

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Johnnie Lee Winfield,)	Date: July 2, 2009
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-282
)	Decision No. CR1971
The Inspector General.)	
_____)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Johnnie Lee Winfield, from participating in Medicare and other federally funded health care programs for a period of 15 years.

I. Background

Petitioner and his wife (a physician who received money from the Medicare program) owned and operated RehabSource, Inc. (clinic) in Greenville, Mississippi. On December 31, 2008 the I.G. notified Petitioner that he had determined to exclude him from participation in Medicare and other federally funded health care programs because, allegedly, he had been convicted of a criminal offense as is described at section 1128(a)(1) of the Social Security Act (Act). The I.G. told Petitioner that the length of the exclusion, 15 years, was based on evidence relating to three circumstances: the acts resulting in his conviction caused a financial loss to a government program of more than \$5000; the acts were committed over a period of one year or more; and the sentence imposed by the court included incarceration. I.G. Ex. 3.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. Neither party requested that I convene an in-person hearing to receive testimony. Each party filed a brief. The I.G. filed three proposed exhibits which he identified as I.G. Ex. 1 – I.G. Ex. 3. Petitioner filed no proposed exhibits, but he filed an attachment with his brief providing explanations for some answers in his brief.

II. Issue, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. Exclusion of Petitioner is mandated by section 1128(a)(1) of the Act; and
2. An exclusion of 15 years is reasonable.

B. Findings of fact and conclusions of law

1. *Petitioner's exclusion is mandated by section 1128(a)(1) of the Act because Petitioner was convicted of a criminal offense related to the delivery of items or services under the Medicare program.*

Section 1128(a)(1) of the Act mandates that the I.G. exclude 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 program. In this case Petitioner's exclusion is mandated by the fact that he was convicted of a criminal offense related to the delivery of items or services by the United States District Court for the Northern District of Mississippi.

The evidence establishes that, on March 31, 2008, based on his guilty plea, Petitioner was found guilty of conspiracy to commit health fraud. I.G. Ex. 1.

Petitioner's plea was in response to the first count of an indictment which alleges that between December 2003 and May 2005, Petitioner and his wife knowingly and willfully combined, conspired, and agreed with each other and with others to commit and aid and abet certain offenses against the United States. I.G. Ex. 2, at 2. Specifically, the indictment alleges that Petitioner violated the Health Care Fraud statute by knowingly and willfully executing a scheme: (1) to defraud the Medicare program; and (2) to obtain money and property owned by and under the custody and control of the Medicare program by false pretenses, "in connection with the delivery of or payment for health care benefits, items and services, in violation of Title 18, United States Code Section 1347," i.e., to falsely bill Medicare. I.G. Ex. 2, at 2-3.

The indictment alleges that the clinic falsely billed Medicare in the amount of \$971,802 for evaluations and physical therapy services and received \$458,237. I.G. Ex. 2, at 3. For each Medicare check received by the physician directed group, one or more representations below regarding evaluations and physical therapy services were false. The clinic falsely represented that the services were:

- (a) initiated by a physician's direct and personal medical evaluation;
- (b) administered for a diagnosis determined to be reasonable and necessary for the medical condition of the patient under Medicare guidelines;
- (c) ordered by a physician as an integral part of a physician's continuing active participation and management of the course of treatment;
- (d) provided by qualified persons; and
- (e) actually provided.

I.G. Ex. 2, at 3.

Petitioner argues that he had no ownership in the clinic; that he is not listed on the corporate documents; that he is not listed on the Planters bank account and did not have any type of signing privileges; and that he has never received compensation for any services performed in relationship to any type of managerial or day to day operations of the clinic. However, Petitioner acknowledges, and the evidence shows, that he was convicted of a criminal offense for which exclusion is required. The facts underlying Petitioner's conviction are not reviewable in this forum. 42 C.F. R. § 1001.2007(d).

The indictment is clear as to the nature of the crime to which Petitioner pled guilty. It explicitly provides that Petitioner executed a scheme to fraudulently obtain money from Medicare, "in connection with the delivery of or payment for health care benefits, items and services" I.G. Ex. 2, at 2. The crime, conspiracy to commit health fraud, clearly meets the criteria of section 1128(a)(1). It is well-established that theft from the Medicare program by falsely claiming reimbursement for items or services that were not provided as claimed constitutes a crime related to the delivery of a healthcare item or service.

