

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Marc J. Blatstein, M.D.,)	Date: August 23, 2007
)	
Petitioner,)	
)	
- v. -)	Docket No. C-07-245
)	Decision No. CR1638
The Inspector General.)	
)	
_____)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Marc J. Blatstein, M.D., from participating in Medicare and other federally funded health care programs for a period of 13 years.

I. Background

At all times relevant to this case, Petitioner was a podiatrist licensed in the Commonwealth of Virginia. I.G. Ex. 4, at 1; I.G. Ex. 5, at 1. On November 30, 2006, the I.G. notified Petitioner that he was being excluded from participating in Medicare and other federally funded health care programs pursuant to section 1128(a)(3) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)). The basis cited for Petitioner's exclusion was his felony conviction in the United States District Court for the Eastern District of Virginia, Richmond Division Court, of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of an item or service. Petitioner was informed that the I.G. had imposed the 13-year exclusion based on the presence of certain aggravating factors.

By letter dated January 29, 2007, Petitioner requested a hearing. The case was assigned to me for a hearing and a decision. On February 28, 2007, I convened a pre-hearing conference by telephone, during which I established a schedule for the parties to submit briefs and proposed exhibits. In addition, I apprised the parties that they could request an in-person hearing if they felt that it was necessary to address any material facts that are in dispute. Neither party requested that I convene an in-person hearing. During the pre-hearing conference counsel for Petitioner was informed that the two issues over which I have jurisdiction are: 1) whether the I.G. has the authority to exclude Petitioner from participation in the Medicare and Medicaid programs; and 2) whether the period of exclusion imposed by the I.G. is reasonable.

On April 16, 2007, I received the I.G.'s motion for summary affirmance, together with a brief in support of the motion and seven exhibits, I.G. Exhibits (Exs.) 1-7. On May 29, 2007, I received Petitioner's response to the I.G.'s motion and four documentary exhibits which were labeled as A, B, C, and D, with attachments, but which I have marked as Petitioner's Exhibits (P. Exs.) 1-4 respectively. On July 3, 2007, I received the I.G.'s reply along with an additional exhibit, I.G. Ex. 8. Neither party filed objections to the exhibits offered by the other party; therefore, I admit I.G. Exs. 1-8 and P. Exs. 1-4 into evidence.

II. Issue

The I.G. has excluded Petitioner from participation in the Medicare, Medicaid, and all federal health care programs for a period of 13 years. Petitioner agrees that the I.G. has a basis upon which to exclude him; however, Petitioner claims that the length of the exclusion should be decreased to the statutory minimum period of five years. Therefore, the sole issue before me is whether the length of Petitioner's exclusion – 13 years – is reasonable. 42 C.F.R. § 1001.2007.

III. Applicable Law

Petitioner's right to a hearing by an administrative law judge and judicial review of the final action of the Secretary of the Department of Health and Human Services (Secretary) is provided by section 1128(f) of the Act (42 U.S.C. § 1230a-7(f)). Petitioner's request for a hearing was timely filed and I have jurisdiction over this matter.

Section 1128(a)(3) of the Act directs the Secretary to exclude an individual convicted of a felony “relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct” in connection with the delivery of a health care item or service. *See* 42 C.F.R. § 1001.101(c)(1). Individuals excluded under section 1128(a)(3) must be excluded for a period of not less than five years. Act, section 1128(c)(3)(B).

Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years may mitigating factors be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102 (c).

The Secretary has delegated to the I.G. the authority to impose exclusions. 42 C.F.R. § 1001.401(a). So long as the period of exclusion is within a reasonable range, based on demonstrated criteria, I have no authority to change it. *Joann Fletcher Cash*, DAB No. 1725, at 7 (2000), *citing* 57 Fed. Reg. 3298, 3321 (1992).

IV. Findings of Fact and Conclusions of Law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below, in italics, as a separately lettered heading.

