

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Yvon Nazon, M.D.,)	DATE: July 8, 1992
Petitioner,)	
- v. -)	Docket No. C-92-126
The Inspector General.)	Decision No. CR214

DECISION ON REMAND

I issue this decision pursuant to a Ruling Remanding Case issued by an appellate panel of the Departmental Appeals Board (DAB). On December 11, 1990, Petitioner requested a hearing on a November 2, 1990 determination by the Inspector General (I.G.) to exclude him from participation in the Medicare and State health care programs for seven years pursuant to section 1128(a)(1) of the Social Security Act (Act). On December 20, 1991, I issued a decision (DAB CR169) in which I found that the I.G. had the authority to exclude Petitioner under section 1128(a)(1) of the Act because he was convicted of a criminal offense related to the delivery of an item or service under Medicaid. I concluded also that the seven year exclusion was reasonable under the circumstances of this case. My decision noted that as part of his sentence for the underlying criminal offense, the United States District Court for the Northern District of Indiana ordered Petitioner to pay restitution to the Medicaid program in the amount of \$84,110.35. Finding 6. I found also that this sentence reflected the "serious nature of Petitioner's criminal offenses." Finding 17.

Petitioner appealed my decision to the DAB. In his April 7, 1992 reply brief, Petitioner notified the DAB of the filing of a Stipulation and Agreed Order with the federal judge in the underlying criminal case to modify the sentence by reducing the restitution amount from \$84,110.35 to \$4,979.00. Petitioner also indicated that this Stipulation and Agreed Order had been signed by

Petitioner's attorney in that case and by the Assistant United States Attorney and was awaiting entry by the federal judge. Petitioner's Reply Brief at 7. On April 9, 1992, Petitioner also filed a petition to reopen the hearing before the ALJ and amend the record on appeal to include the new evidence.¹

On May 8, 1992, an appellate panel of the DAB issued a Ruling Remanding Case. The appellate panel concluded that it is appropriate for the administrative law judge (ALJ) "to assess whether this development alters his conclusion that the exclusion period imposed is reasonable." The appellate panel therefore remanded this case pursuant to 42 C.F.R. § 1005.21(f) for the ALJ "to consider whether to reopen the case below and whether the reduction of restitution would alter his conclusions."

My office subsequently notified the parties by telephone and offered them the opportunity to submit supplemental briefs on the issues before me on remand. The parties declined this offer and indicated that they wished me to consider the arguments related to this new evidence set forth by them in briefs filed with the appellate panel.

The regulations at 42 C.F.R. § 1005.21(f) provide:

If any party demonstrates to the satisfaction of the DAB that additional evidence not presented at such hearing is relevant and material and that there were reasonable grounds for the failure to adduce such evidence at such hearing, the DAB may remand the matter to the ALJ for consideration of such additional evidence.

By deciding to remand this case to me pursuant to 42 C.F.R. § 1005.21(f), I find that the appellate panel of the DAB has concluded that the new evidence regarding the reduction of restitution in this case is relevant, material, and that there were reasonable grounds for Petitioner's failure to adduce such evidence at the hearing. Based on this, I have reopened the record, redocketed the case (as No. C-92-126), and have admitted

¹ On April 27, 1992, Petitioner filed a motion to supplement the petition to reopen hearing and to amend record on appeal. Petitioner stated in that document that on April 7, 1992 the United States District Court for the Northern District of Indiana entered the Agreed Order reducing restitution.

this evidence. I am also modifying my Findings to reflect the reduction of Petitioner's restitution.

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

ISSUE

The issue to be decided on remand is whether the new evidence alters my December 20, 1991 decision upholding the I.G.'s determination to exclude Petitioner for a period of seven years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I have reopened the record for the purpose of considering the new evidence offered by Petitioner. Based on this new evidence, I amend the Findings I made in my December 20, 1991 decision to add two new Findings after Finding 6. The new Findings are numbered 7 and 8 and all the other Findings in that decision are renumbered to reflect the addition of this new Finding. The new Findings are as follows:

7. In March, 1992, the parties in the criminal proceeding before the United States District Court for the Northern District of Indiana agreed to modify the court's May 10, 1990 sentence to reduce the amount of restitution ordered in this case from \$84,110.35 to \$4,979.00. The basis for the agreement to reduce the amount of restitution is that the law in the Seventh Circuit prohibits restitution exceeding the amount of damages alleged in the indictment. P. Ex. 6.²

