Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Sudhir Kumar, Ph.D.,	DATE: August 17, 1994
Petitioner,	Docket No. C-94-029 Decision No. CR328
- v. -	
The Inspector General.	

DECISION

By letter dated September 9, 1993, the Inspector General (I.G.) notified Petitioner that, effective September 29, 1994, he was 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. The I.G. further informed Petitioner that she was taking these actions because Petitioner had been "convicted," within the meaning of section 1128(i) of the Social Security Act (Act), of a criminal offense related to the Medicaid program.[1] The I.G. stated that section 1128(a)(1) provides for a mandatory minimum five year exclusion and that, due to the presence of certain aggravating factors, she had decided to exclude Petitioner for a period of ten years. By letter dated November 10, 1993, Petitioner requested a hearing to contest his exclusion and the case was subsequently assigned to me for hearing and decision.

[1] The State health care programs from which Petitioner was excluded are defined in section 1128(h) of the Act and include the Medicaid program under Title XIX of the Social Security Act. Unless the context indicates otherwise, I use the term "Medicaid" here to refer to all State health care programs listed in section 1128(h).

I have considered all of the evidence and argument of record[2] by the parties and have concluded that the ten year exclusion imposed and directed against Petitioner by the I.G. is reasonable.

ISSUE

Petitioner has 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) and that, based on his conviction, he is subject to a minimum mandatory five year exclusion. Therefore, the only issue in this case is whether the ten year exclusion directed and imposed against Petitioner is reasonable.

BACKGROUND

I conducted a prehearing conference on December 15, 1993. At the conference, Petitioner, representing himself, conceded that his criminal conviction was program related and that he was subject to a mandatory minimum five year exclusion under section 1128(a)(1) of the Act. However, Petitioner contested the reasonableness of the additional five years of exclusion that the I.G. had imposed and directed against him. Petitioner requested a continuance to undertake settlement negotiations with the I.G. and to become familiar with the applicable regulations. The I.G. had no objection to Petitioner's request for a continuance. Therefore, I granted the request.

I conducted a second prehearing conference on January 28, 1994. The parties informed me at that time that they wanted to proceed with a hearing on the record. Petitioner stated that he did not desire an in-person hearing, but rather wanted to present his evidence and arguments to me in writing. The I.G. reiterated her position that Petitioner had been excluded for the mandatory minimum five years because he had been convicted of a criminal offense related to the delivery

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[2] By argument of record, I mean all of the argument contained in the parties' briefs as well as all of the argument that the parties made at the June 22, 1994 oral argument.

I have admitted into evidence all exhibits offered by the parties, with the exception of those I identify in this Decision as being excluded.

of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. The I.G. further stated that she had decided to exclude Petitioner for ten years based on the presence of various aggravating factors listed in 42 C.F.R. § 1001.102(b).[3]

Petitioner agreed with the I.G.'s representation that none of the mitigating factors contained at 42 C.F.R. § 1001.102(c) is present in this case.

I granted Petitioner's motion to proceed on a written record. My prehearing Order of February 7, 1994 established the procedures and deadlines for the parties to submit their briefs along with any documentary evidence as proposed exhibits. The I.G. timely filed her initial brief and proposed exhibits.

On March 14, 1994, two days after Petitioner was to have submitted his brief and proposed exhibits, Petitioner contacted my office and requested an extension for the filing of his brief and proposed exhibits. The I.G. did not object to Petitioner's request. In my letter of March 14, 1994, I granted Petitioner an extension until April 8 to file his initial brief and proposed exhibits. I also directed the parties to file response briefs by April 29, and I allowed the parties until May 6 to request oral argument.

On April 5, 1994, Petitioner timely filed his initial brief and proposed exhibits. The parties then timely filed their response briefs as well. However, Petitioner submitted additional proposed exhibits with his response brief dated April 25, 1994, and, on May 12, 1994, Petitioner submitted additional proposed exhibits accompanied by his written arguments entitled "Request for Leave to Submit of [sic] Additional Documentary Evidence and Clarification of Documents Already Submitted." In his response brief, Petitioner asserted that the additional proposed exhibits had not been available to him when he filed his initial brief. The I.G. moved to strike Petitioner's response brief, the additional exhibits submitted by Petitioner on April 25

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[3] As I noted during the conference, the I.G. did not refer to Petitioner's sanction record as an aggravating factor in her notice letter dated September 9, 1993. During the conference, the I.G. asserted Petitioner's sanction record as an aggravating factor in support of the reasonableness of a ten year exclusion. I find, therefore, that Petitioner received notice of this aggravating factor. 42 C.F.R. § 1005.15(f).

and May 12, and Petitioner's motion dated May 12, 1994. I deferred ruling on the I.G.'s motion until this Decision.

