

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Stuart M. Miller, M.D.,)	Date: July 25, 1996
Petitioner,)	
- v. -)	Docket No. C-95-173
The Inspector General.)	Decision No. CR428

DECISION

In this decision I sustain the five year exclusion from participating in Medicare and other federally-funded health care programs which the Inspector General (I.G.) imposed against Petitioner.

I. Background

On July 25, 1995, the I.G. advised Petitioner that he was being excluded for a period of five years. The I.G. imposed the exclusion pursuant to section 1128(b)(3) of the Social Security Act (Act). The I.G. told Petitioner that she had determined that the exclusion was authorized by section 1128(b)(3), because Petitioner had been convicted of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The I.G. advised Petitioner that the length of the exclusion was based on the presence in Petitioner's case of factors which the I.G. alleged to be aggravating. These included the following:

1. The criminal acts resulting in Petitioner's conviction were committed over a period of one year or more.
2. The acts that resulted in Petitioner's conviction, or similar acts, had a significant adverse physical, mental or financial impact on one or more program beneficiaries or other individuals, or the Medicare or State health care programs.

3. The sentence resulting from Petitioner's conviction included a term of incarceration.

Petitioner requested a hearing. I held a prehearing conference, at which the parties agreed that the only testimony that would be offered would be Petitioner's testimony on his own behalf. The parties agreed also that the hearing could be conducted by telephone. On March 14, 1996, I conducted a hearing by telephone at which Petitioner testified. At the hearing, the I.G. offered eight exhibits (I.G. Ex. 1 - 8), which I received into evidence. Petitioner offered twelve exhibits (P. Ex. 1 - 12), which I received into evidence.

I afforded the parties the opportunity to submit posthearing briefs, and each party submitted a posthearing brief. Prior to submitting his posthearing brief, Petitioner contacted the staff attorney assigned to work with me in hearing and deciding this case. Petitioner advised the staff attorney that he thought there might exist mitigating factors in his case which he had not testified about during the hearing.

In order to assist Petitioner in identifying any mitigating factors, the existence of which he might be able to prove, I asked the staff attorney to mail to Petitioner a copy of the relevant regulation, 42 C.F.R. § 1001.401, which describes all mitigating factors that might apply in the case of an individual who is excluded pursuant to section 1128(b)(3). However, in his posthearing brief, Petitioner did not assert that he could prove the presence of any of the mitigating factors that are described in the regulation.

II. Issues, findings of fact and conclusions of law

The issues in this case are whether the I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(3) of the Act, and whether the five-year exclusion that the I.G. imposed is reasonable. In deciding to sustain the exclusion, I make the following findings of fact and conclusions of law (Findings). I discuss each Finding in detail below.

1. The I.G. was authorized to exclude Petitioner under section 1128(b)(3) of the Act, based on Petitioner's conviction of criminal offenses related to the unlawful distribution or dispensing of controlled substances.
2. The I.G. proved the existence of an aggravating factor in that Petitioner committed some of his crimes over a period of more than one year.

3. The I.G. proved the existence of a second aggravating factor in that Petitioner was sentenced to a period of incarceration as a consequence of his conviction of criminal offenses related to the unlawful distribution or dispensing of controlled substances.

4. Petitioner neither alleged nor proved the existence of any mitigating factor.

5. The presence in this case of aggravating factors not offset by any mitigating factor establishes Petitioner to be untrustworthy to provide care to program beneficiaries or recipients or to participate in federally funded health care programs.

6. A five-year exclusion is reasonable in light of the evidence which proves Petitioner not to be trustworthy.

III. Discussion

A. The I.G.'s authority to exclude Petitioner (Finding 1)

Petitioner has not denied that the I.G. is authorized to exclude him under section 1128(b)(3) of the Act. The authority to exclude Petitioner is established also by the evidence.

Section 1128(b)(3) of the Act authorizes the I.G., acting as the delegate of the Secretary of the Department of Health and Human Services (the Secretary), to exclude any individual who is convicted of a criminal offense under federal or State law relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Here, the evidence establishes unequivocally that Petitioner was convicted of two criminal offenses related to the unlawful distribution or dispensing of controlled substances.

