Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Allen S. Levy,	)	Date: June 20, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-181
	)	Decision No. CR1612
The Inspector General.	)	
	)	

DECISION

In this case, the parties agree that Petitioner, Allen S. Levy, was convicted of grand larceny because he submitted false claims to Medicare and to the New York State Medicaid program. He is therefore subject to exclusion from participation in federal health care programs under sections 1128(a)(1) and 1128(a)(3) of the Social Security Act (Act). The sole issue in dispute is the length of his exclusion. The Inspector General proposes a 13- year exclusion, and, for the reasons set forth below, I find that the imposition of a 13-year exclusion is reasonable.

I. Background

By letter dated October 31, 2006, the I.G. notified Petitioner that, based on his felony conviction in New York's Rockland County Court, he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 13 years. I.G. Ex. 1, at 1. The letter explained that section 1128(a)(1) authorizes such exclusion for criminal convictions related to the delivery of an item or service under the Medicare and Medicaid programs. Section 1128(a)(3) authorizes exclusion for felony convictions related to fraud in connection with the delivery of a health care item or service.

Petitioner thereafter requested a hearing, and the case was assigned to me. I held a prehearing conference on January 31, 2007, at which Petitioner conceded that he had been convicted and is subject to exclusion under sections 1128(a)(1) and (3). The parties agreed that no factual issues were in dispute, and that the case could be resolved based on

written submissions, without the need for an in-person hearing. Order Scheduling Submission of Briefs and Documents (February 5, 2007). Both parties have submitted written arguments, and the I.G. has filed 11 exhibits (I.G. Exs. 1-11). Petitioner has filed 28 exhibits (P. Exs. 1-28). In the absence of objection, I receive into evidence I.G. Exs. 1-11, and P. Exs. 1-28. The I.G. also submitted a reply brief.

II. Issue

The parties agree that the I.G. has a basis upon which to exclude Petitioner from participation in the Medicare, Medicaid, and all federal health care programs, so the sole issue before me is whether the length of the exclusion (13 years) is reasonable. 42 C.F.R. § 1001.2007.

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).

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).

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[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).

A. Based on the aggravating factors presented in this case, the 13-year exclusion falls within a reasonable range. 42 C.F.R. § 1001.102(b)(2).[2]

Federal regulations set forth criteria for determining the length of exclusions imposed pursuant to section 1128 of the Act. 42 C.F.R. § 1001.102. 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.

The following factors may serve as bases for lengthening the period of exclusion: (1) the acts resulting in the conviction, or similar acts, resulted in a financial loss to Medicare and the 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; (3) the sentence imposed by the court included incarceration; and (4) the convicted individual or entity has been the subject of any other adverse action by any federal, state or local government agency or board, if the adverse action is based on the same set of circumstances that serves as the basis for imposition of the exclusion. 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.

Here, Petitioner was a clinical social worker who, until his felony convictions, was licensed to practice psychotherapy in the State of New York. I.G. Ex. 3 at 5-6; I.G. Ex. 10, at 5. On February 4, 2003, he pled guilty in Rockland County Criminal Court to one count of third degree grand larceny, a felony, for stealing more than $3,000 from a private health insurance plan. I.G. Exs. 6, 7, 10, at 8. He was sentenced to five years probation and ordered to pay $4,622.28 in restitution. I.G. Ex. 7.

Two years later, on June 21, 2005, he pled guilty to two counts of second degree grand larceny. I.G. Ex. 3, at 8-9, 26-28, 30. He admitted in open court that, between March 1, 1998, and December 31, 2002, he submitted numerous claims to the New York State Medicaid program, falsely claiming that he had provided forty-five to fifty-minute psychotherapy services to Medicaid recipients; in fact, he had not provided those services. I.G. Ex. 3, at 12-13; *see also* I.G. Ex. 3, at 8 (Count 1 – Medicaid larceny). During the same period (March 1, 1998 until December 31, 2002), he submitted similar claims to the Medicare program for similar bogus services. I.G. Ex. 3, at 12-13; *see also* I.G. Ex. 3 at 8 (Count 2 – Medicare larceny).

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[2] I make findings of fact and conclusions of law to support my decision in this case. I set forth each finding, in italics, as a separate hearing.

He admitted receiving $274,431.56 to which he was not entitled (I.G. Ex. 3, at 18), and was ordered to pay that amount in restitution. I.G. Ex. 3, at 9; I.G. Ex. 4, at 3.

On August 23, 2005, he was sentenced to six months jail time and five years probation. I.G. Exs. 4, 5.

Based on the 2005 indictment, the New York State Department of Health (which administers the state's Medicaid program) excluded Petitioner from Medicaid participation. I.G. Ex. 9. Based on his 2003 conviction, the State Board of Social Work suspended for two years his license to practice as a clinical social worker, although the final year of his suspension was subsequently stayed, and he was placed on probation for two years. I.G. Ex. 10, at 1, 6, 8. On November 10, 2005, he surrendered his social work license because of his 2005 conviction. I.G. Ex. 11.