2. A 15-year exclusion is reasonable.

The purpose of imposing an exclusion is remedial. The Act's purpose is to protect federally funded health care programs and their beneficiaries and recipients from individuals and entities who are untrustworthy.

As a matter of law, an individual must be excluded for a minimum of five years if he or she is convicted of a crime for which section 1128(a)(1) mandates exclusion. Act, section 1128(c)(3)(B). The I.G. is authorized to exclude an individual beyond the minimum five year period where the evidence shows that individual to be so untrustworthy as to necessitate a longer exclusion. When the I.G. excludes an individual for more than five years that raises the issue of whether his determination is reasonable.

Regulations governing the imposition of exclusions define certain aggravating and mitigating factors to consider when evaluating the reasonableness of the length of exclusions. 42 C.F.R. § 1001.102(b), (c). Evidence of aggravating factors may justify

imposing an exclusion longer than the five-year minimum. Evidence of mitigating factors may justify reducing the length of an exclusion but never below the five-year minimum.

The regulatory aggravating and mitigating factors establish what evidence is relevant to the length of exclusion. However, the regulations do not dictate how to weigh that evidence when deciding whether the length of an exclusion is reasonable.

Here, evidence relating to three aggravating factors strongly supports the I.G.'s determination to exclude Petitioner for 15 years. There is no mitigating evidence. First, the evidence proves that Petitioner was convicted of a crime that caused a financial loss of \$5000 or more to the Medicare program. 42 C.F.R. § 1001.102(b)(1). Petitioner alleges that he did not submit claims on behalf of the clinic.¹ But he was charged with, and pled guilty to, a conspiracy which resulted in the loss of more than \$458,000 to the Medicare program. Petitioner was ordered to pay restitution totaling \$458,237. I.G. Ex. 1, at 1, 5; I.G. Ex. 2, at 3.

Second, Petitioner's crimes extended over a period of more than a year. 42 C.F.R. § 1001.102(b)(2). Petitioner claims that he was only in the office for five or six days after the first month of the period from December 2003 to May 2005. His day to day involvement with the clinic is irrelevant, he was charged with, and pled guilty to, crimes that extended over that period of nearly 18 months. I.G. Ex. 1, at 1; I.G. Ex. 2, at 2.

Third, Petitioner's sentence included incarceration. 42 C.F.R. § 1001.102(b)(5). Petitioner was sentenced to twelve months and one day of incarceration. I.G. Ex. 1, at 2.

Petitioner acknowledges that aggravating factors are present, but states that to the best of his knowledge the work for which the clinic billed Medicare was done, that no one was injured, and that the money is being paid back to the government. Petitioner's attachment at 1.

The evidence as to aggravating factors is sufficient to support an exclusion of 15 years in this case because it establishes Petitioner to be manifestly untrustworthy. Regardless of whether anyone was injured or whether Petitioner or his coconspirators began paying back the money after he was caught, he engaged in a systematic large scale scheme to steal program monies over a lengthy period of time. His claim of ignorance is not credible, especially in light of his guilty plea to "conspiracy to commit health care fraud."

¹ Petitioner complains that the I.G. attempts to support his supposed untrustworthiness with unproven information related to other counts in the indictment (he only pled guilty to and was convicted of the first count). However, the I.G.'s case is based solely on the first count of the indictment.

The persistence and scale with which Petitioner conspired to defraud the Medicare program establishes a pattern of criminal activity.

Petitioner alleges that mitigating factors exist that would support reducing his exclusion. He contends that he had no ownership in the clinic; that he is not listed on the corporate documents; that he is not listed on the Planters bank account and did not have any type of signing privileges; and that he has never received compensation for any services performed in relationship to any type of managerial or day to day operations of the clinic. However, as discussed above, the regulations specifically outline what factors may be considered mitigating, and none of Petitioner's evidence falls within that definition.² *See* 42 C.F.R. § 1001.102(c).

/s/
Steven T. Kessel
Administrative Law Judge

² The only factors that may be considered mitigating are: the individual was convicted of three or fewer misdemeanors and the entire financial loss to a federally funded health care program was less than \$1500; the record in the criminal proceeding, including sentencing documents, demonstrates that the individual had a mental, emotional, or physical condition before or during the commission of the offense that reduced his culpability; or the individual's cooperation with federal or state officials resulted in others being convicted or excluded from Medicare, additional cases being investigated or reports identifying program weaknesses, or the imposition of a civil money penalty or assessment against anyone. 42 C.F.R. § 1001.102(c).