

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Frances Unoka Nwoshuocha,	)	
	)	Date: January 19, 2010
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-583
	)	Decision No. CR2057
The Inspector General.	)	

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**DECISION**

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Frances Unoka Nwoshuocha, from participating in Medicare and other federally funded health care programs for a period of 10 years. The I.G. relies on the mandatory authority to do so conveyed to him by section 1128(a)(1) of the Social Security Act (Act).

**I. Background**

During the time period relevant to this case, Petitioner was a nurse practitioner working in Sugar Land, Texas. I.G. Ex. 5. On May 29, 2009, the I.G. notified Petitioner that he had determined to exclude her from participation in Medicare and other federally funded health care programs because, allegedly, she had been convicted of a criminal offense as described at section 1128(a)(1) of the Social Security Act (Act). The I.G. informed Petitioner that the length of the exclusion, 10 years, was based upon evidence relating to three circumstances: the acts resulting in her conviction caused a financial loss to a government program of more than \$5,000; the acts were committed over a period of one year or more; and the sentence imposed by the court included incarceration. I.G. Ex. 1.

On July 8, 2009, Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. On August 26, 2009, I held a prehearing conference in this case.

Both parties agreed that this case involved purely issues of law that do not require an in-person hearing. The parties further agree that this matter could be argued and decided based on written submissions. With the assistance of the parties I set a briefing schedule.

The I.G. filed his initial brief on October 15, 2009, along with seven proposed exhibits which he identified as I.G. Ex. 1-7. Petitioner's brief was due on December 3, 2009. Petitioner's counsel was contacted on December 15, 2009, at which time he indicated that a brief would be filed by December 18, 2009. Petitioner's counsel was contacted again on December 28, 2009, at which time he indicated he would file a brief on December 29, 2009. As of the date of this decision Petitioner's counsel has not filed a brief in response to the I.G.'s arguments. Petitioner has not objected to the proposed exhibits offered by the I.G. and I will therefore admit I.G. Exhibits 1 through 7.

## **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 10 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 she was convicted of a criminal offense, theft, related to the delivery of items or services by the State of Texas, 185th District Court, Harris County.

The evidence establishes that between March 2002 and June 2003, Silver-Hawk Healthcare Systems, Inc., billed Medicare and Medicaid claiming that it provided beneficiaries powered wheelchairs and accessories when less expensive scooters were in fact provided. An investigation by Medicaid Fraud Unit revealed that Petitioner had signed 32 certificates of medical necessity for beneficiaries to receive power wheelchairs. Interviews with the beneficiaries revealed that they did not qualify for, nor had a medical need for, power wheelchairs. I.G. Ex. 6, at 1. Petitioner's provision of the certificates of medical necessity resulted in the submission of false claims and improper payments of \$151,033.58 to Silver-Hawk from the Medicare and Medicaid programs. I.G. Ex. 6, at 1. On October 15, 2007, Petitioner was charged in the 185th District Court of Harris County, Texas, with one count of felony, Aggregate Theft by a Governmental Contractor. I.G. Ex. 7. The indictment alleges that Petitioner, in a combination with others, unlawfully, intentionally, and knowingly appropriated money while she was a Medicaid

Provider. I.G. Ex. 7. On November 5, 2008, Petitioner was found guilty by a jury of First Degree Felony of Theft by a Government Contractor. I.G. Ex. 2. The Court also ordered Petitioner to pay a fine of \$10,000 and restitution in the amount of \$151,033.58 to the Texas Health and Human Services Commission's Office of Inspector General, and, as a condition of probation, to serve 30 days in the Harris County Jail. I.G. Ex. 2.

Petitioner argues that she should not have been excluded, or excluded for more than five years, based on her belief that she is eligible to apply for termination of the exclusion under 42 U.S.C. § 1320a-7(g)(2). Petitioner maintains that section 1128(g)(2) of the Act, states that the Secretary may terminate an exclusion if she determines that: (1) there is no basis under 1128 subsection (a) or (b) for a continuation of the exclusion; and (2) there are reasonable assurances that the types of actions which formed the basis for the original exclusion have not recurred and will not recur. This section has no bearing on whether an individual may or should be excluded in the first place. Petitioner will not be eligible to apply for a termination until after the first five years of her exclusion have run. Act § 1128(g)(1).

