Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Civil Remedies Division

IN THE CASE OF

SUBJECT:

David Benjamin, M.D.,

DATE: June 27, 2000

Petitioner,

- v -

The Inspector General

Docket No.C-98-353
Decision No. **CR681**

DECISION ...TO TOP

I find that the Inspector General (I.G.) is required to exclude Petitioner, David Benjamin, M.D., pursuant to section 1128(a)(2) of the Social Security Act (Act), from participating in Medicare and other federally funded programs. The exclusion is mandated as a consequence of Petitioner's conviction, under New York State law, of a criminal offense relating to neglect or abuse of a patient in connection with the delivery of a health care item or service. I find additionally that the length of the exclusion that the I.G. imposed against Petitioner, 30 years, is not unreasonable.

I. Background

Petitioner is a physician. On March 31, 1998, the I.G. notified Petitioner that he was being excluded pursuant to section 1128(a)(2) of the Act for a period of 30 years. Petitioner requested a hearing and the case was assigned to me for a hearing and a decision.

Petitioner advised me that he was appealing his conviction and I agreed to stay the case pending the outcome of the appeal. I instructed Petitioner to keep me advised as to the status of the appeal. Over a year elapsed without any communication from Petitioner concerning the status of his appeal. I advised the parties that I was not willing to stay the case for an additional period. The I.G. then advised me that she believed that the case could be decided based on an exchange of written submissions. I set up a schedule for the parties to file written submissions.

The I.G. moved for summary affirmance of the case. Petitioner submitted statements

which, to some extent, respond to the I.G.'s motion. Petitioner contends variously: (1) that he is unable to proceed without the assistance of counsel; (2) that he is unable to afford counsel; (3) that I should appoint counsel to represent him; (4) that he is innocent of the crimes for which he was convicted; and (5) that he is the victim of malicious efforts by various entities and individuals to ruin him professionally and to incarcerate him based on a falsely obtained conviction. Additionally, Petitioner has at times asserted that he is declining to participate in this case.

Clearly, this case has unusual features. Petitioner is not only appearing pro se, but has, at times, asserted that he does not intend to participate in the case. At other times, however, Petitioner has filed arguments which clearly demonstrate that he resists the I.G.'s determination. I conclude that, Petitioner's assertions to the contrary, he has not abandoned his hearing request. I am treating all of Petitioner's statements as being in the nature of testimony. I am combining these statements as a single exhibit, which I am identifying as P. Ex. 1 and admitting into evidence.

The I.G. submitted nine exhibits with its motion (I.G. Ex. 1 - I.G. Ex. 9). I am receiving these exhibits into evidence along with P. Ex. 1.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. The I.G. was required to exclude Petitioner pursuant to section 1128(a)(2) of the Act; and

2. The 30-year exclusion that the I.G. determined to impose against Petitioner is unreasonable.

B. Findings of fact and conclusions of law

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

1. Petitioner was convicted, in the State of New York, of a criminal offense as described by section 1128(a)(2) of the Act.

Section 1128(a)(2) of the Act mandates the exclusion of any individual who has been convicted:

under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

The I.G. is required to prove each of the elements of section 1128(a)(2) in order to establish that she has the authority to exclude an individual pursuant to that section.

The I.G. has done so in this case.

a. Petitioner was convicted of a criminal offense under State law.

The evidence submitted by the I.G. establishes that Petitioner was convicted of a criminal offense under the laws of the State of New York. On August 10, 1993, a four count indictment was filed against Petitioner in the Supreme Court of the State of New York, County of Queens. The first count of that indictment accused Petitioner of the crime of murder in the second degree. I.G. Ex. 3 at 2. Specifically, the indictment alleged that, on or about July 9, 1993, Petitioner, under circumstances evincing a depraved indifference to human life, recklessly engaged in conduct which created a grave risk of death to an individual (G.N.), thereby causing her death. *Id.* Petitioner had a jury trial. On August 3, 1995, the jury returned a guilty verdict on the first count of the indictment. I.G. Ex. 5 at 5 - 8.

b. Petitioner was convicted of the neglect or abuse of a patient in connection with the delivery of a health care item or service.

The I.G. established that Petitioner was convicted of neglect or abuse of a patient in connection with the delivery of a health care item or service. Petitioner was convicted of murdering G.N. during the course of performing an abortion on G.N.

The jury in Petitioner's case found that, on July 9, 1993, Petitioner attempted to perform an abortion on G.N. I.G. Ex. 6 at 55; *See* I.G. Ex. 3. The setting for this attempted procedure was an outpatient clinic known as the Metro Women's Center of Queens, in the Borough of Queens, New York. I.G. Ex. 4 at 1. Petitioner attempted to perform the procedure on G.N. during the 19^{th} or 20^{th} week of her pregnancy. I.G. Ex. 6 at 55.

