

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)
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Joseph Tramontana, Ph.D.,)
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Petitioner,)
)
- v. -)
)
The Inspector General.)
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DATE: November 17, 1997

Docket No. C-97-274
Decision No. CR503

DECISION

By letter dated February 25, 1997, the Inspector General (I.G.), United States Department of Health and Human Services, notified Joseph Tramontana, Ph.D. (Petitioner), that he would be excluded 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 The I.G. imposed this exclusion pursuant to section 1128(b)(1) of the Social Security Act (Act), based on Petitioner's conviction in the United States District Court for the Southern District of Mississippi for false, fictitious, or fraudulent claims in violation of 18 U.S.C. section 287.

Petitioner filed a request for review of the I.G.'s action. The I.G. moved for summary disposition. Because I have determined that there are no material and relevant factual issues in dispute (the only matter to be decided is the legal significance of the undisputed facts), I have decided the case on the basis of the parties' written submissions in lieu of an in-person hearing. The I.G. submitted a brief accompanied by three proposed exhibits (I.G. Ex. 1-3). Petitioner submitted a response brief. The I.G. submitted a reply brief. Petitioner did not object to my receiving into evidence the I.G.'s proposed exhibits, and I hereby receive into evidence I.G. Ex. 1-3.

¹ In this decision, I use the term "Medicaid" to refer to these State health care programs.

I affirm the I.G.'s determination to exclude Petitioner from participating in Medicare and other federally-funded health care programs, including Medicaid, for a period of three years.

I. Applicable Law

Under section 1128(b)(1) of the Act, the Secretary may exclude "[a]ny 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."²

42 C.F.R. § 1001.201(b)(1) provides that an exclusion imposed under section 1128(b)(1) of the Act shall be for a period of three years, unless specified aggravating or mitigating factors are present which form the basis for lengthening or shortening the period of exclusion.

42 C.F.R. § 1001.201(b)(2) provides that the following factors may be considered to be aggravating and a basis for lengthening the period of exclusion: "(i) [t]he acts resulting in the 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. (The total amount of financial loss will be considered, including any amounts resulting from similar acts not adjudicated, regardless of whether full or partial restitution has been made); (ii) [t]he acts that resulted in the conviction, or similar acts, were committed over a period of one year or more; (iii) [t]he acts that resulted in the conviction, or similar acts, had a significant adverse physical or mental impact on one or more program beneficiaries or other individuals; (iv) [t]he sentence imposed by the court included incarceration; or (v) [t]he convicted individual or

² Congress amended section 1128 of the Act in 1996. One of the amendments to section 1128 creates a new section, section 1128(a)(3), which mandates a minimum exclusion of at least five years for any felony conviction for an offense formerly described by section 1128(b)(1). Section 1128(b)(1) is retained, but provides permissive exclusion authority for misdemeanor convictions only. Because section 1128(a)(3) applies to offenses which occurred after the date of enactment of the 1996 amendment, the I.G. did not exclude Petitioner under this new exclusion authority.

entity has a prior criminal, civil, or administrative sanction record."

42 C.F.R § 1001.201(b)(3) provides that only the following factors may be considered as mitigating and a basis for reducing the period of exclusion: "(i) [t]he individual or entity was convicted of 3 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 is less than \$1500; (ii) [t]he record in the criminal proceedings, including sentencing documents, 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; (iii) [t]he individual's or entity's cooperation with Federal or State officials resulted in --(A) [o]thers being convicted or excluded from Medicare or any of the State health care programs, or (B) [t]he imposition of a civil money penalty against others; or (iv) [a]lternative sources of the type of health care items or services furnished by the individual or entity are not available."

II. Petitioner's Contentions

Although Petitioner concedes that he has been convicted of a criminal offense within the scope of section 1128(b)(1) of the Act, he cites a number of factors in his case which he maintains warrant mitigation of the exclusion period. He argues that the length of his exclusion should be reduced because he asserts that he is the only licensed psychologist in the part of Mississippi where he practices.

He also maintains that he did not commit the criminal offense for which he was convicted. He asserts that he only pled guilty on the advice of his counsel and that there was no formal evidentiary court proceeding finding that he engaged in criminal misconduct. He also maintains that he did not engage in fraud, but that his only fault was inadequate supervision of his assistant, who submitted claims for him to sign and submit to the health insurer. He maintains that he advised his assistant to cease her unauthorized services but that she persisted over his objections and that he inadvertently signed some of the improper claims as they were commingled with other legitimate claims for payment from the insurer.

Finally he asserts that he did not benefit financially from submission of the claims and that the criminal activity was not as lengthy as the indictment claims, lasting not five years but only three.

