

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Tito B. Trinidad, M.D.,)	Date: March 24, 1997
)	
Petitioner,)	
)	
- v. -)	Docket No. C-97-059
)	Decision No. CR468
The Inspector General.)	
)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Tito B. Trinidad, M.D., for ten years, pursuant to section 1128(a)(1) of the Social Security Act (Act).

I. Background

On October 21, 1996, the I.G. notified Petitioner that he was being excluded from participation in Medicare and State health care programs, including Medicaid, for a period of ten years. The I.G. advised Petitioner that she was excluding him pursuant to section 1128(a)(1) of the Act, based on Petitioner's conviction of a criminal offense related to the delivery of an item or service under the Pennsylvania Medical Assistance Program, the Medicaid program for the State of Pennsylvania.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. The parties agreed that the case could be heard and decided based on written submissions, including the submission of briefs, reply briefs, and proposed exhibits.

The I.G. submitted a brief, a reply brief, and eight proposed exhibits (I.G. Ex. 1 - 8). Petitioner submitted a brief, a reply brief, and three proposed exhibits, which Petitioner designated as exhibits "A", "B", and "C". For the purposes of maintaining a uniform record in this case, I have redesignated Petitioner's Exhibit "A" as P. Ex. 1, Petitioner's Exhibit "B" as P. Ex. 2, and Petitioner's Exhibit

“C” as P. Ex. 3. I hereby receive into evidence I.G. Ex. 1 - 8 and P. Ex. 1 - 3. I base my decision in this case on the relevant law, the parties’ exhibits, and their briefs.

II. Issues, findings of fact and conclusions of law

The issues in this case are whether: (1) the I.G. is authorized to exclude Petitioner pursuant to section 1128(a)(1) of the Act; and (2) the ten-year exclusion that the I.G. imposed against Petitioner is reasonable. I make the following findings of fact and conclusions of law (Findings) to support my decision that the exclusion that the I.G. imposed against Petitioner is authorized and reasonable. I discuss my Findings at Part III. of this decision.

1. Petitioner is a physician. ■
2. On November 29, 1995, a criminal information was filed against Petitioner in the United States District Court for the Western District of Pennsylvania.
3. The information charged Petitioner, in Count 1, with devising and carrying out a scheme and artifice, beginning in around June 1993, and continuing until around February 1994, to defraud the Pennsylvania Medicaid program.
4. The information charged Petitioner additionally, in Count 2, with intentionally and unlawfully distributing oxycodone, in the form of Percocet tablets, a Schedule II narcotic controlled substance. ■
5. On April 17, 1996, Petitioner pleaded guilty to Count 1 and Count 2 of the information.
6. Petitioner was sentenced to pay restitution in the amount of \$27,500.
7. Petitioner was sentenced to a term of incarceration of 18 months.
8. During the period beginning in and around June 1993, and continuing until around February 1994, Petitioner unlawfully prescribed quantities of Percocet, a narcotic, to several individuals without evidence that the Percocet was medically necessary.
9. Petitioner has provided substantial cooperation to prosecuting authorities, in connections with investigations of other individuals or entities. Petitioner did not prove that the cooperation he provided resulted in the conviction of other individuals or entities.

10. The I.G. is required to exclude an individual pursuant to section 1128(a)(1) of the Act for a period of at least five years where that individual is convicted of a criminal offense related to the delivery of an item or service under a State Medicaid program.

11. The I.G. may exclude an individual pursuant to section 1128(a)(1) of the Act for more than five years where there exists an aggravating factor or factors which is not offset by a mitigating factor or factors.

12. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Pennsylvania Medicaid program, and consequently, the I.G. is required to exclude Petitioner, pursuant to section 1128(a)(1) of the Act, for a period of at least five years.

13. The I.G. proved the presence of an aggravating factor in that Petitioner's criminal acts caused damages to the Pennsylvania Medicaid program in an amount greater than \$1,500.

