Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
James D. Payne, D.O.,	)	DATE: July 16, 1991
	)	
Petitioner,	)	
	)	Docket No. C-314
- v. -	)	
	)	Decision No. CR142
The Inspector General.	)	
	)	

DECISION

On September 6, 1990, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare and State health care programs.[1] The I.G. informed Petitioner that he was being excluded as a result of his convictions in federal and state courts of criminal offenses relating to the Medicare and Medicaid programs. Petitioner was advised that the exclusion of individuals convicted of such offenses is mandated by section 1128(a)(1) of the Social Security Act (Act). The I.G. further advised Petitioner that the law required that the minimum period of such an exclusion be for not less than five years.

The I.G. informed Petitioner that he was being excluded for a period of ten years due to his Medicare and Medicaid convictions and to the fact that: 1) the criminal acts resulting in his conviction in federal court were committed over a significant period of time, from on or about July 29, 1985, until on or about April 30, 1987; 2) Petitioner was ordered to make restitution to Medicare of $18,817.30 and to Blue Cross/Blue Shield

---

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

of $13,960.72; and 3) Petitioner's sentence included incarceration.

Petitioner timely requested a hearing, and the case was assigned to me for a hearing and a decision. On November 19, 1990, I issued a prehearing Order setting a date for the hearing in this case of April 9, 1991. On March 8, 1991, this case was reassigned to Administrative Law Judge (ALJ) Constance T. O'Bryant for hearing and decision. On April 3, 1991, this case was reassigned to me. I held a hearing in Mason, Michigan, on April 9, 1991.

I have considered the evidence introduced by both parties at the April 9, 1991 hearing. Based on the evidence and applicable law, I conclude that the ten-year exclusion imposed against Petitioner is reasonable. Therefore, I am entering a decision in this case sustaining the exclusion imposed and directed against Petitioner by the I.G.

ISSUES

The issue in this case is whether the length of the ten-year exclusion imposed and directed against Petitioner is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner has been a physician since 1960. Petitioner is a certified anesthesiologist. Tr. 178 - 179.[2]

2. At all relevant times between 1985 and 1987, Petitioner practiced medicine, both as a general practice family physician in a clinic in Bay City, Michigan, and

---

[2] The parties' exhibits, briefs, and transcript of the hearing will be referred to as follows:

I.G.'s Exhibits	I.G. Ex. (number/page)
Petitioner's Exhibits	P. Ex. (number/page)
I.G. Brief	I.G. Br. (page)
Petitioner's Brief	P. Br. (page)
Transcript	Tr. (page)

as an anesthesiologist in two hospitals in Bay City -- Bay Osteopathic Hospital and Samaritan Hospital. Tr. 179 - 180.

3. On October 16, 1989, Petitioner was charged (pursuant to a criminal information filed in the U.S. District Court, Eastern District of Michigan (district court)) with two counts of mail fraud (18 U.S.C. 1341). I.G. Ex. 1.

4. Both counts of the information alleged that between July 29, 1985 and March 30, 1987, Petitioner filed fraudulent claims for Medicare services by representing that he had provided items or services on dates when he was not present to provide such items or services. I.G. Ex. 1.

5. The information further alleged that Petitioner filed fraudulent Medicare claims, for which Medicare reimbursed him $18,817.30 and Blue Cross Blue Shield of Michigan (BCBSM) reimbursed him $13,960.72. I.G. Ex. 1.

6. On September 25, 1989, Petitioner pleaded guilty to both counts of the information. I.G. Ex. 2.

7. On December 11, 1989, the district court suspended imposition of sentence on Count II of the Information and sentenced Petitioner (based on his guilty plea to Count I) to: 18 months imprisonment and three years' probation. I.G. Ex. 3.

8. The district court additionally imposed on Petitioner: 1) a $30,000.00 fine; 2) the obligation to make restitution to Medicare of $18,817.30 and to BCBSM of $13,960.72; 3) the condition that Petitioner not engage in the practice of medicine, surgery or anesthesiology during the course of his probation; and 4) a special assessment of $100. I.G. Ex. 3.

9. On August 26, 1987, a 19 count summons and complaint was issued by the 74th Judicial District Court of the State of Michigan (state court) against James D. Payne, D.O., personally and as a corporate entity, and against Alex Berehula. I.G. Ex. 5.

10. On October 9, 1989, Petitioner signed a plea agreement in which he agreed to plead guilty to the state criminal charges by admitting that he had filed a false claim with Medicaid and with BCBSM. I.G. Ex. 6.

11. In pleading guilty to the state criminal charges, Petitioner admitted that: 1) On November 3, 1986, he billed Medicaid for medical services he had not rendered, as he was travelling outside Michigan on the date of the alleged service; and 2) he left instructions for an office employee to see his patients while he was gone, even though the office employee had no medical training. I.G. Ex. 6/2-3.

