

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Civil Remedies Division

In the Case of:)	
Joyce Faye Hughey,)	DATE: August 9, 1990
Petitioner,)	
- v. -)	Docket No. C-201
The Inspector General.)	DECISION CR 94

DECISION

By letter dated December 20, 1989, the Inspector General (the I.G.) notified Petitioner that she was being excluded from participation in the Medicare and any State health care program for five years.¹ Petitioner was advised that her exclusion resulted from her conviction of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. Petitioner was further advised that her exclusion was authorized by section 1128(b)(1) of the Social Security Act.

Petitioner timely requested a hearing, and the case was assigned to me for a hearing and decision. I held a hearing in Waco, Texas, on May 15, 1990.

I have considered the evidence introduced by both parties at the hearing, as well as applicable law. I conclude that the five year exclusion imposed and directed against Petitioner is excessive. I conclude further that the remedial purposes of section 1128 of the Social Security Act will be served in this case by a one year exclusion, and I modify the exclusion accordingly.

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.

ISSUE

The issue in this case is whether the five year exclusion imposed and directed against Petitioner by the I.G. is reasonable.²

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Beginning in 1986, and ending in March, 1987, Petitioner was employed as a bookkeeper at the Bellmead Nursing Home in Waco, Texas. Tr. at 70, 73.³
2. Petitioner was hired for this position by her sister, who was employed as the administrator of the Bellmead Nursing Home. Tr. at 71.
3. At the time Petitioner was employed by the Bellmead Nursing Home, she was experiencing personal financial hardship. Tr. at 71.
4. Petitioner's financial problems were the consequence of an automobile accident and resulting injuries to Petitioner which had occurred in 1984. Tr. at 70-71.
5. After beginning her employment at the Bellmead Nursing Home, Petitioner learned that her sister was involved in misappropriating funds from the patients' trust fund. Tr. at 72.
6. Petitioner did not report her sister's unlawful acts to law enforcement authorities. Tr. at 74.
7. Petitioner did not report her sister's unlawful acts because of her relationship to her sister. Tr. at 74.

² In her hearing request, Petitioner raised the additional issue of whether she had been convicted of a criminal offense within the meaning of section 1128(i) of the Social Security Act. However, at the hearing Petitioner abandoned this issue.

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

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

8. Between October and December, 1986, Petitioner's sister offered Petitioner money which had been misappropriated from the patients' trust fund. Tr. at 72-73.
9. The total amount of misappropriated money Petitioner accepted from her sister was about \$875.00. Tr. at 37.
10. Petitioner's decision to accept money from her sister was motivated in part by her relationship with her sister, and by her financial circumstances in 1986. See Findings 4, 5.
11. In February, 1988, Petitioner learned that her acceptance of misappropriated funds was being investigated by law enforcement authorities. Tr. at 75.
12. On November 18, 1988, a criminal information was filed against Petitioner in Texas state court. I.G. Ex. 1.
13. Petitioner was charged in the information with two misdemeanor offenses of unlawfully appropriating money in an amount greater than \$200.00, and less than \$750.00. I.G. Ex. 1.
14. On December 2, 1988, Petitioner pleaded guilty to a misdemeanor charge of theft of an amount between \$200.00 and \$750.00. I.G. Ex. 2, 3.
15. Petitioner was sentenced to twelve months' probation, and to a probation payment of \$350.00. I.G. Ex. 3.
16. Petitioner has no record of criminal offenses other than the charge to which she pleaded guilty. Tr. at 44.
17. Petitioner has accepted responsibility for her unlawful conduct and has acknowledged that it was wrong. Tr. at 76, 83-84, 90-91.
18. The criminal offense of which Petitioner was convicted is a criminal offense as described in section 1128(b)(1) of the Social Security Act. Social Security Act, section 1128(b)(1).
19. Pursuant to section 1128(b)(1) of the Social Security Act, 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. Social Security Act, section 1128(b)(1).

20. 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).

