**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Callie Hall Herpin
(OI 6-03-40336-9),

Petitioner

v.

The Inspector General.

Docket No. C-10-811

Decision No. CR2333

Date: March 3, 2011

# DECISION

In this case, the parties agree that Petitioner, Callie Hall Herpin, was convicted of crimes − health care fraud related to the delivery of items or services under the Medicare program and a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance − that subject her to a minimum five-year exclusion from participation in federal health care programs under sections 1128(a)(1) and 1128(a)(4) of the Social Security Act (Act). The Inspector General (IG) now proposes a 45-year exclusion, which Petitioner argues is excessive and unreasonable.

For the reasons set forth below, I find that a 45-year exclusion is reasonable.

## I. Background

Petitioner was physician, licensed to practice medicine in the State of Texas, who was a key player in a far-reaching scheme of drug dealing, money laundering, and Medicare fraud. IG Ex. 3 at 8. On April 6, 2005, she pled guilty in federal district court for the Southern District of Texas to one felony count of conspiracy to commit health care fraud and violation of the anti-kickback statute (18 U.S.C. § 371), and to one felony count of

conspiracy to distribute and dispense, outside the scope of professional practice and not for a legitimate purpose, more than 1,765,000 dosage units of hydrocodone and 2,500 gallons of promethazine with codeine (21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(D)). IG Ex. 3 at 1-2.

In a letter dated February 28, 2007, the IG advised Petitioner that, because of her convictions, she was excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of 50 years. IG Ex. 5. The letter explained that sections 1128(a)(1) and 1128(a)(4) of the Act authorize the exclusion.

In a hearing request dated June 29, 2010, postmarked June 30, 2010, Petitioner sought review. The IG moved to dismiss the appeal as untimely. In a ruling dated October 20, 2010, I denied the IG's motion, finding that Petitioner had made a reasonable and unrebutted showing that she had not been apprised of her appeal rights until June 2010.

During the course of this appeal, the IG reduced the period of exclusion from 50 years to 45 years. P. Ex. 3.

Each party submitted an initial brief (IG Br.; P. Br.). The IG also submitted five exhibits (IG Exs. 1-5), and Petitioner submitted two exhibits (P. Exs. 1-2). After she received the IG's January 25, 2011 letter reducing the period of exclusion, Petitioner filed a supplemental motion/brief (P. Supp. Br.), along with three exhibits, which have been remarked as (P. Exs. 3-5). The IG filed a reply brief (IG Reply). In the absence of any objection, I admit into evidence IG Exs. 1-5 and P. Exs. 1-5.

## II. Issue

Because the parties agree that the IG has a basis upon which to exclude Petitioner from program participation, the sole issue before me is whether the length of the exclusion (45 years) is reasonable. 42 C.F.R. § 1001.2007.

## III. Discussion

> ***Based on the aggravating factors and the one mitigating factor presented in this case, a 45-year exclusion is reasonable.***[1]

Section 1128(a)(1) of the Act mandates that the Secretary of Health and Human Services exclude an individual who has been convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. 42 C.F.R. § 1001.101(a). Section 1128(a)(4) requires the Secretary to exclude

[1] I make this one finding of fact/conclusion of law.

any individual or entity convicted of a felony criminal offense "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance."

Petitioner concedes that she was convicted and is subject to exclusion under sections 1128(a)(1) and 1128(a)(4). P. Br. at 1.

An exclusion brought under either section 1128(a)(1) or 1128(a)(4) must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a); 1001.2007(a)(2). Federal regulations set forth criteria for lengthening exclusions beyond the five-year minimum. 42 C.F.R. § 1001.102(b). Evidence that does not pertain to one of the aggravating or mitigating factors listed in the regulation may not be used to decide whether an exclusion of a particular length is reasonable.

Among the factors that may serve as a basis for lengthening the period of exclusion are the three that the IG relies on in this case: 1) the acts resulting in the conviction, or similar acts, caused a government program or another entity financial losses of $5,000 or more; 2) the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more; and 3) the sentence imposed by the court included incarceration. 42 C.F.R. § 1001.102(b)(1), (2), and (5). The presence of an aggravating factor or factors, not offset by any mitigating factor or factors, justifies lengthening the mandatory period of exclusion.

