

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Olian Small,)	DATE: June 12, 1991
)	
Petitioner,)	
)	
- v. -)	Docket No. C-272
)	
The Inspector General.)	Decision No. CR136
)	

DECISION

In this case, governed by section 1128 of the Social Security Act (Act), Petitioner requested a hearing before an administrative law judge (ALJ) to contest a determination by the Inspector General (I.G.) to exclude Petitioner from participation in the Medicare program and certain federally-assisted State health care programs.¹

In a letter dated August 6, 1990, the I.G. advised Petitioner that he was being excluded from participation in the Medicare and Medicaid programs because he had been "convicted," within the meaning of section 1128(i) of the Social Security Act (Act), of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service. The I.G. further informed Petitioner that exclusions of individuals convicted of such offenses are mandated by section 1128(a)(2) of the Act for a minimum period of five years. The I.G. stated that, based on the existence of several aggravating circumstances, Petitioner would be excluded for a period of ten years.

Petitioner timely requested a hearing and the case was assigned to ALJ Charles E. Stratton for hearing and

¹ "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-assisted programs, including State plans approved under Title XIX of the Act (Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

decision. Judge Stratton conducted a prehearing conference by telephone. At the prehearing conference, the parties agreed that the case could likely be disposed of on motions for summary disposition. The parties filed motions for summary disposition in accordance with Judge Stratton's Prehearing Order. The case was subsequently reassigned to me for decision.

I have considered the arguments contained in the parties' motions for summary disposition, the undisputed material facts, and applicable law and regulations. I conclude that the exclusion imposed and directed by the I.G. is mandated by section 1128(a)(2) of the Act for a period of at least five years. I further conclude that the I.G. has demonstrated aggravating factors which warrant lengthening the mandatory minimum period of exclusion. The I.G. has not proved that an exclusion of ten years is reasonable, however. My decision is that an exclusion of seven years is reasonable in this case.

ISSUES

1. Whether Petitioner was convicted of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service, within the meaning of section 1128(a)(2) of the Act.
2. Whether a ten year exclusion is reasonable under the circumstances of this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On or about October 4, 1989, the grand jury for Sagadahoc County, Maine, indicted Petitioner in a nine-count indictment. The indictment charged Petitioner with one count of attempted murder, two counts of aggravated assault, and six counts of endangering the welfare of an incompetent person. I.G. Ex. 4 at 1-5.²

² The parties' exhibits and memoranda will be referred to as follows:

Inspector General's I.G. Ex. [number] at [page]
Exhibit

Inspector General's I.G. Mem. at [page]
Memorandum

(continued...)

2. On or about October 12, 1989, Petitioner was committed to the county jail because he was unable to furnish bail. Petitioner remained in jail until his trial. P. Mem. at 5 (unnumbered) and Attachment.
3. Prior to Petitioner's trial, the attorney general dismissed counts VI and IX of the indictment. Counts VI and IX were two of the six counts that charged Petitioner with endangering the welfare of an incompetent person. I.G. Ex. 4 at 6.
4. At the time of the conduct charged in the indictment, Petitioner was employed as a nurse's aide/medication technician at Amenity Manor, a nursing home located in Topsham, Maine. I.G. Mem. at 5; P. Mem. at 2.
5. In the course of his employment, one of Petitioner's duties was to administer medications to the patients at Amenity Manor and to place his initials in the patients' medical records, indicating that the medications had been given. I.G. Ex. 6 at 53-54.
6. Count V of the indictment charged that Petitioner knowingly endangered the health, safety, or mental welfare of Alice Lewis, a patient at Amenity Manor, who, by reason of advanced age, physical or mental disease or disorder, was unable to care for herself, by failing to administer the medication nitroglycerin ointment to her, and by making false entries in her medical records, indicating that he had administered the medication. I.G. Ex. 4 at 3.
7. Count VII of the indictment (originally count VIII) charged that Petitioner knowingly endangered the health, safety, or mental welfare of Helen Ada Potter, a patient at Amenity Manor, who, by reason of advanced age, physical or mental disease or disorder, was unable to care for herself, by failing to administer the medications carafate and tagamet to her and by making false entries in her medical records, indicating that he had administered the medications. I.G. Ex. 4 at 4.
8. At Petitioner's trial, the State did not adduce evidence that Petitioner's failure to give the medications, as charged in the indictment, caused actual harm to either patient. P. Mem. at 3-4.