III. Findings of Fact and Conclusions of Law

1. During the period of time relevant to this case, Petitioner was licensed to practice as a psychologist in the state of Mississippi and provided outpatient therapy to patients through Behavioral Educational Training Associates, Inc. ("BETA").
2. During the period of time relevant to this case, Petitioner was co-owner and vice-president of BETA and also clinical director of BETA, with responsibilities including supervising and signing insurance claims and contracts.
3. On August 9, 1995, a criminal indictment was filed against Petitioner in the United States District Court for the Southern District of Mississippi, charging him with one count of conspiracy and seven counts of fraudulent claims in violation of 18 U.S.C sections 286 and 287. I.G. Ex. 1.
4. The August 9, 1995 indictment alleged that Petitioner filed fraudulent claims with a private health insurer, CHAMPUS, for psychology services that were not provided as claimed; in particular, the claims were for services provided by unauthorized providers (including services provided by an associate of Petitioner's at BETA, Barbara Gholson, who was not an authorized provider), services not covered as benefits, and for missed or cancelled appointments.
5. Petitioner pled guilty to one count of false, fictitious, or fraudulent claims (Count 2 of the Indictment) in violation of 18 U.S.C. section 287. I.G. Ex. 2.
6. On November 30, 1995, the United States District Court for the Southern District of Mississippi found Petitioner guilty of Count 2 of the August 9, 1995 indictment, in violation of 18 U.S.C section 287.
7. As a result of his conviction, Petitioner was placed on probation for one year, of which six months were to be served in home confinement; was required to pay restitution of \$10,353.98 to CHAMPUS; was fined \$1000; and was required to perform 400 hours of community service.
8. Under section 1128(b)(1) of the Act, the I.G. is authorized to exclude 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 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.

9. Where the I.G. determines to exclude an individual pursuant to section 1128(b)(1) of the Act, the term of exclusion will be for a period of three years, in the absence of aggravating or mitigating factors that would support an exclusion of more or less than three years.

10. Petitioner's criminal conviction constitutes a conviction within the scope of section 1128(i)(3) of the Act.

11. Petitioner was convicted under federal law, 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.

12. The I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(1) of the Act.

13. The I.G. did not allege or prove the presence of any aggravating factors.

14. Petitioner did not prove the presence of any mitigating factors.

15. A three-year exclusion of Petitioner is reasonable.

IV. Discussion

To sustain its exclusion, the I.G. must demonstrate that Petitioner was convicted under federal or state law 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. Section 1128(b)(1) of the Act. The first requirement is therefore that Petitioner must have been convicted of a criminal offense under federal or state law. The record reflects that a judgment of conviction was entered in Petitioner's case and he was sentenced by the United States District Court for the Southern District of Mississippi. This judgment was based upon the Court's acceptance of Petitioner's guilty plea on November 30, 1995. Petitioner was thus convicted within the meaning of section 1128(i)(3) of the Act.

I further find that the criminal misconduct for which Petitioner has been convicted is within the scope of section 1128(b)(1) and properly results in his exclusion. The record reflects that Petitioner was found guilty of one count of making false, fictitious, or fraudulent claims in violation of 18 U.S.C. section 287 as a result of his role in falsifying CHAMPUS claims and submitting claims for services rendered by an unlicensed and unauthorized provider. Where an individual is convicted of an offense involving the

submission of fraudulent or false health care claims for reimbursement, the offense is committed in connection with the delivery of health care items and services and subjects the individual to permissive exclusion under section 1128(b)(1) of the Act. Joel Fass, DAB CR349 (1994); see also Erol Ucer, M.D., DAB CR416 (1996); William D. Miles, M.D., DAB CR354 (1995); Michael M. Bouer, R.Ph., DAB CR345 (1994).

Although Petitioner concedes that he was convicted of a crime within the scope of section 1128(b)(1) of the Act and that the I.G. had authority to exclude him, he also alleges that he did not commit the criminal misconduct for which he convicted, that any wrongdoings were unintentional, and that he pled guilty only after being advised to do so by counsel. Arguments such as these amount to a collateral attack on his conviction, which the Departmental Appeals Board has previously held to be an ineffectual argument in the context of an exclusion appeal because the I.G. and the ALJ are not permitted to look beyond the fact of conviction. Paul R. Scollo, D.P.M., DAB No. 1498 (1994); Ernest Valle, DAB CR309 (1994); Peter Edmondson, DAB No. 1330 (1992).

Petitioner has argued in his brief that his three-year exclusion should be reduced due to the presence of mitigating factors. In his favor he maintains that he was not guilty of the criminal offense for which he was convicted; that he did not benefit financially from the alleged misconduct; that such misconduct lasted for three years, not five years as alleged; and that he is the only licensed psychologist in the part of Mississippi where he practices. It is Petitioner's burden to prove the existence of mitigating factors. James H. Holmes, DAB CR270 (1993). Moreover, the only factors which can be considered as mitigating are those factors listed in 42 C.F.R. § 1001.201(b)(3) and Petitioner has not established any of those factors. His claims that he allegedly was not guilty of the offense, that he did not benefit financially, and that the conspiracy was not so longstanding are not factors within the scope of 42 C.F.R. § 1001.201(b)(3). The regulations do provide for a discretionary waiver of an exclusion if an individual or entity "is the sole community physician or the sole source of essential specialized services in a community." 42 C.F.R. § 1001.1801(b). However the I.G. will consider a request for waiver only when it is presented in writing by "an individual directly responsible for administering the state health care program." 42 C.F.R. § 1001.1801(a). In Petitioner's case, the State of Mississippi has not made a waiver request pursuant to these procedures. In any event, the ALJ has no authority to grant a waiver. Bobby D. Layman, DAB CR491 (1997); Benjamin P. Council, M.D., DAB CR391 (1995); Richard G. Philips, D.P.M., DAB No. 1279 (1991). I therefore find that Petitioner has not proved the existence of any mitigating factors.

V. Conclusion

I conclude that the I.G. was authorized to exclude Petitioner, pursuant to section 1128(b)(1) of the Act. I find that the three-year exclusion is reasonable and I sustain it.

/s/

Joseph K. Riotto
Administrative Law Judge