12. In pleading guilty to the state criminal charges, Petitioner also admitted that on January 21, 1987, he improperly billed BCBSM for one hour and 16 minutes for the administration of anesthesia, knowing that the anesthesia had been administered for only 33 minutes. I.G. Ex. 6/3.

13. On October 16, 1989, the state court accepted Petitioner's plea. I.G. Ex. 7.

14. On December 11, 1989, the state court sentenced Petitioner to: 1) five years probation on each count to which he plead guilty; 2) a $50,000 fine on each count to which he plead guilty; 3) costs of $500; 4) an oversight fee of $30 a month; and 5) reservation of the right to require defendant be incarcerated for up to one year as a condition of probation, to be served concurrent to any federal imprisonment imposed in the district court action against Petitioner. I.G. Ex. 7/4; P. Ex. 7/22.

15. On December 11, 1973, Petitioner was indicted in district court on 20 counts of making false statements for payment under Medicare. I.G. Ex. 8.

16. On November 25, 1974, Petitioner pleaded nolo contendere to two counts of the indictment and was sentenced to two years' probation and fined $2,000 on each count. I.G. Ex. 9.

17. On April 9, 1990, the Michigan Department of Licensing and Regulation, Board of Osteopathic Medicine and Surgery (licensing board), pursuant to a stipulated consent order, revoked Petitioner's license to practice medicine. Petitioner was also ordered to pay a $5,000 fine before reapplying for his license. I.G. Ex. 15.

18. The licensing board had previously revoked Petitioner's license on September 3, 1976. On October 6, 1977, the licensing board modified its order and suspended Petitioner's license for 100 days and placed him on probation for two and one-half years. I.G. Ex. 15/4.

19. While there is a five-year minimum mandatory exclusion for criminal offenses relating to the delivery of an item or service under the Medicare and Medicaid programs, there is no statutory maximum length of exclusion.

20. The Secretary delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662, May 13, 1983.

21. On September 6, 1990, 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.

22. Petitioner's conviction occurred after the enactment of the 1987 amendments instituting the mandatory exclusion provision of section 1128(c)(3)(B). Congress intended the mandatory minimum exclusion provision to apply prospectively from the date of the statute's enactment to all convictions occurring on or after the effective date of the 1987 amendment.

23. Petitioner admits that he was convicted of an offense related to the delivery of an item or service relating to the Medicare and Medicaid programs. Petitioner is contesting the ten year length of his exclusion, not whether he is subject to the five-year minimum mandatory exclusion provision of section 1128(c)(3)(B). P. Br. 1; Tr. 205 - 206.

24. Petitioner has been convicted, in both state and federal courts, of several crimes against the Medicare and Medicaid programs. Findings 3-6, 9-10, 13, 15, 16; See 42 C.F.R. 1001.125(b)(1).

25. In allowing untrained personnel to treat his patients, Petitioner endangered the health and safety of those patients at a time when Petitioner was not present in his office. Finding 11; Tr. 136-147, 156-160, 223-224; See 42 C.F.R. 1001.125(b)(2).

26. Petitioner defrauded the Medicare and Medicaid programs of thousands of dollars over a lengthy period of time. Findings 3-6, 9-13; See 42 C.F.R. 1001.125(b)(3).

27. Petitioner has not demonstrated any comprehension of the seriousness of his offenses. See 42 C.F.R. 1001.125(b)(4).

28. Petitioner has not offered any evidence to show that he would not again defraud the Medicare and Medicaid programs if given the opportunity to do so. See 42 C.F.R. 1001.125(b)(4).

29. Petitioner received a lengthy sentence, including incarceration and probation. Findings 7, 14; See 42 C.F.R. 1001.125(b)(5).

30. The criminal convictions which resulted in Petitioner's exclusions are repeat offenses. Findings 15, 16; See 42 C.F.R. 1001.125(b)(7)

31. Petitioner's crimes against the Medicare and Medicaid programs consisted of a scheme to fraudulently represent that he had personally provided items or services which, in fact, he never provided. Findings 4, 11, 12.

32. As an element of Petitioner's scheme, Petitioner directed his office staff to provide items or services for which they had no medical training or qualifications. Finding 11, 25.

33. Petitioner falsely represented that he personally had provided items or services which had in fact been provided by his untrained and unqualified office staff. Findings 4, 11, 25, 33.

34. Items or services which Petitioner falsely claimed to have provided personally were in fact provided on dates when Petitioner was not present in his office. Findings 3-6, 9-11, 13.

35. The I.G. had authority to exclude Petitioner from participating in Medicare and to direct that he be excluded from participating in Medicaid. Findings 3-6, 9-13, Social Security Act, section 1128(a)(1) and 1128(c)(3)(B).

