

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Catherine Lynne Cameron, R.N.  
(OI File No. H-15-4-2128-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-140

Decision No. CR4586

Date: April 14, 2016

**DECISION**

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Catherine Lynne Cameron, a registered nurse, from participating in Medicare, Medicaid, and all federal health care programs for three years. Ms. Cameron requested a hearing to dispute the length of exclusion. For the reasons explained below, I conclude that the three-year exclusion period is not unreasonable in light of one aggravating factor and one mitigating factor present in this case.

**I. Case Background and Procedural History**

In a letter dated September 30, 2015, the IG notified Ms. Cameron that, pursuant to 42 U.S.C. § 1320a-7(b)(1), she was being excluded from participating in Medicare, Medicaid, and all federal health care programs for a period of three years effective October 20, 2015. IG Exhibit (Ex.) 1. The IG based the exclusion on Ms. Cameron's conviction in the Coxsackie Town Court of the State of New York of a misdemeanor offense related to fraud, theft, embezzlement, breach of fiduciary duty, or other financial misconduct in connection with the delivery of any health care item or service. The IG cited one aggravating and one mitigating factor in determining the length of exclusion. As aggravating, the IG cited Ms. Cameron's exclusion from the New York Medicaid

program, which was based on the same circumstances that served as the basis for the IG's exclusion. As mitigating, the IG cited the fact that Ms. Cameron was convicted of fewer than three misdemeanor offenses and the entire loss to the Government or other individual or entity as a result of the acts resulting in her conviction or similar acts was less than \$1,500. IG Ex. 1 at 1-2.

Ms. Cameron, through counsel, timely filed a request for a hearing with the Civil Remedies Division (CRD) to dispute the exclusion. The CRD Director administratively assigned this case to me to hear and decide. On December 30, 2015, I convened a prehearing conference by telephone, the substance of which is summarized in my Prehearing Order and Conference Summary (Prehearing Order) of that same date. During the prehearing conference, counsel for Ms. Cameron conceded that there was a basis for the IG to exclude Ms. Cameron under 42 U.S.C. § 1320a-7(b)(1), and agreed that the only issue to be decided was whether the three-year length of the exclusion was unreasonable. Prehearing Order ¶ 3. The IG filed a brief (IG Br.) on February 3, 2016, with IG Exs. 1 through 7. Ms. Cameron then filed a brief (P. Br.) on March 2, 2016, with P. Ex. 1. The IG filed a reply brief (IG Reply) on March 16, 2016.

## **II. Issue**

The parties agree that the only issue currently before me is whether the length of the three-year exclusion imposed by the IG is unreasonable. *See* Prehearing Order ¶ 3; IG Br. at 1-2; P. Br. at 1-2; *see also* 42 C.F.R. § 1001.2007(a)(1)(ii).

## **III. Jurisdiction**

I have jurisdiction to decide the issue stated above. 42 U.S.C. § 1320a-7(f); 42 C.F.R. §§ 1001.2007, 1005.2(a).

## **IV. Decision on the Written Record**

Petitioner did not object to any of the IG's seven proposed exhibits. Therefore, I admit IG Exs. 1-7 into the record. The IG did not object to P. Ex. 1. Therefore, I admit P. Ex. 1 into the record. Prehearing Order ¶ 5; Civil Remedies Division Procedures (CRDP) § 14(e).

Neither party has offered any witness testimony requiring cross-examination nor has either party requested an in-person (video) hearing. Prehearing Order ¶ 4; IG Br. at 6; P. Br. at 9-10; CRDP § 16(b). Accordingly, because there is no need for any in-person hearing, I issue this decision based on the written record. CRDP § 19(b), (d).

## V. Findings of Fact, Conclusions of Law, and Analysis<sup>1</sup>

The IG may exclude any individual from participation in Medicare, Medicaid, and any federal health care program defined in 42 U.S.C. § 1320a-7B(f), who has been convicted for an offense that occurred after August 21, 1996, under Federal or State law:

(A) of a criminal offense consisting of a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct —

(i) in connection with the delivery of a health care item or service, or

(ii) with respect to any act or omission in a health care program (other than those specifically described in subsection (a)(1)) operated by or financed in whole or in part by any Federal, State, or local government agency; or

(B) of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct with respect to any act or omission in a program (other than a health care program) operated by or financed in whole or in part by any Federal, State, or local government agency.

