Lynn Chertkov, CR No. 294 (1993)

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of: Lynn Chertkov, Petitioner,
- v. -
The Inspector General.

DATE: November 15, 1993

Docket No. C-92-148
Decision No. CR294

DECISION

The Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Lynn Chertkov (Petitioner) by letter dated August 14, 1992 (Notice) that she was being excluded for a period of 10 years from participation in the Medicare program and three federally funded State health care programs which are identified in section 1128(h) of the Social Security Act (Act). 1/

The I.G. informed Petitioner in the Notice that her 10-year exclusion from the Medicare and Medicaid programs was authorized by section 1128 of the Act and resulted from her conviction of a criminal offense related to the delivery of an item or service under the Maryland Medicaid program. The I.G. informed Petitioner that sections 1128(a)(1) and (c)(3)(B) of the Act require a minimum five-year exclusion because her conviction was program related. The I.G. alleged that certain aggravating circumstances were identified, which justified increasing her exclusion from the mandatory minimum period of five years to a period of 10 years.

By letter dated August 27, 1992, Petitioner timely requested a hearing before an ALJ and the case was assigned to ALJ Joseph K. Riotto for a hearing and a decision. The case subsequently was reassigned to

me for a hearing and a decision. I conducted an in-person hearing in Washington, D.C., on June 24, 1993 and the parties then submitted posthearing briefs.

I have considered the evidence of record, the parties' arguments, and the applicable law in this case. I find and conclude that Petitioner's exclusion for 10 years is reasonable.

ADMISSIONS

Petitioner admitted at the hearing that she was "convicted" and that her conviction was for an offense related to the delivery of an item or service under the Medicaid program, within the meaning of section 1128(a)(1) of the Act. Transcript (Tr.) at 4 - 7. Although Petitioner admitted at the prehearing conference that she was subject to a minimum mandatory five-year exclusion, at the hearing she withdrew that admission. Id.

ISSUES

1. Whether Petitioner is subject to a five-year minimum mandatory exclusion under section 1128 of the Act.

2. Whether the regulations published on January 29, 1992 govern the disposition of this case.

3. Whether the ALJ can consider evidence about Petitioner's character and trustworthiness in order to determine if the length of exclusion imposed by the I.G. is remedial and not punitive.

4. Whether the 10-year exclusion imposed by the I.G is reasonable and appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the entire record, the arguments, and the submissions of the parties, and being advised fully, I make the following Findings of Fact and Conclusions of Law (FFCL):

1. Petitioner is a social worker licensed to practice in the State of Maryland. Tr. at 135 - 136.

2. Petitioner and her ex-husband, Keith Wagner, owned and operated Montgomery County Family Life Center, Inc. (Life Center), and its subsidiary, which traded under the name of Oak Leaf Center, Inc. (Oak Leaf). I.G. Exhibit (Ex.) 2, 13.

3. Oak Leaf, a licensed day care center, applied for and received provider status in the Maryland Medical Assistance program, which is a State health care program established pursuant to Title XIX of the Act (Medicaid), 42 U.S.C. 1396a - 1396u. I.G. Ex. 2 at 1 - 2; I.G. Ex. 13 at 1 - 2.

4. Oak Leaf, through its provider application and numerous invoices, represented that it provided group and individual psychiatric therapy to Medicaid recipients by or under the direct supervision of a licensed psychiatrist. I.G. Ex. 13 at 2.

5. Medicaid pays for group and individual psychiatric therapy if it is medically necessary and is provided by or under the direct supervision of a licensed psychiatrist. The provider is required to keep contemporaneous notes of the therapy services and to make them available to Medicaid upon request. Medicaid does not pay for day care. I.G. Ex. 13 at 2.

6. Oak Leaf submitted bills to the Maryland Department of Health and Mental Hygiene (DHMH) for psychiatric therapy provided to Medicaid recipients during the period from January 1, 1986 through May 24, 1990. I.G. Ex. 1 at 2; I.G. Ex. 2 at 2; Tr. at 16 - 17.

7. DHMH paid Oak Leaf approximately $1.6 million for psychiatric therapy services provided during the period from January 1, 1986 through May 24, 1990. Id.

