Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Bruno Real Choiniere,	)	Date: September 20, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-369
	)	Decision No. CR1653
The Inspector General.	)	
	)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Bruno Real Choiniere, from participating in Medicare and other federally funded health care programs for a minimum period of 32 years.

I. Background

On March 30, 2007 the I.G. notified Petitioner that he was being excluded from participating in Medicare and other federally funded health care programs for a minimum period of 32 years.

The asserted basis for the exclusion was Petitioner’s conviction of crimes that are described by the mandatory exclusion provisions of sections 1128(a)(1) and 1128(a)(3) of the Social Security Act (Act). The I.G. relied on evidence relating to four allegedly aggravating factors to justify the length of the exclusion.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I held a pre-hearing conference by telephone at which I assigned the parties deadlines for submitting briefs and proposed exhibits relating to the merits of the case.

Additionally, I advised the parties that either of them could request that I convene an in-person hearing. I instructed them that, if either requested an in-person hearing, I would convene it if the party requesting a hearing satisfied me that he sought to offer evidence in the form of testimony that: (1) was relevant to the issues in the case; and (2) did not duplicate evidence contained in an exhibit.

Both the I.G. and Petitioner filed briefs and proposed exhibits. Additionally, the I.G. filed a reply brief. Neither party requested that I convene a hearing in person.[1] The I.G. filed eight proposed exhibits which he identified as I.G. Ex. 1 - I.G. Ex. 8. Petitioner filed four proposed exhibits which he identified as P. Ex. A, P. Ex. B, P. App. 1, and P. App. 2. I receive all of the parties' proposed exhibits into evidence.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

> 1. Petitioner was convicted of offenses described in sections 1128(a)(1) and 1128(a)(3) of the Act for which exclusion from Medicare and other federally funded health care programs is mandatory and, if so;

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[1] On July 17, 2007 Petitioner filed a motion for discovery and asked that I stay this case pending the I.G.'s compliance with his discovery request. On July 23, 2007 I denied Petitioner's motion and request for a stay. Order Denying Motion for Discovery and Stay and Granting Petitioner an Extension of Time Within Which to File Proposed Exhibits and a Brief, July 23, 2007. I explained in detail in that Order my reasons for denying Petitioner's motion and stay request. In summary, however, I denied the request for discovery because Petitioner sought information from the I.G. that was irrelevant to the issues that I am authorized to hear and decide.

2. The 32-year minimum exclusion imposed by the I.G. is reasonable.

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 as a separate heading. I discuss each Finding in detail.

1. Petitioner was convicted of offenses described in sections 1128(a)(1) and 1128(a)(3) of the Act for which exclusion from Medicare and other federally funded health care programs is mandatory.

Section 1128(a)(1) of the Act mandates the exclusion of any individual who is convicted of a criminal offense relating to the delivery of an item or service under a federally funded health care program including Medicare or a State Medicaid program. Section 1128(a)(3) mandates the exclusion of any individual:

> that has been convicted for an offense which occurred after . . . [August 21, 1996], 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 health care program (other than those specifically described in . . . [section 1128(a)(1)]) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

The I.G. offered overwhelming proof that Petitioner was convicted of crimes falling within the reach of both of these sections. Petitioner did not rebut this evidence.

On August 18, 2006, after a jury trial, Petitioner was convicted on all 34 counts of an indictment charging him with health care fraud, concealing overpayments of benefits, and money laundering. I.G. Ex. 2, at 1. Specifically, the I.G. offered proof that Petitioner was convicted of the following:

> • Beginning in and around 2003 and continuing through 2005, Petitioner, a chiropractor doing business in Indiana, knowingly and willfully executed and attempted to execute a scheme and artifice to defraud the Indiana Medicaid program, Medicare, and several private health insurers;

• As part of his scheme Petitioner solicited elderly, infirm, and low income Medicare beneficiaries and Medicaid recipients by holding meetings at which these individuals received free food, free back massages, and free neck and back pillows. Petitioner provided these individuals with cursory and inadequate examinations and informed them that they needed back braces. During the meetings Petitioner and his agents obtained personal and billing information from the attendees so that Petitioner could use that information to bill Medicare, the Indiana Medicaid program, and private insurers, for the back braces.

• Petitioner caused fraudulent claims for his services to be sent to Medicare, the Indiana Medicaid program, and private health insurers. The claims included claims for back braces that were not provided, that were not medically necessary, and for which he was not entitled to reimbursement.

• To facilitate his scheme Petitioner created and caused to be created fraudulent and phony medical necessity letters. Although the letters purported to document the medical necessity of the back braces that Petitioner provided they in fact contained made-up diagnoses and patient symptoms. The documentation also falsely contained names of referring physicians when, in fact, Petitioner had not communicated with these physicians.

• Petitioner filed reimbursement claims using billing codes for expensive, custom-fitted orthoses (braces) when in fact he did not dispense such items. The brace that Petitioner dispensed, when he dispensed one, was little more than a lumbar support or a fancy weight lifter's belt.

