

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
Tommy E. Thompson, R.Ph.,)	DATE: May 8, 1997
)	
Petitioner,)	
)	
v.)	Docket No. C-96-404
)	Decision No. CR473
The Inspector General.)	
_____)	

DECISION

I conclude that the 10-year exclusion imposed and directed against Petitioner, Tommy E. Thompson, R.Ph., from participating as a provider in Medicare and other federally financed health care programs is reasonable.

PROCEDURAL HISTORY

By letter dated June 19, 1996, the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Petitioner that, as a result of his conviction of a criminal offense related to the Medicaid program, he was being excluded for 10 years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.¹ The I.G. further advised Petitioner that exclusion is mandated by section 1128(a)(1) of the Social Security Act (Act),² that a 5-year minimum period of exclusion is required by section 1128(c)(3)(B) of the Act, and that Petitioner's 10-year period of exclusion took into consideration certain specified aggravating factors.

¹ Unless otherwise indicated, hereafter I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

² Those parts of the Act discussed herein are codified in 42 U.S.C. § 1320a-7.

By letter dated August 20, 1996, Petitioner filed a request for hearing, asserting that a 10-year period of exclusion is excessive and requesting that the period be reduced to a 5-year exclusion.

The I.G. filed her Motion for Decision Based on Documentary Evidence, with accompanying brief and 4 exhibits. Petitioner filed his Response, also asking that the decision be based on the documentary evidence. P. Br. at 1.³ Petitioner agrees with the I.G.'s Statement of Undisputed Facts. Id. Petitioner does not object to the admission into evidence of the exhibits submitted by the I.G., and I admit into evidence I.G. Exhibits (I.G. Exs.) 1 through 4. Petitioner did not submit exhibits. No facts of decisional significance are in dispute, and, consequently, there is no need for an in-person hearing.

Based on the evidence in the written record, the law, and the parties' written arguments, I conclude that Petitioner's 10-year period of exclusion comports with the remedial purposes of the Act and is reasonable. Accordingly, I affirm the 10-year exclusion.

ISSUE

The issue is whether the 10-year exclusion which the I.G. imposed and directed against Petitioner is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner was a licensed pharmacist and the owner and operator of the Medicine Shoppe, Inc., a pharmacy in North Little Rock, Arkansas. I.G. Ex. 2 at 1; I.G. Br. at 2; P. Br. at 1.

³ In this Decision, I refer to the parties' submissions as follows:

<u>I.G.'s Submission</u>	<u>Abbreviation</u>
Motion for Decision Based on Documentary Evidence	I.G. Br.
<u>Petitioner's Submission</u>	
Petitioner's Response	P. Br.

2. The Medicine Shoppe, Inc., was an authorized provider of prescription drugs under the Arkansas Medicaid program. I.G. Br. at 2; P. Br. at 1.

3. Petitioner entered guilty pleas to Counts XV and XX of a superseding indictment filed in the United States District Court for the Eastern District of Arkansas (District Court). I.G. Ex. 2, 3.

4. The District Court entered judgment against Petitioner in February 1996 on Counts XV and XX. The nature of each offense was wire fraud, a felony in violation of 18 U.S.C. §§ 1343 and 2. I.G. Ex. 3 at 1.

5. The District Court sentenced Petitioner to 18 months' incarceration on each count, to run concurrently, and to pay restitution to Medicaid in the amount of \$325,671.63. I.G. Ex. 3 at 2, 4.

6. Petitioner was convicted of a criminal offense, within the meaning of section 1128(i) of the Social Security Act. Findings 3, 4; P. Br. at 2.

7. Petitioner's conviction is related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. I.G. Br. at 3 - 4; P. Br. at 2.

8. The Secretary of DHHS (Secretary) has delegated to the I.G. the authority to exclude individuals from participation in Medicare and to direct their exclusion from participation in Medicaid. 48 Fed. Reg. 21,662 (1983); 53 Fed. Reg. 12,993 (1988).