14. The I.G. proved the presence of a second aggravating factor in that Petitioner was sentenced to a period of incarceration for his crimes.

15. The I.G. proved the presence of a third aggravating factor in that the acts which resulted in Petitioner's conviction had an adverse physical or mental impact on one or more program beneficiaries or other individuals.

16. Petitioner did not prove the presence of any mitigating factor.

17. The presence of aggravating factors, not offset by mitigating factors, establishes Petitioner to be a highly untrustworthy individual. Based on this evidence, a ten-year exclusion is reasonable.

III. Discussion

A. The relevant facts (Findings 1 - 9)

Petitioner is a physician. I.G. Ex. 6, at 1. On November 29, 1995, a criminal information was filed against Petitioner in the United States District Court for the Western District of Pennsylvania. I.G. Ex. 6. The information charged Petitioner with two counts of criminal misconduct. Id.

The information charged that, from in or around June 1993 until in or around February 1994, Petitioner devised and intended to devise a scheme and artifice to defraud the Pennsylvania Medicaid program by means of false and fraudulent pretenses, representations, and promises. I.G. Ex. 6, at 3. Petitioner was

charged with having conducted 13 office visits with Medicaid patients during which Petitioner failed to conduct any physical examination of the patients, failed to provide any medical service to them, and failed to engage in any discussion concerning the health of the patients. Id. Petitioner was charged with furthering the scheme and artifice by falsifying Medicaid claim forms for the 13 office visits, in which he fraudulently represented that he had provided medically necessary procedures to the patients, when in fact, he had not. Id. at 3 - 4. Petitioner was charged additionally with using the United States mails to further his scheme or artifice by mailing false Medicaid claim forms for services that Petitioner allegedly had provided to the 13 patients in which he fraudulently claimed reimbursement for services, when in fact, Petitioner had not provided any medically necessary services to any of the 13 patients. Id.

The information charged additionally that Petitioner had furthered his scheme and artifice by prescribing to Medicaid patients Percocet, a Schedule II narcotic drug controlled substance, for no legitimate purpose. I.G. Ex. 6, at 3. The information asserted that Petitioner had prescribed Percocet in the absence of any physical examination, medical service, or medical discussion concerning patients' physical health. Id. In a second count, the information specifically asserted that Petitioner knowingly, intentionally, and unlawfully, distributed Percocet. I.G. Ex. 6, at 6.

The information was based on investigative interviews conducted with a number of witnesses. I.G. Ex. 1 - 5. Statements given to prosecuting authorities included statements by several individuals who admitted that Petitioner had supplied them with quantities of Percocet. I.G. Ex. 1; I.G. Ex. 3; I.G. Ex. 4. One witness averred that Petitioner admitted to her that he knew that the patient was taking Percocet for recreational use, but that, notwithstanding, Petitioner continued to prescribe Percocet to the patient. I.G. Ex. 3, at 2. This witness asserted that Petitioner seldom actually examined her. Id. Another witness stated that he had visited Petitioner on approximately 100 occasions to obtain Percocet. I.G. Ex. 4.

The investigative reports included an interview with another physician who averred that, over the years, he had seen numerous patients who were addicted to Percocet. I.G. Ex. 2. According to this physician, these patients were receiving their prescriptions for Percocet from Petitioner. Id.

Petitioner did not deny the truth of the contents of any of these investigative reports. In the absence of any credible denial, I find these reports to be credible and to establish the conduct which Petitioner engaged in that is the basis for the criminal charges that were filed against Petitioner.

On April 29, 1996, Petitioner pled guilty to both counts of the information. I.G. Ex. 8. He was sentenced to pay restitution in the amount of \$27,500. Id. at 4. Petitioner was sentenced to a term of 18 months' imprisonment on [REDACTED] count of the information, with the two sentences to be served concurrently. [REDACTED] at 2.