Thus, four aggravating factors justify lengthening the period of exclusion beyond the five-year minimum.

Program Financial Loss. Petitioner's actions resulted in a program financial loss well in excess of $5,000. Petitioner explicitly admitted, and the Court determined, that he stole more than $274,000 from the Medicare and Medicaid programs. Nevertheless, Petitioner now suggests otherwise, arguing that State Attorney General calculated the program loss "based on a mathematical ratio," and the result included charges for services he actually delivered. P. Br. at 5. Petitioner quotes selectively from the court transcript of his June 21, 2005 conviction, asserting that his admission "does not represent 'that he criminally took that money.' " *Id.* at 6.

In fact, the criminal court judge was insistent that Petitioner acknowledge, as part of his plea, the amount taken:

> THE COURT: I am not interested if it was civilly or criminally wrongful or just a mistaking. There was money he was not permitted to take. . . . I simply stated that the restitution amount is money that was wrongfully taken. I didn't say criminally. I haven't said civilly. It wasn't his to take under any kind of situation. If he can't admit that, I don't want to take the plea. I won't take the plea.
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> * * * *

> THE COURT: Dr. Levy, let me try to make your life a little easier. Are you prepared to admit today, sir, that you received two hundred and seventy-four thousand four hundred thirty-one dollars and fifty-six cents ($274,431.56), which you were either not entitled to obtain or retain.
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> MR. ASHE:[3] Under the rules governing Medicare and Medicaid?
>
> THE COURT: Yes.
>
> THE DEFENDANT: I do.
>
> THE COURT: I need not make a distinction which is criminal or which is not. I just have to be certain that the restitution number is correct. That is the sole purpose.

I.G. Ex. 3, at 17-18. The amount of program loss was thus adjudicated by the criminal court, and I am bound to accept the court's finding. *See* 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).

Period of misconduct. Petitioner's criminal conduct spanned almost five years (March 1, 1998 until December 31, 2002), obviously well beyond the one year necessary for aggravation.

Incarceration. The sentence imposed by the criminal court judge included incarceration; Petitioner was sentenced to six months jail time. Petitioner complains that he did not want to accept a plea offer that included jail time, but his attorney warned him that, if convicted after a trial, the judge threatened to sentence him to the State Penitentiary for at least four years, possibly longer. Petitioner's motivation for entering into a plea agreement that includes jail time – a motivation that is probably common to many, if not most, of such guilty pleas – is simply irrelevant.

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[3] Mr. Ashe represented Petitioner in the criminal proceeding.

Other adverse actions. Finally, two state agencies took adverse actions against him, based on the same circumstances that underlie this exclusion. Petitioner acknowledges these additional adverse actions, but attributes them to the natural momentum generated by his conviction. He also points out that New York's sanctions are for only two to three years, and that the State of Connecticut declined to take adverse action.

Again, these arguments are irrelevant. By regulation, the Secretary has determined that the existence of adverse action by other government agencies or boards demonstrates that the sanctioned individual presents a heightened risk to program integrity, justifying a longer exclusion. I am bound by that regulation.

B. 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 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 the 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's *felony* convictions involved program financial losses many times greater than $1,500, the first factor does not apply here. He does not claim that any medical condition reduced his culpability, or argue any cooperation with government officials. Therefore, this case presents no mitigating factors to justify reducing the period of exclusion.

While recognizing that his convictions subject him to exclusion, Petitioner, under the guise of "mitigation," attacks the bases for those convictions, and the motives of those who prosecuted him. He insists that he provided medically necessary services, and suggests that his crimes were not really crimes at all because he made no deliberate or conscious attempt to steal from Medicare or Medicaid ("I may not have violated the law in spirit."). P. Br. at 14. As noted above, Petitioner may not collaterally attack his underlying convictions.

> 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); *Ira Katz, Little Five Points Pharmacy*, DAB CR1044 (2003).

Petitioner also offers letters and other evidence attesting to his good character and service to the community. Under the regulation, these do not create mitigating factors.

IV. Conclusion

I conclude that the I.G. was authorized, under sections 1128(a)(1) and 1128(a)(3) of the Act, to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. The evidence establishes that he has stolen a large sum of money from the Medicare and Medicaid programs, and has stolen from a private insurer. He engaged in his illegal conduct for several years. He was sentenced to jail time, and was appropriately disciplined by both the state social work board and the state Medicaid agency. All of this justifies a significant period of exclusion. No mitigating factors offset these aggravating factors. I find that Petitioner presents a significant risk to program integrity, and the 13-year exclusion falls within a reasonable range.

/s/

Carolyn Cozad Hughes
Administrative Law Judge