Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Ezinne U. Ubani,
(OI File No. 6-10-40414-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-266

Decision No. CR2841

Date: June 24, 2013

DECISION

Petitioner, Ezinne U. Ubani, appeals the determination of the Inspector General for the U.S. Department of Health and Human Services (I.G.) to exclude her from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)) for a 30-year period. For the reasons discussed below, I find the I.G. was authorized to exclude Petitioner. I further find that the 30-year period of exclusion is reasonable.

I. Background

The I.G. notified Petitioner, by letter dated September 28, 2012, that she was being excluded pursuant to section 1128(a)(1) of the Act from participation in Medicare, Medicaid, and all federal health care programs for a 30-year period. The I.G. advised Petitioner that the exclusion was based on her felony conviction in the United States District Court, Southern District of Texas, of criminal offenses related to the delivery of an item or service under Medicare or state health care programs. I.G. Ex. 1.

I convened a prehearing telephone conference with the parties, which I summarized in my Order and Schedule for Filing Briefs and Documentary Evidence dated February 13, 2013. During the prehearing conference, I explained to Petitioner her right to be represented by counsel, and Petitioner decided to proceed representing herself.

Pursuant to my scheduling order, I asked the parties to answer essential questions on the short-form briefs sent to them, together with any additional arguments and supporting documents they wished to submit. The I.G. filed his short-form brief together with exhibits (I.G. Exs.) 1 through 5. Petitioner submitted her short form brief (P. Br.), her written testimony of two pages (also submitted with her hearing request), her written response of two pages to the I.G. Exclusion Notice (also submitted with her hearing request), and four exhibits (P. Exs. 1-4).[1] The I.G. chose not to file a reply brief. In the absence of objection, I admit into evidence I.G. Exs. 1-5 and P. Exs. 1-4.

The parties indicated in their respective briefs that this case does not require an in-person hearing. Therefore, the record is now closed, and I decide this case based on the written record.

II. Discussion

A. Issues

The scope of my review here is limited. 42 C.F.R. § 1001.2007(a)(1). The issues before me are:

- Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Act; and

- Whether the length of the proposed period of exclusion of thirty years is unreasonable.

B. Findings of Fact and Conclusions of Law

1. Petitioner was found guilty of one count of Conspiracy to Commit Health Care Fraud and two counts of False Statements for use in Determining Rights for Benefit and Payment by Medicare, Aiding and Abetting.

[1] Petitioner also submitted the same four exhibits with her hearing request, but she labeled them differently as Petitioner's exhibits. For clarity, I will refer to Petitioner's exhibits as those she labeled and submitted with her short form brief.

The United States charged Petitioner as an owner and operator of Family Healthcare Group, Inc., d/b/a Family Healthcare Services, a home healthcare provider. I.G. Ex. 2 at 7, 8. Petitioner was also a registered nurse licensed by the State of Texas and acted as Family Healthcare Services' Director of Nursing. I.G. Ex. 2 at 8; I.G. Ex. 4 at 1.

On October 7, 2010, Petitioner was indicted with 13 other individuals and found guilty of willful and knowing participation in a scheme to enrich themselves through health care fraud and kickbacks for the period of approximately April 2006 through August 2009. I.G. Ex. 2 (Count 1 of the Grand Jury Indictment); I.G. Ex. 3. Petitioner was found guilty of conspiracy to commit health care fraud based on her participation in a "scheme and artifice to defraud a healthcare benefit program affecting commerce . . .[Medicare] . . . and to obtain, by means of materially false and fraudulent pretenses, representations, and promises, money and property owned by, and under the custody and control of, [Medicare], in connection with the delivery of and payment for health care benefits, items, and services," in violation of 18 U.S.C. §§ 1347 and 1349. I.G. Ex. 2 at 10-11; I.G. Ex. 3. Petitioner, along with her other co-conspirators, was found guilty of falsifying patient files to make it appear that Medicare beneficiaries qualified for, and received, services even though those services were not medically necessary or were not actually provided. I.G. Ex. 2 at 12-13.

