

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Frank J. Haney,)	DATE: June 7, 1990
Petitioner,)	
- v. -)	Docket No. C-156
The Inspector General.)	DECISION CR 81
)	

DECISION

By letter dated June 19, 1989, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare and State health care programs for a period of five years.¹ Petitioner was advised that his exclusion resulted from his conviction of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. Petitioner was further advised that exclusion from participation in the Medicare and Medicaid programs of individuals convicted of such offenses is permitted by section 1128(b)(1) of the Social Security Act (Act).

Petitioner timely requested a hearing and the case was assigned to me for a hearing and decision. During the prehearing conference which I conducted on January 18, 1990, both parties expressed their desire for this case to be decided on the basis of briefs and written documents. Subsequently, the I.G. moved for summary

¹ "State health care program" is defined by section 1128(h) of the Social Security Act to include any State Plan approved under Title XIX of the Act (such as Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

disposition and Petitioner responded. I held oral argument, by telephone, on April 19, 1990.

I have considered the parties' arguments, the undisputed material facts, and the applicable law and regulations. I conclude that there exists a basis in law and fact to impose and direct an exclusion against Petitioner. However, I have decided that a three year period of exclusion against Petitioner is appropriate.

ADMISSIONS

During the prehearing conference of October 11, 1989, Petitioner admitted that he was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act.

ISSUES

The remaining issues are whether:

1. Petitioner was convicted "in connection with" the delivery of a health care item or service within the meaning of section (b)(1) of the Act.
2. Petitioner was convicted of a criminal offense "relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct," within the meaning of section 1128(b)(1) of the Act.
3. The length of Petitioner's exclusion is reasonable and appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW²

1. At all times relevant to this case, Petitioner was employed as the Controller of the James C. Giuffre Medical Center (Giuffre). I.G. Ex. 5/2.
2. Giuffre is a non-profit health care institution. I.G. Ex. 5/1.
3. Giuffre receives a substantial portion of its annual funding from the United States Department of Health and

² The parties exhibits will be cited as follows:

I.G.'s Exhibits	I.G. Ex. (number)
Petitioner's Exhibits	P. Ex. (number)

Human Services (DHHS) under its Medicare and Medicaid programs. Id.

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

5. Giuffre's cash reports are generated based upon information contained in its accounting records. I.G. Ex. 4.

6. On June 23, 1988, as stated in counts one and four of the criminal information filed against Petitioner, Petitioner was charged with: (1) conspiracy to defraud the United States by attempting to impede and impair the lawful functions of the Internal Revenue Service (conspiracy); and (2) filing false tax returns. I.G. Ex. 5.

7. Petitioner's charge of conspiracy was based partly upon allegations that he made false entries in Giuffre's accounting records. I.G. Ex. 5/2-7.

8. The charges filed against Petitioner alleged:

(1) In December 1982, Petitioner issued checks to executives of Giuffre as automobile expense reimbursement checks when, in actuality, those checks were retroactive lump sum salary increases;

(2) In December 1983, Petitioner listed checks as payments for Giuffre's inventory supplies, when, in actuality, the checks were Christmas bonuses for executives of Giuffre;

(3) In 1984, Petitioner falsely listed checks in Giuffre's accounting records as monthly automobile and travel expenses when, in actuality, the checks were salary increases for executives of Giuffre;

(4) In December 1984, Petitioner listed checks in Giuffre's accounting records as hospital related insurance premiums when, in actuality, the checks were a Christmas bonus for executives of Giuffre; and

(5) In August 1985, Petitioner listed a check in Giuffre's accounting record as a vendor payment when, in actuality, the proceeds of the check once

cashed by Petitioner were given to an executive of Giuffre.

Id.

9. Petitioner's charge of filing false tax returns was based upon his failure to report taxable income on his 1984 individual income tax return. I.G. ex. 5/10.