A. There is evidence in this case relevant to four aggravating factors and none relevant to any mitigating factor.

The I.G. has excluded Petitioner for a period of 13 years. The I.G. determined that the following aggravating factors justified extending Petitioner’s period of exclusion beyond the mandatory minimum five-year period:

- (1) the acts resulting in the conviction, or similar acts, resulted in a financial loss to Medicare and the state health care programs of \$5,000 or more. 42 C.F.R. § 1001.102(b)(1)

On October 5, 2005, Petitioner pled guilty to a felony charge of mail fraud in violation of 18 U.S.C. §§ 1341 and 1342. I.G. Ex. 3. The Court accepted Petitioner’s guilty plea and entered a judgment of conviction against him on February 8, 2006. The Court ordered Petitioner to pay restitution in the amount of \$272,704.05 to Humana, Aetna, Cigna, and the Federal Employees Health Benefits Program.

(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)

Petitioner's illegal conduct spanned a period from January 1999 to approximately December 2003. I.G. Ex. 4, at 2.

(3) the sentence imposed by the court included incarceration. 42 C.F.R. § 1001.102(b)(5)

The Court sentenced Petitioner to 12 months and one day of incarceration. I.G. Ex. 2, at 1-2. The court subsequently increased the period of incarceration from 12 months to 24 months.

(4) the convicted individual or entity has been the subject of any other adverse action by any federal, state or local government agency or board, if the adverse action is based on the same set of circumstances that serves as the basis for imposition of the exclusion. 42 C.F.R. §1001.102(b)(9).

Petitioner was subject to adverse action by the Virginia Board of Medicine that was based on the same set of circumstances that serves as the basis for his exclusion. On or about February 24, 2006, Petitioner surrendered his medical license to the Virginia Board of Medicine. I.G. Ex. 6. Additionally, on July 18, 2006, the Office of Personnel Management (OPM) debarred Petitioner for a five-year period based on his felony conviction.

Petitioner does not dispute the fact that he was convicted of a criminal offense within the meaning of section 1128(i) of the Act. Instead, Petitioner claims that the length of the exclusion should be decreased to the statutory minimum period of five years. The crux of Petitioner's argument is that "while the I.G. has cited certain factors as aggravating, the I.G. does not adequately explain how the presence of those factors justifies an exclusion more than 2-1/2 times that imposed by OPM." Petitioner's brief (P. Br.) at 2. Petitioner argues that OPM, after holding an in-person hearing on the same set of facts as here, reduced Petitioner's suspension from seven years to five years. Petitioner also argues that the proposed period is so lengthy as to be obviously punitive. *Id.*

Section 1128 of the Act is a remedial statute having the purpose of protecting federally funded health care programs and their beneficiaries and recipients from untrustworthy individuals. Evidence establishing that an individual is highly untrustworthy will support a lengthy exclusion. Under the applicable regulations, I am not bound by nor can I consider as mitigating factors, actions by OPM in my determination as to whether the 13-year exclusion by the I.G. is reasonable.

Petitioner offered the following mitigating factors to justify a minimal period of exclusion:

First, Petitioner contends he cooperated with the government officials on more than one occasion to attempt to assist the government in potential investigations. Second, Petitioner maintains that he made substantial restitution payments which have left him virtually penniless and homeless. Third, Petitioner argues that his actual sentence was approximately 10 months. Fourth, Petitioner asserts that he voluntarily surrendered his license to the Virginia Board of Health Profession. Fifth, Petitioner argues that the conduct for which he pled guilty evolved over time from his legitimate efforts to set up an ambulatory surgery center that complied with accreditation requirements. Having failed in his efforts to achieve his stated goal, he ultimately billed insurers for facility fees in instances where he had not complied with their requirements to legitimately bill.

P. Br. at 4.

The regulations limit what I can consider to be mitigating factors. The regulations dictate that I can consider as mitigating, only three factors: (1) a petitioner was convicted of three or fewer misdemeanor offenses *and* the resulting financial loss to the program was less than \$1,500; (2) the record demonstrates that a petitioner had a mental, physical, or emotional condition that reduced his culpability; and (3) a petitioner's cooperation with federal or state officials resulted in others being convicted or excluded, or additional cases being investigated, or a civil money penalty being imposed. 42 C.F.R.

