

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Tiffany A. Vanalen
(OI File No. H-13-42319-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-1136

Decision No. CR3383

Date: September 23, 2014

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Tiffany A. Vanalen, from participating in Medicare and Medicaid programs, and all other federally funded health care programs for a period of three years.

I. Background

Petitioner is a nurse. The I.G. determined to exclude her for a period of three years, alleging that she had been convicted of a crime as is defined by section 1128(b)(1) of the Social Security Act (Act). Section 1128(b)(1) permits the I.G. to exclude any individual who is convicted of, among other things, a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

Petitioner requested a hearing and the case was assigned to me. I directed the parties to file briefs and exhibits. The I.G. filed a brief, a reply brief, and eight proposed exhibits that are identified as I.G. Ex. 1 – I.G. Ex. 8. Petitioner filed a brief and one proposed exhibit identified as P. Ex. 1. Neither party requested that I convene an in-person hearing. I receive the parties' exhibits into the record.

II. Issues, Findings of Fact and Conclusions of Law

A. Issue

Petitioner concedes that she was convicted of an offense as is described at section 1128(b)(1) and that the I.G. has authority to exclude her. The only issue remaining to be decided is whether the three-year exclusion that the I.G. imposed is reasonable.

B. Findings of Fact and Conclusions of Law

The length of an exclusion imposed pursuant to section 1128(b)(1) is governed by federal regulations at 42 C.F.R. § 1001.201. An exclusion imposed pursuant to section 1128(b)(1) should be for a period of three years unless there is evidence relating to regulatory factors described as “aggravating” or “mitigating” that militates in favor of a longer or shorter period of exclusion. 42 C.F.R. § 1001.201(b)(1). The regulation lists the factors that may be either aggravating or mitigating and only evidence that relates to these potential factors may be considered in deciding whether an exclusion should be longer or shorter than the three-year benchmark. 42 C.F.R. § 1001.201(b)(2), (3).

The aggravating and mitigating factors identified by the regulation effectively are rules of evidence. The presence of evidence relating to one or more of these factors does not mean that an exclusion period necessarily must be increased above the benchmark or reduced below the benchmark. That evidence must be weighed in order to answer a critical question: what does the evidence show about an individual’s trustworthiness to provide care?

In this case there is evidence that relates to both an aggravating and a mitigating factor. Aggravating evidence consists of Petitioner’s exclusion from the New York State Medicaid program based on the identical facts that led to her conviction. 42 C.F.R. § 1001.201(b)(2)(vi). Mitigating evidence consists of Petitioner’s conviction of only one misdemeanor offense that had a financial impact of less than \$1500 to a government program or to other individuals or entities. 42 C.F.R. § 1001.201(b)(3)(i).

But, merely reciting the presence of these factors does not answer the question of Petitioner’s level of trustworthiness. It is what the evidence relating to the factors says about Petitioner that answers that question. And, that evidence shows that Petitioner engaged in conduct that was potentially extremely harmful to patients under her care, establishing a high level of untrustworthiness on her part.

Petitioner’s crime consisted of falsifying medical records. Petitioner’s falsification of records and her underlying neglect of her duties as a nurse were the basis for her conviction and the reasons for her exclusion from the New York Medicaid program. I.G. Ex. 2. In her role as a nurse employed by a nursing facility, Petitioner failed to

administer a prescribed medication – Synthroid – to five of her patients, and then, covered up her failure by falsely stating on the patients’ medication administration record (MAR) that she had administered the medication. I.G. Ex. 5. She deprived her patients of medication that their physicians had determined was necessary and she compounded that act by lying about having administered the medication. These acts potentially endangered Petitioner’s patients, not only because they were deprived of necessary medication, but also because the falsified MARs could have misled other health care providers into interacting with the patients based on incorrect assumptions about what medications the patients had been receiving.

The evidence relating to a mitigating factor does not show Petitioner to be trustworthy to provide care – at least not to the extent that reduction of her exclusion beyond the three-year benchmark would be appropriate. It is true that Petitioner was convicted of only a single misdemeanor and that the misdemeanor had a financial impact of \$1500 or less. But, that does not gainsay the fact that Petitioner engaged in conduct that jeopardized the welfare of her patients. The potential harm of Petitioner’s actions is not minimized at all by the fact that she ultimately pled guilty only to a misdemeanor offense.

Ultimately, the decision of whether to modify the I.G.’s exclusion determination comes down to whether or not the exclusion imposed by the I.G. falls within a reasonable range. Here, the evidence clearly proves that the I.G.’s exclusion determination is reasonable. When all is said and done, the evidence does not suggest a reason for reducing the exclusion below the three-year regulatory benchmark. Petitioner’s conduct establishes her to be untrustworthy to provide care. Three years is certainly a reasonable length of time to provide protection to program beneficiaries and recipients.

/s/

Steven T. Kessel
Administrative Law Judge