Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Joel Davids,	)	DATE: June 18, 1991
	)	
Petitioner,	)	
	)	
- v. -	)	
	)	Docket No. C-278
The Inspector General.	)	
	)	Decision No. CR137

DECISION

In this case, governed by section 1128 of the Social Security Act (Act), the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Petitioner by letter dated June 4, 1990, that he was being excluded from participating in the Medicare and Medicaid programs for a period of five years.[1] Petitioner was advised that his exclusion resulted from his conviction of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, within the meaning of section 1128(b)(1) of the Act.

Petitioner timely requested a hearing before an Administrative Law Judge (ALJ) and the case was assigned to me for a hearing and decision. I held an in-person hearing in Philadelphia, Pennsylvania on December 13, 1990. Both parties submitted posthearing briefs.

I have considered the evidence introduced by both parties at the hearing, as well as the applicable law. I conclude that the I.G. had authority to exclude Petitioner and that the five-year exclusion imposed and directed against Petitioner is excessive. I conclude

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[1] The Medicaid program is one of three types of federally-financed State health care programs from which Petitioner was excluded. I use the term "Medicaid" to represent all three of these programs, which are defined in section 1128(h) of the Act.

that the remedial purposes of section 1128 of the Act will be served by a three-year exclusion and I modify the exclusion accordingly.[2]

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the Act is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1990 Supp.). Section 1128(b)(1) of the Act permits the I.G. to exclude from Medicare and Medicaid participation:

> . . . any individual or entity that has been convicted, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

II. The Federal Regulations.

The governing federal regulations are codified in 42 C.F.R. Parts 498, 1001, and 1002 (1989). Part 498 governs the procedural aspects of this exclusion case; Parts 1001 and 1002 govern the substantive aspects.

ADMISSIONS

At the hearing and during the prehearing conference on September 27, 1990, Petitioner admitted that: (1) he was "convicted" of a criminal offense, within the meaning of section 1128(i) of the Act; and (2) the offense was "related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct," within the meaning of section 1128(b)(1) of the Act. Tr. 5; Order and Notice of Hearing, dated October 9, 1990.

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[2] I note that at the end of that period, Petitioner may apply for reinstatement under section 1128(g)(1) of the Act.

ISSUE

The remaining issue in this case is whether the five-year exclusion imposed and directed against Petitioner by the I.G. is appropriate and reasonable.[3]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the entire record, the arguments, and the submissions of the parties, and being advised fully herein, I make the following Findings of Fact and Conclusions of Law:[4]

1. At all times relevant to this case, Petitioner was employed as the Associate Administrator of Finance of the James C. Giuffre Medical Center (Giuffre). I.G. Ex. 1/2.[5]

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[3] In the Order and Notice of Hearing issued on October 9, 1990, Petitioner raised two additional issues of whether the 1987 Amendments to section 1128(b)(1) of the Act apply to this case and whether I have authority to decide if the exclusion amounts to an unlawful retroactive application of the law. However, at the hearing Petitioner abandoned these issues. Tr. 5.

[4] Some of my statements in the sections preceding these formal findings and conclusions are also findings of fact and conclusions of law. To the extent that they are not repeated here, they were not in controversy.

[5] Citations to the record and to Board cases in this Decision are as follows:

I.G.'s Exhibits	I.G. Ex. (number/page)
I.G.'s Posthearing Brief	I.G. Br. (page)
Petitioner's Posthearing Brief	P. Br. (page)
Transcript	Tr. (page)
Findings of Fact and Conclusions of Law	FFCL (number)
Departmental Appeals Board ALJ decisions	DAB Civ. Rem. (docket no./ date)

(continued...)

2. Giuffre is a non-profit health care institution, located in Philadelphia, Pennsylvania. I.G. Ex. 1/1.

3. Giuffre receives a substantial portion of its annual funding from DHHS under its Medicare and Medicaid programs. Id.

4. The amount of reimbursement that Giuffre receives from the Medicare and Medicaid programs is determined, in part, by cash reports which Giuffre submits to the Medicare and Medicaid programs. Id.

