Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
David L. Gordon, M.D.,	)	DATE: August 16, 1994
	)	
Petitioner,	)	Docket No. C-94-035
	)	Decision No. CR327
- v. -	)	
	)	
The Inspector General.	)	
	)	

DECISION

By letter dated October 15, 1993 (Notice), the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified David L. Gordon, M.D., (Petitioner), that he was being excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs for a period of ten years.[1] The I.G. advised Petitioner that he was being excluded pursuant to section 1128(a) of the Social Security Act (Act), based on his conviction of a criminal offense related to the delivery of an item or service under the Medicaid program.

The I.G. advised Petitioner further that, in cases of exclusions imposed pursuant to section 1128(a) of the Act, section 1128(c)(3)(B) of the Act requires a minimum exclusion of five years. However, the I.G. determined to exclude Petitioner for ten years after taking into consideration the following allegations, which were recited in the Notice: (1) Financial damage to the programs related to the criminal activity was over $1,000,000; (2) the criminal acts that resulted in the conviction, or similar acts, were committed over a period of two years; (3) Petitioner was sentenced to serve one

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[1] In this decision, I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

to three years in a New York State Correctional Facility.

Petitioner requested a hearing, and the case was assigned to me. I convened prehearing conferences by telephone on December 30, 1993 and March 7, 1994. During the conference calls, Petitioner contended that his penalty was excessive. At the first telephone conference call on December 30, Petitioner argued that it was a mitigating factor that he might never be incarcerated. At the March 7 conference call, Petitioner argued also that the mitigating factor found at 42 C.F.R. § 1001.102(c)(2) was present. Also during that conference, Petitioner stated that he had recently been incarcerated. Order and Notice of Hearing, dated January 7, 1994; Amended Prehearing Order & Ruling, dated March 17, 1994.

At the conference calls, the I.G. alleged that two more aggravating factors were applicable to Petitioner's case, in addition to the three that had been alleged in the Notice. The I.G. identified the two additional aggravating factors to be those found at 42 C.F.R. § 1001.102(b)(5) and (6). The I.G. argued that these aggravating factors warrant a substantial period of exclusion. The I.G. contended that no mitigating factors are present in this case. Id.

At the telephone conference call held on March 7, I issued an oral ruling concerning Petitioner's request to present witnesses at a hearing. I ruled that the testimony of Petitioner's proposed 30 character witnesses would not be relevant under the current federal regulations. I stated that I would allow Petitioner to submit affidavits from the 30 witnesses for the purpose of preserving Petitioner's rights on appeal. Petitioner agreed to submit affidavits in lieu of testimony. Additionally, I allowed Petitioner to submit affidavits or other proof concerning any of the aggravating or mitigating factors alleged or to establish the need for an in-person hearing. Amended Prehearing Order & Ruling, dated March 17, 1994.

At the March 7 conference call, the parties agreed to proceed on a documentary record. Id.

In January 1994, the I.G. filed a brief in support of her motion for summary disposition which was accompanied by proposed findings of fact and conclusions of law and 15 exhibits. In his response, filed in May 1994, Petitioner argued that his cooperation with authorities should be a mitigating factor. Petitioner filed four exhibits pertaining to his character and reputation. The I.G. filed a reply arguing that Petitioner did not cooperate

within the meaning of the current regulations and that character evidence is irrelevant.

ADMISSIONS

Petitioner admits that (1) he was "convicted" of a criminal offense; (2) his conviction related to the delivery of an item or service under Medicaid; and (3) he is subject to a five-year minimum mandatory exclusion. Order and Notice of Hearing, dated January 7, 1994; Amended Prehearing Order & Ruling, dated March 17, 1994.

In addition, Petitioner admits that the following three aggravating factors are present in this case: (1) the acts resulting in Petitioner's conviction resulted in a financial loss to Medicaid of $1500 or more (42 C.F.R. § 1001.102(b)(1)); (2) the sentence imposed by the court included incarceration (42 C.F.R. § 1001.102(b)(4)); and (3) Petitioner was overpaid a total of $1500 or more by Medicare or State health care programs as a result of improper billings (42 C.F.R. § 1001.102(b)(6)). Id.

