

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Emem Dominic Ukpong,)	Date: October 29, 2008
)	
Petitioner,)	
)	
- v. -)	Docket No. C-08-579
)	Decision No. CR1857
The Inspector General.)	
_____)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Emem Dominic Ukpong, from participating in Medicare and other federally funded health care programs for a period of ten years.

I. Background

Petitioner was a supplier of durable medical equipment to recipients of benefits under the Texas State Medicaid program. On May 30, 2008 the I.G. notified Petitioner that he had determined to exclude her from participation in Medicare and other federally funded health care programs because, allegedly, she had been convicted of a criminal offense as is described at section 1128(a)(1) of the Social Security Act (Act). The I.G. told Petitioner that the length of the exclusion, ten years, was based on evidence relating to two factors which the I.G. described as aggravating factors.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. Neither party requested that I convene an in-person hearing to receive testimony. Each party filed a brief. The I.G. filed five proposed exhibits which he identified as I.G. Ex. 1 - I.G. Ex. 5. Petitioner filed one exhibit consisting of portions of I.G. Ex. 1.

Petitioner objected to my receiving I.G. Ex. 2 - I.G. Ex. 5 and to my receiving pages 3-8 of I.G. Ex. 1, principally on the ground that these exhibits contain hearsay evidence. There is no prohibition in the regulations that govern this case against my receiving hearsay evidence and so I overrule Petitioner's objections. *See* 42 C.F.R. Part 1005. Additionally, I note that I.G. Exs. 1, 3, and 4 comprise documents that are part of the official record of Petitioner's criminal case and would be admissible even if I were to apply the Federal Rules of Evidence to this case.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. Exclusion of Petitioner is mandated by section 1128(a)(1) of the Act; and
2. An exclusion of ten years 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 below as a separate heading.

1. Petitioner's exclusion is mandated by section 1128(a)(1) of the Act because Petitioner was convicted of a criminal offense related to the delivery of items or services under the Texas State Medicaid program.

Section 1128(a)(1) of the Act mandates the I.G. to exclude 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 (a State Medicaid program). In this case Petitioner's exclusion is mandated by the fact that she was convicted of a criminal offense related to the delivery of items or services under the Texas State Medicaid program.

The evidence establishes that, on January 23, 2008, Petitioner pled guilty in a Texas court to a felony offense of aggregate theft by a government contractor. I.G. Ex. 1, at 1, 3. Petitioner's plea was in response to an indictment which alleges that, between October 5, 2001 and December 31, 2005, Petitioner, who owned and operated a durable medical equipment supply company, misappropriated money valued at between \$100,000 and less than \$200,000 from the Texas Medicaid program by falsely billing that program for motorized wheelchairs which she did not supply as claimed. *Id.* at 1, 7.

The indictment is based on a lengthy investigation report that was compiled by the Texas Medicaid Fraud Control Unit (MFCU). I.G. Ex. 4. The MFCU describes in extensive detail Petitioner's activities that became the basis for her indictment. *Id.* It is evident from the report that the indictment was based on the report's allegations and that, in turn, eliminates all doubt as to the nature of the crime of which Petitioner was charged and to which she pled guilty.

The indictment thus plainly describes a crime that falls within the purview of section 1128(a)(1). It is well-established that theft from a State Medicaid program by falsely claiming reimbursement for items or services that were not provided as claimed constitutes crimes that are related to the delivery of Medicaid items or services. Indeed, the essence of Petitioner's crime was theft based on false claims for Medicaid items or services.

Petitioner argues that there is no established nexus between her plea and a crime that is related to the delivery of a health care item or service. Petitioner asserts that the order of deferred adjudication in which Petitioner's plea was accepted contains no explanation of the reasons for Petitioner's plea.¹ Petitioner argues that one may not infer from the plea the reason why Petitioner agreed to make it.