8. At all times relevant, Petitioner made significant financial decisions and made or supervised all decisions and operations regarding the appropriate charges for Oak Leaf's services and the billing of third-party insurers, including Medicaid. I.G. Ex. 2 at 3; I.G. Ex. 13.

9. In February 1989, DHMH requested that Oak Leaf submit copies of its notes substantiating the therapy sessions Oak Leaf represented that it had provided to 26 Medicaid recipients and for which Oak Leaf had claimed reimbursement for services purportedly provided during the period starting January 1, 1986. Oak Leaf submitted the requested records. I.G. Ex. 13 at 3; I.G. Ex. 2.

10. Beginning in 1989, Petitioner directed and participated in a treatment note reconstruction scheme in response to DHMH's investigation into Oak Leaf's Medicaid billing practices during the period starting January 1, 1986. I.G. Ex. 2.

11. Petitioner was charged by the State of Maryland with Medicaid fraud, and on March 21, 1991, Petitioner agreed to plead guilty to one count of Medicaid fraud, under Maryland Annotated Code article 27, 230B(b)(1), 230(C), 230(D)(b) (1988 and Supp.) and to enter an Alford plea to one count of common law conspiracy to commit Medicaid fraud, with each count charged by criminal information. I.G. Ex. 1, 3, 4.

12. As a condition to Petitioner's agreement to plead guilty, she entered guilty pleas also on behalf of the Life Center. I.G. Ex. 7 at 3.

13. On April 25, 1991, Petitioner entered guilty pleas in the Circuit Court of Montgomery County for the State of Maryland and a judgment of conviction was entered. I.G. Ex. 4.

14. Petitioner was sentenced to incarceration of three years on each count, with all time suspended except for 179 days, which would be served through home detention. Petitioner was sentenced also to five years' probation and ordered to perform 1500 hours of community service. I.G. Ex. 4.

15. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. FFCL 11, 13 - 14; Act, section 1128(a)(1).

16. The Secretary of DHHS (Secretary) has delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21,662 (1983).

17. The I.G. had authority to impose and direct an exclusion against Petitioner pursuant to section 1128(a)(1) of the Act.

18. The regulations published on January 29, 1992 establish criteria to be used by the I.G. in determining to impose and direct exclusions pursuant to sections 1128(a) and (b) of the Act. 42 C.F.R. Part 1001 (1992).

19. On January 22, 1993, the Secretary published a regulation (1993 Amendment) which directs that the criteria to be used by the I.G. in determining to impose and direct exclusions pursuant to sections 1128(a) and (b) of the Act are binding also upon administrative law judges, appellate panels of the Departmental Appeals Board (DAB), and federal courts in reviewing the imposition of exclusions by the I.G. 42 C.F.R. 1001.1(b); 58 Fed. Reg. 5617, 5618 (1993).

20. By letter dated August 14, 1992, the I.G. notified Petitioner that she was being excluded from participation in the Medicare and any State health care programs for a period of 10 years.

21. My adjudication of the length of the exclusion in this case is governed by the criteria contained in 42 C.F.R. 1001.102.

22. I do not have authority to change the effective date of the exclusion. Act, section 1128.

23. An exclusion imposed pursuant to section 1128(a)(1) of the Act must be for a period of at least five years. Act, sections 1128(a)(1), 1128(c)(3)(B); 42 C.F.R. 1001.102.

24. An exclusion imposed pursuant to section 1128(a)(1) of the Act may be for a period in excess of five years if there exist aggravating factors which are not offset by mitigating factors. 42 C.F.R. 1001.102.

25. Aggravating factors which may form a basis for imposing an exclusion in excess of five years against a party pursuant to section 1128(a)(1) of the Act may consist of any of the following:

a. The acts resulting in a party's conviction, or similar acts, resulted in financial loss to Medicare or Medicaid of $1500 or more.

b. The acts that resulted in a party's conviction, or similar acts, were committed over a period of one year or more.

c. The acts that resulted in a party's conviction, or similar acts, had a significant adverse physical, mental, or financial impact on one of more program beneficiaries or other individuals.

d. The sentence which a court imposed on a party for the above-mentioned conviction included a period of incarceration.

e. The convicted party has a prior criminal, civil, or administrative sanction record.

f. The convicted party was overpaid a total of $1500 or more by Medicare or Medicaid as a result of improper billings.