42 U.S.C. § 1320a-7(b)(1); *see* 42 C.F.R. § 1001.201(a).

It is undisputed that on October 25, 2013, Ms. Cameron pled guilty to seventh-degree criminal possession of a controlled substance and second-degree falsifying of business records, both misdemeanors. IG Ex. 5. In a disciplinary proceeding before the New York State Education Department, Office of Professional Discipline, State Board of Nursing, Ms. Cameron acknowledged that her two misdemeanor convictions were the result of stealing medication from a state correctional facility where she worked and altering facility records to conceal the theft.<sup>2</sup> IG Ex. 7 at 8; *see* IG Ex. 3. Ms. Cameron does not dispute that her convictions for criminal possession of a controlled substance

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<sup>1</sup> My findings of fact and conclusions of law appear in bold and italics.

<sup>2</sup> The Specifications of Professional Misconduct that Ms. Cameron signed as part of a Consent Order in the professional disciplinary proceeding reference three additional misdemeanor offenses for which Ms. Cameron was convicted, but appear to be wholly distinct from her theft of medication from the correctional facility. IG Ex. 7 at 8-10.

and falsification of business records related to the theft of a controlled substance provide the IG with a sufficient basis to exclude her under 42 U.S.C. § 1320a-7(b)(1). Therefore, I turn to whether the length of Ms. Cameron's exclusion is unreasonable.

***1. There is one aggravating factor (42 C.F.R. § 1001.201(b)(2)(vi)) and one mitigating factor (42 C.F.R. § 1001.102(c)(3)(i)) present in this case.***

The presumptive length of an exclusion imposed under 42 U.S.C. § 1320a-7(b)(1) is three years “unless the Secretary determines in accordance with published regulations that a shorter period is appropriate because of mitigating circumstances or that a longer period is appropriate because of aggravating circumstances.” 42 U.S.C. § 1320a-7(c)(3)(D). The regulations establish certain circumstances that the IG may consider as aggravating factors to increase an exclusion period and circumstances that the IG may consider as mitigating factors to decrease an exclusion period. 42 C.F.R. § 1001.201(b)(2)-(3). Relevant here, the aggravating factors include, among other things:

Whether the individual or entity was convicted of other offenses besides those which formed the basis for the exclusion, or 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 the imposition of the exclusion.

*Id.* § 1001.201(b)(2)(vi). The mitigating factors include, among other things:

The individual or entity was convicted of 3 or fewer offenses, and the entire amount of financial loss (both actual loss and reasonably expected loss) to a Government program or to other individuals or entities due to the acts that resulted in the conviction and similar acts is less than \$1,500[.]

*Id.* § 1001.201(b)(3)(i). Ms. Cameron does not dispute the presence of the aggravating and mitigating factors cited in the IG's exclusion notice. P. Br. at 4, 9; *see* IG Ex. 1 at 2.

***A. Aggravating factor: the New York Office of the Medicaid Inspector General excluded Ms. Cameron from the New York Medicaid program.***

In a letter dated September 14, 2015, the New York State Office of the Medicaid Inspector General (OMIG) notified Ms. Cameron that OMIG was excluding her from the New York Medicaid program. IG Ex. 6 at 1. OMIG stated that Ms. Cameron's exclusion from Medicaid was based on:

New York State regulations authorizing the immediate exclusion of a person who has been convicted of, or pled guilty to . . . a crime which relates to or results from:

- a. the furnishing of or billing for medical care, services or supplies; or
- b. participation in the performance of management or administrative services relating to furnishing medical care, services or supplies . . . .”

IG Ex. 6 at 1.

