

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Roderick L. Jones, R.N.,)	DATE: September 14, 1990
)	
Petitioner,)	
)	Docket No. C-230
- v. -)	DECISION CR 98
)	
The Inspector General.)	

DECISION

By letter dated March 5, 1990, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare and State health care programs for a period of five 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 timely requested a hearing and the case was assigned to me for a hearing and decision. I held a hearing in Baltimore, Maryland on July 24, 1990. Based on the evidence introduced at the hearing, and on applicable law, I conclude that there exists a basis in law and fact to impose and direct a substantial exclusion against Petitioner. However, given the presence of mitigating evidence, the five-year exclusion imposed and directed against Petitioner by the I.G. is excessive. A three-year exclusion will satisfy the remedial purpose of

¹ The Medicaid program is one of three types of federally-financed State health care programs from which Petitioner is excluded. I use the term "Medicaid" to represent all three of these programs, which are defined in section 1128(h) of the Act.

the exclusion law. Therefore, I am modifying the exclusion imposed and directed against Petitioner to a period of three years.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the Act is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1989 Supp.). Section 1128(b)(1) of the Act permits the I.G. to exclude from Medicare and Medicaid participation any individual or entity which has been convicted, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

II. The Federal Regulations.

The governing federal regulations (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.

ADMISSIONS

Petitioner admits that he was convicted of a criminal offense for which exclusion under the provisions of section 1128(b)(1) of the Act is permitted.

ISSUE

The remaining issue in this case is whether the length of the exclusion imposed and directed against Petitioner is reasonable and appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW^{2 3}

1. Petitioner is a Registered Nurse who, at all relevant times, was employed by Bon Secours Hospital Systems, Inc. I.G. Ex. 5, Tr. 8,9.
2. On April 17, 1989, Petitioner was indicted in the Circuit Court for Baltimore City, Maryland, of unlawfully stealing \$7,259.26 from Bon Secours Hospital Systems, Inc. in a continuing scheme and course of conduct dating from July 1987 up to and including August 1988. I.G. Ex. 5.
3. On May 12, 1989 Petitioner was found guilty in the Circuit Court for Baltimore City and was sentenced to five years (which was suspended), restitution in the amount of \$7,259.26, to be repaid to Bon Secours Hospital Systems, Inc. at the rate of \$151.24 per month for 48 months, and to probation to end upon payment of restitution. P. Ex. 1, I.G. Ex. 6.
4. The scheme and course of conduct leading to Petitioner's conviction involved "padding the payroll." Time cards were adjusted to show additional work performed which did not take place. Ultimately these time cards were submitted to the payroll department, which generated a check based on the erroneous information. The check was then provided to the employee. Tr. 9.
5. Petitioner received \$7,259.26 as the result of this scheme and course of conduct. Tr. 9.
6. Three other people were also convicted as a result of this scheme and course of conduct. Tr. 10.

² 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.

³ The citations to the record in this Decision and Order are designated as follows:

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

7. A remedial objective of section 1128 of the Act is to protect program beneficiaries and recipients and program funds by mandating or permitting the Secretary to disqualify or to direct disqualification from participation in Medicare and Medicaid of those individuals and entities who demonstrate by their conduct that they cannot be trusted to administer program funds. Act, section 1128.

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

9. The offense of which Petitioner was convicted is a serious criminal offense.

10. Petitioner participated in the conduct resulting in his conviction for a period of over a year. Tr. 9.

11. Petitioner stole a substantial amount of money.

12. Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act. FFCL 3.

13. The I.G. may exclude individuals convicted, "in connection with the delivery of a health care item or service, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct" within the meaning of section 1128(b)(1) of the Act.

14. The permissive exclusion provisions of section 1128 of the Act do not establish minimum or maximum periods of exclusion. Act, sections 1128 (b)(1) - (14).

15. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs. FFCL 1-19.

16. Petitioner has stated that he knows what he did was wrong. Tr. 37-38.

17. There was no evidence submitted that Petitioner had been convicted of any crime before or after the conviction upon which the I.G. based his exclusion.

18. Petitioner did not take an active roll in falsifying the documents or submitting the false time cards. Tr. 26, 27.

19. When the conspiracy of which defendant was a part was discovered, Petitioner admitted his involvement and offered to testify against others in the scheme; Petitioner never denied his guilt. P. Ex. 1.

