

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

In the Case of:)	
)	
Tommy N. Troxell, M.S.,)	DATE: September 12, 1990
)	
Petitioner,)	Docket No. C-131
)	
- v. -)	DECISION CR 96
)	
The Inspector General.)	
)	

DECISION

By letter dated April 21, 1989 (Notice), the Inspector General (I.G.) notified Petitioner that he would be excluded from participation in the Medicare program and federally-financed State health care programs for a period of ten 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. Petitioner was further advised that exclusion from participation in the Medicare and Medicaid programs of individuals convicted of such offenses is permitted by section 1128(b)(1) of the Social Security Act (Act).

Petitioner requested a hearing before an Administrative Law Judge (ALJ) and the case was assigned to me for a hearing and a decision. I conducted a hearing in Arlington, Washington, on April 11, 1990. Based on the evidence in the record, the undisputed material facts, and the applicable law and regulations, I conclude that there exists a basis in law and fact to impose and direct an exclusion against Petitioner and I conclude that a

¹ "State health care program" is defined by section 1128(h) of the Social Security Act to include any State Plan approved under Title XIX of the Act (such as Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

ten-year period of exclusion against Petitioner is appropriate.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the Social Security Act is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1989 Supp.).

II. The Federal Regulations.

The governing federal regulations are codified in 42 C.F.R., Parts 498, 1001, and 1002 (1989). Part 498 governs the procedural aspects of this exclusion case; Parts 1001 and 1002 govern the substantive aspects.

ADMISSIONS²

During the prehearing conference of October 4, 1989, Petitioner admitted that he was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act.

During the hearing on April 11, 1990, Petitioner again admitted that he was convicted. He also admitted that the conviction was related to the language in section 1128(b)(1) of the Act. Tr. 9. Petitioner stated:

. . . I know that the realities are that the money I took I learned later was Medicare/Medicaid funds
. . . I knew it was federal monies but I was unaware that it was Medicaid/Medicare funds.

² The parties' exhibits and the transcript of the hearing will be cited as follows:

I.G.'s Exhibits	I.G. Ex. (number)/(page)
I.G.'s Brief	I.G. Br. (page)
Petitioner's Brief	P. Br. (page)
Transcript	Tr. (page)
Findings of Fact and Conclusions of Law	FFCL

ISSUE

The remaining issue in this case is:

Whether the length of the exclusion imposed and directed against Petitioner by the I.G. is reasonable and appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW³

1. During the time period relevant to this case, Petitioner was employed, on a part-time basis, as a case worker for the State of Washington, Department of Social and Health Services (DSHS). Tr. 49; I.G. Ex. 1.
2. During the time period relevant to this case, Petitioner also operated Madrona Counseling Services (Madrona), an independent counseling service. I.G. Ex. 1.
3. The Community Options Programs Entry System (COPES) is a part of the State of Washington's Medicaid program. COPES began in 1983 for the purpose of preventing unnecessary institutionalization of Medicaid recipients. I.G. Ex. 2; Tr. 50-53.
4. Providers contract with DSHS to provide services to the Medicaid recipients serviced through COPES. I.G. Ex. 2.
5. Providers complete monthly invoice forms attesting to the amount of time worked. Based upon their submissions, providers are paid an hourly rate by DSHS in the form of a state warrant. I.G. Ex. 2.
6. Through his employment as a caseworker with DSHS, Petitioner had access to DSHS forms, computerized social service payment system, computer printouts, and files on individuals eligible for receipt of COPES services. I.G. Ex. 2; Tr. 54-56.
7. Madrona never had a contract to provide counseling services which were billable to DSHS. I.G. Ex. 1; Tr. 54.

³ Some of my statements in the sections preceding these formal findings and conclusions are also Findings of Fact and Conclusions of Law. To the extent that they are not repeated here, they were not in controversy.

