Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Ronald B. Phillips,	)	Date: August 1, 1997
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-385
	)	Decision No. CR485
The Inspector General.	)	
	)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Ronald B. Phillips, D.O., from participating in the Medicare program and State health care programs, including State Medicaid programs, for five years. I conclude that the I.G. was authorized to exclude Petitioner pursuant to the pre-July 1996 version of section 1128(b)(3) of the Social Security Act (Act). Additionally, I conclude that the length of the exclusion that the I.G. imposed against Petitioner, five years, is reasonable.

As I discuss in more detail below, Petitioner is a physician. On November 27, 1995, Petitioner was convicted of unlawfully obtaining controlled substances for his own personal use. Finding 6. The conviction was based on a pattern of unlawful conduct by Petitioner. Over a period of slightly more than three years, Petitioner unlawfully issued hundreds of prescriptions for thousands of units of controlled substances which Petitioner converted to his own use. Findings 6, 7. This unlawful conduct is part of a pattern of substance abuse by Petitioner extending over a period of many years. Finding 7. The I.G. determined to exclude Petitioner. On June 15, 1996, the I.G. excluded Petitioner for five years, which exceeds by two years the three-year benchmark exclusion prescribed by regulations for a case involving a conviction relating to a controlled substance. The I.G. premised the length of the exclusion on her determination that Petitioner's prolonged pattern of substance abuse is an aggravating factor.

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 I.G. advised me that she intended to present her case against Petitioner based on written submissions, and without in-person testimony. Petitioner, through his counsel, advised me that he believed that an in-person hearing would be necessary. I directed the parties to submit their proposed exhibits and briefs addressing the merits of the case. I advised Petitioner that he could make a motion for an in-person hearing.

The I.G. submitted a brief and six proposed exhibits (I.G. Ex. 1 - 6). Petitioner submitted a brief and eleven proposed exhibits (P. Ex. 1 - 11). Each party submitted a reply brief.

Petitioner's proposed exhibits include the affidavits of six individuals. These affidavits consist of the sworn statements of: Nicholas Monti (P. Ex. 6); Philip J. Stevens, D.O. (P. Ex. 7); John T. Troup, Ph.D. (P. Ex. 8); Jon A. Shapiro, M.D. (P. Ex. 9); Dean A. Steinberg, M.D. (P. Ex. 10); and Petitioner (P. Ex. 11). Petitioner listed himself and each of the five other affiants as proposed witnesses, in the event that I scheduled an in-person hearing. Petitioner's Brief at 8 - 9.

Petitioner submitted a motion for an in-person hearing, along with his brief and proposed exhibits. Petitioner moved that I schedule an in-person hearing in the event that there were any disputes of fact concerning the credibility of Petitioner's affidavit or of the other five affidavits submitted by Petitioner.

In her reply brief, the I.G. did not argue that the affidavit testimony submitted by Petitioner lacked credibility. She asserted that the affidavit testimony offered by Petitioner in P. Ex. 6 - 10 is irrelevant. The I.G. argued additionally that the evidence in Petitioner's affidavit, P. Ex. 11, is largely irrelevant, except to the extent that it corroborates other evidence which documents a pattern of substance abuse by Petitioner.

An in-person hearing is not necessary in this case. The I.G. has not contested the credibility of the affidavit testimony offered by Petitioner. Furthermore, I agree with the I.G. that the testimony contained in P. Ex. 6 - 10 is irrelevant, and that the testimony contained in P. Ex. 11 largely is irrelevant. The evidence which I may consider in this case which is relevant to the length of an exclusion is limited to evidence addressing any of the aggravating factors or mitigating factors identified in 42 C.F.R. §§ 1001.401(c)(2) and (c)(3). Finding 4. The evidence in P. Ex. 6 - 11 does not address any of the aggravating factors or mitigating factors that are identified in the regulations, except that Petitioner's admission, in P. Ex. 11, that he abused controlled substances for a period of years, supports my conclusion that the I.G. proved the presence of an aggravating factor. I discuss in greater detail at Finding 8 my conclusion that the evidence offered by Petitioner in P. Ex. 6 - 11 largely is irrelevant.

