

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
David Cooper, R. Ph.,)	DATE: July 24, 1990
Petitioner,)	
- v. -)	Docket No. C-51
The Inspector General.)	DECISION CR 88

DECISION

By letter dated July 6, 1988, the Inspector General (the I.G.) notified Petitioner that he was being excluded from participation in the Medicare and any State health care program for 15 years.¹ Petitioner was advised that his exclusion resulted from his conviction of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. He was further advised that his exclusion was authorized by section 1128(b)(1) of the Social Security Act.

Petitioner requested a hearing, and the case was assigned to me for hearing and disposition. I conducted a hearing in Detroit, Michigan on April 10, 1990.²

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.

² The long delay between the date of the I.G.'s notice to Petitioner and the hearing was essentially the consequence of Petitioner's request that the hearing be postponed for the duration of his incarceration in a federal prison.

I have considered the evidence introduced by both parties at the April 10 hearing. Based on the evidence and the applicable law, I conclude that the exclusion imposed against Petitioner is reasonable. Therefore, I sustain the exclusion.

ISSUE

The issue in this case is whether the exclusion imposed and directed against Petitioner by the I.G. is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner was licensed to practice pharmacy in the State of Michigan. Ex. B-7; Tr. at 294.³
2. From January 1982 until October 1986, Petitioner was the largest shareholder and operator of Karp Pharmacy, Inc. Ex. B-1, B-3, B-6.
3. In August, 1987, Petitioner was indicted by a federal grand jury on five counts of unlawful pharmacy practices and as a participant in a criminal conspiracy. Ex. B-1.
4. On November 19, 1987, Petitioner was convicted after a jury trial on all five counts of the indictment. Ex. B-1, B-2.
5. Petitioner was convicted of: conspiracy to commit a violation of the RICO law, 18 U.S.C. 1962(d); substantive acts in violation of the RICO law, 18 U.S.C. 1962(c); conspiracy to distribute controlled substances in violation of 21 U.S.C. 846; conspiracy to commit mail fraud in violation of 18 U.S.C. 371; and substantive acts of mail fraud and aiding and abetting, in violation of 18 U.S.C. 1341 and 1342. Ex. B-5, B-6.

³ The parties' exhibits and the transcript of the hearing will be cited as follows:

I.G.'s Exhibit	Ex. B-(number)
Petitioner's Exhibit	Ex. P-(number)
Transcript	Tr. at (page)

6. A necessary element of the offenses of which Petitioner was convicted was that Petitioner knowingly and intentionally engaged in conduct which was unlawful. Tr. at 118-119.
7. Petitioner's conviction was affirmed on appeal to the United States Court of Appeals for the Sixth Circuit. Ex. B-6.
8. Petitioner's unlawful activities were part of a wide-ranging conspiracy to engage in fraudulent claims for reimbursement from health insurers, controlled substance violations and mail fraud. Ex. B-6.
9. In furtherance of this conspiracy, Petitioner filled customers' prescriptions with generic drugs, but billed health insurers for more expensive brand name drugs. Ex. B-6.
10. Also in furtherance of this conspiracy, Petitioner filled large quantities of forged and illegal prescriptions for controlled substances, which were presented to him by dealers of "street drugs." Ex. B-6.
11. Petitioner participated in the conspiracy to bill sales of generic drugs as sales of brand name drugs for approximately four years. Tr. at 154.
12. Petitioner presented or caused to be presented about 3,000 fraudulent claims for prescription drugs. Tr. at 211-212.
13. Petitioner participated in the conspiracy to unlawfully sell controlled substances from January 1982 to mid-1983, or about 18 months. Tr. at 106-109, 154, 205-206, 214.
14. During this period, Karp Pharmacy earned at least \$300,000 from Petitioner's unlawful sale of controlled substances. Tr. at 213.
15. Petitioner unlawfully dispensed Schedule II controlled substances, including Dilaudid, Talwin, Preludin, Desoxyn, and Quaalude. Ex. B-6, B-12; Tr. 205-208.
16. Schedule II controlled substances can be addictive, have a high potential for abuse, and an attendant value for unlawful drug trafficking. Ex. B-13; Tr. 202-203.

