Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Ukeme Etuk, a/k/a Kim Etuk,	)	Date: February 28, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-03
	)	Decision No. CR1568
The Inspector General.	)	
	)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Ukeme Etuk, a/k/a Kim Etuk, from participating in Medicare and other federally funded health care programs for a period of 11 years.

I. Background

On July 31, 2006, the I.G. notified Petitioner that she was being excluded from participating in Medicare and other federally funded health care programs for a period of 11 years. The I.G. advised Petitioner that the exclusion was being imposed pursuant to the requirements of section 1128(a)(1) of the Social Security Act (Act) as a consequence of Petitioner's conviction of a criminal offense related to the delivery of an item or service under Medicare or a State health care program.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I held a pre-hearing conference at which I established a schedule for the parties to submit proposed exhibits and briefs addressing the issues in the case. At that conference I advised the parties that either of them could request that I convene an in-person hearing. I told them that I would consider doing so if a party offered to present testimony that was relevant and did not duplicate the contents of a document in evidence.

The I.G. submitted a brief and three proposed exhibits consisting of I.G. Exhibit (Ex.) 1 - I.G. Ex. 3. Petitioner submitted a brief and no proposed exhibits. Petitioner did not object to my receiving any of the I.G.'s proposed exhibits into evidence. Consequently, I receive into evidence I.G. Ex. 1 - I.G. Ex. 3.

In her brief Petitioner contends that an in-person hearing is necessary to decide this case. Petitioner's brief at 5 - 6. However, Petitioner offered no description of the evidence that she wished to present in person. Nor did Petitioner explain how any evidence she might present would relate to either the basis for an exclusion or to the regulatory factors that govern the length of exclusions. I find no basis to schedule an in-person hearing in light of Petitioner's failure to present me with an offer as to what relevant evidence she would present if I were to schedule such a hearing.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. The I.G. is required to exclude Petitioner as a consequence of her conviction of a criminal offense that is described at section 1128(a)(1) of the Act; and

2. The I.G.'s determination to exclude Petitioner for a period of 11 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 and I discuss each Finding in detail.

1. The I.G. is required to exclude Petitioner because she was convicted of a criminal offense described at section 1128(a)(1) of the Act.

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 Medicare or a State health care program. I find that Petitioner was convicted of such an offense and, consequently, the I.G. is required to exclude her.

These are the facts. On June 13, 2005, a criminal information was issued against Petitioner in the United States District Court for the Northern District of Georgia, Atlanta Division. I.G. Ex. 2. The information charged that, over a period that began in or about August 2001, and which continued through August 2002, Petitioner knowingly and willfully paid remuneration to another individual in order to induce that individual to refer individuals for furnishing and arranging for the furnishing of services for which payment may be made in whole or in part under a federal health care program. *Id.* The information charged also that Petitioner, along with a co-defendant, unlawfully paid remuneration totaling $29,000 in order to induce referrals, thereby generating gross proceeds of more than $300,000 and net proceeds of more than $200,000. *Id.*

On November 30, 2005, Petitioner pled guilty to the charge. I.G. Ex. 3, at 1. She was sentenced to 24 months' incarceration and to pay restitution to the Centers for Medicare & Medicaid Services (CMS) of $275,107.89. I.G. Ex. 3, at 6.

Petitioner does not dispute that she was convicted of a criminal offense. Nor has she asserted that the target of her crime was some entity other than the Medicare program. Moreover, although the criminal information does not allege specifically that Petitioner directed her crime against the Medicare program, it is reasonable to infer that Medicare was the target and victim of her crime because it is CMS that administers Medicare and to which Petitioner was sentenced to pay restitution.[1]

Petitioner makes two arguments to contend that the I.G. has no authority to exclude her pursuant to section 1128(a)(1) of the Act. First, she contends that, in order to be subject to the provisions of section 1128(a)(1), an individual who is convicted of a covered crime must be a physician or other health care practitioner. Petitioner asserts that there is no evidence of record that Petitioner is either a physician or a health care practitioner and asserts, consequently, that the I.G. has failed to prove a basis for excluding her.

---

[1] Moreover, if the "federal health care program" that is referred to in the criminal information is some federally funded health care program administered by CMS *other than* Medicare the I.G. would be mandated to exclude Petitioner pursuant to the requirements of section 1128(a)(3) of the Act, which mandates exclusion of any individual who is convicted of, among other things, any criminal offense committed in connection with the delivery of a health care item or service by a federally funded health care program other than Medicare. There is no practical difference between an exclusion that is imposed pursuant to section 1128(a)(1) and one that is imposed pursuant to section 1128(a)(3).

Second, Petitioner argues that the crime of which she was convicted is in the nature of a bribe or kickback that is addressed by section 1128B(b)(2) of the Act. She argues that section 1128(b)(7) of the Act governs exclusions for those who are convicted of such offenses. Exclusions imposed pursuant to section 1128(b)(7) are permissive and not mandatory and thus, according to Petitioner, she should be excluded – if at all – pursuant to the permissive exclusion standard of section 1128(b)(7).