The evidence which Petitioner offered in P. Ex. 6 - 11 is not the only irrelevant evidence which I have been asked to consider in this case. The evidence which Petitioner offered in P. Ex. 1 - 5 is largely irrelevant, because it does not relate to any aggravating or mitigating factor. Finding 8. And, some of the evidence which the I.G. offered is irrelevant because it does not relate to an aggravating factor or to a mitigating factor. Finding 7; See I.G. Ex. 2.

However, I receive into evidence I.G. Ex. 1 - 6 and P. Ex. 1 - 11. I have not based my decision on evidence which I find to be irrelevant. Therefore, the parties are not prejudiced by my receiving into evidence all of their exhibits.

The issues in this case are whether: (1) the I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(3) of the Act; and (2) the five-year exclusion that the I.G. imposed against Petitioner is reasonable. I make findings of fact and conclusions of law (Findings) to support my decision to sustain the I.G.'s exclusion determination. Below, I set forth each Finding as a separately numbered heading, and I discuss each Finding in detail.

1. Prior to July 1996, section 1128(b)(3) of the Act authorized the I.G. to exclude an individual or entity who was convicted of a criminal offense relating to a controlled substance.

Prior to July 1996, section 1128(b)(3) of the Act authorized the I.G. to exclude any individual or entity who was convicted under Federal or State law, of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Congress revised and amended section 1128 in July 1996. The revised and amended Act, which became effective in January 1997, now mandates the exclusion for at least five years of any individual or entity who is convicted of a felony relating to a controlled substance. Act, sections 1128(a)(4); 1128(c)(3)(B). It authorizes exclusion, without a minimum mandated exclusion period, of any individual or entity who is convicted of a misdemeanor relating to a controlled substance. Act, section 1128(b)(3).

2. This case is governed by the provisions of section 1128(b)(3) of the Act which predate the July 1996 revisions and amendments to section 1128.

Neither the I.G. nor Petitioner argues that this case is governed by the July 1996 revisions and amendments to section 1128. I conclude that this case is governed by the version of section 1128(b)(3) which predates the July 1996 revisions and amendments, inasmuch as the conduct at issue, including Petitioner's November 1995 conviction, predates the effective date of those revisions and amendments.

3. The purpose of an exclusion imposed under section 1128 of the Act is to protect the integrity of federally-funded health care programs, and the welfare of beneficiaries and recipients of those programs, from an individual or entity who is not trustworthy to provide care.

Section 1128 of the Act is a remedial statute. The purpose of any exclusion that is imposed pursuant to section 1128, including an exclusion imposed pursuant to the version of section 1128(b)(3) that predated the July 1996 revisions and amendments, is to protect the integrity of federally-funded health care programs, and the welfare of program beneficiaries and recipients from an individual or entity who is not trustworthy to provide care. An exclusion will be sustained if it relates reasonably to the Act's remedial purpose.

4. The Secretary has established the exclusive criteria to be used to determine trustworthiness in the case of an exclusion imposed under the pre-July 1996 version of section 1128(b)(3) of the Act.

The pre-July 1996 version of section 1128(b)(3) of the Act authorized, but did not mandate, the exclusion of an individual who was convicted of a criminal offense relating to a controlled substance. The Act did not establish specific criteria for determining whether an individual was untrustworthy. However, the Secretary published regulations which establish specific criteria for evaluating trustworthiness. The criteria to be used in cases involving the pre-July 1996 version of section 1128(b)(3) of the Act are set forth at 42 C.F.R. § 1001.401(c).

An exclusion imposed pursuant to the pre-July 1996 version of section 1128(b)(3) will be for a period of three years, in the absence of evidence which establishes the presence of either aggravating factor or factors or a mitigating factor or factors. 42 C.F.R. § 1001.401(c)(1). An exclusion may be for a period of more than three years if there exists evidence establishing an aggravating factor or factors which is not offset by evidence establishing a mitigating factor or factors. 42 C.F.R. §§ 1001.401(c)(1), (2), (3). An exclusion may be for a period of less than three years if there exists evidence establishing a mitigating factor or factors which is not offset by evidence establishing an aggravating factor or factors. Id.

