

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Basem F. Kandah, R.Ph.)	DATE: May 31, 1990
)	
Petitioner,)	
)	
- v. -)	Docket No. C-155
)	DECISION CR 80
The Inspector General.)	
)	

DECISION

By letter dated June 16, 1989, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare program and certain federally-assisted State health care programs¹ for six years, based on his conviction of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The I.G. advised Petitioner that the exclusion was authorized by section 1128(b)(3) of the Social Security Act. Petitioner timely requested a hearing on the issue of whether the length of time of the exclusion was reasonable.

During a telephone prehearing conference on November 3, 1989, Petitioner acknowledged that he knew of his right to obtain legal counsel, but he stated that he intended to appear on his own behalf (pro se). Petitioner appeared pro se at the evidentiary hearing I conducted on January 23, 1990, in Detroit, Michigan.

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 (Medicaid) of the Act. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

Based on the evidence introduced by both parties at the January 23 hearing, and the applicable law, I conclude that the exclusions imposed by the I.G. are authorized by section 1128(b)(3) of the Social Security Act and are reasonable. I set forth below my findings of fact and conclusions of law in support of this conclusion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a pharmacist who obtained a license to practice pharmacy in the State of Michigan on April 8, 1977. I.G. Exhibit (Ex.) 26.
2. Petitioner was employed at East Pharmacy Inc., in Detroit, Michigan, from late August 1985 through December 1986. Transcript (Tr.) at 144.
3. While employed at East Pharmacy, Inc., from early September, 1985, until November 14, 1985, Petitioner personally dispensed dosages of Tylenol with codeine, a Schedule III controlled substance, without legitimate prescriptions or other legitimate authorizations. I.G. Ex. 1, 7, 12.
4. On May 26, 1988, Petitioner was convicted of the criminal offense of intentional and unlawful distribution of a controlled substance (Tylenol with codeine), in violation of 21 U.S.C. 841(a)(1), after a jury trial in the United States District Court for the Eastern District of Michigan. I.G. Ex. 1.
5. Petitioner's conviction was affirmed on appeal to the United States Court of Appeals for the Sixth Circuit, which found that a necessary element of the conviction was a finding that Petitioner "knew that a purported prescription was not issued in the usual course of medical practice . . ." United States v. Hughes, 895 F.2d 1135 (6th Cir. 1990).
6. Petitioner was sentenced to a three-year term of imprisonment, followed by a special parole term of four years, and a \$50 special assessment. I.G. Ex. 1.
7. The criminal offense of which Petitioner was convicted on May 26, 1988, is related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, within the meaning of section 1128(b)(3) of the Social Security Act. 42 U.S.C.A. 1320a-7(b)(3).
8. On June 16, 1989, the I.G. notified Petitioner that he was being excluded from participation in Medicare and

Medicaid for six years, pursuant to section 1128(b)(3) of the Social Security Act, in light of the May 26, 1988 conviction. I.G. Ex. 2.

9. The exclusion provisions of section 1128 of the Social Security Act establish neither minimum nor maximum lengths for exclusions based on section 1128(b)(3).

10. A purpose of section 1128(b)(3) of the Social Security Act is to protect beneficiaries and program funds by excluding individuals or entities who by conduct have demonstrated a risk that they may engage in fraud, substandard services, abuse, or unsafe practices in connection with controlled substances until such time as those excluded can demonstrate that such risk no longer exists. S. Rep. No. 109, 100th Cong. 1st Sess. 2, reprinted in 1987 U.S. Code Cong. & Admin. News 682.

11. Petitioner committed a serious criminal offense which resulted in his incarceration for a substantial period of time. Finding 6.

12. Petitioner engaged in the criminal conduct knowingly and with knowledge that the conduct was illegal. I.G. Ex. 1, 7; Tr. at 117-123, 135; United States v. Hughes, supra, pp. 1143-44.

13. Petitioner's criminal conduct continued over a significant period of time and was not an isolated event. Tr. at 134-35; United States v. Hughes, supra, p. 1143.

14. This conduct involved a large quantity of controlled substances (approximately 20,000 doses). Tr. at 63.

15. This conduct endangered the health and safety of individuals who obtained controlled substances from Petitioner. 21 U.S.C. 841(b); Tr. at 126.

16. In 1984, Petitioner was convicted of mislabelling a controlled substance, based on conduct which included both mislabelling and unlawful distribution of controlled substances. Petitioner was sentenced to a year of probation. I.G. Ex. 28.

17. Based on the 1984 conviction, Petitioner's license to practice pharmacy was suspended for six months, and limitations were placed on his license for the rest of the probationary period. I.G. Ex. 25-27.