I am not persuaded by these arguments. First, there is no language in section 1128(a)(1) which states or suggests that an individual must be a physician or a health care practitioner in order to be subject to its provisions. The section states that "any individual" who is convicted of a program-related offense must be excluded. Petitioner has pointed to nothing to show that Congress intended that this term be given anything other than its common and ordinary meaning.

Second, although it is possible that Petitioner's crime might also justify exclusion pursuant to section 1128(b)(7) of the Act, that does not vitiate the I.G.'s obligation to exclude her pursuant to section 1128(a)(1). In this case Petitioner's crimes met all of the elements of an (a)(1) offense. It was a crime directed against the Medicare program relating to Medicare-reimbursed items or services.[2] The fact that the crime might also be an offense that is covered by section 1128(b)(7) is not a basis to say that it falls outside the parameters of section 1128(a)(1).

In enacting section 1128 of the Act, Congress did not indicate that it intended that individuals who were convicted of offenses that were covered by both mandatory and permissive exclusion language should be excluded pursuant to the more flexible and, arguably, more lenient permissive exclusion provisions. There are numerous offenses described in the Act which arguably could be viewed as falling within the mandatory *and* permissive exclusion sections. In such cases mandatory exclusions are always imposed.

For example, a conviction of a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct in connection with the delivery of a health care item or service is a conviction for which the I.G. may impose an exclusion pursuant to section 1128(b)(1)(A)(i) of the Act. But, such a conviction would mandate an exclusion under section 1128(a)(1) if the crime related to a Medicare or State Medicaid item or service. The fact that the conviction meets both statutory definitions has never been held to limit the I.G. to imposing a permissive exclusion.

---

[2] And, if Petitioner's crime was not directed specifically against Medicare, then it certainly would be directed against a program that is covered by section 1128(a)(3).

2. The 11-year exclusion is reasonable.

I find that the 11-year exclusion imposed by the I.G. against Petitioner is reasonable given the degree of untrustworthiness manifested by her.

Section 1128 is a remedial statute. Its purpose is not to punish offenders for their crimes but to protect federally funded health care programs and their beneficiaries and recipients from untrustworthy individuals.

The Act does not prescribe terms of exclusion aside from requiring that exclusions imposed pursuant to the mandatory requirements of section 1128(a) be for a minimum of five years. Act, section 1128(c)(3)(B). Regulations published by the Secretary of the Department of Health and Human Services establish criteria which may be used to determine the length of an exclusion. For all exclusions imposed pursuant to section 1128(a) of the Act, including those imposed pursuant to subsections (a)(1) and (a)(3), the relevant criteria are contained at 42 C.F.R. § 1001.102(b) and (c). These are described in the regulation as consisting of potentially aggravating and mitigating factors. Evidence that relates to an aggravating factor or factors may be the basis for lengthening an exclusion beyond the five-year minimum period. Evidence that relates to a mitigating factor or factors may be the basis for reducing the length of an exclusion, but never for less than the five-year minimum. 42 C.F.R. § 1001.102(b) and (c).

The aggravating and mitigating factors set forth at 42 C.F.R. § 1001.102(b) and (c) function as rules of evidence for determining the length of an exclusion. Only evidence that relates to an aggravating or mitigating factor may be considered in deciding the reasonable length of an exclusion. Like rules of evidence, the regulation does not assign weight to any evidence that relates to an aggravating factor. The weight that is assigned to such evidence depends on what that evidence says about the excluded individual's trustworthiness to provide care.

Here, the I.G. alleged that the evidence relates to two aggravating factors. First, Petitioner's crime caused a financial loss of $5,000 or more to be sustained by a government program. 42 C.F.R. § 1001.102(b)(1). In fact, the financial impact of her crime was far greater than $5,000. The information to which she pled guilty alleges that Petitioner and her co-defendant obtained in excess of $300,000 through unlawfully inducing referrals. Petitioner was sentenced to pay restitution of $275,107.89.

Second, Petitioner was sentenced to a term of incarceration. 42 C.F.R. § 1001.102(b)(5). In this case, Petitioner was sentenced to a term of 24 months' imprisonment.

In fact, and although the I.G. did not allege the presence of a third aggravating factor, the evidence offered by the I.G. plainly relates to a third factor. That is, that Petitioner's crime transpired over a period of one year or more. 42 C.F.R. § 1001.102(b)(2). The criminal information to which Petitioner pled guilty alleges that her crime began in or about August 2001, and continued "through" August 2002, thus alleging a period of at least one full year during which Petitioner committed her crime. I.G. Ex. 1.

In any event, the evidence offered by the I.G. relating to the financial impact of Petitioner's crime and her sentence is sufficient to justify the 11-year exclusion that the I.G. determined to impose. What is unchallenged in this case is that Petitioner unlawfully obtained a very large sum of money as a direct consequence of her unlawful activity. That is sufficient for me to conclude that she acted without regard for the welfare of program beneficiaries and recipients and that she was aggressive in obtaining program funds to which she was not entitled. That is enough to conclude that Petitioner is highly untrustworthy. Such untrustworthiness merits the relatively lengthy exclusion that the I.G. determined to impose against Petitioner.

/s/

Steven T. Kessel
Administrative Law Judge