

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Michelle Donaldson, D.P.M.)	DATE: October 9, 1992
Petitioner,)	
- v. -)	Docket No. C-92-015
The Inspector General.)	Decision No. CR234

DECISION

By letter dated November 4, 1991, Michelle Donaldson, D.P.M., the Petitioner herein, was notified by the Inspector General (I.G.), U.S. Department of Health & Human Services (HHS), that it had been decided to exclude her for a period of 15 years from participation in the Medicare and Medicaid programs (in this decision, "Medicaid" means those State health care programs mentioned in section 1128(h) of the Social Security Act (the Act)). The I.G. explained that exclusion for a minimum period of five years is mandatory under sections 1128(a)(1) and 1128(c)(3)(B) of the Act because Petitioner had been convicted of a criminal offense related to the delivery of items or services under Medicare or Medicaid. The I.G. concluded that Petitioner should be excluded for more than the mandatory minimum period due to the nature and severity of her offenses.¹

Petitioner filed this timely request for review of the I.G.'s action.

Petitioner acknowledges that, since she "was convicted of a criminal offense in connection with her provision of

¹ The I.G. cited, as aggravating considerations, the facts that Petitioner's criminal activities defrauded Medicaid of approximately \$60,000; that Medicaid patients may have been harmed by being given cheap orthotic devices; and that she was sentenced to jail for up to six years by a State court.

Medicaid services, she must be excluded ... under the applicable statutory sections for a minimum of five years." Petitioner's April 20, 1992 Letter at 1. She further states "I do not suggest an exclusion ... of less than five years [h]owever in light of the mitigating factors in this case, I request that the exclusionary period be reduced from fifteen years to five years." Petitioner's April 20, 1992 Letter at 2. See Petitioner's July 8, 1992 Brief at 1 - 2.

Petitioner declined an in-person oral hearing. May 6, 1992 Prehearing Order at 2.

I conclude that Petitioner's exclusion is required by law and that a period of exclusion of ten years is appropriate.

APPLICABLE LAW

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act make it mandatory for any individual who has been convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid to be excluded from participation in such programs, for a period of at least five years.

ARGUMENT

In her defense, Petitioner asserts that the Medicaid billing codes for the podiatric services relevant to this case are unclear and that this may have caused her to make errors, but she never intended to defraud anyone. She declares that, erroneous billing notwithstanding, she always provided her patients with medical care and enjoyed a very positive reputation in the community. Lastly, she emphasizes that she cooperated with the New York authorities during the course of their investigation and is currently making restitution.

The I.G. explained that the proposed duration of Petitioner's exclusion was determined in accordance with the factors set forth at 42 C.F.R. Part 1001.125 and that it also reflects Departmental Appeals Board (DAB) case precedent.² The I.G. argues that Petitioner has not

² For cases in which the I.G. gave notice of the exclusion after January 29, 1992, these regulations have been superseded by the present 42 C.F.R. 1001.102. The I.G. noted that "[a]t the time that Petitioner's case was

demonstrated the presence of mitigating factors that warrant altering the 15-year exclusion. Her arguments in the present appeal, the I.G. asserts, are no more than a recapitulation of allegations that were rejected by the State courts. The I.G. notes that, in providing records to State investigators and in paying restitution, Petitioner did no more than the law requires.

FINDINGS OF FACT AND CONCLUSIONS OF LAW³

1. During the period relevant to this proceeding, Petitioner was a licensed podiatrist and a Medicaid provider in the State of New York. I.G.'s proposed findings of fact 1; Petitioner's statement regarding I.G.'s proposed findings of fact 1.

2. On or about July 26, 1989, an indictment was filed against Petitioner charging her with grand larceny and offering a false instrument for filing. The indictment alleged that she had billed the New York Medicaid program for foot molds (orthotics) fabricated from casts that she purportedly furnished her patients. P. Ex. 1; I.G. Ex. 3.

3. Petitioner furnished her patients orthotics made from two-dimensional tracings. Petitioner's July 8, 1992 Brief at 3, 5.