8. On March 8, 1988, the Attorney General of the State of Washington filed an amended information in the Superior Court for the County of Skagit, charging Petitioner with: (1) two counts of Medicaid false statements; (2) one count of first degree theft; and (3) one count of computer trespass. I.G. Ex. 3.
9. Counts One and Two charged that Petitioner, in connection with applications for payment, knowingly made false statements or representations of material fact in a claim for payment for services allegedly rendered by Madrona to Medicaid recipients. I.G. Ex. 3.
10. Count One encompassed 33 separate and distinct criminal acts of knowingly filing false claims over the 22-month period from December 1985 to October 1987. I.G. Ex. 3.
11. Count Two encompassed two separate and distinct criminal acts of knowingly filing false claims over an eight-month period in 1987. I.G. Ex. 3.
12. Count Three, first degree theft, charged that Petitioner obtained control over \$161,391.16 belonging to the State of Washington through the submission of false invoices, as stated above, and DSHS's payment to Madrona, based upon the invoices. I.G. Ex. 3 and 4.
13. Count Four, computer trespass, charged that Petitioner, without authorization and with intent to commit a crime, intentionally gained access, instructed, and communicated with the computer system and data base of DSHS's Social Service Payment System (SSPS). I.G. Ex. 3.
14. On March 8, 1988, Petitioner pled guilty to the four counts enumerated above. I.G. Ex. 5.
15. Petitioner was convicted of criminal offenses "relating to fraud, theft, embezzlement, and breach of fiduciary responsibility or other financial misconduct," within the meaning of section 1128(b)(1) of the Act. FFCL 8-14.
16. On June 10, 1988, Petitioner was: (1) sentenced to 36 months of incarceration for each of the four counts, the terms of incarceration to run concurrently; and (2) ordered to make restitution to DSHS in the amount of \$161,391.16. I.G. Ex. 7.

17. Petitioner's sentence was affirmed on appeal to the Court of Appeals for the State of Washington. I.G. Ex. 22.

18. Pursuant to section 1128(b)(1) of the Act, the Secretary of the Department of Health and Human Services (Secretary) has authority to impose and direct exclusions against Petitioner from participation in the Medicare and Medicaid programs.

19. The Secretary has delegated to the I.G. the duty to impose and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

20. The exclusion provisions of section 1128 of the Act do not establish a minimum or maximum period of exclusion to be imposed and directed in cases where the I.G. has discretion to impose and direct exclusions. Act, section 1128(b)(1)-(14).

21. The major purposes of the exclusion law (section 1128 of the Act) are to: (1) protect Medicare beneficiaries and Medicaid recipients from incompetent practitioners and inappropriate or inadequate care; (2) protect the Medicare and Medicaid programs from fraud and abuse; and (3) deter individuals from engaging in conduct which is detrimental to the Medicare and Medicaid programs and to the respective beneficiaries and recipients of those programs.

22. The trustworthiness of a Petitioner is a consideration in determining an appropriate period of exclusion.

23. In addition to indicia of trustworthiness, the length of Petitioner's exclusion is to 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 incurred by the Medicare, Medicaid, or social services programs; (4) the existence of mitigating circumstances; (5) the length of sentence imposed by the court; (6) any other factors bearing on the nature and seriousness of the violations; and (7) the previous sanction record of Petitioner. 42 C.F.R. 1001.125(b)(1)-(7).

24. The fact that the criminal acts forming the basis for Petitioner's convictions were committed over a period of time in excess of one year is an aggravating factor and was considered in my determination of an appropriate length of exclusion. FFCL 10-11.

25. The fact that Petitioner's criminal conviction was based upon four counts (that included over 400 false claims of services rendered) is an aggravating factor and was considered in my determination of an appropriate length of exclusion. I.G. Ex. 4; FFCL 10-13.

26. The fact the Petitioner was ordered to pay \$161,391.16 in restitution is an aggravating factor and was considered in my determination of an appropriate length of exclusion. FFCL 16.

27. The fact that Petitioner was sentenced to 36 months of incarceration for each of the four counts, to run concurrently, is an aggravating factor and was considered in my determination of an appropriate length of exclusion. FFCL 16.