42 C.F.R. 1001.102(b)(1) - (6) (paraphrase).

26. Mitigating factors which may offset the presence of aggravating factors may consist of only the following:

a. A party has been convicted of three or fewer misdemeanor offenses, and the entire amount of financial loss to Medicare and Medicaid due to the acts which resulted in the party's conviction and similar acts, is less than $1500.

b. The record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that, before or during the commission of the offense, the party had a mental, emotional, or physical condition that reduced that party's culpability.

c. The party's cooperation with federal or State officials resulted in others being convicted of crimes, or in others being excluded from Medicare or Medicaid, or in others having imposed against them a civil money penalty or assessment.

42 C.F.R. 1001.102(c)(1) - (3) (paraphrase).

27. Petitioner was convicted of fraudulently submitting false Medicaid bills of at least $337,000 for services not provided or not provided as claimed, of which amount $76,000 was due to improper Medicaid billings for Petitioner's two adopted children. I.G. Ex. 13.

28. The acts which resulted in Petitioner's conviction resulted in overpayments by Medicaid and financial loss to Medicaid of $1500 or more, which is an aggravating factor that justifies excluding Petitioner for more than five years. 42 C.F.R. 1001.102(b)(1), (6).

29. The acts which resulted in Petitioner's conviction occurred during the period from January 1986 to May 1990, which is an aggravating factor that justifies excluding Petitioner for more than five years. 42 C.F.R. 1001.102(b)(2).

30. The acts which resulted in Petitioner's conviction had a significant adverse financial impact on the Maryland taxpayers, which is an aggravating factor that justifies excluding Petitioner for more than five years. 42 C.F.R. 1001.101(b)(3).

31. Petitioner's sentence to a period of incarceration of two concurrent three-year terms -- even though all was suspended except for 179 days which was to be served through home detention -- is an aggravating factor that justifies excluding Petitioner for more than five years. 42 C.F.R. 1001.102(b)(4).

32. The aggravating factors present in this case establish that Petitioner engaged in conduct which jeopardized the integrity of federally financed health care programs and which jeopardized the well-being and safety of program beneficiaries and recipients. FFCL 28 - 31.

33. Petitioner has not shown by a preponderance of the evidence that her cooperation resulted in others being convicted or excluded, within the meaning of section 1001.102(c)(3).

34. Petitioner did not prove the presence of any mitigating factors under 42 C.F.R. 1001.102.

35. In the absence of any offsetting mitigating factor, the aggravating factors present in this case establish Petitioner as a threat to the integrity of federally financed health care programs and to the well-being and safety of program beneficiaries and recipients.

36. In the absence of any offsetting mitigating factor, the significant aggravating factors present in this case justify excluding Petitioner for 10 years. 42 C.F.R. 1001.102(b)(1) - (6).

37. Petitioner is an unfit health care provider.

38. A lengthy exclusion is needed in this case to satisfy the remedial purposes of the Act and to protect the Medicare and Medicaid programs from an unfit medical provider.

39. The 10-year exclusion imposed and directed against Petitioner by the I.G. is reasonable. FFCL 1 - 38.

DISCUSSION

Petitioner admitted that she was convicted of a crime related to the Medicaid program, within the meaning of section 1128(a)(1) of the Act. However, she argues that she is not subject to a five-year minimum mandatory exclusion under sections 1128(a)(1) and (c)(3)(B) of the Act. Tr. at 4 - 7. She argues also that the I.G. did not prove the aggravating circumstances alleged and that she proved the presence of mitigating circumstances that require a reduction of the 10-year exclusion imposed by the I.G. Finally, she argues that the January 1992 regulations do not apply to her case. Petitioner's Posthearing Brief (P. Br.) at 1 n.1, 1 - 2, 5.

I. By reason of federal law and regulations, Petitioner must be excluded for a minimum period of five years.

Sections 1128(a)(1) and (c)(3)(B) of the Act mandate that a petitioner be excluded from the Medicare and Medicaid programs for a minimum period of five years if the I.G. proves that such petitioner was (1) "convicted" of a criminal offense which was (2) "related to the delivery of an item or service" under Medicare or Medicaid.

