Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Neil E. Norwood,	)	Date: April 28, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-216
	)	Decision No. CR1780
The Inspector General.	)	
	)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Neil E. Norwood, from participating in Medicare and other federally funded health care programs for a period of at least 25 years.

I. Background

On October 31, 2007 the I.G. notified Petitioner that he was being excluded from participating in Medicare and other federally funded health care programs for at least 25 years. The I.G. told Petitioner that the exclusion was the consequence of Petitioner's conviction of crimes as are described at sections 1128(a)(1) and (a)(3) of the Social Security Act (Act). Petitioner requested a hearing and the case was assigned to me for a hearing and a decision.

I held a pre-hearing conference at which I directed the parties to file briefs and exhibits addressing the issues in the case. The I.G. filed a brief and nine proposed exhibits, which he designated as I.G. Ex. 1 - I.G. Ex. 9. Petitioner filed a brief and an exhibit which he designated as Pet. Ex. A. I receive each party's proposed exhibits into evidence. Additionally, Petitioner requested that I convene an in-person hearing in order to receive testimony from him and a witness. For reasons that I discuss below I find an in-person hearing not to be necessary.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. The I.G. must exclude Petitioner based on his conviction of crimes that are described at sections 1128(a)(1) and (a)(3) of the Act; and

2. Assuming the I.G. must exclude Petitioner, an exclusion of 25 years is reasonable.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision. I set forth each Finding below as a separate heading.

1. The I.G. must exclude Petitioner because he was convicted of crimes that are described at sections 1128(a)(1) and (a)(3) of the Act.

Petitioner does not dispute that he was convicted of crimes that are described at sections 1128(a)(1) and (a)(3) of the Act. Section 1128(a)(1) mandates the exclusion of any individual who is convicted of a criminal offense related to the delivery of a Medicare or a State Medicaid item or service. Section 1128(a)(3), in relevant part, mandates the exclusion of any individual who is convicted of a felony relating to theft committed in connection with the delivery of a health care item or service.

The undisputed facts in this case are that, on December 20, 2006, Petitioner, a pharmacist, pled guilty in a New York State court to two felony counts of grand larceny in the first degree. I.G. Ex. 2, at 19. His crimes consisted of theft from the New York State Medicaid program and from the Oxford Insurance Company, a private health insurer. *Id.* at 14. Petitioner admitted perpetrating against these entities a variety of different insurance scams including, but not limited to, improperly substituting generic for brand-name medication while billing as if the medication were brand name medication, improperly shorting patients on medication but billing as if he had supplied them with larger quantities, and improperly compounding medication that he was not authorized to compound. *Id.* at 14-15, 16. In pleading guilty Petitioner admitted that he stole more than $1 million from each of these two health care programs and about $3 million overall from these two health care programs and other insurers.

Petitioner's crimes clearly fall within the purview of sections 1128(a)(1) and (a)(3). Consequently, the I.G. is mandated to exclude Petitioner pursuant to these sections. Petitioner's crimes were related to the delivery of State Medicaid items or services and thus (a)(1) offenses in that he stole from Medicaid by filing false claims for Medicaid items or services that he had purported to provide. Second, the crimes were related to theft in connection with the delivery of a health care item or service and thus (a)(3) offenses because Petitioner admitted to stealing from a private health insurer by filing false claims with that insurer for health care items or services that he had purported to provide.

2. An exclusion of 25 years is reasonable.

Exclusions that are imposed pursuant to sections 1128(a)(1) and (a)(3) of the Act must be for a minimum of five years. Act, section 1128(c)(3)(B). In this case the I.G. determined to impose an exclusion of at least 25 years. The I.G.'s determination to impose an exclusion for more than the statutory minimum period raises the issue of whether this exclusion is reasonable.

Section 1128 is a remedial statute. Its purpose is not to impose punishment in addition to that which is imposed by the criminal justice system but to protect federally funded health care programs and these programs' beneficiaries and recipients from individuals whose conduct establishes them to be untrustworthy. Ultimately, then, the issue in any case where the reasonableness of the exclusion is at issue is whether the exclusion is reasonably necessary to attain the Act's remedial goal of protection.

The Secretary has published regulations which must be utilized in evaluating whether an exclusion is reasonable. For exclusions imposed pursuant to sections 1128(a)(1) and (a)(3), the relevant regulation is 42 C.F.R. § 1001.102. The regulation establishes factors, designated as "aggravating" and "mitigating" factors, that are set forth at 42 C.F.R. § 1001.102(b) (aggravating factors) and (c) (mitigating factors) that function very much like rules of evidence in deciding whether an exclusion is reasonable. I may only consider as evidence of reasonableness evidence that relates to an aggravating or a mitigating factor. Evidence which does not relate to one of these factors is irrelevant and I may not consider it.

Like rules of evidence, the aggravating and mitigating factors tell me *what* evidence is relevant but they do not contain directions as to *how much weight* I must assign to relevant evidence. The regulations contain no formula for calculating the length of an exclusion. Therefore, I must weigh all evidence that relates to an aggravating or a mitigating factor against the underlying remedial purpose of protecting programs and their beneficiaries and recipients against someone who is untrustworthy.

