

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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| In the Case of: |) | |
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| Young Moon, M.D., |) | Date: March 8, 2007 |
| |) | |
| Petitioner, |) | |
| |) | |
| - v. - |) | Docket No. C-06-615 |
| |) | Decision No. CR1572 |
| The Inspector General. |) | |
| _____ |) | |

DECISION

Petitioner, Young Moon, M.D., a Tennessee oncologist, orchestrated a scheme whereby she gave her patients only partial doses of their chemotherapy and side effect medications, but recorded in their patient charts that she had given the full doses, and billed Medicare, Medicaid, and Blue Cross for the full doses. She was caught, convicted on four felony counts, sentenced to more than fifteen years in prison, and ordered to pay more than \$430,000 in restitution. Based on her conviction, the Inspector General (I.G.) excluded her from participation in Medicare, Medicaid, and all federal health care programs for a period of 27 years, and she has filed this appeal.

For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner under sections 1128(a)(1) and 1128(a)(3) of the Social Security Act (Act), and that the 27-year exclusion falls within a reasonable range.

I. Background

By letter dated July 31, 2006, the I.G. notified Petitioner that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 27 years. I.G. Ex. 1. In that letter, the I.G. explained that he is authorized to exclude Petitioner under sections 1128(a)(1) and 1128(a)(3) of the Act based on her conviction in the United States District Court for the Middle District of Tennessee of : (1)

a criminal offense related to the delivery of an item or service under the Medicare or a state health care program (1128(a)(1)); and (2) a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service (1128(a)(3)).

Petitioner thereafter requested a hearing, and the case has been assigned to me for decision.

I held a prehearing conference on September 6, 2006. At that time, the parties agreed that the matter could be decided based on written submissions. Order Scheduling Submission of Briefs and Documents (September 8, 2006). In accordance with my order, the I.G. filed a Brief in Support of Exclusion, along with six exhibits (I.G. Exs. 1 - 6). Petitioner filed a brief objecting to the I.G.'s exclusion. With this submission, she included a set of unmarked documents. To conform to Civil Remedies Division procedures, we have marked these documents Petitioner's Exhibits 1 - 6 (P. Exs. 1-6). Petitioner also filed a supplemental memorandum, and the I.G. filed a reply brief. I receive into evidence I.G. Exs.1-6 and P. Exs. 1-6.

II. Issue

The issues before me are whether the I.G. has a basis upon which to exclude Petitioner from participation in the Medicare, Medicaid, and all federal health care programs, and, if so, whether a 27-year exclusion is reasonable.

III. Discussion

Section 1128(a)(1) requires that the Secretary of Health and Human Services (Secretary) exclude an individual who has been convicted under federal or state law of a criminal offense relating to the delivery of an item or service under Medicare or a state health care program.¹ Section 1128(a)(3) directs the Secretary to exclude an individual convicted of a felony "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. *See also* 42 C.F.R. § 1001.101. Individuals excluded under either section 1128(a)(1) or section 1128(a)(3) must be excluded for a period of not less than five years. Act, section 1128(c)(3)(B).

¹ The term "state health care program" includes a state's Medicaid program. Section 1128(h)(1) of the Act; 42 U.S.C. § 1320a-7(h)(1).

The Secretary has delegated to the I.G. the authority to impose exclusions. 42 C.F.R. § 1001.401(a). 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 7 (2000), *citing* 57 Fed. Reg. 3298, 3321 (1992).

A. Section 1128(a)(1) provides a basis for excluding Petitioner from program participation because she was convicted of a criminal offense relating to the delivery of an item or service under Medicare or a state health care program; and section 1128(a)(3) provides an additional independent basis for excluding Petitioner because she was convicted of a felony relating to fraud in connection with the delivery of a health care item or service.²

Petitioner concedes, as she must, that she has been convicted on three felony counts of health care fraud (18 U.S.C. § 1347) and one felony count of making false statements regarding health care matters (18 U.S.C. § 1001). I.G. Ex. 4. She argues, nevertheless, that she was not “duly convicted” because her criminal prosecution was riddled with errors. The regulations, however, explicitly preclude such a collateral attack on the underlying conviction.

When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds, in this appeal.

42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Chander Kachoria, R.Ph.*, DAB No. 1380, at 8 (1993) (“There is no reason to ‘unnecessarily encumber the exclusion process’ with efforts to reexamine the fairness of state convictions.”); *Ira Katz, Little Five Points Pharmacy*, DAB CR1044 (2003). Petitioner “[s]imply cannot challenge the facts relating to his criminal conviction” *See Jose Grau*, DAB CR930 at 12 (2002).³

² I make findings of fact and conclusions of law to support my decision in this case. I set forth each finding below, in italics, as a separate numbered or lettered heading.

³ During the prehearing conference, I explained the limits of my authority: I advised Petitioner that I cannot look behind her criminal conviction. Her arguments regarding the effectiveness of her criminal attorney and other purported errors in the criminal trial are, therefore, irrelevant. I reiterated this advice in my subsequent order.

(continued...)