17. Dilaudid is a narcotic properly used to treat extreme pain and sometimes used illicitly as a heroin substitute. Ex. B-13, B-21; Tr. at 208.
18. Talwin is also a pain killer with a heroin-like effect. Tr. at 208.
19. Desoxyn is an amphetamine which stimulates the central nervous system. Ex. B-21.
20. Desoxyn is sold illicitly under the street name of "speed." Ex. B-13.
21. Preludin is also a stimulant which is sold illicitly under the street name of "speed." Ex. B-13, B-21; Tr. at 208.
22. Quaalude is a sedative or hypnotic drug. Ex. B-13, B-21.
23. Because of its danger and high potential for abuse, Quaalude has been taken off the market. Ex. B-13.
24. In order to conceal his unlawful sales of controlled substances, Petitioner would "shuffle" false and forged prescriptions. Ex. B-13, B-16; Tr. at 204-205.
25. Petitioner's "shuffling" of prescriptions consisted of dating and filing them in a manner calculated to hide the fact that they were illegal. Ex. B-13, B-16; Tr. at 204-205.
26. Petitioner was sentenced to three years' imprisonment, fined \$5,000, and assessed a special fee of \$250. Ex. B-5.
27. Petitioner was convicted under federal law, in connection with the delivery of a health care item or service, of a criminal offense relating to fraud or other financial misconduct. Findings 5, 8; Social Security Act, section 1128(b)(1).
28. The Secretary of the Department of Health and Human Services (the Secretary) has authority to impose and direct an exclusion against Petitioner from participating in Medicare and Medicaid, pursuant to section 1128(b)(1) of the Social Security Act. Social Security Act, section 1128(b)(1).

29. 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).

30. On July 6, 1988, the I.G. notified Petitioner that he was being excluded from participation in Medicare and Medicaid for 15 years, pursuant to section 1128(b)(1) of the Social Security Act. Ex. B-9.

31. The exclusion provisions of section 1128 of the Social Security Act establish neither minimum nor maximum lengths for exclusions based on section 1128(b)(1).

32. The remedial purposes of section 1128 of the Social Security Act include protecting the integrity of federally funded health care programs from persons who have demonstrated by their conduct that they cannot be trusted to deal with program funds. Social Security Act, section 1128.

33. The remedial purposes of section 1128 of the Social Security Act also include protecting program beneficiaries and recipients from persons who have demonstrated by their conduct that they cannot be trusted to treat beneficiaries and recipients. Social Security Act, section 1128.

34. An additional remedial purpose of section 1128 of the Social Security Act is to deter persons from engaging in conduct which jeopardizes the integrity of federally-funded health care programs, or the safety and welfare of program beneficiaries and recipients. Social Security Act, section 1128.

35. Petitioner was convicted of several serious criminal violations. Finding 5; see 42 C.F.R. 1001.125(b)(1).

36. Petitioner's actions jeopardized the integrity of health insurance programs. Findings 5, 8-9; see 42 C.F.R. 1001.125(b)(2).

37. Petitioner's actions endangered the health and safety of individuals who obtained controlled substances which were sold illegally by Petitioner. Findings 5; 10-25 see 42 C.F.R. 1001.125(b)(2).

38. Petitioner's criminal activities were perpetrated over a four-year period, a lengthy period of time. Findings 11, 13; see 42 C.F.R. 1001.125(b)(6).

39. As a result of his conviction, Petitioner was sentenced to a lengthy period of incarceration, three years. Finding 26; see 42 C.F.R. 1001.125(b)(5).

40. Petitioner has not accepted full responsibility for the offenses of which he was convicted. Tr. at 286-87.

41. Petitioner proved that he was devoted to his family, kind to his employees, and trustworthy in relationships with his close personal associates. Tr. at 144-145, 217, 247, 254, 256, 266-267, 271.

42. Petitioner did not prove that, in light of the evidence of his character and personal relationships, he is trustworthy to deal with federal health care funds or with program beneficiaries and recipients. See Tr. at 144-145, 217, 247, 254, 256, 266-267, 271.

43. Petitioner's misconduct establishes that he is an individual who is not trustworthy to deal with program funds or with beneficiaries or recipients. Findings 35-42.