4. Petitioner was tried before a jury in the County Court, Albany, New York, and was convicted of one count of grand larceny and ten counts of offering a false instrument for filing. She was sentenced on December 14, 1990 to imprisonment for one and one third to six years and also required to make restitution of \$59,984. I.G. Ex. 7.

reviewed by the OIG [Office of Inspector General], it applied the text of 42 C.F.R. Part 1001 as it read before January 29, 1992." I.G. Brief dated June 15, 1992 at 12. The I.G. does not contend, and I do not find, that the regulations promulgated on January 29, 1992 at 42 C.F.R. § 1001.102 apply retroactively to this case. See Behrooz Bassim, M.D., DAB 1333 (1992).

³ Petitioner and the I.G. submitted briefs and documentary exhibits. I admitted all of the exhibits into evidence and refer to them herein as "P. Ex. (number)" or "I.G. Ex. (number)."

5. The State's intermediate appellate court (New York Supreme Court, Appellate Division, Third Department) upheld Petitioner's conviction, but reduced her term of imprisonment to one to three years. I.G. Ex. 8.

6. The New York Supreme Court found that Petitioner submitted claims for orthotics pursuant to Medicaid procedure code 90473 which were not equivalent to what Petitioner was required to supply to patients under that procedure code. I.G. Ex. 8.

7. On September 19, 1991, the Board of Regents of the State of New York suspended Petitioner's license to practice podiatry for a period of one year and stayed execution of the last six months of the suspension. P. Ex. 7.

8. The Secretary of HHS has delegated to the I.G. the authority to determine and impose exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

9. By letter dated November 4, 1991, Petitioner was notified by the I.G. that it had been decided to exclude her for a period of 15 years from participation in the Medicare and Medicaid programs because she had been convicted of a criminal offense related to the delivery of items or services under Medicare or Medicaid.

10. It is undisputed that Petitioner was convicted of criminal offenses related to the delivery of items or services under the Medicare or Medicaid programs, and, consequently, that her exclusion from such programs for a minimum period of five years is mandated pursuant to sections 1128(a)(1) and 1128(c)(3)(B). Petitioner's April 20, 1992 Letter at 1 - 2; Petitioner's July 8, 1992 Brief at 1 - 2.

11. The fact that Petitioner committed multiple offenses which were directly program related is an aggravating factor to be considered when determining the appropriate exclusion.

12. The fact that Petitioner did substantial financial and other damage to the Medicaid program is an aggravating factor to be considered when determining the appropriate exclusion.

13. The fact that Petitioner was sentenced to an atypical and relatively long period of imprisonment is an

aggravating factor to be considered when determining the appropriate exclusion.

14. Inasmuch as the I.G. has not proved all the aggravating considerations he alleged (and no others have emerged), he has not shown the 15-year exclusion to be reasonable.

15. The aggravating considerations that are undisputedly present, as well as the minimal to nonexistent evidence of trustworthiness and/or rehabilitation, show that an exclusion of ten years is reasonable.

DISCUSSION

A. The fact finder must evaluate the evidence in light of the remedial purpose of the exclusion law in order to determine the appropriate length of the exclusion.

Inasmuch as the parties to this proceeding acknowledge that Petitioner was convicted of criminal offenses related to the delivery of items or services under the Medicare or Medicaid programs, and, consequently, that her exclusion from such programs for a minimum period of five years is mandated by sections 1128(a)(1) and 1128(c)(3)(B), the only issue to be resolved herein is whether the 15-year exclusion imposed and directed by the I.G. is reasonable.

Congress enacted section 1128 of the Act to protect the Medicare and Medicaid programs from fraud and abuse and to protect the beneficiaries and recipients of such programs from incompetence and dishonesty. As one means of protecting these programs and their beneficiaries and recipients, Congress provided for the exclusion of individuals who threaten them. Exclusion is also intended to serve as a deterrent to future misdeeds. Congress did not, however, intend that exclusions from the Medicare and Medicaid programs be permanent; i.e., transgressors were to have an opportunity to rehabilitate themselves. It is, therefore, necessary, in each case, to ascertain what period of exclusion is appropriate to effectuate the purposes of the law. Charles J. Burks, M.D., DAB CR54 (1989).

In determining an exclusion, the totality of circumstances of the case must be considered. In general, though, the following criteria have been found suitable for evaluating trustworthiness and the length of exclusion: (1) the circumstances of the misconduct and the seriousness of the offense, particularly whether

there was program-related crime; (2) whether Petitioner exhibited a willingness to place the programs in jeopardy (even if no actual harm resulted); (3) failure to admit misconduct, or express remorse, or demonstrate rehabilitation; and (5) the likelihood of future abuse. Bhupandra Patel, M.D., DAB CR227 (1992).