The sentence of incarceration represented a downward departure from what would normally be imposed, based on federal sentencing guidelines. I.G. Ex. 8, at 6. The downward departure in Petitioner's prison sentence was based on a motion filed by the United States Attorney. P. Ex. 2. In that motion, the United States Attorney requested that Petitioner's sentence be reduced, due to substantial cooperation that Petitioner had provided. According to the United States Attorney, Petitioner had contributed substantially to the continued investigation of narcotics laws violators. Id. at 2. He recited that Petitioner had agreed to provide, if called upon, truthful testimony in grand jury, pretrial, trial, sentencing and post-conviction proceedings.

The evidence offered by Petitioner concerning his cooperation with prosecuting authorities proves that he has cooperated with these authorities, and that they consider the information which Petitioner supplied to them to be valuable. However, there is no evidence that Petitioner's cooperation has resulted in the conviction of other individuals or entities. See P. Ex. 2.

B. The governing law (Findings 10 - 11)

The I.G. excluded Petitioner based on her determination that Petitioner was convicted of a criminal offense under section 1128(a)(1) of the Act. Section 1128(a)(1) mandates exclusion of any individual who is convicted of a criminal offense related to the delivery of an item or service under Medicare or a State health care program, including any State Medicaid program. The minimum exclusion period for an individual excluded pursuant to section 1128(a)(1) is five years. Act, section 1128(c)(3)(B).

Section 1128 is a remedial statute. Its purpose is not to punish offenders, but to ensure that federally-funded health care programs, and the beneficiaries and recipients of these programs, are protected from untrustworthy individuals and entities. An exclusion must comport with the Act's remedial purpose in order to be reasonable.

The Secretary of the United States Department of Health and Human Services (Secretary) has published regulations which contain criteria for determining the length of exclusions imposed under section 1128 of the Act. These regulations are set forth at 42 C.F.R. Part 1001. The regulation which establishes criteria for determining the length of an exclusion imposed under section 1128(a)(1) of the Act is at 42 C.F.R. § 1001.102.

The regulation provides that an exclusion imposed under section 1128(a)(1) may be for more than five years if there exists a factor or factors in a case which the regulation defines to be aggravating, which are not offset by a factor or factors which the regulation defines to be mitigating. 42 C.F.R. § 1001.102(b), (c). The regulation makes it plain that only evidence which relates to specified aggravating or mitigating factors may be considered in determining what may be a reasonable exclusion under section 1128(a)(1). *Id.* Evidence which does not relate to one of the specified aggravating or mitigating factors may not be considered.

The presence in a case of an aggravating factor or factors, even if not offset by the presence of a mitigating factor or factors, does not mean that an exclusion of more than five years must be imposed in that case. While an exclusion of more than five years may be authorized, the evidence pertaining to aggravating and mitigating factors must be examined to see what it shows about the individual's or entity's trustworthiness to provide care.

C. Application of the law to the relevant facts (Findings 12 - 17)

Petitioner has not denied that he was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act. I find from the evidence that it is manifest that he was convicted of such an offense. Petitioner pled guilty to a scheme and an artifice to defraud the Pennsylvania Medicaid program, a federally-funded health care program. Fraud directed against a federally-funded health care program is a criminal offense related to the delivery of an item or service under that program. It would not have been possible for Petitioner to have perpetrated his fraud, but for his false reimbursement claims for services that he allegedly delivered to Medicaid recipients.

The I.G. must exclude Petitioner, inasmuch as Petitioner has been convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act. The minimum exclusion that I may sustain in this case is for five years.

There remains the issue of whether the ten-year exclusion that the I.G. imposed is reasonable. I find that it is reasonable, based on the presence in this case of aggravating factors that are not offset by mitigating factors. I am convinced that Petitioner is a highly untrustworthy individual, particularly by evidence that he engaged in conduct that damaged the health of his patients.

The I.G. alleged and proved the presence of three aggravating factors. These are as follows.

