

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Valentine Okonkwo,  
(OI File No. H-16-42544-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-494

Decision No. CR4900

Date: August 2, 2017

**DECISION**

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Valentine Okonkwo, from participating in Medicare, Medicaid, and other federally funded health care programs for a period of 40 years.

**I. Background**

Petitioner requested a hearing to challenge the I.G.'s exclusion determination. I established a schedule for the parties to file briefs and proposed exhibits. My order directed the I.G. to file his pre-hearing exchange first and afforded Petitioner the opportunity to reply. Petitioner in effect jumped the gun, filing a brief before the I.G. filed his pre-hearing exchange. In light of that, I afforded Petitioner the opportunity to file a second brief after he received and had the opportunity to consider the I.G.'s arguments. The I.G. then filed his pre-hearing exchange, including five proposed exhibits, identified as I.G. Ex. 1-I.G. Ex. 5. Petitioner filed a reply brief.

I receive I.G. Exhibit (Ex.) 1-I.G. Ex. 5 into the record.

## **II. Issues, Findings of Fact and Conclusions of Law**

### **A. Issues**

The issues are whether the I.G. established grounds to exclude Petitioner and whether the 40-year exclusion imposed by the I.G. is reasonable.

### **B. Findings of Fact and Conclusions of Law**

The I.G. determined to exclude Petitioner on the authority of section 1128(a)(4) of the Social Security Act (Act). This section of the Act mandates the exclusion of any individual who is convicted of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

The evidence unequivocally proves that Petitioner was convicted of multiple felonies falling within the purview of section 1128(a)(4), thereby establishing a basis for the I.G.'s determination to exclude him. On March 18, 2016, after a trial in a federal district court, a jury convicted Petitioner of 11 felonies. I.G. Ex. 5. The jury convicted Petitioner, a pharmacist, of one charge of conspiring with others to dispense and distribute and ten charges of knowingly dispensing and distributing unlawfully Oxycodone, a Schedule II controlled substance (an opioid). I.G. Ex. 2; I.G. Ex. 5.

Petitioner asserts that there presently is pending an appeal of his convictions. There would be no basis to exclude Petitioner pursuant to section 1128(a)(4) of the Act if his convictions are reversed on appeal. However, barring a reversal, those convictions plainly establish authority to exclude. The fact that an appeal is pending doesn't vitiate or diminish that authority.

Petitioner's principal argument is that he is not guilty of the crimes of which he was convicted. He argues that he has always been honest and that he never violated any law but that he was convicted wrongfully based on the false testimony of other individuals. That argument is no defense against the I.G.'s exclusion determination. The I.G.'s authority to exclude Petitioner derives from his conviction. A jury considered the evidence against Petitioner as well as any evidence that Petitioner offered on his behalf and found him guilty of 11 felonies. I may not look behind that conviction and re-evaluate the question of Petitioner's guilt or innocence. 42 C.F.R. § 1001.2007(d).

The Act directs that any exclusion imposed pursuant to section 1128(a)(4) be for a minimum period of five years. Act, section 1128(c)(3)(B). The I.G. has discretion to impose an exclusion that is for a period that is longer than the statutory minimum. In this case the I.G. elected to exclude Petitioner for a minimum of 40 years. The I.G. relied on two regulatory grounds for exceeding the five-year minimum: that Petitioner was

convicted of crimes transpiring over a period of three years; and, that Petitioner's sentence for his crimes included a period of 292 months' imprisonment (more than 24 years). I.G. Ex. 2; I.G. Ex. 5 at 3-5.

The duration of Petitioner's crimes and his sentence plainly constitute evidence that falls within the aggravating factors justifying an exclusion of more than five years. Regulations governing the length of exclusions imposed pursuant to section 1128(a)(4) describe aggravating factors that may be used to lengthen exclusion beyond the five-year mandatory minimum and mitigating factors that may offset any aggravating factors. Aggravating factors include crimes committed over a period of more than a year and incarceration. 42 C.F.R. §§ 1001.401(c)(2)(i), (iii).

Petitioner offered no mitigating evidence. *See* 42 C.F.R. § 1001.401(c)(3). Therefore, I must decide whether the length of his exclusion is reasonable based solely on the evidence offered by the I.G. relating to aggravation.

There is no formula for deciding whether the length of exclusion is reasonable. The regulatory aggravating and mitigating factors operate as rules of evidence in the sense that they do not prescribe exclusions of any particular length but, rather, tell me only what is and what is not relevant to decide the length of exclusion. Ultimately, the question that I must answer is what does any relevant evidence say about an individual's trustworthiness to provide care to a Medicare beneficiary? I also must sustain any exclusion determination that is reasonable. My role is not to second-guess or look behind the I.G.'s determination but, rather, to decide whether that determination falls within a reasonable range of possible exclusion lengths given evidence relating to aggravation.

Here, the evidence establishes Petitioner to be extraordinarily untrustworthy. Petitioner was convicted of one felony count of conspiring to dispense or distribute and ten felony counts of knowingly dispensing and distributing unlawfully Oxycodone, a Schedule II controlled substance (opioid), over a period of three years. The duration of Petitioner's crimes establish that he engaged in a willful and protracted plan to distribute or dispense unlawfully a highly dangerous narcotic. That evidence alone justifies the very lengthy exclusion that the I.G. determined to impose. Moreover, the sentence imposed against Petitioner – more than 24 years' incarceration – is a measure of the seriousness and highly destructive nature of his crimes. This evidence in sum more than justifies the I.G.'s exclusion determination.

\_\_\_\_\_/s/\_\_\_\_\_  
Steven T. Kessel  
Administrative Law Judge