

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Pamela Gail Hill,)	DATE: December 8, 1994
)	
Petitioner,)	
)	
- v. -)	Docket No. C-94-345
)	Decision No. CR347
The Inspector General.)	
)	

DECISION

On March 11, 1994, the Inspector General (I.G.) notified Petitioner that she was being excluded from participating in the following programs: Medicare, Medicaid, Maternal and Child Health Services Block Grant, and Block Grants to States for Social Services programs. The I.G. advised Petitioner that she was being excluded because she had been convicted of a criminal offense related to the delivery of an item or service under the Medicaid program, within the meaning of section 1128(a) of the Social Security Act (Act).

The I.G. informed Petitioner that five years is the minimum mandatory exclusion period for an individual whose exclusion is based on conviction of an offense, as set out in section 1128(a) of the Act. The I.G. stated that Petitioner was being excluded for a period of 10 years, based in part on the I.G.'s determination that Petitioner was convicted of a criminal offense related to the submission of false claims to Medicaid resulting in financial damage to Medicaid of more than \$1500. The I.G. stated also that that the determination to exclude Petitioner for 10 years was based in part on evidence that Petitioner's criminal acts resulting in her conviction, or similar acts, were committed over a period of one year or more. Finally, the I.G. told Petitioner that the exclusion determination was based in part on Petitioner's sentence for her conviction, which included incarceration as a punishment.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. On August 24, 1994, I held a hearing in Pensacola, Florida. At the hearing, I admitted into evidence I.G. Exhibits 1 - 3, 5 - 7, 9, and 11 and Petitioner Exhibits 1 - 3, 6, 10, 15, 18, 25, 28, and 29. Subsequently, the parties submitted briefs.

I have considered carefully the evidence that I received at the hearing, the arguments which the parties made in their briefs, and the applicable law. I conclude that the 10-year exclusion which the I.G. imposed is reasonable, and I sustain it.

I. Issues, findings of fact, and conclusions of law

Petitioner has not disputed that she was convicted of a criminal offense nor that the offense was related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. The sole issue in this case is whether the 10-year exclusion which the I.G. imposed is reasonable. In finding the exclusion to be reasonable, I make the following findings of fact and conclusions of law. In setting forth these findings and conclusions, I cite to relevant portions of my decision at which I discuss my findings and conclusions in detail.

1. Under the Act and applicable regulations, an individual who is excluded pursuant to section 1128(a)(1) of the Act must be excluded for at least five years. Page 3.
2. An exclusion imposed pursuant to section 1128(a)(1) may be for more than five years if aggravating factors, not offset by mitigating factors, are proven. Page 3.
3. The I.G. proved the presence of an aggravating factor, in that Petitioner was convicted of having obtained unlawfully more than \$1,500 from Medicaid. Page 5.
4. The I.G. proved the presence of an additional aggravating factor, in that the crimes that Petitioner committed were committed over a period of more than one year. Page 5.
5. The I.G. proved the presence of an additional aggravating factor, in that the sentence imposed on Petitioner for her conviction included a term of incarceration. Page 6.
6. There are no mitigating factors present in this case. Page 6.

7. The evidence relating to the aggravating factors proven by the I.G. establishes Petitioner to be so untrustworthy so as to justify an exclusion of 10 years. Page 7.

II. Discussion

A. Governing law

In the case of an exclusion imposed under section 1128(a)(1), the Act requires that the exclusion be for not less than a period of five years. Social Security Act, section 1128(c)(3)(B). In this case, the I.G. excluded Petitioner for a period of 10 years. I must decide whether the additional five years which the I.G. imposed beyond the mandatory five-year period is reasonable.

Section 1128 is a remedial statute. Its purpose is to protect federally-financed health care programs and their beneficiaries and recipients from individuals who are not trustworthy to provide care. Regulations establish a framework for deciding whether a party is trustworthy in a particular case and, if not, the length of the exclusion which is reasonable in that case. These regulations are contained in 42 C.F.R. Part 1001. The regulation which governs the length of exclusions imposed under section 1128(a)(1) of the Act is 42 C.F.R. § 1001.102.

Section 1001.102 provides that an exclusion may be imposed for a period of more than five years in a particular case if any of certain specified aggravating factors are present in that case. Those factors are listed in 42 C.F.R. § 1001.102(b)(1) - (6). In the case where one or more aggravating factors is present, then the aggravating factor or factors may be offset by the presence of a mitigating factor. The factors which may be mitigating are listed in 42 C.F.R. § 1001.102(c)(1) - (3).