10. On July 10, 1988, Petitioner pleaded guilty to the two counts filed against him. I.G. Ex. 2.

11. On November 9, 1988, a judgment of conviction was entered against Petitioner on the two counts to which he pleaded guilty. I.G. Ex. 2

12. Petitioner made false entries in Giuffre's accounting records to conceal the fact that he was generating income for himself and other employees of Giuffre. I.G. Ex. 5/2-7.

13. As a result of Petitioner's actions, false and inaccurate cash reports were submitted to the Medicare and Medicaid programs. Findings 5, 12.

14. Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act. Findings 10, 11.

15. As a result of his conviction, Petitioner was: (1) fined \$10,000; (2) placed on probation for a period of five years; (3) sentenced to serve 50 hours of community service. I.G. Ex. 2.

16. The I.G. may exclude individuals convicted, "in connection with the delivery of a health care item or service, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct" within the meaning of section 1128)(b)(1) of the Act. Act, section 1128(b)(1).

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

18. Petitioner's conspiracy conviction is a criminal offense "in connection with the delivery of a health care item or service relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct within the meaning of section 1128(b)(1) of the Act." Findings 1-12.

19. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs. Findings 1 - 18.
20. It is an aggravating factor that Petitioner's crimes were serious in nature. Findings 7, 11.
21. It is an aggravating factor that the District Court imposed a serious penalty against Petitioner as a result of his criminal conviction. Finding 15.
22. The length of probation imposed against Petitioner by the District Court is not conclusive in determining an appropriate length of exclusion.
23. It is a mitigating factor that Petitioner is no longer employed in the health care industry and does not intend to obtain employment in that industry. August 13, 1989 letter to I.G..
24. It is a mitigating factor that Petitioner's mother was terminally ill and residing with Petitioner during the time period when Petitioner committed the criminal acts at issue in this case. P. Br.13
25. The ALJ does not have the authority to determine the scope of Petitioner's exclusion from participation in the Medicare and Medicaid programs.
26. The I.G. has not proved that Medicaid made any overpayments as a result of Petitioner's actions. I.G. Ex. 5.
27. The I.G. has not proved that Petitioner's criminal offenses had an adverse impact on the Medicare or Medicaid programs. I.G. Ex.5

DISCUSSION

I. Petitioner was convicted, "in connection with the delivery of a health care item or service, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct", within the meaning of section 1128 (b)(1) of the Act.

Petitioner admits that he was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act. Further, Petitioner's conviction for conspiracy to

defraud the United States by attempting to impede and impair the lawful functions of the I.R.S. relates to fraud.³ Thus, the major issue remaining is whether Petitioner's conviction is "in connection with" the delivery of health care items or services.

The determination of whether Petitioner's conviction is "in connection with" the delivery of a health care item or service, requires an examination of: (1) the criminal offense for which Petitioner was convicted; and (2) the actions which formed the basis for the conviction.

Petitioner was convicted of conspiracy to defraud the United States by attempting to impede and impair the lawful functions of the I.R.S. On its face, there is no apparent connection between the delivery of a health care item or service and the criminal offense of conspiracy. However, a review of the criminal offense itself is only one part of the examination to determine whether a criminal offense is connected with the delivery of a health care item or service. See, Charles W. Wheeler and Joan K. Todd, DAB App. 1123 (1990).

The second part of the analysis requires a review of the actions which formed the basis for the conviction. Petitioner participated in a conspiracy with two other employees of Giuffre. Petitioner and the other persons involved generated income payments for themselves and concealed the income by making false entries in Giuffre's accounting records. As a result of Petitioner's actions of making false entries in Giuffre's accounting records, false and inaccurate cash reports were generated and submitted to DHHS and its authorized agents.