18. Petitioner's license to practice pharmacy was suspended by the State of Michigan on August 15, 1988, and was revoked on March 21, 1989 (effective April 20,

1989), based on Petitioner's conviction in 1988 and his underlying conduct. I.G. Ex. 9, 10.

19. The Michigan Board of Pharmacy found that Petitioner's conduct "demonstrated a lack of good moral character," and showed that Petitioner "lacks the propensity to serve the public as a pharmacist in a fair, honest, and open manner." I.G. Ex. 9, pp. 55-56, (finding adopted in I.G. Ex. 10).

20. Petitioner presented no evidence that he had provided substantial cooperation to government authorities investigating the criminal activities in which he was involved.

21. Petitioner's status as an employee, financial difficulties, and lack of personal profit beyond his salary, while mitigating factors, do not establish that a six-year exclusion is extreme or excessive.

22. The six-year length of the exclusion is reasonable in light of the seriousness of the offense, the large number of individual transactions, the length of time during which the criminal conduct occurred, the evaluation of Petitioner's moral character by the Michigan Board of Pharmacy, and Petitioner's prior and similar criminal offense.

ANALYSIS

Petitioner admitted that he was convicted for a criminal offense related to "the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance," within the meaning of section 1128(b)(3) of the Social Security Act. Petitioner did not contest that section 1128(b)(3) authorizes the I.G. to impose an exclusion in this circumstance. The only issue before me, therefore, is whether the six-year length of the exclusion is extreme or excessive (and, thus, unreasonable). For the reasons set out below, I conclude that a six-year exclusion is reasonable.

The law does not prescribe minimum or maximum exclusion periods, or contain any specific guidelines on reasonable exclusion periods, for section 1128(b)(3) exclusions. To determine whether this exclusion is reasonable, I am guided only by the remedial purpose of the exclusion statute and the policies embodied in the implementing regulations. Congress intended that section 1128 exclusions protect beneficiaries and program funds by excluding from participation in covered programs those individuals or entities which had demonstrated (by

conduct) untrustworthiness, professional incompetence, or risk of harm to patients.² Findings of Fact and Conclusions of Law (FFCL) 10; see S. Rep. No. 109, 100th Cong. 1st Sess. 2, reprinted in 1987 U.S. Code Cong. & Admin. News, 682. The exclusion law contemplates that an excluded individual or entity will not be permitted to participate in covered programs until there are reasonable assurances that the type of conduct which was the basis for the exclusion has not recurred and will not recur in the future. Section 1128(g).

The length of an exclusion is reasonable if it is: 1) consistent with the statutory and regulatory policy of protecting beneficiaries and covered programs; and 2) not extreme or excessive as a length of time necessary to establish that the excluded individual or entity no longer poses a risk to covered programs and beneficiaries. See 48 Fed. Reg. 3744 (Jan. 27, 1983). To determine these issues, I examine the seriousness of the conduct involved and other factors related to the character and trustworthiness of the excluded party.

The basic facts underlying the conviction were established in the prior criminal action and reiterated in the hearing before me. During the period of his employment at East Pharmacy, from late August 1985 until November 14, 1985, Petitioner dispensed Tylenol with codeine in response to telephone authorizations from personnel at Hubbell Clinic. I.G. Ex. 12, p. 86-87; Tr. at 15, 67. Tylenol with codeine is a Schedule III controlled substance. 21 U.S.C. 841(b)(3). These telephone authorizations were not based on legitimate prescriptions of a medical doctor in the course of ordinary medical practice, but were part of a scheme to illegally distribute Schedule III narcotics and to defraud the Medicare and Medicaid program through improper claims for other services to the patients. FFCL 3 and 4; I.G. Exs. 1, 7, and 12, p. 82; Tr. at 13-16.³

² Section 1128 was enacted in the Omnibus Reconciliation Act of 1980, Public Law 96-499. Section 1128 was substantially amended and strengthened by the Medicare and Medicaid Patient and Program Protection Act of 1987, Public Law 100-93.

³ The overall scheme was fairly complex and involved claims for unnecessary services and kickbacks. Petitioner, however, was not convicted as a conspirator in the overall scheme. While it is relevant to note that
(continued...)