5. Counts one and three of the criminal information filed against Petitioner in the United States District Court for the Eastern District of Pennsylvania (District Court), charged Petitioner with: conspiracy to defraud the United States by attempting to impede and impair the lawful functions of the Internal Revenue Service (IRS); and filing a false tax return. I.G. Ex. 1.

6. Petitioner's charge of conspiracy was based partly upon allegations that he caused false and inaccurate cash reports to be generated and submitted to DHHS and its authorized representatives. I.G. Ex. 1/2-7.

7. The charges filed against Petitioner alleged:

a. In December 1982, Petitioner distributed checks to executives of Giuffre as automobile expense reimbursement checks when, in actuality, those checks were retroactive lump-sum salary increases;

b. On December 22, 1982, Petitioner received a check from Giuffre for $5,000 based on a false and inaccurate travel authorization/settlement form submitted by him requesting six months' of automobile expenses at $833 per month, when, in actuality, the expenses had not been incurred;

c. In January 1983, Petitioner submitted a false and fraudulent automobile lease invoice bearing the name ELDA Leasing Co.; that company in fact did not exist and the company's address was that of Petitioner's residence;

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[5] (...continued)

d. From January 1983 to December 1983, Petitioner received monthly checks in the amount of $833 for a total of approximately $10,000 under the guise of automobile expense reimbursement, when, in actuality, those checks were a salary increase;

e. In 1984, Petitioner computed salary increases for executives of Giuffre. The monthly checks issued for these increases were falsely listed in Giuffre's account records as monthly automobile and travel expenses, when, in actuality, the checks were Christmas bonuses for executives of Giuffre; and

f. In December 1984, Petitioner prepared and distributed checks which were listed in Giuffre's accounting records as hospital related insurance premiums, when, in actuality, the checks were a Christmas bonus for executives at Giuffre.

Id.

8. Petitioner's charge of filing a false tax return was based upon his failure to report taxable income on his 1984 individual income tax return. I.G. Ex. 1/9.

9. Petitioner pled guilty to, and was convicted of, the two counts filed against him. I.G. Ex. 4; I.G. Ex. 2.

10. Petitioner made false entries in Giuffre's accounting records to conceal the fact that he was generating income for himself and other employees of Giuffre. I.G. Ex. 1/3-7.

11. As a result of Petitioner's actions, false and inaccurate cash reports were submitted to the Medicare and Medicaid programs. FFCL 10.

12. Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act. FFCL 9.

13. As a result of his conviction, Petitioner was fined $15,000; placed on probation for a period of five years; ordered to pay all taxes, penalties, and sums charged in the indictment or as required by law; and sentenced to serve 100 hours of community service. I.G. Ex. 2.

14. The Secretary of the United States Department of Health and Human Services (the Secretary) delegated to the I.G. the authority to determine, impose, and direct

exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21661 (May 13, 1983).

15. The I.G. may exclude individuals convicted of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, within the meaning of section 1128(b)(1) of the Act.

16. The permissive exclusion provisions of section 1128 of the Act do not establish minimum or maximum periods of exclusion. See Act, section 1128(b)(1)-(14).

17. Petitioner admitted that he was "convicted" of a criminal offense "related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct," within the meaning of sections 1128(i) and 1128(b)(1) of the Act. Tr. 5; Order and Notice of Hearing, dated October 9, 1990.

18. A remedial objective of section 1128 of the Act is to protect program beneficiaries and recipients by permitting the Secretary (or his delegate, the I.G.) to impose and direct exclusions from participation in Medicare and Medicaid of those individuals who demonstrate by their conduct that they cannot be trusted to provide items or services to program beneficiaries and recipients.

19. An additional remedial objective of section 1128 of the Act is to deter individuals from engaging in conduct which jeopardizes the integrity of federally-funded health care programs.

20. Petitioner's conspiracy conviction is a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, within the meaning of section 1128(b)(1) of the Act. FFCL 1-12.

21. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs. FFCL 1-20.

22. It is an aggravating factor that Petitioner's crimes were serious in nature. FFCL 6, 9.

23. It is an aggravating factor that the District Court imposed a serious penalty against Petitioner as a result of his criminal conviction. FFCL 13.