EXHIBITS

At the March 7 telephone conference call, Petitioner expressed specific objections to I.G. Exhibits (I.G. Ex.) 3, 5, 9, 10, and 12. I overruled Petitioner's objections and admitted I.G. Ex. 3, 5, 9, 10, and 12. Petitioner stipulated to the admission of the remaining I.G. exhibits. Accordingly, I admitted also I.G. Ex. 1, 2, 4, 6, 7, 8, 11, 13, 14, and 15 into evidence.

Petitioner submitted four exhibits with his response. I admit Petitioner's Exhibits (P. Ex.) 1-4 into evidence.

ISSUE

Whether the ten-year exclusion directed and imposed against Petitioner by the I.G. is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCL)[2]

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:

1. At all times relevant to this case, Petitioner was a medical doctor with a specialty in radiology licensed to practice in New York State (NYS). I.G. Ex. 2, 3, 10.

2. By letter dated September 12, 1990, the NYS Department of Social Services (DSS) excluded Petitioner from NYS Medicaid for five years. I.G. Ex. 1.

3. Petitioner was ordered to pay restitution to NYS Medicaid in the amount of $608,333 plus interest. I.G. Ex. 1.

4. Petitioner was excluded from NYS Medicaid because of his filing of false Medicaid claims, his unacceptable recordkeeping, and his furnishing excessive services during the period March 1988 through February 1989. I.G. Ex. 1.

5. In 1991, Petitioner was indicted by a grand jury of Queens County, New York, on one count of grand larceny in the first degree and 24 counts of offering a false instrument for filing in the first degree. I.G. Ex. 2-4.

6. According to the indictment, NYS Medicaid paid Petitioner more than one million dollars to which he was not entitled based on his knowing submission of false reimbursement claims. I.G. Ex. 2, 3.

7. According to the indictment, the alleged offenses committed by Petitioner took place from on or about March 1, 1988 to on or about February 12, 1990. I.G. Ex. 2.

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[2] The parties' briefs will be cited as follows:

I.G.'s Brief	I.G. Br. at (page)
Petitioner's Brief	P. Br. at (page)
I.G.'s Reply Brief	I.G. R. Br. at (page)

8. On October 28, 1992, Petitioner, with the assistance of counsel, entered into a plea bargain agreement; Petitioner pled guilty to one "C" felony count of grand larceny in the second degree, in full satisfaction of the 25-count indictment. I.G. Ex. 5, 6, 8; Order and Notice of Hearing, dated January 7, 1994; Amended Prehearing Order & Ruling, dated March 17, 1994; see I.G. Ex. 10.

9. In pleading guilty to the grand larceny count, Petitioner admitted that he had knowingly submitted false claims to NYS Medicaid during the period March 1, 1988 to February 12, 1990. I.G. Ex. 5, 6, 8.

10. In pleading guilty, Petitioner admitted that he knowingly and illegally received over $50,000 from NYS Medicaid during the period March 1, 1988 to February 12, 1990. I.G. Ex. 5, 6.

11. Pursuant to the plea agreement, Petitioner agreed to provide NYS with a confession of judgment in the amount of $500,000 as restitution to NYS Medicaid. I.G. Ex. 5, 6, 8; see I.G. Ex. 10.

12. On April 9, 1993, the court sentenced Petitioner to a prison term of one to three years; the court stayed Petitioner's incarceration pending appeal. I.G. Ex. 5, 9; see I.G. Ex. 10.

13. On April 9, 1993, Petitioner provided NYS with a signed confession of judgment in the amount of $500,000. I.G. Ex. 5, 8, 9.

14. Petitioner has not paid NYS any part of the $500,000 restitution amount. I.G. Ex. 5, 9, 12.

15. Petitioner appealed his sentence and made a motion for a reduced sentence. I.G. Ex. 5, 11.

16. The Office of the New York State Special Prosecutor for Medicaid Fraud Control ("Special Prosecutor") opposed Petitioner's motion for a reduced sentence. I.G. Ex. 5, 12.