The exclusion notice letter does not say exactly which conviction formed the basis for OMIG’s action. However, OMIG’s exclusion of Ms. Cameron from the New York Medicaid program is more likely than not based on her two October 25, 2013 misdemeanor convictions. Petitioner stole medication from her work at a correctional facility, and then altered records to cover up her theft. IG Ex. 6; IG Ex. 7 at 8. The theft of medication and subsequent cover up by falsifying records is indeed related to the furnishing of medical care, services, or supplies, or the participation in the performance of administrative services related to such care, services, or supplies. *See* IG Ex. 6 at 1. There is no evidence that Ms. Cameron had other convictions that could arguably be related to furnishing medical care, services, or supplies. *See* IG Ex. 7 at 8-10 (explaining Ms. Cameron’s other convictions were for theft of items from a department store, theft of gasoline from a gas station, and misdemeanor contempt). Accordingly, the only reasonable conclusion is that OMIG was referring to Ms. Cameron’s two October 23, 2013 misdemeanor convictions in its exclusion notice letter to her. Those two misdemeanor convictions also serve the basis of the IG’s exclusion of Ms. Cameron from Medicare, Medicaid, and all federal health care programs. IG Ex. 1 at 1-2. Thus, the evidence establishes the aggravating factor in 42 C.F.R. § 1001.201(b)(2)(vi) because it shows that Ms. Cameron has been the subject of an adverse action by a state agency, and the adverse action adverse action is based on the same set of circumstances that serves as the basis for the imposition of the exclusion.

***B. Mitigating factor: Ms. Cameron was convicted of fewer than three misdemeanors and her criminal conduct or related acts resulted in financial loss to the government or other entity of less than \$1,500.***

On April 13, 2013, Ms. Cameron entered into a plea agreement in which she agreed to plead guilty to seventh-degree possession of a controlled substance in violation of New York Penal Law § 220.03, and second-degree falsification of a business record in violation of New York Penal Law § 175.05. IG Ex. 4. Ms. Cameron had also been charged with petit theft, a misdemeanor, but she did not plead guilty to that offense as

part of the plea agreement. IG Ex. 4. On October 23, 2013, the trial court accepted Ms. Cameron's guilty plea to the two offenses stated above. IG Ex. 5. Under New York law, both seventh-degree possession of a controlled substance and second-degree falsification of a business record are "class A" misdemeanors. N.Y. Penal Law §§ 175.05, 220.03. Further, there is no evidence in the record that Ms. Cameron's offenses resulted in any financial loss to the government or other individual or entity. The trial court sentenced Ms. Cameron to criminal fines, but did not order any restitution. IG Ex. 5. Indeed, the IG concedes that Ms. Cameron's offenses "caused no demonstrable financial loss" to the government or otherwise. IG Br. at 5. Therefore, the evidence before me establishes the mitigating factor in 42 C.F.R. § 1001.201(b)(3)(i) because it shows that Ms. Cameron was convicted of two misdemeanors and those offenses caused no financial loss.

***2. A three-year exclusion period is not unreasonable.***

I must uphold the IG's determination as to the length of exclusion if it is not unreasonable. 42 C.F.R. § 1001.2007(a)(1)(ii). The Secretary of Health and Human Services explained in the preamble to the final rule establishing the exclusion regulations: "So long as the amount of time chosen by the [IG] is within a reasonable range, based on demonstrated criteria, the [administrative law judge] has no authority to change it under this rule. We believe that the deference § 1001.2007(a)[ ] grants to the [IG] is appropriate, given the [IG]'s vast experience in implementing exclusions under these authorities." 57 Fed. Reg. 3327, 3321 (Jan. 29, 1992). It is the quality of the aggravating (or mitigating) factors that is most important when considering the length of exclusion and not the sheer number of aggravating factors that are present in a given case. The preamble further indicates:

We do not intend for the aggravating and mitigating factors to have specific values; rather, these factors must be evaluated based on the circumstances of a particular case. For example, in one case many aggravating factors may exist, but the subject's cooperation with the [IG] may be so significant that it is appropriate to give that one mitigating factor more weight than all of the aggravating. Similarly, many mitigating factors may exist in a case, but the acts could have had such a significant physical impact on program beneficiaries that the existence of that one aggravating factor must be given more weight than all of the mitigating. The weight accorded to each mitigating and aggravating factor cannot be established according to a rigid formula, but must be determined in the context of the particular case at issue.

