Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
John A. Crawford, Jr., M.D.,	DATE: October 18, 1991
Petitioner,	
- v. -	Docket No. C-364
The Inspector General.	Decision No. CR160

DECISION

On March 22, 1991 the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare and State health care programs.[1] The I.G. told Petitioner that he was being excluded pursuant to section 1128(a)(1) of the Social Security Act (Act) because he had been convicted of a criminal offense related to Medicare. The I.G. advised Petitioner that the Act mandated that he be excluded for at least five years, and that the I.G. had determined to exclude Petitioner for a period of six years.

Petitioner timely requested a hearing and the case was assigned to me for a hearing and decision. I held a hearing in Chicago, Illinois, on July 18, 1991.

I have considered the evidence, the parties' arguments, and the applicable laws and regulations. I conclude that the I.G. was mandated by section 1128(a)(1) to exclude Petitioner for at least five years. I conclude further that the six-year exclusion imposed and directed against Petitioner by the I.G. is reasonable.

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-financed health care programs, including Medicaid. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

ISSUES

The issues in this case are whether:

1. I have authority to decide whether the exclusion in this case violated Petitioner's constitutional right not to be placed in double jeopardy;

2. I have authority to decide whether the exclusion in this case is an unconstitutional ex post facto application of the Act; and

3. the six-year exclusion imposed and directed against Petitioner by the I.G. is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a physician whose practice has included treating patients in their homes. Tr. at 123-127.[2]

2. In April 1987, a United States grand jury indicted Petitioner on 32 counts of Medicare fraud and 17 counts of mail fraud. I.G. Ex. 1/1-55.

3. On February 15, 1990 Petitioner was convicted of 20 counts of Medicare fraud and five counts of mail fraud. I.G. Ex. 2/1-4.

4. Petitioner was convicted of knowingly submitting for Medicare reimbursement claim forms containing false statements and representations concerning the number, dates, location, and nature of claimed medical services. I.G. Ex. 1/15, /17-24, /26-35, /38; I.G. Ex. 2/1.

5. Petitioner was convicted of knowingly causing Medicare reimbursement checks to be delivered to him in the mail as an element of a scheme to unlawfully obtain Medicare reimbursement. I.G. Ex. 1/2, /40, /42, /44, /52, /54; I.G. Ex. 2/1.

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[2] The parties' exhibits and the transcript of proceedings in this case will be cited as follows:

Inspector General Exhibit	I.G. Ex. (number)/(page)
Petitioner Exhibit	P. Ex. (number)/(page)
Transcript	Tr. at (page)

6. Petitioner was sentenced to a term of five years' probation, six months' service in a work release program, and 500 hours of community service. I.G. Ex. 2/2.

7. Petitioner was ordered not to practice any medicine involving Medicare or Medicaid payments during his term of probation. I.G. Ex. 2/2.

8. Petitioner was additionally ordered to pay a special assessment of $1,300.00 to the United States and to pay restitution to Medicare. I.G. Ex. 2/1, /3.

9. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicare program. Findings 2-5; Social Security Act, section 1128(a)(1).

10. Petitioner's fraud included knowingly presenting numerous claims for Medicare reimbursement for items or services which Petitioner had never provided. I.G. Ex. 1/15, /17-24, /26-35, /38; I.G. Ex. 2/1; I.G. Ex. 9/1-2; I.G. Ex. 10/10-16; I.G. Ex. 13/21-27; I.G. Ex. 15; I.G. Ex. 17/13-24; I.G. Ex. 19; I.G. Ex. 21/20, /27-32, /35; I.G. Ex. 25; I.G. Ex. 26/9-10, /16, /19-21; See 42 C.F.R. 1001.125(b)(1).

11. The Medicare program suffered substantial pecuniary loss as a result of Petitioner's fraud. See I.G. Ex. 2/3; Tr. at 111; See 42 C.F.R. 1001.125(b)(3).

