Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Mary Jean Negri, R.N., D.C.,
(OI File No. H-14-4-2988-9),

Petitioner,

v.

The Inspector General.

Respondent

Docket No. C-15-3126

Decision No. CR4443

Date: November 18, 2015

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Mary Jean Negri, R.N., D.C., from participating in Medicare, State Medicaid programs, and all other federally funded health care programs for a period of at least three years.

I. Background

The I.G. filed a brief and supporting exhibits that are identified as I.G. Ex. 1 – I.G. Ex. 4. Petitioner filed a brief and supporting exhibits that are identified as P. Ex. 1– P. Ex. 6, P. Ex. 7a, P. Ex. 7b, and P. Ex. 8. The I.G. filed a reply brief.

Counsel for Petitioner requested that I hear in-person the testimony of three individuals - Petitioner, Erin Hargis, Esq., and Jessica Hargis, Esq. - whose affidavits consist of P. Ex. 1 – P. Ex. 3. P. Br. at 8-9. I find no reason for convening an in-person hearing. The I.G. has not requested to cross-examine any of these individuals. Moreover, as I discuss below, I find these individuals' testimony to be irrelevant.

I receive into evidence the parties' exhibits. The fact that I receive these exhibits does not necessarily signify that I find them to be relevant or persuasive evidence. Hearings in these cases are not bound by the Federal Rules of Evidence and I often accept parties' exhibits that may not, in the final analysis, contain relevant evidence.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether: Petitioner was convicted of an offense as is described at section 1128(b)(2) of the Social Security Act (Act); an exclusion of at least three years is reasonable.

B. Findings of Fact and Conclusions of Law

Section 1128(b)(2) authorizes the I.G. to exclude any individual who is:

> convicted, under Federal or State law, in connection with the interference with or obstruction of any investigation into any criminal offense described in [section 1128(b)(1) or section 1128(a) of the Act].

The evidence establishes unequivocally that Petitioner was convicted of such a crime. It shows that on September 29, 2014, the United States District Court for the District of New Jersey accepted Petitioner's guilty plea to a single count of obstructing a criminal investigation of a health care fraud offense. I.G. Ex. 1 at 1.

The facts underlying Petitioner's conviction are as follows. Petitioner was the owner of a chiropractic clinic, Lafayette Hilltop. Petitioner was being investigated for possible criminal health care fraud consisting of possibly filing false claims for services not actually rendered by her clinic. I.G. Ex. 3; I.G. Ex. 4 at 4-6. Petitioner destroyed certain of her clinic's books in an effort to obstruct the investigation. *Id.*

The suspected fraud that was the focus of the investigation was fraud committed against health care insurers. Thus, it was possible fraud committed in connection with the delivery of health care items or services. Had that fraud been established, Petitioner might be found culpable of the types of health care fraud described at section 1128(a)(3) of the Act. The focus of the investigation coupled with Petitioner's intentional destruction of her books is sufficient to establish that Petitioner's conviction was for an 1128(b)(2) offense.

The regulation governing exclusions pursuant to section 1128(b)(2) states that an exclusion pursuant to that section ordinarily shall be for a term of at least three years.

42 C.F.R. § 1001.301(b)(1). That term may be lengthened or decreased if there are aggravating or mitigating factors present, as specified at 42 C.F.R. § 1001.301(b)(2) and (3). The regulation specifies that *only* the specifically described mitigating factors may justify reducing the exclusion period to less than a minimum of three years.

The I.G. excluded Petitioner for a period of at least three years based on the conclusion that there were neither aggravating nor mitigating factors present in Petitioner's case. Petitioner now argues that two mitigating factors are present and that evidence relating to these factors justifies reducing the length of the exclusion. She asserts that she suffered from a mental condition that reduced her culpability. Additionally, she contends that she provides unique and valuable services that make her irreplaceable to members of her community.

I find these arguments to be without merit. Petitioner has made no showing that either of the two asserted mitigating factors is present in her case. Consequently, I find that the I.G.'s exclusion determination – which is for the period prescribed by regulation – is reasonable.

The first mitigating factor that Petitioner claims applies to her case is at 42 C.F.R. § 1001.301(b)(3)(i):

> The record of the court proceeding, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional, or a physical condition, before or during the commission of the offense, that reduced the individual's culpability.

In order to qualify for a mitigating factor under this section an excluded individual must prove not only that he or she suffers from some mental, emotional, or physical condition, but, additionally, that the sentencing court made a finding that the excluded individual's culpability was reduced by that condition. Petitioner has offered evidence to show that she suffers from emotional and psychiatric problems. However, she has not offered any evidence to prove that the sentencing judge in her case made a finding that Petitioner's culpability for her crime was reduced in any way by her problems. I have reviewed the transcript of Petitioner's sentencing hearing. P. Ex. 8. In that hearing the judge noted that Petitioner's destruction of her business records may have been as a consequence of her anger but he did not find that this in any respect reduced her culpability. He sentenced Petitioner to probation in lieu of prison, but this decision reflected his findings that Petitioner's crime was in some measure offset by her good standing in her community. He made no finding that her culpability was reduced by her mental condition. *Id.* at 1-36.

I have also reviewed the affidavits that Petitioner supplied from several individuals, including herself, and a report from a psychiatrist. P. Ex. 1 – P. Ex. 5. These exhibits

contain some evidence concerning Petitioner's mental state. They do not, however, show that the sentencing judge took that evidence into consideration when he issued his sentence or made any findings based on them. Consequently, they do not contain evidence of mitigation.

The second mitigating factor that Petitioner claims applies to her case is at 42 C.F.R. § 1001.301(b)(3)(iii):

> Alternative sources of the type of health care items or services furnished by the individual or entity are not available.

Petitioner contends that she provides chiropractic services of unique quality that are esteemed by her patients. She has offered letters from several individuals that attest to the quality of the care that she provides. This evidence is not mitigating. The purpose of this mitigating factor is to address situations where there are no other available providers except for the excluded one. What Petitioner has failed to establish – and what she must establish in order to qualify as mitigating –is that there exist no other providers of care in her community who can provide services equivalent to those that she provides. She has offered no evidence that meets this test. She has not shown, for example, that there are no other qualified chiropractors practicing within a reasonable distance of her practice. Nor has she shown that patients will be unable to find alternative sources of care if she is excluded.

/s/
Steven T. Kessel
Administrative Law Judge