The presence in a case of aggravating factors, not offset by mitigating factors, means that an exclusion of more than five years may be appropriate. However, any exclusion imposed for more than five years under section 1128(a)(1) of the Act and 42 C.F.R. § 1001.102(b) and (c) must still comport with the remedial purpose of establishing protection against untrustworthy parties. Thus, the aggravating factors established in a given case must be weighed carefully to decide whether they support a conclusion that a party is sufficiently untrustworthy

so as to necessitate an exclusion of a particular length. William F. Middleton, DAB CR297 at 10 - 11 (1993).

One consequence of the regulations which govern the length of exclusions is to limit the factors which I may consider as relevant to an excluded party's trustworthiness to provide care. An appellate panel of the Departmental Appeals Board held that, inasmuch as section 1128 of the Act is a remedial statute, all factors relevant to an excluded party's trustworthiness to provide care must be considered in deciding whether an exclusion is reasonable in a given case. Robert Matesic, R.Ph., DAB 1327, at 7 - 8 (1992). These factors were held to include such elements as a party's remorse for his or her crimes, or that party's rehabilitation. Id. However, beginning in January, 1993, adjudicators were authorized to apply only the criteria contained in the regulations in deciding whether exclusions were reasonable. John M. Thomas, Jr., M.D., DAB CR281, at 14 - 18 (1993).

B. Relevant facts

Petitioner is a licensed pharmacist. I.G. Ex. 1 at 1. Petitioner was President of, and responsible for the operation of, Hill Pharmacy, Incorporated, (Hill Pharmacy) in Pensacola, Florida. Id. On February 24, 1993, Petitioner and Hill Pharmacy were indicted in the United States District Court for the Northern District of Florida. I.G. Ex. 1. They were charged with a scheme to increase unlawfully the reimbursement that Hill Pharmacy received from the Florida Medicaid program, by systematically presenting false, fictitious, and fraudulent reimbursement claims for drugs. Id. at 3.

The indictment contained 43 counts. Counts 1 through 31 charged Petitioner and Hill Pharmacy with having presented false, fictitious, and fraudulent Medicaid claims. Id. at 3 - 33. Each of these counts enumerated specific claims which were alleged to be false and fraudulent. See, e.g., Id. at 4. Petitioner and Hill Pharmacy were charged with having presented false Medicaid claims beginning on or about June 6, 1989 and continuing through on or about April 30, 1991. Id. at 5, 11. Counts 32 through 39 charged Petitioner and Hill Pharmacy with having unlawfully distributed certain controlled substances. Id. at 34 - 37. Petitioner and Hill Pharmacy were charged with having unlawfully distributed controlled substances, beginning in December 1989 and continuing into March 1992. Id. at 34 - 36. Count 40 charged Petitioner and Hill Pharmacy with intentionally furnishing false and fraudulent material

information in the dispensing of a controlled substance. Id. at 37. Counts 41 through 43 charged Petitioner and Hill Pharmacy with obstruction of justice by providing false information to the Drug Enforcement Administration, in an attempt to deceive both the Drug Enforcement Administration and a federal grand jury. Id. at 37 - 41.

On July 8, 1993, Petitioner pled guilty to all 43 counts of the indictment. I.G. Ex. 7.¹ Petitioner admitted wrongfully appropriating the sum of \$14,742.00. I.G. Ex. 6 at 2. Petitioner was sentenced to pay restitution to the Florida Medicaid Program in the amount of \$3580.72. I.G. Ex. 7 at 4. She was sentenced to pay a special assessment of \$2150. Id. at 1. Petitioner was sentenced also to imprisonment for a period of five months. Id. at 2.

C. The presence of aggravating factors

The I.G. has alleged and proved the presence of three aggravating factors in this case. First, the I.G. has proved that Petitioner's conduct resulting in her conviction, or similar acts, resulted in a loss to the Florida Medicaid program of more than \$1500. 42 C.F.R. § 1001.102(b)(1). Petitioner admits appropriating wrongfully over \$14,000.²

Second, the I.G. has proved that the conduct resulting in Petitioner's conviction, or similar acts, transpired over a period exceeding one year's duration. 42 C.F.R. § 1001.102(b)(2). The fraudulent claims which Petitioner admitted to having presented were presented over a period beginning in June 1989 and continuing through April 1991.