Ruling on the parties' cross-motions on the written arguments and submissions Petitioner filed on and after April 25, 1994

As a preliminary matter, I must rule on the parties' pending cross-motions. I construe Petitioner's May 12 motion for leave to submit additional documentary evidence as a motion for me to admit and consider all of the proposed exhibits he submitted on April 25 and on May 12, as well as a motion for me to consider the additional arguments contained in his May 12 motion. As earlier noted, the I.G. has moved to strike all filings made by Petitioner on and after April 25, 1994.

For the following reasons, I deny the I.G.'s motion to strike Petitioner's April 25 response brief, and I deny Petitioner's motion in its entirety.

Petitioner timely filed his response brief under my Order dated March 12, 1994. Petitioner is entitled to have me consider the merits of the arguments he has set forth in said brief. Therefore, I deny the portion of the I.G.'s motion seeking to strike Petitioner's response brief.

However, I grant the remainder of the I.G.'s motion to the extent it seeks to exclude from the record those documents Petitioner submitted on April 25 and May 12, as well as the additional arguments Petitioner filed on May 12.

First, the additional proposed exhibits filed by Petitioner on April 25 and May 12 were not timely submitted and not authorized by my February 7 Order. Likewise, Petitioner's additional arguments and clarifications dated May 12 were also not timely submitted and not authorized by my scheduling order. In my February 7 Order, I established deadlines to enable both parties to explain their positions fully and expeditiously for the record. I did so after considering the parties' suggestions at the prehearing conferences. At no time did Petitioner indicate that he might have difficulty submitting his evidence or arguments on time. The additional documents and arguments in issue relate to matters contained in Petitioner's initial brief. As such, they should have been offered with Petitioner's initial brief and not thereafter. Petitioner failed to make his submissions in accordance with my scheduling order even after I had granted him a substantial

extension of time after his initial deadline had elapsed.

More importantly, I find that the proposed exhibits Petitioner filed untimely on April 25 and May 12 are not probative or relevant to the issue before me: i.e., whether the length of the exclusion is reasonable. Even if they had been submitted by Petitioner on time, I would not have admitted them into evidence or accorded weight to arguments concerning them. I will discuss the contents of each proffered document in turn.

P. Ex. 3[4] is a four page exhibit containing a copy of an April 15, 1991 letter from Petitioner to the Illinois Department of Public Aid and a return receipt for that letter.[5] In the letter, Petitioner asserted that his laboratory had found a number of incorrect bills to the Illinois Department of Public Aid and requested guidance on correcting the mistakes. The remaining two pages of P. Ex. 3 are a fax cover sheet and a copy of a phone bill, which were probably included to show that Petitioner faxed the letter to the Illinois Department of Public Aid on April 15, 1991.

Petitioner submitted P. Ex. 3 without any proof as to the context in which the letter was written. There is nothing contained in any of Petitioner's submissions to indicate that the "mistakes" referenced in the letter

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[4] Petitioner's April 25, 1994 submission contained several documents which were labelled collectively by Petitioner as "Exhibit A." I have revised the markings and numbered the exhibits consecutively as Petitioner's Exhibit 3 (P. Ex. 3) and P. Ex. 4.

[5] I refer to the parties' exhibits, the transcript of the oral argument, and my findings of fact and conclusions of law as follows:

Petitioner's Exhibit . . . . . P. Ex. (number)
I.G.'s Exhibit . . . . . I.G. Ex. (number)
Transcript of Oral Argument . . . . . Tr. at (page)
My Findings of Fact and Conclusions of Law . . Findings (number)
Petitioner's Brief . . . . . P. Br. at (page)
I.G.'s Brief . . . . . I.G. Br. at (page)

related to any of the billings that formed the basis for Petitioner's criminal conviction. Moreover, the issue of Petitioner's intent to submit false billings is not before me. Petitioner's intent to commit a crime should have been litigated at Petitioner's criminal proceedings. Although I recognize that Petitioner, in pleading guilty to the charge of submitting false billings, may have been precluded from offering any evidence with regard to his intent, the fact remains that Petitioner did plead guilty to the offense of submitting false billings. Therefore, Petitioner's argument that he did not intend to submit false billings amounts to a collateral attack upon his conviction in these proceedings.