Petitioner asserted at the hearing that he had not known that these telephone authorizations were not legitimate, and, thus, had not intentionally committed the illegal acts. Tr. at 117-19. Essentially, Petitioner sought to reopen issues which were part of the criminal action against him, in which he was convicted, by a jury, on a charge that he did "knowingly, intentionally and unlawfully distribute and aid and abet in the distribution of Tylenol with codeine" FFCL 4; I.G. Ex. 7, p. 28. A necessary element of this conviction was a finding that Petitioner "knew that a purported prescription was not issued in the usual course of medical practice." FFCL 5; United States v. Hughes, 895 F.2d 1135, 1143-44 (6th Cir. 1990)

The authority given to the I.G. to impose and direct exclusions pursuant to section 1128(b)(3) is based on a prior conviction; the statute clearly contemplates that the Secretary may rely on findings by the court necessary to support those convictions. Cf. John W. Foderick, DAB App. No. 1125 (1990) (considering section 1128(b)(4) licensing actions). Additionally, since a jury in a criminal trial must be persuaded beyond a reasonable doubt of their conclusions, these findings were made using a considerably higher standard of persuasion than that employed in a civil administrative proceeding such as this. There would be no purpose served in relitigating issues related to fundamental elements of the criminal offense, such as Petitioner's intent to unlawfully distribute and aid and abet in the distribution of Tylenol with codeine. In sum, I conclude that I may rely on the judicial finding that Petitioner acted knowingly and intentionally.⁴

³ (...continued)

there was a larger scheme, I rely here only on evidence of Petitioner's own actions in dispensing controlled substances without legitimate prescriptions.

⁴ This is not to say that a conviction forecloses all further inquiry into the underlying conduct. I permitted Petitioner to "explain" the conduct which resulted in his conviction, because such an explanation may establish mitigating circumstances which are not revealed by the record of the prior criminal case. By the same token, I also let the I.G. present evidence of Petitioner's conduct not in the record of the prior criminal case, to establish aggravating circumstances.

Furthermore, I was persuaded by the evidence presented at the hearing that Petitioner was indeed aware that the telephone authorizations were not legitimate. Petitioner personally filled almost all of the prescriptions from the Hubbell Clinic, personally ordered the inventory, and admitted that he was aware of the high volume of narcotic prescriptions. Tr. at 135. Petitioner testified that he had repeatedly expressed concern about the volume of narcotic prescriptions being dispensed and, indeed, refused to handle some prescriptions. Tr. at 118-119. He admitted that the high volume was "odd." Tr. at 123. He even stated that he had closed down the pharmacy on some days to express his concern. Tr. at 117-119. But he ultimately reopened the pharmacy and filled prescriptions. I.G. Ex. 12, pp. 92-93. In a transcript of a wiretapped telephone conversation submitted by the I.G., Petitioner indicated to an employee of Hubbell Clinic calling in prescriptions that he would fill the prescriptions if she "don't tell nobody." I.G. Ex. 15, p. 2.

As the Sixth Circuit stated in reviewing the conviction:

Consistent with the "good faith" practice of pharmacy, Kandah [Petitioner] recognized the problems with HMC [Hubbell Medical Clinic] prescriptions and initially refused to fill them. The November 2, 1985 prescriptions, however, were filled after Kandah closed the pharmacy upon realizing that the prescriptions were illegal. Kandah's decision to re-open East Pharmacy and continue to fill prescriptions after realizing that they were not prescribed within the course of legitimate medical practice provides ample evidence to support his conviction for unlawful distribution of controlled substances.

United States v. Hughes, *supra*, at 1143.

Petitioner's illegal conduct was a serious criminal offense. The seriousness of the offense is reflected in its classification as a felony and the sentencing of Petitioner to a significant period of incarceration. FFCL 6. Furthermore, the seriousness of the offense is reflected in the fact that Petitioner was convicted of a deliberate violation of the law. FFCL 5 and 12.

The offense involved a drug which Congress has determined has a high potential for abuse. 21 U.S.C. 841(b); see also Tr. at 126. Petitioner admitted that the drug has a possibility of both physical and psychological

dependence. Tr. at 126. Petitioner's conduct endangered the health and safety of individuals to whom he unlawfully dispensed controlled substances. FFCL 15.

Petitioner provided no evidence which convinced me that his criminal conduct was an isolated incident or a mistake by an otherwise trustworthy individual. Petitioner's conduct occurred over a significant period of time, approximately three months, and involved a large number of dosages and individual transactions. FFCL 14, 13. Moreover, this conviction represents the second time Petitioner has been convicted of a criminal offense involving unlawful distribution of controlled substances. In 1984, Petitioner was convicted of dispensing controlled substances without a proper label. FFCL 16; I.G. Ex. 27-28. Petitioner admitted in disciplinary proceedings related to his professional license that this prior conviction was based on conduct which included dispensing controlled substances without a physician's order. I.G. Ex. 25-26.⁵ This consistent pattern of behavior shows that Petitioner generally lacked respect for the laws respecting controlled substances.

Nor did Petitioner present evidence which convinced me that he has changed and become more trustworthy since the time he engaged in criminal conduct. Petitioner provided no evidence that he sought to dissociate himself from those who had facilitated his criminal conduct, even after the Hubbell Clinic had been closed by federal authorities. Petitioner continued working at East Pharmacy up until the point when it closed in December 1986. Tr. at 143. The record contains no evidence that Petitioner cooperated with investigating authorities by alerting authorities to the criminal conduct of others, or that he assisted in the prosecution of others.