44. A fifteen-year exclusion is reasonable in this case, given the seriousness of Petitioner's misconduct, his lack of trustworthiness, and the dangers posed to the integrity of federally-funded health care programs and to beneficiaries and recipients, should Petitioner ever in the future engage in the misconduct for which he was convicted.

ANALYSIS

Petitioner does not deny that he was convicted of a criminal offense within the meaning of section 1128(b)(1) of the Social Security Act. Therefore, there is no dispute in this case as to the I.G.'s authority to impose and direct an exclusion against Petitioner from participating in Medicare and Medicaid. The only issue before me is whether the length of the 15 year exclusion which the I.G. imposed is reasonable.

Congress enacted the exclusion law to protect the integrity of federally funded health care programs. The law was intended to protect program funds and beneficiaries and recipients from parties who had demonstrated by their behavior that they posed a threat

to the integrity of such funds, or to the well-being and safety of beneficiaries and recipients.

There are two ways that exclusions imposed and directed pursuant to this law advance the remedial purpose. First, the law protects the programs and their beneficiaries and recipients from an untrustworthy provider until the provider demonstrates that he or she can be trusted to deal with program funds and to serve beneficiaries and recipients. Second, exclusions deter providers of items or services from engaging in conduct which threatens the well-being and safety of beneficiaries and recipients, or the integrity of program funds. See House Rep. No. 95-393, Part II, 95th Cong. 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News, 3072.

An exclusion imposed and directed pursuant to section 1128 will likely have an adverse financial impact on the person against whom the exclusion is imposed. However, the law places the well-being and safety of beneficiaries and recipients and the integrity of program funds ahead of the pecuniary interests of providers. An exclusion is not punitive if it reasonably serves the law's remedial objectives, even if the exclusion has a severe adverse financial impact on the person against whom it is imposed.

The hearing is, by law, de novo. Social Security Act, section 205(b). Evidence which is relevant to the reasonableness 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. Moreover, evidence which relates to a petitioner's trustworthiness or to the remedial objectives of the exclusion law is admissible at the 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 the legislative purpose.

In this case, I permitted both sides to offer evidence consisting of excerpts from the record of Petitioner's criminal trial. My purpose in admitting such evidence was to create as full a record as possible of Petitioner's motivation for engaging in unlawful conduct, as well as the gravity and effect of his offenses. I

also received evidence from Petitioner as to his character and trustworthiness.

The Secretary has adopted regulations to be applied in exclusion cases. The regulations specifically apply only to exclusions for "program-related" offenses (convictions for criminal offenses relating to Medicare and Medicaid). However, they express the Secretary's policy for evaluating cases where permissive exclusions may be appropriate. Thus, the regulations are instructive as broad guidelines for determining the appropriate length of exclusions in cases where the Secretary has discretionary authority to exclude parties. 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 mitigating factors that may exist. 42 C.F.R. 1001.125(b)(1) - (7).⁴

An exclusion determination will be held to be reasonable where, given the evidence in the case, it is shown to fairly comport with legislative intent. "the word 'reasonable' conveys the meaning that . . . [the I.G.] is required at the hearing only to show that the length of the [exclusion] . . . was not extreme or excessive." (Emphasis added). 48 Fed. Reg. 3744 (Jan. 27, 1983). However, based on the law and the evidence, should I determine that an exclusion is unreasonable, I have authority to modify the exclusion. Social Security Act, section 205(b).

The evidence establishes a pattern of many criminal offenses by Petitioner over a lengthy period of time. See 42 C.F.R. 1001.125(b)(1). The seriousness of Petitioner's offenses is in some measure reflected in the sentence imposed on him, which included three years'

⁴ There are proposed regulations which, if adopted by the Secretary, would supersede the regulations which presently govern exclusions. See 55 Fed. Reg. 12205 (April 2, 1990). The I.G. urged that I use these proposed regulations as guidelines to evaluate the reasonableness of the exclusion imposed and directed against Petitioner. However, these proposed regulations have not been finally adopted, and it would not be appropriate for me to assume that they will be adopted in their proposed form. Moreover, it is not clear that, assuming these proposed regulations are adopted, they would apply retroactively to exclusions imposed prior to the date of their adoption.

incarceration. See 42 C.F.R. 1001.125(b)(5). The evidence establishes that Petitioner's conduct was motivated by considerations of unlawful gain. Furthermore, his conduct jeopardized the safety of his customers. See 42 C.F.R. 1001.125(b)(2).