17. By decision and order dated December 6, 1993, the New York State Supreme Court, Appellate Division: Second Department, affirmed Petitioner's sentence. I.G. Ex. 13.

18. On January 25, 1994, Petitioner was ordered to begin his prison sentence on February 28, 1994. I.G. Ex. 5.

19. By letter dated October 15, 1993, the I.G. notified Petitioner that he was being excluded pursuant to

sections 1128(a) and 1128(c)(3)(B) of the Act for a period of ten years, based on his conviction of a criminal offense related to the delivery of an item or service under the Medicaid program.

20. By letter dated December 13, 1993, Petitioner requested a hearing to contest his exclusion.

21. 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).

22. The I.G. had authority to impose and direct an exclusion against Petitioner pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act. FFCL 1-21.

23. The regulations published on January 29, 1992 include criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act. 42 C.F.R. §§ 1001.101, 1001.102.

24. On January 22, 1993, the Secretary published a regulation which directs that the criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to section 1128 of the Act are binding also upon administrative law judges, appellate panels of the Departmental Appeals Board, 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).

25. My adjudication of the length of the exclusion in this case is governed by the criteria contained in 42 C.F.R. §§ 1001.101 and §§ 1001.102. FFCL 23, 24.

26. 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(a).

27. 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(b), (c).

28. 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 and 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 or more program beneficiaries or other individuals.

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

29. 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).

30. In evaluating the reasonableness of the ten-year exclusion, it is necessary to weigh the evidence relevant

to the aggravating and mitigating factors enumerated in the regulations in a manner that is consistent with the goals of the Act.

31. On January 13, 1994, Petitioner, with counsel, met with the Special Assistant Attorney General, Special Prosecutor's office. I.G. Ex. 5.

32. Petitioner admitted that the information he gave to the Special Prosecutor's office in the meeting of January 13, 1994, did not result in the conviction, exclusion, or imposition of civil monetary penalties upon others. P. Br. at 1; I.G. Ex. 5.

33. The mitigating factor of cooperation listed at 42 C.F.R. § 1001.102(c)(3) has not been proven by Petitioner in this case. FFCL 32.

34. There is no evidence that, as 42 C.F.R. § 1001.102(c)(2) requires, the criminal court made a finding on the record, that before or during the commission of his crimes, Petitioner suffered from a mental, emotional, or physical condition that reduced his culpability. I.G. Ex. 5, 6, 9, 15.

35. The mitigating factor listed at 42 C.F.R. § 1001.102(c)(1), is not present in this case. FFCL 34.

36. Petitioner was convicted of a criminal 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. FFCL 5-18; Order and Notice of Hearing, dated January 7, 1994; Amended Prehearing Order & Ruling, dated March 17, 1994.

37. Petitioner is subject to an exclusion of at least five years. Act, sections 1128(a)(1), 1128(c)(3)(B); FFCL 36.

38. Petitioner has admitted that the aggravating factor listed at 42 C.F.R. § 1001.102(b)(1) is present. Order and Notice of Hearing, dated January 7, 1994; Amended Prehearing Order & Ruling, dated March 17, 1994.

39. Petitioner has admitted that the aggravating factor listed at 42 C.F.R. § 1001.102(b)(4) is present. Amended Prehearing Order & Ruling, dated March 17, 1994.

40. Petitioner has admitted that the aggravating factor listed at 42 C.F.R. § 1001.102(b)(6) is present. Amended Prehearing Order & Ruling, dated March 17, 1994.

41. The crimes which Petitioner perpetrated against NYS Medicaid were committed during the period March 1, 1988 to February 12, 1990. FFCL 4, 7, 9, 10.

42. That the criminal conduct for which Petitioner was convicted was committed over a period exceeding one year is an aggravating factor that justifies excluding Petitioner for more than five years. FFCL 41; 42 C.F.R. § 1001.102(b)(2).

