

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Howard S. Weiss, M.D.,)	DATE: June 12, 1996
Petitioner,)	
- v. -)	Docket No. C-96-048
The Inspector General.)	Decision No. CR421

DECISION

The Inspector General (I.G.) determined to exclude Petitioner from participating in Medicare and Medicaid for a period of 10 years, based on Petitioner's conviction of a criminal offense related to the delivery of an item or service under Medicare, within the meaning of section 1128(a)(1) of the Social Security Act (Act). I conclude that a 10-year exclusion is reasonable, given the evidence in this case. I sustain the exclusion.

I. Background, issue, findings of fact and conclusions of law

The parties agreed that the case could be heard and decided based on written submissions and without an in-person hearing. The I.G. submitted three exhibits (I.G. Exs. 1 - 3), and Petitioner submitted four exhibits (P. Exs. 1 - 4).¹ I receive into evidence I.G. Exs. 1 - 3 and P. Exs. 1 - 4. I afforded the parties the opportunity to submit briefs and replies. Each party submitted a brief; the I.G. submitted a reply.

¹ Petitioner did not object to any of the I.G.'s exhibits. The I.G. objected to each of Petitioner's exhibits as irrelevant. I.G. Reply Brief at 1. It is true, as the I.G. argues, that Petitioner's exhibits are not relevant to any mitigating factor under the regulations. Nevertheless, I conclude there is no prejudice to the I.G. by my admitting the documents, since I accord them no weight in my Decision.

Petitioner does not dispute that he was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act. Petitioner's Brief (P. Br.) at 1. Consequently, an exclusion of at least five years is mandatory in this case. Act, section 1128(c)(3)(B). The issue in this case is whether the 10-year exclusion that the I.G. imposed is reasonable. In concluding that the exclusion is reasonable, I make the following findings of fact and conclusions of law (Findings). I discuss each Finding in detail, below.

1. The I.G. proved that Petitioner was convicted of a scheme to defraud Medicare and other health insurers by making fraudulent claims.

2. The I.G. proved the presence of an aggravating factor, in that Petitioner committed a crime causing more than \$1,500 in damages to Medicare.

3. The I.G. proved the presence of an additional aggravating factor, in that Petitioner committed his crime over a period of time lasting more than one year.

4. Petitioner did not prove the presence of any mitigating factors.

5. The evidence of aggravating factors in this case, which is not offset by any evidence of mitigating factors, proves Petitioner to be a highly untrustworthy individual.

6. A 10-year exclusion is reasonable.

II. Discussion

A. Petitioner's criminal scheme (Finding 1)

Petitioner perpetrated a criminal scheme against Medicare and other health insurers, consisting of the mailing of false and fraudulent claims to these insurers. I.G. Exs. 1 - 3. Petitioner operated this scheme over a period of more than one year, and managed to obtain unlawfully more than \$35,000 from Medicare and other health insurers. I.G. Ex. 1 at 4. Of that amount, Petitioner obtained more than \$14,000 unlawfully from Medicare. I.G. Ex. 2 at 2.

On January 12, 1995, a criminal information was filed against Petitioner in the United States District Court in the Eastern District of Virginia. I.G. Ex. 1.

Petitioner was charged with a single count of mail fraud. Id. at 4. Specifically, Petitioner was charged with formulating a scheme to defraud Medicare and other health insurers by submitting claims for reimbursement which represented falsely and fraudulently that Petitioner had provided psychotherapy to patients in individual sessions of specified duration when, in fact, the length of the sessions was shorter than represented. Id. at 3. As part of that scheme, Petitioner was charged with mailing and causing to be mailed false and fraudulent claims for health care insurance, and with accepting payment for false and fraudulent claims for health care insurance. Id. This scheme was alleged to have occurred beginning in January 1990, and to have lasted through or about December 1991. Id.

On January 12, 1995, the same date on which the criminal information was issued against Petitioner, Petitioner agreed to plead guilty to a single count of mail fraud. I.G. Ex. 2. Petitioner explicitly agreed to plead guilty to the one count criminal information that had been filed against him. I.G. Ex. 2 at 1; see I.G. Ex. 1.

A judgment was entered against Petitioner on April 11, 1995. I.G. Ex. 3. The judgment recited that Petitioner pled guilty to a one count criminal information and to the offense of mail fraud. Id. at 1. The judgment recites that Petitioner's offense concluded on October 24, 1991. Id. at 1. This departs from the allegations of the criminal information, which recites that Petitioner's crimes concluded in or about December 1991. I.G. Ex. 1 at 3. No explanation is offered in the judgment or in Petitioner's plea agreement for this apparent discrepancy. For purposes of this Decision, however, I find that Petitioner's crimes ended on October 24, 1991.