The regulation identifies the sole factors which may be established as aggravating or mitigating in a case. 42 C.F.R. §§ 1001.401(c)(2), (3). In effect, the regulation establishes the rules of evidence that must be used to evaluate trustworthiness. The only evidence which I may consider on the issue of an excluded individual or entity's trustworthiness, in a case involving an exclusion imposed under the pre-July 1996 version of section 1128(b)(3), is evidence which relates to an aggravating factor or to a mitigating factor. I may not consider evidence which is offered as proof of an excluded individual or entity's trustworthiness or lack of trustworthiness if that evidence does not

relate to one of the specific aggravating or mitigating factors identified in 42 C.F.R. §§ 1001.401(c)(2) or (3).

5. I must evaluate any evidence that relates to an aggravating factor or a mitigating factor in light of the Act's remedial purpose in order to decide whether an exclusion is reasonable.

The aggravating and mitigating factors identified in 42 C.F.R. §§ 1001.401(c)(2) and (3) define what evidence is relevant to deciding an excluded individual or entity's trustworthiness to provide care but they do not establish the weight that must be assigned to such evidence. Although the presence of one or more of these factors in a case may be a basis to impose an exclusion of more than or less than three years, the presence of an aggravating or mitigating factor or factors in a case does not direct that an exclusion of any particular length be imposed. In any case where aggravating or mitigating factors are proved, I must weigh the evidence which relates to each factor or factors that is proved in order to decide whether an exclusion that is greater than or less than three years is reasonable.

In order to be meaningful, evidence which relates to an aggravating or a mitigating factor must be evaluated in light of the Act's remedial purpose. At bottom, the question that I must answer in any case where there exists proof of one of the factors is: what does that evidence establish about the excluded party's trustworthiness to provide care?

For example, an aggravating factor identified in 42 C.F.R. § 1001.401(c)(2)(i), which is at issue in this case, is that:

> The acts that resulted in the [excluded individual or entity's] conviction or similar acts were committed over a period of one year or more . . . .

Proof of unlawful conduct which occurred over a period of more than one year relating to a controlled substance would establish the presence of this aggravating factor. However, such evidence would have to be examined closely in order to decide what it shows about the trustworthiness to provide care of the excluded individual or entity. For example, proof of a few isolated acts of misconduct which occurred over a period of one year or slightly more than one year, may not establish that the excluded individual or entity is significantly more untrustworthy than would be the case if those same acts had occurred in a period of less than one year. In that circumstance, although an aggravating factor would be present, an exclusion of more than three years might be unreasonable.

On the other hand, the evidence might establish that there is a pattern of misconduct by the excluded individual or entity covering a period of substantially more than one year. In that event, the evidence relating to the aggravating factor might be a basis for concluding that the excluded individual or entity manifests a high degree of untrustworthiness. An exclusion of more than three years might be reasonable in such a case.

6. Petitioner was convicted of a criminal offense, relating to a controlled substance, within the meaning of the pre-July 1996 version of section 1128(b)(3) of the Act.

Petitioner is a physician. I.G. Ex. 1 at 1. On May 10, 1995, Petitioner was indicted in the United States District Court for the Eastern District of Pennsylvania. Id. The indictment charged that, between on or about April 15, 1990, and on or about May 13, 1993, Petitioner knowingly and intentionally acquired, by misrepresentation, fraud, forgery, deception and subterfuge, for no legitimate medical purpose, Schedule II through Schedule IV controlled substances. Id. at 3.

The indictment charged that Petitioner wrote prescriptions under various names, and used these prescriptions to obtain for his personal use, controlled substances, including Percocet and Vicodin. I.G. Ex. 1 at 3. Specifically, the indictment charged that, between April 1990 and May 1993, Petitioner wrote 466 prescriptions for 14,624 total dosage units of controlled substances, including Percocet and Vicodin, in the names of various members of his family. Id. at 2. The indictment charged further that, during the same period of time, Petitioner wrote approximately 110 prescriptions for controlled substances, including Percocet and Vicodin, in the name of another individual. Id.