43. The sanction imposed upon Petitioner by NYS DSS in September 1990, which consisted of exclusion from Medicaid and the requirement to pay restitution of $608,333 plus interest, constitutes a prior administrative sanction. FFCL 2-4.

44. Petitioner's prior administrative sanction record is an aggravating factor that justifies excluding Petitioner for more than five years. FFCL 43; 42 C.F.R. § 1001.102(b)(5).

45. A remedial purpose of section 1128 of the Act is to protect the integrity of federally-funded health care programs and the welfare of beneficiaries and recipients of such programs from individuals and entities who have been shown to be untrustworthy. See S. Rep. No. 109, 100th Cong., 1st Sess. 1 (1987), reprinted in 1987 U.S.C.C.A.N. 682.

46. The aggravating factors specified at 42 C.F.R. §§ 1001.102(b)(1), (2), (4), (5), and (6) are present in this case. FFCL 38-40, 42, 44.

47. The aggravating factors present in this case establish that Petitioner committed serious criminal offenses which damaged the integrity of federally-financed health care programs. FFCL 46.

48. The aggravating factors present in this case establish Petitioner to be a threat to the integrity of federally-financed health care programs. FFCL 46, 47.

49. Petitioner did not prove the presence of any mitigating factors which may be used as a basis for offsetting aggravating factors. FFCL 33-35; 42 C.F.R. § 1001.102(c)(1) - (3).

50. In the absence of any offsetting mitigating factors, the aggravating factors present in this case justify excluding Petitioner for more than five years. FFCL 46, 49; 42 C.F.R. § 1001.102(b)(1)-(2), (4)-(6).

51. The aggravating factors present in this case establish that a ten-year exclusion is reasonable to satisfy the remedial purposes of the Act. FFCL 27-30, 46.

DISCUSSION

Petitioner admitted that he 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. Admissions supra p.3. In addition, Petitioner does not dispute that the Act requires that he be excluded for a minimum of five years, based on his conviction of a program-related offense. Id.

Petitioner's criminal conduct involved falsely billing Medicaid in a sonogram fraud scheme. Between 1988 and 1990, Petitioner knowingly and illegally received large sums of money from NYS Medicaid through this scheme. FFCL 3, 4, 6, 10, 11, 13. Pursuant to the plea agreement, Petitioner agreed to pay restitution of $500,000 to NYS Medicaid. FFCL 11, 13. Petitioner has failed to pay NYS one cent of the $500,000 restitution amount. FFCL 14.[3]

The I.G.'s exclusion of Petitioner for ten years is reasonable for the following reasons.

I. In evaluating the reasonableness of the ten-year exclusion, I must weigh the evidence relevant to the aggravating and mitigating factors enumerated in the regulations in light of the goals of the Act.

My adjudication of the reasonableness of the length of the exclusion in this case is governed by the criteria contained in the Secretary's implementing regulations that were initially published on January 29, 1992 and subsequently clarified on January 22, 1993. 42 C.F.R. Part 1001; 42 C.F.R. § 1001.1(b). The I.G. contends that a ten-year exclusion is reasonable pursuant to the criteria for determining the length of exclusions contained in the regulations. Petitioner contends that the ten-year exclusion imposed by the I.G. is excessive.

As I stated in Paul G. Klein, D.P.M., DAB CR317 (1994), the regulations governing exclusions imposed pursuant to section 1128(a)(1) of the Act are contained in 42 C.F.R.

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[3] In 1992, Petitioner filed for bankruptcy. I.G. Ex. 5, 9.

§§ 1001.101 and 1001.102. The standard for adjudication contained in the regulations mandates that, in cases of exclusions imposed pursuant to section 1128(a)(1), the minimum exclusion imposed must be for no less than five years. The regulations incorporate the minimum exclusion period mandated by section 1128(c)(3)(B) of the Act for exclusions imposed pursuant to section 1128(a)(1). In addition, the regulations provide that, in appropriate cases, exclusions imposed pursuant to section 1128(a)(1) may be for more than five years. Such exclusions may be appropriate where there exist aggravating factors (identified by 42 C.F.R. § 1001.102(b)) that support a lengthening of the exclusion while taking into consideration any mitigating factors which might be present (identified by 42 C.F.R. § 1001.102(c)).