Petitioner admitted at the in-person hearing that she was convicted of Medicaid fraud. Tr. at 4 - 7. Also, the I.G. proved the material facts required by section 1128(a)(1) of the Act through the documentary evidence submitted in support of her case and the testimony of Steven Capobianco and Carolyn McElroy, the State officials who investigated and prosecuted Petitioner. Tr. at 15 - 87, 143 - 164. Petitioner pled guilty in the Circuit Court for Montgomery County for the State of Maryland of one count of Medicaid fraud and one count of common law conspiracy to commit Medicaid fraud. I.G. Ex. 1 - 4. The pleas were accepted and judgment was entered on April 25, 1991. I.G. Ex. 4. This is a conviction as defined by section 1128(i) of the Act and the conviction was program related. Jack W. Greene, DAB 1078, at 7 (1989), aff'd sub. nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990); Charles W. Wheeler, DAB 1123 (1990).

Petitioner argues erroneously that since her conviction predates the issuance of the January 1992 regulations on January 29, 1992, there can be no minimum mandatory five-year exclusion. P. Br. 1 n.1. Section 1128 of the Act required a five-year minimum mandatory period of exclusion long before Petitioner's exclusion. Wheeler. Accordingly, section 1128 requires at least a five-year exclusion in this case. DeWayne Franzen, DAB 1165 (1990). 2/ 3/

II. The regulations published on January 29, 1992 do govern the disposition of this case.

On January 29, 1992, the Secretary published regulations which effect both procedural and substantive changes with respect to section 1128(a)(1) exclusion cases. 42 C.F.R. Parts 1001 - 1007; 57 Fed. Reg. 3298 - 3358. Petitioner argues that the regulations do not apply to this case. P. Br. 1 n.1.

An appellate panel of the DAB has held that the regulations issued by the Secretary of DHHS do not apply to cases where the I.G.'s Notice was issued prior to January 29, 1992. Behrooz Bassim, M.D., DAB 1333, at 5 - 9 (1992). However, the regulations do apply in this case because the I.G.'s exclusion Notice was issued after the effective date of the regulations.

III. Several factors are relevant in determining whether the 10-year exclusion imposed by the I.G. is reasonable.

In order to determine the reasonableness of an exclusion imposed under the authority of section 1128 of the Act, I must look at the purpose of section 1128, its language, the purpose and language of the regulations, and applicable case law.

Section 1128 of the Act is a civil statute designed to protect government financed health care programs from fraud and abuse by providers and to protect the beneficiaries and recipients of these programs from incompetence and dishonesty. 4/ An exclusion is also a deterrent to future misdeeds. However, Congress did not intend that exclusions from the Medicare and Medicaid programs be permanent; transgressors are meant to have an opportunity to rehabilitate themselves. Michelle Donaldson, D.P.M., DAB CR234, at 5 (1992).

The stated purpose of the regulations is "to protect program beneficiaries from unfit health care practitioners, and otherwise to improve the anti-fraud provisions of the Department's health care programs . . . ." 57 Fed. Reg. 3298. Section 1128 hearings are de novo and not appellate hearings. Bernardo G. Bilang, M.D., DAB 1295 (1992); Eric Kranz, M.D., DAB 1286 (1991). Both the I.G. and Petitioner agree with this proposition. I.G. Br. at 3; P. Br. at 2 - 3.

The I.G. has the burden of proof and must establish the reasonableness of the length of the exclusion imposed by a preponderance of the evidence. A petitioner has the right to present rebuttal evidence and the burden of proving his or her allegations of why an exclusion should be reduced by a preponderance of the evidence.

A. The standard used by ALJs and appellate panels of the DAB to determine the length of section 1128 exclusions in cases where the I.G.'s exclusion notice was issued prior to January 29, 1992.

In 1992, a DAB appellate panel upheld an ALJ's finding that several factors relating to a petitioner's trustworthiness and character were relevant to the remedial purpose of section 1128 of the Act and that a petitioner could present evidence supporting his or her trustworthiness in order to reduce the length of exclusion imposed by the I.G. Robert Matesic, R.Ph., d/b/a Northway Pharmacy, DAB CR158 (1991), aff'd, DAB 1327, at 7 - 8, 12 (1992).