On May 13, 1994, a criminal information was filed against Petitioner in the United States District Court for the Eastern District of Pennsylvania. I.G. Ex. 2; I.G. Ex. 3 at 1. The information charged Petitioner with the following two counts:

1. From in or about January 13, 1994, to in or about February 28, 1994, Petitioner knowingly, intentionally, and unlawfully distributed and dispensed by means of prescriptions: approximately 1,000 tablets of Percocet, containing oxycodone, a Schedule II narcotic controlled substance; and, approximately 7,000 tablets

containing diazepam, a Schedule IV depressant controlled substance.

2. Between approximately 1987 and February 1994, Petitioner knowingly, intentionally, and unlawfully distributed: approximately 350,000 tablets of Adipex-P or its generic equivalent, phentermine, a Schedule IV stimulant controlled substance; and approximately 30,000 tablets of Valium or its generic equivalent, diazepam, a Schedule IV depressant controlled substance.

I. G. Ex. 2.

On November 18, 1994, Petitioner pled guilty to both of these counts of the information. I. G. Ex. 5 at 1.

B. The presence of aggravating factors (Findings 2 - 3)

As I describe at Part I of this decision, the I.G. alleged the presence of three aggravating factors in her notice letter to Petitioner which, if proved, would be relevant to deciding whether the length of the exclusion imposed against Petitioner by the I.G. is reasonable. At the hearing, the I.G. advised me that she would not offer proof as to the second of the three aggravating factors identified by the I.G. in her notice letter, that Petitioner's conduct had a significant adverse physical, mental or financial impact on one or more program beneficiaries or other individuals, or the Medicare or State health care programs. Transcript (Tr.) at 18. Therefore, there remains the question of whether the I.G. proved the presence of the other two aggravating factors identified in the notice letter.

The Secretary has published regulations at 42 C.F.R. Part 1001 which establish criteria for determining the length of exclusions which the I.G. may impose pursuant to section 1128 of the Act. The regulation which governs exclusions imposed pursuant to section 1128(b)(3) is 42 C.F.R. § 1001.401. The regulation provides that, in the absence of factors that the regulation describes to be either aggravating or mitigating, an exclusion imposed pursuant to section 1128(b)(3) must be for a period of three years. 42 C.F.R. § 1001.401(c)(1). In an individual case, an exclusion may be for more than or less than three years, depending on whether factors which the regulation identifies as aggravating or mitigating exist in that case. Id.

Petitioner concedes that the two aggravating factors that the I.G. asserts are present in this case are present here. Petitioner's posthearing brief at 5. Even so, I have evaluated the evidence offered by the I.G., and I conclude

that the I.G. proved the presence of the two aggravating factors which the I.G. asserts are present.

First, the I.G. proved that Petitioner committed some of his criminal offenses over a period of more than one year, thus proving the presence of an aggravating factor as described in 42 C.F.R. § 1001.401(c)(2)(i). Petitioner was convicted of criminal offenses which spanned a period of about six years. He pled guilty to unlawfully distributing Schedule IV controlled substances over a period beginning in approximately 1987 and ending in February 1994. I.G. Ex. 2 at 3, I.G. Ex. 5 at 1.

Second, the I.G. proved that Petitioner was sentenced to incarceration for his crimes, thus proving the presence of an aggravating factor as described in 42 C.F.R. § 1001.401(c)(2)(iii). Petitioner was sentenced to a prison term of 57 months (57 months on count 1, to run concurrently with 36 months on count 2). I.G. Ex. 5 at 2.

C. The absence of mitigating factors (Finding 4)

Petitioner neither alleged nor proved the presence of any factors which, under 42 C.F.R. § 1001.401, I might consider to be mitigating. The regulation which governs exclusions imposed pursuant to section 1128(b)(3) of the Act identifies two possible mitigating factors which may be established in a given case and which are relevant to deciding whether the length of an exclusion is reasonable:

(i) The [excluded] individual's . . . cooperation with Federal or State officials resulted in --

(A) Others being convicted or excluded from Medicare or any of the State health care programs, or

(B) The imposition of a civil money penalty against others; or

(ii) Alternative sources of the type of health care items or services furnished by the [excluded] individual . . . are not available.

42 C.F.R. § 1001.401(c)(3)(i),(ii). The regulation provides that only the factors which are identified in the regulation as possible mitigating factors may be considered to be mitigating in an individual case. 42 C.F.R. § 1001.401(c)(3).