¹ On the same date, Hill Pharmacy pled guilty to all 43 counts of the indictment. I.G. Ex. 7 at 6. It was sentenced to pay restitution of \$3580.72, a special assessment of \$8600, and a one-year term of probation. Id. at 6 - 8.

² The United States Attorney for the Northern District of Florida alleged that Petitioner and Hill Pharmacy had defrauded the Florida Medicaid program of at least \$168,974.84. I.G. Ex. 6 at 2. However, the I.G. did not argue that Petitioner's criminal conduct had caused a loss to Medicaid in this amount. At the hearing, the I.G. represented that she would not contend that the evidence proved that Petitioner had misappropriated more than the \$14,742 that Petitioner admitted to having misappropriated. Tr. at 32 - 33.

Furthermore, Petitioner admitted to having unlawfully dispensed controlled substances into the month of March 1992.

Third, the I.G. has proved that the sentence imposed on Petitioner as a consequence of her plea of guilty included a term of incarceration. 42 C.F.R. § 1001.102(b)(4). Among other things, Petitioner was sentenced to a term of five months' imprisonment.

D. Petitioner's evidence

As discussed above, the presence of aggravating factors in the case of an exclusion imposed pursuant to section 1128(a)(1) of the Act may be offset only by proof of the mitigating factors specified in the regulations. At the hearing, Petitioner offered evidence which, arguably, might mitigate the inference of culpability arising from the aggravating factors proved by the I.G., if I were permitted to consider it. However, this evidence did not fall within any of the mitigating factors established under the regulations. Thus, although I permitted Petitioner some leeway in presenting her case, I am not now allowed to consider the evidence she presented.

Petitioner attempted to prove that, in some respects, her unlawful conduct may have been motivated by the stress she experienced in operating a pharmacy, and by the problems she may have encountered in keeping accurate business records and in filling prescriptions accurately. Tr. at 42 - 61. Petitioner attempted to argue also that her crimes were more a consequence of poor recordkeeping by government agencies than of her criminal intent. Tr. at 27 - 28. This evidence relates generally to the question of Petitioner's culpability for the offenses of which she was convicted. However, the regulations do not permit me to consider evidence that is not described by one or more of the specified aggravating and mitigating factors. Thus, although I have no doubt that the evidence that Petitioner offered is relevant to her overall culpability for the offenses of which she was convicted (and, indeed, I would have accepted and considered that evidence prior to the adoption of the regulations), I cannot consider it, because it does not fall within any of the mitigating factors identified in the regulations.

E. The basis for the 10-year exclusion

The evidence proves the presence of three aggravating factors in this case. There is no evidence which establishes the presence of any mitigating factors. The

presence of aggravating factors not offset by mitigating factors is a basis for imposing an exclusion of more than five years' duration. However, as I hold at Part A of this section, that does not mean that an exclusion of any particular duration is necessarily justified. I must still consider the evidence relating to the aggravating factors as evidence of a petitioner's lack of trustworthiness and decide from it whether or not an exclusion of more than five years is justified and, if so, for what duration.

In this case, the evidence establishing the existence of aggravating factors establishes also that Petitioner is a highly untrustworthy individual. The indictment to which Petitioner pled guilty describes an extensive scheme, carried out over a period of nearly two years, to defraud the Florida Medicaid program. The duration of the fraud suggests that Petitioner engaged in a pattern of criminal activity which required planning and persistence to execute. The financial impact of Petitioner's crimes on the Florida Medicaid program was substantial. In considering this impact in conjunction with the duration of Petitioner's fraud, I conclude that Petitioner engaged in criminal activity demonstrating a high degree of untrustworthiness. For this reason, I find the 10-year exclusion to be reasonable.

I have taken into account Petitioner's characterization of her conduct in reaching my conclusion that the exclusion is reasonable. Petitioner characterizes her criminal conduct as being in the nature of errors and mistakes in judgment. Petitioner's Brief at 2. She denies that she engaged in a scheme to defraud the Florida Medicaid program. Notwithstanding her present assertions, the crimes to which she pled guilty plainly establish a scheme to defraud the Florida Medicaid program. The pattern of criminal activity described in the 43 count indictment to which Petitioner pled guilty is compelling evidence of a scheme to defraud the program.

CONCLUSION

Based on applicable regulations and the evidence, I find the 10-year exclusion which the I.G. imposed against Petitioner to be reasonable and I sustain it.

/s/

Steven T. Kessel
Administrative Law Judge