

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Francis Craven,)	DATE: July 17, 1991
Petitioner,)	
- v. -)	
The Inspector General.)	Docket No. C-275
)	Decision No. CR143

DECISION

In this case, governed by section 1128 of the Social Security Act (Act), the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Petitioner by letter dated June 4, 1990, that he was being excluded from participating in the Medicare and Medicaid programs for a period of five years.¹ Petitioner was advised that his exclusion resulted from his conviction 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 timely requested a hearing before an Administrative Law Judge (ALJ) and the case was assigned to me for a hearing and decision. During the prehearing conference which I conducted on September 27, 1990, the I.G. moved for summary disposition and Petitioner responded. The I.G. filed a reply to Petitioner's response. Subsequently, I held an in-person evidentiary hearing in Philadelphia, Pennsylvania on March 7, 1991. Both parties submitted posthearing briefs.

I have considered the evidence introduced by the parties at the hearing, the arguments, and the applicable law. I

¹ The Medicaid program is one of three types of federally-financed State health care programs from which Petitioner was excluded. I use the term "Medicaid" to represent all three of these programs, which are defined in section 1128(h) of the Act.

conclude that the I.G. had authority to exclude Petitioner and that the five-year exclusion imposed and directed against Petitioner is excessive. I conclude that the remedial purposes of section 1128 of the Act will be served in this case by a three-year exclusion and I modify the exclusion accordingly.²

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the Act is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1990 Supp.). Section 1128(b)(1) of the Act permits the I.G. to exclude from Medicare and Medicaid participation:

. . . any individual or entity that has been convicted, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

II. The Federal Regulations.

The governing federal regulations are codified in 42 C.F.R. Parts 498, 1001, and 1002 (1990). Part 498 governs the procedural aspects of this exclusion case; Parts 1001 and 1002 govern the substantive aspects.

ADMISSIONS

At the hearing and during the prehearing conference on September 27, 1990, Petitioner admitted that he was "convicted" of a criminal offense, within the meaning of section 1128(i) of the Act. Tr. 7; Prehearing Order and Schedule for Filing Motions for Summary Disposition, dated October 2, 1990.

² I note that at the end of that period, Petitioner may apply for reinstatement under section 1128(g)(1) of the Act.

ISSUES

The remaining issues are:

(1) Whether Petitioner was convicted "under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by any Federal, State, or local agency, 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; and

(2) Whether a five-year exclusion imposed and directed against Petitioner by the I.G. is appropriate and reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the entire record, the arguments, and the submissions of the parties, and being advised fully herein, I make the following Findings of Fact and Conclusions of Law:³

1. At all times relevant to this case, Petitioner was employed as the Administrator of the James C. Giuffre Medical Center (Giuffre). I.G. Ex. 1/2.⁴

³ Some of my statements in the sections preceding these formal findings and conclusions are also findings of fact and conclusions of law. To the extent that they are not repeated here, they were not in controversy.

⁴ Citations to the record and to Board cases in this Decision are as follows:

I.G.'s Brief	I.G. Br. (page)
I.G.'s Exhibits	I.G. Ex. (number/page)
I.G.'s Posthearing Brief	I.G. P. Br. (page)
Petitioner's Brief	P. Br. (page)
Petitioner's Exhibits	P. Ex. (number/page)
Petitioner's Posthearing Brief	P. P. Br. (page)

(continued...)

2. Giuffre is a non-profit health care institution, located in Philadelphia, Pennsylvania. I.G. Ex. 1/1.
3. Giuffre receives a substantial portion of its annual funding from DHHS under its Medicare and Medicaid programs. Id.
4. The amount of reimbursement that 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. On June 23, 1988, as stated in Counts One and Two of the criminal information filed against Petitioner in the United States District Court for the Eastern District of Pennsylvania (District Court), Petitioner was charged with: conspiracy to defraud the United States by attempting to impede and impair the lawful functions of the Internal Revenue Service (IRS); and filing a false tax return. I.G. Ex. 1.
6. Petitioner's charge of conspiracy was based partly upon allegations that he and others caused false and inaccurate cash reports to be generated and submitted to DHHS and its authorized representatives. I.G. 1/2-7.
7. The charges filed against Petitioner alleged:
 - a. In December 1982, Petitioner signed and distributed checks to executives of Giuffre as automobile expense reimbursements checks when, in actuality, those checks were retroactive lump-sum salary increases. Petitioner then advised recipients of these checks that these payments represented a salary increase from July through December 1982;

⁴ (...continued)

Transcript	Tr. (page)
Findings of Fact and Conclusions of Law	FFCL (number)
Departmental Appeals Board ALJ decisions	DAB Civ. Rem. (docket no./ date)
Departmental Appeals Board Appellate decisions	DAB App. (decision no./date)

b. On December 22, 1982, Petitioner received a check from Giuffre for \$7,500 as reimbursement for automobile expenses in the amount of \$1,250 per month for the previous six months, when, in actuality, the expenses had not been incurred;

c. Petitioner recommended that an employee receive \$833 per month as automobile expense allowance in lieu of a salary increase;

d. In December 1983, Petitioner signed four checks totalling \$12,580, made payable to cash to generate monies to provide cash Christmas bonuses to executives of Giuffre. Petitioner also signed individual check request forms to support these checks;

e. In 1984, Petitioner signed checks which were falsely listed in Giuffre's accounting records as monthly automobile and travel expenses, when, in actuality, the checks were salary for executives of Giuffre;

f. In December 1984, Petitioner signed and distributed checks which were listed in Giuffre's accounting records as hospital related insurance premiums, when, in actuality, the checks were a Christmas bonus for executives at Giuffre; and

g. In August 1985, Petitioner requested that a Giuffre check be issued for \$6,900. The check was cashed and the cash was given to Petitioner, who then distributed \$2,300 each to three Giuffre employees. This disbursement was falsely listed in Giuffre's accounting records as a vendor payment.

I.G. Ex. 1.

8. Petitioner's charge of filing a false tax return was based upon his failure to report taxable income on his 1984 individual income tax return. I.G. Ex. 1/8.

9. Petitioner pled guilty to, and was convicted of, the two counts filed against him. I.G. Ex. 4; I.G. Ex. 2.

10. Petitioner and others made false entries in Giuffre's accounting records to conceal the fact that they were generating income for themselves and other employees of Giuffre. I.G. Ex. 1/3-7.

11. As a result of Petitioner's and others' actions, false and inaccurate cash reports were submitted to the Medicare and Medicaid programs. FFCL 10.

12. Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act. FFCL 9.

13. As a result of his conviction, Petitioner was fined \$5,000; placed on probation for a period of five years; ordered to pay all taxes, penalties, and sums charged in the indictment or as required by law; and sentenced to serve 300 hours of community service. I.G. Ex. 2.

14. The Secretary of the United States Department of Health and Human Services (the Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21661 (May 13, 1983).

15. The I.G. may exclude individuals 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.

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

17. Petitioner was "convicted" of a criminal offense, within the meaning of section 1128(i) of the Act. Tr. 7; Prehearing Order and Schedule for Filing Motions for Summary Disposition, dated October 2, 1990.

18. A remedial objective of section 1128 of the Act is to protect program beneficiaries and recipients by permitting the Secretary (or his delegate, the I.G.) to impose and direct exclusions from participation in Medicare and Medicaid of those individuals who demonstrate by their conduct that they cannot be trusted to provide items or services to program beneficiaries and recipients.

19. An additional remedial objective of section 1128 of the Act is to deter individuals from engaging in conduct which jeopardizes the integrity of federally-funded health care programs.

20. Petitioner's conspiracy conviction is 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. FFCL 1-12.

21. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs. FFCL 1-20.

22. It is an aggravating factor that Petitioner's crimes were serious in nature. FFCL 5-6, 9.

23. It is an aggravating factor that the District Court imposed a serious penalty against Petitioner as a result of his criminal conviction. FFCL 13.

24. The I.G. has not proved that Medicare or Medicaid made any overpayment as a result of Petitioner's actions. I.G. Ex. 1.

25. The length of probation imposed against Petitioner by the District Court is not conclusive in determining an appropriate length of exclusion.

26. The I.G. has not proved that Petitioner's criminal offenses had an adverse impact on the Medicare or Medicaid programs. I.G. Ex. 1.

27. The five-year exclusion imposed and directed against Petitioner is excessive.

28. The remedial considerations of section 1128 of the Act will be served in this case by a three-year exclusion.

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 IRS relates to fraud.⁵ Thus, the major issue remaining is whether

⁵ 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 on Petitioner's conspiracy conviction. Conviction for any
(continued...)

Petitioner's conviction is "under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by any Federal, State, or local agency, 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. Tr. 7-8; P. Br. 2-9.

The determination of whether Petitioner's conviction fits within the language of section 1128(b)(1) 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 IRS. 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 and the other person's actions, false and inaccurate cash reports were generated and submitted to DHHS and its authorized agents. See Joel Davids, DAB Civ. Rem. C-278 (1991); Frank J. Haney, DAB Civ. Rem. C-156 (1990).

Petitioner argues that his offense was not connected to the delivery of a health care item or service because his offense was not related to the Medicare and Medicaid programs and was merely a failure to report certain income as taxable income. However, I conclude that Petitioner's offense was "in connection with" the delivery of a health care item or service within the

⁵ (...continued)

one criminal offense relating to fraud in connection with the delivery of a health care item or service is sufficient basis for an exclusion.

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). Dauids.

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 connection also is shown by the need for accurate information to determine the amount of reimbursement that Giuffre should receive from the Medicare and Medicaid programs. See Dauids; Haney.

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. Roderick L. Jones, R.N., DAB Civ. Rem. C-230 (1990); Dauids; Haney. 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 (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 hearing is, by law, de novo. 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. Dauids; Haney.

By not mandating that exclusions from participation in the Medicare and Medicaid programs be permanent, Congress has allowed the I.G. the opportunity to give individuals a "second chance." The placement of a limit on the

period of exclusion allows an excluded individual or entity the opportunity to demonstrate that he or she can and should be trusted to participate in the Medicare and Medicaid programs as a provider of items and services to beneficiaries and recipients. A determination of an individual's current and future trustworthiness thus necessitates an appraisal of the crime for which that individual was convicted, the circumstances surrounding it, whether and when that individual sought help to correct the behavior which led to the criminal conviction, and how far that individual has come toward rehabilitation. Dauids; Haney; Thomas J. DePietro, R.Ph., DAB Civ. Rem. C-282 (1991). See Joyce Faye Hughey, DAB App. 1221 at 10 (1991).

The evidence in this case reveals that in November 1988 Petitioner was convicted of conspiracy to defraud the United States by attempting to impede and impair the lawful functions of the IRS.⁶ As part of the overt acts in furtherance of the conspiracy, Petitioner and others generated income payments for themselves and concealed the income by making false entries in Giuffre's accounting records. As a result of Petitioner's and others' action of making false entries in Giuffre's accounting records, false and inaccurate cash reports were generated and submitted to DHHS and its authorized agents. The fact that the convictions were based on

⁶ At the hearing and in the briefs submitted, counsel for Petitioner argued that when Petitioner pled guilty to the conspiracy charge, he did not plead guilty to all of the overt acts of the conspiracy. P. Br. 6-9; Tr. 75-76, 114-117. The I.G. contends that Petitioner's argument is without merit. A similar argument was raised by petitioner in Dauids. In Dauids, I found petitioner's argument to be without merit because petitioner was represented by counsel when he signed the plea agreement and that document was also signed by his attorney. Further, in Dauids, the plea agreement stated that petitioner's counsel explained to him, and that petitioner understood, the nature of the charges to which he was pleading guilty. Thus, my analysis in Dauids is applicable to the instant case. I find Petitioner's argument to be without merit in this case. The plea agreement stated that "defendant will enter a plea of guilty to Counts One and Two of an information to be filed later." I.G. Ex. 4. Any concerns that Petitioner had concerning the nature of the overt acts as stated in the Information should have been raised at the criminal proceeding and certainly before he signed the plea agreement.

Petitioner's fraudulent activities is proof of Petitioner's lack of trustworthiness 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 will be untrustworthy for five years. Dauids; Haney.

The I.G. contends that there are several factors in this case which warrant a five-year period of exclusion. These factors are: (1) the serious nature of Petitioner's criminal offenses; (2) the three-year period over which Petitioner's criminal offenses occurred; and (3) that the sentence imposed by the District Court included significant periods of probation, community service, and fines.

Petitioner argues that the following factors warrant a reduction in the five-year period of exclusion imposed and directed by the I.G.: (1) his remorse and shame for the criminal offenses he committed; (2) the depression which was the result of stress related to the criminal offenses at issue (the record indicates that Petitioner was admitted to the hospital in November 1987 for clinical depression and stayed just under two months) (Tr. 76); (3) his good character as attested to in letters written by associates of Petitioner; (4) the lack of program violations, thus no related offenses; (5) the lack of adverse impact on beneficiaries or recipients; (6) his cooperation with the government's investigation of this matter; (7) his lack of prior Medicare or Medicaid sanctions; and (8) the absence of damage to Medicare, Medicaid, and the social services programs.

I conclude that the exclusion imposed and directed against Petitioner is excessive. Given the facts of this case, a five-year exclusion is not needed to protect the integrity of federally-funded health care programs, or beneficiaries and recipients. I am persuaded that a three-year exclusion is sufficient to ensure that Petitioner will be a trustworthy provider.

The main purpose of an exclusion from the Medicare and Medicaid programs is to allow for a period of time in which to ensure that Petitioner is trustworthy. Trustworthiness is not something that is subject to exact measurement or determination. I examined such relevant factors as the nature of the crime for which Petitioner was convicted, the length of the sentence imposed by the court in Petitioner's criminal case, and Petitioner's subsequent conduct. To ensure the protection of the beneficiaries of the Medicare and Medicaid programs, I also considered Petitioner's previous sanction record,

whether his criminal conviction involved program violations or other related offenses, and whether Petitioner's conduct resulted in damage to the Medicare or Medicaid programs.

The absence of prior offenses by Petitioner is not a mitigating factor. Furthermore, Petitioner's lack of a sanction record under Medicare or Medicaid, the I.G.'s lack of proof that there was any adverse impact on program beneficiaries, and the fact that Petitioner's convictions did not involve program violations, are not mitigating in nature. Rather, their presence would be aggravating factors that might justify an increased sanction.

In attempting to measure Petitioner's trustworthiness, I also gave great weight to the credibility of his testimony during the March 7, 1991 hearing. I also evaluated Petitioner's credibility, based on the following factors. First, I compared Petitioner's testimony to the other evidence introduced at the March 7, 1991 hearing. Such evidence included testimony of other witnesses and documents. Second, my personal observation of Petitioner was that he testified in a forthright manner and did not appear to try to avoid questions. For these reasons, I conclude that Petitioner's testimony was credible and that this reflects favorably on his trustworthiness.

In addition to Petitioner's credibility, I also considered Petitioner's past exercise of judgment in determining his trustworthiness. I considered Petitioner's judgment relevant to this trustworthiness because a mistake in judgment can be as harmful as an intentional wrong to program beneficiaries and recipients. Petitioner demonstrated naivete and lack of judgment, rather than malice, in the circumstances surrounding his case which led to his criminal offenses. Petitioner's criminal behavior appears to have been an aberration rather than the norm and is not likely to be repeated.

The record establishes that Petitioner is completing his probation without incident. He has not been implicated in any additional misconduct. In December 1988, Petitioner obtained employment at the Graduate Health System (Graduate) as assistant director of subsidiary operations. Tr. 79. Petitioner stated that Graduate was aware of his conviction and after working there three or four months, he became the director of subsidiary operations. Tr. 79; P. Ex. 1. At Graduate, Petitioner was responsible for the overall financial reporting and,

in one subsidiary, he was the signatory on the checking account from which accounts payable and payroll checks were issued. Tr. 79-80. When Graduate decided to reduce its operational costs by reducing manpower, Petitioner's employment was terminated. Tr. 79-80; P. Ex. 1. Petitioner's employment at Graduate is just the beginning of his road toward once again becoming a trustworthy individual. The record shows that Petitioner was given at least three years to complete his community service; however, he completed it in an expedited fashion and has voluntarily continued to render weekend service to that charity. I.G. Ex. 2/57; Tr. 89-91; P. Br. 15.

At the hearing, Petitioner demonstrated remorse for his actions and credibly asserted that he was sorry to have caused so much suffering not only for himself but for others as well. Tr. 122-123. These assertions were underscored by the fact that Petitioner cooperated with the government in its investigation of this matter. I.G. Ex. 2/16; I.G. Ex. 3/6-7. See Dauids; Haney. I am persuaded by Petitioner's testimony, as well as the other evidence of record, that there is little or no likelihood that he will again engage in unlawful conduct. There is therefore no need for a lengthy exclusion in this case in order to assure Petitioner's trustworthiness. A five - year exclusion would be punitive.

Three years is appropriate in this case because of the serious nature of Petitioner's offense. This is shown in large part by the trial judge's action in sentencing Petitioner to five years' probation, 300 hours of community service, and a \$5000 fine.

CONCLUSION

Based on the material facts and the law, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs was authorized by law. I further conclude that a three-year period of exclusion is reasonable and appropriate in this case.

/s/

Charles E. Stratton
Administrative Law Judge