12. Petitioner presented fraudulent Medicare reimbursement claims over a two-year period, a lengthy period of time. I.G. Ex. 8; I.G. Ex. 28; See 42 C.F.R. 1001.125(b)(1), (6).

13. Petitioner's denial that he ever presented false Medicare reimbursement claims is not credible. See Findings 3-10; See P. Ex. 3/7; Tr. at 154-155.

14. Petitioner refuses to accept any responsibility for his wrongful conduct. See Finding 13.

15. Petitioner's fraud against the Medicare program and his refusal to acknowledge responsibility for such fraud establishes that he is not a trustworthy provider of health care. Findings 3-14.

16. The personal support and trust placed in Petitioner by friends and associates does not establish that Petitioner is a trustworthy provider of health care. See P. Ex. 2; P. Ex. 3/1-6; P. Ex. 4; P. Ex. 5; P. Ex. 7; P. Ex. 8, 8A - 8D.

17. The Secretary of Health and Human Services (Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

18. On March 22, 1991 the I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid, pursuant to section 1128(a)(1) of the Act.

19. The exclusion imposed and directed against Petitioner is for six years.

20. The I.G. had authority to impose and direct an exclusion against Petitioner pursuant to section 1128(a)(1) of the Act, because Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicare. Finding 9; Social Security Act, section 1128(a)(1).

21. The minimum mandatory exclusion which the I.G. must impose and direct against an individual pursuant to section 1128(a)(1) of the Act is five years. Social Security Act, section 1128(c)(3)(B).

22. An exclusion of six years is needed in this case to protect federally-funded health care programs and their beneficiaries and recipients from the commission of future harm by Petitioner.

23. I do not have authority to decide whether the exclusion imposed and directed against Petitioner by the I.G. violates Petitioner's constitutional right against being placed in double jeopardy. See 42 C.F.R. 1001.128(a).

24. I do not have authority to decide whether the exclusion imposed and directed against Petitioner by the I.G. is an unconstitutional ex post facto application of the Act. See 42 C.F.R. 1001.128(a).

ANALYSIS

The parties do not dispute that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare. Petitioner was convicted of, among other things, 20 counts of fraud against the Medicare program. Petitioner's fraud consisted of presenting false claims for Medicare reimbursement to the program. This crime plainly relates to the delivery of

items or services under Medicare. Jack W. Greene, DAB App. 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). Therefore, the I.G. was mandated by section 1128(a)(1) of the Act to exclude Petitioner from participating in Medicare. Furthermore, the Act requires that, for exclusions imposed pursuant to section 1128(a)(1), the minimum exclusion period must be for at least five years. Social Security Act, section 1128(c)(3)(B).

Petitioner argues that the exclusion was improper in this case for three reasons. First, he asserts that the exclusion serves as a punishment of Petitioner in addition to that imposed by the United States District Court as a sentence for Petitioner's crimes. Therefore, according to Petitioner, the I.G.'s imposition of an exclusion against him amounted to an unconstitutional placing of Petitioner in double jeopardy. Second, Petitioner contends that the exclusion constitutes an unconstitutional ex post facto application of the Act. Finally, he argues that the six-year exclusion which was imposed and directed against Petitioner is unreasonable, given the evidence in this case.

1. I do not have authority to decide whether the exclusion in this case violated Petitioner's constitutional right not to be placed in double jeopardy.

My authority to hear and decide cases pursuant to section 1128 of the Act is limited to the issues of whether the I.G. had statutory authority to impose and direct an exclusion and whether the exclusion is reasonable. I do not have the authority to decide whether the I.G.'s determination to impose and direct an exclusion is an unconstitutional application of the Act. Betsy Chua, M.D. et al., DAB App. 1204 (1990); see 42 C.F.R. 1001.128(a). Therefore, I do not have authority to decide whether the I.G.'s exclusion determination in this case was an unconstitutional placing of Petitioner in double jeopardy.