20. Petitioner is making timely restitution payments, and is trying to accelerate his restitution payments. P. Ex. 1/3.

21. In light of the mitigating factors that are present in this case, a three-year exclusion of Petitioner is reasonable and appropriate.

DISCUSSION

There is no dispute in this case that Petitioner was convicted of a criminal offense relating to fraud and theft in connection with the delivery of health care items or services. Therefore, I find and conclude that the I.G. has authority, pursuant to section 1128(b)(1) of the Act, to impose and direct an exclusion against Petitioner from participating in the Medicare and Medicaid programs. The only contested issue in this case is whether the length of the exclusion that the I.G. determined to impose and direct against Petitioner is reasonable and appropriate.

As I stated in Frank J. Haney, DAB Civ. Rem. C-156 (1990), an exclusion must be judged in light of the evidence in the case and the intent of the exclusion law. 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 modify an exclusion if I determine that the exclusion is not reasonable. Act, section 205(b).

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 Secretary adopted regulations to be applied in exclusion cases. The regulations specifically apply only to exclusions for "program-related" offenses. However, they also express the intent of the Secretary in cases where a permissive exclusion is imposed. The factors require a consideration of the seriousness of the offense weighed against any mitigating factors. 42 C.F.R. 1001.125.

In this case, the I.G. excluded the Petitioner for five years. At the hearing, the program analyst who made the recommendation to the I.G. to exclude Petitioner for five years stated that the I.G.'s policy is now to use the five year minimum, mandatory exclusion, which is applicable in all section 1128(a) program related exclusions, as a "benchmark" for permissive exclusions under section 1128(b). The I.G. would then consider any mitigating or aggravating factors which might affect that five year period of exclusion. Here, the I.G. found that while there were mitigating circumstances, they did not mitigate to the extent of recommending a lesser period of exclusion. Tr. 15-16. I disagree.

In Haney, supra, I reduced petitioner's exclusion from five years to three. The petitioner in that case had been convicted of two felonies, relating to fraud, whereby the petitioner and others generated income payments for themselves and concealed the income by making false entries in accounting records. As a result of his criminal actions, petitioner was placed on probation for a period of five years, sentenced to serve 50 hours of community service, and fined \$10,000. I found, however, several mitigating factors in Haney which warranted a reduction in the five year period of exclusion imposed and directed by the I.G. These included letters regarding Petitioner's good character, the illness and resulting death of Petitioner's mother during the pertinent time, and the fact that Petitioner was no longer employed, and did not intend to become employed, in the health care field.

While Petitioner in the instant case, unlike the petitioner in Haney, did not actively change records or personally send in the altered time cards, Petitioner did accept and enjoy the fruits of the theft. A substantial exclusion is reasonable and necessary to ensure that Petitioner is trustworthy enough to again participate in the programs. However, as in Haney, I also find additional mitigating circumstances to exist, which lead me to reduce Petitioner's period of exclusion.

I believe that Petitioner is repentant. Petitioner has admitted what he did was wrong. FFCL 16. At the hearing Petitioner seemed truly remorseful. As soon as the theft was discovered, Petitioner admitted it and agreed to cooperate with the authorities in the prosecution of others involved in the scheme. FFCL 19. No evidence was offered to show that Petitioner had ever been convicted of a previous offense, and no complaint has been raised with respect to Petitioner's conduct since his conviction. FFCL 17. Petitioner stated that he has changed his life and his associations, and that he would not engage in unlawful activities ever again. Also, an assertion was made, which the I.G. did not dispute, that as well as timely making restitution payments, Petitioner has even been trying to accelerate his restitution payments. FFCL 20. This reflects that Petitioner is taking his responsibility seriously and is faithfully fulfilling his commitment.

These observations and developments are positive and encouraging signs that Petitioner has made substantial progress toward recovering the trustworthiness he should have to participate in Medicare and State health care programs.

CONCLUSION

In view of the mitigating factors and the factors considered by the I.G. in determining the period of exclusion to be imposed and directed against Petitioner, I conclude that a five year period of exclusion is excessive and that a three year period of exclusion is sufficient to serve the exclusion law's purpose of protecting the Medicare and Medicaid programs and their respective beneficiaries and recipients.

/s/

Charles E. Stratton
Administrative Law Judge