• Petitioner fitted braces to individuals in circumstances where it would be medically inappropriate or dangerous to provide such devices.

• To facilitate his scheme Petitioner falsely represented to patients that the braces he supplied would help them lose weight.

• Petitioner submitted redundant reimbursement claims for a single brace to different insurers, including Medicare and the Indiana Medicaid program.

• During the three year period that Petitioner executed his fraud the approximate dollar amounts of his false or fraudulent claims and the reimbursement he received from those claims is as follows:

a. More than $600,000 in false or fraudulent claims with the Indiana Medicaid program for which he received more than $210,000;

b. More than $2,000,000 in false or fraudulent claims with Medicare for which he received more than $1,200,000;

c. More than $480,000 in false or fraudulent claims with private insurers for which he received more than $110,000.

• The total dollar amount of Petitioner's false or fraudulent claims exceeds $3,000,000. The total amount of money he obtained by fraud exceeds $1,500,000.

• Petitioner concealed and failed to disclose his fraudulent activities in order to obtain money from health care programs and insurers to which he was not entitled.

• He engaged in numerous acts of money laundering of funds derived from health care billing fraud.

I.G. Ex. 2, at 1; I.G. Ex. 7, at 1-17.

Petitioner's conviction is of crimes that meet the statutory test of a section 1128(a)(1) crime because he was convicted of defrauding both Medicare and the Indiana Medicaid program by filing claims for items or services that he did not provide or which were not provided as claimed. Petitioner was convicted of stealing funds from these programs based on his fraudulent claims of having provided Medicare or Medicaid items or services. His conviction also is of crimes amounting to fraud against a health care insurer or insurers other than Medicare or the Indiana Medicaid program, and is thus a conviction of a crime within the meaning of section 1128(a)(3) of the Act. Petitioner was convicted explicitly of having defrauded health insurers other than Medicare or the Indiana Medicaid program.

Petitioner has offered nothing to prove that he was not, in fact, convicted of section 1128(a)(1) or 1128(a)(3) offenses. Indeed, he does not deny that he was convicted nor does he assert that his conviction was of crimes that do not fall within the reach of sections 1128(a)(1) and 1128(a)(3). His argument, essentially, is that he is not guilty of the crimes of which he was charged. Alternatively, Petitioner argues that, for a variety of reasons, his conviction was obtained wrongfully, or that the United States government committed a host of reversible errors in obtaining his conviction. Petitioner's Response to the Inspector General's Brief in Support to Exclusion (Petitioner's response) at 1-7. In support of these assertions, Petitioner contends, among other things, that:

• He made his reimbursement claims in good faith, relying on billing information provided to him by the United States Department of Health and Human Services. He argues that he was "entrapped" because he made his claims in reliance on such information.

• He has appealed his conviction and he expects that he will be exonerated as a consequence of errors committed by the government.

• The government had no jurisdiction over his claims and no basis for bringing criminal charges against him.

• He is innocent of all charges and was convicted unconstitutionally.

Id.

I do not have the authority to hear and decide these arguments. The I.G.'s authority to exclude an individual pursuant to sections 1128(a)(1) and 1128(a)(3) of the Act derives from that individual's conviction of one of the offenses that is described in those sections. In deciding whether the I.G. is authorized to exclude Petitioner I may hear and decide only the issue of whether Petitioner was convicted of an offense for which exclusion is authorized. 42 C.F.R. § 1001.2007(a)(1)(i). In addressing that issue I may not decide whether a conviction was obtained improperly or in error or whether the excluded individual is not, in fact, guilty of the offense of which he was convicted. These issues may only be considered in the context of an appeal of the conviction itself.[2]

Petitioner also seems to argue that an exclusion may not be imposed administratively but only through a civil action brought in a federal court. If that is his argument, he is incorrect. The authority to exclude administratively is conferred explicitly by section 1128 of the Act. Finally, Petitioner asks that his exclusion be stayed pending the outcome of his appeal of his conviction. I have no authority to grant that request.

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[2] Petitioner asserts that he has appealed his conviction to the United States Court of Appeals. The I.G. would reinstate Petitioner if his conviction is reversed on appeal. 42 C.F.R. § 1001.3005(a)(1).

2. The length of Petitioner's exclusion is reasonable.

Section 1128 is a remedial statute. Its purpose is not to impose punishment on an individual in addition to that which the individual has received as a consequence of a conviction. Rather, it is intended to give the Secretary a means to protect federally funded health care programs and the beneficiaries and recipients of program funds from individuals who are demonstrably untrustworthy. An exclusion will be sustained if it relates reasonably to the statutory purpose of protection.