This affirmance was consistent with other ALJs' decisions on the question of relevant evidence that would be considered and the way that evidence would be used as a standard to measure the reasonableness of the length of an exclusion imposed by the I.G. See Donaldson at 5 - 6, citing Bhupandra Patel, M.D., DAB CR227 (1992), aff'd, DAB 1370 (1992); Charles J. Burks, M.D., DAB CR54, at 8 - 9 (1989); Arthur V. Brown, M.D., DAB CR226, at 9 (1992). All decisions issued by DAB ALJs had been consistent with the ruling in Matesic until recently.

B. The impact of the 1993 Amendment to the regulations is to cause a departure from Matesic.

Decisions issued by ALJs in section 1128 cases have recently departed from the appellate panel's decision in Matesic because on January 22, 1993, the Secretary published an amendment to the January 29, 1992 regulations. 58 Fed. Reg. 5617, 5618 (42 C.F.R. 1001.1(b)). The 1993 Amendment provides that ALJs are bound by the exclusion provisions in 42 C.F.R. Part

1001 of the regulations in reviewing all exclusions imposed by the I.G. For example, section 1001.102(c) of the regulations departs from Matesic dramatically because it prohibits an ALJ from considering any mitigating factors, except those enumerated in the regulations.

Thus, the 1993 Amendment appears to: (1) change case law concerning the issue of what evidence is relevant in determining the reasonableness of the length of an exclusion imposed by the I.G. and (2) prevent ALJs from considering the full range of evidence concerning character and trustworthiness of a petitioner.

C. The evidence that can be considered relevant in this case and the standard that can be used to determine the reasonableness of the length of the exclusion imposed by the I.G. is now different.

Section 1001.102 of the regulations provides that the only relevant evidence to determine the reasonableness of Petitioner's 10-year exclusion is evidence of those aggravating or mitigating circumstances enumerated in section 1001.102 of the regulations. See John M. Thomas, Jr., M.D. et al., DAB CR281 (1993). Petitioner argues that I should consider evidence of her character and trustworthiness in order to reduce the length of her exclusion. P. Br. at 2. The I.G. argues that I must consider evidence only of the aggravating and mitigating circumstances enumerated in section 1001.102 of the regulations. I.G. Br. at 5 and n.6. The I.G. is correct and I stated so in my May 14, 1993 Prehearing Order.

Petitioner argues that once the parties have proved the aggravating or mitigating circumstances alleged, the ALJ is given absolutely no standards or criteria by which to measure the appropriate length of an exclusion by the statute or the regulations. P. Br. at 3. Petitioner argues that the regulations do not require the ALJ to increase her exclusion beyond five years, but state that the ALJ "may" consider the aggravating factors as a basis to increase the exclusion beyond five years. Id. Petitioner argues that common sense dictates that I should consider other evidence after I have looked

at the aggravating and mitigating circumstances; she argues that a narrow review "would result in merely rubber stamping" the I.G.'s determinations. Id.

I agree with Petitioner only partially. I agree that section 1001.102 of the regulations gives an ALJ a great deal of discretion. For example, assume a case under section 1128(a)(1) of the Act in which the I.G. proves the aggravating circumstances alleged; petitioner proves one mitigating factor that the I.G. failed to consider; and the ALJ finds the exclusion imposed by the I.G. to be unreasonable. There is nothing in the regulations specifically indicating how the ALJ is to arrive at an appropriate length of exclusion beyond the five-year minimum mandatory term. In this instance, the ALJ is given discretion under section 1001.102 of the regulations, but arguably no authority to consider any evidence of character or trustworthiness outside of the aggravating and mitigating factors listed. I do not agree with Petitioner that my authority to review the I.G.'s administrative action and my authority to impose a proper exclusion in this case is "worthless" as argued (P. Br. at 2) because there is considerable evidence of character and trustworthiness that I may consider solely by reason of the listed aggravating and mitigating factors that section 1001.102 allows me to analyze.

In another example, assume that the I.G. proves all the aggravating circumstances alleged and petitioner fails to prove any mitigating circumstances; the regulations are silent as to whether the ALJ must uphold the length of the exclusion imposed by the I.G. or whether the ALJ has unbridled discretion and authority to reduce the length of the exclusion down to the minimum period of five years.

