

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Shirlene Reese Boone,  
(OI File No. H-11-42650-9),

Petitioner,

v.

The Inspector General.

Docket No. C-12-784

Decision No. CR2668

Date: November 20, 2012

**DECISION**

Petitioner, Shirlene Reese Boone, owned and managed companies that provided community support and HIV case management services to Medicaid beneficiaries in Murfreesboro, North Carolina. She was convicted of conspiracy to commit health care fraud and other felonies. Based on these convictions, the Inspector General (I.G.) has excluded her for 20 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 length of the exclusion. For the reasons discussed below, I find that the I.G. properly excluded Petitioner and that the 20-year exclusion falls within a reasonable range.

**I. Background**

Petitioner Boone owned, operated, and acted as registered agent for a non-profit corporation and two related companies that provided community support services and HIV management to Medicaid beneficiaries. I.G. Ex. 2 at 1, 2, 7. She pled guilty to conspiracy to commit health care fraud and mail fraud (in violation of 18 U.S.C. § 371);

aggravated identity theft and aiding and abetting (in violation of 18 U.S.C. § 1028A and 2); and failure to collect and pay over payroll taxes and aiding and abetting (in violation of 26 U.S.C. § 7202 and 18 U.S.C. § 2). I.G. Ex. 3 at 1-2. The Federal District Court for the District of North Carolina entered judgment against her on April 26, 2011. I.G. Ex. 3 at 1-2.

In a letter dated May 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 20 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 concedes that she was convicted and is subject to exclusion under section 1128(a)(1). P. Br. at 4; *see* Order and Schedule for Filing Briefs and Documentary Evidence at 1 (June 29, 2012).

The parties agree that this case does not require an in-person hearing. I.G. Br. at 12; P. Br. at 19. 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 seven exhibits (P. Ex. 1-7). 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. Ex. 1-7.

## **II. Issue**

Because the parties agree that the I.G. has a basis upon which to exclude Petitioner from program participation, the sole issue before me is whether the length of the exclusion (20 years) is reasonable.

## **III. Discussion**

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 (which includes Medicaid). 42 C.F.R. § 1001.101(a).

In this case, Petitioner operated companies that participated in the state Medicaid program. Among her crimes, she attempted to justify her company's Medicaid billings by directing employees to fabricate patient/client progress notes "documenting" services that were never provided. I.G. Ex. 2 at 8-9. She signed the fabricated progress notes, claiming to have provided services that she did not, in fact, provide. I.G. Ex. 2 at 9. As the federal prosecutor described the scheme: Petitioner's employees "were sitting at their desks everyday just faking notes for things that didn't happen." P. Ex. 6 at 14. Even when confronted by the family of someone whose treatment notes were fabricated, she

declined to return the resulting ill-gotten funds to the Medicaid program and even refused to remove the bogus treatment notes from the patient record. I.G. Ex. 2 at 10.

Petitioner Boone not only defrauded the Medicaid program, she directed company employees to apply for state unemployment benefits and advised the state unemployment agency that they were no longer working for her company because no work was available. The employees then continued working while they collected the state benefits; Petitioner Boone paid them the difference between their usual wages and the benefit amounts, which obviously netted her considerable savings. I.G. Ex. 2 at 14-15. Finally, although she withheld employee payroll taxes, she did not pay those taxes to the IRS. I.G. Ex. 2 at 14.

By means of an information dated January 3, 2011, Petitioner was charged with felony counts of conspiracy to commit health care fraud and mail fraud, in violation of 18 U.S.C. § 371; aggravated identity theft and aiding and abetting (in connection with her misuse of Medicaid identification information), in violation of 18 U.S.C. § 1028A and 2; and failure to collect and pay over payroll taxes and aiding and abetting, in violation of 26 U.S.C. § 7202 and 18 U.S.C. § 2. I.G. Ex. 2. On April 4, 2011, she pled guilty to all three counts. I.G. Ex. 3. The federal district court for the Eastern District of North Carolina accepted her plea and imposed judgment against her. I.G. Ex. 3 at 1-2. The court sentenced her to 144 months (12 years) in prison, and ordered her to pay restitution to the Medicaid Investigative Unit, the North Carolina Employment Security Commission, and the IRS. I.G. Ex. 3 at 3, 6, 7; P. Ex. 6 at 18-20.

***Based on the aggravating factors in this case and the absence of any mitigating factor, the 20-year exclusion falls within a reasonable range.<sup>1</sup>***

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 four that the I.G. cites to justify the period of exclusion in this case: 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; 3) the sentence imposed by the

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<sup>1</sup> I make this one finding of fact/conclusion of law.

court included incarceration; and 4) the individual was convicted of other offenses besides those that formed the basis for her exclusion. 42 C.F.R. § 1001.102(b)(1),(2),(5) and (9). The presence of an aggravating factor or factors not offset by any mitigating factor or factors justifies lengthening the mandatory period of exclusion.

Financial loss to Medicaid (42 C.F.R. § 1001.102(b)(1)). Petitioner's actions resulted in a program financial loss well in excess of \$5,000. The district court found that her fraud cost the Medicaid program at least \$3,550,840.30. I.G. Ex. 3 at 6.<sup>2</sup> In sentencing, the Court characterized her conduct as "especially poignant and egregious in light of the current budget crisis facing the United States and North Carolina." P. Ex. 6 at 17.

The Defendant's greed denied qualified Medicaid recipients . . . treatment and services and cut deep into the pocket of taxpayers. As the complexity of loss related to lost treatment and services could not readily be ascertained, the 4.6 million dollar loss determined in this case, arguably, does not fully capture the defendant's conduct.