The Secretary published regulations which provide criteria for deciding whether an exclusion is reasonable. In the case of an exclusion imposed pursuant to sections 1128(a)(1) or 1128(a)(3) of the Act the relevant regulation is at 42 C.F.R. § 1001.102(b) and (c). The regulation describes factors which may be considered as aggravating and/or mitigating. The presence of evidence relating to one or more of the aggravating or mitigating factors may be a basis for lengthening or shortening an exclusion imposed pursuant to either of the two sections of the Act.[3]

The aggravating and mitigating factors serve as rules of evidence for deciding whether an exclusion is reasonable. They define what is relevant to deciding the issue of reasonableness. Evidence that does not relate to one of the factors is, by definition, irrelevant and, therefore, may not be used to decide whether an exclusion is reasonable.

Also as the case with rules of evidence the aggravating and mitigating factors establish no formula for deciding the length of an exclusion. They define what is relevant to deciding the issue but do not prescribe what weight must be assigned to relevant evidence. Consequently, any evidence that relates to an aggravating or a mitigating factor must be evaluated in terms of what it says about an individual's trustworthiness.

The exclusion that the I.G. determined to impose against Petitioner – at least 32 years – is extraordinarily lengthy. In practical terms it is essentially a permanent exclusion against Petitioner participating in federally funded health care programs. The I.G. asserts that the exclusion is reasonable based on the presence of evidence relating to four aggravating factors and the absence of any evidence relating to a mitigating factor.

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[3] The minimum exclusion which must be imposed in the case of a section 1128(a)(1) or 1128(a)(3) conviction is five years. Act, section 1128(c)(3)(B). Evidence relating to a mitigating factor cannot, in any circumstance, be used to justify an exclusion that is less than the five-year minimum.

The record supports the I.G.'s contention that there is evidence relevant to four aggravating factors. The factors, and the supporting evidence offered by the I.G., are as follows:

- Petitioner's crimes caused Medicare, Indiana Medicaid, and other health care programs, to sustain losses of more than $5,000. 42 C.F.R. § 1001.102(b)(1). The total amount Petitioner was convicted of stealing from these programs was over $1,500,000 and, of that sum, he stole more than $1,200,000 from Medicare. I.G. Ex. 7, at 11.

- Petitioner committed his crimes over a period of more than a year. 42 C.F.R. § 1001.101(b)(2). In fact, Petitioner perpetrated his crimes over about a three-year period, from 2003 through 2005. I.G. Ex. 7, at 8-9.

- Petitioner was incarcerated as a consequence of his conviction. 42 C.F.R. § 1001.102(b)(5). His sentence included a total of 151 months' imprisonment. I.G. Ex. 2, at 2.

- Petitioner was the subject of adverse actions by State administrative agencies based on the same facts that authorize his exclusion. 42 C.F.R. § 1001.102(b)(9). Petitioner's professional license was revoked permanently in both Indiana and Michigan based on the same facts that resulted in his conviction. I.G. Ex. 5; I.G. Ex. 6.

Petitioner offered no evidence to rebut that which the I.G. offered relating to the aggravating factors. Nor did Petitioner offer evidence that is relevant to any of the potentially mitigating factors stated at 42 C.F.R. § 1001.102(c).

As I discuss above, at Finding 1, Petitioner's arguments are that he is innocent of the crimes of which he was convicted, that the government committed procedural and constitutional errors in charging, trying, and convicting him, and that was "entrapped" into relying on information supplied to him by the government which turned out to be false or misleading. None of these arguments is relevant to any of the possible aggravating and mitigating factors described in 42 C.F.R. §§ 1001.102(b) and (c). Consequently, I may not consider them. His arguments do not derogate from the fact that he was *convicted* of having stolen more than $1,500,000 from various health care programs via a scheme that transpired over about a three year period. Nor do they address his sentence or the fact that State agencies permanently revoked his license to provide health care.

In this case the evidence relating to aggravating factors, and in particular that evidence which describes the seriousness of Petitioner's crimes, is more than ample to justify the 32-year exclusion that the I.G. determined to impose. The evidence establishes that Petitioner was convicted of essentially making a career out of defrauding health care programs. Petitioner's fraud was massive, sustained, and persistent. In a period of about three years he attempted to steal over $3,000,000 from Medicare, the Indiana Medicaid program, and other health care programs. He was convicted of stealing more than $1,500,000 from these programs. Petitioner was convicted of perpetrating his theft via an elaborate and complex fraud scheme that included duping vulnerable patients, falsifying medical documents and records, and fabricating or falsifying claims for services. The seriousness of Petitioner's crimes is reflected also in the length of the sentence he received for them, more than 12 years in federal prison.

The facts that relate to the aggravating factors show Petitioner to have been an extraordinarily diligent criminal. In order to perpetrate his scheme he had to process many false claims and devote considerable efforts to generating the phony documents that supported those claims. Such persistence in perpetrating theft on a grand scale is the mark of an individual who is utterly untrustworthy to participate in federally funded health care programs. There is nothing in the record to suggest that Petitioner is likely to become trustworthy at any time in the foreseeable future.

/s/

Steven T. Kessel
Administrative Law Judge