57 Fed. Reg. at 3314-3315.

Ms. Cameron argues that the three-year exclusion period is unreasonable because a “nuanced assessment of the aggravating and mitigating factor show that they are not equal in weight and that the mitigating factor should have been given greater weight resulting in an exclusion below the three-year benchmark as provided for” in 42 C.F.R. § 1001.201(b). P. Br. at 5. She argues that the aggravating factor in this case is premised on the results of Ms. Cameron’s professional disciplinary proceeding because it was that disciplinary proceeding that subsequently triggered OMIG’s exclusion of her from the New York Medicaid program. P. Br. at 5. She also notes that OMIG’s exclusion of her has no defined period, and she is “free to request enrollment or reinstatement in the New York Medicaid Program,” which thus lessens the severity of OMIG’s exclusion action. P. Br. at 8. Ms. Cameron also points to her prior substance addiction as the underlying cause for her criminal conduct and professional misconduct, but asserts that she has sought treatment and addressed her addiction “in a substantive way.” P. Br. at 6-7; P. Ex. 1. Additionally, according to Ms. Cameron, if considering the “circumstances surrounding the factors that are present,” the IG should have recognized the weakness of the aggravating factor, given more weight to the mitigating factor, and thus reduced the exclusion period below three years. P. Br. at 6.

Ms. Cameron’s description of the OMIG exclusion from the New York Medicaid program is not accurate. OMIG did not mention the results of Ms. Cameron’s disciplinary proceeding in its notice letter, but instead cited a New York regulation that authorizes exclusion from Medicaid based on a medical-care related criminal conviction. *See* IG Ex. 6 at 1 (citing N.Y. Comp. Codes R & Regs. tit. 18 § 515.7(c)). Even if OMIG obtained knowledge of Ms. Cameron’s convictions based on the outcome of her professional disciplinary proceeding, the actual exclusion from the New York Medicaid program, and thus the aggravating factor in this case, was based on Ms. Cameron’s misdemeanor convictions. Moreover, the fact that Ms. Cameron may have been able to apply for reinstatement in the New York Medicaid program after OMIG exclusion does not guarantee that she would have actually been reinstated to that program. Indeed, she remained excluded from the New York Medicaid program at the time the IG excluded her from all federal health care programs, which greatly undercuts Ms. Cameron’s argument. Therefore, I do not find Ms. Cameron’s arguments on these points to be persuasive.

In addition, substance addiction is not a recognized mitigating factor, as Ms. Cameron concedes in her brief (P. Br. at 7), yet she has attempted to use her addiction to reduce, *i.e.*, mitigate, the weight of the aggravating factor. *See* 42 C.F.R. § 1001.201(b)(3). The regulations only permit consideration of the factors specifically identified as aggravating or mitigating. *Id.* Ms. Cameron has used her prior substance addiction problem to frame her overall argument and then asks that I consider the “circumstances surrounding” the aggravating and mitigating factors. P. Br. at 6-7. However, while it is laudable that Ms. Cameron has sought treatment for what she argues was the root cause of her criminal conduct, I cannot consider that fact to mitigate the weight of the aggravating factor in this case.

The mitigating factor in this case warrants a fair amount of weight. Ms. Cameron ultimately pled guilty to two misdemeanor offenses and did not cause any financial loss to the government or anyone else. IG Ex. 5. Her criminal conduct does not appear to have been motivated by profit or defrauding the government or other entity of money. Instead, the facts of Ms. Cameron's case support her position that she stole the morphine to supply her substance addiction problem. IG Ex. 7 at 8; P. Ex. 1. Nevertheless, there can be no doubt that Ms. Cameron's criminal offenses were serious. She used her position as a health care practitioner to access controlled substances unlawfully and then covered up her theft by falsifying documents. IG Ex. 7 at 8. That conduct, regardless of its motivation, has the potential to impact health care programs in a serious way. For that reason the mitigating factor, while worthy of some weight, should not receive the substantial amount of weight for which Ms. Cameron argues.

Therefore, I conclude that a three year exclusion period is not unreasonable.

## **VI. Conclusion**

I affirm the IG's determination to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs for a period of three years.

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/s/

Scott Anderson  
Administrative Law Judge