

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
William F. Middleton,)	DATE: December 16, 1993
Petitioner,)	
- v. -)	Docket No. C-93-088
The Inspector General.)	Decision No. CR297

DECISION

On May 7, 1993, the Inspector General (I.G.) notified Petitioner, William F. Middleton, that he was being excluded from participation in the Medicare program and certain State health care programs for 10 years.¹ The I.G. advised Petitioner that he was being excluded pursuant to section 1128(a)(1) 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 Maryland Medicaid program. The I.G. advised Petitioner further that, in cases of exclusions imposed pursuant to section 1128(a)(1) 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 10 years after taking into consideration circumstances which were unique to his case. The unique circumstances recited in the notice letter included the length of time in which Petitioner engaged in program-related crimes and the financial loss to the Maryland Medicaid program resulting from Petitioner's criminal activity.

¹ "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally financed health care programs, including Medicaid. Unless the context indicates otherwise, I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I scheduled an in-person hearing to be held on October 20, 1993. The I.G. moved for summary disposition, alleging that there were no disputed issues of material fact in the case. Petitioner responded to the motion. I ruled that, while there appeared to be no disputed issue of material fact as to Petitioner's conviction of a criminal offense related to the delivery of an item or service under Medicaid, there appeared to be a dispute as to whether the 10-year exclusion imposed by the I.G. against Petitioner was reasonable. I afforded the parties the opportunity to have an in-person hearing on the issue of the reasonableness of the 10-year exclusion. At a prehearing conference which I held by telephone on October 14, 1993, both parties advised me that they were prepared to rely on their written presentations, in lieu of an in-person hearing. Notwithstanding, I gave Petitioner time to reflect on his conclusion that an in-person hearing was not necessary, and provided him the opportunity to file a written request for an in-person hearing, should he change his mind and decide that he wanted one. Petitioner did not file a request for an in-person hearing. Based on that, I canceled the in-person hearing which I had scheduled, but admitted into evidence exhibits which had been filed by the I.G. and Petitioner.

I have carefully considered the exhibits which were filed by the I.G. and Petitioner and which I have accepted into evidence.² I have considered also the parties' arguments and the relevant law and regulations. I conclude that the I.G. is authorized to exclude Petitioner pursuant to section 1128(a)(1) of the Act. I conclude further that the 10-year exclusion which the I.G. imposed against Petitioner is reasonable.

² The exhibits offered by the I.G. in support of the I.G.'s motion, and which I have received into evidence, are I.G. Exhibits 1 through 4, referred to hereafter as "I.G. Ex. (number), (page number)." The exhibits offered by Petitioner in response to the motion, and which I have received into evidence, consist of communications between Petitioner and the Maryland Board of Public Works. I have identified and received these exhibits as P. Ex. 1 and 2.

ISSUES

The issues in this case are whether:

1. The I.G. has authority to exclude Petitioner pursuant to section 1128(a)(1) of the Act.
2. The 10-year exclusion imposed against Petitioner by the I.G. is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On February 10, 1992, Petitioner was indicted for criminal offenses under Maryland law. I.G. Ex. 1.
2. The indictment charged Petitioner with: conspiring with other individuals to make false claims for reimbursement from the Maryland Medicaid program; making false claims for reimbursement from the Maryland Medicaid program; and obstruction of justice. I.G. Ex. 1, pp. 2 - 4.
3. Count 1 of the indictment charged Petitioner with making false Medicaid reimbursement claims for transportation of Medicaid recipients in taxicabs which he owned and operated, in the amount of \$74,176.80. I.G. Ex. 1, pp. 2, 10 - 21.
4. Count 1 of the indictment charged Petitioner with making false Medicaid reimbursement claims over a period beginning November 30, 1989 and ending on or about January 10, 1992. I.G. Ex. 1, p. 2.
5. Count 2 of the indictment charged Petitioner with obstructing justice by willfully withholding and failing to produce documents that were subpoenaed from him by a grand jury. I.G. Ex. 1, p. 3.
6. On October 13, 1992, Petitioner pled guilty to Counts 1 and 2 of the indictment. I.G. Ex. 2; I.G. Ex. 3, p. 2.
7. Petitioner was sentenced to incarceration for a period of three years for his crimes, two years of which were suspended. I.G. Ex. 3, p. 2; see I.G. Ex. 2.
8. Petitioner was sentenced additionally to probation for a period of three years. I.G. Ex. 3, p. 2.

9. Petitioner was sentenced additionally to pay restitution in the amount of \$24,275 to the Maryland Medicaid program. I.G. Ex. 3, p. 2; see I.G. Ex. 2.
10. Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. Findings 1 - 9; Social Security Act, section 1128(a)(1).
11. The Secretary of the Department of Health and Human Services (Secretary) 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).
12. The I.G. had authority to impose and direct an exclusion against Petitioner pursuant to section 1128(a)(1) of the Act. Findings 1 - 11.
13. Regulations published on January 29, 1992 establish criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to section 1128 of the Act. 42 C.F.R. Part 1001 (1992).
14. 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 section 1128(a)(1) of the Act. 42 C.F.R. §§ 1001.101, 1001.102.
15. 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).
16. 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. Findings 14 - 15.
17. An exclusion imposed pursuant to section 1128(a)(1) of the Act must be for a period of at least five years. Social Security Act, sections 1128(a)(1), 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).
18. 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).

