs. 1, 5; *see* 42 C.F.R. § 1001.102(c). Following Petitioner's timely filing of his request for hearing on June 23, 2016, the IG informed Petitioner, in a letter dated September 6, 2016, that he had taken into account "[t]he reduction of the restitution amount identified in the aggravating factors to approximately $191,900" and had reduced the exclusion period from 15 years to 10 years.[1] IG Ex. 5 at 1.

On August 3, 2016, pursuant to 42 C.F.R. § 1005.6, I presided over a telephonic pre-hearing conference, and the following day 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 five exhibits (IG Exs. 1-5). Petitioner filed an informal brief (P. Br.) and four exhibits. Petitioner Exhibits (P. Exs. 1-4).[2] In the absence of any objections, I admit the parties' exhibits into the record.

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[1] In his previous letter imposing a lengthier period of exclusion, the IG informed Petitioner that it had considered that the court imposed restitution in the amount of $1,036,200. IG Ex. 1 at 2.

[2] Petitioner filed four exhibits, P. Exs. A, B, C, and D, and did not identify each of his exhibits with a whole number. Order, § 5(b). I have re-designated Petitioner's exhibits as P. Exs .1-4.

Both parties agreed that an in-person hearing was not necessary for me to decide this case. IG Br. at 12; P. Br. at 5. Therefore, I am deciding this case on the written submissions and documentary evidence. *See* Order § IV.

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 Medicare, 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)):
>
> (1) Conviction of program-related crimes--

[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.

> 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 argues that he properly 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 4-6; *see* IG Ex. 2 at 8; P. Ex. 1 at 12. Petitioner concedes in his informal brief that he was convicted of a criminal offense for which exclusion is required. P. Br. at 2. 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 June 13, 2014, the United States Attorney for the Western District of North Carolina filed a bill of information charging that Petitioner "attempted to defraud Medicare, Medicaid and private insurers of over $500,000 by submitting false and fraudulent claims . . ." and that he "committed tax evasion by hiding approximately $2.4 million in personal income from the United States Internal Revenue Service (IRS)." IG Ex. 2 at 1. The nine-count information charged that Petitioner committed, "[f]rom in or about 2009 to 2013," one count of health care fraud conspiracy, in violation of 18 U.S.C. § 1349, seven counts of health care fraud, in violation of 18 U.S.C. § 1347, and one count of tax evasion, in violation of 26 U.S.C. § 7201. IG Ex. 2 at 7-10. The bill of information described that Petitioner was an internal medicine physician who engaged in a scheme to defraud Medicare, Medicaid, and private insurers, and that he diverted money from his practice to "pay for the construction of [his] multi-million dollar personal residence." IG Ex. 2 at 5. The information further indicated that the proceeds of Petitioner's health care fraud conspiracy totaled $191,921.52 and were subject to forfeiture. IG Ex. 2 at 11. On the same day that the United States Attorney filed the criminal information, the parties to the criminal case filed a plea agreement that they executed on June 13, 2014. IG Ex. 3. In entering into a plea agreement, Petitioner explicitly waived indictment and admitted guilt to all nine counts that were charged in the bill of information. IG Ex. 3 at 1. Petitioner also agreed that the amount of loss for each count was in excess of $400,000 and less than $1,000,000. IG Ex. 3 at 2. Petitioner entered a guilty plea on June 25, 2014. IG Ex. 4 at 6; P. Ex. 1 at 1.

On September 14, 2015, a United States District Judge sentenced Petitioner to an 18-month term of incarceration for each of the nine counts, to run concurrently. IG Ex. 4 at 2. The sentencing judge imposed a fine of $7,500 and ordered Petitioner to pay restitution in the amount of $1,036,288.52.[5] IG Ex. 4 at 4.

[5] The majority of the restitution relates to the proceeds of Petitioner's personal income tax evasion that totaled $844,367. IG Ex. 2 at 6.