Program financial loss: The district court ordered Petitioner to pay the Medicare program a whopping $12,926,680 in restitution. IG Ex. 3 at 6-7. Based on this, the IG argues that her crimes caused the Medicare program financial losses many times greater than the $5,000 threshold for aggravation. Petitioner objects to the IG's reliance on the court-ordered restitution. Pointing to her plea agreement, she notes that she specifically admitted to writing just 920 certificates of medical necessity (CMN) [2] for motorized wheelchairs and personally realized "only" $184,000 in cash proceeds. P. Br. at 1 (*citing* CMS Ex. 2 at 11). In fact, in her plea agreement, Petitioner admitted to writing no *fewer* than 920 CMNs for motorized wheelchairs and prescriptions and receiving *no less* than $184,000, which does not preclude her having generated more fraudulent CMNs and realized greater sums. IG Ex. 2 at 11. At the time of her crimes, Medicare was paying approximately $4,216 for a motorized wheelchair, which means that, by any reckoning, her crimes cost the Medicare program significantly more than the $184,000 she admits she pocketed.

In any event, aggravation is not triggered by the amount of money netted by Petitioner; the standard is loss to the program. Restitution has long been considered a reasonable measure of program losses. *See Jason Hollady, M.D.*, DAB No. 1855 (2002).

[2] Medicare covers durable medical equipment, like motorized wheelchairs, only if justified by a CMN signed by a medical doctor or other authorized provider.

If anything, the amount of restitution ordered by the court grossly underestimates the program losses. Petitioner was the lynch-pin in a vast scheme to defraud. But for her medical license and her Medicare provider enrollment number, the fraudulent billing could not have occurred. In her plea agreement, she admits that suppliers of durable medical equipment used the fraudulent CMNs that she and her employee/co-conspirator, Etta Williams, generated to bill the Medicare program more than *$30 million*. IG Ex. 2 at 11. She should be held accountable for all of those program losses since they are directly attributable to her participation in the fraud. IG Ex. 2. As Judge Hittner said at the time of her sentencing, "None of this [drug distribution, money laundering, and Medicare fraud] would have been possible without a licensed physician at the apex of the pyramid of illegality . . . ." IG Ex. 3 at 8. That one corrupt physician could cause such significant losses to Medicare underscores the importance of keeping the unscrupulous out of the program.

In any event, whether the figure is $12,926,680 or $30,000,000, Petitioner's crime caused the Medicare program significant financial losses, far in excess of the $5,000 threshold for aggravation. The Departmental Appeals Board has characterized amounts substantially greater than the statutory standard as an "exceptionally aggravating factor" that is entitled to significant weight. *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, PhD.*, DAB No. 1865 (2003). I agree and consider that the substantial program loss here more than justifies a significant increase in the period of exclusion.

Length of criminal conduct. The IG maintains that the acts that resulted in Petitioner's conviction and similar acts were committed over a period of at least one year. Petitioner challenges this assertion, claiming that she did not open her office until December 2002, and she closed it in September 2003. P. Br. at 1.

Petitioner's crimes were not limited to what occurred within the confines of her office. The counts she was convicted on say that she "did knowingly, intentionally, and willfully combine, conspire, confederate, and agree" with her co-conspirators to violate the law. IG Ex. 1 at 5. The fraud conspiracy ran from on or about October 2002 until on or about October 2003. IG Ex. 1 at 5. The drug conspiracy ran from October 2002 until December 2005. IG Ex. 1 at 16. The indictment lists multiple overt acts committed in furtherance of the conspiracy, which include obtaining, on *July 19, 2002*, a County Assumed Name Certificate for her business, CH Medical Consultants, PA., and thereafter opening several bank accounts in October 2002. IG Ex. 1 at 8, 21. The final two overt acts listed under the drug count involved: 1) her writing a bogus prescription for controlled substances that was in the possession of one of her co-conspirators on October 22, 2002; and 2) a prescription for controlled substances filled under her DEA (Drug Enforcement Administration) authorization number on November 18, 2003. IG Ex. 1 at 32.

Thus, Petitioner pled guilty to criminal activity that lasted for more than one year, and the IG appropriately considered the duration of the crimes an aggravating circumstance.

Incarceration. The sentence imposed by the criminal court included a lengthy period of incarceration – ten years. IG Ex. 3 at 3. The IG appropriately considered this in determining the period of exclusion.

These aggravating factors show that Petitioner poses a significant threat to program integrity. She engaged in an enormous fraud for at least a year, costing the Medicare program millions of dollars. Her actions were egregious enough to merit a substantial period of incarceration. Based on these factors, I find that the IG's originally proposed 50-year exclusion fell within a reasonable range. I now consider the one mitigating factor presented in this case.