The regulations specifically identify those factors which may be classified as aggravating and those factors which may be classified as mitigating. Under the regulatory scheme, evidence which relates to factors which are not among those specified as aggravating and mitigating is not relevant to adjudicating the length of an exclusion and cannot be considered.[4]

Section 1128 of the Act is a civil statute and Congress intended it to be remedial in application. The remedial purpose of the exclusion law is to protect the integrity of federally financed health care programs and the welfare of the programs' beneficiaries and recipients. The exclusion law is intended to protect program funds and beneficiaries and recipients from providers who have demonstrated by their conduct that they pose a threat to the integrity of such funds, or to 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. In view of the fact that the regulations' intent is to implement the Act's remedial purpose, I must decide, using the regulatory factors, whether an exclusion is reasonably necessary to protect the integrity of federally-financed health care programs and the welfare of the programs' beneficiaries and recipients. William F. Middleton, DAB CR297, at 8 (1993) (appellate panel declined review, Feb. 7, 1993).

My authority in hearing and deciding cases pursuant to section 1128 of the Act remains de novo. See section 205(b) of the Act as incorporated by section 1128(f) of

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[4] I describe the permissible aggravating factors in FFCL 28. I describe the permissible mitigating factors in FFCL 29.

the Act; 42 C.F.R. § 1005.20. I am not charged with an appellate review of the I.G.'s actions, nor am I directed to conduct an inquiry as to whether the I.G.'s agent has discharged his or her duty competently in a particular case. The purpose of my inquiry is not to determine how accurately the I.G. applied the law to the evidence which was before the I.G. Instead, the purpose of my inquiry is to evaluate the reasonableness of the exclusion de novo. Klein, DAB CR317, at 11.

II. The aggravating factors present in this case are a basis for lengthening the period of exclusion beyond the minimum period of five years.

In the present case, the I.G. contends that the following five aggravating factors are present in this case: (1) Petitioner was convicted of a program-related offense involving a financial loss to the Medicaid program in an amount greater than or equal to $1500 within the meaning of 42 C.F.R. § 1001.102(b)(1); (2) the crimes engaged in by Petitioner were perpetrated by him over a period of one year or more within the meaning of 42 C.F.R. § 1001.102(b)(2); (3) Petitioner's sentence included a period of incarceration within the meaning of 42 C.F.R. § 1001.102(b)(4); (4) Petitioner has a prior administrative sanction record within the meaning of 42 C.F.R. § 1001.102(b)(5); and (5) Petitioner was overpaid a total of $1500 or more by Medicaid as a result of improper billings within the meaning of 42 C.F.R. § 1001.102(b)(6).[5]

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[5] The Notice mentioned only three of these aggravating factors. The Notice referred to the financial damage caused by Petitioner's crimes, the duration of his criminal activity, and his prison sentence, but it did not mention Petitioner's prior administrative sanction or that Petitioner was overpaid $1500 or more by Medicaid as a result of improper billings. I have accepted evidence concerning the latter two factors even though they were not mentioned in the Notice because my authority to hear and decide this case is de novo. Additionally, the I.G. provided Petitioner adequate notice by asserting these additional factors to be aggravating factors during the prehearing conference calls held on December 30, 1993 and on March 7, 1994. The I.G. argued also that these aggravating factors were applicable to this case in her brief in support of her motion for summary disposition. Petitioner was given ample opportunity to rebut the evidence and arguments which the I.G. made pertaining to these factors.

Petitioner admitted that the aggravating factors listed at 42 C.F.R. § 1001.102(b)(1), (4), and (6) are present in this case. FFCL 38-40. Since the existence of these three aggravating factors is undisputed, it is possible to lengthen the period of exclusion beyond the minimum five-year period. In addition, I find that the I.G. has proved the existence of the other two aggravating factors alleged, listed at 42 C.F.R. § 1001.102(b)(2) and (5).