It is well settled that an excluded individual may not utilize these administrative proceedings to collaterally attack or relitigate his conviction. Ernest Valle, DAB CR309 (1993) at 12; Peter J. Edmonson, DAB 1330 (1992) at 4; Richard G. Philips, D.P.M., DAB CR133 (1991), aff'd, DAB 1279 (1991). Even if P. Ex. 3 constituted irrefutable proof that the billing discrepancies that resulted in Petitioner's conviction were generated by computer error as alleged in his letter, this proof does not vitiate the fact that Petitioner was convicted of a program related crime. The asserted error is not among the mitigating factors that I can consider in determining the reasonableness of the exclusion period. 42 C.F.R. § 1001.102(c). Accordingly, with respect to P. Ex. 3, I grant the relevant portion of the I.G.'s motion, deny Petitioner's motion, and, in doing so, reject this proposed exhibit.

P. Ex. 4 is a copy of a one page letter dated October 16, 1990 from Petitioner to the Illinois Department of Public Aid. In the letter, Petitioner stated that his laboratory had submitted incorrect bills for services performed from October 1, 1990 to October 6, 1990, and he requested that all bills submitted for this period be cancelled. I find this document irrelevant and lacking in probative value for the same reasons I stated for P. Ex. 3. Accordingly, with respect to P. Ex. 4, I grant the relevant portion of the I.G.'s motion, deny Petitioner's motion, and, in doing so, reject this proposed exhibit.

P. Ex. 5 and P. Ex. 6 each contain three pages of computer printouts, filed untimely by Petitioner on May 12, 1994. In his motion for leave to file these two proposed exhibits, Petitioner states that he only recently obtained them. Petitioner argues that these documents show that errors in the computer program caused the submission of incorrect invoices to the Illinois

Department of Public Aid. No independent analysis of the computer data accompanied these proposed exhibits to support Petitioner's arguments that the computer program was defective. Nothing of record shows whether Petitioner was convicted of acts related to his use of the computer program. Moreover, Petitioner's reliance on such proposed exhibits amounts to a collateral attack upon his conviction. As I stated earlier, it is well established that Petitioner may not use these proceedings to collaterally attack his conviction. I find also that P. Ex. 5 and P. Ex. 6 are not relevant to any issue before me. Accordingly, I deny Petitioner's motion to admit P. Ex. 5 and P. Ex. 6, and, in doing so, reject these proposed exhibits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant to this Decision, Petitioner was president and director of Clinical Regional Laboratory (Clinical). I.G. Ex. 2, 3.

2. On August 27, 1991, Petitioner and Clinical were each indicted on one count of fraud and one count of theft. I.G. Ex. 1.

3. Count I of the indictment charged that, from on or about January 1990 to on or about May 1991, Petitioner and Clinical committed the criminal offense of vendor fraud, specifically, knowingly causing fraudulent billing invoices for Medicaid laboratory services to be submitted, resulting in the receipt of more than $10,000 in Medicaid payments to which they were not entitled. I.G. Ex. 1.

4. Count II of the Indictment charged that, from on or about January 1990 to on or about May 1991, Petitioner and Clinical committed the criminal offense of theft, specifically, knowingly and with intent to permanently deprive, obtaining control of payments from the Illinois Department of Public Aid in an amount over $100,000. I.G. Ex. 1.

5. On July 31, 1992, Petitioner pled guilty to vendor fraud, as charged in Count I of the indictment. I.G. Ex. 1, 4.

6. In pleading guilty to the vendor fraud charge, Petitioner admitted that he knowingly caused fraudulent invoices to be submitted for Medicaid laboratory services. I.G. Ex. 1, 4; Petitioner's November 15, 1993 request for hearing.

7. Petitioner was sentenced to incarceration for a period of four years and was ordered to pay $480,000 in restitution. I.G. Ex. 4.

8. When an individual has been convicted of a criminal offense related to the delivery of an item or service under Medicaid, the individual must be excluded from participation in the Medicare and Medicaid programs for a period of not less than five years. Sections 1128(a)(1), (c)(3) of the Act.

9. The Secretary of Health and Human Services (Secretary) has been charged with the responsibility for implementing the statutory provisions for excluding individuals from participation in the Medicare and Medicaid programs. E.g., section 1128(a) of the Act.

10. The 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).

11. An individual is considered to have been "convicted" of a criminal offense when his guilty plea has been accepted by a court of competent jurisdiction. Section 1128(i)(3) of the Act.

12. The evidence does not establish that Petitioner was convicted of the offense of theft over $100,000, the charge contained in Count II of the indictment. See I.G. Ex. 1, 4.

13. Petitioner was convicted of vendor fraud, as charged in Count I of the indictment. I.G. Ex. 1, 4; Findings 3, 5, 11.

14. Petitioner was convicted of a criminal offense related to the delivery of a health care item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. Findings 1 - 13.