9. The I.G. was required to exclude Petitioner from participating in Medicare and to direct his exclusion from participating in Medicaid for at least 5 years. Act, sections 1128(a)(1), 1128(c)(3)(B).

10. The I.G. proved 4 aggravating factors, any of which may be considered as a basis for lengthening the period of exclusion beyond the mandatory 5 years. 42 C.F.R. § 1001.102(b)(1), (2), (4), (6).

11. Petitioner acknowledges that none of the mitigating factors applies. 42 C.F.R. § 1001.102(c)(1) - (3); P. Br. at 4.

12. The evidence relevant to the aggravating factors proves Petitioner to be untrustworthy to the extent that a 10-year exclusion is reasonably necessary to protect the integrity of federally financed health care programs,

and to protect program beneficiaries and recipients.
I.G. Ex. 2, 3.

13. The 10-year exclusion imposed and directed against Petitioner by the I.G. comports with the remedial purposes of the Act and, consequently, is reasonable.
Findings 1 - 12.

DISCUSSION

The I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid, pursuant to section 1128(a)(1) of the Act. The I.G. proved and Petitioner does not contest: (1) that Petitioner was convicted of a criminal offense under federal law, and (2) that the conviction related to the delivery of an item or service under Medicaid.

Petitioner acknowledges that an exclusion of at least 5 years is required as a matter of law, and that aggravating factors specified in the regulations may be considered to be a basis for lengthening the period of exclusion. 42 C.F.R. § 1001.102(b)(1), (2), (4), (6). Petitioner agrees that 4 aggravating factors and no mitigating factors apply in his case but maintains that the weight of the aggravating factors does not support a 10-year exclusion. Petitioner requests a decision adjusting the exclusion from 10 years to 5 years.

A. Aggravating factors

Below, I discuss the weight I have assigned to each of the 4 aggravating factors, taking the most weighty first. 42 C.F.R. § 1001.102(b)(1), (2), (4), (6).

1. Financial loss to Medicaid

The most weighty aggravating factor in Petitioner's case is the financial loss to Medicaid [42 C.F.R. § 1001.102(b)(1)], represented by the \$325,671.63 in restitution required of Petitioner. I.G. Ex. 3 at 4.

Petitioner shows that \$277,400.12 in restitution had already been paid when judgment was entered. I.G. Ex. 3 at 4; P. Br. at 3. Petitioner asserts, and for purposes of this decision I assume his assertion to be true, that he, in addition, "is currently making [restitution] payments of \$50.00 per month during his period of incarceration." P. Br. at 3.

Nevertheless, the regulation specifying this aggravating factor includes the following:

(The entire amount of financial loss to such programs will be considered, including any amounts resulting from similar acts not adjudicated, regardless of whether full or partial restitution has been made to the programs);

42 C.F.R. § 1001.102(b)(1).

The \$325,671.63 loss to Medicaid is far greater than the \$1,500.00 threshold that triggers this aggravating factor. 42 C.F.R. § 1001.102(b)(1). Moreover, even if I were to take into account the partial restitution that has been made, the remaining loss to Medicaid of somewhat less than \$50,000.00 is still far greater than the \$1,500.00 threshold. The large loss to Medicaid demonstrates the magnitude of Petitioner's untrustworthiness and persuades me that Petitioner's period of exclusion must be lengthened significantly beyond the mandatory 5 years.

2. Overpayment to Petitioner

The next most weighty aggravating factor is the overpayment to Petitioner by Medicaid of \$1,500.00 or more as a result of improper billings. 42 C.F.R. § 1001.102(b)(6). Petitioner "agrees that the amount of overpayments set forth by the counts to which he pled guilty meets the criteria of this factor." P. Br. at 4.