In pleading guilty to the grand larceny count, Petitioner admitted that he had knowingly submitted false claims to NYS Medicaid during the period March 1, 1988 to February 12, 1990. FFCL 9. Petitioner admitted also that he knowingly and illegally received over $50,000 from NYS Medicaid during March 1, 1988 to February 12, 1990. FFCL 10. Thus, by his own admission, Petitioner engaged in a scheme against NYS Medicaid which spanned a period of almost two years. Accordingly, the second aggravating factor cited by the I.G., that Petitioner's criminal activity last a year or more, has been met. FFCL 41, 42; 42 C.F.R. § 1001.102(b)(2).

In addition, the fourth aggravating factor cited by the I.G., that there exists a prior administrative sanction record, is met in this case. 42 C.F.R. § 1001.102(b)(5). By letter dated September 12, 1990, the NYS DSS excluded Petitioner from NYS Medicaid for five years. FFCL 2. Petitioner was ordered to pay restitution to NYS Medicaid in the amount of $608,333 plus interest. FFCL 3. According to the letter, Petitioner was excluded from NYS Medicaid because of his filing of false Medicaid claims, his unacceptable recordkeeping, and his furnishing excessive services during the period March 1988 through February 1989. FFCL 4. This sanction imposed upon Petitioner by NYS DSS, which occurred approximately three years prior to the I.G.'s exclusion of Petitioner, constitutes a prior administrative sanction of Petitioner even though it arose out of basically the same set of circumstances cited by the I.G. FFCL 43. Thus, the aggravating factor set forth at 42 C.F.R. § 1001.102(b)(5) has been satisfied. FFCL 44.

The weight of the five aforementioned aggravating factors, singly and together, establishes Petitioner to be a highly untrustworthy individual. Through his deliberate, larcenous actions in filing numerous false Medicaid claims over almost two years, Petitioner cost the Medicaid program an enormous sum of money.

The presence of the aggravating factors listed at 42 C.F.R. § 1001.102(b)(1), (2), (4)-(6) in this case leads to the conclusion that Petitioner has been and remains

capable of engaging in criminal misconduct that causes great damage to the financial integrity of the Medicaid program. As I have stated before, the purpose of the exclusion law is to protect public health funds from unscrupulous providers. In view of the foregoing, I conclude that absent any mitigating evidence, the minimum five-year exclusion is not sufficient to protect the federally-financed health care programs in this case. The aggravating factors present in this case justify an exclusion substantially longer than five years.

III. There are no mitigating factors present in this case.

The regulatory scheme which governs this case provides that only if there are aggravating factors which justify an exclusion longer than five years may mitigating factors be considered as a basis for reducing the period of exclusion to no less than five years. Only the mitigating factors identified by the regulations may be considered to reduce the period of exclusion. FFCL 29; 42 C.F.R. § 1001.102(c). Since the aggravating factors in this case justify an exclusion substantially longer than five years, the specified mitigating factors, if present, may be considered.

Petitioner contends that the ten-year exclusion imposed by the I.G. is "excessive and unreasonable", and that I should consider Petitioner's cooperation with the Special Prosecutor's office as a mitigating factor. P. Br. at 1. As set forth at 42 C.F.R. § 1001.102(c)(3), it is a mitigating factor when:

> 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.

Petitioner, with counsel, met with the Special Assistant Attorney General, Special Prosecutor's office, on January 13, 1994. FFCL 31. Petitioner admitted that the information he gave the Special Prosecutor's office in that meeting did not result in the conviction, exclusion, or imposition of civil monetary penalties upon others. FFCL 32. Petitioner contends, however, that he cooperated "to the best of his abilities." P. Br. at 2.