15. On September 12, 1986, in a separate matter, Petitioner pled guilty to a mail fraud charge. I.G. Ex. 5.

16. Based on his guilty plea to mail fraud, Petitioner was sentenced to incarceration for one year and one day and placed on probation for a period of one year, to run consecutively with his incarceration. I.G. Ex. 5.

17. By letter dated September 9, 1993, the I.G. notified Petitioner that, pursuant to sections 1128(a)(1) and

1128(c)(3)(B) of the Act, he was being excluded from participation in the Medicare and Medicaid programs for a period of ten years.

18. The regulations issued by the Secretary list the only mitigating and aggravating factors that may be considered in determining the length of an exclusion. 42 C.F.R. §§ 1001.101, 1001.102.

19. My adjudication of the length of the exclusion is governed by the contents of the regulations at 42 C.F.R. §§ 1001.101 and 1001.102, and I may not order the increase or decrease of any exclusion in controversy on the basis of a factor not listed in the regulations. See 58 Fed. Reg. 5617, 5618 (1993).

20. An exclusion imposed pursuant to section 1128(a)(1) of the Act may be for a period in excess of five years if the aggravating factors listed in the regulation are present and not offset by any listed mitigating factor in the case. 42 C.F.R. § 1001.102(b), (c).

21. In evaluating the reasonableness of the ten year exclusion directed and imposed against Petitioner, I must weigh the evidence relative to the aggravating and mitigating factors enumerated in the regulations in a manner that is consistent with the remedial goals of the Act. See Act, section 1102(a).

22. 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.

23. An aggravating factor exists in that the fraudulent activities for which Petitioner was convicted caused the Illinois Medicaid program to lose more than $10,000 in payments for clinical laboratory services not performed. 42 C.F.R. § 1001.102(b)(1); I.G. Ex. 1, 4; Findings 4, 13.

24. An aggravating factor exists in that the acts of fraud for which Petitioner was convicted took place over a period of more than one year. 42 C.F.R. § 1001.102(b)(2); I.G. Ex. 1, 4; Findings 3, 5.

25. An aggravating factor exists in that the sentence imposed upon Petitioner by the court included

incarceration for a period of four years. 42 C.F.R. § 1001.102(b)(4); I.G. Ex. 4; Finding 7.

26. An aggravating factor exists in that Petitioner has a prior conviction for mail fraud. 42 C.F.R. § 1001.102(b)(5); I.G. Ex. 5; Findings 15, 16.

27. An aggravating factor exists in that Petitioner has been overpaid more than $10,000 by the Illinois Medicaid agency as a result of his improper billing practices. 42 C.F.R. § 1001.102(b)(6); I.G. Ex. 1, 4; Findings 3, 5, 6.

28. The existence of aggravating factors in this case permits Petitioner to introduce evidence of the mitigating factors contained at 42 C.F.R. § 1001.102(c)(1) - (3). 42 C.F.R. § 1001.102(c)(1) - (3).

29. Petitioner has introduced evidence that he is currently undertaking medical research on the acquired immune deficiency syndrome (AIDS). P. Ex. 2.

30. Petitioner contends that he alerted the Illinois Department of Public Aid of the Medicaid billing errors, which resulted in his own conviction. Tr. at 7.

31. Petitioner's alleged reports to the Illinois Department of Public Aid did not result in the conviction of any other individual. Tr. at 7 - 8.

32. Petitioner has failed to establish the presence of any mitigating factor within the meaning of the regulations. 42 C.F.R. § 1001.102(c)(1) - (3); Findings 29 - 31.

33. The evidence and inferences relevant to the foregoing aggravating factors have probative weight on the issue of Petitioner's trustworthiness. Findings 21 - 26.

34. The remedial purposes of the Act will be served by excluding Petitioner for a period of ten years. Findings 1 - 33.

35. The ten year exclusion imposed and directed by the I.G. is reasonable in length. Findings 1 - 34.

ANALYSIS

A. The record establishes that Petitioner was convicted of only one program related offense.

Petitioner has admitted that he was convicted of a program related criminal offense within the meaning of section 1128(a)(1) of the Act. The I.G. argues, however, that Petitioner was convicted of two program related offenses. I.G. Br. at 2. I find that the evidence establishes Petitioner's conviction for only one program related offense.

The I.G. has submitted a copy of the indictment in which Petitioner was charged with two offenses. I.G. Ex. 1. Count I of the indictment charged Petitioner and his clinical laboratory[6] with vendor fraud involving an unspecified amount exceeding $10,000.[7] Count II of the indictment charged Petitioner and his clinical laboratory with theft.[8] The I.G. has also offered a copy of a

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[6] The record evidence does not disclose the outcome of the charge against the laboratory. In this case involving only the exclusion of Petitioner, I need not decide whether the laboratory was Petitioner's alter ego, because Petitioner, in his individual capacity, pled guilty to the charges contained in Count I of the indictment.