A United States probation officer prepared a pre-sentence report in July 2015, in which she documented that Petitioner owed restitution to the following entities:

- "CMS (Medicare)" - $143,989.46
- North Carolina Fund for Medical Assistance - $12,010.84
- Blue Cross Blue Shield of North Carolina - $19,892.21
- Blue Cross Blue Shield of South Carolina - $2,550.18
- Anthem Blue Cross - $523.95
- Blue Cross Blue Shield of Michigan - $910.00
- United Healthcare - $12,044.88
- Internal Revenue Service - $844,367.00

P. Ex. 1 at 12. The pre-sentence report detailed the schemes to defraud that were contained in the bill of information, to include billing for treatments that had not been performed.[6] P. Ex. 1 at 6-10; *see* IG Ex. 2 at 3-5. In addition to detailing the schemes to defraud and the offense conduct, the probation officer's report included a discussion of Petitioner's personal and family data, physical condition, mental and emotional health, substance abuse, employment record, financial condition, and educational, vocational, and special skills. P. Ex. 1 at 4-20.

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. 2 at 1; P. Ex. 1 at 12. Pursuant to section 1128(i)(3) of the Act, a petitioner 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 June 13, 2014, Petitioner entered into a plea agreement in which he admitted guilt to all nine counts charged in the information, to include the acts of health care fraud, in violation of 18 U.S.C. § 1347, specified in Count Three involving the Medicare program. IG Ex. 2 at 8. Petitioner entered a guilty plea to the nine-count information. IG Ex. 4 at 6; P. Ex. 1 at 1. The information further explained that Petitioner submitted "false and fraudulent claims that [he] and his medical practice had performed certain procedures, namely hemorrhoidectomies and Enhanced External Counterpulsation (EECP) therapy, when these procedures were never performed." IG Ex. 2 at 1. The IG correctly determined that Petitioner had been convicted pursuant to 42 U.S.C. § 1320a-7(i)(3), and Petitioner concedes as much in his brief. P. Br. at 2.

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[6] The information and pre-sentence report both discuss an instance in which Petitioner directed a medical biller to submit a claim for an office visit in which he performed hemorrhoidectomies on a patient, but that same patient had suffered cardiac arrest a day earlier and was "comatose" and admitted to a hospital at the very time that Petitioner claimed to have performed procedures on him at his office. P. Ex. 1 at 9; IG Ex. 3 at 5.

Congress, through enactment of the Act, determined that an individual who has been convicted of a criminal offense relating to 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). Even if I were so inclined, 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). I therefore agree with the IG and Petitioner that an exclusion for a minimum period of five years is mandated.

2. A 10-year minimum exclusion is not unreasonable based on the presence of three 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), therefore Petitioner must be excluded for a minimum of five years. The IG increased the minimum exclusion period from five years to 10 years based on his consideration of three 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 three aggravating factors warrants an exclusion for 10 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 2009 to 2013. 42 C.F.R. § 1001.102 (b)(2). Third, the sentence imposed included incarceration, specifically 18 months of incarceration. 42 C.F.R. § 1001.102(b)(5). The IG properly considered these three factors as aggravating factors in this case. *See Jeremy Robinson*, DAB No. 1905 at 12 (2004) (determining that loss of 41 times the minimum amount required for an aggravating factor supported a 15-year exclusion); *Vinod Chandrashekhar Patwardhan, M.D.*, DAB No. 2454 at 7 (2012) (determining that three-year duration of conduct was an aggravating factor); *Jason Hollady, M.D.*, DAB No. 1855 at 12 (2002) (stating that a nine-month period of incarceration was "relatively substantial"). Petitioner, in his brief, does not disagree with the IG's determination that these three factors were properly considered by the IG to be aggravating factors. P. Br. at 2-3.

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.

Petitioner contends that his "behavior that gave rise to the criminal offense was deeply entwined with his daily abuse of marijuana, alcohol, and other drugs," and that "[u]se of these substances contributed to a cycle of poor choices, depression, and avoidance." P. Br. at 3. Petitioner further contends that the United States District Court considered his history of alcohol abuse, marijuana abuse, and treatment for addiction, and it is referenced in the pre-sentence report prepared by the probation office. P. Br. at 4; *see* P. Ex. 1. Petitioner further argues that the sentencing judge ordered participation in substance abuse and mental health treatment, and that "[t]he Court cited [Petitioner's] personal history as a factor pursuant to 18 U.S.C. [§] 3553 as a factor in varying from the United States Sentencing Guidelines." P. Br. at 4, citing P. Ex. 3. I find this argument to be unpersuasive.

