

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Gregory M. Manga, R.Ph.,)	DATE: January 18, 1996
)	
Petitioner,)	
)	
- v. -)	Docket No. C-95-164
)	Decision No. CR409
The Inspector General.)	
_____)	

DECISION

The I.G. excluded Petitioner from participating in Medicare and Medicaid for ten years, pursuant to section 1128(a)(1) of the Social Security Act (Act).¹ I conclude that the I.G. had authority to exclude Petitioner and that the duration of the exclusion is reasonable.

I. Background

On July 25, 1995, the I.G. sent a notice of exclusion to Petitioner. Petitioner requested a hearing, and the case was assigned to me. At a prehearing conference, Petitioner and the I.G. agreed that an in-person hearing was not necessary, and that the case could be decided based on written submissions, including briefs and exhibits. The parties briefed the issues. Additionally, the I.G. submitted three proposed exhibits with her brief and a fourth proposed exhibit with her reply.² Petitioner did not object to my receiving these exhibits into evidence. Therefore, I receive into evidence I.G. Exs. 1 - 4.

¹ I use the term "Medicaid" to refer to all State health care programs described in section 1128(h) of the Act.

² Although the I.G. offered I.G. Ex. 4, the I.G. objected to my admitting the exhibit into evidence. The I.G.'s objections are hereby overruled.

II. Issues, findings of fact, and conclusions of law

The issues in this case are whether the I.G. had authority to exclude Petitioner, and whether the duration of the exclusion is reasonable. I make the following findings of fact and conclusions of law (Findings), which I discuss, in detail, below.

1. Section 1128(a)(1) of the Act requires the Secretary to exclude any individual who is convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid.
2. Petitioner was convicted of a criminal offense related to items or services delivered under the Pennsylvania Medicaid program and, therefore, was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act.
3. The I.G. was not limited to imposing a five-year exclusion against Petitioner.
4. An exclusion imposed under section 1128(a)(1) must be for a minimum duration of five years.
5. Regulations provide that an exclusion of more than five years may be imposed in any case where there exist aggravating factors, which are not offset by mitigating factors.
6. The I.G. proved that two aggravating factors exist.
7. Petitioner did not prove that any mitigating factors exist.
8. The degree of untrustworthiness established in this case proves that an exclusion of ten years is reasonable.

III. Analysis

A. The I.G.'s authority to exclude Petitioner (Findings 1 and 2)

Section 1128(a)(1) of the Act mandates the Secretary of the United States Department of Health and Human Services, or her delegate, the I.G., to exclude from participation in Medicare or Medicaid any individual or entity who is convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid. Petitioner pleaded guilty to, and was convicted of, a scheme to defraud the Pennsylvania

Medical Assistance Program, by knowingly and intentionally submitting to that program reimbursement claims for services which he had not provided. I.G. Exs. 1, 3.

The I.G. avers that the Pennsylvania Medical Assistance Program is the Pennsylvania Medicaid program. I.G.'s brief at 1. Petitioner has not denied this assertion. I conclude that the Pennsylvania Medical Assistance Program is the Pennsylvania Medicaid program.

The offense of which Petitioner was convicted consists of perpetrating a fraud against the Pennsylvania Medicaid program. Conviction of such an offense has been held to be conviction of a criminal offense as defined by section 1128(a)(1). Jack W. Greene, DAB 1078 (1989), aff'd, Greene v. Sullivan, 731 F. Supp. 835 and 838 (E.D. Tenn. 1990). Thus, I conclude that Petitioner was convicted of an offense within the meaning of section 1128(a)(1) of the Act.