[7] The offense of vendor fraud is described in the indictment as "knowingly and willfully, by means of a fraudulent scheme and device . . . causing to be made billing invoices which falsely stated that a Medicaid Provider had performed certain clinical laboratory services for certain public aid recipients and others, when, in fact said services had not been provided . . ." I.G. Ex. 1.

[8] The offense of theft is described in the indictment as --

> knowingly, in furtherance of a single intention and design, to wit: to obtain money and/or property on behalf of Sudhir Kumar and/or Clinical Regional Laboratory, Inc., Medicaid Providers, by deception, obtained control over two or more payments from the State of Illinois, Illinois Department of Public Aid, said payments having a value in excess of one-hundred-thousand dollars, intending to deprive the owner permanently of the use and benefit of the money and/or property. I.G. Ex. 1.

document entitled "Certified Statement of Conviction." I.G. Ex. 4. This document shows that Petitioner pled guilty to the offense of "vendor fraud, etc." on July 31, 1992 and that judgment was entered on August 6, 1992. Petitioner was sentenced to four years incarceration and required to pay $480,000 in restitution.

In order for me to accept the I.G.'s contention that Petitioner was convicted of two program related offenses, I would need to construe the term "etc." in the "Certified Statement of Conviction" as referring to the theft charge. This I decline to do. It appears unlikely that in a document as important as a "Certified Statement of Conviction," no express reference would have been made to theft or Count II if Petitioner's guilty plea were of the scope described by the I.G. Moreover, for purposes of deciding whether the length of an exclusion is reasonable, I need not find that Petitioner was convicted of more than one program related offense. A prior conviction in a petitioner's criminal record is considered an aggravating factor and may justify lengthening an exclusion; however, an exclusion may not be lengthened merely because the individual was contemporaneously convicted of multiple program-related offenses. See, 42 C.F.R. § 1001.102(b).

Throughout these proceedings, Petitioner has admitted that he was convicted of a criminal offense within the meaning of section 1128(a)(1). The evidence submitted by the I.G., in conjunction with Petitioner's admission, shows that the vendor fraud specified in Count I was the program related offense to which Petitioner had pled guilty.

B. The aggravating factors present in this case justify lengthening the period of exclusion beyond the minimum five year period.

The controlling regulations for exclusions imposed pursuant to section 1128(a)(1) of the Act were codified at 42 C.F.R. § 1001.101 and 102. Both the Act and the regulations make clear that no exclusion imposed under section 1128(a)(1) may be for less than five years. The regulations further provide that, in appropriate cases, an exclusion imposed under section 1128(a)(1) may be for a period greater than five years when certain enumerated aggravating factors are present and not offset by any enumerated mitigating factors. 42 C.F.R. § 1001.102(b)(1) - (6), 42 C.F.R. § 1001.102(c)(1) - (3).

The regulations provide that six circumstances may be considered aggravating and a basis for lengthening the

term of Petitioner's exclusion beyond the five year mandatory period. 42 C.F.R. § 10001.102(b)(1) - (6). In this case, the I.G. has alleged and proven that the presence of five of those aggravating circumstances justify lengthening Petitioner's exclusion from five years to ten years:

> (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 (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 (42 C.F.R. § 1001.102(b)(2));
>
> (3) the sentence imposed by the court included a period of incarceration (42 C.F.R. § 1001.102(b)(4));
>
> (4) Petitioner has a prior criminal, civil or administrative sanction record (42 C.F.R. § 1001.102(b)(5)); and
>
> (5) Petitioner has been 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)).

The I.G. has not alleged, nor has she offered any evidence, that the acts that resulted in Petitioner's conviction, or similar acts, had a significant adverse physical, mental or financial impact on one or more program beneficiaries or other individuals within the meaning of 42 C.F.R. § 1001.102(b)(3).

The evidence shows that, in pleading guilty to the charge of vendor fraud, Petitioner admitted that he received payments to which he was not entitled from the Illinois State Medicaid agency in an amount exceeding $10,000. I.G. Ex. 1, 4; Petitioner's November 15, 1993 Request for Hearing. Therefore, the acts for which Petitioner was convicted, or similar acts, caused damage to the Medicaid program in excess of the $1500 threshold specified by the Secretary's regulations. Accordingly, I find that the I.G. has shown that the aggravating circumstance defined at 42 C.F.R. § 1001.102(b)(1) is present in this case.