24. The I.G. has not proved that Medicaid made any overpayment as a result of Petitioner's actions. I.G. Ex. 1.

25. The length of probation imposed against Petitioner by the District Court is not conclusive in determining an appropriate length of exclusion.

26. The I.G. has not proved that Petitioner's criminal offenses had an adverse impact on the Medicare or Medicaid programs. I.G. Ex. 1.

27. The five-year exclusion imposed and directed against Petitioner is excessive.

28. The remedial considerations of section 1128 of the Social Security Act will be served in this case by a three-year exclusion.

DISCUSSION

Petitioner admits that he was "convicted" of a criminal offense "related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct," within the meaning of sections 1128(i) and 1128(b)(1) of the Act. Therefore, I find and conclude that the I.G. has authority to impose and direct an exclusion against Petitioner from participating in the Medicare and Medicaid programs. The only contested issue in this case is whether the length of the exclusion that the I.G. determined to impose and direct against Petitioner is reasonable and appropriate. Resolution of that question depends on analysis of the evidence in light of the exclusion law's remedial purpose.

There are two ways that an exclusion imposed and directed pursuant to the law advances this remedial purpose. First, an exclusion protects programs and their beneficiaries and recipients from an untrustworthy provider until that provider demonstrates that he or she can be trusted to deal with program funds and to serve beneficiaries and recipients. Second, an exclusion deters providers of items or services from engaging in conduct which threatens the integrity of programs or the well-being and safety of beneficiaries and recipients. See H.R. Rep. No. 393, Part II, 95th Cong., 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News 3072.

An exclusion imposed and directed pursuant to section 1128 will likely have an adverse financial impact on the person against whom the exclusion is imposed. However,

the law places program integrity and the well-being of beneficiaries and recipients ahead of the pecuniary interests of providers. An exclusion is not punitive if it reasonably serves the law's remedial objectives, even if the exclusion has a severe adverse financial impact on the person against whom it is imposed.

No statutory minimum mandatory exclusion period exists for section 1128(b)(1) exclusions. The determination of when an individual should be trusted and allowed to reapply for participation as a provider in the Medicare and Medicaid programs is a difficult issue and is one which is subject to discretion; there is no mechanical formula. The Secretary has adopted regulations to be applied in exclusion cases. 42 C.F.R. 1001.125(b). The regulations specifically apply only to exclusions for "program-related" offenses. To the extent that they have not been repealed, however, they embody the Secretary's intent that they continue to apply, at least as broad guidelines, to the cases in which discretionary exclusions are imposed.[6] 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 mitigating factors that may exist. 42 C.F.R. 1001.125(b)(1)-(7). See Thomas J. DePietro, R.Ph., DAB Civ. Rem. C-282 (1991); Falah R. Garmo, R.Ph., DAB Civ. Rem. C-222 at 10 (1990); Leonard N. Schwartz, R.Ph., DAB Civ. Rem. C-62 at 12 (1989).

An exclusion must be judged in light of the evidence in the case and the intent of the exclusion law. Roderick L. Jones, R.N., DAB Civ. Rem. C-230 (1990); Frank J. Haney, DAB Civ. Rem. C-156 (1990). An exclusion determination will be held to be reasonable where, given the evidence in the case, it is shown to fairly comport with legislative intent. "The word 'reasonable' conveys the meaning that . . . [the I.G.] is required at the

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[6] There are proposed regulations which, if adopted by the Secretary, would supersede the regulations which presently govern exclusions. See Fed. Reg. 12204 (April 2, 1990). The I.G. urged that I use these proposed regulations as guidelines to evaluate the reasonableness of the exclusion imposed and directed against Petitioner. However, these proposed regulations have not been finally adopted, and it would not be appropriate for me to assume that they will be adopted in their proposed form. Moreover, it is not clear that, assuming these proposed regulations are adopted, they would apply retroactively to exclusions imposed prior to the date of their adoption.

hearing only to show that the length of the [exclusion] determined . . . was not extreme or excessive." (Emphasis added.) 48 Fed. Reg. 3744 (1983). Thus, based on the law and the evidence, I have the authority to modify an exclusion if I determine that the exclusion is not reasonable. Act, section 205(b). The hearing is, by law, de novo. Act, section 205(b). 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 the legislative purpose of protecting the Medicare and Medicaid programs and their beneficiaries and recipients from untrustworthy individuals. Haney, supra.