² (...continued)

9. John H. Kanwit, M.D., a physician called by the State as a witness at Petitioner's trial, testified that Petitioner's failure to administer nitroglycerin ointment could expose a patient to the risk of heart damage, if the underlying heart condition continued untreated. I.G. Ex. 7 at 19.

10. Dr. Kanwit, who was Mrs. Potter's treating physician, testified that the failure to administer carafate and tagamet could have exposed Mrs. Potter to the potential risk of suffering a "rebleed," that is, a reoccurrence of the stomach hemorrhage for which she was being treated. Dr. Kanwit testified that such a rebleed would have been "disastrous" to the patient. I.G. Ex. 7 at 10-11, 15.

11. Dr. Kanwit testified that if Mrs. Potter's medical records indicated that she had received carafate and tagamet, when in fact she had not, the false entry might have led him to make an incorrect treatment decision. Specifically, Dr. Kanwit stated that if the patient suffered another hemorrhage, he would assume that nothing more could be done for her through medication and he would have to intervene surgically. In Mrs. Potter's case, Dr. Kanwit opined that she probably could not have tolerated surgery. I.G. Ex. 7 at 11-12, 17-18.

12. On May 25, 1990, a jury found Petitioner guilty of Counts V and VII of the indictment. Petitioner was acquitted on the remaining charges. I.G. Ex. 2.

13. The trial judge entered a judgment of conviction against Petitioner. I.G. Ex. 2.

14. The crime of endangering the welfare of an incompetent person is a Class D misdemeanor, which carries a maximum sentence of 364 days' imprisonment and a \$1,000 fine, under Maine law. P. Mem. at 4.

15. The trial judge sentenced Petitioner to a jail term of 205 days. That period corresponded with the amount of time Petitioner had been jailed awaiting trial. The judge credited Petitioner with time served. P. Mem. at 4-5; I.G. Ex. 2.

16. Petitioner has a record of prior criminal convictions dating back to 1972. I.G. Ex. 8.

17. Petitioner's State Bureau of Identification record indicates that he was convicted on six occasions for negotiating a worthless instrument; on two occasions for theft by unauthorized taking or transfer; and on one

occasion each for petty larceny, cheating by false pretenses, and theft by deception. I.G. Ex. 8.

18. Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act. Findings 12, 13.

19. Petitioner's conviction was related to the neglect or abuse of patients in connection with the delivery of a health care item or service, within the meaning of section 1128(a)(2) of the Act. Findings 4-12.

20. Pursuant to section 1128(a)(2) of the Act, the Secretary is required to exclude Petitioner from participation in Medicare and to direct his exclusion from participation in Medicaid.

21. The minimum mandatory period of exclusion for exclusions pursuant to section 1128(a) of the Act is five years. Social Security Act, section 1128(c)(3)(B).

22. The Secretary delegated to the I.G. the duty to impose and direct exclusions pursuant to section 1128 of the Social Security Act. 48 Fed. Reg. 21662 (May 13, 1983).

23. The I.G. imposed and directed an exclusion against Petitioner for a period of ten years. I.G. Exhibit 1.

24. It is an aggravating factor that the nature of Petitioner's offenses placed Medicare beneficiaries at risk of suffering grave health consequences.

25. It is neither an aggravating nor a mitigating factor that Petitioner was sentenced to "time served."

26. It is an aggravating factor that Petitioner has a lengthy record of convictions for crimes involving dishonesty.

27. An exclusion of seven years is reasonable in this case. Findings 1-26.

ANALYSIS

1. Petitioner was convicted of a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service, within the meaning of section 1128(a)(2) of the Social Security Act.

There are no disputed issues of material fact in this case. Petitioner was employed as a nurse's aide/medication technician at Amenity Manor, a nursing home located in Topsham, Maine. In that capacity, Petitioner had the duty to distribute medications to patients and to note in the patients' medical records that the medications had been given. Petitioner was convicted of two counts of endangering the welfare of an incompetent person in that he failed to administer medications to two elderly nursing home patients and attempted to conceal that fact by falsely indicating in the patients' records that the medications had been given. Petitioner falls within the ambit of section 1128(a)(2) because: (1) he was convicted of two criminal offenses; (2) the convictions were for neglect of patients; and (3) the acts of neglect occurred in connection with the delivery of a health care item or service.

Petitioner has admitted that he was convicted of a criminal offense, within the meaning of section 1128(i) of the Act. Petitioner contends, however, that the conviction was not related to neglect or abuse of patients, within the meaning of section 1128(a)(2). Petitioner's argument appears to be that because neither patient was shown to have suffered any actual ill effects from Petitioner's failure to administer medications, no neglect or abuse occurred. See P. Mem. at 3-4. I disagree.