In addition to the abovementioned indicia of trustworthiness, the appropriateness of an exclusion may be determined by assessing the following criteria, which are incorporated in the regulations (42 C.F.R. Part 1001.125): (1) the number and nature of the offenses; 2) adverse impact upon beneficiaries; (3) damages incurred by the Medicare, Medicaid, and social services programs; (4) the existence of mitigating circumstances [facts suggestive of trustworthiness]; (5) the length of sentence imposed by the court; (6) any other facts bearing on the nature and seriousness of the violations; and (7) previous sanctions against the excluded person. Charles J. Burks, M.D., DAB CR54 (1989).

This proceeding is de novo. All evidence relevant to Petitioner's trustworthiness or the remedial objectives of the law is admissible, even if such evidence does not pertain to the legal basis for exclusion, and even if the I.G. did not consider it. Christino Enriquez, M.D., DAB CR119 (1991).

As to Petitioner's principal defense -- that the billing codes for the podiatric services applicable here are unclear and that this caused her to make errors, but she never intended to defraud anyone -- these contentions have, indeed, been litigated and rejected in the State criminal proceedings. By continuing to insist that she acted out of ignorance or inadvertence, and that she had no criminal intent, Petitioner is attempting to deny and re-litigate the conclusions of the New York trial and appellate courts which found that she was guilty of offenses in which criminal intent was an essential element and that her claim that the billing rules confused her was not convincing. As the trial judge expressed it, Petitioner was found guilty of intentional theft from the people of the State of New York. I.G. Ex. 7 at 33; I.G. Ex. 8 at 3. It is well established that a Petitioner will not be allowed to collaterally attack a prior criminal conviction in order to dispute the applicability of a mandatory (five year) exclusion. Peter J. Edmonson, DAB 1330 (1992).

However, in this case, we must also be concerned with the ten year exclusion that the I.G. added to the mandatory minimum period. In Bernardo G. Bilang, M.D., DAB 1295

(1992), an appellate panel of the DAB held that, in cases involving discretionary periods of exclusion, a Petitioner is entitled to introduce evidence concerning culpability, even if this amounts to challenging findings reached in the State action underlying the exclusion. The panel explained that, although the excluded provider could not thereby deny the fact of conviction, he could contest other matters relevant to culpability or trustworthiness since these directly affect the length of the additional exclusion.

B. The remedial purpose of the Act is satisfied in this case by a ten year exclusion.

Bilang, though, makes it clear that Petitioner bears the burden of discrediting the prior State proceedings or individual items of evidence relied upon therein. Bilang at page 12. In the case at hand, Petitioner has argued extensively, but has not produced evidence which, when considered in context of the record as a whole, casts any doubt upon the findings and conclusions of the New York courts.

In support of her contention that she was unaware that billing code 90473 required that an orthotic be fabricated from a three dimensional cast, Petitioner submitted a letter sent by Laurin Laboratory, Inc., one of the laboratories from which she ordered orthotics supplied to her patients. P. Ex. 6. Petitioner contends that this letter "demonstrates that, prior to February of 1988, the two-dimensional technique was believed to be a proper procedure for billing under code 90473." Petitioner's July 8, 1992 Brief at 8. I disagree. This letter merely states that there was a revision "on page 4-17 of the procedure manual" which requires foot molds be made using casts. The letter also states that "in the past, the impression sheets or prescription forms have been accepted." This letter does not specifically refer to procedure code 90473 and it contains insufficient information for me to conclude that the medical community believed the two dimensional technique to be a proper procedure for billing under that code. In addition, even if there were those in the medical community who did not use the proper billing code prior to 1988, this does not absolve Petitioner of the responsibility of filing claims under the proper procedure code.

Petitioner also submitted an excerpt of the testimony of an expert witness she called at her criminal trial. P. Ex. 2. Petitioner argued that this testimony establishes that a reasonable person could interpret billing code 90473 as she did. Petitioner's July 8, 1992 Brief at 7.

In upholding Petitioner's conviction, the Appellate Division of the New York Supreme Court concluded that the requirements of billing code 90473 were clear on its face. I.G. Ex. 8. I find that there is nothing in the expert testimony submitted by Petitioner which derogates from the conclusion of the Appellate Division of the New York Supreme Court. In addition, even if I were to accept that procedure code 90473 contained some ambiguities, Petitioner still had an affirmative responsibility as a Medicaid provider to clarify those ambiguities and to submit proper bills.