19. 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).

20. 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).

21. Petitioner was convicted of crimes involving fraudulent Medicaid claims in the amount of \$74,176.80. Findings 3, 6.

22. The financial loss to the Maryland Medicaid program from Petitioner's crimes was at least \$24,275. Finding 9.

23. The crimes for which Petitioner was convicted resulted in financial loss to the Maryland Medicaid program in excess of \$1500, which is an aggravating factor that may justify excluding Petitioner for more than five years. Finding 22; 42 C.F.R. § 1001.102(b)(1).

24. The crimes which Petitioner perpetrated against the Maryland Medicaid program were committed over a period of more than two years. Findings 4, 6.

25. That the crimes for which Petitioner was convicted were committed over a period exceeding one year's duration is an aggravating factor that may justify excluding Petitioner for more than five years. Finding 24; 42 C.F.R. § 1001.102(b)(2).

26. The sentence imposed against Petitioner for his crimes against the Maryland Medicaid program included a period of incarceration. Finding 7.

27. That the sentence imposed against Petitioner for his crimes against the Maryland Medicaid program included a period of one year's incarceration is an aggravating factor that may justify excluding Petitioner for more than five years. Findings 7, 26; 42 C.F.R. § 1001.102(b)(4).

28. The I.G. did not prove that the criminal acts engaged in by Petitioner had a significant adverse physical, mental, or financial impact on one or more program beneficiaries or other individuals. See I.G. Ex. 1, pp. 10 - 21.

29. That Petitioner paid restitution for his crimes is not a mitigating factor which may be used as a basis for

offsetting aggravating factors. See Finding 9; 42 C.F.R. § 1001.102(c)(1) - (3).

30. Petitioner did not prove the presence of any mitigating factors which may be used as a basis for offsetting aggravating factors. See Finding 29; 42 C.F.R. § 1001.102(c)(1) - (3).

31. The aggravating factors present in this case establish that Petitioner committed serious criminal offenses which damaged the integrity of federally financed health care programs. Findings 21 - 30.

32. The aggravating factors present in this case establish Petitioner to be a threat to the integrity of federally financed health care programs. Finding 31.

33. The aggravating factors present in this case justify excluding Petitioner for 10 years. Findings 21 - 32.

34. The 10-year exclusion which the I.G. imposed against Petitioner is reasonable. Findings 21 - 33; 42 C.F.R. § 1001.102.

ANALYSIS

Petitioner does not dispute that he was convicted of a criminal offense relating to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. The I.G. was required to exclude Petitioner for a minimum of five years, based on Petitioner's conviction of a program-related offense. Finding 17. What is at issue here is whether the 10-year exclusion which the I.G. imposed against Petitioner is reasonable. More specifically, the question is whether the I.G. established sufficient aggravating factors not offset by mitigating factors to prove that Petitioner is so untrustworthy as to necessitate the 10-year exclusion which the I.G. imposed.

This case is governed by regulations published in January 1992 and January 1993. 42 C.F.R. Part 1001; 42 C.F.R. § 1001.1(b). These regulations establish factors which must be used to evaluate the reasonableness of exclusions imposed pursuant to section 1128 of the Act. The regulations provide that, in cases involving exclusions imposed pursuant to section 1128(a) of the Act, the reasonableness of the length of any exclusion imposed for a period of more than five years will be decided based on the presence of, and the weight assigned to, certain aggravating and mitigating factors which the regulations

identify. 42 C.F.R. § 1001.102(b)(1) - (6), (c)(1) - (3).³

Section 1128 is a remedial statute, and the regulations' intent is to implement the Act's remedial purpose. The remedial purpose of the Act is to protect the integrity of federally-financed health care programs, and the welfare of program beneficiaries and recipients, from parties who have been shown to be untrustworthy. Exclusions imposed pursuant to section 1128 (including exclusions of more than five years imposed pursuant to section 1128(a)(1)) have been found reasonable only insofar as they are consistent with the Act's remedial purpose. Robert Matesic, R.Ph., d/b/a Northway Pharmacy, DAB 1327, at 7 - 8 (1992); John M. Thomas, Jr., M.D. and Texoma Orthopedic Associates, d/b/a Orthopedic and Sports Medicine Center of North Texas, DAB CR281, at 11, 19 - 23 (1993).

One consequence of the regulations is to limit the factors which I may consider as relevant to an excluded party's trustworthiness to provide care. Under the standard for ascertaining trustworthiness established in Matesic and now superseded by the regulations, evidence which was relevant to deciding a party's trustworthiness to provide care (for example, evidence as to a party's remorse or rehabilitation) would have been admissible. However, the regulations direct that, if evidence does not conform to an aggravating factor or a mitigating factor identified by the regulations, I may not consider it. Thomas at 13.

