

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

| | | |
|------------------------|---|------------------------|
| In the Case of: |) | |
| Arthur D. Freiberg, |) | DATE: January 19, 1990 |
| D.P.M., |) | |
| Petitioner, |) | Docket No. C-58 |
| - v. - |) | DECISION CR 63 |
| The Inspector General. |) | |

DECISION AND ORDER

Petitioner requested a hearing to contest the Inspector General's (I.G.'s) determination to exclude him from participation in the Medicare and Medicaid programs for a period of ten years, pursuant to section 1128 of the Social Security Act (Act).¹

I conducted a hearing in New York, New York, on September 19 and 20, 1989. Based on the evidence introduced at the hearing, and on applicable federal law and regulations, I conclude that Petitioner was properly excluded by the I.G. and that it is appropriate for Petitioner to be excluded for a period of seven years.

¹ Section 1128 of the Act provides for the exclusion of individuals and entities from the Medicare program and requires the I.G. to direct States to exclude those same individuals and entities from "any State health care program" as defined in section 1128(h) of the Act. The Medicaid program is one of three types of State health care programs defined in Section 1128(h) of the Act, and for the sake of brevity, I refer only to it in this Decision.

BACKGROUND

By letter dated August 18, 1986 (Notice), the I.G. notified Petitioner of his ten-year exclusion from participation in the Medicare and Medicaid programs. Further, the I.G. notified Petitioner that the exclusion determination was mandated by section 1128 of the Act, which required the I.G. to impose and direct exclusions against an individual convicted of a criminal offense related to his participation in the Medicaid program.

By letter dated September 2, 1986, Petitioner submitted his initial request for a hearing regarding his ten-year exclusion. Subsequently, Petitioner withdrew his hearing request. By Order dated November 19, 1986, Administrative Law Judge Joseph C. Medicis dismissed the case without prejudice. By letter dated September 30, 1988, Petitioner renewed his hearing request and the case was assigned to me for a hearing and decision.

On November 3, 1988, the I.G. filed a Motion to Dismiss Petitioner's request for a hearing as being untimely. The I.G. based his motion on a November 11, 1986, stipulation in which the I.G. and Petitioner agreed that the case could be dismissed without prejudice and that Petitioner could request reinstatement of his hearing request within 60 days of the date of the stipulation. On November 21, 1988, Petitioner filed a brief in opposition to the I.G.'s motion. I issued a Ruling on December 1, 1988, in which I: (1) denied the I.G.'s motion to dismiss, and (2) scheduled a telephone prehearing conference for December 9, 1988.

In response to the discussions and consent of the parties during the December 9, 1988, prehearing conference, I issued a Prehearing Order on December 15, 1988, in which I proposed a remand of this case to the I.G. for consideration of evidence not previously considered by the I.G. in determining Petitioner's period of exclusion.

By letter dated January 9, 1989, Petitioner submitted the information which he proposed to have the I.G. review on remand. On January 13, 1989, the I.G. filed a brief in which he asserted that I lacked the authority to direct him to consider the information submitted by Petitioner. Although the I.G.'s brief did not state whether the I.G. objected to a remand of this case, further discussions revealed that the I.G. did object to a remand.

As a result of a telephone conference which I held on February 28, 1989, I issued an Order and Summary of Telephone Conference on March 8, 1989. On March 24,

1989, Petitioner filed a motion to remand and brief in support thereof. On April 19, 1989, the I.G. filed a brief in opposition to Petitioner's motion to remand. On May 22, 1989, I issued a Ruling denying Petitioner's motion to remand.

On June 15, 1989, I held a telephone prehearing conference for the purpose of setting the date and location for an evidentiary hearing. I issued a Prehearing Order on June 23, 1989. Finally, a trial-type hearing was conducted on September 19 and 20, 1989, in New York, New York.

ADMISSIONS

Petitioner admits that: (1) he was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act; and (2) the offense was "related to the delivery of an item or service" within the meaning of section 1128(a)(1) of the Act.

APPLICABLE STATUTES AND REGULATIONS

The statutes and regulations which are applicable to this case are those which were in effect in August 1986, the date on which the I.G. issued Petitioner's Notice.