Petitioner pled guilty to the indictment. I.G. Ex. 6. A judgment of conviction was imposed against Petitioner on November 27, 1995. Id.

The evidence of Petitioner's indictment and conviction establishes that he was convicted of a criminal offense as is described by the pre-July 1996 version of section 1128(b)(3) of the Act. Petitioner was convicted of an offense relating to the unlawful prescription or dispensing of a controlled substance. Act, section 1128(b)(3) (pre-July 1996 version).

7. The I.G. established the presence of an aggravating factor.

The aggravating factor which the I.G. alleged and proved is that Petitioner engaged in a pattern of unlawful prescription, dispensing, and abuse of controlled substances over a period of more than one year. 42 C.F.R. § 1001.401(c)(2)(i). The criminal conduct of which Petitioner was convicted involved a pattern of unlawful prescriptions extending over a period of more than three years. I.G. Ex. 1 at 2. Moreover, this conduct was

part of a history of unlawful substance abuse by Petitioner extending back over a period of many years. I.G. Ex. 1 at 2; I.G. Ex. 2 at 5; P. Ex. 11 at 1.

There is some dispute in the evidence concerning the duration of Petitioner's addiction to controlled substances. Evidence offered by the I.G. supports a conclusion that Petitioner's addiction goes back at least to 1980. I.G. Ex. 2 at 5. Petitioner, in his affidavit, suggests that his addiction began in 1988. P. Ex. 11 at 1. However, it is not necessary for me to find precisely when Petitioner's addiction began to conclude that he manifests a long-standing addiction and a pattern of substance abuse extending over many years.

In her brief, the I.G. directed my attention to a determination by the Pennsylvania State Board of Osteopathic Medicine (Board), made in November 1996, not to reinstate Petitioner's license to practice osteopathic medicine in Pennsylvania. I.G. Ex. 2. The I.G. seems to argue that the Board's determination that Petitioner is not trustworthy supports her own determination that Petitioner is not trustworthy. I.G.'s Brief at 4 - 6.

I find I.G. Ex. 2 to be relevant only insofar as it describes a pattern of substance abuse by Petitioner which predates the conduct for which Petitioner was indicted and convicted. The remainder of the exhibit, including the findings by the Board concerning Petitioner's credibility and his trustworthiness to function as a licensed physician is not relevant, because it does not relate to any aggravating or mitigating factor identified in 42 C.F.R. §§ 1001.401(c)(2) or (3).

8. Petitioner did not establish the presence of any mitigating factor.

The sole mitigating factors which may be considered in a case involving an exclusion imposed pursuant to the pre-July 1996 version of section 1128(b)(3) of the Act are stated at 42 C.F.R. § 1001.401(c)(3). These are that: the excluded individual or entity's cooperation with federal or State officials resulted in the conviction or exclusion of others or in the imposition of a civil money penalty against others; or, alternative sources of the type of health care items or services that are provided by the excluded individual or entity are not available. 42 C.F.R. §§ 1001.401(c)(3)(i)(A), (B); (c)(3)(ii). Petitioner neither alleged nor proved the presence of any of these mitigating factors.

Petitioner has offered evidence which relates to his general trustworthiness to provide care. P. Ex. 1 - 11. I have reviewed this evidence. I conclude that it does not relate to any of the aggravating or mitigating factors which are enumerated in 42 C.F.R. §§ 1001.401(c)(2), (3). Therefore, I find it not to be relevant.

Petitioner submitted three letters from professional colleagues and a patient, attesting to Petitioner's professional behavior. P. Ex. 1. The letters in P. Ex. 1 address Petitioner's personal and professional qualities. They do not address any of the aggravating or mitigating factors which are stated at 42 C.F.R. §§ 1001.401(c)(2), (3).