However, I do have authority to rule on the factual premises and contentions of the parties, as well as to interpret laws, regulations, and applicable court decisions. Chua, supra; see Edward J. Petrus, Jr., M.D. et al., DAB Civ. Rem. C-147 (1990), aff'd DAB App. 1264 (1991); Greene, supra.

The premise of Petitioner's double jeopardy argument is that the exclusion in this case is a punitive application of section 1128(a)(1) by the I.G. against Petitioner. Petitioner asserts that, inasmuch as he has already been

punished once for his crimes, a punitive exclusion constitutes an unconstitutional "second punishment." He relies on the Supreme Court's decision in United States v. Halper, 490 U.S. 435 (1989) as support for his argument.

Arguably, Petitioner could find support for his argument in the Halper decision assuming that his premise is correct that the exclusion imposed and directed against him by the I.G. is punitive and not remedial. Halper restates the constitutional principle that a party cannot be punished twice for the same offense. However, Halper also unequivocally states that a remedial civil penalty imposed against a party which is derived from the same facts upon which that party was previously convicted and for which that party was previously punished in a criminal prosecution does not implicate the double jeopardy clause of the United States Constitution. Id. at 448.

I conclude at Part 3 of this Analysis that the exclusion imposed and directed against Petitioner by the I.G. is a reasonable remedial application of the Act. Therefore, although I reach no conclusion as to the constitutionality of the I.G.'s exclusion determination, I find that the premise on which Petitioner rests his double jeopardy argument -- that the exclusion is punitive and a "second punishment" -- is incorrect.[3]

2. I do not have authority to decide whether the exclusion in this case is an unconstitutional ex post facto application of the Act.

Petitioner argues that the I.G.'s exclusion determination is an unconstitutional ex post facto application of the Act. He contends that the 1987 revisions to section

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[3] One element of Petitioner's premise is that his criminal sentence included a prohibition against his offering health care items or services to Medicare beneficiaries and Medicaid recipients during the term of his probation (five years). Petitioner argues that, inasmuch as he has already been punished by an "exclusion," the exclusion in this case serves as a second punishment. However, the sentence imposed against Petitioner by the district court serves a different purpose (punishment) than the exclusion imposed and directed against Petitioner by the I.G. (remedy). That the punishment and the remedy may have similar features, or, in some respects, may achieve complementary results, does not derogate from their separate purposes.

1128, which for the first time mandated an exclusion of at least five years for individuals convicted of program-related crimes, may only constitutionally apply to conduct occurring on or after the effective date of the revisions. Petitioner contends that, inasmuch as the conduct for which he was convicted transpired prior to 1987, it cannot constitutionally comprise a basis for the exclusion imposed and directed in this case.

As with Petitioner's other constitutional argument, I lack authority to decide this contention. See Part 1 of this Analysis. I would note, however, that the argument made by Petitioner here was also made by the petitioners in the Chua case. Both Judge Stratton, the administrative law judge who heard and decided Chua, and the appellate panel of the Departmental Appeals Board which reviewed and affirmed his decision, concluded that the ex post facto clause of the United States Constitution forbids penal legislation which imposes or increases criminal punishment for conduct lawful prior to its enactment. Inasmuch as section 1128(a)(1) is, both in its language and intent and in its application in this case, a civil remedies law, the underlying premise of Petitioner's constitutional argument as to the ex post facto clause is incorrect. DAB App. 1204 at 6; see Part 3 of this Analysis.

3. The six-year exclusion imposed and directed against Petitioner is reasonable.

Section 1128 is a civil remedies statute. The remedial purpose of section 1128 is to enable the Secretary to protect federally-funded health care programs and their beneficiaries and recipients from individuals and entities who have proven by their misconduct that they are untrustworthy. Exclusions are intended to protect against future misconduct by providers. Manocchio v. Sullivan, No. 90-8114, slip op. at 1 (S.D. Fla. July 12, 1991).