I. The Federal Statute.

On August, 18, 1986, section 1128 of the Act required the Secretary of Health and Human Services to exclude from participation in the Medicare program, and to direct that the states to exclude from participation in the Medicaid program, any physician or other individual who had been convicted of a criminal offense related to that person's delivery of medical care or services under the Medicare or Medicaid program. The law did not prescribe a minimum period of exclusion.

The law was revised in August, 1987, to provide for a five-year minimum period of exclusion from Medicare and Medicaid for those individuals or entities convicted of a criminal offense related to the delivery of an item or service under the Medicare or Medicaid programs.

II. The Federal Regulations.

The governing federal regulations (Regulations) are codified in 42 C.F.R., Parts 498, 1001, and 1002. Part 498 governs the procedural aspects of this exclusion case; Parts 1001 and 1002 govern the substantive aspects.

Section 1001.123 requires the I.G. to issue an exclusion notice to an individual whenever the I.G. has "conclusive information" that such individual has been "convicted" of Medicare or Medicaid item or service; such exclusion must begin 15 days from the date on the notice.²

ISSUE

The issue in this case is whether the ten-year period of exclusion imposed against Petitioner is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW³

Having considered the entire record, the arguments and submissions of the parties, and being fully advised herein, I make the following Findings of Fact and Conclusions of Law:

1. Petitioner was engaged in the private practice of podiatry, in the State of New York, from April 1978 through October 1986. Tr. 165.

² The I.G.'s notice letter allows an additional five days for receipt by mail.

³ Citations to the record in this Decision and Order are as follows:

| | |
|--|-------------------------|
| Petitioner's Brief | P. Br.(page) |
| I.G.'s Brief | I.G. Br.(page) |
| Petitioner's Exhibits | P. Ex.(letter)/(page) |
| I.G.'s Exhibits | I.G. Ex.(number)/(page) |
| Transcript of September 19 and 20, 1989 | Tr. (page) |

2. On March 3, 1986, Petitioner was convicted in the Supreme Court of the State of New York, Kings County, of one count of grand larceny in the second degree, 18 counts of filing a false instrument in the first degree, and four counts of falsifying business records in the first degree. I.G. Ex. 4.

3. Petitioner's convictions were the result of actions taken from about January 1981 through August 1984. Tr. 135; I.G. Ex. 3, 4.

4. Petitioner's grand larceny conviction resulted from Medicaid's reimbursement to Petitioner based upon claims, submitted by Petitioner, for items or services not provided. I.G. Ex. 3, 4.

5. Petitioner's convictions for 18 counts of offering a false instrument resulted from his submission of claims to the Medicaid program for reimbursement for surgical procedures which he did not perform. I.G. Ex. 3, 4.

6. Petitioner's convictions for four counts of falsifying business records resulted from his falsifying his medical records to reflect that services were performed for various Medicaid recipients, although, in actuality, the services had not been performed. I.G. Ex. 3, 4.

7. Petitioner's convictions resulted in sentences of: (1) four months in prison, to be served on weekends; (2) five years probation for each count of filing a false instrument and falsifying business records, to run concurrently; (3) \$49,000 in fines; and (4) \$40,000 in restitution to the Medicaid program. I.G. Ex. 5.

8. Section 1128 of the Act required the I.G. to impose and direct an exclusion against individuals convicted of criminal offenses related to their participation in the delivery of medical care or services under the Medicaid program. 1128(a)(1986); 42 U.S.C. 1320a-7(a).

9. The purpose of the exclusion law is to protect the Medicare and Medicaid programs from fraud and abuse and to protect the beneficiaries and recipients of those programs from incompetent practitioners and inappropriate or inadequate care.

10. Petitioner admits, and I conclude, that he was convicted of criminal offenses which are related to his delivery of medical care or services under the Medicaid program, within the meaning of section 1128(a) of the Act. Tr. 10, 136; FFCL 2-4.

11. The I.G. properly imposed and directed an exclusion from participation in the Medicare and Medicaid programs against Petitioner.

12. During the time period applicable to this case, section 1128 of the Act did not provide for a minimum or maximum period of exclusion.

13. In addition to reviewing and weighing indicia of trustworthiness, the length of Petitioner's exclusion is to be determined by reviewing and weighing: (1) the number and nature of the 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 social services programs, (4) the existence of mitigating circumstances, (5) the length of sentence imposed by the court, (6) any other facts bearing on the nature and seriousness of the violations, and (7) the previous sanction record of Petitioner. 42 C.F.R. 1001.125(b).