P. Ex. 6 at 17.

Petitioner nevertheless points out that her co-defendants were "jointly and severally" liable for restitution. P. Br. at 10, citing P. Ex. 6 at 19-20. Inasmuch as Petitioner was convicted of conspiracy, the fact that others were implicated is hardly surprising, but I find it irrelevant. *Petitioner's* crimes caused the program losses, without regard to the roles others may have played in helping her commit those crimes.<sup>3</sup>

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<sup>2</sup> The court also found that Petitioner's crimes cost the North Carolina Employment Security Commission \$46,059.00, and they cost the Internal Revenue Service \$1,061,820.00 (total restitution \$4,658,719.30). IG Ex. 3 at 6.

The I.G. points to the court's restitution order to establish program losses. While I agree that restitution has long been considered a reasonable measure of program losses (*see, e.g. Jason Hollady, M.D.*, DAB No. 1855 (2002), where, as here, the court makes a specific ruling, I need not consider the less direct measures of program losses. Nor am I impressed by Petitioner's attack on the court's ruling. P. Br. at 14-15. Where the facts have been adjudicated and a final decision has been made, Petitioner may not now collaterally attack that judgment on substantive or procedural grounds. 42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000).

<sup>3</sup> Petitioner also complains that her co-defendants served no jail time and have not been excluded from program participation. Not only are these complaints irrelevant to the issues before me, she is apparently wrong. The I.G. notes that her co-defendants have been excluded. I.G. Reply at 4 n.4.

Because the financial losses were significantly in excess of the threshold amount for aggravation (more than 700 times greater), the I.G. may justifiably increase significantly the period of exclusion. *See Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein*, PhD., DAB No. 1865 (2003).

I consider the enormity of the program's financial losses here an exceptionally aggravating factor that compels a period of exclusion significantly longer than the five-year minimum.

Duration of crime (42 C.F.R. § 1001.102(b)(2)). Petitioner pled guilty to criminal acts that were committed over a period of close to four years, if not longer, beginning "no later than June 28, 2006, and continuing until on or about June 1, 2010," four times longer than necessary to constitute an aggravating factor. I.G. Ex. 2 at 16. Although Petitioner claims that her involvement lasted mere months, not years, she was convicted of criminal conduct that began "no later than" June 28, 2006, and continued until about June 1, 2010. She may not here collaterally attack that conviction. 42 C.F.R. § 1001.2007(d).

Incarceration (42 C.F.R. § 1001.102(b)(5)). The sentence imposed by the criminal court included a substantial prison sentence -- 12 years, seven years of which were directly attributable to her health care schemes and five to her tax offenses. I.G. Ex. 3 at 3. *See Jeremy Robinson*, DAB No. 1905 at 12 (2004) (characterizing a nine-month incarceration as "relatively substantial.").

It is noteworthy that 12 years was at the top of the sentencing range for Petitioner's offenses. P. Ex. 6 at 15. The sentencing judge emphasized that he imposed the maximum because he found Petitioner untrustworthy and "a danger to the public." P. Ex. 6 at 21. She not only "defrauded the government of something like \$4.6 million," she also "obstructed justice by telling her former employees to lie to the investigator." P. Ex. 6 at 7.

The Defendant is an educated woman and had the means and abilities to earn lawful and honest income while helping those in need.

However, she abused the trust of those individuals she espoused to assist and repeatedly and consistently bilked the government, all for her personal avarice.

P. Ex. 6 at 17.

Other offenses (42 C.F.R. § 1001.102(b)(9)). As noted above, in addition to her Medicaid-related crimes, Petitioner was convicted of failing to collect and pay over taxes and aiding and abetting, a felony. I.G. Ex. 2 at 18-19; I.G. Ex. 3 at 2.

No mitigating factors. 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 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 conviction 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 claim to have cooperated with law enforcement. *See* P. Ex. 6 at 2 (in which prosecuting counsel advises the court that any information she provided "did not rise to the level of substantially assisting the government.") Indeed, the trial judge found that she "essentially obstructed justice by instructing her former employees to lie to the investigator . . . ." P. Ex. 6 at 7. That she obstructed justice in order to evade the consequences of her illegal acts does not enhance her trustworthiness.

Based on the aggravating factors and the absence of any mitigating factor, I find the period of exclusion reasonable. I agree with the sentencing court. As the above discussion shows, Petitioner poses an extreme threat to the financial integrity of health care programs. She betrayed the trust of the Medicaid program and its beneficiaries in order to enrich herself. *See* P. Ex. 6 at 14 (Pointing out that "[t]he programs trust people like Ms. Boone. They're trusted to only bill for the things that they do . . . . These notes that were fabricated in this case completely undermine the trust that's integral to that system working.") She continued her illegal conduct for years before she was stopped. The sentencing judge was so appalled by her actions that he imposed the maximum period of incarceration. Finally, her felonious conduct was not limited to Medicaid fraud; she also deceived and stole from the state unemployment program and the IRS. I consider these aggravating circumstances powerful evidence that she is untrustworthy.

#### **IV. Conclusion**

So long as the period of exclusion is within a reasonable range, based on demonstrated criteria, I have no authority to change it. *Jeremy Robinson*, DAB No. 1905, at 5; *Joann*

*Fletcher Cash*, DAB No. 1725, at 7, *citing* 57 Fed. Reg. 3298, 3321 (1992). In this case, Petitioner's crime demonstrates that she presents a significant risk to the integrity of health care programs. I therefore sustain as reasonable the 20-year exclusion.

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/s/

Carolyn Cozad Hughes  
Administrative Law Judge