The jury found that Petitioner knew or should have been aware of the state of G.N.'s pregnancy. I.G. Ex. 6 at 55. It found that Petitioner should have referred G.N. to a hospital in order to have the procedure performed. *Id.* It found that Petitioner elected not to do that. *Id.* The jury found that, instead, Petitioner elected to perform the procedure at his office (the outpatient clinic) without having the proper anesthesia and without having any backup support. *Id.*

The jury found that, in attempting to perform an abortion on G.N., Petitioner caused a three inch by one inch laceration to G.N.'s uterus. I.G. Ex. 6 at 56. It found that this injury caused G.N. to suffer an extreme loss of blood. *Id.* The jury found that Petitioner failed to make arrangements immediately to transport G.N. to a hospital in order to treat her laceration and to stop the bleeding. *Id.* at 56 - 58. It found that, while G.N. was bleeding profusely, Petitioner left G.N. unattended while he performed an abortion

on another patient. *Id.* at 58.

The jury found additionally that Petitioner returned to treat G.N. only after G.N.'s niece made entreaties to him. I.G. Ex. 6 at 58. It found that, at that point, Petitioner, assisted by his wife - who had no medical training - attempted to insert a breathing tube into G.N.'s lungs. *Id.* at 58. It found that Petitioner inserted the tube into G.N.'s esophagus rather than into her air passage. *Id.* Emergency medical technicians were then summoned to the clinic. I.G. Ex. 4 at 3. On arrival, they determined that G.N. appeared to be dead. *Id.* They transported G.N. to New York Hospital Medical Center of Queens, where G.N. was determined to be dead on arrival. *Id.* at 4.

Under section 1128(a)(2) an exclusion is mandated for an individual convicted of either abuse or neglect. The I.G. asserts that Petitioner was convicted of abusing G.N. Petitioner was indicted for exhibiting a depraved indifference to the life of G.N. I.G. Ex. 3. The trial judge who presided over Petitioner's criminal case summed up his conviction as follows:

I don't think you could find a better case for a classic history of depraved murder than this case. He [Petitioner] chased the dollar. He didn't care about his patient . . . Do no harm, that's what they live by, the doctors, supposedly. He did harm, he did the maximum amount of harm, he killed his patient.

I.G. Ex. 6 at 59.

What is evident from both the indictment and from the trial judge's findings is that Petitioner was charged with, and convicted of, being recklessly indifferent to the welfare of G.N., thereby causing her death. Under New York State law, reckless indifference to the welfare of an individual in a circumstance that results in that individual's death is plainly interchangeable with the intentional murder of that individual.

It is less clear whether such indifference amounts to "abuse" within the meaning of section 1128(a)(2) of the Act. Neither the term "abuse" nor the term "neglect" is defined at section 1128(a)(2). In a different circumstance, the Secretary has defined "abuse" to mean the willful infliction of harm to an individual. 42 C.F.R. § 488.301. Arguably, Petitioner's conviction might not meet the technical definition of a conviction for "abuse" because he was not convicted of intentional murder.

But, it is not necessary to resolve the issue of whether Petitioner was convicted of abusing G.N. Section 1128(a)(2) of the Act mandates exclusion for a conviction of either neglect *or* abuse. Here, Petitioner plainly was convicted of the criminal neglect of G.N. even if that conviction arguably might not meet the technical definition of "abuse."

Petitioner argues strenuously that he is not guilty of the crime for which he was convicted. He asserts that he is the victim of false and malicious allegations.

Petitioner's arguments carry no weight in deciding whether the I.G. is required to exclude Petitioner under section 1128(a)(2) of the Act. The mandatory exclusion requirement derives from a *conviction* of an offense that falls within the ambit of section 1128(a)(2). Whether Petitioner actually committed the acts that the jury found that he committed is irrelevant to deciding the question of whether Petitioner was convicted of a section 1128(a)(2) offense. All that the I.G. must establish is that Petitioner was convicted of the allegations that were made against him. The I.G. has met this burden here.

2. The I.G. is required to exclude Petitioner, pursuant to section 1128 (a)(2) of the Act, for a minimum period of five years.

As I discuss above, at Finding 1, Petitioner was convicted of a criminal offense that falls within the ambit of section 1128(a)(2) of the Act. Exclusion for such a conviction is mandatory. The Act imposes a minimum exclusion period of at least five years for any individual who is excluded pursuant to section 1128(a)(2). Act, section 1128(c)(3)(B).

3. The I.G. is authorized to impose an exclusion for more than five years, pursuant to section 1128(a)(2) of the Act, in a case where there are aggravating factors that are not offset by mitigating factors.

