

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In The Case of:)	
Kelly R. Pyne,)	DATE: October 29, 1991
Petitioner,)	
- v. -)	Docket No. C-343
The Inspector General.)	Decision No. CR161

DECISION

On January 3, 1991 the Inspector General (I.G.) notified Petitioner of her five-year exclusion from participation in the Medicare and State health care programs, pursuant to section 1128(b)(1) of the Social Security Act (Act).¹ The I.G. told Petitioner that she was being excluded because she had been convicted of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

Petitioner timely requested a hearing and the case was assigned to me for a hearing and decision. On June 25, 1991, I held a hearing in Cheyenne, Wyoming.

I have considered the evidence, the parties' arguments, and the applicable laws and regulations. I conclude that the five-year exclusion imposed and directed against Petitioner by the I.G. is reasonable.

¹ "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-financed health care programs, including Medicaid. 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 which the I.G. imposed and directed against Petitioner is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On August 9, 1989, a Deputy District Attorney for the State of Wyoming filed an Information charging Petitioner with the crimes of: (1) conspiracy to commit embezzlement, and (2) conversion of property valued at \$500.00 or more belonging to another. ALJ Ex. 1/1; I.G. Ex. 4.²
2. Under Wyoming law, the crimes of conspiracy to commit embezzlement and conversion of property valued at \$500.00 or more are felonies. ALJ Ex. 1/2; I.G. Ex. 4.
3. On December 18, 1989 Petitioner pled guilty to conspiracy to commit embezzlement. ALJ Ex. 1/2; I.G. Ex. 9/4, 10/1.
4. On December 18, 1989, Petitioner was sentenced to, among other things, a period of five years of probation. ALJ Ex. 1/2; I.G. Ex. 9/4-6, 10.
5. Petitioner was convicted of a criminal offense within the meaning of section 1128(i)(4) of the Act. ALJ Ex. 1/3; Findings 1-4.

² I refer to the exhibits admitted into evidence and the transcript of the hearing as follows:

I.G. Exhibit	I.G. Ex. (number)/(page)
Petitioner's Exhibit	P. Ex. (number)/(page)
Administrative Law Judge Exhibit	ALJ Ex. 1/page
Transcript	Tr. at (page)

ALJ Ex. 1 consists of stipulations of facts entered into by the parties and jointly submitted by them to me at the June 25, 1991 hearing. I opted to mark the stipulations as an ALJ exhibit and to admit them into evidence although, technically, I was not obligated to do so.

6. Petitioner was convicted 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. ALJ Ex. 1/3; Findings 1-5.
7. The Secretary of the Department of Health and Human Services (Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).
8. On January 3, 1991 the I.G. excluded Petitioner from participating in Medicare and directed she be excluded from participating in Medicaid, pursuant to section 1128(b)(1) of the Act.
9. The I.G. had authority to impose and direct an exclusion against Petitioner pursuant to section 1128(b)(1) of the Act. Findings 1-7.
10. In about June 1986, Petitioner was employed by Home Oxygen Plus Equipment in Cheyenne, Wyoming. Tr. at 24, 32, 191.
11. Home Oxygen Plus Equipment is a health care provider whose business includes providing liquid oxygen to patients at their homes and renting and selling other medical supplies to individuals. Tr. at 25-26.
12. About 40 percent of Home Oxygen Plus Equipment's customers are Medicare beneficiaries. Tr. at 28.
13. About 20 percent of Home Oxygen Plus Equipment's customers are Medicaid recipients. Tr. at 28.
14. While employed by Home Oxygen Plus Equipment, Petitioner and other individuals established a business which they called Home Oxygen Plus Supply. I.G. Ex. 1/2; Tr. at 43-44, 197.
15. A purpose of establishing Home Oxygen Plus Supply was to operate as a health care provider in competition with Home Oxygen Plus Equipment. I.G. Ex. 1/2, 2/4; Tr. at 43-44, 210-211.
16. Petitioner named the business "Home Oxygen Plus Supply" in order to mislead individuals and entities with whom she did business under this name that they were continuing to deal with Home Oxygen Plus Equipment. Tr. at 44; See Tr. at 60-61, 79-81.