Petitioner's guilty plea constitutes his admission that he knowingly and willfully caused false bills to be submitted, with the result that he or his laboratory received over $10,000 in Medicaid payments to which they

were not entitled. The admissions contained in Petitioner's guilty plea are highly probative of Petitioner's lack of trustworthiness. I have given them substantial weight in determining the reasonableness of the length of Petitioner's exclusion.

I find that Petitioner's lack of trustworthiness is further demonstrated by the fact that his criminal activities occurred over a period of more than one year, as shown by Petitioner's guilty plea to Count I of the indictment and the court's entry of judgment. I.G. Ex. 4. Count I charged that Petitioner committed the offense of vendor fraud from approximately January 1990 to approximately May 1991. I.G. Ex. 1. The I.G. has proven that the acts that resulted in Petitioner's conviction were committed over a period of one year or more, within the meaning of 42 C.F.R. § 1001.102(b)(2).[9]

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[9] This section of the regulation states that the duration of Petitioner's bad acts is aggravating if the acts that led to the conviction, or similar acts, were committed over a period of one year or more. As discussed below, Petitioner has a prior conviction for mail fraud. Therefore, Petitioner's prior conviction gives rise to an inference of "similar acts" under 42 C.F.R. § 1001.102(b)(2). However, the evidence before me is insufficient for me to conclude that Petitioner's prior conviction was the result of "similar acts" within the meaning of 42 C.F.R. § 1001.102(b)(2). Moreover, the record is devoid of evidence as to the duration of the acts giving rise to Petitioner's mail fraud conviction. Assuming for the sake of argument that Petitioner's conviction for mail fraud is a "similar act", I am unable to make any conclusions on how, if at all, the activities that led to Petitioner's conviction for mail fraud would increase the period of time over which Petitioner committed "similar acts." Nor is there anything in the record from which I can conclude that the acts which led to Petitioner's prior conviction for mail fraud overlapped in time with the acts that led to Petitioner's conviction for vendor fraud. However, since the I.G. has shown that Petitioner, in pleading guilty to vendor fraud, admitted that he perpetrated the acts that resulted in his conviction over a period of more than one year (Findings 3, 5, 24), this fact alone is sufficient to meet the criteria contained at 42 C.F.R. § 1001.102(b)(2). Therefore, Petitioner's previous conviction for mail fraud adds nothing to my determination of the applicability of 42 C.F.R. § 1001.102(b)(2).

Petitioner's guilty plea to Count I indicates that his fraudulent activities against the Illinois Medicaid program were not isolated occurrences. Instead, he took deliberate and calculated actions during a 15-month period. This factor is also highly probative of the issue of Petitioner's trustworthiness, and I have accorded it substantial weight in determining what period of exclusion is appropriate for Petitioner.

As required by the relevant regulations, I have also reviewed the evidence relevant to the sentence imposed by the court. In this case, Petitioner's sentence included a four year term of incarceration. I.G. Ex. 4. The mere presence of a term of incarceration in the sentence imposed by the court is sufficient to trigger the aggravating factor at 42 C.F.R. § 1001.101(b)(4). Under established constitutional principles, the sentence should correspond to the seriousness of an individual's offense and the extent of his culpability. Thus, the four year term of incarceration is relevant to the issue of Petitioner's trustworthiness.

However, I find the court's order of incarceration in this case to be less probative than the admissions made by Petitioner in conjunction with his guilty plea. First, absent a plea colloquy from the sentencing court, I cannot ascertain the court's precise reasons for ordering incarceration. For example, was the court required to do so under mandatory sentencing provisions, or did the court find Petitioner's conduct reprehensible or flagrant? Secondly, the record evidence also does not detail why a four year term of incarceration (as opposed to a shorter term) was imposed. Thirdly, the evidence does not show if Petitioner actually served the amount of time to which he was sentenced, and if he did not serve his full sentence, whether that outcome is indicative of the sentencing court's view of Petitioner's rehabilitation. Absent such information, I have merely assigned Petitioner's four year term of incarceration some weight in deciding the reasonableness of the exclusion period in issue.

I agree with the I.G. that Petitioner has a prior criminal record that constitutes an aggravating factor for increasing the length of an exclusion. The I.G. submitted evidence which establishes that, on September 12, 1986, Petitioner pled guilty to the charge of mail fraud. I.G. Ex. 5. Based on his guilty plea, Petitioner was sentenced to one year and one day of incarceration, the imposition of which was suspended by the court. Id.. Petitioner has not disputed the existence of a prior conviction for mail fraud. Accordingly, I find that

Petitioner has a prior criminal sanction record within the meaning of 42 C.F.R. 1001.102(b)(5).