36. The ten-year exclusion imposed and directed against Petitioner by the I.G. is not extreme or excessive. Findings 1-35; Social Security Act, section 1128(a)(1) and 1128(c)(3)(B); See 42 C.F.R. 1001.125(b)(1)-(7).

ANALYSIS

Petitioner does not dispute that he has been convicted of a criminal offense related to the delivery of an item or service under the Medicare and Medicaid programs, nor does he dispute that he is subject to the five-year

minimum mandatory exclusion. Petitioner is contesting only the ten-year exclusion which the I.G. imposed and directed against him, asserting that it is unreasonable. P. Br. 1 - 2. While Petitioner accepts that the minimum mandatory exclusion provision applies to him, he does question its applicability in light of the fact that the conduct underlying Petitioner's conviction occurred before the enactment of the minimum mandatory exclusion provision. Tr. 13. However, Congress intended the minimum mandatory exclusion provision to apply prospectively from the date of the provision's enactment to all convictions, such as Petitioner's, occurring on or after the provision's 1987 effective date. See Betsy Chua, M.D., DAB Civ. Rem C-139, aff'd DAB App. 1204 (1990).

In deciding whether or not Petitioner's exclusion is reasonable, I must review the evidence with regard to the exclusion law's remedial purpose. Section 1128 is a civil remedies statute. The remedial purpose of section 1128 is to enable the Secretary to protect federally-funded health care programs and their beneficiaries and recipients from individuals and entities who have proven by their misconduct that they are untrustworthy. Exclusions are intended to protect against future misconduct by providers.

Federally-funded health care programs are no more obligated to deal with dishonest or untrustworthy providers than any purchaser of goods or services would be obligated to deal with a dishonest or untrustworthy supplier. The exclusion remedy allows the Secretary to suspend his contractual relationship with those providers of items or services who are dishonest or untrustworthy. The remedy enables the Secretary to assure that federally-funded health care programs will not continue to be harmed by dishonest or untrustworthy providers of items or services. The exclusion remedy is closely analogous to the civil remedy of termination or suspension of a contract to forestall future damages from a continuing breach of that contract.

Exclusion may have the ancillary benefit of deterring providers of items or services from engaging in the same or similar misconduct as that engaged in by excluded providers. However, the primary purpose of an exclusion is the remedial purpose of protecting the trust funds and beneficiaries and recipients of those funds. Deterrence cannot be a primary purpose for imposing an exclusion. Where deterrence becomes the primary purpose, section 1128 no longer accomplishes the civil remedies objectives

intended by Congress. Punishment, rather than remedy, becomes the end.

> [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

United States v. Halper, 490 U.S. 435, 448 (1989).

Therefore, in determining the reasonableness of an exclusion, the primary consideration must be the degree to which the exclusion serves the law's remedial objective of protecting program recipients and beneficiaries from untrustworthy providers. An exclusion is not excessive if it does reasonably serve these objectives.

The hearing in an exclusion case is, by law, de novo. Social Security Act, section 205(b). Evidence which is relevant to the reasonableness of the length of an exclusion will be admitted in a hearing on an exclusion whether or not that evidence was available to the I.G. at the time the I.G. made his exclusion determination. Evidence which relates to a petitioner's trustworthiness or the remedial objectives of the exclusion law is admissible at an exclusion hearing even if that evidence is of conduct other than that which establishes statutory authority to exclude a petitioner.

The purpose of the hearing is not to determine how accurately the I.G. applied the law to the facts before him, but whether, based on all relevant evidence, the exclusion comports with legislative intent. Because of the de novo nature of the hearing, my duty is to objectively determine the reasonableness of the exclusion by considering what the I.G. determined to impose in light of the statutory purpose and the evidence which the parties offer and I admit. The I.G.'s thought processes in arriving at his exclusion determination are not relevant to my assessment of the reasonableness of the exclusion.

Furthermore, my purpose in hearing and deciding the issue of whether an exclusion is reasonable is not to second-guess the I.G.'s exclusion determination so much as it is to decide whether the determination was extreme or excessive. 48 Fed. Reg. 3744 (Jan. 27, 1983). Should I determine that an exclusion is extreme or excessive, I

have authority to modify the exclusion, based on the law and the evidence. Social Security Act, section 205(b).

The Secretary has adopted regulations to be applied in exclusion cases. The regulations specifically apply to exclusion cases for "program-related" offenses (convictions for criminal offenses relating to Medicare or Medicaid). The regulations express the Secretary's policy for evaluating cases where the I.G. has discretion in determining the length of an exclusion. The regulations require the I.G. to consider factors related to the seriousness and program impact of the offense and to balance those factors against any factors that may exist demonstrating trustworthiness. 42 C.F.R. 1001.125(b)(1)-(7). In evaluating the reasonableness of an exclusion, I consider as guidelines the regulatory factors contained in 42 C.F.R. 1001.125(b).