§§ 1001.102(c)(1)-(3). Characterizing a mitigating factor as "in the nature of an affirmative defense," the Departmental Appeals Board has ruled that a petitioner has the burden of proving any mitigating factor by a preponderance of the evidence. *Barry D. Garfinkel, M.D.*, DAB No. 1572, at 8 (1996).

The first factor does not apply to this case because Petitioner was convicted of a *felony* which involved financial losses to the program in an amount significantly greater than \$1,500. Petitioner does not claim that any medical condition should be considered in reducing his culpability. Thus, I cannot consider the second mitigating factor. Petitioner argues that he has cooperated with government officials on more than one occasion to attempt to assist the government in potential investigations. This argument raises the potential application of the mitigating factor listed at 42 C.F.R. § 1001.102(c)(3). However, the mitigating factor of cooperation requires that an individual's cooperation with federal or state officials results in: (1) others being convicted or excluded from federal health care programs; (2) additional cases being investigated or reports being issued by law enforcement authorities identifying program vulnerabilities or weaknesses; or (3) the imposition of civil monetary penalties or assessments. Petitioner bears the burden of proving the existence of a mitigating factor by a preponderance of the evidence. *See* 42 C.F.R. § 1001.102(c)(3); *see also, Garfinkel*, DAB No. 1572, at 8 (1996). Petitioner has provided no specific evidence that his cooperation with federal or state officials has fulfilled any of the requirements specified in 42 C.F.R. § 1001.102(c)(3). Thus, Petitioner has not met his burden of proving the existence of a mitigating factor relative to his cooperation with state and federal officials.

B. Based on the aggravating factors presented in this case, the 13-year exclusion falls within a reasonable range. 42 C.F.R. § 1001.102(b)(2).

Federal regulations set forth criteria for determining the length of exclusions imposed pursuant to section 1128 of the Act. In determining whether the length of an exclusion is reasonable, the administrative law judge considers and evaluates all of the evidence in a case pertaining to the existence of aggravating and mitigating factors set forth in 42 C.F.R. § 1001.102, and whether the I.G.'s determination is within a reasonable range. 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.

Petitioner did not establish the presence of any mitigating factors that would justify reducing the period of his exclusion. *See* 42 C.F.R. § 1001.102(c). Therefore, I must evaluate the reasonableness of Petitioner's exclusion based solely on evidence that is relevant to the four aggravating factors that I have discussed. Contrary to Petitioner's arguments, all four of the aggravating factors relied on by the I.G. in determining to enhance the exclusion period to 13 years have been clearly established and proven.

Petitioner has not pleaded or proven any of the mitigating factors recognized by regulation which I am bound to consider. The evidence advanced by the I.G. clearly establishes that the proposed length of the period of exclusion is within a reasonable range, and is therefore not unreasonable. The Secretary has delegated to the I.G. the authority to impose exclusions for convictions relating to health care fraud. 42 C.F.R. § 1001.201(a). So long as the period of exclusion is within a reasonable range, based on demonstrated criteria, I have no authority to change it. *Cash*, DAB No. 1725, at 7 (2000), *citing* 57 Fed. Reg. 3298, 3321 (1992).

In this case, Petitioner's misconduct demonstrates that he presents a significant risk to the financial integrity of federal health care programs. The financial loss of more than \$270,000 he caused greatly exceeded the regulatory threshold for aggravation. His crime was serious enough for the Court to have sentenced Petitioner to 12 months of incarceration. Moreover, in considering a "downward departure" in his sentence, the Court decided to increase Petitioner's period of incarceration from 12 months to 24 months. I.G. Ex. 8, at 2. Finally, Petitioner surrendered his medical license to the Virginia Board of Medicine as the result of his felony conviction. Based upon all of these factors, I am unable to find that a 13-year exclusion is outside a reasonable range.

V. Conclusion

Considering the totality of the evidence, I conclude that the I.G. has a basis for excluding Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. I also conclude that the I.G. has established that the 13-year exclusion is within a reasonable range. Therefore, I sustain the I.G.'s exclusion of Petitioner for a period of 13 years.

/s/

Alfonso J. Montano
Administrative Law Judge