In the Thomas case, Judge Kessel recently reduced a section 1128(a)(1) 10-year exclusion down to five years. In doing so, he held that, while the regulations restrict his review to those specific factors listed in section 1001.102 and while these factors may not be as complete as those factors enumerated in Matesic, he must still assign specific weight to those factors and must still decide whether an exclusion is reasonable. He concluded, in effect, that his de novo consideration of the I.G.'s action, while not nearly as

complete as a review using the Matesic factors, did continue to include his analysis of evidence which was relevant under the regulations, in accord with the Act's remedial purpose. He held that the regulations read together with section 1128 of the Act provide ascertainable standards for adjudicating the length of exclusions. I agree with Judge Kessel that the parties may present evidence to explain the aggravating and mitigating factors listed in the regulations and that the Act and regulations provide ascertainable standards for adjudicating the length of exclusions.

In sum, in applying the present standard for adjudicating a reasonable length of exclusion, an ALJ must assign specific weight to the evidence concerning aggravating and mitigating factors listed in section 1001.102 of the regulations, keeping in mind that the purpose of section 1128 is remedial and that the purpose of the regulations is to protect program beneficiaries from unfit or fraudulent medical providers.

IV. The remedial purpose of the Act is satisfied in this case by a 10-year exclusion.

There should be an exclusion of greater than five years in this case because the I.G. proved five out of the six aggravating circumstances listed in section 1001.102 of the regulations. The record demonstrates that these aggravating factors had a substantial deleterious effect on the Maryland Medicaid program. Furthermore, there were no mitigating circumstances proven by Petitioner that warrant a reduction in her exclusion of 10 years.

A. There are significant aggravating factors.

The five aggravating factors proven by the I.G. are serious and establish that Petitioner seriously harmed the Maryland Medicaid program and is unfit as a health care provider. While the I.G. noted only three of these factors in the exclusion Notice, I permitted the I.G. to submit evidence concerning the additional two factors (section 1001.102(b)(3) and (6)) because this is a de novo proceeding and Petitioner was not prejudiced; as early as March 2, 1993 she had notice of the I.G.'s intent to prove these additional

aggravating factors. See I.G. supplemental brief on the effect of the regulations published on January 22, 1993; 42 C.F.R. 1005.15(f).

The first aggravating factor proven by the I. G. is that Petitioner was convicted of fraudulently submitting false Medicaid bills of at least $337,000, of which $76,000 was due to improper Medicaid billings for Petitioner's two adopted children. 42 C.F.R. 1001.101(1); FFCL 25 - 27. This was one of the worst losses to the Maryland Medicaid program. I.G. Ex. 5. Petitioner was president, owner, administrator, manager, and member of the board of Oak Leaf and its parent corporation. I.G. Ex. 2, 3; Tr. at 114 - 115.

The second aggravating factor is that the acts which resulted in Petitioner's conviction occurred during the period from January 1986 to May 1990, over four years, a very long time. 42 C.F.R. 1001.102(b)(2); FFCL 25 - 28.

Third, Petitioner's acts were not just some simple oversights; they were acts of serious fraud. The State court judge thought so too. Petitioner was sentenced to a period of incarceration of two concurrent three-year terms -- even though all was suspended except for 179 days which was to be served through home detention. 42 C.F.R. 1001.102(b)(4); FFCL 25 - 28.

Fourth, Petitioner was overpaid more than $1500 as a result of the improper billings. 42 C.F.R. 1001.102(b)(6).

Finally, Petitioner's actions had a significant adverse financial impact on the taxpayers of Maryland because those taxpayers paid at least $337,000 to Petitioner for fraudulent services. 42 C.F.R. 1001.102(b)(3).

The evidence in the record overwhelmingly demonstrates the existence of the serious aggravating factors described above. Petitioner attempted to rebut this evidence by testifying that she had very little involvement in the fraudulent billing scheme for which she was convicted. Petitioner admitted to a "record recreation," but argues that this wasn't wrongdoing. P. Br. at 8 n.5. She admitted, also, the improper

billing with regard to the "Yost account". P. Br. at 8. However, she argues that, even though she participated in billing Medicaid for at least $1.6 million, she never benefitted from any of the monies received. Id. She argues also that the I.G. did not prove that the financial loss to Medicaid was over $1,500. Id. at 9. She testified that she was to date unaware of the law regarding what services Medicaid reimburses. Tr. at 126 - 127.

