

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Janine L. Wright,
(OI File No. H-12-41063-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-327

Decision No. CR2872

Date: July 26, 2013

DECISION

Petitioner, Janine L. Wright, was a speech language pathologist, licensed in the State of Georgia, who was convicted of felony Medicaid fraud. Based on her conviction, the Inspector General (I.G.) has excluded her for ten years from participation in the Medicare, Medicaid, and all federal health care programs, as authorized by section 1128(a)(1) of the Social Security Act (Act). Petitioner now challenges the exclusion. For the reasons discussed below, I find that the I.G. properly excluded Petitioner and that the ten-year exclusion falls within a reasonable range.

I. Background

Petitioner Wright owned and operated S.L.C. Professional Consultations and Referral Service, through which she provided speech language pathology services to children, many of whom received treatment under the state's Medicaid program. I.G. Ex. 3 at 2-3. Following a jury trial, she was convicted of submitting false claims to Medicaid and to managed care organizations that serve Medicaid recipients. I.G. Ex. 2; I.G. Ex. 3 at 3. The state court entered judgment against her on February 9, 2012. I.G. Ex. 2; P. Br. at 1.

In a letter dated November 30, 2012, the I.G. notified Petitioner that she was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of ten years, because she had been convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. The letter explained that section 1128(a)(1) of the Act authorizes the exclusion. I.G. Ex. 1. Petitioner requested review, and the matter is before me for resolution.

Each party submitted an initial brief (I.G. Br.; P. Br.). The I.G. submitted three exhibits (I.G. Exs. 1-3) and Petitioner submitted three exhibits (P. Exs. 1-3). The I.G. submitted a reply brief (I.G. Reply). In the absence of an objection, I admit into evidence I.G. Exs. 1-3 and P. Exs. 1-3.

II. Issues

The issues before me are: 1) whether Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program within the meaning of section 1128(a)(1), thus providing a basis for excluding her from program participation; and 2) if so, whether the length of the exclusion (ten years) is reasonable.

III. Discussion

A. Petitioner must be excluded from program participation, because she was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program within the meaning of section 1128(a)(1).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). The term “state health care program” includes a state’s Medicaid program. Act § 1128(h)(1). Because Petitioner Wright was indicted and convicted of presenting fraudulent claims to Medicaid, she obviously committed an offense related to the delivery of items or services under a state health care program and must be excluded from program participation. I.G. Exs. 2, 3.

Petitioner nevertheless argues that she is not subject to exclusion because her conviction is “under review” before various tribunals. In Petitioner’s view, the I.G. may exclude her

¹ My findings of fact and conclusions of law are set forth, in italics and bold, in the discussion captions of this opinion.

only if her underlying conviction is not reviewable and only if she “may not collaterally attack the conviction in . . . her exclusion appeal.” P. Br. at 2. Petitioner misunderstands the statute and regulations. Hers is a “conviction” within the meaning of section 1128, which specifically provides that “an individual or entity is considered to have been ‘convicted’” when a court has entered a judgment of conviction “regardless of whether there is an appeal pending. . . .” Act § 1128(i)(1). Further, the regulations explicitly preclude any collateral attack on an 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.”); *Young Moon, M.D.*, DAB CR1572 (2007).

Thus, Petitioner was convicted of a program-related crime and must be excluded for at least five years. I now consider whether the length of her exclusion, beyond five years, falls within a reasonable range.

B. Based on the aggravating factors present in this case, the ten-year exclusion falls within a reasonable range.

An exclusion under section 1128(a)(1) 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 bases for lengthening the period of exclusion are three relied on by the I.G. in determining the length of Petitioner’s exclusion: 1) the acts resulting in the conviction, or similar acts, resulted in a financial loss to Medicare and state health care programs 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). 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. Petitioners' actions resulted in program financial losses more than ten times greater than the \$5,000 threshold for aggravation. The court ordered her to pay \$59,570.25 in restitution to the state Medicaid program. I.G. Ex. 3. Restitution has long been considered a reasonable measure of program losses. *Jason Hollady, M.D.*, DAB No. 1855 (2002). Because the financial losses were significantly in excess of the threshold amount for aggravation, the I.G. may justifiably increase significantly Petitioner's period of exclusion. *See Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, PhD.*, DAB No. 1865 (2003).

Duration of crime (42 C.F.R. § 1001.102(b)(2)). Petitioner was convicted of criminal acts that were committed over a period of approximately eighteen months, beginning "on or about June 6, 2008 and continuing through on or about January 25, 2010." I.G. Ex. 3 at 2.

Incarceration (42 C.F.R. § 1001.102(b)(5)). The sentence imposed by the criminal court included a substantial prison sentence – ten years, although she is required to serve four years, followed by six years probation, provided she meets certain conditions. I.G. Ex. 2. *See Jason Hollady, M.D.*, DAB No. 1855 at 12 (2002) (characterizing a nine-month incarceration as "relatively substantial"); *Jeremy Robinson*, DAB No. 1905 (2004).

C. No mitigating factors justify decreasing 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 in the criminal proceedings 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). Characterizing a mitigating factor as "in the nature of an affirmative defense," the Departmental Appeals 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).

Obviously, because Petitioner was convicted of a felony that involved program financial losses many times greater than \$1,500, the first factor does not apply here. Nor does Petitioner claim any mental, physical, or emotional condition that reduced her culpability. She does not allege that she cooperated with government officials.

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 crime demonstrates that she presents significant risks to the integrity of health care programs.

She engaged in illegal conduct that cost the Medicaid program a significant amount of money. Her criminal conduct lasted more than a year, and resulted in a significant prison sentence. No mitigating factors offset the aggravating factors. I therefore find that the ten-year exclusion falls within a reasonable range.

IV. Conclusion

For these reasons, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid and all federal health care programs, and I sustain as reasonable the period of exclusion.

 /s/

Carolyn Cozad Hughes
Administrative Law Judge