21. On December 20, 1989, the I.G. notified Petitioner that she was being excluded from participation in the Medicare and Medicaid programs as a result of her conviction of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

22. Petitioner was notified that she was being excluded for five years, pursuant to section 1128(b)(1) of the Social Security Act.

23. The exclusion provisions of section 1128(b)(1) of the Social Security Act establish neither minimum nor maximum exclusion terms in those circumstances where the I.G. has discretion to impose and direct exclusions. Social Security Act, section 1128(b)(1) - (14).

24. A remedial objective of section 1128 of the Social Security Act is to protect the integrity of federally funded health care programs, and their recipients and beneficiaries, from individuals who demonstrate by their conduct that they cannot be trusted to deal with program funds or to provide items or services to recipients and beneficiaries. Social Security Act, section 1128.

25. An additional remedial objective of section 1128 is to deter individuals from engaging in conduct which jeopardizes the integrity of federally-funded health care programs. Social Security Act, section 1128.

26. Petitioner was convicted of a serious criminal offense. Finding 14; See 42 C.F.R. 1001.125(b)(1).

27. The offense of which Petitioner was convicted involved an isolated circumstance of wrongful conduct which occurred over a brief period of time. Finding 8; See 42 C.F.R. 1001.125(b)(1).

28. The amount of money misappropriated by Petitioner, while not insubstantial, did not constitute a large sum. Finding 9; See 42 C.F.R. 1001.125(b)(3).

29. Petitioner's misconduct was in some respects the consequence of emotional duress, and is at variance with her record for honesty. Finding 10; See 42 C.F.R. 1001.125(b)(4), (6).

30. There is little likelihood that Petitioner will in the future repeat her unlawful conduct. Findings 16, 17, 29; See 42 C.F.R. 1001.125(b)(6).

30. The sentence imposed on Petitioner for her crime did not involve incarceration. Finding 15; See 42 C.F.R. 1001.125(b)(5).

31. The five year exclusion imposed and directed against Petitioner is excessive. Findings 26-30.

32. The remedial considerations of section 1128 of the Social Security Act will be served in this case by a one year exclusion.

ANALYSIS

There is no dispute in this case that Petitioner was convicted of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, within the meaning of section 1128(b)(1) of the Social Security Act. By virtue of this conviction, the I.G. had authority to impose and direct an exclusion against Petitioner from participating in the Medicare and Medicaid programs. Therefore, the only issue to be resolved in this case is whether the five year exclusion is reasonable. Resolution of that question depends on analysis of the evidence in light of the exclusion law's remedial purpose.

The exclusion law was enacted by Congress to protect the integrity of federally funded health care programs. Among other things, the law was designed to protect program recipients and beneficiaries from individuals who had demonstrated by their behavior that they threatened the integrity of federally funded health care programs, or that they could not be entrusted with the well-being and safety of beneficiaries and recipients.

There are two ways that an exclusion imposed and directed pursuant to the law advance this remedial purpose. First, an exclusion protects programs and their beneficiaries and recipients from an untrustworthy provider until that provider demonstrates that he or she can be trusted to deal with program funds and to serve beneficiaries and recipients. Second, an exclusion deters providers of items or services from engaging in conduct which threatens the integrity of programs or the well-being and safety of beneficiaries and recipients. 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 program integrity and the well-being of beneficiaries and recipients 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 is admissible 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 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 the legislative purpose.

In this case, I admitted evidence from the I.G. which established that the amount of money misappropriated by Petitioner was greater than that to which she pleaded guilty to having misappropriated. I admitted evidence from Petitioner which explained her motivation for misappropriating money. I also admitted character evidence in the form of statements from associates of Petitioner. The evidence which I admitted from both parties therefore related to facts beyond the narrow scope of the offense with which Petitioner was charged, and to which she entered a guilty plea. It was relevant in that it pertained to the remedial considerations embodied in section 1128.

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 discretion to impose and direct exclusions. 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] determined . . . 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).