Petitioner offered evidence concerning allegedly extenuating circumstances that pertain to his case. This evidence addresses the hardship that has resulted or will result to Petitioner and his family as a consequence of Petitioner's conviction and incarceration. P. Ex. 2 - 4. It addresses Petitioner's remorse for his crimes. P. Ex. 2; Tr. at 39 - 40, 43. It addresses Petitioner's character, including the esteem and affection that patients and family members hold for him. P. Ex. 3 - 12. It addresses also Petitioner's emotional state during the time that he committed his crimes. P. Ex. 2; Tr. at 33, 35 - 36.

I have reviewed this evidence closely. Although Petitioner characterized this evidence to be mitigating evidence, it does not relate to any of the mitigating factors that are identified in 42 C.F.R. § 1001.401(c)(3). Tr. at 44. For this reason, I may not consider this evidence as relevant in deciding whether the exclusion imposed against Petitioner by the I.G. is reasonable.

D. Whether the length of the exclusion is reasonable (Findings 5 - 6)

The purpose of an exclusion imposed pursuant to section 1128 of the Act is remedial, and not punitive. The objective of any exclusion is to protect federally funded health care programs and beneficiaries and recipients of those programs from an untrustworthy individual and to preserve the integrity of those programs. The regulation which governs exclusions imposed pursuant to section 1128(b)(3) of the Act establishes a presumption that an individual who is excluded pursuant to that section will be untrustworthy for at least three years. 42 C.F.R. § 1001.401(c)(1). The presence of aggravating or mitigating factors in an individual case may be evidence that an exclusion of more or less than three years is reasonable.

The presence of an aggravating factor or factors in a case may be a basis for deciding that an exclusion of more than three years is reasonable. However, it does not necessarily follow from the presence of an aggravating factor or factors that an exclusion of more than three years is reasonable. The regulation does not direct that an exclusion of more than three years must be imposed where an aggravating factor or factors is proved. In the case where the presence of an aggravating factor is proved, I must examine the evidence that relates to that factor in order to decide what it says about the excluded individual's trustworthiness.

Here, there are two aggravating factors. Petitioner was sentenced to incarceration for a period of 57 months. He perpetrated some of his crimes over a period of about six

years. I have considered carefully the evidence that relates to these aggravating factors. I find that the evidence establishes Petitioner not to be trustworthy. The evidence supports my conclusion that an exclusion of five years is reasonable.

It is apparent from the transcript of Petitioner's sentencing proceeding that the judge who sentenced Petitioner applied federal sentencing guidelines to Petitioner's case, without making explicit findings as to the need for punishment of the duration that was imposed. I.G. Ex. 4 at 23 - 25; P. Ex. 1 at 1 - 3. In fact, the judge expressed some regret at the necessity for the sentence. Id. But this does not mean that the evidence of the duration of Petitioner's sentence is irrelevant to the issue of Petitioner's trustworthiness.

The federal sentencing guidelines in some respect constitute Congress' judgment as to the trustworthiness of individuals who are convicted of federal crimes to operate in society. The fact that the guidelines required a sentence of 57 months in this case is evidence that Congress determined that an individual who commits the kind of crime that Petitioner committed is a highly untrustworthy individual.

More direct evidence of Petitioner's lack of trustworthiness is demonstrated by the fact that he perpetrated his crimes over a six-year period. The inference that I draw from this evidence is that Petitioner's crimes were calculated and deliberate. They were not spontaneous or spur-of-the moment acts. The duration of Petitioner's crimes is evidence that Petitioner is an individual who is capable of deliberately placing his personal needs above the law, and who is capable of doing so for a long period of time.

It may be true, as Petitioner asserts, that he committed his crimes in order to keep his medical practice afloat and to provide necessary income to support his family from his first marriage. Tr. at 33 - 34. However, even if that was Petitioner's motivation for committing his crimes, the fact that he committed those crimes over such a protracted period establishes that Petitioner is capable of prolonged illegal conduct where he determines that it is in his self interest to engage in such conduct. Therefore, I find the evidence of the duration of Petitioner's crimes to be strong evidence that Petitioner is untrustworthy.

On balance, I find that the evidence in this case proves that an exclusion of five years is reasonable. The degree of untrustworthiness proved by the evidence relating to the two aggravating factors established in this case is ample grounds for imposing a relatively lengthy exclusion, in order to

protect federally funded health care programs and the beneficiaries and recipients of these programs.

IV. Conclusion

I find that the I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(3) of the Act. I find that an exclusion of five years is reasonable.

/s/

Steven T. Kessel
Administrative Law Judge