14. The fact that the criminal acts which formed the basis for Petitioner's conviction were committed over a period of time in excess of one year is an aggravating factor in determining an appropriate length of exclusion. FFCL 2.

15. The fact that Petitioner was convicted of a total of 23 counts of criminal offenses related to the delivery of items and services under the Medicaid program is an aggravating factor in determining an appropriate length of exclusion. FFCL 3.

16. The fact that Petitioner's violations did not have a direct adverse impact on Medicaid recipients, in that the alleged items and services were never provided, is a neutral factor in determining an appropriate length of exclusion. FFCL 5, 6.

17. The fact that Petitioner was ordered to pay \$40,000 in restitution to the Medicaid program is an aggravating factor in determining an appropriate length of exclusion. FFCL 7.

18. The fact that Petitioner was: (1) sentenced to four months in prison; (2) placed on probation for five years (although he was released from probation prior to the expiration of the five-year period); and (3) ordered to pay \$49,000 in fines (although Petitioner was excused from paying the balance of the fines amounting to

\$23,000) are aggravating factors in determining an appropriate length of exclusion. FFCL 7; Tr. 145.

19. Petitioner received treatment from a psychoanalyst from about 1982 through 1986. Petitioner learned from this treatment that he was exhibiting self-destructive behavior patterns and was experiencing feelings of inadequacy. Tr. 142.

20. The fact that Petitioner received treatment from a psychoanalyst from about 1982 through 1986 is a mitigating factor in determining an appropriate length of exclusion. FFCL 18.

21. The I.G. did not consider the medical treatment, which Petitioner received from a psychoanalyst, as a mitigating factor in determining an appropriate length of exclusion.

22. The various community services performed by Petitioner are not mitigating factors in determining an appropriate period of exclusion, but the behavior evidenced by Petitioner's participation in those community services is a mitigating factor.

23. Petitioner engaged in the community services at issue subsequent to his conviction and subsequent to the I.G.'s exclusion determination.

24. An exclusion is unreasonable if it is extreme or excessive.

25. In light of the evidence presented in this case, a seven year period of exclusion is appropriate and would serve the purposes of the exclusion law.

DISCUSSION

There is no dispute in this case that Petitioner was convicted of a criminal offense relating to his participation (or lack thereof) in the delivery of medical care or service under the Medicaid program. Therefore, pursuant to section 1128 of the Act as it existed on the date of the I.G. Notice in 1986, the I.G. had the authority to impose and direct an exclusion from participation in the Medicare and Medicaid programs against Petitioner. FFCL 8, 9. Therefore, the remaining issue in this case is the appropriate length of exclusion.

In making the determination of the appropriate length of an exclusion, it is helpful to look at the following factors: (1) the purpose of the exclusion law, and (2) the facts and circumstances of the case at issue.

I. The Purpose of The Exclusion Law Should be Considered in Determining an Appropriate Length of Exclusion.

In determining an appropriate length of exclusion, major consideration must be given to the purpose of the exclusion law. As I held in Charles J. Burks, M.D., Petitioner, v. The Inspector General, DAB Docket No. C-111 (1989):

Congress enacted section 1128 of the Act to protect the Medicare and Medicaid programs from fraud and abuse and to protect the beneficiaries of those programs from incompetent practitioners and inappropriate or inadequate care. See, S. Rep. No. 109, 100th Conf., 1st Sess. 1; reprinted 1987 U.S. Code Cong. and Admin. News 682. The key term to keep in mind is "protection," the prevention of harm. See, Webster's II New Riverside University Dictionary 946 (1984). As a means of protecting the Medicare and Medicaid programs and its beneficiaries, Congress chose to mandate, and in other instances to permit, the exclusion of individuals. Through exclusion, individuals who have caused harm, or may cause harm, to the program or its beneficiaries are no longer permitted to receive reimbursement for items or services which they provide to Medicare or Medicaid beneficiaries. Thus, individuals are removed from a position which provides a potential avenue for causing harm to the programs and their beneficiaries. Exclusion also serves as a deterrence to other individuals against deviant behavior which may result in harm to the Medicare and Medicaid programs or its beneficiaries.