The Secretary has published regulations which govern the length of exclusions that are imposed pursuant to section 1128 of the Act. 42 C.F.R. Part 1001. The regulation which establishes criteria to govern the length of exclusions that are imposed pursuant to section 1128(a)(2) is 42 C.F.R. § 1001.102. This regulation identifies "aggravating" factors which may be used, if present in a case, as a basis to lengthen an exclusion beyond the five-year minimum period and "mitigating" factors which may be used, if present in a case, to offset any aggravating factors that are established.

The regulation makes clear that *only* those factors that it identifies as either aggravating or mitigating may be considered to determine whether an exclusion of more than five years is reasonable in a case involving section 1128(a)(2) of the Act. The aggravating and mitigating factors thus operate as rules of evidence in such a case. Evidence which does not relate to an identified aggravating or mitigating factor is irrelevant to determining the length of an exclusion and may not be considered.

The regulation does not, however, prescribe the weight which is to be given to any aggravating or mitigating factor. The regulation contains no formula prescribing any exclusion length beyond the five-year minimum period based on the presence of aggravating factors or absence of mitigating factors. Rather, the regulation merely identifies the factors which may be used to lengthen an exclusion beyond the minimum period.

The factors which are identified in 42 C.F.R. § 1001.102 may not be applied arbitrarily to lengthen an exclusion beyond the five-year minimum. The regulation establishes the

criteria which may be considered in determining whether or not to lengthen an exclusion. But, in the absence of any statement in the regulation as to how much weight must be given to an aggravating or mitigating factor, one must look to the purpose of the Act in order to determine what is the reasonable length of an exclusion where aggravating or mitigating factors are present.

Section 1128 of the Act is a remedial statute. Its purpose is not to punish an excluded individual but to protect federally funded health care programs and the beneficiaries and recipients of program funds from an individual whose conduct establishes him or her not to be trustworthy. In assessing the length of any exclusion that is imposed under section 1128, the ultimate issue that must be addressed is: how long an exclusion is reasonably necessary to protect programs, beneficiaries, and recipients from an untrustworthy individual?

The I.G. may not arbitrarily exclude an individual for any period of more than five years simply because aggravating factors exist in a given case. The I.G. must weigh the evidence that pertains to aggravating and mitigating factors in order to establish the degree of untrustworthiness that is manifested by the excluded individual. An exclusion that is not based on what the evidence which relates to aggravating and mitigating factors shows about the trustworthiness of the excluded individual may be arbitrary and unreasonably punitive.

4. An excluded individual has a right to a de novo hearing.

Any individual who is excluded pursuant to section 1128 of the Act has a right to a hearing before an administrative law judge. Such a hearing is conducted pursuant to section 205(b) of the Act. That section has been interpreted on numerous occasions to require a de novo hearing and an independent decision by an administrative law judge.

That is not to suggest that an administrative law judge is free to ignore entirely the determination that is made by the I.G. The I.G. has expertise in making exclusion determinations and her determinations deserve to be respected. The I.G.'s exclusion determination should be sustained as reasonable if that determination falls within a reasonable range of possible exclusions. However, an administrative law judge must evaluate independently the evidence relating to the aggravating and mitigating factors that are set forth in the regulations. If the administrative law judge concludes, based on his or her independent and de novo evaluation of the evidence, that the exclusion imposed by the I.G. departs significantly from that which the administrative law judge decides is reasonable, then the administrative law judge may modify the length of the exclusion to assure that the exclusion falls within a reasonable range of exclusions.

5. The I.G. established the presence of three aggravating factors.

The I.G. determined to exclude Petitioner based on the alleged presence of three aggravating factors in Petitioner's case. The I.G. concluded that these factors were present based on regulations which were in effect as of March 1998. The regulations

have subsequently been revised and amended. The changes that were made to the regulations have no substantive effect on this case. However, as part of these changes, the applicable sections were renumbered. For purposes of clarity in this Finding, I cite both to the relevant regulation as it was codified in March 1998, and as it is codified today.

The I.G. proved the presence of three aggravating factors in this case. These are as follows:

1. *The acts that resulted in Petitioner's conviction had a significant adverse physical impact on another individual (the factor is found at 42 C.F.R. § 1001.102(b)(3) in both the 1998 version and the current version of the regulation).* The I.G. proved that Petitioner wrongfully caused the death of another individual, G.N.

Petitioner asserts that he is innocent of the charge that he caused G.N.'s death. Although, as I discuss above at Finding 1, allegations of innocence are not relevant to deciding whether a conviction gives the I.G. the authority to exclude pursuant to section 1128(a)(2) of the Act, such allegations may be relevant to the issue of whether an aggravating factor is present. That is because the presence of this aggravating factor depends on the facts of a case and does not derive from a conviction.

