

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Dinesh Dayabhai Shah,

Petitioner

v.

The Inspector General.

Docket No. C-10-380

Decision No. CR2143

Date: June 4, 2010

**DECISION**

I sustain the determination to exclude Petitioner, Dinesh Dayabhai Shah, from participating in Medicare and other federally-financed health care programs for a period of at least 20 years.

**I. Background**

Petitioner is a pharmacist. On November 30, 2009, the Inspector General (I.G.) notified Petitioner that he was being excluded from participating in Medicare and other federally-financed health care programs for a period of at least 20 years. The asserted basis for the exclusion was that Petitioner had been convicted of a criminal offense related to the delivery of an item or service under New York State's Medicaid program. The I.G. cited several allegedly aggravating factors that, according to the I.G., justified imposing a 20-year exclusion.

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 assigned the parties deadlines for exchanging briefs and proposed exhibits. The I.G. submitted a brief and five proposed exhibits, which I identify as I.G. Ex. 1 – I.G. Ex. 5 and which I receive into evidence.

Petitioner submitted a brief but did not submit proposed exhibits. The I.G. also submitted a reply brief.

Neither party requested that I convene a hearing to receive testimony.

## **II. Issues, findings of fact, and conclusions of law**

### **A. Issues**

The issues in this case are whether:

1. Petitioner was convicted of a criminal offense as is described at section 1128(a)(1) of the Social Security Act (Act); and
2. An exclusion of Petitioner for a period of at least 20 years is reasonable.

### **B. Findings of fact and conclusions of law**

I make the following findings of fact and conclusions of law (Findings):

- 1. Petitioner was convicted of a criminal offense as is described at section 1128(a)(1) of the Act.*

Section 1128(a)(1) mandates the exclusion of 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 (State Medicaid) program. The undisputed facts establish that Petitioner was convicted of such an offense.

Petitioner pled guilty in March 2008 to both counts of a criminal indictment that had been issued against him in United States District Court for the Southern District of New York. I.G. Ex. 3 at 1-12; I.G. Ex. 4 at 1. He pled guilty both to conspiracy to commit health care fraud and to perpetrating fraud against the New York State Medicaid program. Petitioner was charged, along with several co-conspirators, with a scheme whereby he and his co-conspirators purchased prescriptions from Medicaid beneficiaries for a fraction of the actual cost of filling those prescriptions. Petitioner and his co-conspirators then submitted claims to Medicaid for reimbursement for those prescriptions as if they had filled them, whereas, in fact, the prescriptions were not filled. As a consequence, Petitioner and his co-conspirators defrauded Medicaid into reimbursing them for items that were never sold. I.G. Ex. 3.

The crime that Petitioner committed clearly is related to Medicaid items or services. Axiomatically, fraud committed against a State Medicaid program to obtain reimbursement for items or services that were never provided is related to Medicaid items or services.

***2. Exclusion for at least 20 years is reasonable.***

Exclusion imposed pursuant to section 1128(a)(1) of the Act must be for a minimum of five years. Act § 1128(c)(3)(B). The I.G. has discretion to exclude for more than five years in a case where the evidence establishes the presence of aggravating factors that are not offset by mitigating factors. 42 C.F.R. § 1001.102(b), (c).

The ultimate issue that must be decided in any case in which an exclusion of more than five years is imposed is the trustworthiness of the excluded provider to participate in federally-funded programs. Exclusion is a remedy and not a punishment. It is intended to protect federal programs and the beneficiaries and recipients of program funds from untrustworthy individuals. In any case where I decide the reasonableness of an exclusion I must ask: how long is reasonably necessary to protect the programs and beneficiaries and recipients from an untrustworthy individual?

The aggravating and mitigating factors that are listed in the regulation function as rules of evidence for deciding an exclusion's length. In a de novo hearing, I may consider as relevant to the ultimate issue of trustworthiness any evidence that fits within the definition of an aggravating or mitigating factor. Evidence that does not meet the definition of one of the factors is irrelevant, and I may not consider it.

