

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
Erol Ucer, M.D.,)	DATE: March 25, 1996
)	
Petitioner,)	
)	
- v. -)	Docket No. C-95-151
)	Decision No. CR416
The Inspector General.)	
_____)	

DECISION

In a letter dated May 15, 1995, the Inspector General (I.G.) notified Petitioner that she had made a determination to exclude him for a period of three years from participation in Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.¹ Petitioner was informed that his exclusion was being imposed pursuant to section 1128(b)(1) of the Social Security Act (Act), due to the fact that Petitioner had been convicted of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. The I.G. further informed Petitioner that his exclusion had national effect, and that she was required by law to notify the appropriate State agency of Petitioner's exclusion. The appropriate State agency was required by law to exclude Petitioner for a minimum of three years as well.

By letter dated June 29, 1995, Petitioner requested a hearing to contest his exclusion. The case was docketed and assigned to me. I conducted a prehearing conference in this case on August 7, 1995, during which time Petitioner conceded that he had in fact been convicted of a criminal offense related to fraud in connection with the delivery of a health care item or service. I informed Petitioner of the regulation at 42 C.F.R. §

¹ Unless the context indicates otherwise, I will use Medicare and Medicaid to designate these programs.

1001.201, which provides for a three-year benchmark exclusion in cases where an individual has been convicted of a criminal offense related to fraud in connection with the delivery of a health care item or service. I informed Petitioner that, since he was not disputing that he was convicted or that his conviction was related to fraud in connection with the delivery of a health care item or service, the only remaining issue in this case was whether the three-year exclusion directed and imposed against Petitioner by the I.G. was reasonable.

Counsel for the I.G. requested leave to file a motion for summary disposition. Because there did not appear to be any material facts in dispute in this case, I granted the I.G.'s request.

The parties have filed briefs and exhibits. I have reviewed the parties' submissions and conclude that the I.G. is entitled to judgment as a matter of law.

APPLICABLE LAW

Section 1128(b)(1) of the Act provides that the Secretary (or the Secretary's lawful delegate, the I.G.) may exclude individuals and entities from participation in Medicare and Medicaid under the following circumstances:

- (1) CONVICTION RELATING TO FRAUD. -- Any individual or entity that has been convicted, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by any Federal, State or local government agency, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct . . .

The implementing regulation, codified at 42 C.F.R. § 1001.201, sets forth the criteria for determining the length of exclusion imposed pursuant to section 1128(b)(1) of the Act. Such an exclusion will be for three years, unless the aggravating or mitigating factors specified by the regulation are present and warrant adjusting the three-year benchmark exclusion period. 42 C.F.R. § 1001.201(b). The contents of the regulation are binding upon administrative law judges. Joel Fass, DAB CR349, at 4 - 5 (1994).

The only issues appealable to an administrative law judge are whether a basis for the imposition of the exclusion exists and whether the length of the exclusion is

reasonable. 42 C.F.R. § 1001.2007(a)(1). When the exclusion is based on a conviction, the basis of the conviction is not subject to review, and may not be collaterally attacked during the appeal of an exclusion. 42 C.F.R. § 1001.2007(d).

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FINDINGS)

A. Background facts concerning Petitioner's conviction

1. On June 15, 1992, Petitioner was formally charged with 54 counts alleging that he made or presented or caused to be made or presented, false claims against the Medicaid program, in violation of Mich. Comp. Laws Ann. § 400.607(1) (West 1991) and with 44 counts alleging that he made or presented or caused to be made or presented, false claims against Blue Cross, Blue Shield of Michigan, in violation of Mich. Comp. Laws Ann. § 752.1003(1) (West 1991). I.G. Ex. 3².

2. The 44 counts of fraud against Blue Cross, Blue Shield of Michigan alleged that Petitioner made or presented or caused to be made or presented to a health care corporation or health care insurer, claims for payment of health care benefits, knowing the claims to be false. I.G. Ex. 3.

3. Petitioner was convicted on 11 of the 44 counts of submitting fraudulent or false claims to Blue Cross, Blue Shield of Michigan, in violation of Mich. Comp. Laws Ann. § 752.1003(1). I.G. Exs. 3, 4.

4. Petitioner was convicted of eleven felony counts. I.G. Ex. 4 at 2-3; Mich. Comp. Laws Ann. § 752.1003(1) - (5) (West 1991).

