

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Arthur Almer Ridge,)	Date: June 3, 2009
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-226
)	Decision No. CR1959
The Inspector General.)	
_____)	

DECISION

In this case, the parties agree that Petitioner, Arthur Almer Ridge, was convicted of deviate sexual assault relating to the neglect or abuse of a patient in connection with the delivery of health care services. He is therefore subject to exclusion from participation in federal health care programs under section 1128(a)(2) of the Social Security Act (Act). The sole issue in dispute is the length of his exclusion. The Inspector General (I.G.) proposes a 10-year exclusion, and, for the reasons set forth below, I find that the imposition of a 10-year exclusion is reasonable.

I. Background

By letter dated November 28, 2008, the I.G. notified Petitioner that, because he had been convicted of a criminal offense related to the neglect or abuse of patients in connection with the delivery of a health care item or service, he was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 10 years. The letter explained that section 1128(a)(2) of the Act authorizes the exclusion. I.G. Exhibit (Ex.) 4.

Petitioner concedes that he was convicted and is subject to exclusion under section 1128(a)(2). P. Br. at 1, 2, 6-7; Order and Schedule for Filing Briefs and Documentary Evidence, at 1. The parties agree that no factual issues are in dispute, and that the case can be resolved based on written submissions, without the need for an in-person hearing. CMS Br. at 7; P. Br. at 4. Both parties have

submitted written arguments, and the I.G. has filed 12 exhibits (I.G. Exs. 1-12). In the absence of objection, I receive into evidence I.G. Exs. 1-12.

II. Issue

Because the parties agree that the I.G. has a basis upon which to exclude Petitioner from program participation, the sole issue before me is whether the length of the exclusion (10 years) is reasonable. 42 C.F.R. § 1001.2007.

III. Discussion

Section 1128(a)(2) requires that an individual or entity convicted of “a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service” be excluded from participation in federal health care programs.¹ See also 42 C.F.R. § 1001.101(b). Individuals excluded under section 1128(a)(2) must be excluded for a period of not less than five years. Act, section 1128(c)(3)(B). The Secretary of Health and Human Services has delegated to the I.G. the authority to impose exclusions. 42 C.F.R. § 1001.101. So long as the period of exclusion is within a reasonable range, based on demonstrated criteria, I have no authority to change it. *Joann Fletcher Cash*, DAB No. 1725, at 17 (2000), citing 57 Fed. Reg. 3298, 3321 (1992).

Based on the aggravating factors present in this case, the 10-year exclusion falls within a reasonable range.²

Federal regulations set forth criteria for determining the length of exclusions imposed pursuant to section 1128 of the Act. 42 C.F.R. § 1001.102. Evidence that does not pertain to one of the aggravating or mitigating factors listed in the regulation may not be used to decide whether an exclusion of a particular length is reasonable.

Among the factors that justify lengthening a period of exclusion beyond the five year minimum are the following: 1) in convictions involving patient abuse or neglect, the action that resulted in the conviction was premeditated, was part of a continuing pattern of behavior, or consisted of non-consensual sexual acts; 2) the

¹ “Federal health care program” means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, that is funded directly, in whole or in part, by the United States government, and includes any state health care program. Act, section 1128B(f). A “state health care program” includes a state’s Medicaid program. Act, section 1128(h)(1).

² I make this one finding of fact/conclusion of law.

sentence imposed by the court included incarceration; and 3) the convicted individual or entity was the subject of another adverse action by a federal, state, or local government agency or board, if the adverse action was based on the same set of circumstances that serves as the basis for imposition of the exclusion. 42 C.F.R. § 1001.102(b). The presence of an aggravating factor or factors not offset by any mitigating factor or factors justifies lengthening the mandatory period of exclusion.

The I.G. argues that these three factors justify lengthening the period of Petitioner's exclusion from the five year minimum to 10 years. I agree.

Non-consensual sexual acts. Petitioner was a licensed practical nurse working in a skilled nursing facility. On August 22, 2006, he was supposed to administer medication to one of the facility residents, a 34-year-old quadriplegic woman. The woman had been adjudicated incapacitated and disabled in 1989. She was unable to speak, received nourishment and medications through a gastrostomy tube, and was completely dependent on facility staff. Another facility employee observed Petitioner performing a sexual act on this defenseless resident. I.G. Exs. 3, 5, 6, 11. On January 25, 2007, Petitioner pled guilty to deviate sexual assault, a class C felony. I.G. Exs. 1, 2, 7, 8. He admits that his actions "did consist of non-consensual sexual acts," although he questions whether that fact alone justifies extending his exclusion by five years. P. Br. at 6.

I find that, by itself, the sexual assault justifies extending Petitioner's exclusion by at least five years. In determining the length of an exclusion, the I.G. must evaluate an individual's future trustworthiness. *Narendra M. Patel, M.D.*, DAB No. 1736, at 25 (2000). As a nurse, Petitioner was entrusted with caring for a defenseless and vulnerable resident. But he betrayed that trust when he assaulted her. Few actions could demonstrate more dramatically that an individual simply cannot be trusted and should therefore be excluded for a substantial period of time.

Incarceration. According to the I.G., the Court sentenced Petitioner to four years incarceration. Petitioner admits that he was initially sentenced to four years, but points out he served only four months, and was then placed on probation. P. Br. at 6. However, release from confinement earlier than expected does not eliminate incarceration as an aggravating factor. *See, Jason Hollady, M.D., a/k/a Jason Lynn Hollady*, DAB No. 1855, at 9-10 (2002) (where the Board found irrelevant to the issue of whether his sentence included incarceration, the fact that, a few days after the beginning of his sentence, the petitioner was put on a work release program).

Another adverse action. Following his conviction, Petitioner voluntarily surrendered his state license to practice as a licensed practical nurse. He argues that, because he took the action voluntarily, his surrender does not constitute a reasonable cause for extending the period of his exclusion. P. Br. at 6. I disagree.

Loss of a nursing license, whether voluntary or imposed, must be considered an “adverse action” within the meaning of the regulation, and must be considered an aggravating factor so long as “the action is based on the same set of circumstances that serves as the basis for imposition of the exclusion.” 42 C.F.R.

§ 1001.102(b)(9). On January 23, 2007, Petitioner entered into a settlement agreement with the Missouri State Board of Nursing “for the purpose of resolving the question of whether [Petitioner’s] license to practice as a licensed practical nurse [would] be subject to discipline.” I.G. Ex. 9, at 1. In that agreement, Petitioner stipulated that his license was subject to disciplinary action based on his guilty plea to a charge involving moral turpitude, i.e., his conviction on charges of deviate sexual assault. Based on this agreement and the licensing board’s actions, I find aggravating the surrender of Petitioner’s nursing license.

The parties agree that no mitigating factors justify reducing the period of exclusion.

IV. Conclusion

The parties agree that Petitioner is subject to exclusion under section 1128(a)(2) of the Act, and, for the reasons discussed above, I find that the 10-year exclusion imposed by the I.G. falls within a reasonable range.

/s/ Carolyn Cozad Hughes
Administrative Law Judge