Mitigating factors. The regulations consider mitigating just three factors: 1) a petitioner was convicted of three or fewer misdemeanor offenses and the resulting financial loss to the program was less than $1,500; 2) the record in the criminal proceedings demonstrates that a petitioner had a mental, physical, or emotional condition that reduced her culpability; and 3) a petitioner's cooperation with federal or state officials resulted in others being convicted or excluded, or additional cases being investigated, or a civil money penalty being imposed. 42 C.F.R. § 1001.102(c). Characterizing the mitigating factor as "in the nature of an affirmative defense," the Board has ruled that Petitioner has the burden of proving any mitigating factor by a preponderance of the evidence. *Barry D. Garfinkel*, M.D., DAB No. 1572 at 8 (1996).

The parties agree that Petitioner cooperated with law enforcement and that her cooperation led to the conviction in state court of one of her co-conspirators. Based on her cooperation, the IG reduced Petitioner's period of exclusion from 50 years to 45 years. P. Ex. 3; IG Reply at 3. Petitioner complains that the reduction is meaningless, because either period of exclusion (45 years or 50 years) is effectively a lifetime exclusion. This may be true, but it does not make the period of exclusion unreasonable. The IG should appropriately offset the period of exclusion based on Petitioner's cooperation with law enforcement, but that factor does not have greater impact simply because her underlying crime was so substantial. I consider it reasonable for the IG to reduce an exclusion by five years where, as here, the individual cooperates with law enforcement, leading to the conviction of a co-conspirator.

Petitioner also points out that the sentencing court recommended that, during her incarceration, she participate in the prison's comprehensive residential drug abuse treatment program, "stemming from [her] drug abuse which occurred during the offense." IG Ex. 3 at 3; P. Ex. 4. From this, she suggests reduced culpability as a mitigating circumstance. 42 C.F.R. § 1001.102(c)(2). But to establish a mitigating factor under 42 C.F.R. § 1001.102(c)(2), Petitioner must show that the criminal court *specifically*

*determined* "that a mental, emotional, or physical condition reduced culpability for the crime." *Joseph M. Ruske, Jr., R.Ph.*, DAB No. 1851 at 6 (2002) (*citing Frank R. Pennington, M.D.*, DAB No. 1786 at 6 (2001)). Petitioner points to no portion of the criminal record suggesting that the court considered that Petitioner's drug abuse made her less responsible for her crime. In fact, Judge Hittner's comments at sentencing leave no doubt that he held her fully culpable for her crimes. IG Ex. 3 at 8-9. ("You took probably the most valued and respected graduate degree in our society, the M.D. degree, and deposited it in the middle of schemes of drug distribution, money laundering and Medicare fraud. You not only cheated the government, but also committed a disservice to citizens of your own community. . . . I consider you a disgrace to every physician in this country who adheres to the ethics of the medical profession and to the Hippocratic oath.").

Additional defenses. Petitioner raises some additional arguments. She cites § 1001.102(d), which provides that an individual with a prior conviction must be excluded for a minimum period of ten years, and argues that, as a first-time offender, she is entitled to a shorter period of exclusion than a repeat offender. But Petitioner's underlying premise is faulty. Ten years is simply the minimum period of exclusion for repeat offenders. Based on aggravating and mitigating circumstances, the actual period of exclusion could be considerably longer. An individual with prior convictions whose case presented aggravating factors similar to those presented here would unquestionably have been subjected to a longer period of exclusion than Petitioner's.

Petitioner also complains about the effective date of her exclusion. As a matter of law, an exclusion becomes effective 20 days after the date of the IG's notice of exclusion. 42 C.F.R. § 1001.2002. An administrative law judge has no authority to review the timing of the IG's determination to impose an exclusion or to alter retroactively the date of the imposition of the exclusion. *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *Samuel W. Chang, M.D.*, DAB No. 1198 (1990).

## IV. Conclusion

So long as the period of exclusion is within a reasonable range, based on demonstrated criteria, I have no authority to change it. *Joann Fletcher Cash*, DAB No. 1725 at 17 (2000) (*citing* 57 *Fed. Reg*. 3298, 3321 (1992)). The record in this case establishes that Petitioner is an exceptionally untrustworthy individual who presents a significant risk to the integrity of health care programs. The staggering financial loss she caused the Medicare program greatly exceeds the regulatory threshold for aggravation. Her crime continued for at least a year, and was serious enough to earn her ten years in prison. Because she cooperated with law enforcement, the IG reasonably reduced her period of

exclusion by five years. Nevertheless, based on the totality of the aggravating and mitigating factors, I find that the 45-year exclusion falls within a reasonable range.

/s/
Carolyn Cozad Hughes
Administrative Law Judge