In this case the evidence relating to aggravating factors proves Petitioner to be manifestly untrustworthy. Petitioner has offered no evidence which relates to a regulatory mitigating factor. As a consequence, an exclusion of 25 years is certainly reasonable because it comports with the Act's remedial purpose.

The I.G. presented evidence relating to the following aggravating factors.

> • Petitioner's theft caused health insurers to sustain losses of more than $5000. 42 C.F.R. § 1001.102(b)(1). Petitioner admitted to stealing about $3,000,000 from the New York Medicaid program and private health insurers. I.G. Ex. 2, at 18.
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> • Petitioner committed his crimes over a period lasting longer than a year. 42 C.F.R. § 1001.102(b)(2). Petitioner's crimes extended from about January 1, 2000 to about June 18, 2005, a period of more than five years. I.G. Ex. 2, at 14.
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> • Petitioner was sentenced to incarceration for his crimes. 42 C.F.R. § 1001.102(b)(5). He was sentenced to imprisonment for a term of between two and six years. I.G. Ex. 4, at 9.
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> • Petitioner was subject to an adverse action by a State government agency based on the facts that underlie his convictions and the I.G.'s exclusion determination. 42 C.F.R. § 1001.102(b)(9). On May 22, 2007 Petitioner surrendered his license to practice pharmacy in New York in the face of an investigation that addressed the same facts as were the basis for his convictions and exclusion. I.G. Ex. 5. Additionally, Petitioner was excluded from participating in the New York State Medicaid program as a consequence of his guilty plea. I.G. Ex. 9, at 3.

This evidence, if not offset by mitigating evidence, is strong support for an exclusion of at least 25 years. It shows that Petitioner perpetrated theft on a grand scale, committed over a period of five years, against a State Medicaid program and private insurers. The sheer magnitude of Petitioner's admitted crimes – about $3,000,000 in all – is in and of itself sufficient to justify the exclusion determined by the I.G. Evidence of his incarceration and remedial actions taken against him by other government entities is additional support.

Petitioner argues that his culpability is in fact less than what he pled to. For example, he asserts that the extent of his crimes is magnified in the documents relating to his plea because those documents do not offset the admitted amount of his crimes by the value of the items or services he actually provided (as in generic drugs in substitution for brand name drugs). I find this argument to be without merit because it is an attempt by Petitioner to reopen and relitigate his conviction. The fact is that Petitioner admitted in open court – when it was in his self interest to do so – that he stole about $3,000,000 from

insurers including Medicaid. Now, when it is in his self interest to minimize the effect of his crimes, he attempts to do that. That assertion is impermissible in this setting because the evidence that relates to aggravating and mitigating factors derives from Petitioner's admissions at the time he made his plea. Moreover, his arguments are not credible at this juncture because they are so obviously self-serving.

Petitioner also attempts directly to challenge his conviction in the setting of this case by arguing that the prosecution in his criminal case relied on statistically invalid evidence. I find this argument effectively to be an attempt by Petitioner to retract his plea in this forum after that plea had become final under State law. Such an effort by Petitioner, at this late stage, is transparently self serving. Moreover, it is impermissible because of the derivative nature of exclusions imposed pursuant to sections 1128(a)(1) and (a)(3) of the Act.

Petitioner asserts, while admitting that his assertions do not comprise mitigating evidence under 42 C.F.R. § 1001.102(c), that his age and 20 years of problem free practice as a licensed pharmacist should weigh in his favor. But, such evidence clearly is irrelevant.

Petitioner contends that there is a mitigating factor in this case, arguing that he "fully cooperated with the prosecution of this matter." Petitioner's brief at 6. But, cooperation, even full cooperation, is not a mitigating factor. Cooperation with prosecuting authorities is a mitigating factor under 42 C.F.R. § 1001.102(c)(3) *only* if it results in: others being convicted or excluded from federally funded health care programs; additional cases being investigated or reports being issued by appropriate law enforcement agencies identifying program vulnerabilities or weaknesses; or the imposition of a civil money penalty or assessment against another individual or entity. Petitioner has made no showing that any of these results occurred as a consequence of his cooperation.

Finally, Petitioner asserts that his surrender of his license to practice pharmacy makes him less of a threat to health care programs and their beneficiaries and recipients than if he'd continued to practice. But, that argument loses all force if Petitioner should regain his license before the termination of his exclusion. At that point federally funded programs might be faced with a licensed but nevertheless untrustworthy provider. That is why the I.G. is vested with authority to exclude that is independent from authority vested in State licensing agencies.

3. There is no reason to convene an in-person hearing.

Petitioner contends that there should be an in-person hearing in this case so that he might testify to "the problems with the audits and the circumstances under which he agreed to plead guilty." Petitioner's brief at 6. Petitioner avers, apparently, that his testimony would be corroborated by that of another witness. I find that Petitioner's demand to present testimony creates no legitimate basis for me to convene an in-person hearing. As I discuss above, his assertion that his guilty plea was made in the face of flawed evidence is nothing less than an improper attempt to relitigate his criminal conviction in this forum. I have no authority to allow that inasmuch as Petitioner's exclusion derives from his conviction. If Petitioner now wishes to challenge his conviction he must do so in an appropriate State court.

/s/
Steven T. Kessel
Administrative Law Judge