5. Petitioner was sentenced to 90 days of incarceration and ordered to pay \$700 in restitution. I.G. Ex. 4.

² The I.G. submitted five exhibits in conjunction with her motion for summary disposition. I have marked and refer to these exhibits as "I.G. Exs. 1 - 5," respectively. I admit I.G. Exs. 1 - 5 into evidence. Petitioner submitted a one page letter (brief) on his own behalf and three pages of exhibits. I have marked and refer to these exhibits as "P. Exs. 1 - 3," respectively. I admit P. Exs. 1 - 3 into evidence.

B. The circumstances underlying Petitioner's conviction mandate that he should be excluded for a three-year period.

6. Petitioner was convicted of a criminal offense, within the meaning of section 1128(i) of the Act. Act, section 1128(i)(1) and (2). Findings 1 - 5.

7. Petitioner's conviction for 11 counts of submitting fraudulent or false claims to Blue Cross, Blue Shield of Michigan is a conviction relating to fraud, within the meaning of section 1128(b)(1) of the Act. Act, section 1128(b)(1).

8. An exclusion imposed pursuant to section 1128(b)(1) of the Act will be for a period of three years unless certain specific aggravating or mitigating factors are present. 42 C.F.R. § 1001.201.

9. It is an aggravating factor and a basis for increasing an exclusion beyond the three-year benchmark period if the acts that resulted in Petitioner's conviction, or similar acts, resulted in financial loss of \$1500 or more to a government program or to one or more other entities, or had a significant financial impact on program beneficiaries or other individuals. 42 C.F.R. § 1001.201(b)(2)(i).

10. The aggravating factor at 42 C.F.R. § 1001.201(b)(2)(i) is not present in this case.

11. It is an aggravating factor and a basis for increasing an exclusion beyond the three-year benchmark period if the acts that resulted in Petitioner's conviction, or similar acts, were committed over a period of one year or more. 42 C.F.R. § 1001.201(b)(2)(ii).

12. The aggravating factor contained at 42 C.F.R. § 1001.201(b)(2)(ii) is not present in this case.

13. It is an aggravating factor and a basis for increasing an exclusion beyond the three-year benchmark period if the acts that resulted in Petitioner's conviction, or similar acts, had a significant adverse physical or mental impact on one or more program beneficiaries or other individuals. 42 C.F.R. § 1001.201(b)(2)(iii).

14. The aggravating factor at 42 C.F.R. § 1001.201(b)(2)(iii) is not present in this case.

15. It is an aggravating factor and a basis for increasing an exclusion beyond the three-year benchmark period if the sentence imposed by the court included incarceration. 42 C.F.R. § 1001.201(b)(2)(iv).

16. The aggravating factor at 42 C.F.R. § 1001.201(b)(2)(iv) is present in this case. I.G. Ex. 4; Finding 5.

17. The I.G. has not presented any evidence or argument that would support increasing Petitioner's exclusion based on the presence of the aggravating factor at 42 C.F.R. § 1001.201(b)(2)(iv).

18. It is an aggravating factor and a basis for increasing an exclusion beyond the three-year benchmark period if Petitioner has a prior criminal, civil, or administrative sanction record. 42 C.F.R. § 1001.201(b)(2)(v).

19. The aggravating factor contained at 42 C.F.R. § 1001.201(b)(2)(v) is not present in this case.

20. It is a mitigating factor if Petitioner was convicted of three or fewer misdemeanor offenses, and the entire amount of financial loss to a government program or to other individuals or entities due to the acts that resulted in the conviction and similar acts is less than \$1500. 42 C.F.R. § 1001.201(b)(3)(i).

21. The mitigating factor contained at 42 C.F.R. § 1001.201(b)(3)(i) is not present in this case.

22. It is a mitigating factor if the record in the criminal proceedings demonstrates that the court determined that the individual had a mental, emotional, or physical condition, before or during the commission of the offense, that reduced the individual's culpability. 42 C.F.R. § 1001.201(b)(3)(ii).

23. The mitigating factor contained at 42 C.F.R. § 1001.201(b)(3)(ii) is not present in this case.

24. It is a mitigating factor if Petitioner cooperated with federal or State officials and that cooperation resulted in others being excluded from Medicare or any of the State health care programs or resulted in the imposition of a civil monetary penalty against others. 42 C.F.R. § 1001.201(b)(3)(iii).

