

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Cecilia Valdes,
(OI File No. M-12-40110-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-400

Decision No. CR4642

Date: June 23, 2016

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Cecelia Valdes, from participating in Medicare, State Medicaid programs, and all other federally funded health care programs, for a period of at least eight years. Exclusion in this case is based on Petitioner's conviction of a crime as is described at section 1128(a)(1) of the Social Security Act (Act).

I. Background

Petitioner filed a hearing request to challenge the I.G.'s determination to exclude her. The I.G. filed a brief in support of its determination plus six exhibits that are identified as I.G. Ex. 1 – I.G. Ex. 6. Petitioner filed a brief (P. Br.) in support of her challenge to the exclusion determination plus 14 exhibits that are identified as P. Ex. 1 – P. Ex. 14.¹

¹ I issued a pre-hearing order in which I instructed Petitioner to file her brief and exhibits after the I.G. filed his brief and exhibits. My intent was to allow Petitioner the opportunity to review and reflect on the I.G.'s arguments and evidence before responding. However, Petitioner filed her brief and exhibits a week prior to the I.G.
(Continued next page.)

Neither the I.G. nor Petitioner requested an in-person hearing. P. Br. at 4; I.G. Br. at 7. I decide the case based on the parties' written exchanges. I receive the parties' exhibits into the record.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The sole issue in this case is whether the duration of the exclusion imposed by the I.G. – at least eight years – is reasonable.

B. Findings of Fact and Conclusions of Law

Petitioner admits that she was convicted of a criminal offense that falls within the meaning of section 1128(a)(1) of the Act. P. Br. at 2. Section 1128(a)(1) mandates the exclusion of any individual who is convicted of a criminal offense related to the delivery of an item or service under Medicare or a State health care program. On September 23, 2014, Petitioner was convicted of one count of a conspiracy to commit health care fraud. I.G. Ex. 3; I.G. Ex. 4. Specifically, she pled guilty to conspiring to falsely certify, in connection with Medicare reimbursement, claims that she had provided physical therapy services that, in fact, she had not provided. I.G. Ex. 5. That is obviously an 1128(a)(1) crime in that the conspiracy's target was the Medicare program itself and the reimbursement that the program paid for health care items or services.

Petitioner's challenge is directed at the length of the exclusion imposed by the I.G. She asserts that an exclusion of eight years is unreasonable.²

Section 1128(a)(1) mandates the exclusion of any individual who is convicted of a criminal offense that falls within its purview. An exclusion imposed pursuant to section 1128(a)(1) must be for at least five years. Act, § 1128(c)(3)(B).

(Continued from preceding page.)

filing his submission. I gave Petitioner a renewed opportunity to respond to the I.G.'s submission and she did so by filing a letter response, which I am accepting as Petitioner's reply.

² Originally, the I.G. determined to exclude Petitioner for at least 10 years. I.G. Ex. 1. The I.G. reduced the length of the exclusion to at least eight years based on evidence proving that Petitioner's cooperation with prosecuting authorities led to the conviction of other individuals. I.G. Ex. 2.

The I.G. has discretion to impose an exclusion of more than five years' duration in appropriate cases. An exclusion of more than five years may be reasonable where the evidence satisfies criteria set forth in the regulations. 42 C.F.R. § 1001.102(b), (c). The regulations describe these criteria as aggravating and mitigating factors. The factors function very much as rules of evidence. Evidence falling within an aggravating or a mitigating factor may be relevant to deciding whether an exclusion of more than five years is reasonable and, if so, for how long. However, the presence of such evidence does not direct an exclusion of a particular length. Relevant evidence must be weighed in order to decide how untrustworthy an individual is to provide care to program beneficiaries and recipients.

In this case, the I.G. offered proof that falls under three of the regulation's aggravating factors. First, he established that Petitioner's crime caused the government to sustain significant financial loss. 42 C.F.R. § 1001.102(b)(1). Petitioner participated in a conspiracy that caused the Medicare program to sustain losses in the neighborhood of \$355,000. I.G. Ex. 3; I.G. Ex. 4; I.G. Ex. 5. Second, the conspiracy in which Petitioner participated occurred over a period of more than a year. 42 C.F.R. § 1001.102(b)(2). Petitioner pled guilty to participating in a conspiracy that began on April 20, 2011, and that continued until April 9, 2013. I.G. Ex. 5; I.G. Ex. 6. Third, Petitioner's sentence for her crime included a period of incarceration. 42 C.F.R. § 1001.102(b)(5). Petitioner was sentenced to a year and a day of imprisonment. I.G. Ex 3; I.G. Ex. 4.

This evidence establishes a very substantial crime on Petitioner's part and a high level of untrustworthiness. It proves that she was a willing member of a conspiracy that was calculated to defraud the Medicare program and that had a very significant financial impact on the program. Given that, an exclusion of eight years, which takes into account her cooperation with prosecuting authorities ultimately leading to the conviction of other individuals, is not unreasonable.

Petitioner attempts to minimize the significance of her role in the conspiracy by asserting that the order to pay restitution applied not just to her, but also to the other participants in the conspiracy. She contends that her share of the total restitution amount is somewhat in excess of \$50,000. P. Br. at 3. Petitioner misses the point with this argument, however. The evidence unequivocally establishes that Petitioner participated in a crime that had a very substantial impact on the Medicare program. She was a willing member of a conspiracy to defraud that program and that conspiracy had a total impact of over \$350,000 on the program. She cannot now minimize her role by suggesting that one can apportion responsibility by dividing the dollar impact of the conspiracy by the total number of participants. In this case, the crime was a group effort of which she was an active member.