The regulatory aggravating and mitigating factors, as is the case with rules of evidence, do not prescribe a formula for deciding an outcome. They only tell me what is relevant. In any case, where there is evidence that falls within an aggravating or mitigating factor, I still must decide independently from the I.G. what that evidence says about the trustworthiness of the excluded individual.

In this case, the I.G. produced evidence that meets the definitions set forth by four distinct aggravating factors.

- *The acts that resulted in Petitioner's conviction caused a financial loss of \$5,000 or more to a government program.* 42 C.F.R. § 1001.102(b)(1). Petitioner pled guilty to defrauding the New York Medicaid program of approximately \$2.1 million by fraudulently obtaining reimbursements for prescription drugs, which were not in fact dispensed to beneficiaries. I.G. Ex. 3 at 2. He was sentenced to pay restitution in the amount of \$1.1 million for his crimes. I.G. Ex. 4 at 5.

- *The acts that resulted in Petitioner's conviction were committed over a period of one year or more.* 42 C.F.R. § 1001.102(b)(2). Petitioner committed his crimes over a period that extended from June 2002 into February 2007, a period of about four and one-half years. I.G. Ex. 3 at 2.
- *The sentence imposed on Petitioner included incarceration.* 42 C.F.R. § 1001.102(b)(5). Petitioner was sentenced to serve a term of 37 months' imprisonment. I.G. Ex. 4 at 2.
- *Petitioner has been subject to other adverse action by a State agency or board, based on the same set of circumstances as was the basis for his exclusion.* 42 C.F.R. § 1001.102(b)(9). On March 17, 2009, the Office of Professional Discipline of the New York State Education Department revoked Petitioner's license to practice pharmacy in New York, based on the identical conviction and crimes that are the basis for the exclusion that is at issue in this case. I.G. Ex. 5 at 2, 8.

Petitioner did not assert that he had evidence that conformed to any of the mitigating factors that are set forth at 42 C.F.R. § 1001.102(c). He offered evidence concerning his personal history, the absence of any prior criminal convictions involving him, his family, and his professional experience. He asserted that he acknowledged responsibility for his crimes. I rule all of this evidence to be irrelevant to the case inasmuch as it does not relate to either an aggravating or a mitigating factor.

The evidence that the I.G. offers relating to aggravating factors shows Petitioner to be a manifestly untrustworthy individual. It establishes that he participated in a scheme that endured for more than four years in which he, in concert with others, stole more than a million dollars from the New York Medicaid program. Petitioner's scheme – to purchase prescriptions from beneficiaries for a fraction of the cost of filling them and then to claim reimbursement for the unfilled prescriptions as if they had been filled – was not a particularly complicated or subtle scheme. But, it was a scheme that was profoundly damaging to the Medicaid program. At a time when program funds are stretched to their limits, Petitioner and his cohort engaged in wholesale and concerted fraud. Moreover, it was a scheme that Petitioner and his cohort pursued with great intensity and diligence. It involved a huge number of individual fraudulent claims and a correspondingly large number of corrupt supporting transactions between Petitioner, his cohort, and Medicaid recipients.

The seriousness of Petitioner's crimes may be measured also by his lengthy term of incarceration, more than three years in prison, as well as the very substantial restitution of more than \$ 1 million that he was ordered to pay. The fact that the State of New York found it necessary to revoke Petitioner's license to practice pharmacy in that State, based

on the crimes that Petitioner had committed, simply provides more evidence of the gravity of Petitioner's crimes and of his untrustworthiness to provide care.

Exclusion for 20 years obviously is a very lengthy exclusion. But, it is reasonable here given the gravity of Petitioner's crimes and what the aggravating evidence says about Petitioner's lack of trustworthiness.

Petitioner argues that he is being treated disparately. He asserts that in other cases that are similar to his, the I.G. determined not to impose exclusions that are as lengthy as the 20 years that Petitioner received. I make no findings based on what happened in other cases. The merits of any case must stand or fall based on the evidence of that case, and I do not decide the reasonableness of exclusions using a comparative standard.

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/s/  
Steven T. Kessel  
Administrative Law Judge