17. Petitioner obtained a Medicare provider number for Home Oxygen Plus Supply. I.G. Ex. 2/4, 12.
18. Petitioner opened a checking account in a Cheyenne, Wyoming, bank for Home Oxygen Plus Supply. I.G. Ex. 11.
19. Petitioner deposited checks for items or services payable to "Home Oxygen Plus" which were remitted in payment for items or services provided by Home Oxygen Plus Equipment into the Home Oxygen Plus Supply checking account. I.G. Ex. 1/15, 2/4, 14; Tr. at 44, 60-61, 84, 130, 214-215.
20. Petitioner diverted Medicare reimbursement for items or services which had been provided by Home Oxygen Plus Equipment to the account of Home Oxygen Plus Supply. I.G. Ex. 13; Tr. at 130, 150-153.
21. Petitioner transferred customers of Home Oxygen Plus Equipment to the account of Home Oxygen Plus Supply without explaining to them that Home Oxygen Plus Equipment and Home Oxygen Plus Supply were competing businesses. Tr. at 166-167; See Tr. at 211-214.
22. Petitioner used equipment belonging to Home Oxygen Plus Equipment to supply items or services to customers of Home Oxygen Plus Supply. Tr. at 43, 85, 135, 140, 152.
23. Petitioner's scheme to establish Home Oxygen Plus Supply and her misappropriation of the assets of Home Oxygen Plus Equipment was a deliberate act of embezzlement. Findings 1-22; See 42 C.F.R. 1001.125(b)(1).
24. Petitioner's embezzlement caused substantial damage to Home Oxygen Plus Equipment. I.G. Ex. 13-19; Tr. at 45; See 42 C.F.R. 1001.125(b)(6).
25. Petitioner's embezzlement deceived customers of Home Oxygen Plus Equipment, including Medicare beneficiaries. Findings 19-21; See 42 C.F.R. 1001.125(b)(6).
26. Petitioner's embezzlement was motivated by animus towards her employer, Home Oxygen Plus Equipment. Tr. at 195-196, 211, 226-227; See 42 C.F.R. 1001.125(b)(6).
27. Previous to her establishing Home Oxygen Plus Supply, Petitioner had embezzled funds from Home Oxygen Plus Equipment in order to repay a gambling debt. Tr. at 100-101, 112-113, 226.

28. The character and nature of Petitioner's unlawful conduct establishes that she is not a trustworthy provider of care. Findings 1-27.
29. That Petitioner now expresses remorse for her unlawful conduct does not establish that she is a trustworthy provider of care. See P. Ex. 6; Tr. at 202-203, 208.
30. The fact that Petitioner was a competent employee of Home Oxygen Plus Equipment does not establish that she is a trustworthy provider of care. See Tr. at 114.
31. Petitioner's honesty and trustworthiness in her personal relationships does not establish that she is a trustworthy provider of care. See Tr. at 181-183.
32. Petitioner's valued services as an inhalation therapist do not establish that she is a trustworthy provider of care. See P. Ex. 1, 2; Tr. at 204-207.
33. The conclusion of Petitioner's probation officer that Petitioner is unlikely to again enter the criminal justice system does not establish that Petitioner is a trustworthy provider of care. See P. Ex. 11; Tr. at 190.
34. When considered in its entirety, evidence as to Petitioner's trustworthiness does not outweigh evidence as to Petitioner's lack of trustworthiness. Findings 30-35.
35. An exclusion is needed in this case to protect the integrity of federally-funded health care programs and the welfare of beneficiaries and recipients of those programs.
36. The five-year exclusion imposed and directed against Petitioner by the I.G. is reasonable.

ANALYSIS

The parties stipulated that Petitioner was convicted of a criminal offense relating to fraud, theft, embezzlement, and breach of fiduciary responsibility or other financial conduct, within the meaning of section 1128(b)(1) of the Act. Therefore, there is no dispute as to the authority of the I.G. to impose and direct an exclusion against Petitioner.

What is disputed is the reasonableness of the five-year exclusion which the I.G. imposed and directed against Petitioner. The I.G. contends that Petitioner's admitted unlawful embezzlement of assets from her employer is proof that she is an untrustworthy provider of care and that the five-year exclusion is reasonably necessary to accomplish the remedial purpose of the Act. Petitioner argues that, notwithstanding her unlawful acts, she has learned her lesson and will never repeat such acts or engage in other misconduct in the future. She asserts, additionally, that the effect of the exclusion is to prevent her from performing a valuable medical service to patients. Therefore, according to Petitioner, the exclusion is unreasonable. She urges that I terminate it effective the date of my decision in this case, thereby making her immediately eligible for reinstatement as a Medicare and Medicaid provider.

Section 1128 is a civil remedies statute. The remedial purpose of section 1128 is to enable the Secretary to protect federally-funded health care programs and their beneficiaries and recipients from individuals and entities who have proven by their misconduct that they are untrustworthy. Exclusions are intended to protect against future misconduct by providers. Manocchio v. Sullivan, No. 90-8114, slip op. at 6 (S.D. Fla. July 12, 1991).