The exclusion law, as it existed during the time period applicable to this case, is analogous to the present exclusion law relating to permissive exclusion in that Congress has not prescribed a minimum or maximum period of exclusion to be imposed. By not mandating that exclusions from participation in the Medicare and Medicaid program be permanent, Congress has allowed the I.G. the opportunity to give individuals a "second chance." The placement of a limit on the period of exclusion allows an excluded individual the opportunity to demonstrate that he or she can and should be trusted

to participate in the Medicare and Medicaid programs and to provide items and services to program beneficiaries.

II. The Facts and Circumstances of Each Case Should be Considered in Determining an Appropriate Length of Exclusion.

The determination of when an individual should be allowed to reapply for participation as a provider in the Medicare and Medicaid programs is based on evidence concerning that individual's trustworthiness. The Regulations provide some guidance which may be followed in making this determination.⁴

The Regulations provide that the length of a petitioner's exclusion may be determined by reviewing: (1) the number and nature of the offenses, (2) the nature and extent of any adverse impact the violations have had on beneficiaries, (3) the amount of damages suffered by the Medicare, Medicaid, and social services programs, (4) the existence of mitigating circumstances, (5) the length of sentence imposed by the court, (6) any other facts bearing on the nature and seriousness of the violations, and (7) the previous sanction record of Petitioner. 42 C.F.R. 1001.125(b).

A. The fact that the criminal acts which formed the basis for Petitioner's conviction were committed over a period of time in excess of one year is an aggravating factor in determining an appropriate length of exclusion.

The criminal offenses of which Petitioner was convicted were committed over a three-year period. The facts of this case do not present a situation where the provider's offenses occurred during a brief period (e.g., a few months or a year), but instead reveal a provider who repeatedly, over an extended period of time, committed fraud against the Medicaid program.

⁴ The Regulations at 42 C.F.R. 1001.125(b)(1) - (7) were adopted by the Secretary prior to the enactment of the 1987 revisions to the exclusion law and specifically apply to this case.

B. The fact that Petitioner was convicted of a total of 23 counts of criminal offenses related to the delivery of items and services under the Medicaid program is an aggravating factor in determining an appropriate length of exclusion.

The Regulations provide that the number of criminal offenses of which Petitioner was convicted should be used as a guide in determining the appropriate period of exclusion. Petitioner was convicted of 23 criminal offenses, a significant number.

C. The fact that Petitioner's violations did not have a direct adverse impact on Medicaid recipients is a neutral factor in determining an appropriate length of exclusion.

In determining an appropriate length of exclusion, the Regulations provide that I should consider whether Petitioner's violations had an adverse impact on Medicaid recipients. The I.G.'s witness testified, and accordingly I find and conclude, that Petitioner's violations did not have a direct adverse impact on Medicaid recipients. Although Petitioner's actions adversely affected the Medicaid program, the I.G. did not prove that Petitioner's failure to provide the services claimed resulted in direct harm to Medicaid recipients.

D. The fact that Petitioner was ordered to pay \$40,000 in restitution to the Medicaid program is an aggravating factor in determining an appropriate length of exclusion.

In determining an appropriate length of exclusion, the Regulations instruct me to consider the amount of damages incurred by the Medicaid program. The fact that Petitioner was ordered to pay \$40,000 in restitution to the Medicaid program evidences that his conduct resulted in damage to the program. By definition, restitution means "an act of repaying or compensating for loss, damage or injury." See, Webster's II New Riverside University Dictionary 1002 (1984). Petitioner caused a substantial amount of loss, damage, or injury to the Medicaid program, as evidenced by the \$40,000 in restitution which he was ordered to pay. Therefore, this is an aggravating factor in determining an appropriate length of exclusion.

E. The fact that Petitioner was sentenced to substantial penalties and incarceration as a result of his conviction are aggravating factors in determining an appropriate length of exclusion.

Petitioner was: (1) sentenced to four months in prison, (2) placed on probation for five years; and (3) ordered to pay \$49,000 in fines. FFCL 7; Tr. 145. Petitioner was excused from paying the balance of \$23,000 in fines and was released from probation prior to the scheduled probation termination date. However, the Regulations instruct me to review the sentence imposed by the Court, not the amount of fines which Petitioner ultimately paid, or the term of probation he ultimately served.

F. Petitioner has proved the existence of mitigating factors in determining an appropriate length of exclusion.

The Regulations state that I should consider mitigating factors in determining an appropriate length of exclusion. However, the Regulations do not provide a definition of what constitutes a "mitigating factor." I have held in previous decisions that mitigating factors include, but are not limited to, factors which demonstrate trustworthiness. See, Burks, supra.