The evidence in this case establishes that Petitioner is a manifestly untrustworthy individual. Petitioner engaged in protracted fraud against the Medicare and Medicaid programs. His unlawful conduct not only jeopardized the financial integrity of these programs, it imperiled the health and safety of Petitioner's patients. Petitioner is a repeat criminal offender who has on more than one occasion been convicted of defrauding federally-funded health care programs. Petitioner was convicted once in the early 1970's for Medicare fraud. Based on this conviction, he was placed on probation, fined, and had his license suspended. Findings 15, 16. Apparently learning nothing from this experience, Petitioner then perpetrated additional crimes against Medicare and Medicaid. He was subsequently convicted in both state and federal courts of fraud against these programs. These crimes involved large sums of money and took place over a lengthy period of time. Findings 3-6, 9-13. Furthermore, Petitioner placed large numbers of program recipients and beneficiaries at risk by allowing untrained individuals to treat his patients. Findings 11, 25. Petitioner persisted in his criminal behavior for a lengthy period even though by his own assertion he did not "need the money". P. Ex. 1/Appendix 1.

The record of this case is devoid of evidence that Petitioner can now or at any time in the near future be trusted with federal funds or with the welfare of program beneficiaries and recipients. I find nothing to suggest that Petitioner even acknowledges that he engaged in illegal or wrongful conduct. I am not persuaded that Petitioner would not in the future engage in such conduct, if provided with the opportunity to do so. Petitioner provided no credible explanation for his

criminal conduct either to me or to the judges who heard his pleas to criminal charges. The state court judge who sentenced Petitioner on his 1989 conviction was skeptical that Petitioner had learned his lesson. That judge stated:

> [W]e have somebody [Petitioner] who is clearly able to avoid it, has no financial need for taking the money, has done it before and been caught and does it again, and I'm supposed to make a finding in the fact of that that it's not likely that he's again going to engage in a course of offensive conduct. And it's not easy.

P. Ex. 7/21. The judge also noted that Petitioner "expresses remorse for negligence, but no remorse for what he did which is a lot further than negligence." P. Ex. 7/19.

While Petitioner acknowledges some "legal" responsibility for the fraudulent activities for which he was convicted, he blames his difficulties on his office staff or on unjust Medicare and Medicaid reimbursement formulas. Tr. 182, 183, 185, 187 - 189, 195, 221 - 222; P. Ex. 6/9. Petitioner persists in asserting that the actions for which he was convicted were simply a case of inadvertence or oversight on the part of a busy practitioner. Tr. 190 - 191, 221; P. Ex. 1/Appendix 1, 6/9, 7/17. Petitioner also asserts that he was not in fact away from his office on the dates for which he falsely claimed to have been present and to have treated patients. He testified that on those occasions when he was absent he had made provisions for two other doctors to treat his patients. Tr. 192 - 193; P. Br. 4. These assertions are belied by the admissions which Petitioner made in pleading guilty to federal and state criminal charges. They were also persuasively contradicted by the credible testimony of one of Petitioner's former employees, Andrea Rahn. Tr. 142, 145, 156, 159 - 160.

Petitioner testified at the hearing before me that he had an affidavit that Andrea Rahn was "out to get" him. Tr. 195. However, Petitioner did not introduce this affidavit as evidence in this hearing, even though Ms. Rahn testified and Petitioner was notified in advance of the hearing of the I.G.'s intent to call her as a witness. I find not credible Petitioner's assertion that he possessed an affidavit impugning Ms. Rahn's motives. Furthermore, this assertion by Petitioner supports my conclusion that he is an untrustworthy and dishonest individual.

The evidence in this case proves that over a period of almost twenty years, Petitioner made claims on numerous occasions to government health care programs for services he did not render. Further, Petitioner has showed a callous disregard for the health and safety of his patients by allowing unqualified persons to treat them, which action could have led to tragic consequences for beneficiaries and recipients of the Medicare and Medicaid programs. There is no evidence in this case that Petitioner accepts responsibility for the gravity of his offenses or the harm which he has caused. Instead, Petitioner has chosen to blame others for his crimes or to characterize his actions as being inadvertence or oversight. Petitioner has offered no evidence that he has tried to rehabilitate himself or his conduct. The best that he can say for himself is that he is substance free and has worked hard and in a competent manner. See P. Br. 7. Given the evidence, I conclude that the ten-year exclusion imposed and directed by the I.G. against Petitioner is not extreme or excessive.

CONCLUSION

Based on the evidence and the law, I sustain the ten-year exclusion which the I.G. imposed and directed against Petitioner.

/s/

Steven T. Kessel
Administrative Law Judge