The regulations governing exclusions recognize that a mitigating factor may exist where the sentencing judge determines that the excluded individual's culpability is reduced by virtue of a mental, emotional, or physical condition. 42 C.F.R. § 1001.102(c)(2). In such an instance, the finding of diminished culpability must be memorialized in the record of the sentencing proceeding. *Id.* Petitioner has not offered evidence to prove that the sentencing judge made such a finding. I cannot find the presence of this mitigating factor in the absence of such evidence. Furthermore, and as discussed below, Petitioner has not shown that that he had a mental, physical, or emotional condition before or during the commission of the offenses that reduced his culpability. 42 C.F.R. § 1001.102(c)(2).

Despite his allegation that his "alcohol and marijuana abuse was entwined with his criminal conduct, diminishing his ability to make lawful choices" and his unsupported insinuation that "the Court granted a significant variance from the sentencing guidelines" due to his substance abuse, there is simply no evidence that a mental or emotional condition, to include substance addiction, was considered by the sentencing judge to have reduced his culpability as contemplated by 42 C.F.R. § 1001.102(c)(2). In fact, the pre-sentencing report indicates "[t]here appears to be no factors or combination of factors that warrant a variance from the advisory guideline range," and Petitioner has not submitted any transcripts from the sentencing hearing or other documentation evidencing that the sentencing judge determined that Petitioner's culpability was reduced owing to a mental or emotional condition. P. Ex. 1 at 25. While the sentencing judge indicated that he was imposing a sentence below the advisory guideline range, he did not indicate that a departure from the advisory sentencing guidelines was authorized due to the presence of any of the following enumerated factors: mental and emotional condition, physical condition, aggravating or mitigating circumstances, physical injury, extreme psychological injury, or diminished capacity. P. Ex. 3 at 2. Rather, the sentencing judge exercised his discretion and imposed a sentence below the advisory guideline range based

on a "defense motion for a sentence outside the advisory guideline system to which the government objected." P. Ex. 3 at 3. The sentencing judge reported that he imposed the sentence below the advisory guideline range based on the following reasons:

- The nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1).
- To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A)).
- To afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B)).
- To protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C)).
- To provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7)).

P. Ex. 3 at 3. The sentencing judge further explained, in a narrative explaining the reason for the sentence below the advisory guideline range:

> Court varies to Offense Level 15 based on 18 U.S.C. § 3553(a) factors listed above, as well as his extensive community assistance with the health care needs of various ethnicities and his prior assistance with law enforcement in addressing Asian gangs in the Charlotte, NC area.

P. Ex. 3 at 3. The sentencing judge did not indicate that a sentence below the advisory guideline range was warranted due to a mental, emotional, or physical condition (P. Ex. 3 at 2), but rather, exercised his authority to impose a sentence below the advisory guideline range following Petitioner's motion for such a departure, and the reduced sentence was apparently significantly influenced by Petitioner's extensive community assistance and prior assistance to law enforcement.[7] Absent the submission of any evidence that the sentencing judge specifically determined that Petitioner's culpability was reduced due to a mental, physical, or emotional condition, Petitioner has not demonstrated that a regulatory mitigating factor is present.[8] 42 C.F.R. § 1001.102(c)(2).

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[7] I note that Section 5K2.13 of the United States Sentencing Guidelines indicates that a downward departure for diminished capacity is prohibited where significantly reduced mental capacity is due to the voluntary use of drugs or other intoxicants.

[8] Petitioner has not submitted a copy of his motion for a sentence outside of the advisory guideline range in support of his argument that the "trial court considered these findings [of mental status and substance abuse] in the Presentence Report in imposing sentence . . . ." P. Br. at 4.

The 10-year period of Petitioner's exclusion is not unreasonable based on the three aggravating factors present in this case. The amount of loss caused by Petitioner's criminal conduct is very substantial, and is nearly 40 times higher than the threshold $5,000 amount of loss necessary to trigger consideration of this aggravating factor. In addition, Petitioner's criminal activity lasted for approximately four years, and he was sentenced to a period of 18 months of incarceration.

3. The effective date of Petitioner's exclusion is May 18, 2016.

The effective date of the exclusion, May 18, 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 10 years, effective May 18, 2016.

__/s/_____
Leslie C. Rogall
Administrative Law Judge