The 2 counts to which Petitioner pled guilty specify a combined total overpayment of \$43,433.86 (\$10,986.90 in Count XV and \$32,446.96 in Count XX). I.G. Ex. 2 at 12, 15. Petitioner's illegal gain in the amount of \$43,433.86, far beyond the \$1,500.00 threshold that triggers this aggravating factor, underscores his untrustworthiness. Again, I am persuaded that Petitioner's period of exclusion must be lengthened significantly beyond the mandatory 5 years.

3. Incarceration included in sentence

Petitioner agrees that the sentence imposed by the court included incarceration. P. Br. at 4. The sentence of incarceration for a term of 18 months on each count, to run concurrently (I.G. Ex. 3 at 2), is a weighty aggravating factor and an additional indicator of the extent of Petitioner's untrustworthiness. 42 C.F.R. § 1001.102(b)(4).

4. Acts committed over a period of 1 year or more

Petitioner "agrees that the acts resulting in conviction, or similar acts, were committed over a period of 1 year or more. 42 C.F.R. § 1001.102(b)(2)." P. Br. at 3. Petitioner asserts, and I agree with Petitioner's assertion, that the 15-1/2 month period covered by the superseding indictment "is not excessively beyond the 1 year set forth as an aggravating factor." P. Br. at 3. The 2 counts to which Petitioner pled guilty occurred about 1-1/2 months apart, but Petitioner's pattern of repeated similar acts over the course of more than a year is a significant indicator of the extent of Petitioner's untrustworthiness.

B. Mitigating factors

None of the mitigating factors applies. 42 C.F.R. § 1001.102(c)(1) - (3). Finding 11.

C. Consistency with other exclusions

Petitioner argues that in comparison with other exclusions, his is unreasonable. Petitioner states that his actions "were less egregious than those set forth" in Rosalyn Saba Khalil, M.D., DAB CR353 (1995), and Gary E. Wolfe, D.O., DAB CR395 (1995). While this may be true, in each of those cases, a 15-year exclusion, rather than a 10-year exclusion, was sustained.

Petitioner cites the case of Dr. Abdul Abassi, DAB CR390 (1995), in which an administrative law judge modified a 15-year exclusion down to 8 years. In that case, the petitioner was convicted of fraud against Medicaid in the amount of \$75,000.00 and was sentenced to incarceration for 1 year. An important distinguishing factor appears to be that in Abassi, the record was practically silent as to the nature of the petitioner's involvement in the crimes for which he was convicted. In addition, in Abassi, only 2 aggravating factors were proven. Here, the I.G. has proven 4 aggravating factors. The cases are distinguishable for the additional reason that the amount of the loss to the Medicaid program was only \$75,000 in Abassi, compared to over \$300,000 in this case, and the length of incarceration was only 1 year in Abassi, compared to 18 months in this case.

D. Reasonableness of the 10-year exclusion

Petitioner deliberately and systematically defrauded Medicaid to obtain illegal payments to the pharmacy which he owned and operated. I.G. Ex. 2. Petitioner billed Medicaid for reimbursement for drugs supposedly provided to Medicaid recipients when no such drugs had been provided. I.G. Ex. 2. Petitioner caused fraudulent prescriptions to be created, so that there would be documentation to deceive auditors. I.G. Ex. 2.

Petitioner asserts that a 10-year exclusion from Medicare and Medicaid is unreasonable and excessive. I disagree. The 4 aggravating factors that apply in Petitioner's case convince me that the 10-year period of exclusion imposed and directed against Petitioner is necessary to protect Medicare and Medicaid, and the programs' beneficiaries and recipients, and to allow the I.G. enough time to be able to determine whether Petitioner has regained trustworthiness.

CONCLUSION

The I.G.'s determination to exclude Petitioner for 10 years from participating in Medicare, and to direct that he be excluded for 10 years from participating in Medicaid, comports with the remedial purposes of the Act and is, thus, reasonable. Accordingly, I affirm the 10-year exclusion.

/s/

Jill S. Clifton

Administrative Law Judge