B. The duration of the exclusion (Findings 3 - 8)

1. Petitioner's argument that the I.G. agreed to impose an exclusion of five years (Finding 3)

Petitioner argues that he was excluded by the I.G. only for a period of five years. See I.G. Ex. 4. This argument is incorrect. The exhibit on which Petitioner relies is the notice which the I.G. sent to Petitioner in June 1995, proposing to exclude Petitioner. In that proposal, the I.G. advised Petitioner that she intended to exclude Petitioner for five years. Although the June 1995 notice was a clear statement of the I.G.'s intent as of June 1995, it did not constitute a guarantee that the I.G. would limit the exclusion only to five years. In fact, as is evident from the July 25, 1995 notice of exclusion which the I.G. sent to Petitioner, the I.G. superseded her original intent to exclude for five years with a ten-year exclusion. I find that no rights inured to Petitioner from the June 1995 notice, nor do I conclude that the I.G.'s determination to impose a lengthier exclusion than that contemplated originally by the I.G. deprived Petitioner of due process. The July 1995 notification gave Petitioner adequate notice of the I.G.'s determination, and adequate opportunity to request a hearing and to challenge the exclusion.

2. The criteria which govern the length of exclusions imposed under section 1128(a)(1) (Findings 4 and 5)

The Act mandates the I.G. to exclude, for a minimum of five years, an individual who is convicted of an offense described in section 1128(a)(1). Act, section 1128(c)(3)(B). Here, the I.G. excluded Petitioner for ten years. The remaining issue, therefore, is whether the ten-year exclusion is reasonable.

Section 1128 is a remedial statute. The purpose of an exclusion imposed under section 1128, including an exclusion imposed under section 1128(a)(1), is not to punish the excluded party, but to protect the integrity of federally funded health care programs, and the beneficiaries and recipients of those programs, from an untrustworthy individual. The Secretary has published regulations which establish criteria for determining whether an exclusion imposed under section 1128 is reasonable. 42 C.F.R. Part 1001. The regulation which establishes the criteria for assessing the duration of an exclusion imposed under section 1128(a)(1) of the Act is 42 C.F.R. § 1001.102.

That regulation provides that the I.G. may impose an exclusion of more than five years in any case where there exist one or more aggravating factors which are not offset by one or more mitigating factors. 42 C.F.R. § 1001.102(b), (c). The factors which may be aggravating or mitigating are enumerated specifically in the regulation. Id. I may not consider evidence relating to the duration of an exclusion unless that evidence relates to one of the aggravating or mitigating factors which are identified in the regulation.

In a case involving an exclusion imposed under section 1128(a)(1), the presence of an aggravating factor or factors not offset by the presence of a mitigating factor or factors, does not automatically justify an exclusion of more than five years. The regulations contain no formula for assigning weight to aggravating and mitigating factors. It is apparent both from the regulations themselves, and from the Act's remedial purpose, that I must explore in detail, and assign appropriate weight to, those factors which are aggravating or mitigating.

3. The presence of aggravating factors (Finding 6)

The I.G. alleged that there are three aggravating factors present in this case. The alleged aggravating factors are that Petitioner: (1) defrauded the Pennsylvania Medicaid program of more than \$1,500; (2) committed his criminal acts over a period of more than one year; and

(3) committed criminal acts which harmed recipients of the Pennsylvania Medicaid program.

The I.G. proved the existence of two aggravating factors. First, the undisputed evidence is that Petitioner defrauded the Pennsylvania Medicaid program of more than \$1,500. Under 42 C.F.R. § 1001.102(b)(1), an aggravating factor exists if an individual engages in acts resulting in financial loss to Medicare or Medicaid of \$1,500 or more. Here, Petitioner was charged with defrauding the Pennsylvania Medicaid program of more than \$175,000. I.G. Ex. 1 at 7. He was sentenced to pay restitution of \$200,000. I.G. Ex. 3.

Second, Petitioner committed his crime over a period of more than one year. Under 42 C.F.R. § 1001.102(b)(2), an aggravating factor exists if an individual engages in criminal acts against Medicare or Medicaid of more than a year's duration. Here, Petitioner was charged with and convicted of engaging in fraud against Medicaid over a period of more than four years. I.G. Exs. 1, 3.