Petitioner was also charged with, and found guilty of, making false statements in patient files that were used to determine Medicare benefits and payments in violation of 42 U.S.C. § 1320a-7b(a)(2) and 18 U.S.C. § 2. I.G. Ex. 2 at 20-21; I.G. Ex. 3. Specifically, from April 2008 to August 2009, Petitioner and other co-conspirators described symptoms that were non-existent and services that were not rendered for Medicare beneficiary H.A. I.G. Ex. 2 at 21. Further, from June 2008 to August 2009, Petitioner and other co-conspirators described symptoms that were non-existent and services that were not rendered for Medicare beneficiary J.A. I.G. Ex. 2 at 21.

2. Petitioner was convicted of a criminal offense for purposes of section 1128(a)(1) of the Act.

The Secretary of the U.S. Department of Health and Human Services must exclude from participation in the Medicare and Medicaid programs any individual convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Act § 1128(a)(1) (42 U.S.C. § 1320a-7(a)(1)); *see also* 42 C.F.R. § 1001.101(a). An individual is considered convicted of a criminal offense when: (1) a judgment of conviction has been entered against him or her in a federal, state, or local court whether an appeal is pending or the record of the conviction is expunged; (2) there is a finding of guilt by a court; (3) a plea of guilty or no contest is accepted by a court; or (4) when the individual has entered into any arrangement or program where judgment of conviction is withheld. Act § 1128(i) (42 U.S.C § 1320a-7(i)(3)); *see also* 42 C.F.R. § 1001.2.

A jury of the United States found Petitioner guilty of the felony criminal offenses of conspiracy to commit health care fraud and for making false statements for use in determining rights for benefits and payment by Medicare. I.G. Ex. 2; I.G. Ex. 3. She was sentenced and a judgment of conviction was entered against her. I.G. Ex. 3. I therefore find that Petitioner was convicted of a criminal offense within the meaning of the exclusion statute.

3. Petitioner's conviction requires exclusion under section 1128(a)(1) because her criminal conduct related to the delivery of an item or service under Medicare.

A conviction is related to the delivery of a health care item or service under Medicare or a state health care program if there is a "common-sense connection or nexus between the offense and the delivery of an item or service under the program." *Scott D. Augustine*, DAB No. 2043, at 5-6 (2006)(citations omitted). Here, Petitioner was convicted of conspiracy to specifically defraud the Medicare program and for making false statements for use in determining Medicare benefits and payment. I.G. Ex. 2 at 10, 20-21; I.G. Ex. 3 at 1. Certainly, conspiracy to commit health care fraud against the Medicare program is related to the delivery of items of services under a federal health care program. *See, e.g., Salvacion Lee, M.D.*, DAB No. 1850 (2002) (upholding an ALJ's finding of conspiracy to commit bribery as related to the delivery of an item or service under Medicare). Also, Petitioner's conviction for making false statements to Medicare under 42 U.S.C. § 1320a-7b bears an obvious nexus between the offense and the delivery of an item or service under the Medicare program considering that Petitioner made the false statements in order to receive payment for services covered under the Medicare program.

Thus, I conclude that Petitioner's conviction here is directly related to the delivery of an item or service under the Medicare program within the meaning of section 1128(a)(1) of the Act, and I find the requisite "nexus or common-sense connection" between the conduct giving rise to Petitioner's offense and the delivery of Medicare services.

Petitioner confirmed that she was convicted of a criminal offense, but she disagrees with the outcome of her trial and the decision reached by the jury to convict her on the charge of conspiracy to commit health care fraud. P. Br. at 2. She contends that the decision to charge her was based on the false premise that she was a part owner of Family Healthcare Services instead of merely an employee.[2] P. Br. at 2-3.

[2] The Indictment set forth that Family Healthcare Services was owned and operated by Petitioner, her husband, and two others. I.G. Ex. 2 at 8.

Petitioner's arguments amount to collateral attacks on the accuracy of the charges underlying her conviction. Regulation explicitly precludes any such collateral attack on Petitioner's conviction:

> 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). Excluding individuals based on criminal convictions provides protection for federally funded programs and their beneficiaries and recipients, without expending program resources to duplicate existing criminal processes. *Lyle Kai, R. Ph.*, DAB No. 1979, at 8 (2005). Statutory and regulatory authority require exclusion under the circumstances if the elements of section 1128(a)(1) are met. Thus, I must uphold the exclusion and may not consider Petitioner's collateral attacks on her underlying conviction.