I do not find Petitioner's argument to be persuasive. Petitioner did not enter her plea in a vacuum. It is obvious that she entered her plea in order to resolve the pending criminal charges against her and, as I have discussed, these charges plainly were of crimes related to the delivery of Medicaid items or services. Indeed, the only possible explanation for Petitioner's plea is that she made it in order to resolve the criminal charge that she had stolen from the Texas Medicaid program. Consequently, her conviction can only be for a crime that is related to the delivery of Medicaid items or services.²

¹ An order of deferred adjudication is a conviction of a crime under section 1128 of the Act. Act, section 1128(i)(4).

² The Act does not require an admission of guilt or a jury finding of guilt in order for a conviction to be of a program-related crime. Act, section 1128(i). All that is necessary is that there be a conviction which emanates from allegations that a program-related crime was committed. Act, sections 1128(a)(1), 1128(i).

2. A ten-year exclusion is reasonable.

The purpose of imposing an exclusion is remedial. The Act's purpose is to protect federally funded health care programs and their beneficiaries and recipients from individuals and entities who are untrustworthy to provide care.

As a matter of law an individual who is convicted of a crime for which exclusion is mandated by section 1128(a)(1) of the Act must be excluded for a minimum of five years. Act, section 1128(c)(3)(B). The I.G. is authorized to exclude such an individual for more than the minimum period where the evidence shows that individual to be so untrustworthy as to necessitate a lengthier exclusion. Where the I.G. opts for a longer than five-year exclusion that raises the issue of whether his determination is reasonable.

Regulations governing the imposition of exclusions establish criteria for measuring the reasonableness of an exclusion. The regulations define certain aggravating and mitigating factors. 42 C.F.R. § 1001.102(b), (c). Evidence relating to an aggravating factor may justify imposing an exclusion for more than the five-year minimum. Evidence relating to a minimum factor may be a basis for reducing the length of an exclusion but may never justify reducing the exclusion term to less than the five-year minimum.

The regulatory aggravating and mitigating factors function as rules of evidence for deciding whether the length of an exclusion is reasonable. They establish what is relevant evidence that may be weighed in deciding reasonableness. And, as is the case with rules of evidence, the factors do not direct what weight should be assigned to evidence that is relevant. The factors are not a formula for deciding what is or is not reasonable.

In this case there is evidence relating to two of the regulation's aggravating factors that strongly supports the I.G.'s determination to exclude Petitioner for ten years. There is no mitigating evidence.

First, the weight of the evidence proves that Petitioner was convicted of crimes that caused a financial loss of \$5000 or more to a State Medicaid program. 42 C.F.R. § 1001.102(b)(1). She was charged with, and pled guilty to, theft from the Texas Medicaid program in an amount between \$100,000 and \$200,000. Petitioner paid restitution totaling more than \$125,000.

Second, Petitioner's crimes extended over a period of more than a year. 42 C.F.R. § 1001.102(b)(2). She was charged with, and pled guilty to, crimes that extended over a period of more than four years.

The evidence as to aggravation is sufficient to support an exclusion of ten years in this case because it establishes Petitioner to be manifestly untrustworthy. Petitioner engaged in systematic large scale theft of program monies over a lengthy period of time. The persistence and scale with which Petitioner committed theft establish a pattern of criminal activity.

Petitioner alleges that there is mitigating evidence. However, she has not established the presence of such evidence. Petitioner contends that she cooperated with prosecuting authorities. Cooperation might be mitigating if it led to the conviction of other individuals, to their exclusion, to additional cases being investigated, or to a report by a law enforcement agency identifying program vulnerabilities or weaknesses. 42 C.F.R. § 1001.102(c)(3)(i) - (iii). But, Petitioner has offered no corroborating evidence to support her contention that she cooperated nor has she shown that any of the beneficial results that the regulation requires as a prerequisite to establishing mitigation were the consequence of her alleged cooperation.³

/s/

Steven T. Kessel
Administrative Law Judge

³ Indeed, the only documentary evidence concerning Petitioner's alleged cooperation with prosecuting officials is a report of contact between an I.G. employee and a Harris County, Texas assistant district attorney. I.G. Ex. 5. In that communication the assistant district attorney is reported to have said that he could not recall any cooperation by Petitioner. *Id.* The document is hearsay and I do not accord it a high degree of credibility for that reason.