And the charges upon which she was convicted unquestionably fall within the purview of both 1128(a)(1) and 1128(a)(3). Petitioner was a Tennessee physician who specialized in oncology and hematology. Her patients were generally cancer patients. I.G. Ex. 3, at 1. From at least 1999 through the beginning of 2002, she knowingly executed a scheme to defraud the Medicare and Medicaid programs, and private insurers. Pursuant to her scheme, she provided her patients only partial doses of chemotherapy medications and side effect medications. She then billed the insurers for the full doses, thus receiving reimbursement for substantially more medications than she provided to her patients. On the patient charts she recorded (or instructed her employees to record) that she had administered the full doses. I.G. Exs. 3, 4. Based on these facts, she was convicted on three felony counts of health care fraud and one count of making false statements regarding health care matters. Obviously, her crimes related to the delivery of items and services under both Medicare and state health care programs. Her felony fraud convictions were for actions connected to the delivery of a health care item or service. The I.G. thus has bases for imposing an exclusion.

B. The 27-year exclusion falls within a reasonable range.

Having found a basis for the exclusion, I next consider whether the 27-year exclusion imposed falls within a reasonable range.

1. Aggravating factors justify lengthening the period of exclusion beyond the five-year minimum.

The statute mandates a five-year minimum exclusion. Act, section 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2). Specific aggravating factors that are not offset by specified mitigating factors may justify increasing the period of exclusion beyond the five-year minimum. 42 C.F.R. § 1001.102. Here, the I.G. cites four of the nine aggravating factors listed in the regulations as bases for lengthening Petitioner's period of exclusion: (1) Petitioner's crimes resulted in program (and other entities') financial losses in excess of \$5,000; (2) the acts that resulted in Petitioner's conviction were committed over a period of more than one year; (3) the sentence imposed by the court included incarceration; and (4) Petitioner was the subject of other adverse actions by a state agency. 42 C.F.R. §§ 1001.102(b)(1) (2) (5) and (9).

³(...continued)

Order Scheduling Submission of Briefs and Documents at 2 (September 8, 2006). Nevertheless, her appeal consists almost exclusively of a collateral attack on her criminal conviction.

Program financial loss. The I.G. correctly determined that Petitioner's actions resulted in financial losses to government health care programs and to Blue Cross well in excess of \$5,000. The sentencing court made specific findings as to the dollar amount of losses sustained as a result of Petitioner's crimes, and ordered her to pay restitution. The Court determined total losses of \$432,238. Losses to the Medicare program specifically were \$328,369. Losses to the State of Tennessee, which I reasonably infer as losses to the State Medicaid program, were \$11,723. The remaining \$92,146 loss was to Blue Cross/Blue Shield of Tennessee. I.G. Ex. 4, at 5. Thus the actual losses were many, many times the \$5,000 necessary to justify extending the period of exclusion.

Duration of crimes. Petitioner's criminal scheme began in June 1999 and continued until January 2002, making the duration of her criminal activity a second aggravating factor. I.G. Ex. 3, at 3; I.G. Ex. 4, at 1; I.G. Ex. 5, at 2.

Incarceration. As a result of her crimes, Petitioner was sentenced to a total of 188 months – 15 years and eight months – incarceration. I.G. Ex. 4, at 2. This is significant jail time and underscores the seriousness of her crimes.

Other adverse actions. Based on Petitioner's convictions and her admission of underlying misconduct, the Tennessee Board of Medical Examiners revoked Petitioner's medical license effective March 16, 2006. I.G. Exs. 5, 6. The I.G. may consider this state adverse action another aggravating factor.

Unless offset by one or more mitigating factors, these factors justify a significant increase in the length of Petitioner's exclusion.

2. No mitigating factors justify reducing the period of exclusion.

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 demonstrates that a petitioner had a mental, physical, or emotional condition that reduced his 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). Obviously, because Petitioner's *felony* conviction involved financial losses to the program significantly greater than \$1,500, the first factor does not apply here. She does not claim that any medical condition reduced her culpability, nor argue any cooperation with government officials. Therefore, this case presents no mitigating factors to justify reducing the period of exclusion.

The Secretary has delegated to the I.G. the authority to impose exclusions for convictions relating to health care fraud. 42 C.F.R. § 1001.201(a). 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 7 (2000), *citing* 57 Fed. Reg. 3298, 3321 (1992). In this case, Petitioner's crimes, which I find remarkable for their callousness, demonstrate that she presents a significant risk to the integrity of health care programs, not to mention patient health and safety. The financial loss she caused greatly exceeds the regulatory threshold for aggravation. Her crimes continued for at least eighteen months, and were so serious as to merit lengthy incarceration. She justifiably lost her medical license. These aggravating factors underscore how dangerous she is and more than justify a 27-year exclusion.

IV. Conclusion

For the reasons set forth above, I conclude that the I.G. was authorized, under sections 1128(a)(1) and 1128(a)(3), to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. Considering the totality of the evidence, I find the 27-year exclusion within a reasonable range.

 /s/

Carolyn Cozad Hughes
Administrative Law Judge