Petitioner also submitted exhibits which relate to disciplinary proceedings against Petitioner's license to practice osteopathic medicine that were conducted by the Board and the remedial measures taken by Petitioner pursuant to, or in conjunction with, the disciplinary measures that were imposed against him by the Board. P. Ex. 2 - 5. Petitioner's point in offering these exhibits is that Petitioner has complied with the Board's remedies and has remained free of substance abuse since he began treatment for his addiction. These exhibits, and the arguments that Petitioner seeks to make from them, are not relevant because they do not address any of the aggravating or mitigating factors identified by regulation. Remedial measures that an excluded party may have undertaken to free himself or herself from a substance addiction are not within the aggravating or mitigating factors that the regulation identifies. See 42 C.F.R. §§ 1001.401(c)(2), (3).

The affidavits offered by Petitioner, including much of his own affidavit, are not relevant to any of the aggravating or mitigating factors identified in the regulation. The affidavits of Nicholas Monti, Philip J. Stevens, D.O., and John T. Troup, Ph.D., attest to Petitioner's professional skills. P. Ex. 6 - 8. Even assuming these affidavits to be credible, they say nothing about any of the aggravating or mitigating factors identified in 42 C.F.R. §§ 1001.401(c)(2), (3). Thus, they suggest neither a basis for finding an exclusion to be reasonable nor unreasonable.

The affidavits of Jon A. Shapiro, M.D. and Dean A. Steinberg, M.D. address the efforts that Petitioner made at rehabilitation beginning in May 1993. P. Ex. 9, 10. As with the other affidavits offered by Petitioner, these affidavits do not relate to any of the aggravating or mitigating factors identified in 42 C.F.R. §§ 1001.401(c)(2), (3). These affidavits establish that Petitioner's patterns of unlawful conduct and substance abuse ended in May 1993. However, the I.G. has not alleged that Petitioner's unlawful conduct and substance abuse continued after May 1993.

Even if I were to accept Petitioner's affidavit as completely credible, it does not detract from the evidence of aggravation offered by the I.G., nor does it offer any relevant evidence of mitigation. See P. Ex. 11. Indeed, in one respect, P. Ex. 11 supports the I.G.'s evidence concerning the presence of an aggravating factor. In his affidavit, Petitioner admits that he prescribed controlled substances for his own use and that he was addicted to controlled substances. Id. at 1. He describes his efforts at rehabilitation. Id. at 2 - 5. Petitioner's affidavit, in part, constitutes an admission of the aggravating circumstance proved by the I.G. His assertion that he is attempting to rehabilitate himself from his substance abuse is not relevant to any of the aggravating or mitigating factors described in 42 C.F.R. §§ 1001.401(c)(2), (3).

9. A five-year exclusion is reasonable in light of the evidence establishing the presence of an aggravating factor.

I conclude that a five-year exclusion is reasonable in this case because the pattern of substance abuse and unlawful conduct engaged in by Petitioner establishes him to be a highly untrustworthy individual. During a period of more than three years, Petitioner unlawfully wrote hundreds of prescriptions for thousands of units of controlled substances, which he converted to his own use. By his own admission, Petitioner was addicted to, and abused, controlled substances for a period that began at least in 1988. The evidence establishes a persistent pattern of unlawful, reckless, and self-destructive conduct by Petitioner. I infer from the evidence which establishes a long-standing pattern of unlawful abuse of controlled substances by Petitioner that Petitioner was capable of subverting the welfare of his patients to his own self-gratification. Petitioner's conduct was especially egregious, in light of the fact that Petitioner practiced medicine for years while impaired, thereby potentially placing his patients' welfare at risk.

I have taken into consideration the absence of evidence showing that Petitioner engaged in this pattern of unlawful behavior and substance abuse after May 1993. Petitioner will not be eligible for reinstatement before June 2001, or approximately eight years after he ceased his unlawful conduct and substance abuse. I do not find a five-year exclusion to be unreasonable, even considering the length of time that will have elapsed between the date when Petitioner ceased abusing controlled substances and the earliest date when Petitioner will be eligible for reinstatement. The evidence of persistent misconduct by Petitioner is ample ground to impose a lengthy exclusion. Such an exclusion is reasonably necessary in order to protect the welfare of program beneficiaries and recipients.

/s/

Steven T. Kessel
Administrative Law Judge