28. The fact that Petitioner's convictions were based upon his theft from a program designed to address the needs of elderly Medicaid recipients is an aggravating factor which I have considered in determining an appropriate length of exclusion. FFCL 3, 9-13.

29. The fact that Petitioner chose to steal from a program which possessed more funds than other programs in the State of Washington is not a mitigating factor. Tr. 61.

30. The fact that Petitioner may be eligible for work release and may not be incarcerated for the entire 36 months is a mitigating factor. Tr. 101.

31. The fact that Petitioner does not have a prior record of criminal convictions is a neutral factor. I.G. Ex. 4.

32. The fact that Petitioner cooperated with the Medicaid Fraud Control Unit investigators after pleading guilty, by debriefing them on SSPS computer security and program vulnerability issues, is a mitigating factor and was considered in determining an appropriate length of exclusion. I.G. Ex. 4.

33. The COPES program suffered a substantial loss as a result of Petitioner's criminal acts. FFCL 12, 16.

34. The I.G. does not have to prove the percentage of the total amount of COPES funds stolen by Petitioner in order to prove that the program suffered a substantial loss.

35. I do not have the authority to determine the scope of Petitioner's exclusion from participation in the Medicare and Medicaid programs, once I determine that the exclusion has a sufficient basis in law and fact and I determine the appropriate length of exclusion.

36. Petitioner's misconduct establishes that he is an individual who is not trustworthy to deal with program funds or with beneficiaries or recipients. FFCL 25-33.

37. In this case, a ten-year period of exclusion is reasonable and appropriate 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.

DISCUSSION

I. Petitioner was convicted of a criminal offense within the meaning of section 1128(b)(1) of the Act.

Petitioner admitted during the hearing that he was convicted of a criminal offense. I find and conclude that this constitutes an admission and that the record supports a finding and conclusion that Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act. Tr. 9. Also, Petitioner admitted during the hearing that the monies that he took were Medicare/Medicaid funds. I find and conclude that this constitutes an admission that he was convicted of a criminal offense within the meaning of section 1128(b)(1) of the Act. Additionally, in Petitioner's letter, dated June 12, 1989, requesting a hearing, he states, "I am currently incarcerated for my crimes of Medicaid fraud, theft and computer trespass that I committed while an employee of the State of Washington." Thus, Petitioner admits that he was convicted of a criminal offense within section 1128(b)(1) of the Act. Even if Petitioner had not admitted this, the record supports a finding and conclusion that Petitioner was convicted of a criminal offense "in connection with the delivery of a health care item or service or with respect to any act or omission" in a program financed by the State of Washington, "relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct," within the meaning of section 1128(b)(1) of the 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 the Medicare and Medicaid programs. The only issue before me is whether

the length of the ten-year exclusion is reasonable and appropriate.

II. Ten years is a reasonable and appropriate period of exclusion.

Congress enacted and amended section 1128 in 1987 to protect the integrity of federally-funded health care programs. The law was intended to protect program funds and to protect 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 section 1128 advance the remedial purpose of the Act. First, the law protects the programs and protects their beneficiaries and recipients from an untrustworthy provider until the provider demonstrates that he or she can be trusted to competently deal with program funds and to properly service beneficiaries and recipients. Second, exclusions deter providers of items or services from engaging in improper or illegal 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. The primary purpose of an exclusion is remedial, not punitive, even if the exclusion has a severe adverse financial impact on the person against whom it is imposed.

The Secretary has adopted regulations to be applied in exclusion cases. The regulations were enacted when section 1128 of the Act only applied to exclusions for "program-related" offenses (convictions for criminal offenses relating to the delivery of an item or service under the Medicare and Medicaid programs). However, the regulations also express the intent of the Secretary in cases where a permissive exclusion is imposed. See Frank J. Haney, DAB Civ. Rem. C-156 at 8 (1990). 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. See Vincent Baratta, M.D., DAB App. 1172 at 10-11 (1990). 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). See Baratta, supra.