The I.G. did not prove the existence of the third alleged aggravating factor. Under 42 C.F.R. § 1001.102(b)(3), an aggravating factor exists if an individual's crimes had a significant adverse physical, mental or financial impact on one or more program beneficiaries or other individuals. The I.G. argues that this section means that the aggravating factor is established any time it is proved that an individual engages in crimes which have a significant adverse financial impact on a program, such as a State Medicaid program. The I.G.'s theory is that such a crime deprives the program of money which might otherwise have been spent on recipients' medical care. Under this theory, recipients are harmed indirectly by crimes against the program, because they are denied funding for needed medical care.

I disagree with this asserted interpretation of the regulation. I read this section as establishing a basis for finding an aggravating factor where an individual engages in a crime that harms a beneficiary or recipient directly, such as a crime involving physical or psychological abuse, or a crime involving fraud against a beneficiary or recipient. The section may be read also as establishing a basis for an aggravating factor where the I.G. proves that a crime directed against a program has an actual, and not just a theoretical, adverse impact on the beneficiaries or recipients of that program. However, I do not read this section to mean that an adverse impact on beneficiaries or recipients can be

predicated automatically based on any offense which has an adverse financial impact on federally funded programs.

If I were to interpret this section as the I.G. reads it, then the section would essentially duplicate 42 C.F.R. § 1001.102(b)(1). This would mean that, any time an aggravating factor was established under 42 C.F.R. § 1001.102(b)(1), then, virtually automatically, a second aggravating factor would be established under 42 C.F.R. § 1001.102(b)(3). It does not appear reasonable that the Secretary would want the regulations to be read so as to, in effect, turn the presence of a single aggravating factor into the presence of two aggravating factors.

The I.G. has not proved that Petitioner's crime directly harmed beneficiaries or recipients of federally funded programs. Moreover, even if I were to agree with the I.G.'s theory that a financial loss to the Medicaid program could be interpreted as an aggravating factor under 42 C.F.R. § 1001.102(b)(3), the I.G. has not proved that Pennsylvania's Medicaid program was deprived of funds that it would otherwise have paid to provide health care to recipients, as a consequence of Petitioner's crime.

4. The absence of mitigating factors (Finding 7)

Petitioner did not prove the presence of any mitigating factors. See 42 C.F.R. § 1001.102(c)(1) - (3). Petitioner asserts that he has no prior criminal or anti-social record, and that he engaged in fraud only as a means of saving his business. Petitioner's brief at 1 - 2. Even if true, these assertions do not establish the presence of any mitigating factors under 42 C.F.R. § 1001.102(c)(1) - (3).

C. Evaluation of the duration of the exclusion (Finding 8)

The presence of two aggravating factors not offset by a mitigating factor means that an exclusion of more than five years may be reasonable. It does not direct an exclusion of any particular length, however.

In this case, the un rebutted evidence relating to the aggravating factors proved by the I.G. shows Petitioner to be a highly untrustworthy individual. Petitioner operated a pharmacy. I.G. Ex. 1 at 3. Petitioner's fraud consisted of submitting hundreds of falsified claims to the Pennsylvania Medicaid program for drugs which, in fact, Petitioner had never dispensed. Id. at 3

- 4, 6. In order to perpetrate this fraud, Petitioner deliberately created over 900 claims in which he inserted false information, including recipient numbers, recipient names, and physician license numbers. Id. at 3 - 6. Petitioner committed this offense over a period of more than four years, and succeeded in defrauding Medicaid of more than \$175,000.

The evidence proves that Petitioner's crime involved a high degree of planning and persistence. It was a deliberate, sophisticated crime, which, for a time, was extremely successful. I conclude from this evidence that Petitioner is capable of engaging in extraordinarily dishonest conduct. Under the circumstances, a ten-year exclusion is reasonable, in order to protect federally funded programs from the possibility that Petitioner might perpetrate such dishonesty against these programs in the future.

IV. Conclusion

I conclude that the I.G. was authorized to exclude Petitioner. A ten-year exclusion is reasonable in this case.

/s/

Steven T. Kessel
Administrative Law Judge