Petitioner argues that his offense was not connected to the delivery of a health care item or service because his offense (1) did not relate to the Medicare and Medicaid programs; and (2) was merely a failure to report certain income as taxable income. Petitioner also argues that his offense would have been the same had he been working

³ Although Petitioner was convicted of two criminal offenses relating to fraud, conspiracy and filing false tax returns, the I.G. has based Petitioner's exclusion pursuant to the provisions of section 1128(b)(1) on Petitioner's conspiracy conviction. Conviction for any one criminal offense relating to fraud in connection with the delivery of a health care item or service is a sufficient basis for an exclusion.

in a field other than health care. However, I conclude that Petitioner's offense was "in connection with" the delivery of a health care item or service within the meaning of section 1128(b)(1) of the Act. It is not necessary for the I.G. to prove that Petitioner's criminal offense is connected to the Medicare and Medicaid programs for an exclusion to be proper pursuant to section 1128(b)(1).

Giuffre, a hospital, is in the business of providing health care items and services. Petitioner falsified Giuffre's accounting records. These facts alone are sufficient to establish the necessary connection between Petitioner's criminal offense and the delivery of health care items or services. The fact that accurate information was necessary to determine the amount of reimbursement that Giuffre should receive from the Medicare and Medicaid programs is secondary.

Petitioner argues that his offense would have been the same if he had been working in a field other than health care. This is only half true and assumes that his offense should be examined in a vacuum. However, Petitioner committed the offense for which he was convicted while employed as a Controller in a field which is directly responsible for the health and well-being of members of society. Thus, the consequences which Petitioner must endure should and do differ accordingly.

I conclude that, pursuant to the provisions of section 1128(b)(1) of the Act, the I.G. properly imposed and directed an exclusion against Petitioner.

II. Three years is a reasonable period of exclusion to be imposed and directed against Petitioner.

The remaining issue involves the appropriate period of exclusion imposed and directed against Petitioner. An exclusion must be judged in light of the evidence in the case and the intent of the exclusion law. An exclusion determination will be held to be reasonable where, given the evidence in the case, it is shown to fairly comport with legislative intent. "The word 'reasonable' conveys the meaning that . . . [the I.G.] is required at the hearing only to show that the length of the [exclusion] determined . . . was not extreme or excessive." (Emphasis added). 48 Fed. Reg. 3744 (January 27, 1983). Thus, based on the law and the evidence, I have the

authority to modify an exclusion if I determine that the exclusion is not reasonable. Act, section 205(b).

The purpose of the hearing is not to determine how accurately the I.G. applied the law to the facts before him, but whether, based on all relevant evidence, the exclusion comports with the legislative purpose of protecting the Medicare and Medicaid programs and their beneficiaries and recipients from untrustworthy individuals.

The Secretary adopted regulations to be applied in exclusion cases. The regulations specifically apply only to exclusions for "program-related" offenses. However, they also express the intent of the Secretary in cases where a permissive exclusion is imposed. The factors require a consideration of the seriousness of the offense weighed against any mitigating factors. 42 C.F.R. 1001.125(b)(1) - (7).

The I.G. argues that there are several factors in this case which warrant a five year period of exclusion. These factors are: (1) Petitioner's untrustworthiness as demonstrated by his criminal offenses; (2) the serious nature of Petitioner's criminal offense; and (3) the penalty and probation imposed upon Petitioner by the criminal court in which he was convicted.

The evidence in this case reveals that in November 1988, Petitioner was convicted of two felonies, relating to fraud. The fact that the convictions concerned Petitioner's engagement in fraudulent activities is demonstrative of Petitioner's untrustworthiness in 1988 and will be considered in determining an appropriate period of exclusion. However, Petitioner's criminal conviction in 1988 does not necessarily evidence that he is, at this time, an untrustworthy individual. As stated, a purpose of the exclusion law is to allow a sufficient period of time to ensure that an individual is trustworthy. In addition, although Petitioner may now be trustworthy, a period of exclusion may still be necessary to comport with the purpose of protecting the integrity of the programs by deterring others from similar improper acts.

As a result of his criminal actions, Petitioner was placed on probation for a period of five years, sentenced to serve 50 hours of community service, and fined \$10,000. The I.G. argues that the criminal court's determination to monitor Petitioner for a period of five

years, through probation, is an important factor to be considered in determining an appropriate period of exclusion. I agree that the length of probation imposed by the criminal court is a factor to be considered in determining an appropriate period of exclusion. However, it is not determinative. Further, it should be noted that the exclusion imposed and directed by the I.G. would not run concurrently with the period of probation imposed by the criminal court, and, thus, would result in Petitioner being excluded longer than his probation. The fact that the I.G. did not prove that Petitioner's actions adversely impacted the Medicare or Medicaid programs is a neutral factor.

Petitioner asserts that there are several mitigating factors in this case which warrant a reduction in the five year period of exclusion imposed and directed by the I.G. These factors include: (1) Petitioner's good character as attested to in letters written by friends and associates of Petitioner; (2) the illness of Petitioner's mother during the time period in which Petitioner committed the criminal offenses at issue; and (3) Petitioner's involvement in a lawsuit during the time period in which Petitioner committed the criminal offenses at issue; and (4) Petitioner no longer being employed, or intending to seek employment, in the health care field.

The regulations do not delineate which factors are mitigating. However, factors which relate to a petitioner's trustworthiness have been considered mitigating. See, Leonard N. Schwartz, R. Ph., Petitioner, v. The Inspector General, DAB Civ. Rem. No. C-62 (1989) The I.G. argues that there are no mitigating factors in this case.

I conclude that there are mitigating factors in this case. First, the letters submitted on behalf of Petitioner, by his friends and associates, regarding Petitioner's good character are mitigating and have been viewed as such in my determination of an appropriate period of exclusion. Second, the illness, and resulting death, of Petitioner's mother during part of the time period in which Petitioner committed the criminal acts in issue is another mitigating factor which I have considered in determining an appropriate period of exclusion. Third, the fact that Petitioner is no longer employed in the health care field and does not intend to seek employment in the health care field is a mitigating factor. As stated, the purpose of the exclusion law is

to protect program beneficiaries and recipients from untrustworthy persons. Petitioner's lack of employment in the health care field coupled with his intent not to seek employment in the health care field is analogous to an exclusion in that he is no longer in a position in which he poses an immediate threat to Medicare and Medicaid beneficiaries and recipients. I have also considered as mitigating the factor that no evidence was presented regarding Petitioner's engagement in any fraudulent activities since August 1985, the date of the last incident in his 1988 conviction.

The fact that Petitioner was involved in a major lawsuit during the relevant time period is not a mitigating factor. Pressures, such as those faced by Petitioner as a result of the aforementioned lawsuit, may recur and do not excuse, justify, or mitigate criminal behavior.

III. The ALJ does not have the authority to determine the scope of Petitioner's exclusion from participation in the Medicare and Medicaid programs.

Petitioner has requested that I address the issue of whether the sale of printing services to individuals or entities in the health care industry would violate the terms of the exclusion imposed and directed against him. This matter was addressed during prehearing conferences which I conducted in this case. Upon my request, the I.G. submitted a letter dated October 27, 1989, in an attempt to clarify the I.G.'s position with respect to the scope of Petitioner's exclusion. The I.G. stated that the statute does not preclude Petitioner from selling to doctors and hospitals, but it does prevent Medicare and Medicaid from paying for the services which Petitioner provides. The I.G. went on to say that he would not preclude a hospital or doctor from receiving reimbursement for services and items provided by Petitioner because the amount of reimbursement attributable to these items and services would be nominal and difficult to ascertain. However, Petitioner requested a more definitive response to this issue.

Once I have determined that an exclusion is properly imposed and determine the appropriate length of an exclusion, I do not have the authority to determine the scope of the exclusion, unless specific statutory or regulatory language needs to be interpreted. I conclude that there is no such endeavor called for in this case.

CONCLUSION

In view of the mitigating factors and the factors considered by the I.G. in determining the period of exclusion to be imposed and directed against Petitioner, I conclude that a five year period of exclusion is excessive and that a three-year period of exclusion is sufficient to serve the purpose of the exclusion law's purpose of protecting the Medicare and Medicaid programs and their respective beneficiaries and recipients.

/s/

Charles E. Stratton
Administrative Law Judge