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 of protecting the Medicare and Medicaid programs and their beneficiaries and recipients from untrustworthy individuals. The hearing is, by law, de novo. Act, section 205(b). Accordingly, in deciding the appropriate length of an exclusion, I must make an independent assessment of the seven factors listed in section 1001.125 of the regulations and consider all of the purposes designated by Congress for the enactment of section 1128 of the Act. See Vincent Baratta, M.D., DAB Civ. Rem. C-144 at 8 (1990); Charles J. Burks, M.D., DAB Civ. Rem. C-111 (1989).

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 (January 27, 1983). Thus, based on the law and the evidence, I have the authority to and will modify an exclusion if I determine that the exclusion is not reasonable. Act, section 205(b).

The record illustrates that Petitioner pled guilty to charges of: knowingly making a false statement or a representation of a material fact in a claim for payment for services allegedly rendered to Medicaid recipients; intending to deprive another of property exceeding the amount of \$1,500.00; and intentionally gaining access and, without authorization, instructing and communicating with a computer system and data base of another with the intent to commit a crime. FFCL 9-14.

There is no dispute that Petitioner was employed as a caseworker with DSHS and had access to DSHS forms, computerized SSPS computer printouts, and files on individuals eligible for receipt of COPES services. Petitioner also operated an independent counseling service called Madrona. He obtained an unauthorized provider number for Madrona and created fictitious

authorization transactions for services that were alleged to have been performed by Madrona for various COPES recipients, by using the SSPS computer terminal. However, Madrona never had a contract to provide the services billed to DSHS. DSHS was billed in excess of 400 times for services alleged to have been provided by Madrona to Medicaid recipients. Between December 1985 and December 1987, Petitioner signed 37 service invoices and received 43 warrants totaling \$161,391.16. The warrants were negotiated and deposited into Madrona's bank account, which was controlled by Petitioner.

Petitioner was sentenced to 36 months of incarceration for each of the four counts and ordered to make restitution to DSHS in the amount of \$161,391.16. The Court of Appeals for the State of Washington affirmed Petitioner's sentence, finding that Petitioner's offense was a series of major economic offenses which involved multiple incidents occurring over an 18-month period of time, a monetary loss of \$161,391.16, and a high degree of sophistication and planning. The Court of Appeals found that Petitioner held a position of trust and fiduciary responsibility and that he used his position as a caseworker to facilitate the commission of these offenses. I.G. Ex. 22/3; Tr. 26.

The evidence in this case establishes a pattern of serious 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 36 months' incarceration. See 42 C.F.R. 1001.125(b)(5). The evidence establishes that Petitioner's conduct was motivated by considerations of unlawful and personal gain. Furthermore, his conduct denied benefits to eligible and needy COPES recipients. See 42 C.F.R. 1001.125(b)(2).

The I.G. maintains that there are several factors in this case which warrant a ten-year period of exclusion. These factors are: (1) the serious nature of Petitioner's criminal offenses; (2) the adverse impact of offenses on beneficiaries; (3) the amount of damages incurred by the program; (4) whether mitigating circumstances exist; and (5) the length of the sentence imposed by the court. I.G. Br. 9. The I.G. contends that the theft of funds from the COPES program by the Petitioner involved forethought, deceit, and a devious mind. I.G. Br. 4. Additionally, the I.G. argues that the theft of funds deprived other eligible needy people from receiving the services that were available under this program. Tr. 22.

Petitioner suggests that the I.G. is barred from excluding him because of the doctrine of double jeopardy. Tr. 43-44. This case involves a state conviction, not a federal conviction. Double jeopardy does not apply to a subsequent federal prosecution based on facts which led to a state conviction. See United States v. Halper, 109 S. Ct. 1892 (1989). Chapman v. U.S. Dept. of Health and Human Services, 821 F.2d. 523 (10th Cir. 1987); Abbate v. United States, 359 U.S. 187 (1959). In the instant case, 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. See David Cooper, R.Ph., DAB Civ. Rem. C-151 (1990). Dwayne Franzen, DAB App. 1165 (1990); see Jack W. Greene v. Louis Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990).