Petitioner was fined \$10,000 and sentenced to pay restitution of more than \$35,000. I.G. Ex. 3 at 4. Of the restitution, more than \$14,600 was allocated as restitution to be paid to Medicare. Id.

Petitioner now asserts that he never intended to violate the law. P. Exs. 1 - 4. According to Petitioner, his billing practices merely reflected local custom and were not perpetrated as a fraud. P. Br. at 1 - 2. I find this argument to be without merit. The criminal information filed against Petitioner is explicit, as is his agreement to plead guilty to that information. I.G. Exs. 1, 2. In agreeing to plead guilty, Petitioner admitted that he was, in fact, guilty of the offense to which he pleaded. I.G. Ex. 2 at 2. Petitioner did not

admit merely to "improper billing," as he now avers, but to a criminal scheme to defraud Medicare and other health care insurers.

B. The presence of aggravating factors and the absence of mitigating factors (Findings 2 - 4)

The regulations which govern exclusions imposed pursuant to section 1128(a)(1) of the Act provide that the I.G. may impose an exclusion of more than five years in a case if one or more aggravating factors is present in that case which are not offset by the presence of any mitigating factors. 42 C.F.R. § 1001.102. In this case, the I.G. proved the presence of two aggravating factors. Petitioner did not prove the presence of any mitigating factors.

First, an aggravating factor is established if the acts resulting in an individual's conviction, or similar acts, resulted in financial loss to Medicare or to State health care programs of more than \$1,500. 42 C.F.R. § 1001.102(b)(1). Petitioner's crimes damaged Medicare in an amount exceeding \$14,600. The I.G. proved that Petitioner was sentenced to pay restitution to Medicare of more than \$14,600. A sentence to pay restitution is tantamount to a finding of damages.

Second, an aggravating factor is established if the acts resulting in an individual's conviction, or similar acts, were committed over a period of one year or more. 42 C.F.R. § 1001.102(b)(2). Petitioner committed his crime over a period of more than one year's duration. The I.G. proved that Petitioner was convicted of committing a crime beginning in January 1990 and continuing through October 24, 1991.

Petitioner did not prove that any of the mitigating factors described in 42 C.F.R. § 1001.102(c)(1) - (4) are present here. Petitioner asserts that he was not culpable for the offense of which he was convicted, asserting rather that his conduct constituted billing errors and not crimes. P. Br. at 1 - 2; see P. Exs. 1 - 4. As I discuss above, I do not find this assertion to be credible. In pleading guilty to the crime of mail fraud, Petitioner admitted his culpability for that offense. However, even if I were to find Petitioner's assertion to be credible, it would not comprise a mitigating factor under 42 C.F.R. § 1001.102(c)(1) - (4).

C. The evidence of Petitioner's lack of trustworthiness to provide care (Findings 5 - 6)

Section 1128 of the Act is a remedial statute. Its purpose is to protect federally funded health care programs and their beneficiaries and recipients from individuals who have been proven not to be trustworthy to provide care. An exclusion imposed pursuant to section 1128 is intended to provide a remedy to protect the programs and their beneficiaries and recipients from an untrustworthy individual. In order to be remedial, and not punitive, the exclusion must be reasonably calculated to achieve the statutory purpose of protection.

The regulation which establishes the criteria for determining the length of an exclusion to be imposed pursuant to section 1128(a)(1) of the Act does not mandate that an exclusion of more than five years must be imposed against an individual if aggravating factors exist that are not offset by mitigating factors. 42 C.F.R. § 1001.102. The presence of aggravating factors that are not offset by mitigating factors means that an exclusion of more than five years may be reasonable. However, the regulation also makes it clear that the only evidence which may be considered in determining whether to sustain an exclusion of more than five years is that which relates to any aggravating or mitigating factors that are established.

The only evidence before me in this case which is relevant to the issue of whether the exclusion is reasonable is evidence which relates to the two aggravating factors proved by the I.G.

The credible evidence proves that the 10-year exclusion imposed by the I.G. is reasonable. The evidence proves that Petitioner engaged in a deliberate scheme to defraud Medicare and other health insurers which extended over a period of nearly 22 months. It proves also that Petitioner's crime was substantial, netting him more than \$14,600 in unlawful returns from Medicare alone. This evidence of deliberate, prolonged criminal conduct proves Petitioner to be a highly untrustworthy individual. The impact of this evidence is not diminished by Petitioner's assertions that he is not culpable for his crime. Petitioner is simply not credible in denying now what he had admitted to previously. Moreover, his assertion that he was responsible merely for billing errors is belied by the persistence with which he engaged in criminal conduct and the amount of money that he obtained unlawfully.

III. Conclusion

I conclude that the ten-year exclusion imposed against Petitioner by the I.G. is reasonable, and I sustain it.

/s/

Steven T. Kessel
Administrative Law Judge