- Petitioner's criminal acts damaged the Pennsylvania Medicaid program in an amount in excess of \$1500. 42 C.F.R. § 1001.102(b)(1). I make this conclusion based on Petitioner's sentence that he pay restitution for his crimes in the amount of \$27,500. I.G. Ex. 8, at 4. I infer that the amount of restitution is at least an approximation of the damages that Petitioner caused by his fraud to the Pennsylvania Medicaid program.

- Petitioner was sentenced to incarceration for his fraud. 42 C.F.R. § 1001.102(b)(4). The record of Petitioner's sentencing establishes that he was sentenced to serve two 18-month terms of imprisonment, to be served concurrently. I.G. Ex. 8, at 2.

- Petitioner's criminal acts caused physical harm to Medicaid recipients or other individuals. 42 C.F.R. § 1001.102(b)(3). The un rebutted evidence offered by the I.G. proves that Petitioner prescribed Percocet, a Schedule II controlled narcotic substance, to Medicaid recipients, without there being a medical necessity for the prescriptions. I.G. Ex. 1, 3, 4. Petitioner knew that at least one of his patients was using Percocet for recreational, and not for medical, purposes. I.G. Ex. 3, at 2. Yet, Petitioner continued to supply Percocet to this patient. *Id.* Petitioner was, in fact, serving as a source of supply of Percocet for numerous addicted individuals. I.G. Ex. 2.

I do not find that Petitioner proved the presence of any mitigating factors. Petitioner proved that he cooperated with prosecuting authorities, and that these authorities consider Petitioner's cooperation to have been valuable. Petitioner's cooperation was a principal reason that the United States Attorney moved to have Petitioner's sentence of incarceration set at a level below that which is normally required for the crimes of which Petitioner was convicted.

However, this evidence does not prove the presence of a mitigating factor. Under the regulation which governs the length of exclusions imposed pursuant to section 1128(a)(1) of the Act, cooperation with prosecuting officials is not a mitigating factor unless it results in the conviction of other individuals. 42 C.F.R. § 1001.102(c)(3)(i). Here, there is no evidence that others were convicted as a result of Petitioner's cooperation. See P. Ex. 2.

Petitioner did not prove the presence of any other mitigating factors. Petitioner has offered statements by patients and other individuals attesting to his skill as a physician and his dedication to the welfare of his patients. Assuming these statements to be true, they do not comprise proof of any mitigating factor stated in the regulations. See 42 C.F.R. § 1001.102(c)(1) - (3).

The amount of Petitioner's fraud is substantial, and is strong evidence that Petitioner is not trustworthy. I would be inclined to sustain an exclusion of more than five years based on that evidence alone.

However, I find the evidence of the quantity of Petitioner's fraud to be not nearly so serious evidence of a lack of trustworthiness as is the evidence which proves that Petitioner engaged in conduct that was harmful to his patients. It is apparent, from evidence proving that Petitioner prescribed narcotics to patients whom Petitioner knew were addicts who had no medical need for narcotics, that Petitioner was manifestly indifferent to the health and safety of his patients.

I find a ten-year exclusion to be reasonable in this case because of the high degree of untrustworthiness displayed by Petitioner. A lengthy exclusion is necessary, both to protect the integrity of federally-funded health care programs, and to protect the health and safety of beneficiaries and recipients of those programs.

Although Petitioner did not prove that his cooperation with prosecuting authorities is a mitigating factor, I would be inclined to sustain a ten-year exclusion in this case even had Petitioner proved that his cooperation resulted in the conviction of others. That is because I find that the evidence of Petitioner's unlawful prescription of narcotics shows Petitioner to be so manifestly untrustworthy, that I would not find such evidence to be offset by proof of subsequent cooperation by Petitioner with prosecutors.

IV. Conclusion

I conclude that the I.G. is required to exclude Petitioner for at least five years pursuant to section 1128(a)(1) of the Act, because Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Pennsylvania Medicaid program. I conclude also that a ten-year exclusion is reasonable.

/s/

Steven T. Kessel
Administrative Law Judge