Next, the offenses of which Petitioner was convicted were offenses which required that Petitioner knowingly and intentionally engaged in unlawful activity. The seriousness of his criminal offenses is in some respects underscored by the facts that the offenses were committed over a relatively lengthy period of time, involved a substantial amount of money, and the sentence imposed on Petitioner included a period of incarceration. See 42 C.F.R. 1001.125(b)(1), (3), (5), and (6). I conclude from this evidence that a significant exclusion is merited in this case. An exclusion will serve to protect the integrity of federally-funded health care programs by deterring other providers of services from engaging in the criminal conduct for which Petitioner was convicted.

The ten-year exclusion imposed against Petitioner is reasonable. I base my conclusion on the seriousness of Petitioner's crimes and the damage that they caused. Given the gravity of Petitioner's crimes, 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 care programs. These crimes were motivated by considerations of personal gain. It is reasonable to infer from the nature of these offenses, and from the circumstances under which they were committed, 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. Thus, a margin of safety should be directly built into any exclusion imposed against Petitioner to protect the Medicare and Medicaid programs, should Petitioner suffer a relapse of his former criminal behavior. See Michael D. Reiner, R.M.D., DAB Civ. Rem. C-197 at 10 (1990).

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 crew supervisor at the Indian Ridge Correctional Center, as well as that of the correctional counselor. His crew supervisor stated that Petitioner showed up for work regularly and that he has been rated superior in dependability, knowledge of the work, and ability to communicate. The crew supervisor also revealed that Petitioner has indicated that honesty takes precedence when interacting with others and that he would feel comfortable if Petitioner lived in his community when he is released from jail. Petitioner has indicated that his "integrity and trustworthiness has returned to pre-1985 time period," the period before his criminal activities. P. Br. 9. The counselor also indicated that Petitioner was recommended for a work release program after he finishes serving his time at Indian Ridge. Tr. 101.

These observations and developments are encouraging signs that Petitioner has made a good beginning toward recovering the trustworthiness he should have to participate in Medicare and State health care programs. I also note his cooperation with authorities; this shows that he began the process of recovery as soon as his wrongdoing came to light. His lack of a prior criminal record also indicates that criminal activities are more likely the exception than the rule in his life.

However, the crimes committed by Petitioner strike at the nerve center of the Medicaid system. The mitigating circumstances are not sufficient to reduce the exclusion to less than ten years. Petitioner has not provided evidence which demonstrates that his character is such that in the near future he should be trusted with public funds. Given the gravity and circumstances of the offense and the timing and quality of Petitioner's cooperation, I conclude that the intent of Congress in protecting the integrity of the Medicare and Medicaid programs is best served by a ten-year period of exclusion.

Petitioner also argued at the hearing that a ten-year exclusion would deny him access to the livelihood that he has undertaken in the past few years. I recognize that the exclusion imposed against Petitioner will possibly impair his ability to practice his profession as a caseworker for the duration of the exclusion. This exclusion 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.

III. The ALJ does not have the authority to determine the scope of Petitioner's exclusion from participation in the Medicare and Medicaid programs.

Petitioner has requested that I address the issue of whether it is lawful for him to be excluded from working with Medicare and Medicaid clients during his ten-year period of exclusion. The exclusion Notice from the I.G. stated:

Payment will not be made to any entity in which you are serving as an employee, administrator, operator, or in any other capacity for any services that you furnish on or after the effective date of this exclusion. . . . no payment will be made to any supplier wholly owned by you during the exclusion period.

Once I have determined that an exclusion is properly imposed and determine the appropriate length of an exclusion, I do not have the authority to determine the scope of the exclusion, unless specific statutory or regulatory language needs to be interpreted. I conclude that there is no such endeavor called for in this case.

Petitioner should direct any further questions regarding the scope of his exclusion directly to the I.G.'s representatives.

CONCLUSION

Based on the law and undisputed material facts in the record of this case, I conclude that Petitioner is subject to the permissive exclusion provisions of section 1128(b)(1) of the Act and that ten years is a reasonable and appropriate period of exclusion.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge