

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Rafic A. Amro, M.D.,)	Date: December 13, 1996
Petitioner,)	
- v. -)	Docket No. C-96-314
The Inspector General.)	Decision No. CR449

DECISION

I sustain the 10-year exclusion from participating in Medicare and State health care programs (including Medicaid) which the Inspector General (I.G.) imposed against Rafic A. Amro, M.D. (Petitioner).

I. Background

On June 15, 1996, the I.G. notified Petitioner that he was being excluded from Medicare and State health care programs, for a period of 10 years. The I.G. advised Petitioner that he was being excluded pursuant to section 1128(a)(1) of the Social Security Act (Act) because Petitioner had been convicted of a criminal offense related to the delivery of an item or service under the Pennsylvania Medicaid program. The I.G. advised Petitioner further that the length of the exclusion, 10 years, was based on the presence of aggravating factors.

Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision. I held a prehearing conference, at which the parties advised me that the case could be heard and decided based on their written submissions. The I.G. submitted a brief, along with four proposed exhibits (I.G. Ex. 1 - 4). Petitioner submitted a brief and no exhibits. Petitioner did not object to my receiving into evidence the I.G.'s proposed exhibits. Therefore, I receive into evidence I.G. Ex. 1 - 4. I base my decision in this case on the law, the exhibits, and on the parties' arguments.

II. Issue, findings of fact and conclusions of law

A case involving an exclusion of more than five years imposed pursuant to section 1128(a)(1) of the Act may involve the issues of whether: (1) the excluded individual has been convicted of a criminal offense related to the delivery of an item or service under Medicare or State health care programs, thereby giving the I.G. authority to exclude that individual pursuant to section 1128(a)(1); and, (2) whether an exclusion of more than five years is reasonable. Here, Petitioner concedes that he was convicted of a program-related criminal offense as is described in section 1128(a)(1). Petitioner's brief at 1. Therefore, the only issue for me to decide is whether the 10-year exclusion that the I.G. imposed is reasonable.

In deciding that the exclusion is reasonable, I make the following findings of fact and conclusions of law (Findings), which I discuss in detail at Part III. of this decision.

1. The Act requires the Secretary, or her delegate, the I.G., to exclude for at least five years any individual who is convicted of an offense described in section 1128(a)(1) of the Act.
2. Regulations provide that an exclusion of more than five years may be imposed in any case where there exist factors which the regulations define as aggravating, and that are not offset by factors which the regulations define as mitigating.
3. The I.G. proved that there exist two aggravating factors.
4. Petitioner did not prove that there exist any mitigating factors.
5. The evidence which is relevant to the aggravating factors proves that Petitioner is a highly untrustworthy individual.
6. A 10-year exclusion is reasonable in this case.

III. Discussion

A. Governing Law (Findings 1 - 2)

The I.G. excluded Petitioner pursuant to section 1128(a)(1) of the Act. This section mandates the exclusion of any individual who has been convicted of a criminal offense related to the delivery of an item or service under Medicare or under any State health care program. An exclusion imposed under section

1128(a)(1) must be for a minimum of five years. Act, section 1128(c)(3)(B).

The Secretary has published a regulation which establishes the criteria for determining and evaluating whether an exclusion of more than five years' duration is reasonable in a case involving an exclusion imposed pursuant to section 1128(a)(1) of the Act. 42 C.F.R. § 1001.102. The regulation provides that, where any of several defined aggravating factors are present in a case, and the aggravating factor or factors are not offset by any mitigating factor or factors, then an exclusion of more than five years may be reasonable in that case. 42 C.F.R. § 1001.102(b),(c). The regulation makes it plain that, in determining and deciding whether an exclusion of more than five years is reasonable in a case involving section 1128(a)(1) of the Act, the only evidence that may be considered on the issue of reasonableness is evidence which pertains to one or more of the defined aggravating and mitigating factors. Id.

The regulation contains no formula for assigning weight to evidence that is relevant to an aggravating factor or to a mitigating factor. It is evident that, in any case, the Secretary intends that this evidence be considered in light of the Act's remedial purpose. Congress intended that the Act, including section 1128(a)(1), be applied to protect the integrity of federally funded health care programs, and the welfare of program beneficiaries and recipients, from individuals who have been shown to be untrustworthy. Exclusions imposed pursuant to section 1128(a)(1) which are for more than five years are reasonable insofar as they comport with the Act's remedial purpose. Thus, evidence pertaining to aggravating and mitigating factors must be considered in light of what the evidence says about the excluded individual's trustworthiness to provide care. If such evidence shows the excluded individual to be highly untrustworthy, then a lengthy exclusion may be reasonable.

B. The relevant evidence (Findings 3 - 4)

The evidence in this case establishes the presence of two aggravating factors. Petitioner did not prove the presence of any mitigating factors which might offset the aggravating factors.

The two aggravating factors which the I.G. alleges, and which I find to be established, are described in 42 C.F.R. § 1001.102(b)(1) and (2). First, the I.G. asserts that the acts which resulted in Petitioner's conviction, or similar acts, caused financial loss to Medicare or State health care programs of more than \$1500. 42 C.F.R. § 1001.102(b)(1). In this case, the I.G. asserts that Petitioner caused damage to the Pennsylvania Medicaid program of more than \$21,000. Second, the I.G. asserts that the acts which resulted in Petitioner's

conviction, or similar acts, were committed by Petitioner over a period of more than one year. 42 C.F.R. § 1001.102(b)(2). Specifically, the I.G. contends that Petitioner filed fraudulent claims with the Pennsylvania Medicaid program over a period of more than three years.

Petitioner does not deny that his unlawful conduct caused damage to the Pennsylvania Medicaid program in excess of \$1500. However, Petitioner does not admit that his unlawful conduct occurred over a period of more than one year and challenges the I.G.'s assertion that the evidence proves that Petitioner's unlawful conduct occurred over an extended period of time.

The evidence in this case establishes that a six-count criminal information was filed against Petitioner in a Pennsylvania State court. I.G. Ex. 2. On January 12, 1996, evidently as part of a plea bargain, Petitioner entered a nolo contendere plea to the first count of the information. Id. at 4; I.G. Ex. 4. Counts two through six of the information were dismissed. Id.

Count one of the information to which Petitioner pleaded nolo contendere alleges that, between January 2, 1990 and August 17, 1993, Petitioner knowingly and intentionally presented for allowance or payment false or fraudulent claims for Medicaid reimbursement. I.G. Ex. 2 at 1. More specifically, this count charges that, during the period between January 2, 1990 and August 17, 1993, Petitioner knowingly and intentionally submitted claims to Medicaid for electrocardiograms that he had not performed. Id.

On January 12, 1996, a judgment was entered against Petitioner, based on his plea of nolo contendere to count one of the information. I.G. Ex. 3, 4. Among other things, Petitioner was sentenced to pay restitution in the amount of \$21,000.

It is true that, in pleading nolo contendere to count one of the information, Petitioner did not explicitly admit his guilt of the offense described in that count. However, his agreement to pay restitution of \$21,000 is a tacit admission that he engaged in unlawful conduct that damaged the Pennsylvania Medicaid program in at least the amount of the restitution payment. See I.G. Ex. 4 at 7.

Furthermore, the criminal information which was filed against Petitioner is evidence of Petitioner's unlawful conduct which I can consider as proof of aggravating factors, even if Petitioner has not explicitly admitted to any of the charges in the information. The information is based on a criminal complaint authored by the special agent of the Pennsylvania Attorney General who investigated Petitioner. I.G. Ex. 1. The criminal complaint is supported by an affidavit from the special agent. I.G. Ex. 1 at 4 - 14.

Although I am not required to accept this evidence on its face, I must consider it to the extent that it is relevant. And, I must attach to it the probative value which it is due. The contents of the criminal information and the complaint have not been explicitly denied by Petitioner. Petitioner has not offered any evidence to rebut or contradict the criminal information or complaint. And, the circumstances under which the complaint was made - it being issued under oath by a special investigator for the Attorney General of Pennsylvania - suggest that it should be afforded a high degree of probative value, in the absence of any evidence which contradicts it or rebuts it.

The affidavit supporting the criminal complaint establishes that the special agent reviewed Petitioner's office records to determine whether Petitioner had maintained records of the items or services for which he submitted claims to Medicaid. I.G. Ex. 1 at 4. He interviewed Petitioner's patients, as well as a former employee of Petitioner. Id. The investigator determined that 82 of Petitioner's patients denied having had tests performed by Petitioner, for which Petitioner had claimed reimbursement from Medicaid. Id. at 10 - 11. The special agent determined also that, of over 1700 electrocardiograms for which Petitioner claimed reimbursement during the period from January 2, 1990 to August 17, 1993, there were records of only two test results present in Petitioner's files. Id. at 13. Of over 1100 spirometric w/bronchodilator tests for which Petitioner claimed reimbursement during the period between March 3, 1992 through April 19, 1993, there were records of only 14 test results present in Petitioner's files. Id.

I am persuaded from the affidavit of the special investigator, and from the un rebutted allegations of the criminal complaint and information, that the I.G. established both of the aggravating circumstances alleged. Petitioner committed his crimes against Medicaid over a period of more than three years. His crimes caused damages to Medicaid of at least \$21,000.

C. Application of the law to the evidence (Findings 5 - 6)

The evidence as to aggravating factors establishes Petitioner to be a highly untrustworthy individual. A 10-year exclusion is reasonable in light of the evidence which proves that Petitioner is not trustworthy.

The evidence proves a persistent pattern of false claims by Petitioner. I am satisfied that, during the period between January 2, 1990 and August 17, 1993, Petitioner submitted hundreds of claims for Medicaid reimbursement for items or services that he did not provide. This extended pattern of false claims demonstrates that Petitioner's crimes were not random or spur-of-the-moment events. Rather, the evidence shows that

Petitioner's crimes were calculated to extract systematically funds from Medicaid to which Petitioner was not entitled.

The gravity of Petitioner's crimes is made evident by the amount of restitution that Petitioner was sentenced to pay. The sum of \$21,000 is significant, and it demonstrates that Petitioner's crimes were extensive.

I find that Petitioner's pattern of unlawful conduct, coupled with proof of the gravity of his crimes, is ample evidence of a high degree of untrustworthiness. Given that degree of untrustworthiness, a 10-year exclusion is reasonable.

Petitioner did not argue that the length of the exclusion imposed against him by the I.G. should be limited by any agreement he made in his criminal case. I note, however, that, as an aspect of Petitioner's plea arrangement, he agreed to a five-year exclusion from the Pennsylvania Medicaid program. I.G. Ex. 3 at 2. That a State health care program may be willing to accept an exclusion of a shorter duration than the I.G. determines to be reasonable is not a factor that I may consider in deciding whether an exclusion imposed pursuant to section 1128(a)(1) is reasonable. Here, the reasonableness of the exclusion is measured solely by evidence pertaining to aggravating factors, which establishes Petitioner to be untrustworthy.

IV. Conclusion

I conclude that the 10-year exclusion the I.G. imposed against Petitioner is reasonable. Therefore, I sustain the exclusion.

/s/

Steven T. Kessel
Administrative Law Judge