Petitioner's remaining assertions -- that, erroneous billing notwithstanding, she always provided her patients with medical care; that she enjoyed a very positive reputation in the community; that she cooperated with the New York authorities during the course of their investigation; and that she is making restitution -- I find to be unproven or without legal merit. That a Medicaid patient has received genuine medical care does not excuse the provider's program-related financial misconduct in the same transaction. Zenaida Macapagal, DAB CR179 (1992). Petitioner's claims of outstanding reputation and cooperation with the government are not substantiated in the record before me. Finally, I agree with the I.G. that no special merit attaches to Petitioner's paying restitution where a court has ordered it. Continuing to other aggravating and mitigating factors, I conclude that the considerations which tend to exacerbate the gravity of Petitioner's misconduct are: the number of violations and the fact that they were directly program related; financial and other damage to the Medicaid program; and the court-imposed sentence.

Specifically, Petitioner defrauded the program on multiple occasions and received very substantial proceeds from such false claims. (The exact sum is in dispute, but its magnitude is suggested by the \$60,000 restitution required of Petitioner). The direct losses occasioned by Petitioner's criminal acts, plus the costs of investigating and prosecuting them, deprived the federal-state health care system of scarce resources and, inevitably, tended to undermine public confidence. The egregiousness of Petitioner's conduct is underscored by the atypical sentence of incarceration that the court imposed upon her. Additionally, it must be emphasized that she has neither expressed remorse nor demonstrated any changes in behavior which would suggest that her character or conduct have evolved or that her degree of trustworthiness has improved. To Petitioner's credit is her clean prior record.

There is ample evidence that the orthotics fabricated in accordance with Petitioner's directions are inferior to those which could be made from three-dimensional castings. I.G. Ex. 2/13-25. However, the record is devoid of proof that even one specific patient was actually harmed by the orthotics supplied by Petitioner.

The I.G. argues that a 15-year exclusion is justified in this case because the intended orthotics supplied by Petitioner may have caused harm to patients. The I.G. reasons that the two dimensional tracing technique used by Petitioner conveys only a limited amount of information about a patient's foot. It does not, for example, give any information about the patient's arch or the angle at which the patient's foot meets the ground. The I.G. contends that the medical conditions of at least some of Petitioner's patients may have necessitated that they receive custom orthotics made from three dimensional casts which conveyed information about their arches or other biomechanics of their feet. I.G. June 15, 1992 Brief at 16.

I accept that it is possible that the inferior orthotic devices supplied by Petitioner may have harmed at least some of Petitioner's patients. Based on this, I find that a lengthy exclusion is needed to protect program beneficiaries.

Although the record establishes that Petitioner's patients may have been harmed by Petitioner's conduct, the I.G. has not developed the record on the nature and severity of that harm. In Bernard Lerner, M.D., DAB CR60 (1989) the Administrative Law Judge (ALJ) sustained a 15-year exclusion because the record established that the dangers to the health care provider's future patients were "enormous" should the provider engage in the same wrongdoing in the future. The ALJ in Lerner found that the danger of harm to patients was so great in that case that "a substantial margin of safety must be built into any exclusion imposed against [p]etitioner." Lerner at 11. In this case, the evidence adduced by the I.G. is insufficient to convince me that the potential harm to beneficiaries and recipients is serious enough to justify a 15-year exclusion.

Additionally, at the time the I.G. issued his Notice of exclusion, he did not know that Petitioner's jail term would be reduced by the appellate court. However, this directly impacts upon one of the aggravating factors cited and suggests a corresponding reduction of the HHS exclusion. Inasmuch as the I.G. has not proved all the aggravating considerations alleged in his letter (and no

others have emerged), I find he has not shown the 15-year exclusion to be reasonable. Olian Small, DAB CR136 (1991); S. Khalid Hussain, M.D., DAB CR204 (1992). Nevertheless, the aggravating considerations that are undisputedly present, as well as the minimal to nonexistent evidence of improved trustworthiness and/or rehabilitation, convince me that an exclusion longer than the five years mandated by statute is called for.

CONCLUSION

It is appropriate to exclude Petitioner for a period of ten years, pursuant to section 1128(a)(1) of the Act.

/s/

Joseph K. Riotto
Administrative Law Judge