

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Rose M. Ray-Vasser,  
(OI File No. 7-11-40100-9)

Petitioner,

v.

The Inspector General.

Docket No. C-14-832

Decision No. CR3365

Date: September 11, 2014

**DECISION**

I sustain the determination of the Inspector General (I.G.) of the Department of Health and Human Services to exclude Petitioner, Rose M. Ray-Vasser, from participating in Medicare, Medicaid, and all other federally funded health care programs for a minimum period of 13 years.

**I. Background**

The I.G. excluded Petitioner for 13 years based on her guilty plea in the United States District Court of the Eastern District of Missouri to one count of health care fraud. I.G. Exhibit (Ex.) 1 at 1. Petitioner requested a hearing in order to challenge the I.G.'s determination to exclude her. Following a prehearing conference by telephone, I directed the parties to file briefs and proposed exhibits. The I.G. filed a brief and two exhibits that he identified as I.G. Ex. 1 – I.G. Ex. 2. Petitioner filed a brief (P. Br.) on the same date and claimed she had not yet received the I.G.'s filing. The I.G. did not file a reply brief. On August 6, 2014, I ordered both parties to file any further argument or exhibits they wanted me to consider within five days, and I told them after that time I would close the record and review the parties' written submissions. Neither party responded to my August 6, 2014 Order.

Petitioner has not objected to the I.G.'s proposed exhibits and I receive I.G. Ex. 1 and I.G. Ex. 2 into the record. Neither party requested an in-person hearing, so I decide this case based on the written record.

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

### **A. Issues**

The issues are: whether Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Social Security Act (Act); and, whether an exclusion of at least 13 years is reasonable.

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

Section 1128(a)(1) of the Act mandates the 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 (State Medicaid program). The evidence offered by the I.G. proves conclusively that Petitioner was convicted of a crime as is described in section 1128(a)(1).

On November 30, 2012, Petitioner pled guilty to the federal crime of health care fraud. I.G. Exs. 1-2. A United States District Court entered a judgment of conviction against Petitioner based on her plea. I.G. Ex. 1. Petitioner specifically pled guilty to devising and executing a fraud scheme to pay patients for the use of their names and identifying information and to submitting false reimbursement claims to the Missouri Medicaid program for non-rendered in-home services. I.G. Ex. 2 at 5-6. Petitioner committed her fraud as a part of a calculated scheme to defraud a State Medicaid program.

Devising a scheme to defraud a State Medicaid program is an offense directly related to the delivery of and payment for services under a state health care program. Act §§ 1128(a)(1), 1128(h)(1) (defining "state health care program" to include a program under Title XIX of the Act, *i.e.*, Medicaid). The Act considers a guilty plea to be a "conviction" for purposes of section 1128. Act § 1128(i)(3). Petitioner's conviction based on executing a scheme to defraud the Missouri Medicaid program and filing of false and fraudulent reimbursement claims is precisely what is aimed at by section 1128(a)(1). It is unnecessary to analyze Petitioner's conviction beyond saying that.

An individual who is convicted of a crime described in section 1128(a)(1) must be excluded for a minimum of five years. Act § 1128(c)(3)(B). The I.G. may exclude an individual for more than the five-year minimum where there exists evidence showing that person to be so untrustworthy as to merit a longer exclusion.

There are regulatory factors that function as rules of evidence for deciding whether an exclusion of more than five years is reasonable. These factors are set forth at 42 C.F.R. § 1001.102. The regulatory factors include factors that may be aggravating or mitigating. The factors do not dictate how long any exclusion must be. Evidence that relates to an aggravating or mitigating factor may be weighed to determine an individual's trustworthiness and to decide how long of an exclusion is reasonable. Evidence that does not relate to one of the factors is irrelevant to deciding the length of an exclusion.

The I.G. offered evidence that relates to three aggravating factors. He proved that:

- Petitioner's crime caused government programs to suffer \$5,000 or more in losses. 42 C.F.R. § 1001.102(b)(1). In fact, the losses caused by Petitioner's fraud were substantial. She was ordered to pay \$398,000 in restitution to the Missouri Medicaid program. I.G. Ex. 1 at 5.
- Petitioner committed the crime resulting in her conviction over a period of more than one year. 42 C.F.R. § 1001.102(b)(2). Petitioner pled guilty to committing fraud against the Missouri Medicaid program for a period of approximately five years, from 2006 to 2011. I.G. Ex. 2 at 5.
- Petitioner was sentenced to a term of incarceration for her crime. 42 C.F.R. § 1001.102(b)(5). Petitioner was sentenced to a term of 30 months of imprisonment. I.G. Ex. 1 at 2.

The evidence that I have just cited is overwhelming proof that Petitioner is manifestly untrustworthy to provide services to program beneficiaries and is strong support for the reasonableness of an exclusion of at least 13 years. Petitioner, along with others, engaged in a planned and sustained effort to defraud the Missouri Medicaid program. By Petitioner's own admission, she filed false claims for a period of about five years and she, along with her staff, deliberately generated fraudulent documents to justify the false claims. I.G. Ex. 2 at 5-11. The impact of Petitioner's crime was substantial, as is made evident by the amount of restitution, \$398,000, that she was sentenced to pay. This establishes Petitioner to be highly untrustworthy and easily justifies the 13-year exclusion imposed by the I.G.

Petitioner does not directly challenge the presence of aggravating evidence. She asserts that she never hurt a client and was in business for over 25 years and "just did some costly things to help people." P. Br. at 6. Petitioner also has not shown the presence of any mitigating evidence. She states that she was an excellent nurse, that she needs to make a living to support herself, and she "may need to be paid by an employer with federal fund, since my professional field is in nursing." P. Br. at 6. However, these are not among the mitigating factors listed at 42 C.F.R. § 1001.102(c) and thus Petitioner's arguments are irrelevant to the issue of mitigation. Congress long ago outlined the scope