8. On April 7, 1992, the United States District Court for the Northern District of Indiana entered an Agreed Order, vacating its May 10, 1990 restitution order, and

² This Finding is based on the document attached to Petitioner's reply brief in his appeal before the DAB which he identified as "Exhibit A". I have reopened the record to admit this document into evidence, and I redesignate it P. Ex. 6.

ordering Petitioner to pay \$4,979.00 in restitution. P. Ex. 7.³

In addition, I am modifying Finding 17 (now renumbered as 19) to read:

19. The serious nature of Petitioner's criminal offense is reflected in the sentence fashioned by the court, as modified by the April 7, 1992 Agreed Order, which reduced the amount of restitution ordered to \$4,979.00. (The modification is underlined.)

In all other respects, the Findings of Fact and Conclusions of Law set forth in my December 20, 1991 decision remain unchanged.

ANALYSIS

Petitioner contends that, based on his reading of my December 20, 1991 decision, the amount of restitution that he was ordered to pay on May 10, 1990 was a "significant factor" in my decision to sustain the seven year exclusion imposed by the I.G. He therefore argues that my assessment of the seriousness of his criminal offenses and the reasonableness of the seven year exclusion will be altered by the reduction of the restitution from \$84,110.35 to \$4,979.00. Petitioner Motion to Reopen at 3.

The I.G. argues that even though the amount of restitution ordered in the criminal case is reduced, the seven year exclusion period "remains reasonable given the Petitioner's persistent refusal to accept responsibility for his criminal actions and given the nature and extent of his criminal conduct." I.G.'s Reply Brief at 5. The I.G. also asserts that evidence in the record continues to support the larger figure as the amount of damages to the program and that any amount of damages over \$1,500.00 should be treated as an aggravating factor. Id., citing 42 C.F.R. § 1001.102(b)(1).

³ The April 7, 1992 Agreed Order was attached to Petitioner's April 27, 1992 Motion to Supplement Petition, and was identified as "Exhibit A". I have admitted this document into evidence as P. Ex. 7.

In its Ruling Remanding Case, the DAB noted the I.G.'s arguments, and stated:

[W]hat the ALJ is being asked to reconsider is only the effect, if any, of the agreed reduction in sentence on the degree of aggravation. He is not thereby required to alter his findings as to the damages to the program or to treat the damages any less seriously.

Ruling Remanding Case at 2. In my December 20, 1991 decision, I found that the financial loss to the Medicaid program resulting from Petitioner's criminal misconduct amounted to at least \$84,000.00 and that this was "a significant amount of money". Finding 16. Petitioner was initially ordered to pay full restitution for these damages, but this order was subsequently modified to require him to pay only partial restitution in the amount of \$4,979.00. The reason for the reduction of restitution was related to a legal requirement prohibiting restitution exceeding the amount of damages alleged in the indictment. It was not related to any newly discovered evidence showing that the financial loss to the Medicaid program was less than \$84,000.00. I therefore do not alter my findings as to the damages to the Medicaid program resulting from Petitioner's misconduct. Since the restitution amount was reduced for reasons unrelated to Petitioner's culpability, my assessment of the nature and seriousness of his criminal conduct remains unchanged.

My December 20, 1991 decision to uphold the seven year exclusion was based on the nature and gravity of Petitioner's offenses, Petitioner's culpability, and his continuing efforts to avoid responsibility for his actions. The amount of restitution he was ordered to pay was a relatively insignificant factor in evaluating the reasonableness of the exclusion. Since there is no new evidence which shows that I should change my assessment of Petitioner's culpability, I do not find a basis for changing my decision sustaining the exclusion.

I do not draw any inferences favorable to Petitioner from the reduction of restitution. In fact, the Medicaid program is in a worse financial position after the Agreed Order was entered on April 7, 1992 than it was before this order was in effect. As a result of this Agreed Order, Petitioner will pay only a small fraction of the amount of damages to the program. That Petitioner was able to avoid paying back the money he caused the program

to lose certainly does not lead to the conclusion that he is trustworthy.

In view of the foregoing, I do not alter my previous decision that the remedial purposes of the Act is satisfied by a seven year exclusion in this case.

CONCLUSION

Based on the law and evidence, including the newly admitted evidence, I conclude that the seven-year exclusion from participating in Medicare and Medicaid imposed and directed against Petitioner is reasonable. I therefore sustain the exclusion.

/s/

Edward D. Steinman
Administrative Law Judge