In considering all the factors relating to the length of exclusion necessary to protect the programs and beneficiaries, I also find significant the findings of the Michigan Board of Pharmacy in revoking Petitioner's

⁵ Petitioner also admitted that the improper label was for a vial of Tylenol with codeine and that the label stated:

Prescriber: "DR. FEELGOOD"
Directions for Use: "Take as needed to feel good"
No. of Refills: "No Way Man"
Patient Name: "Nowhere Man"

license. The Board of Pharmacy found that Petitioner had "demonstrated a lack of good moral character" and that Petitioner "lacks the propensity to serve the public in a fair, honest, and open manner." FFCL 18 and 19. This provides an independent basis for me to conclude that a responsible and trustworthy pharmacist would have refused to dispense controlled substances in these circumstances.

The Board of Pharmacy's findings on Petitioner's moral character confirm my own assessment based on observations of Petitioner as a witness on his own behalf during the January 23, 1990 hearing. Petitioner was evasive on many issues, and did not impress me as open and honest about his conduct and state of mind. For example, his testimony that he had not questioned the legitimacy of the telephone authorizations was inconsistent with evidence that he had protested to his employer and to the Hubbell Clinic about the amount of controlled substances being ordered. See, e.g., Tr. at 117-18.

The factors discussed above provide justification for a substantial exclusion, but I also consider three factors which the Petitioner asserted as mitigating factors. First, Petitioner asserted that he was only an employee and did not direct the pharmacy or arrange the overall scheme to distribute controlled substances. Second, Petitioner asserted that he was paid a flat salary of \$11.50 per hour and did not receive any other benefit from the criminal conduct. Third, Petitioner asserted that he had experienced difficulty in securing employment and had financial pressures which limited his ability to question the propriety of the pharmacy's business. The I.G. provided no evidence to undercut the factual basis for these assertions.

The first two factors, status as an employee and lack of personal profit outside of salary, are indeed significant factors which I have seriously considered. These factors indicate that Petitioner was not motivated by greed and may not have actively or maliciously sought to break the law. These factors suggest that Petitioner will not, in the future, be likely to engage in criminal conduct based solely on greed or a malevolent intent. While this does not excuse Petitioner's criminal conduct, all else being equal, the maximum period of exclusion reasonable here would be shorter than it would be for a pharmacist who owned and operated a pharmacy, and who directly profited from criminal conduct.

The third factor, Petitioner's employment and financial difficulties, does not provide any additional insight into whether Petitioner can be expected to conduct

himself responsibly in the future. He is likely to face similar employment and financial difficulties should he seek to pursue his career as a pharmacist. Thus, I do not assign much weight to this third factor.

In weighing all the factors discussed above, I conclude that the six-year period of the exclusion is reasonable. I accord most weight to the seriousness of the offense, the large number of individual transactions, and the lengthy period of time over which the criminal conduct occurred. I find significant support for the six-year length in the determination by the trial court to impose a seven-year sentence.⁶ As I discuss further below, I might find that a longer exclusion was warranted except for the factors such as Petitioner's employee status and lack of personal profit.

In the similar case of Leonard N. Schwartz, DAB Civ. Rem. C-62 (1989), I found an eight-year exclusion to be reasonable. In comparing the two cases, I find no inconsistency. The convictions were for similar types of activities. While the controlled substances in Schwartz were of a more dangerous level and were dispensed over a longer period, the conviction was of a lesser offense and there was no prior criminal record. The major difference between the cases is that Schwartz involved a pharmacy owner who instigated and profited from the criminal conduct, and this case involves an employee who neither instigated the conduct nor profited outside of his salary. This difference is reflected in the shorter length of the exclusion period here.⁷

⁶ The six-year period is also supported by the fact that Petitioner could have been excluded for at least five years under section 1128(a)(1) of the Social Security Act, based on his conviction for a criminal offense related to the delivery of items under Medicare and Medicaid.

⁷ I do not mean to suggest that there can be a precise formula to compare exclusion periods in different cases. Each case has countless unique facts which must be weighed. For example, in Schwartz, the individual was convicted only of distributing controlled substances without maintaining proper records, had no prior criminal record, offered to cooperate with the prosecution, and presented some evidence of otherwise good moral character and service to the community.

CONCLUSION

Based on the evidence in this case and the law, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare program, and to direct that Petitioner be excluded from participation in State health care programs, for six years, is reasonable. Therefore, I am entering a decision in favor of the I.G. in this case.

/s/

Steven T. Kessel
Administrative Law Judge