I find that Petitioner's cooperation has failed to satisfy the requirements of 42 C.F.R. § 1001.102(c)(3). By his own admission, Petitioner acknowledged that any

information he gave to the Special Prosecutor's office did not lead to the conviction or exclusion of others, as required by the regulation. Additionally, in his affidavit of January 1994, the Special Assistant Attorney General unequivocally stated that Petitioner never cooperated with his office during the criminal investigation, prosecution, and appeal. I.G. Ex. 5. It was only after the Appellate Division affirmed Petitioner's sentence that Petitioner sought a meeting with the Special Assistant Attorney General. In his affidavit, the Special Assistant Attorney General stated that the information given by Petitioner "has not led" and "[would] not lead" to others being convicted or excluded. Id. at 4. The mitigating factor listed at 42 C.F.R. § 1001.102(c)(3) thus does not exist in this case. FFCL 33.

Petitioner has submitted evidence relating to his character and reputation, contending that such evidence should be viewed as mitigating.[6] However, such general character evidence does not fall within the parameters of any of the three mitigating factors set forth in the regulations. Under the regulatory scheme, such evidence is not relevant to my adjudication of the length of Petitioner's exclusion and cannot be considered. Even if I were to consider such character evidence as relevant and probative, which I do not, Petitioner's submission of character evidence is a weak attempt to minimize his highly egregious acts against NYS Medicaid. In the face

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[6] During the March 7, 1994 prehearing conference call, Petitioner alleged the presence of the mitigating factor listed at 42 C.F.R. § 1001.102(c)(2), citing his physical condition. Petitioner, however, acknowledged that the State court judge had not specifically found that Petitioner's physical condition reduced his culpability. Amended Prehearing Order & Ruling, dated March 17, 1994. Petitioner did not address this factor further in his written brief. I find that this mitigating factor is not met in this case. There is no evidence that, as 42 C.F.R. § 1001.102(c)(2) requires, the criminal court made a finding on the record, that before or during the commission of his crimes, Petitioner suffered from a mental, emotional, or physical condition that reduced his culpability. FFCL 34.

Petitioner does not contend that the other mitigating factor, listed at 42 C.F.R. § 1001.102(c)(1), is present in this case, and the evidence shows that it is not present. FFCL 35.

of the evidence submitted by the I.G., Petitioner's submission of character evidence is akin to placing a handful of feathers on one side of a scale and hoping it will balance a boulder on the opposite side of the scale.

In view of the foregoing, the evidence of record fails to show that there is even one mitigating factor present in this case. FFCL 49.

IV. A ten-year exclusion is reasonable.

Petitioner, in pleading guilty to grand larceny, admitted that he knowingly and illegally received over $50,000 from NYS Medicaid during March 1988 to February 1990. As part of his plea agreement, Petitioner provided NYS with a signed confession of judgment in the amount of $500,000 as restitution, of which he has not paid one cent. FFCL 13, 14. The court sentenced Petitioner to a term of incarceration of one to three years. FFCL 12. Prior to the I.G.'s exclusion, Petitioner had an administrative sanction imposed against him by the NYS DSS, which consisted of exclusion from NYS Medicaid for five years and the requirement that he pay restitution to NYS Medicaid in the amount of $608,333 plus interest.

The multiple aggravating factors present in this case, combined with their severity, establish that Petitioner has been and remains a threat to the integrity of federally-financed health care programs. FFCL 48. By any standard, the criminal conduct for which Petitioner was convicted is serious. Petitioner's crimes were committed as part of a long-term scheme to defraud Medicaid, and the crimes resulted in an enormous sum of money being fraudulently obtained from Medicaid. Petitioner has failed to show that there is even one mitigating factor present in this case. In the absence of any offsetting mitigating factors, the aggravating factors present in this case establish that a ten-year exclusion is reasonable to satisfy the remedial purposes of the Act.[7] FFCL 50, 51. The ten-year exclusion imposed and directed against Petitioner by the I.G. must stand.

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[7] I find that the three aggravating factors conceded by Petitioner alone warrant a ten-year period of exclusion.

CONCLUSION

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

It is so Ordered.

/s/

Charles E. Stratton
Administrative Law Judge