The I.G. contends that Petitioner's prior conviction involved "health care fraud" (I.G. Br. at 6). There is insufficient evidence in the record to support the I.G.'s conclusion, however. The evidence merely shows that Petitioner's prior conviction involved sending for delivery by the U.S. Postal Service "envelopes containing checks drawn on the account of Evangelical Hospital Association . . . ." I.G. Ex. 5. This reference to Evangelical Hospital Association is not sufficient to prove that the mail fraud conviction was related to the delivery of health care services. It is possible that Petitioner was convicted of the fraudulent activities he perpetrated against a corporation, the Evangelical Hospital Association, for reasons having nothing to do with the nature of its business in the health care industry.

I have assessed Petitioner's prior conviction and sanction record in light of the remedial purposes of the Act. Viewed in the context of the conviction for which the I.G. has imposed the exclusion at issue, Petitioner's previous conviction is very probative of his lack of trustworthiness. Petitioner has shown a tendency to commit fraud of a type that is serious enough to warrant incarceration. His recidivistic tendency is especially apparent because he committed the vendor fraud offenses within five years of having been convicted and sentenced for mail fraud. I.G. Ex. 1, 4, 5. The sanctions imposed by the court for his mail fraud conviction, which included a suspended sentence of incarceration for a period of one year and one day, did not deter Petitioner from committing vendor fraud crimes. I agree with the I.G. that the length of the exclusion imposed on Petitioner must be adequate for safeguarding the Medicare and Medicaid programs against the likelihood that he may undertake other fraudulent activities in the future. See I.G. Br. at 3 - 4. Accordingly, I have given substantial weight to Petitioner's prior conviction and sanction record in determining the appropriate length of Petitioner's exclusion.

I find that the I.G. has also proven the applicability of the aggravating factor listed at 42 C.F.R. § 1001.101(b)(6). When Petitioner pled guilty to Count I of the indictment, Petitioner admitted that he fraudulently obtained Medicaid payments to which he was not entitled in an amount greater than $10,000. November 15, 1993 request for hearing; February 7, 1994 Order. His admission is, in essence, that Medicaid overpaid him

by more than $10,000 as a direct consequence of the false bills he submitted or caused to be submitted to Medicaid. The amount of Medicaid overpayment to Petitioner far exceeds the $1500 threshold specified in 42 C.F.R. § 1001.101(b)(6).

The regulations do not mandate the lengthening of an exclusion whenever an aggravating factor is present. 42 C.F.R. § 1001.101(b). I conclude on the facts of this case that the acts that resulted in Petitioner's conviction and the financial loss to the Medicaid program of more than $1500 were the same acts that caused Petitioner to be overpaid more than $1500 by the Medicaid program. See 42 C.F.R. § 1001.102(b)(1), (6).[10] Thus, I do not find it appropriate or necessary to give effect to both aggravating factors stemming from the same set of facts, even though both aggravating factors are technically present in this case.

I have already considered the fiscal damage Petitioner caused to the federally funded health care programs in my consideration of the aggravating factor at 42 C.F.R. § 1001.102(b)(1). Given the facts of this case, the aggravating factor at 42 C.F.R. § 1001.102(b)(1) is more probative of Petitioner's trustworthiness in light of the remedial purposes of the Act. It deals with Petitioner's deliberate fraud against federally funded health care programs, whereas the aggravating factor at 42 C.F.R. § 1001.102(b)(6) merely deals with improper billings, irrespective of whether the improper billings bear any relationship to Petitioner's offense, or whether they contain deliberately created false or inaccurate information. For these reasons, I have given the aggravating factor at 42 C.F.R. § 1001.102(b)(6) no weight in determining the appropriate length of Petitioner's exclusion.

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[10] The two aggravating factors focus on different things. The regulation at 42 C.F.R. § 1001.102(b)(1) focuses on financial loss to the Medicare and State health care programs independent of billings. Under this regulation, such financial loss could be manifested in a number of ways that may not be related to the party billing Medicare. The regulation at 42 C.F.R. § 1001.102(b)(6) focuses exclusively on overpayment that a party receives as a result of improper billings.