By not mandating that exclusions from participation in the Medicare and Medicaid programs be permanent, Congress has allowed the I.G. the opportunity to give individuals a "second chance." The placement of a limit on the period of exclusion allows an excluded individual or entity the opportunity to demonstrate that he or she can and should be trusted to participate in the Medicare and Medicaid programs as a provider of items and services to beneficiaries and recipients. A determination of an individual's current and future trustworthiness thus necessitates an appraisal of the crime for which that individual was convicted, the circumstances surrounding it, whether and when that individual sought help to correct the behavior which led to the criminal conviction, and how far that individual has come toward rehabilitation. DePietro, supra. See Joyce Faye Hughey, DAB App. 1221 at 10 (1991).

The evidence in this case reveals that in November 1988 Petitioner was convicted of conspiracy to defraud the United States by attempting to impede and impair the lawful functions of the IRS.[7,8] Petitioner and the other

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[7] Although Petitioner was convicted of two criminal offenses relating to fraud, conspiracy and filing a false tax return, the I.G. has based Petitioner's exclusion on Petitioner's conspiracy conviction, pursuant to the provisions of section 1128(b)(1). Conviction for any one criminal offense relating to fraud in connection with the delivery of a health care item or service is a sufficient basis for an exclusion.

[8] At the hearing, counsel for Petitioner argued that when Petitioner pled guilty to the conspiracy charge, he did not plead guilty to all of the overt acts of the conspiracy. Tr. 18-25. The I.G. contends that

(continued...)

persons involved generated income payments for themselves and concealed the income by making false entries in Giuffre's accounting records. As a result of Petitioner's action of making false entries in Giuffre's accounting records, false and inaccurate cash reports were generated and submitted to DHHS and its authorized agents. The fact that the convictions concerned Petitioner's engagement in fraudulent activities is demonstrative of Petitioner's trustworthiness in 1988 and will be considered in determining an appropriate period of exclusion. However, Petitioner's criminal conviction in 1988 does not necessarily evidence that he is, at this time, an untrustworthy individual.

As a result of his criminal actions, Petitioner was placed on probation for five years, sentenced to serve 100 hours of community service, and fined $15,000. Additionally, Petitioner lost his Certified Public Accountant's license for an undetermined period of time. I.G. Ex. 2/36, 52.

The I.G. contends that there are several factors in this case which warrant a five-year period of exclusion. These factors are: (1) Petitioner's untrustworthiness evidenced by his criminal offenses; (2) the serious nature of Petitioner's criminal offenses; (3) the three-year period over which Petitioner's criminal offenses occurred; and (4) the sentence imposed by the District Court included significant periods of probation, community service, and fines.

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[8] (...continued)
Petitioner's argument is without merit. Neither the I.G. nor Petitioner offered the plea agreement as an exhibit at the hearing. The I.G. submitted the plea agreement as I.G. Ex. 4 when he filed his posthearing brief because at the hearing: Petitioner alleged that he had not pled guilty to charge one as set forth in the information; Tr. 24-25, 44-45; and Petitioner's counsel quoted from and referred to the plea agreement when it was not in evidence. I note for the record that Petitioner was represented by counsel when he signed the plea agreement and that the document was also signed by his attorney. Further, the plea agreement stated that Petitioner's counsel explained to him and that Petitioner understood the nature of the charges to which he was pleading guilty. Thus, I find Petitioner's argument to be without merit. Accordingly, I admit I.G. Ex. 4 in evidence. Petitioner will not be prejudiced by the admission of this exhibit since it was part of the record in the criminal proceeding.