When Petitioner pled guilty, she agreed to the amounts stated in the plea agreement. The documentary evidence, such as the State court findings and the testimony of the State officials who investigated and prosecuted Petitioner (Mr. Capobianco and Ms. McElroy) establish Petitioner's involvement in the fraudulent billing scheme and reconstruction of the treatment record, even had she not admitted to that wrongful act. P. Br. at 8; see also, I.G. Br. at 7 n.10.

The testimony of the I.G.'s witnesses, corroborated by the documentary evidence of record in this case, is more credible than Petitioner's testimony, which was no more than a series of self-serving statements. Tr. at 126 - 129, 144 - 146. Despite able counsel on her behalf, Petitioner was unsuccessful in her attempt to establish that others were really to blame for what happened and that she was a minor player in a game of defrauding the Medicaid program. I did not find Petitioner's claims of reduced culpability credible. I found Petitioner's testimony hard to believe and inconsistent with the documentary evidence, such as the criminal information, the agreed statement of facts in the criminal case, the March 21, 1991 plea agreement, the plea acceptance, and related docket entries in the criminal case against Petitioner. I.G. Ex. 1 - 4 and 12 - 15.

Petitioner argues that there was nothing about her testimony or demeanor that should lead me to conclude that she was less than candid. P. Br. at 8. I disagree. When Ms. McElroy was recalled as a witness, she testified that three individuals (Keith Wagner (Petitioner's ex-husband), Jane Margolious, and Margaret Riggs) would have been witnesses in the criminal proceeding against Petitioner if she had not pled guilty. Tr. at 157-165. These three individuals stated that

Petitioner knew everything about the billing and that if there was a question about anything, they went to Petitioner. Id. Ms. McElroy testified also that Keith Wagner and Petitioner were both the "master minds" of the fraudulent billing scheme "together". Tr. at 159. Petitioner pled guilty to this fraudulent billing scheme which was one of the largest losses to the Maryland Medicaid program. I.G. Ex. 5. Her attempt to distance herself from that plea and all of the facts that she agreed to in the criminal proceedings which evidence the fraud is not convincing. The record establishes firmly Petitioner's guilt in this grand scheme of fraud and deception. FFCL 1 - 39; Tr. at 16 - 28, 76 - 77, 110, 157 - 159.

The five aggravating factors, which are established by a preponderance of the evidence, justify excluding Petitioner for at least 10 years. Moreover, the three aggravating factors identified in the I.G.'s Notice are sufficiently serious enough to warrant a 10-year exclusion in this case, without the presence of the two additional aggravating factors proven. However, the I.G. proved two additional aggravating factors which firmly establish that the I.G.'s exclusion is reasonable. Thus, the aggravating factors present in this case establish that Petitioner engaged in conduct which significantly injured the integrity of the Maryland Medicaid program, a federally financed health care program.

B. There are no mitigating factors.

Petitioner argues that she cooperated with State officials and that her cooperation led to the conviction of her corporation, Life Center, and of her ex-husband, Keith Wagner. Tr. at 113 - 115; P. Ex. 3 at 9. She argues that her cooperation is a mitigating factor as described in 42 C.F.R. 1001.102(c)(3). Petitioner testified that the State would not have allowed Mr. Wagner to plead guilty unless both she and the corporation pled guilty. Rather, the evidence in the record indicates that Mr. Wagner's cooperation formed the basis for Petitioner's conviction. Tr. at 28 - 30, 143 - 149. Petitioner's actions were not really cooperation within the meaning of section 1001.102(c)(3).

At the hearing, Petitioner testified that Mr. Wagner had communicated to her that he was fearful of going

to jail and that in order for his plea to be accepted, Petitioner had to plead guilty. Tr. at 114. Petitioner stated also that she was told that, in order for her to enter a plea of guilty, she had to allow the corporation to plead guilty and agree not to contest the restitution figure that the State alleged was owed by Life Center. Tr. at 115.