C. Petitioner has not shown the presence of any mitigating factors.

The regulations provide that, if any enumerated aggravating factors are present and justify an exclusion of more than five years, then certain mitigating factors may be considered as a basis for reducing the exclusion to a period of not less than five years. 42 C.F.R. § 1001.102(c). The regulations provide that only the following factors may be considered as mitigating:

> (1) The individual or entity was convicted of 3 or fewer misdemeanor offenses, and the entire amount of financial loss to Medicare and State health care programs due to the acts that resulted in the conviction, and similar acts, is less than $1500;
>
> (2) The record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional or physical condition before or during the commission of the offense that reduced the individual's culpability; or
>
> (3) The individual's or entity's cooperation with Federal or State officials resulted in --
>
> > (i) Others being convicted or excluded from Medicare or any of the State health care programs, or
> >
> > (ii) The imposition against anyone of a civil monetary penalty or assessment under part 1003 of this chapter.

42 C.F.R. § 1001.102(c)(1) - (3).

Petitioner has not claimed the existence of these mitigating factors.[11] I have already discussed my finding that the damage caused by Petitioner's criminal offense exceeded $10,000. Moreover, the offense to which Petitioner pled was not a misdemeanor. I.G. Ex. 1 (citing to Chapter 23, Section 8A-3(a) of Illinois Revised Statutes, as amended). Therefore, the first mitigating factor is not present in this case.

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[11] Petitioner has never alleged any of these mitigating factors. However, for the sake of completeness and clarity, I have examined the record to determine if these mitigating circumstances exist.

In addition, nothing of record indicates that the sentencing court determined that Petitioner had any type of mental, emotional or physical condition that bears on his culpability for the crimes he committed. Petitioner bases his claim of reduced culpability on alleged computer errors. His contentions, even if true, do not constitute mitigating factors within the meaning of 42 C.F.R. § 1001.102(c).

Lastly, while Petitioner claims to have cooperated with the Illinois Department of Public Aid by notifying them of billing errors, Petitioner's actions have not resulted in the conviction or exclusions of others. Tr. at 7 - 8. Nor has Petitioner alleged that his cooperation resulted in the imposition of a civil monetary penalty against anyone. The record is therefore devoid of any evidence that would make the third mitigating factor applicable.

Petitioner's remaining argument against the ten year exclusion is that his work on finding a cure for AIDS is important and could even lead to a cure of this terrible disease. Tr. at 6 - 7. Petitioner contends that his exclusion from the Medicare and Medicaid programs will make it impossible for him to continue his research. However, even assuming that Petitioner has been performing valuable research on AIDS and such research activities would be hindered by his inability to participate as a health care provider in the Medicare and Medicaid programs, I cannot consider these matters as mitigating factors under the regulations.

D. The exclusion imposed and directed by the I.G. is reasonable in length.

I have already noted that the presence of any of the aggravating factors enumerated in the regulations only makes it possible to increase the period of exclusion beyond the mandatory five years. The presence of aggravating factors in a given case means that an exclusion of more than five years may be reasonable. The regulation uses the word "may" to indicate the permissive, discretionary use of these aggravating factors as a basis for lengthening the exclusion period. 42 C.F.R. § 1001.102(b). What controls the exclusion period is the relative weight of the material evidence of such factors in the context of the total record. Paul G. Klein, D.P.M., DAB CR317 (1994). Any exclusion imposed for more than five years under section 1128(a)(1) of the Act must comport with the remedial purpose of protecting the programs and those individuals served by the programs against untrustworthy health care providers.

At bottom, the related issues of reasonableness and trustworthiness before me concern only the period of exclusion that is in excess of five years. In enacting section 1128(a)(1) of the Act, Congress has already determined that persons convicted of program related offenses are not sufficiently trustworthy to continue participating in the Medicare and Medicaid programs. Such persons must be excluded for a period of no less than five years. Section 1128(c)(3) of the Act. Therefore, I am bound by the legislative determination that five years is the minimally reasonable period for the exclusion at issue.

In this case, the totality of the record persuades me that excluding Petitioner for five additional years beyond the minimum period mandated by law (i.e., excluding Petitioner for a total period of ten years) is reasonable. The I.G. has explained her legal and factual basis for imposing and directing the ten year exclusion. I have considered the inferences arising from the parties' evidence, and, as discussed above, I have assigned relative weight to the aggravating factors to reflect their probative value on the issue of Petitioner's trustworthiness.

Petitioner has not been able to offer any relevant evidence to prove his trustworthiness or the inappropriateness of the ten year exclusion. Instead, Petitioner has sought to collaterally attack his conviction and has interposed assertions that were not legally relevant even if true. Based on the nature, extent, and weight of the aggravating evidence present in this case and the remedial purposes of the Act, I find the ten year exclusion reasonable.

CONCLUSION

For the foregoing reasons, I uphold the ten year exclusion imposed and directed against Petitioner by the I.G.

/s/

Mimi Hwang Leahy
Administrative Law Judge