25. The mitigating factor contained at 42 C.F.R. § 1001.201(b)(3)(iii) is not present in this case.

26. It is a mitigating factor if alternative sources of the type of health care items or services furnished by Petitioner are not available. 42 C.F.R. § 1001.201(b)(3)(iv).

27. The mitigating factor contained at 42 C.F.R. § 1001.201(b)(3)(iv) is not present in this case.

28. The I.G. properly excluded Petitioner for three years in accordance with 42 C.F.R. § 1001.201. Findings 1 - 27.

29. There exists no genuine issue of material fact. Findings 1 - 28.

30. As a matter of law, the I.G. is entitled to summary disposition in her favor. Findings 1 - 29.

DISCUSSION

There is no dispute in this case that Petitioner was convicted of a criminal offense, within the meaning of section 1128(i) of the Act. Petitioner states that he was charged with 98 counts of billing fraud and was acquitted of 87 of the counts. Still, the record in this case reflects, and Petitioner does not dispute, that he was convicted of 11 counts of filing false health care claims. I.G. Exs. 3 - 5. Petitioner argues that he should not have been excluded by the I.G. because he has committed no offense which has caused harm to either the Medicare or Medicaid programs.

However, section 1128(b)(1) of the Act, under which Petitioner was excluded, authorizes the I.G. to exclude any individual or entity who has been convicted, in connection with the delivery of a health care item or service, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. Thus, the authority to exclude under this section of the Act does not depend on whether Petitioner had harmed the Medicare or Medicaid programs.

The facts of this case leave no doubt but that Petitioner was convicted of a criminal offense in connection with the delivery of a health care item or service relating to fraud. Specifically, Petitioner was convicted, after a jury trial, of 11 counts of submitting false health care

claims for reimbursement to Blue Cross, Blue Shield of Michigan when Petitioner knew that the claims were false. I.G. Exs. 1, 4, 5. It is well established that where an individual is convicted of an offense involving the submission of fraudulent or false health care claims for reimbursement, that offense is committed in connection with the delivery of health care items or services. William D. Miles, M.D., DAB CR354 (1995); Joel Fass, DAB CR349 (1994); Michael M. Bouer, R.Ph., DAB CR345 (1994). Petitioner does not dispute this in his submission.

Moreover, Petitioner's conviction meets the second test required by section 1128(b)(1) of the Act because it is a conviction relating to fraud. I.G. Exs. 4, 5. The State statute under which Petitioner was convicted is very specific, and it makes clear that Petitioner's conviction involved not only filing false claims, but involved Petitioner knowing that the claims were false. I.G. Exs. 4, 5. The conviction itself specifies that Petitioner was convicted of fraud. I.G. Ex. 4. Petitioner's conviction is thus, on its face, related to fraud in connection with the delivery of a health care item or service. It falls squarely within the purview of section 1128(b)(1) of the Act.

Petitioner argues also that a three-year exclusion is unduly harsh and that the financial damage from his false billing activities totalled only \$650. I am bound in this case by regulations which allow me to consider only certain mitigating and aggravating factors. Absent such factors, a three-year exclusion is reasonable under the relevant regulations. 42 C.F.R. § 1001.201(b).

The record in this case does not disclose the extent of financial damage resulting from Petitioner's criminal or any related activities. However, even if I were to accept as true Petitioner's statement that the extent of the financial damage was only \$650, this amount would be a mitigating factor only if Petitioner had been convicted of no more than three misdemeanors. 42 C.F.R. § 1001.201(b)(3). The record in this case reveals that Petitioner was convicted of 11 felony counts. I.G. Exs. 1 - 5. The mitigating factor at 42 C.F.R. § 1001.201(b)(3) therefore is not applicable to this case.

In addition, the I.G.'s decision to impose a three-year exclusion in this case is reasonable because the I.G. could have argued for a greater period of exclusion based upon the fact that Petitioner's sentence included incarceration. 42 C.F.R. § 1001.201(b)(2)(iv). Instead, the I.G. showed restraint and imposed only the three-year benchmark exclusion period.

CONCLUSION

For the foregoing reasons, I conclude as a matter of law that the I.G. properly excluded Petitioner for a period of three years pursuant to section 1128(b)(1) of the Act and 42 C.F.R. § 1001.201.

/s/

Mimi Hwang Leahy
Administrative Law Judge