

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

In the Case of:	)	
	)	
Alla Mikhli, D.P.M.,	)	Date: August 3, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-350
	)	Decision No. CR1631
The Inspector General.	)	
	)	
	)	

**DECISION**

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Alla Mikhli, D.P.M., from participating in Medicare and other federally funded health care programs for a period of 10 years.

**I. Background**

Petitioner is a podiatrist. On January 31, 2007, the I.G. notified Petitioner that she was being excluded from participating in Medicare and other federally funded health care programs as a consequence of her conviction of a criminal offense related to the delivery of an item or service under Medicare or a State health care program (a State Medicaid program). The I.G. told Petitioner that he had determined the duration of her exclusion – 10 years – based on the presence of certain aggravating factors.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I held a pre-hearing conference at which I established a schedule for the parties to file written submissions including proposed exhibits and briefs. Additionally, I told the parties that either of them could request to present testimony in person and that I would evaluate any such request based on whether the proposed testimony was relevant and unique.

Neither party requested that I convene an in-person hearing. The I.G. filed a brief and four proposed exhibits, which he designated as I.G. Ex. 1 - I.G. Ex. 4. Petitioner filed a brief and five proposed exhibits, which she designated as P. Ex. 1 - P. Ex. 5. The I.G. also filed a reply brief. I receive all of the proposed exhibits into evidence.

## **II. Issue, findings of fact and conclusions of law**

### **A. Issue**

The sole issue in this case is whether the length of Petitioner's exclusion – ten years – is reasonable. Petitioner does not dispute that the I.G. is authorized to exclude her. The I.G. excluded her under the authority of section 1128(a)(1) of the Social Security Act (Act), based on Petitioner's conviction of a criminal offense related to the delivery of a Medicare or Medicaid item or service.

### **B. 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 as a separate heading and I discuss each Finding in detail.

#### ***1. There is evidence in this case relevant to three aggravating factors and none relevant to any mitigating factor.***

Any exclusion that is imposed pursuant to section 1128(a)(1) of the Act must be for a minimum period of five years. Act, section 1128(c)(3)(B). The I.G. may exclude an individual for more than five years based on evidence relating to aggravating and mitigating factors described in the regulations at 42 C.F.R. § 1001.102(b) and (c).

The aggravating and mitigating factors that are set forth at 42 C.F.R. § 1001.102 operate as rules of evidence in cases where the length of an exclusion is at issue. Evidence which relates to an aggravating or a mitigating factor is relevant to deciding whether an exclusion is reasonable. All other evidence is, as a matter of law, irrelevant to the issue of reasonableness and may not be considered.

In this case the I.G. established evidence relevant to three aggravating factors. First, the I.G. proved that Petitioner's crimes caused federally funded health care programs to sustain losses in excess of \$5,000. 42 C.F.R. § 1001.102(b)(1). On March 13, 2006, Petitioner pled guilty to the crime of executing or attempting to execute a scheme or artifice to: (1) defraud a health care benefit program; or (2) obtain by means of false or fraudulent pretenses, representations, or promises any of the money or property owned by or under the custody or control of any health care benefit program. I.G. Ex. 3, at 4. More specifically, Petitioner pled guilty to knowingly and willfully representing falsely to Medicare and the Ohio Medicaid program that she had performed certain surgical procedures, and making reimbursement claims for such procedures, when in fact she performed lesser procedures or routine foot care that was reimbursable, if at all, at lesser rates. *Id.* at 5. She admitted that, as a consequence, Medicare and the Ohio Medicaid program suffered losses totaling \$120,000.

Second, the I.G. proved that Petitioner committed her crimes over a time period of more than a year. 42 C.F.R. § 1001.102(b)(2). Petitioner pled guilty to perpetrating her fraud over a period of nearly four years, commencing in March 2001 and continuing through January 2005. I.G. Ex. 3, at 5.

Third, the I.G. proved that Petitioner was sentenced to incarceration for her crimes. 42 C.F.R. § 1001.102(b)(5). Petitioner was sentenced to prison for five months and received an additional sentence of five months of home confinement. I.G. Ex. 2, at 4.

Petitioner did not establish the presence of any mitigating factors. *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 three aggravating factors that I have discussed.<sup>1</sup>

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<sup>1</sup> As Petitioner notes, there is evidence in this case that is relevant to a fourth aggravating factor. As a consequence of Petitioner's conviction her license to practice podiatric medicine in Ohio was suspended for a period of one year. 42 C.F.R. § 1001.102(b)(9). However, the I.G. did not argue that evidence relating to Petitioner's license suspension was relevant to deciding the length of her exclusion and, so, I do not consider it as aggravating evidence. On the other hand, Petitioner seems to argue that the ostensibly lenient treatment that she received from the Ohio licensing authority is proof of mitigation in the sense that it shows that she is really not so untrustworthy as to merit a lengthy exclusion. I find this argument to be unpersuasive because it constitutes an impermissible attempt to use evidence that may be considered only as a basis for increasing an exclusion as grounds for reducing that exclusion.

## *2. An exclusion of ten years is reasonable.*

As I discuss above, the aggravating and mitigating factors described in 42 C.F.R. § 1001.102 function as rules of evidence in deciding whether an exclusion is reasonable. They establish what is relevant to evaluating the length of an exclusion but they do not assign weight to relevant evidence. Moreover, there is no formula for determining the length of an exclusion set forth in the Act or regulations. The presence of evidence relevant to one or more aggravating or mitigating factors does not dictate the imposition of an exclusion of any particular length.

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. In any case where the length of an exclusion is at issue, the question must be answered: what does the evidence relevant to aggravating or mitigating factors say about the trustworthiness of that individual? Evidence establishing that an individual is highly untrustworthy will support a lengthy exclusion.

Here, the evidence shows Petitioner to have been highly untrustworthy. It establishes that she defrauded federally funded health care programs out of a substantial amount of money – \$120,000, by her own admission – and that she perpetrated her crimes over a lengthy period of time, nearly four years. That is evidence which supports the 10-year exclusion that the I.G. determined to impose because it overwhelmingly supports the conclusion that Petitioner engaged in systematic, substantial, and protracted fraud ending only when she was apprehended.

Petitioner argues that her crimes were caused by her lack of understanding of the billing process and not by fraud. According to Petitioner, she was guilty of no more than picking the wrong provider reimbursement code to utilize in billing her services without fully researching its specific requirements and without comprehending the consequences of her choice. Petitioner's brief at 8; *see* P. Ex. 1, at 2; P. Ex. 3, at 2. She contends that her crimes were only small-bore because she defrauded federally funded programs of only \$120,000, and not a greater sum. That, according to Petitioner, is proof that she was not motivated by greed. Petitioner's brief at 8.

I disagree with these characterizations. Petitioner was not convicted of making billing errors. She admitted to perpetrating a calculated and sustained fraud against Medicare and the Ohio Medicare program. And, Petitioner's crimes – her contentions notwithstanding – were very substantial. Net fraud of \$120,000 is a very substantial sum and is indicative of a high degree of untrustworthiness.

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**Steven T. Kessel**  
Administrative Law Judge