Petitioner's failure to administer medications to elderly nursing home patients is an act of patient neglect within the meaning of section 1128(a)(2). The term "neglect" is not defined in section 1128. In the absence of a statutory definition, the term must be defined according to its common and ordinary meaning. In the context of section 1128, "neglect" means failure to attend to the needs of patients in circumstances where the party is under a duty to provide care. Summit Health Care Limited, dba Marina Convalescent Hospital, DAB Civ. Rem. C-108 (1989), aff'd, DAB App. 1173 (1990). The Maine

statute under which Petitioner was convicted defines endangering in almost identical terms:

As used in this section "endangers" includes a failure to act only when the defendant had a legal duty to protect the health, safety or mental welfare of the incompetent person.

Me. Rev. Stat. Ann. tit. 17-A, § 555 (1983). No showing of actual injury to a patient is required under either standard.

Petitioner's duties as a nurse's aide/medication technician included the duty to administer medications. His failure to do so constituted an act of "neglect" within the meaning of section 1128(a)(2). Petitioner was convicted, after a jury trial, of endangering the welfare of two incompetent persons. The legal definition of that offense, under State law, encompasses the same conduct that constitutes "neglect" under federal law. Therefore, Petitioner's conviction was for neglect, within the meaning of the Social Security Act.

Petitioner does not dispute that the acts of neglect for which he was convicted occurred in connection with the delivery of a health care item or service. Indeed, on the present facts there could be no dispute. The two patients who failed to receive their medications because of Petitioner's neglect were confined to Amenity Manor because their advanced age and ill health required skilled nursing care. The administration of medications is an integral part of the nursing care that patients in a nursing home require. Therefore, Petitioner's failure, as a nursing home employee, to administer medications as prescribed is an act of neglect in connection with the delivery of a health care item or service.

2. An exclusion of seven years is reasonable in this case.

Because Petitioner's conviction was for an act of neglect of patients in connection with the delivery of a health care item or service, the I.G. was required, under section 1128(c)(3)(B) of the Act, to exclude Petitioner for at least five years. The I.G. imposed an exclusion of ten years. The I.G.'s notice to Petitioner stated that an additional five years was added to the term of exclusion based on two aggravating factors: (1) a jury found Petitioner guilty of endangering the welfare of an incompetent person, and (2) the court sentenced Petitioner to a 205-day jail sentence. I.G. Ex. 1. In

his Memorandum, the I.G. also refers to Petitioner's criminal record. The I.G. argues that this criminal record indicates Petitioner's lack of trustworthiness. I.G. Mem. at 9-10.

My review of the reasonableness of the exclusion imposed by the I.G. is de novo. Social Security Act, section 205(b)(1). Accordingly, in deciding the appropriate length of an exclusion, I must make an independent assessment of the law and the facts. Based on that independent assessment, I have the authority to and will modify an exclusion if I determine that the exclusion is not reasonable. Id.

In determining the reasonableness of an exclusion, I am guided by the remedial purpose of section 1128. Congress enacted section 1128 to protect the Medicare and Medicaid programs from fraud and abuse and to protect the beneficiaries and recipients of those programs from incompetent or inadequate care. See S. Rep. No. 109, 100th Cong., 1st Sess. 1, reprinted in 1987 U.S. Code Cong. & Admin. News 682. The primary purpose of an exclusion, then, is to protect the Medicare and Medicaid trust funds, and the beneficiaries and recipients of those funds, from those individuals or entities who have proven by their misconduct that they are untrustworthy. See Christino Enriquez, M.D., DAB Civ. Rem. C-277 at 9 (1991).

The Secretary has adopted regulations governing the duration of suspensions for program-related crimes. The regulations express the Secretary's policy for evaluating cases where the I.G. has discretion in determining the length of an exclusion, including exclusion periods beyond the mandatory minimum. Id. at 11. The regulations direct that the following factors be considered in determining the length of an exclusion:

- (1) The number and nature of the program violations and other related offenses;
- (2) The nature and extent of any adverse impact the violations have had on beneficiaries;
- (3) The amount of the damages incurred by the Medicare, Medicaid, and the social services programs;
- (4) Whether there are any mitigating circumstances;
- (5) The length of the sentence imposed by the court;

(6) Any other facts bearing on the nature and seriousness of the program violations; and

(7) The previous sanction record of the suspended party under the Medicare or Medicaid program.