Petitioner notes that she requested that the decision to exclude her be postponed for two reasons, first, because she is appealing her conviction, and second, because she is already excluded for all practical purposes by the terms of her conviction. However, the writers of the Act anticipated that individuals may contest their exclusions based on appeals of their underlying convictions. The Act specifically states that when a judgment of conviction has been entered against an individual by a Federal, State, or local court, the individual is still considered to have been convicted regardless of whether an appeal is pending. And while the State court has placed limits on Petitioner's practice, the Act nevertheless requires that a person who has been convicted of a crime under section 1128(a) be excluded.

## ***2. A 10-year exclusion is reasonable.***

The purpose of imposing an exclusion is remedial. The Act is intended 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 § 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, the issue of whether his determination is reasonable is raised.

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 the evidence when deciding whether the length of an exclusion is reasonable.

Here, evidence relating to two aggravating factors strongly supports the I.G.'s determination to exclude Petitioner for 10 years. Petitioner provided no mitigating evidence. First, the evidence shows that Petitioner was convicted of a crime that caused a financial loss of \$5000 or more to the Medicaid and Medicare programs. 42 C.F.R. § 1001.102(b)(1). She was charged with, and convicted of, theft which resulted in the loss of more than \$151,033 to the Medicaid and Medicare programs. Petitioner was ordered to pay restitution totaling \$151,033.58. I.G. Ex. 1, at 1, 5; I.G. Ex. 2, at 1, 4; I.G. Ex. 7. Petitioner has not challenged these facts.

Second, Petitioner's crimes extended over a period of more than a year. 42 C.F.R. § 1001.102(b)(2). Petitioner has not challenged this fact. She was charged with, and convicted of, crimes that extended over a period of nearly 15 months. I.G. Ex. 1, at 1; I.G. Ex. 2, at 2.

The I.G. alleges that a third aggravating factor is that Petitioner's sentence included incarceration. I.G. Ex. 1; 42 C.F.R. § 1001.102(b)(5). Petitioner argues that she was not sentenced to serve prison time but that the judge added 30 days in the Harris County Jail as a condition of probation, which does not constitute a sentence or increased sentence under Texas law. Hearing Request at 1-2. Whether State law considers the sentence and the conditions of community supervision to be separate parts of a judgment is irrelevant. The Act and the regulations have broadly defined terms such as incarceration and conviction.\* However, because I have concluded that the first two aggravating factors are present, I need not determine whether or not the third aggravating factor is present.

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\* I make no determination as to the meaning of "sentence" in 42 C.F.R. § 1001.102(b)(5). However, as I noted above, the regulations define incarceration broadly to include any type of confinement with or without supervised release, including, but not limited to, community confinement, house arrest, and home detention. 42 C.F.R. § 1001.2(a). The Act defines conviction broadly to include a finding of guilt by a Federal, State, or local court; a plea of guilty or nolo contendere which has been accepted by a Federal, State, or local court; and an individual's entry into a first offender or deferred adjudication program where judgment of conviction has been withheld. Act § 1128(i).

The evidence as to the first two aggravating factors is sufficient to support an exclusion of 10 years in this case because it establishes Petitioner to be untrustworthy. Although Petitioner argues that her theft was “minimal” compared to others who were involved in the scheme, she was convicted of theft which cost federal health care programs more than \$151,033.

Petitioner also seems to suggest that when the I.G. determined the length of her exclusion, he should have considered her request that the agency postpone its determination to exclude her pending her appeal of the underlying conviction. Hearing Request at 4. Petitioner also argues that other persons whose involvement in the scheme was greater than her own have pled guilty but have not yet been excluded. Hearing Request at 4.

The actions taken or not taken relative to others involved in the criminal scheme are not before me. The only case and issues before me relate to Petitioner, and the evidence or arguments that have been made on her behalf. The regulations specifically outline what factors may be considered mitigating and Petitioner has advanced no argument or evidence which meets that definition. *See* 42 C.F.R. § 1001.102(c).

### **III. Conclusion**

Based on my review of all of the evidence in this case and for the reasons set forth above, I conclude that the I.G. has the authority to exclude Petitioner from Medicare, Medicaid, and all other federal health care programs. I further conclude that based on the evidence before me the 10-year exclusion imposed by the I.G. is reasonable.

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/s/  
Alfonso J. Montaña  
Administrative Law Judge