Petitioner was a pharmacist and the largest shareholder in a pharmacy. For a period of approximately four years, Petitioner, in concert with numerous other individuals, participated in a criminal conspiracy to defraud health care insurers, including Blue Cross and Blue Shield of Michigan. Petitioner's role in this conspiracy included systematically claiming reimbursement from health care insurers for the sale of brand name prescription drugs, when in fact, he had dispensed less costly generic substitutes to insured customers.

Petitioner also conspired to unlawfully distribute controlled substances. He was found to have filled large quantities of forged and illegal prescriptions for such drugs. The substances unlawfully dispensed by Petitioner included the Schedule II narcotics Dilaudid and Talwin, and the amphetamine Desoxyn. These are addictive drugs with a high potential for abuse. Misuse of these drugs may pose grave health hazards for the abuser. Petitioner's unlawful sales of these drugs included sales of large quantities to runners for drug dealers, for which he received substantial illicit cash payments.

Petitioner was convicted of criminal offenses including conspiracy and racketeering. Petitioner's crimes both compromised the integrity of health insurance programs, and endangered the health and safety of his customers. During the more than four years that Petitioner defrauded insurers, he filed approximately 3000 false claims for prescription drugs. Over a period of approximately 18 months, Petitioner's pharmacy unlawfully made sales of controlled substances in an amount of at least \$300,000.00

The offenses of which Petitioner was convicted were offenses which required proof that Petitioner knowingly and intentionally engaged in unlawful activity. The evidence establishes not only that he intentionally engaged in unlawful conduct, but that Petitioner systematically attempted to conceal his activities from scrutiny. Such efforts included "shuffling" forged prescriptions to make it more difficult to detect Petitioner's unlawful sale of controlled substances. I

conclude that this evidence establishes an extremely high level of culpability on Petitioner's part.

I am not convinced, even as of this date, that Petitioner accepts full responsibility for his unlawful conduct. Petitioner characterized his behavior as constituting "poor judgment." Ex. P-18. He has consistently denied his guilt of the offenses of which he was convicted.

I conclude that the 15 year exclusion imposed against Petitioner is reasonable. I base my conclusion on the seriousness of Petitioner's crimes, the damage that they caused, and on Petitioner's inability to accept full responsibility for his actions or their consequences. Given the gravity of Petitioner's crimes, and his continued failure accept responsibility for them, it is reasonable to conclude that Petitioner will continue to pose a threat to the integrity of federally funded health care programs for the foreseeable future. Therefore, the lengthy exclusion imposed in this case provides reasonable protection for those programs and for their beneficiaries and recipients. A lengthy exclusion may have the additional benefit of deterring other providers of services from engaging in the conduct engaged in by Petitioner.

I am mindful of the fact that the exclusion imposed and directed against Petitioner is for a lengthy period of time. However, the crimes perpetrated by Petitioner were exceedingly serious, and wrought substantial damage to the integrity of health insurance programs. These crimes also potentially jeopardized the health and well-being of numerous individuals. Moreover, they were motivated by considerations of personal gain. It is not unreasonable to infer from the nature of these offenses, from the circumstances under which they were committed, and from Petitioner's failure to acknowledge full responsibility for his conduct, that Petitioner is a manifestly untrustworthy individual. Therefore, substantial protection must be created to guard against even the possibility that Petitioner could in the future perpetrate against Medicare or Medicaid, or the beneficiaries and recipients of these programs, the misdeeds which resulted in his conviction.

My conclusion that the exclusion in this case is reasonable takes into account character evidence which Petitioner offered at his hearing. This evidence included the testimony of Petitioner's former attorney, as well as that of a family acquaintance, and one of

Petitioner's former employees. Although I do not doubt the good faith of these witnesses, their assurances as to Petitioner's trustworthiness are outweighed by the evidence which establishes the seriousness of Petitioner's crimes and Petitioner's failure to completely acknowledge responsibility for those crimes.