Federally-funded health care programs are no more obligated to deal with dishonest or untrustworthy providers than any purchaser of goods or services would be obligated to deal with a dishonest or untrustworthy supplier. The exclusion remedy allows the Secretary to suspend his contractual relationship with those providers of items or services who are dishonest or untrustworthy. The remedy enables the Secretary to assure that federally-funded health care programs will not continue to be harmed by dishonest or untrustworthy providers of items or services. The exclusion remedy is closely analogous to the civil remedy of termination or suspension of a contract to forestall future damages from a continuing breach of that contract.

Exclusion may have the ancillary benefit of deterring providers of items or services from engaging in the same or similar misconduct as that engaged in by excluded providers. However, the primary purpose of an exclusion is the remedial purpose of protecting the trust funds and beneficiaries and recipients of those funds. Deterrence cannot be a primary purpose for imposing an exclusion. Where deterrence becomes the primary purpose, section 1128 no longer accomplishes the civil remedies objectives

intended by Congress. Punishment, rather than remedy, becomes the end.

[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

United States v. Halper, 490 U.S. 435, 448 (1989).

In determining the reasonableness of an exclusion, the primary consideration must be the degree to which the exclusion serves the law's remedial objective of protecting program recipients and beneficiaries from untrustworthy providers. An exclusion is not excessive if it does reasonably serve these objectives. Thus, in any case in which the length of an exclusion is at issue, I must assess the evidence in order to decide whether the exclusion is reasonably needed to protect federally-funded health care programs or their beneficiaries and recipients from a party whose conduct demonstrates that he or she manifests a propensity to commit harmful acts in the future. I do not analyze an exclusion as redress for past harmful conduct. On the other hand, evidence of past harmful acts by an excluded party may demonstrate a propensity by that party to commit such acts or similar misconduct in the future.

The hearing in an exclusion case is, by law, de novo. Act, section 205(b). Evidence which is relevant to the reasonableness of the length 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. Evidence which relates to a petitioner's trustworthiness or 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. For example, in this case I allowed Petitioner to introduce evidence attesting to her honesty and trustworthiness which emanated from relationships and events occurring after her conviction for embezzlement. See, e.g., P. Ex. 1, 2, 11.

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 legislative intent. Because of the de novo nature of the hearing, my duty is to objectively determine the reasonableness of the exclusion by considering what the I.G. determined to impose in

light of the statutory purpose and the evidence which the parties offer and I admit. The I.G.'s thought processes in arriving at his exclusion determination are not relevant to my assessment of the reasonableness of the exclusion.

Furthermore, my purpose in hearing and deciding the issue of whether an exclusion is reasonable is not to second-guess the I.G.'s exclusion determination so much as it is to decide whether the determination was extreme or excessive. 48 Fed. Reg. 3744 (Jan. 27, 1983). Should I determine that an exclusion is extreme or excessive, I have authority to modify the exclusion, based on the law and the evidence. Act, section 205(b).

The Secretary has adopted regulations to be applied in exclusion cases. The regulations specifically apply to exclusion cases for "program-related" offenses (convictions for criminal offenses relating to Medicare or Medicaid). The regulations express the Secretary's policy for evaluating cases where the I.G. has discretion in determining the length of an exclusion. 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 factors that may exist demonstrating trustworthiness. 42 C.F.R. 1001.125(b)(1)-(7). In evaluating the reasonableness of an exclusion, I consider the regulatory factors contained in 42 C.F.R. 1001.125(b).

The evidence in this case establishes that Petitioner committed a calculated act of embezzlement against her employer, Home Oxygen Plus Equipment. The cunning and animus which Petitioner demonstrated in planning and executing her scheme establishes her to be capable of engaging in acts which could cause severe damage to federally-funded health care programs and their recipients and beneficiaries. I find that this evidence greatly outweighs evidence from Petitioner that she has learned her lesson and regrets her unlawful acts.

Petitioner was employed as a manager by Home Oxygen Plus Equipment. Her duties involved the marketing of health care items and services, including home oxygen supplies, to individuals. Dissatisfied with her compensation and with the amount of recognition she received from her employer for her efforts on its behalf, Petitioner determined to redress the perceived inequities through unlawful means.

While employed by Home Oxygen Plus Equipment, Petitioner established a competing enterprise, which she called Home Oxygen Plus Supply. In plan and execution, this competitor was a parasite which fed off the assets, income, and good will of Home Oxygen Plus Equipment. Petitioner chose the business name "Home Oxygen Plus Supply" partly because the name would deceive customers of Home Oxygen Plus Equipment into believing that they were dealing with Home Oxygen Plus Equipment, when, in fact, their business had been transferred to Home Oxygen Plus Supply. Petitioner diverted remuneration paid to Home Oxygen Plus Equipment to the account of Home Oxygen Plus Supply. She deceived customers of Home Oxygen Plus Equipment into transferring their business to Home Oxygen Plus Supply. She made use of equipment belonging to Home Oxygen Plus Equipment to provide services on behalf of her parasite business. And, of course, she disclosed none of these acts to her employer.

Petitioner's fraud operated at three levels. First, she deluded her employer into believing that she was working to further its business, when, in fact, she was working to destroy it. Second, she deceived customers of her employer into believing that they were dealing with her employer, when, in fact, they were dealing with the parasite company created by Petitioner. Finally, Petitioner deceived third party payers including Medicare into paying remuneration to her for items or services which were legitimately remunerable to her employer.

I am impressed by the cleverness and malice which Petitioner devoted to her scheme. Her unlawful acts cannot possibly be attributed to a good-faith misunderstanding of her obligations, to mistake, or to poor judgment. Nor do her acts suggest, as Petitioner argues, an intent to simply "borrow" resources from her employer. Rather, her conception and execution of her embezzlement establishes Petitioner to have engaged in a calculated and carefully planned fraud. Her level of culpability is extremely high.

I infer from this evidence a propensity on Petitioner's part to engage in harmful conduct in the future. I conclude that she is an untrustworthy individual. In reaching this conclusion, I am mindful of Petitioner's assertions that she has learned her lesson and regrets her unlawful conduct. I am also cognizant that she has convinced other individuals, including her probation officer, that she is sincere in her expression of remorse and that she is unlikely to enter the criminal justice system again. See P. Ex. 11. However, Petitioner's behavior convinces me that she remains capable of

engaging in harmful conduct in the future. I am unwilling to gamble that my assessment is incorrect based on Petitioner's representations that she is a changed person or on other individuals' assertions that she has been honest so far in her dealings with them.

Petitioner asserts that none of her unlawful conduct harmed the Medicare program. From this, she argues that I should not infer a need for an exclusion continuing past the date this decision is issued.³ As I note above, the test for determining the reasonableness of an exclusion is a party's propensity to harm federally-funded health care programs or their beneficiaries and recipients in the future. That propensity may be inferred from past acts which are harmful to Medicare, but it may be inferred from other things as well, including acts which harmed Petitioner's private employer.⁴ In this case, I infer a propensity to do harm in the future from the calculating and malicious nature of Petitioner's unlawful conduct. I find that the fact that Petitioner engaged in an elaborate scheme to embezzle funds from her employer after he declined to press charges for a previous embezzlement offense is strong evidence of her untrustworthiness. Petitioner admitted that, prior to establishing Home Oxygen Plus Supply, she had embezzled money from her employer to pay a gambling debt and that her employer resolved this matter without criminal prosecution.

³ It is not entirely clear that Petitioner is correct in her contention that her conduct did not harm Medicare. The evidence establishes that Petitioner diverted to the account of Home Oxygen Plus Supply Medicare reimbursement for items or services which was in fact payable to Home Oxygen Plus Equipment. There is not evidence of record to show what impact such diversion had on the Medicare program.

⁴ Congress has explicitly recognized that a propensity to commit harm against federally-funded health care programs or their beneficiaries and recipients may be inferred from unlawful or damaging conduct which is not directed against Medicare or Medicaid or against the beneficiaries or recipients of these programs. Many of the subsections of section 1128 authorizing an exclusion are based on conduct other than conduct which is necessarily harmful to Medicare or Medicaid or to beneficiaries and recipients of these programs. See, e.g., Act, sections 1128(a)(2), (b)(1), (b)(2), (b)(3), (b)(4), and (b)(5).

Petitioner introduced evidence to show that since her conviction she has served as an inhalation therapist and has performed credibly in that capacity. She asserts that one effect of the exclusion will be to deprive her of the opportunity to perform work which is of great social value. I recognize that may be so. However, I conclude that the exclusion imposed by the I.G. is reasonable in light of the propensity to engage in harmful conduct demonstrated by Petitioner.⁵

CONCLUSION

Based on the evidence in this case and the law, I conclude that the five-year exclusion imposed and directed against Petitioner by the I.G. is reasonable. I therefore sustain the exclusion.

/s/

Steven T. Kessel
Administrative Law Judge

⁵ If I could modify the exclusion so as to permit Petitioner to continue as a Medicare or Medicaid provider as an inhalation therapist employed by Children's Hospital in Denver, Colorado I might be tempted to do so. The evidence in this case suggests that Petitioner does not represent a threat to federally-funded health care programs or to beneficiaries and recipients while employed in that capacity. However, I do not have the freedom to so narrow the exclusion. Walter J. Mikolinski, Jr., DAB App. 1156 (1990) at 5-16; See Corrine B. Kohn, DAB Civ. Rem. C-262 (1991).