Federally-funded health care programs are no more obligated to deal with dishonest or untrustworthy providers than any purchaser of goods or services would be obligated to deal with a dishonest or untrustworthy supplier. The exclusion remedy allows the Secretary to suspend his contractual relationship with those providers of items or services who are dishonest or untrustworthy. The remedy enables the Secretary to assure that federally-funded health care programs will not continue to be harmed by dishonest or untrustworthy providers of items or services. The exclusion remedy is closely analogous to the civil remedy of termination or

suspension of a contract to forestall future damages from a continuing breach of that contract.

Exclusions may have the ancillary benefit of deterring providers of items or services from engaging in the same or similar misconduct as that engaged in by excluded providers. However, the primary purpose of an exclusion is the remedial purpose of protecting the trust funds and beneficiaries and recipients of those funds. Deterrence cannot be a primary purpose for imposing an exclusion. Where deterrence becomes the primary purpose, section 1128 no longer accomplishes the civil remedies objectives intended by Congress. Punishment, rather than remedy, becomes the end.

> [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

United States v. Halper, 490 U.S. 435, 448 (1989).

Therefore, in determining the reasonableness of an exclusion, the primary consideration must be the degree to which the exclusion serves the law's remedial objective of protecting program recipients and beneficiaries from untrustworthy providers. An exclusion is not excessive if it does reasonably serve these objectives.

The hearing in an exclusion case is, by law, de novo. Social Security Act, section 205(b). Evidence which is relevant to the reasonableness of the length of an exclusion will be admitted in a hearing on an exclusion whether or not that evidence was available to the I.G. at the time the I.G. made his exclusion determination. Evidence which relates to a petitioner's trustworthiness or the remedial objectives of the exclusion law is admissible at an exclusion hearing even if that evidence is of conduct other than that which establishes statutory authority to exclude a petitioner. For example, in this case I allowed Petitioner to introduce as evidence numerous letters and petitions which he obtained from his friends and associates attesting to his trustworthiness and honesty. See P. Ex. 7; P. Ex. 8, 8A - 8D. These exhibits were not offered in Petitioner's criminal trial as evidence of his guilt or innocence.

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 legislative intent. Because of the de novo nature of the hearing, my duty is to objectively determine the reasonableness of the exclusion by considering what the I.G. determined to impose in light of the statutory purpose and the evidence which the parties offer and I admit. The I.G.'s thought processes in arriving at his exclusion determination are not relevant to my assessment of the reasonableness of the exclusion.

Furthermore, my purpose in hearing and deciding the issue of whether an exclusion is reasonable is not to second-guess the I.G.'s exclusion determination so much as it is to decide whether the determination was extreme or excessive. 48 Fed. Reg. 3744 (Jan. 27, 1983). Should I determine that an exclusion is extreme or excessive, I have authority to modify the exclusion, based on the law and the evidence. Social Security Act, section 205(b).

The Secretary has adopted regulations to be applied in exclusion cases. The regulations specifically apply to exclusion cases for "program-related" offenses (convictions for criminal offenses relating to Medicare or Medicaid). The regulations express the Secretary's policy for evaluating cases where the I.G. has discretion in determining the length of an exclusion. 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 factors that may exist demonstrating trustworthiness. 42 C.F.R. 1001.125(b)(1) - (7). In evaluating the reasonableness of an exclusion, I consider the regulatory factors contained in 42 C.F.R. 1001.125(b).

The evidence in this case establishes Petitioner to be a highly untrustworthy health care provider. For that reason, the six-year exclusion imposed and directed against Petitioner by the I.G. is a reasonable remedy.

Petitioner was convicted of 20 counts of Medicare fraud, involving numerous false claims for Medicare reimbursement. The evidence establishes that Petitioner engaged in a systematic fraud of the Medicare program for more than a two-year period. He unlawfully appropriated thousands of dollars of trust fund monies. I conclude from this evidence that Petitioner is an individual who is capable of engaging in flagrantly dishonest conduct when it suits his ends. His unlawful acts establish a propensity to commit harmful conduct which in and of itself justifies the remedy imposed in this case. Moreover, Petitioner refuses to admit that he has engaged in dishonest conduct or to accept any responsibility for

his acts. I find that Petitioner's denial of responsibility in the face of overwhelming evidence to the contrary establishes a strong propensity on his part to commit future dishonest or damaging acts against federally-funded health care programs. This provides additional support for the remedy imposed and directed against Petitioner by the I.G.