Petitioner argues that, inasmuch as he has already been punished for his crimes, a lengthy exclusion would simply constitute a second punishment in violation of the double jeopardy provision of the United States Constitution. He bases this argument on the United States Supreme Court's decision in United States v. Halper, 109 S.Ct. 1892 (1989).⁵

In Halper, the Supreme Court held that a civil penalties award under the False Claims Act may violate the double jeopardy doctrine if it is based on the same transaction as the prior federal conviction, and if there was not even a remote relationship between the amount of the penalty imposed and the cost to the government resulting from the defendant's conduct.

This case is distinguishable from Halper. It is true that, as was the case with the defendant in Halper, the remedy imposed by the I.G. pursuant to section 1128 is premised on the same facts which resulted in a federal criminal conviction of Petitioner. However, unlike in Halper, the remedy imposed by the I.G. and sustained here is not punitive. Rather, it constitutes a reasonable mechanism to protect the integrity of federally funded health care programs and their beneficiaries and recipients from an untrustworthy provider. It serves the same remedial end, and is therefore analogous to, revocation of a professional license for misconduct. It also is analogous to a civil remedy of contract termination for a systematic breach of contract. Therefore, the exclusion imposed and directed against Petitioner is not double jeopardy. Dewayne Franzen, DAB App. 1165 (1990); see Greene v. Sullivan, No. CIV-3-89-758 (E.D. Tenn. Feb. 22, 1990).

⁵ On June 28, 1990, the I.G. moved to strike Petitioner's arguments as to this issue, and as to a "rule of lenity," which Petitioner contends should be used to interpret and apply section 1128 to his case. In the interest of providing Petitioner with an opportunity to argue the issues he believes are germane to this case, I deny the I.G.'s motion.

Petitioner also asserts that, as the exclusion law does not contain explicit instructions to the Secretary as to the length of exclusions to be imposed pursuant to section 1128(b), it is ambiguous. Therefore, according to Petitioner, a "rule of lenity" should apply to preclude the imposition against him of a lengthy exclusion.

Petitioner's argument is misplaced. While the law does not specify the minimum or maximum length of permissive exclusions, it does embody remedial criteria by which such exclusions are to be determined and evaluated. Moreover, the rule cited by Petitioner is a rule which has been used by courts to interpret and apply penal statutes. The exclusion law is not a penal statute. See United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952).

Petitioner argues that the length of the exclusion in this case makes the remedy punitive. Although the exclusion is lengthy, it is not punitive, because, given the facts, it is reasonable.

Petitioner also argued at the hearing that the length of this exclusion imposed and directed against him is unreasonable when compared with those exclusions which may have been imposed and directed against other participants in the conspiracy of which Petitioner was convicted. I did not allow Petitioner to obtain discovery from the I.G. as to any such exclusions, in part because his request was not timely, but also because, in my opinion, it was not reasonably calculated to lead to the discovery of relevant evidence. No evidence was offered which compared the specific circumstances justifying exclusions in other cases with the facts upon which Petitioner's exclusion was premised. However, I do not consider evidence as to exclusions imposed and directed against other participants in the conspiracy of which Petitioner was convicted to be relevant to the issue of reasonableness of the length of the exclusion imposed and directed against Petitioner.

First, the exclusion against Petitioner would in no circumstance be unreasonable simply because that exclusion is lengthier (or shorter) than that imposed against other participants in the same conspiracy. An administrative remedy is not invalid in a particular case because it is more severe than remedies imposed in other cases. Butz v. Glover, 411 U.S. 182, 187 (1973). Furthermore, the exclusion in this case is reasonable in

light of the facts in evidence. The possibility that exclusions imposed in other cases may differ from the exclusion imposed in this case does not derogate from my conclusion that this exclusion is justified by the record.

I recognize that the exclusion imposed against Petitioner will possibly prevent him from meaningfully practicing his profession of pharmacist for the duration of the exclusion. This may have a severe financial impact on Petitioner. However, the remedial considerations of the law must take precedence over the personal consequences that an exclusion may have for an excluded party.

CONCLUSION

Based on the evidence in this case and the law, I conclude that the 15-year exclusion imposed against Petitioner from participating in Medicare and Medicaid is reasonable. Therefore, I sustain the exclusion imposed against Petitioner, and I enter a decision in favor of the I.G.

/s/

Steven T. Kessel
Administrative Law Judge