

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Persio Pereyra,

Petitioner

v.

The Inspector General.

Docket No. C-10-721

Decision No. CR2248

Date: September 20, 2010

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Persio Pereyra, from participating in Medicare and other federally-funded health care programs for a period of at least ten years.

I. Background

Petitioner is a nurse. On March 31, 2010, the I.G. informed Petitioner that he was being excluded from participating in Medicare and other federally-funded health care programs for a period of at least ten years, based on the I.G.'s determination that Petitioner had been convicted of a criminal offense as is described at section 1128(a)(1) of the Social Security Act (Act).

Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision. At my direction, the parties exchanged briefs, and the I.G. filed his proposed exhibits (Ex.). These are identified as I.G. Ex. 1 – I.G. Ex. 8. Petitioner did not object to my receiving these exhibits into evidence, and, so, I receive them. Both the I.G. and Petitioner advised me that they did not desire an in-person 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 for having been convicted of a criminal offense as is described at section 1128(a)(1) of the Act; and
2. An exclusion of at least ten years is reasonable.

B. Findings of Fact and Conclusions of Law

I make the following findings of fact and conclusions of law.

- 1. The I.G. must exclude Petitioner, because Petitioner was convicted of a criminal offense as is 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 Medicaid program. The undisputed evidence establishes that Petitioner was convicted of an 1128(a)(1) offense.

Petitioner was charged with having filed false Medicaid claims, on behalf of a Medicaid recipient, in a criminal indictment that the Supreme Court of the State of New York, Nassau County, issued. I.G. Ex. 3 at 3. The indictment alleged that, during a period beginning on or about September 1, 2004 and continuing through August 17, 2007, Petitioner filed, or caused to be filed, false Medicaid claims on behalf of an individual who is named Jane Doe in the indictment. *Id.* at 3, 5. The essence of the scheme charged by the indictment is that Petitioner, in concert with his common law wife, filed false Medicaid reimbursement claims on behalf of Jane Doe, who is their child. The claims were alleged to be palpably false, inasmuch as Petitioner claimed to have provided services for work performed in excess of 24 hours in a single day on at least 180 separate days. I.G. Ex. 6 at 1.

On February 29, 2007, Petitioner pled guilty to the crime of grand larceny in the fourth degree, a felony under New York law. I.G. Ex. 7 at 12. He specifically admitted to filing claims with the New York Medicaid program seeking reimbursement for services that he had not provided. *Id.* at 11-12.

Petitioner's conviction is for a crime that is described at section 1128(a)(1) of the Act. Petitioner was convicted of filing false claims with the New York Medicaid program demanding reimbursement for services that he did not provide. That is clearly a

program-related crime, because the essence of Petitioner's crime was his theft of program funds through false claims for covered items or services.

2. An exclusion of at least ten years is reasonable.

An exclusion that is 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. determined to impose a ten-year exclusion in this case.

Section 1128 of the Act is a remedial statute. Its purpose is to protect program funds and their beneficiaries and recipients from untrustworthy individuals. The Act's remedial purpose is satisfied where exclusion is found to relate reasonably to the statutory purpose.

Regulatory factors govern what evidence may be considered in deciding whether the length of an exclusion is reasonable. They are set forth at 42 C.F.R. § 1001.102 and are described as either "aggravating" or "mitigating" factors. The aggravating factors function as rules of evidence, determining what evidence is relevant to the issue of reasonableness of the length of an exclusion. Evidence that relates to a specific aggravating or mitigating factor is relevant and may be considered in deciding the ultimate question of trustworthiness. Evidence that does not relate to a specific aggravating or mitigating factor is irrelevant and may not be considered.

The I.G. offered proof of evidence relating to three specific aggravating factors. First, he proved that Petitioner's crimes caused a financial loss to the New York Medicaid program of more than \$5,000. 42 C.F.R. § 1001.102(b)(1). Petitioner admitted to having defrauded that program of \$26,648.12. I.G. Ex. 7 at 2. He was sentenced to pay restitution in the amount of \$36,116.23. *Id.* at 3.

Second, the I.G. proved that Petitioner perpetrated his crimes over a period of more than one year. 42 C.F.R. § 1001.102(b)(2). He was convicted of stealing funds from the New York Medicaid program during a period that began in 2004 and that continued through August 2007. I.G. Ex. 7 at 11.

Third, the I.G. established that Petitioner was the subject of another adverse action by a government agency based on the same set of circumstances that are the basis for his exclusion. 42 C.F.R. § 1001.102(b)(9). On May 10, 2010, the New York Medicaid program excluded Petitioner based on the conviction that is at issue here. I.G. Ex. 8.

Petitioner has offered no mitigating evidence. He asserts that he cost the New York Medicaid program nothing, because he actually provided the services that were found to be falsely claimed. That is tantamount to arguing that he is not really guilty of the crime to which he pleaded. I find that assertion to be irrelevant. It is irrelevant, because the exclusion in this case is based on Petitioner's conviction and not on underlying evidence

of guilt or innocence. The proper forum for contesting the criminal charges filed against Petitioner was the New York Supreme Court. Petitioner chose not to exercise the right to contest the charges, and that closes the door on subsequent claims of innocence. Petitioner's assertion of innocence is also irrelevant, because "innocence in reality" is not a mitigating factor that I may consider. *See* 42 C.F.R. § 1001.102.

I note, moreover, that Petitioner's present claim of innocence is highly self-serving. Petitioner freely admitted his guilt and the specific elements of his crimes, when it was in his interest to plead guilty to reduced charges. Now, when it is in his interest to claim innocence, Petitioner urges that I disregard his prior admission of guilt.

Petitioner submitted with his brief a Certificate of Relief from Disabilities from the State of New York, dated April 3, 2009, without explanation. The certificate is meant to grant relief from all or certain disabilities, forfeitures, or bars to employment automatically imposed by law by reason of his conviction. However, the very terms of that Certificate excludes any right to relief by Petitioner from the I.G.'s actions here as the Certificate will "not prevent any judicial, administrative . . . board or authority from relying upon the conviction specified . . . as the basis for the exercise if its discretionary power to suspend, revoke, refuse to issue or renew any license, permit or other authority or privilege."

Petitioner argues also that he was led to believe by the attorney who prosecuted the criminal case against him that he would only be excluded for five years. That assertion is not evidence that relates to any mitigating factor, and it is irrelevant for that reason. Furthermore, Petitioner has offered nothing, other than his uncorroborated and clearly self-serving claim that this alleged representation was made to him. I would not find Petitioner's assertion to be credible, even if it were relevant.

Petitioner also protests that he was convicted in 2007 and that the I.G. did not impose the exclusion until 2010. In effect, he asserts that it is unfair that the I.G. wait for so long before imposing an exclusion. That argument relates to no mitigating factor. Moreover, it is beyond my authority to consider in any event. There is nothing in the regulations that permits me to modify an exclusion so as to impose an earlier start date than that determined by the I.G.

The relevant evidence relating to aggravating factors is strong evidence that Petitioner is a highly untrustworthy individual. Petitioner engaged in a protracted and deliberate scheme to defraud the New York Medicaid program. He perpetrated his scheme over a period of more than two and one-half years by filing many false reimbursement claims. He was successful in stealing a fairly substantial sum of money from the program. This