The gravamen of Petitioner's fraud against Medicare was that Petitioner presented numerous claims for Medicare reimbursement for items or services which he never provided. Petitioner made home visits to elderly Medicare beneficiaries. His reimbursement claims for services for these individuals included many claims for services allegedly rendered at visits which never occurred. Finding 10; See, e.g., I.G. Ex. 25/2. His fraudulent claims also included fictitious claims for services which Petitioner never provided (such as claims for Holter monitoring), regardless of whether Petitioner actually visited the beneficiary for some other reason.[4] See, e.g., I.G. Ex. 4/1.

Petitioner submitted these many false claims over an extended period of time, establishing that he manifested a high level of culpability. This evidence as to Petitioner's culpability alone satisfies me that Petitioner is not trustworthy and that a lengthy exclusion is needed in this case for remedial purposes.

But what is more disturbing is Petitioner's denial of responsibility for his actions in the face of overwhelming evidence that he defrauded the Medicare program. Both at his criminal trial and at the hearing in this case, Petitioner asserted that he had never presented a false claim or defrauded the Medicare program. Findings 13, 14. Petitioner's denials fly in the face of the unequivocal testimony of several Medicare beneficiaries whom Petitioner falsely claimed to have treated. I conclude from Petitioner's unwillingness to acknowledge that he has engaged in wrongful conduct that he has

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[4] Holter monitoring is an electrocardiographic tracing conducted over a protracted period of time. Tr. at 95 - 97. Petitioner claimed reimbursement for such services when, in fact, he did not provide them. Tr. at 99.

offered me no meaningful assurance that he may not engage in future wrongdoing.[5]

Furthermore, I am disturbed by the way in which Petitioner attempted to deny responsibility for his misconduct. In my judgment, this is additional evidence of a lack of trustworthiness. Upon being confronted with the testimony of several Medicare beneficiaries that he had not provided items or services to them as he had claimed to have provided, Petitioner countered with the wholly unpersuasive assertions that these beneficiaries were incompetent, or suffering from mental illnesses, or had been intimidated into making false statements. Tr. at 127, 141.

I have considered the many statements which Petitioner offered from third parties attesting to his character and honesty. See P. Ex. 7; P. Ex. 8, 8A - 8D. These do not cause me to hesitate in my conclusions that he is an untrustworthy provider of care and that the six-year exclusion is reasonable in this case. These statements speak to the declarants' personal relationships with Petitioner and to his skills as a physician. I accept as true that the declarants may have found Petitioner to be honest and of good character in his personal dealings with them. Also, I do not question their judgment as to Petitioner's skills. However, none of these declarants profess knowledge of the evidence of Petitioner's crimes or of the misconduct which leads me to conclude that he is an untrustworthy provider of care. Therefore, while the declarants' statements may be literally true, they do not derogate in any sense from the strong evidence of lack of trustworthiness which I have discussed in this Decision.

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[5] Petitioner's expressions of remorse, proclaimed at a time when it plainly suited his self-interest, ring hollow. At his sentencing hearing, Petitioner told the judge that he was "very, very sorry" for his actions that resulted in his conviction, that he had learned some "very painful lessons," that he acknowledged having made many mistakes, and that these mistakes would not be repeated. P. Ex. 6/14.

CONCLUSION

Based on the law and the evidence, I conclude that the six-year exclusion from participating in Medicare and Medicaid imposed and directed against Petitioner is reasonable. Therefore, I sustain the exclusion.

/s/

Steven T. Kessel
Administrative Law Judge