42 C.F.R. § 1001.125. The regulations were adopted by the Secretary to implement the Act prior to the 1987 Amendment. To the extent that they have not been repealed or modified, however, it is appropriate for me to continue to be guided by them, particularly in cases involving program-related convictions.

On the facts of the present case, I find that there are aggravating factors warranting an increase in the length of exclusion beyond the mandatory five year minimum. However, the I.G. has not proved all the aggravating circumstances alleged in his notice and therefore has not proved that an exclusion of ten years is reasonable.

The I.G. argues that the nature of the offenses of which Petitioner was convicted is an aggravating factor in this case. I.G. Mem. at 8-9. I agree. Petitioner was convicted of failing to administer medications to two elderly nursing home patients, who, because of age and ill health, were unable to care for themselves. Findings 6, 7, 12. While his conduct may not have caused actual injury to the patients, it did place them at risk for serious health consequences. Findings 8-10. Moreover, an element of Petitioner's crime was concealment of his failure to give the medications. The false entries made by Petitioner in the patients' medical records could have misled doctors and nurses in making medical decisions regarding the patients' treatment. Finding 11. The nature of Petitioner's crimes indicates that he cannot be trusted to care for Medicare and Medicaid beneficiaries and recipients for a lengthy period of time.

The I.G. additionally argues that Petitioner's prior criminal record indicates that he is not a trustworthy individual. I.G. Mem. at 9-10. The I.G. has not specifically alleged that this is an aggravating factor. A substantial number of Petitioner's prior convictions involve deception or dishonesty. Finding 17. The conviction which formed the basis for Petitioner's exclusion also involved dishonesty, in that Petitioner was convicted of falsifying information on patients' medical records. Petitioner's criminal record spans at least seventeen years and includes a conviction for a theft occurring after the conduct which formed the basis for his exclusion. Petitioner's lengthy criminal record and the nature of the offenses of which he has been

convicted demonstrate that he cannot be trusted to make accurate record entries or to perform other duties which depend upon his personal honesty. Therefore, I conclude that Petitioner's prior convictions for negotiating a worthless instrument and his convictions for theft, larceny, cheating by false pretenses, and theft by deception, all combined, constitute an aggravating factor warranting a lengthy exclusion.

Finally, the I.G. argues that it is an aggravating factor that Petitioner was sentenced to a "substantial" jail term. I.G. Mem. at 9. Petitioner argues that, under the circumstances of this case, his jail sentence should not be regarded as an aggravating factor. Petitioner points out that he was merely sentenced to "time served," and that the only reason he was imprisoned pending his trial was because he was unable to post bail. Petitioner further argues that the maximum sentence for a class D misdemeanor is 364 days in jail and a \$1000 fine. Since Petitioner was convicted on two counts, the trial judge could have sentenced him to nearly two years in prison, but instead decided not to impose any further term of imprisonment. P. Mem. at 4-5.

The record before me does not reflect whether the trial judge made any remarks that would illuminate his reasons for imposing the sentence he did. I can conclude that the judge chose not to impose a longer prison term, and that he chose not to impose a fine of any amount. However, it is not clear from this record whether the judge would have imposed a jail term, had Petitioner been free on bail pending his trial. Had Petitioner not been in jail for the 205 days preceding his trial, the trial judge may not have imposed a prison term at all. The regulations state that the length of any sentence imposed must be considered in setting the length of an exclusion. The regulations do not require that the fact that a prison sentence was imposed be considered an aggravating circumstance. I have considered the length of the sentence imposed. I consider it to be a neutral factor under the circumstances of this case. On the present record, I conclude that the I.G. has not proven that sentencing Petitioner to "time served" as a consequence of his convictions should be regarded as an aggravating factor in this case.

Because the I.G. has failed to prove the existence of one of the aggravating factors on which he based his decision to exclude Petitioner for ten years, I conclude that a ten-year exclusion is excessive in this case. See Victor M. Janze, M.D., DAB Civ. Rem. C-212 (1990). Nevertheless, as I have stated, the nature of the crimes of which

Petitioner was convicted and his history of dishonesty warrant a lengthy period of exclusion. Moreover, Petitioner has not offered any evidence of his present trustworthiness or rehabilitation since his conviction. Therefore, I conclude that an exclusion of seven years is reasonable in this case.

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs was authorized by law. I further conclude that a seven year exclusion is reasonable and appropriate in this case.

IT IS SO ORDERED.

/s/

Constance T. O'Bryant
Administrative Law Judge