4. Based on the aggravating factors in this case and the absence of any mitigating factors, the 30-year exclusion falls within a reasonable range.

An exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); 42 C.F.R. § 1001.102(a), 1001.2007(a)(2). The period of exclusion may be extended based on the presence of specified aggravating factors. 42 C.F.R. § 1001.102(b). Only if the aggravating factors justify an exclusion of longer than five years are mitigating factors considered as a basis for reducing the period of exclusion to no 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 regulation may not be used to decide whether an exclusion of a particular length is reasonable.

Here, I find the following factors serve as a basis for lengthening the period of exclusion: 1) the acts resulting in the conviction, or similar acts, resulted in a financial loss to Medicare of $5,000 or more; 2) the acts that resulted in the conviction were committed over a period of one year or more; 3) the sentence the court imposed included incarceration; and 4) the convicted individual has a prior criminal, civil or administrative sanction record. I.G. Br. at 6-8.

Financial loss to Medicare (42 C.F.R. § 1001.102(b)(1). Restitution has long been considered a reasonable measure of program losses. *Craig Richard Wilder,* DAB No. 2416, at 9 (2011). Here, the U.S. District Court ordered Petitioner to pay $2,500,000 in restitution to the Medicare program. I.G. Ex. 3 at 5. Because the financial losses were significantly in excess of the threshold amount of $5,000 for aggravation (almost 500

times greater), the I.G. may justifiably increase significantly the period of exclusion. *See Jeremy Robinson*, DAB No. 1905 (2004) (determining that restitution in an amount that is "very substantially greater than the statutory standard" is characterized as an "exceptional aggravating factor").

Duration of crime (42 C.F.R. § 1001.102(b)(2). Petitioner was found guilty of committing criminal acts over a period of three years, from April 2006 to August 2009 for the first count, and from April 2008 to August 2009 for the other counts. I.G. Ex. 3; I.G. Ex. 2 at 10, 21. Petitioner's three years of criminal conduct lasted more than three times longer than necessary to constitute an aggravating factor.

Incarceration (42 C.F.R. § 1001.102(b)(5). The court sentenced Petitioner to 97 months (approximately eight years) of imprisonment, which is substantial. I.G. Ex. 3 at 2. *See Jason Hollady, M.D.*, DAB No. 1855, at 12 (2002) (characterizing a nine-month incarceration as "relatively substantial").

Prior Administrative Sanction Record (42 C.F.R. §1001.102(b)(6)).[3] Following her conviction, Petitioner voluntarily surrendered her Registered Nurse License and her Vocational Nurse License to the Texas Board of Nursing when it brought a disciplinary action against her. I.G. Ex. 4. Based on this action, the Texas Health and Human Services Commission, Office of Inspector General, excluded Petitioner from the Texas Medicaid program and other federally funded health care programs. I.G. Ex. 5. Both the surrendering of her licenses pursuant to a disciplinary proceeding and her exclusion from the state Medicaid program constitute prior administrative sanctions even if they arose from the same set of circumstances forming the basis of the I.G.'s exclusion of Petitioner. *See, e.g., David L. Gordon, M.D.*, DAB CR327, at 13 (1994).

Petitioner does not deny the existence of these aggravating factors. P. Br. at 5. Petitioner contends generally that mitigating factors exist that support reducing the length of her exclusion, but she failed to allege the elements of any of the type of mitigating factors that the I.G. could consider to offset the aggravating factors. P. Br. at 5-6; 42 C.F.R. § 1001.102(c).

The I.G. may decide that periods of exclusion longer than the five-year minimum are reasonable and necessary to fight health care fraud, and here four serious aggravating factors are indisputably present. Petitioner was found guilty and convicted of knowingly

[3] I note that the Texas Board of Nursing proceeding could have also been considered an aggravating factor under 42 C.F.R. § 1001.102(b)(9) as an adverse action by a state board on the same set of circumstances that served as the basis for imposing the exclusion.

and willingly committing offenses related to Medicare. The egregious circumstances and results of her acts amply justify the exclusion imposed, and I find that her 30-year exclusion falls within a reasonable range.

/s/
Joseph Grow
Administrative Law Judge