Here, the evidence which supports the presence of the aggravating factor is overwhelming. A jury, after considering all of the evidence presented at a trial, found as a matter of fact that Petitioner wrongfully caused G.N.'s death. Petitioner has not offered any evidence to refute these findings aside from baldly denying them. I find Petitioner's denial of culpability for the death of G.N. not to be credible in view of his failure to present any evidence which would rebut the jury's findings in his criminal case.

2. *The sentence imposed on Petitioner for his conviction included a period of incarceration (the factor is found at 42 C.F.R. § 1001.102(b)(4) in the 1998 version of the regulation and at 42 C.F.R. § 1001.102(b)(5) in the current version of the regulation).* Petitioner was sentenced to a term of imprisonment for a period of from 25 years to life. I.G. Ex. 6 at 54; I.G. Ex. 7.

3. *Petitioner has a prior administrative sanction record (the factor is found at 42 C.F.R. § 1001.102(b)(5) in the 1998 version of the regulation and at 42 C.F.R. § 1001.102(b)(6) in the current version of the regulation).* The I.G. proved that on May 11, 1993, the State of New York Department of Health, State Board for Professional Medical Conduct, ordered that Petitioner's license to practice medicine in the State of New York be revoked, based on findings of professional misconduct by Petitioner. I.G. Ex. 8. On July 30, 1993, this recommendation was sustained by the State of New York Department of Health, Administrative Review Board for Professional Medical Conduct (New York Administrative Review Board). I.G. Ex. 9. The revocation action against Petitioner's New York State license to practice medicine was an "administrative sanction." This action predated the events which resulted in Petitioner's conviction of

murder.

6. Petitioner did not establish the presence of any mitigating factor.

I have reviewed Petitioner's submissions in this case. In none of them does Petitioner allege, much less does he prove, the presence of any of the mitigating factors that are set forth at 42 C.F.R. § 1001.102(c).

Petitioner's principal assertion is that he is not guilty of the crime for which he was convicted. Petitioner intertwines with this assertion his contention that he is the victim of falsified testimony. As I have discussed above, at Finding 5, Petitioner has not offered credible evidence to support these allegations. I find Petitioner's assertions of innocence and of being a victim not to be credible. However, none of these assertions - even if there were some truth to them - establish mitigating factors under the relevant regulation.

7. A 30-year exclusion is reasonable.

The evidence establishes Petitioner to pose a grave threat to any individual who might seek medical care from him. The lack of trustworthiness manifested by Petitioner is extraordinary. A 30-year exclusion of Petitioner is reasonable.

An exclusion of 30 years is tantamount to a permanent exclusion from participation in Medicare and other federally funded programs. I have evaluated the exclusion that was imposed on Petitioner as if it were a permanent exclusion. An exclusion of such length plainly is warranted here given the evidence which relates to aggravating factors.

I would have no difficulty sustaining a 30-year exclusion of Petitioner based solely on the harm that Petitioner caused G.N. to experience. The harm that Petitioner perpetrated on G.N. is incalculable. The evidence relating to Petitioner's treatment of G.N. shows Petitioner to be an absolutely untrustworthy individual. Petitioner mishandled G.N.'s abortion procedure horribly, and then, through his indifference, allowed G.N. to bleed to death. Based on these facts, the jury which convicted Petitioner found that he displayed a depraved indifference towards human life and convicted him of a crime that equates with premeditated murder.

Petitioner's lack of trustworthiness is reflected by the sentence that was imposed on him for his crime. Petitioner was sentenced to serve a minimum prison term of 25 years. I.G. Ex. 6 at 54. Petitioner's attorney requested that a reduced sentence be imposed. The judge rejected that plea for leniency in light of the gravity of Petitioner's crime. *Id.* at 54 - 58.

Finally, the circumstances of Petitioner's prior administrative sanction record establish Petitioner to be a manifestly untrustworthy individual. The New York Administrative Review Board, in sustaining the revocation of Petitioner's license to practice medicine in New York, sustained the findings on which the revocation decision was based, citing

Petitioner's:

repeated acts of incompetence, lack of understanding of patients' rights and welfare, lack of understanding about how to maintain adequate medical records and his failure to improve after the significant remediation which followed the earlier disciplinary proceeding.

I.G. Ex. 9 at 4. The findings of incompetence that were made in Petitioner's administrative sanction case were based on numerous and egregious failures by Petitioner to perform medical and surgical procedures consistent with applicable standards of care. I.G. Ex. 8.

JUDGE ...TO TOP

Steven T. Kessel

Administrative Law Judge