Mr. Capobianco testified that Petitioner's plea of guilty was due to Mr. Wagner's agreement to plead guilty and to testify against Petitioner. Tr. at 30. The witness testified also that Petitioner authorized the corporation (Life Center) to plead guilty. Id. However, Mr. Capobianco stated that Petitioner did not provide the I.G.'s office with any evidence that was needed to convict Mr. Wagner, the Life Center, or any other offender. Id.

Carolyn McElroy, Deputy Director of the Maryland Medicaid Fraud Unit, testified that Petitioner's plea of guilty did not facilitate the subsequent conviction or Mr. Wagner and the Life Center. Tr. at 144. Ms. McElroy stated that her office attempted to negotiate pleas with Petitioner, Mr. Wagner, and the Life Center at the same time in early 1990. Since Petitioner and Wagner were married at the time, under Maryland law, neither spouse could have been required to testify against the other. Id. Both Petitioner and Wagner were offered the opportunity to waive their spousal privileges and testify against the other. If their spousal privilege was not waived, then Ms. McElroy's office would have required that all of the plea agreements come in at the same time. Id. In March, Mr. Wagner agreed to testify against Petitioner, and on March 4, 1991, he executed his plea agreement. Tr. at 145. Petitioner's plea agreement was executed three weeks later. Id. Ms. McElroy testified further that Petitioner did not speak to her office before she signed the plea agreement, so no evidence or testimony from Petitioner assisted the investigation. Tr. at 146. Ms. McElroy did indicate that both Life Center's and Petitioner's plea were required at the same time, and that if Petitioner did not authorize the corporate plea, Petitioner's plea would not have been accepted. Id.

I find the testimony of the I.G.'s witnesses to be credible. Petitioner's actions were not really cooperation within the meaning of section 1001.102(c)(3). Accordingly, Petitioner did not prove the presence of any mitigating factors under section 1001.102(c) of the regulations. Even if Petitioner did prove cooperation as she alleged, it was not significant enough to reduce the 10 year exclusion imposed by the I. G. in this case. 5/

Accordingly, in the absence of any offsetting mitigating factors, the aggravating factors present in this case establish that Petitioner's 10 year exclusion is reasonable because she is a threat to the integrity of federally financed health care programs. This makes her an unfit health care provider. A lengthy exclusion is needed in this case to satisfy the remedial purposes of the Act. The 10-year exclusion imposed and directed against Petitioner by the I.G. must stand. FFCL 1 - 39.

CONCLUSION

Based on the law and the evidence, I conclude that Petitioner's 10-year exclusion is reasonable and must stand.

It is so Ordered.

/s/

Charles E. Stratton
Administrative Law Judge

1. Section 1128(h) of the Act enumerates three State health care programs that receive federal funds, such as the Medicaid program. Unless indicated otherwise, I use the term "Medicaid" to represent all three of the State health care programs from which Petitioner was excluded.

2. Section 1128(c)(3)(B) of the Act provides for a waiver, upon the request of a State, where a petitioner is the "sole community physician" or "sole source of specialized services in a community." I am not aware of any request for a waiver by a State in this case.

3. I noted at the hearing that the I.G. has taken the position in other cases that while a federal exclusion prevents a petitioner from submitting claims for reimbursement to Medicare and Medicaid, a petitioner may continue to treat Medicare and Medicaid patients free of charge (so long as the conviction did not relate to patient abuse or neglect). The I.G. agreed. Tr. 155 - 156.

4. Congress enacted the exclusion law to protect the integrity of federally funded health care programs. Among other things, the law is designed to protect program beneficiaries and recipients from individuals who have demonstrated by their behavior that they threaten the integrity of the programs or that they can not be entrusted with the well-being and safety of beneficiaries and recipients. See S. Rep. No. 109, 100th Cong., 1st Sess. 1 (1987), reprinted in 1987 U.S.C.C.A.N. 682.

5. This result is unfortunate because it appears that Petitioner is considered to be a talented social worker and that her work with children and families will be missed by some. See P. Ex. 2-14. However, it is the I.G.'s position that Petitioner can work as a volunteer providing health care as long as Medicare or Medicaid is not billed for her services. Tr. at 155-156.