Petitioner argues that, under the circumstances of this case, it is appropriate that he be excluded for time served. He asserts that the following mitigating factors warrant a reduction in the five-year period of exclusion imposed and directed by the I.G.: (1) his remorse and shame for the criminal offenses he committed; (2) he is diabetic and is also suffering from depression which was the result of stress related to the criminal offenses at issue; (3) his good character as attested to in letters written by associates of Petitioner; (4) there were no program violations, and as a result, no related offenses; (5) there was no adverse impact on beneficiaries or recipients; (6) he cooperated with the government's investigation of this matter; (7) he has no prior Medicare or Medicaid sanctions; and (8) Medicare, Medicaid, and the social services programs were not damaged.

I conclude that the exclusion imposed and directed against Petitioner is excessive. Given the facts of this case, a five-year exclusion is not needed to protect the integrity of federally-funded health care programs, or beneficiaries and recipients. Nor is an exclusion of that length needed as a deterrent. I am persuaded that there is little likelihood that Petitioner will again engage in fraudulent activities.

Since one of the main purposes of an exclusion from the Medicare and Medicaid programs is to allow for a period of time in which to ensure that Petitioner is trustworthy, I examined such relevant factors as the nature of the crime for which Petitioner was convicted, the length of the sentence imposed by the court in Petitioner's criminal case, and Petitioner's subsequent conduct. To ensure the protection of the beneficiaries of the Medicare and Medicaid programs, I also considered Petitioner's previous sanction record, whether his criminal conviction involved program violations or other related offenses, and whether Petitioner's conduct resulted in damages to the Medicare or Medicaid programs.

The fact that Petitioner cooperated with the government in its investigation of this matter is a mitigating factor and was considered in determining an appropriate length of exclusion. I.G. Ex. 2/16; I.G. Ex. 3/6-7. The absence of prior offenses by Petitioner is not a mitigating factor. Furthermore, Petitioner's lack of a sanction record under Medicare or Medicaid, the I.G.'s lack of proof that there was any adverse impact on program beneficiaries, and the fact that Petitioner's convictions did not involve program violations, are not mitigating in nature. Rather, their presence would be

aggravating factors that might justify an increased sanction.

Trustworthiness is not something that is subject to exact measurement or determination. However, in attempting to measure Petitioner's trustworthiness, I gave great weight to the credibility of his testimony during the December 13, 1990 hearing. I also evaluated Petitioner's credibility, based on the following factors. First, I compared Petitioner's testimony to the other evidence introduced at the December 13, 1990 hearing. Such evidence included testimony of other witnesses and documents. Second, my personal observation of Petitioner was that he testified in a forthright manner and did not appear to try to avoid questions. For these reasons, I conclude that Petitioner's testimony was credible and that this reflects favorably on his trustworthiness.

In addition to Petitioner's credibility, I also considered Petitioner's past exercise of judgment in determining his trustworthiness. I considered Petitioner's judgment relevant to this trustworthiness because a mistake in judgment can be as harmful as an intentional wrong to program beneficiaries and recipients. Petitioner has demonstrated naivete and lack of judgment in the circumstances surrounding his case which led to his criminal offenses. Petitioner specialized in working at hospitals that were suffering severe financial problems, and through Petitioner's and others' hard work, at least two of these hospitals are now "surviving admirably." Tr. 61-62. Petitioner wrongfully believed that he could take an approved salary increase as a car allowance which he then failed to properly document and thereby avoided payment of income tax on that money to the IRS. P. Br. 3. Petitioner's criminal behavior appears to have been an aberration rather than the norm and is not likely to be repeated.

The record establishes that Petitioner is completing his probation without incident. He has not been implicated in any additional misconduct. At the hearing, he demonstrated remorse for his actions and credibly asserted that he had learned to never repeat his unlawful conduct. Tr. 62-63. I am persuaded by Petitioner's testimony, as well as the other evidence of record, that there is little or no likelihood that Petitioner will again engage in unlawful conduct.

There is therefore no need for a lengthy exclusion in this case in order to assure Petitioner's trustworthiness. A lengthy exclusion imposed as a deterrent

would be unreasonably punitive when applied to Petitioner.

CONCLUSION

Based on the material facts and the law, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs was authorized by law. I further conclude that a three-year period of exclusion is reasonable and appropriate in this case.

/s/

Charles E. Stratton
Administrative Law Judge