I conclude that the exclusion imposed and directed against Petitioner is excessive. Given the facts of this case, a five year exclusion is not needed to protect the integrity of federally funded health care programs, or beneficiaries and recipients. Nor is an exclusion of that length needed as a deterrent.

There is no question that Petitioner committed a serious crime which directly affected the welfare of nursing home patients whom she had a duty to protect. By her own admission, she participated in the theft of nursing home patients' trust funds. On the other hand, the evidence shows that this theft constituted an isolated episode of unlawful behavior by Petitioner, for which she has demonstrated remorse. Her theft was motivated by emotional duress. I conclude that there is little or no likelihood that she would ever repeat such conduct.

The evidence establishes that, prior to her involvement in the theft, Petitioner had an unblemished record as an employee in a variety of settings. In 1984, Petitioner was seriously injured in an automobile accident, for which she was not completely compensated. The accident

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.

and its aftermath caused Petitioner serious financial problems.

Petitioner's sister was the administrator of the Bellmead Nursing Home in Waco, Texas. In 1986, she offered Petitioner employment at the nursing home as a part-time bookkeeper. After Petitioner accepted this offer, she became aware that her sister was misappropriating patients' trust funds.

Petitioner was constrained by her family relationship from reporting her discovery to authorities. She allowed herself to become enmeshed in her sister's unlawful activities by accepting relatively small amounts of stolen funds from her sister. Thus compromised, Petitioner allowed herself to become a minor co-conspirator in a wholesale fraud of nursing home patients.⁵

Fearful of detection and the consequences of her acts, Petitioner resigned her employment early in 1987. In 1988, authorities investigated Petitioner's sister, and during the course of the investigation, the sister implicated Petitioner. Petitioner immediately admitted her misconduct and shortly thereafter entered a plea arrangement whereby she pleaded guilty to a misdemeanor offense. She was sentenced to probation as part of a deferred adjudication arrangement.

The record establishes that Petitioner completed her probation without incident. She has not been implicated in any additional misconduct. At the hearing, she demonstrated remorse for her actions and credibly asserted that she had learned to never repeat her unlawful conduct.

The picture created by the record of this case is of an essentially honest individual who, in a moment of weakness, succumbed to temptation and accepted misappropriated funds. The evidence shows this to have been a brief and isolated incident, and I am persuaded by Petitioner's testimony, as well as the other evidence of record, that there is little or no likelihood that Petitioner will again engage in unlawful conduct.

There is therefore no need for a lengthy exclusion in this case in order to assure Petitioner's trustworthiness

⁵ Petitioner accepted about \$875.00 in misappropriated funds. The total amount stolen from patients exceeded \$25,000.00. Tr. at 48.

as a health care provider. And, in light of the unique circumstances of this case, a lengthy exclusion imposed as a deterrent would be unreasonably punitive when applied to Petitioner.

I stress that this case is, in many respects, unusual. The crime committed by Petitioner directly harmed the welfare of individuals who are literally at the mercy of those persons, including Petitioner, who are charged with protecting them. It is a serious and unforgivable offense. I find the exclusion to be excessive here only because I am convinced that Petitioner's actions were the consequence of unique emotional pressures, and totally at variance with her past record. It is unlikely that such circumstances would often be present.

I conclude that the exclusion should be modified in this case to a term of one year. This modification will make Petitioner eligible to apply for reinstatement as a provider of Medicare and Medicaid services in January 1991. A one year exclusion will, given the unique circumstances of this case, be sufficient for Petitioner to demonstrate that she no longer poses a threat to the integrity of federally funded health care programs, or to beneficiaries and recipients. The exclusion is also long enough, given the circumstances, to serve as a reasonable deterrent.

CONCLUSION

Based on the evidence in this case and the law, I conclude that the five year exclusion imposed against Petitioner from participating in the Medicare and Medicaid programs is excessive and unreasonable. I modify the exclusion to a one year exclusion from participating in the Medicare and Medicaid programs.

/s/

Steven T. Kessel
Administrative Law Judge