Medical conditions which relate to a petitioner's culpability in committing criminal offenses may be mitigating in determining an appropriate length of exclusion. The fact that Petitioner received treatment from a psychoanalyst from about 1982 through 1986 is a mitigating factor. The I.G. stated that he did not consider this factor in determining the length of exclusion to be imposed upon Petitioner because the information was not presented to him in a timely fashion. I.G. Br. 11. However, in determining an appropriate length of exclusion, I am not bound to consider only the information which the I.G. had before him at the time he made his exclusion determination. Vincent Baratta, M.D. v. The Inspector General, DAB Docket No. C-144 (1990).

Petitioner testified that, during the time period in which he committed the criminal offenses for which he was convicted, he was receiving treatment for a psychological problem. The psychoanalyst who treated Petitioner was deceased and therefore, unavailable to testify at the hearing. Tr. 143. However, Petitioner also testified that, subsequent to the death of his psychoanalyst, he sought and received medical treatment from other professionals, none of whom testified, and that he stopped receiving treatment because of financial

hardship. Tr. 144. Petitioner did not testify that he stopped receiving treatment because the problems for which he sought treatment initially no longer existed. Therefore, although the fact of Petitioner's medical treatment is mitigating, the amount of weight which I assign to this factor in determining an appropriate period of exclusion will be minimal. The purpose of the exclusion law is to protect the program from fraud and abuse, and to assure that program participants are qualified and willing to provide the required items and services in a professional and competent manner.

Subsequent to Petitioner's conviction, he has engaged in various community services. Tr. 163. The I.G. cites Judge Steven T. Kessel's decision in Leonard N. Schwartz, R. Ph. v. The Inspector General, DAB Docket No. C-62 (1989), in support of his argument that Petitioner's community services are not mitigating factors. Judge Kessel held in Schwartz that the petitioner's community services demonstrated that he manifested "personal virtues other than trustworthiness." In this case, Petitioner's engagement in community services following his conviction illustrates that he is remorseful. Tr. 145 -146. It is reasonable to infer from Petitioner's remorse that he now understands the magnitude of, and harm caused by, his unlawful activities. Out of Petitioner's remorse, an understanding may have been born: (1) that actions which he takes may result in undue harm to the Medicaid program and its recipients; and (2) he will be punished for his unlawful actions to a degree which he may be unwilling or afraid to face. Petitioner's participation in community activities and his testimony concerning his insight into his criminal activities indicates that he is well into the process which will hopefully culminate in his being a an individual who can be trusted to participate in the Medicaid program and to administer services to the program's recipients. Thus, Petitioner's community services, coupled with his testimony, are mitigating factors.

As stated, the Regulations set forth criteria to follow in determining an appropriate length of exclusion. The Regulations do not provide a formula which specifies the amount of weight to accord each factor. The final determination of an appropriate length of exclusion must be based upon: (1) a consideration of the factors stated in the Regulations; (2) the purpose of the exclusion law; (3) the immediate individual facts and circumstances of the case (although they may differ from the facts and circumstances which were ~~before~~ the I.G. at the time he

made his exclusion determination); (4) the experience of the Administrative Law Judge.

In applying the above considerations to this case, I conclude that the I.G.'s determination to exclude Petitioner for a period of ten years was excessive. This determination would have been reached based upon my consideration of the facts and circumstances which the I.G. had before him at the time he made his exclusion determination. The mitigating factors presented by Petitioner serve to further reduce what I have concluded, based upon the evidence presented, was an unreasonable length of exclusion.

I recognize that Petitioner was convicted of serious criminal offenses which resulted in substantial harm to the Medicaid program. I also recognize, although I accord them a lesser degree of weight, that Petitioner has proven two mitigating factors. However, in consideration of the purpose of the exclusion law, and the totality of the facts and circumstances presented in this case, I conclude that a seven-year period of exclusion is appropriate.

CONCLUSION

Based on the evidence of this case and the law, I conclude that the I.G. had authority to impose and direct an exclusion against Petitioner from participation in the Medicare and Medicaid programs. Further, I conclude that the purpose of the exclusion law will be best served by a seven-year period of exclusion. Therefore, I modify the exclusion imposed and directed against Petitioner to a term of seven years.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge