

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
David G. Harow, D.P.M.,)	DATE: December 11, 1991
and Associated Podiatrists))	
of Worcester, P.C.,)	
)	Docket No. C-394
Petitioners,)	Decision No. CR167
)	
- v. -)	
)	
The Inspector General.)	
)	

DECISION

By letters dated April 12, 1991, the Inspector General (I.G.) notified Petitioners David G. Harow, D.P.M. (Petitioner Harow) and Associated Podiatrists of Worcester, P.C. (Petitioner Associated Podiatrists), that they were being excluded from participation in the Medicare program, and any State health care program, as defined in section 1128(h) of the Social Security Act (Act).¹ The I.G.'s notices informed Petitioners that their exclusion resulted from State convictions of a criminal offense related to the delivery of an item or service under Medicare. The I.G. further informed Petitioners that section 1128(a)(1) of the Act requires that individuals and entities convicted of such program-related offenses be excluded for a minimum period of five years. The I.G. told Petitioners that they were being excluded for a period of seven years, two years longer than the mandatory minimum under section 1128(c)(3)(B).

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.

Petitioners timely requested a hearing and the case was assigned to me for a hearing and decision. Two prehearing conferences were held on July 11 and 17, 1991. The substance of those conferences was summarized in my July 30, 1991 Prehearing Order and Notice of Hearing. The Petitioners, through counsel, indicated that they did not contest the authority of the I.G. to exclude them pursuant to section 1128(a)(1) of the Act. They stated they were contesting only the reasonableness of the length of the seven year exclusion. Petitioners stated on July 11, 1991 that an in-person hearing would not be necessary to decide this case. Counsel for the I.G. indicated her agreement with this view. The parties were given until July 17, 1991 to consider their litigation strategies, and, at the July 17 prehearing conference, they agreed to proceed with this case based on a written record instead of an in-person hearing.

The parties have timely submitted their list of stipulated facts and briefs. Petitioner moved for leave to submit an additional exhibit (marked as Petitioner's Exhibit 11) and the I.G. did not object. I have admitted all of the exhibits, including P. Ex. 11², into evidence. I have considered the evidence, the parties' written briefs and supporting exhibits, and the applicable laws and regulations. I conclude that the I.G. was mandated by section 1128(a)(1) to exclude Petitioners for at least five years. I conclude further that the seven year exclusions which the I.G. imposed and directed against Petitioners are reasonable. Therefore, I sustain the exclusions.

ISSUE

The issue in this case is whether the seven year exclusions imposed and directed against Petitioners by the I.G. are reasonable.

²The parties' exhibits, briefs, and stipulations will be referred to as follows:

I.G.'s Exhibits	I.G. Ex. (number/page)
Petitioner's Exhibits	P. Ex. (number/page)
I.G.'s Brief	I.G. Br. (page)
Petitioner's Brief	P. Br. (page)
Stipulated Facts	Stip. (number)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner Harow is, and at all material times has been, licensed as a podiatrist in the State of Massachusetts. Stip. 3.

2. Petitioner Harow established Petitioner Associated Podiatrists of Worcester, P.C., a professional corporation incorporated under the laws of Massachusetts. At all material times, Petitioner Harow has been the president and sole shareholder of Associated Podiatrists. Stip. 4; P. Ex. 1/1.

3. Petitioners were, at all times relevant, approved providers under the Medicare program. As approved providers, Petitioners were authorized to claim reimbursement from Medicare for certain podiatric services provided to Medicare beneficiaries. P. Ex. 1/2.

4. On March 6, 1989, Petitioners were indicted by a federal grand jury for violation of 41 U.S.C. 1320a-7b(a)(1) for making false representations of material fact in an application for payment under the Medicare program. The original indictment contained 15 counts. Subsequently, one of the counts was dropped. Stip. 6; P. Ex. 1/4.

5. The government alleged in each count of the indictment that Petitioners had submitted false claims for reimbursement to Medicare. Petitioners were alleged to have claimed to have provided podiatric services to Medicare recipients while knowing the services had not been provided as claimed. The false claims allegedly resulted in payments to Associated Podiatrists of between \$1,500 and \$3,000. Stip. 7; P. Exs. 1/4, 1/5, 8.

6. Petitioners entered into a plea agreement whereby Petitioner Harow pled guilty to eight counts of Medicare fraud. Petitioner Associated Podiatrists pled guilty to 14 counts of Medicare fraud. Stip. 10, 11; P. Exs. 5 and 6.

7. Pursuant to the plea agreement, Petitioner Harow was sentenced to one year's imprisonment on each of the eight counts, to run concurrently. Petitioner Harow was fined \$5,000 on each of the eight counts he pled guilty to and was additionally assessed \$400, for a total of \$40,400. Petitioner Associated Podiatrists was fined \$5,000 on each of the fourteen counts it had pled to and was additionally assessed \$700, for a total of \$70,700. Stip. 15; P. Exs. 5, 6 and 8/1.

8. Petitioners, in a separate proceeding, entered into a civil settlement agreement with the United States Government. In the settlement agreement, Petitioners agreed to jointly and severally pay the United States \$100,000 as a full and final settlement of any and all potential civil claims and causes of action arising from Petitioners' criminal cases. Petitioner Harow has paid the United States the full \$100,000. Stip. 12; P. Ex. 4.

9. Petitioner Harow was imprisoned for two months and served two and a half months in a halfway house. He was released early from his halfway house obligation because of good behavior. Stip. 17; P. Ex. 8/1.

10. Petitioners were investigated by the Medicaid Fraud Control Unit of the Department of the Massachusetts Attorney General in 1988. The investigation resulted in a Disposition Agreement in a Massachusetts State court whereby Petitioners were indicted for false Medicaid claims. The case was continued without a finding by the court, and the charge was subsequently dismissed as per the Disposition Agreement, pursuant to which Petitioner Harow paid \$19,948 in investigative costs and \$52 in restitution, for a total of \$20,000. Stip. 19; P. Exs. 4, 8/2.

11. Petitioners were convicted of a criminal offense related to the delivery of an item or service under the Medicare program. Findings 4 - 7; Social Security Act, section 1128(a)(1).

12. Petitioners' fraud included knowingly presenting claims for Medicare reimbursement for items or services which Petitioners did not provide. P. Exs. 1 - 5.

13. Petitioners' fraudulent activity occurred over approximately an eight-month period, from August 1984 until March 1985. P. Br. at 4.

14. The Medicare program suffered pecuniary loss as a result of Petitioners' fraud. P. Br. at 4 - 7; I.G. Br. at 4; P. Ex. 1/4; P. Ex. 2; P. Ex. 4.

15. Petitioner Associated Podiatrists is, and at all relevant times has been, wholly controlled by Petitioner Harow and is essentially Petitioner Harow's corporate alter ego. P. Br. at 2; See Stip. 4; P. Ex. 1/1.

16. Petitioner Harow's contention that his bout with pneumonia and subsequent lung operation were a contributing cause to his commission of fraud against the

Medicare program is not supported by any evidence of record and is not credible.

17. On September 11, 1991, after a lengthy hearing process, the Massachusetts Board of Registration in Podiatry suspended Petitioner Harow's license to practice podiatry for a period of three years. The three year suspension was stayed for two years, with the remaining year being reduced to six months to account for Petitioner's incarceration. Petitioners' characterization of the Massachusetts Board's procedure as a six month suspension is misleading. P. Ex. 11.

18. The Secretary of Health and Human Services (Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128(a)(1) of the Act. 48 Fed. Reg. 21622 (May 13, 1983).

19. On April 12, 1991, the I.G. excluded Petitioners from participating in Medicare and directed they be excluded from Medicaid, pursuant to section 1128(a)(1) of the Act.

20. The exclusion imposed and directed against Petitioners is for seven years. I.G. Br. 1; P. Br. 1.

21. The I.G. had authority to impose and direct an exclusion against Petitioner pursuant to section 1128(a)(1) of the Act, because Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicare. Finding 11; Social Security Act, section 1128(a)(1).

22. The minimum mandatory exclusion which the I.G. must impose and direct against an individual pursuant to section 1128(a)(1) of the Act is five years. Social Security Act, section 1128(c)(3)(B).

23. An exclusion of seven years is needed in this case to protect federally-funded health care programs and their beneficiaries from the commission of future harm by Petitioners. Findings 11 - 15.

ANALYSIS

The parties do not dispute that Petitioners were convicted of a criminal offense related to the delivery of an item or service under Medicare. Petitioner Harow pled guilty to eight counts of Medicare fraud and Petitioner Associated Podiatrists pled guilty to 14

counts of Medicare fraud. Petitioners' fraud consisted of billing the Medicare program for procedures that were not actually performed. The criminal conviction, on its face, plainly relates to the delivery of an item or service under Medicare. Jack W. Greene, DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990); John A. Crawford, M.D., DAB CR160 (1991); Christino Enriquez, M.D., DAB CR119 (1991). Petitioners do not dispute that they are subject to the mandatory minimum five-year exclusion. What Petitioners are contesting is the reasonableness of the seven year exclusion imposed by the I.G. P. Br. 3.

Specifically, Petitioners contend that adding two years to the mandatory minimum amounts to vindictive and punitive action on the part of the I.G. P. Br. 3. Petitioners further argue that the Medicare trust fund is not in jeopardy from any of their future activities. P. Br. 3. Petitioners contend that based on their acceptance of criminal responsibility and the relatively small amounts of money involved, their level of fault or criminality is less than what exists in many, if not most, Medicare fraud prosecutions. P. Br. 3 - 4, 6 - 8.

In deciding whether or not Petitioners' exclusions are reasonable, I must review the evidence with regard to the exclusion law's remedial purpose. 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 1 (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.

Exclusions 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).

Therefore, 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.

The hearing in an exclusion case is, by law, de novo. Social Security 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.

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. My purpose is not to second-guess the I.G.'s determination but 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. Social Security 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 relation to Medicare and Medicaid). The regulations express the Secretary's policy for evaluating cases where the I.G. has discretion in determining the length of an exclusion, including exclusion periods beyond the mandatory minimum. 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).

I conclude that the crimes admitted to by Petitioners establish that they are untrustworthy providers of care. Given the extent and seriousness of Petitioners' crimes, the lengthy exclusions imposed here are a reasonable remedy. Petitioner Associated Podiatrists was convicted of 14 counts of Medicare fraud. Petitioner Harow was convicted of eight counts of Medicare fraud. Moreover, Petitioner Harow admits in his own brief that the corporation was his alter ego, in that he owned all of the stock and had complete control over the daily operation of the corporation. P. Br. at 2, 4. Therefore, while Petitioner Harow was not convicted of the same crimes as Petitioner Associated Podiatrists, Harow was the controlling entity behind the corporation's fraudulent billing procedures and had ultimate responsibility for those procedures.

The evidence is uncontroverted that Petitioners engaged in systematic fraud of the Medicare program for approximately an eight-month period. The scheme involved interlacing requests for reimbursement for medical services that were not performed with claims for compensable services and resulted in the unlawful appropriation of approximately \$3,000. Thus, the offenses admitted to by Petitioners involve a large number of separate crimes, committed with a very high level of culpability on Petitioners' part, over a substantial period of time. 42 C.F.R. 1001.125(b)(1), (b)(2). They involve a substantial amount of program funds and considerable damage to the Medicare program. 42 C.F.R. 1001.125(b)(3). I conclude from this evidence that Petitioners have a propensity to commit conduct that is harmful to the program. The number of offenses, as well as their duration, establish that these were not isolated incidents. Petitioners fully intended to profit from defrauding the Medicare program, while attempting to conceal the fraud by intermingling compensable and fraudulent claims.

Petitioners contend that the amount of money involved was small when compared with the number of procedures actually performed and that most of the procedures performed were compensable. P. Br. at 4 - 5. Petitioners also contend that since Medicare customarily pays only 80 percent of a patient's charges, the amount which Petitioners could have expected to receive was only a small amount of the amount actually charged the patient. P. Br. at 5. I find these arguments unpersuasive. First, I do not find that the amount of money involved in this case is small. The amounts involved in this case are certainly not staggering, but neither are they insignificant. Furthermore, I find it significant as to the extent of Petitioners' fraud that Petitioners were obliged to pay a \$100,000 civil settlement to the United States. Such a settlement is evidence that their fraudulent activities were serious and substantial.

While Petitioners admit to wrongdoing, they attempt to minimize their wrongdoing by stating that they didn't gain as much monetarily as other perpetrators of Medicare fraud. Petitioners argue that the fact that they did not obtain substantial sums of money as a result of their actions makes them more trustworthy. However, it is necessary for me to compare the level of Petitioner's crimes with other known episodes of Medicare fraud in order for me to conclude that Petitioners' conduct independently shows that they are untrustworthy providers.

Petitioner Harow also argues that his prolonged lung infection and subsequent surgery led to aberrant behavior which resulted in fraud that would not otherwise have occurred. The record of this case, however, does not indicate that Petitioner Harow's physical ailment induced Petitioner to engage in fraud. Nor is there evidence that, as a result of his illness, Petitioner was unable to comprehend the nature or lawfulness of his acts. Indeed, the evidence clearly indicates that Petitioner intentionally and deliberately charged the program for procedures that he did not perform. Petitioners' actions were serious, systematic, and willful. Petitioners' attempts to attribute their acts to Petitioner Harow's illness is not credible and is additional evidence of a lack of trustworthiness.

Petitioner Harow has offered evidence that the State of Massachusetts suspended his license to practice podiatric medicine for a period of six months. Pet. Ex. 11. Petitioner argues that the length of the suspension is

indicative of his trustworthiness and therefore relevant to the reasonableness of the exclusion.

I conclude that, while it may be relevant to look to the actions of a State licensing authority as evidence of trustworthiness or untrustworthiness in an exclusion case based on fraud against Medicare, such evidence will not necessarily establish grounds for evaluating the reasonableness of an exclusion. Moreover, Petitioner Harow does not accurately characterize the suspension imposed on him by the State of Massachusetts when he states that he was suspended for six months. While it is true the practical effect of the Massachusetts Board's action was a six-month suspension of Petitioner Harow's license, the length of the suspension imposed by the State was actually three years. The State stayed two years of Petitioner Harow's suspension, and gave him six months credit for the time he was imprisoned, thus making one year the actual time Petitioner's license was suspended. In any event, there exists ample evidence independent of the State's action against Petitioner to demonstrate that he is an untrustworthy provider of care. The State action in this case does not derogate from my conclusion that the exclusions imposed and directed against Petitioners are reasonable.

Finally, Petitioner Harow asserts that he has so far complied with the terms of the criminal sentence imposed against him, including the payment of restitution and substantial fines. He argues that his good behavior is proof of trustworthiness. I am not belittling any efforts Petitioner Harow has made to comply with the terms of his sentence by saying that I do not find him to be a trustworthy provider of care. The evidence of this case shows that Petitioners are capable of engaging in calculated fraud against federally-funded health care programs. In light of that, I conclude that the lengthy exclusions imposed by the I.G. are reasonable protections of the integrity of those programs. I find that as a safeguard and protection against future fraud, the exclusions are reasonable.

CONCLUSION

Based on the law and the evidence, I conclude that the seven year exclusions from participating in Medicare and State health care programs imposed and directed against Petitioners are reasonable. I therefore sustain the exclusions.

/s/

Steven T. Kessel
Administrative Law Judge