In any case in which the reasonableness of an exclusion is at issue, I am obligated to decide, using the regulatory factors, whether an exclusion of a particular length is reasonably necessary to protect the integrity of federally financed health care programs and the welfare of the programs' beneficiaries and recipients. Thomas at 14 - 18. The regulations contain no formula for assigning weight to aggravating and mitigating factors once the presence of any of such factors is proven by a party. However, it is apparent both from the regulations themselves, and from the Act's remedial purpose, that I must explore in detail, and assign appropriate weight to, those factors which are aggravating or mitigating.

³ I describe the permissible aggravating factors in Finding 19. I describe the permissible mitigating factors in Finding 20.

In the present case, the I.G. proved the existence of these three aggravating factors: Petitioner was convicted of a program-related offense involving a financial loss to the Maryland Medicaid program in excess of \$1500; the crimes engaged in by Petitioner were perpetrated by him over a period of time in excess of one year; and his sentence included a period of incarceration. Findings 23, 25, 27; 42 C.F.R. § 1001.102(b)(1), (2), (4).

The notice letter which the I.G. sent to Petitioner mentioned only two aggravating factors, consisting of the financial impact of Petitioner's crimes, and the duration of his criminal activity. I have accepted evidence concerning Petitioner's incarceration, even though it was not mentioned in the notice letter, because the I.G. provided Petitioner adequate notice of the intent to assert this additional factor as an aggravating factor, and Petitioner was given the opportunity to rebut the evidence and arguments which the I.G. made pertaining to this factor. An exhibit which described the conditions of Petitioner's incarceration was offered as evidence by the I.G. I.G. Ex. 3. The I.G. argued Petitioner's incarceration as an additional aggravating factor, both in the brief which the I.G. filed in support of summary disposition and in a supplemental brief.

The I.G. alleged the existence of a fourth aggravating factor. The I.G. contended that Petitioner's crimes had an adverse effect on program recipients. See 42 C.F.R. § 1001.102(b)(3). The basis for this contention is that Petitioner's crimes involved false reimbursement claims for transporting Medicaid recipients in taxicabs operated by him. However, while the record establishes that Petitioner made false claims for the transportation of Medicaid recipients, it does not contain any evidence that these individuals were affected adversely, either by the transportation provided by Petitioner, or by the false claims he made concerning that transportation. Therefore, the I.G. failed to prove that Petitioner's crimes adversely affected program recipients.

Petitioner did not prove the existence of any mitigating factors. Petitioner argued that the exclusion should be reduced because he paid restitution to the State of Maryland. However, the payment of restitution is not a

mitigating factor identified in the regulations which I may consider. See 42 C.F.R. § 1001.102(c)(1) - (3).⁴

Petitioner offered an exhibit, P. Ex. 2, to show that the State of Maryland was considering debarring him for a period of five years, based on his conviction. It is not entirely clear from this exhibit what Petitioner intends it to prove. Apparently, Petitioner is asserting that the I.G.'s authority to exclude him should not permit an exclusion of a greater duration than a State debarment. Alternatively, Petitioner may be asserting that the State of Maryland considers him to be untrustworthy for only five years. From that he may be contending that I should infer that he will be trustworthy after five years.

Section 1128 is a federal statute and it neither states nor suggests that the I.G. must defer to State authorities in determining the length of an exclusion. That the State of Maryland may choose to debar Petitioner for five years does not serve to estop the I.G. from excluding Petitioner for a longer period, if there exists a legitimate remedial reason to do so. Furthermore, the fact that the State of Maryland may consider Petitioner to be untrustworthy for a period of five years only is not a mitigating factor under the regulations which I may consider in deciding whether the exclusion imposed by the I.G. is reasonable. See 42 C.F.R. § 1001.102(b)(1), (c)(1) - (3).

The fact that there exist aggravating factors in this case and no mitigating factors does not resolve the issue of whether the exclusion imposed by the I.G. is reasonable. The I.G. suggested originally that, as a matter of discretion, the I.G. had unreviewable authority to impose an exclusion of any length in excess of five years where aggravating factors existed and where there were no mitigating factors. However, the I.G. modified

⁴ Arguably, evidence as to whether an excluded party paid restitution might have been considered to be relevant to that party's trustworthiness to provide care under Matesic, because the payment of restitution might suggest that the excluded party showed remorse for his or her offenses or had been rehabilitated. That is not to say that I necessarily would find that to be so in every case or even in this case. The fact that a party is directed by a court to pay restitution for a crime may say very little about that party's remorse or rehabilitation.

this contention to assert that, in such a case, the administrative law judge must weigh the aggravating factors in order to decide whether the exclusion imposed by the I.G. comports with the Act's remedial purpose.

I agree with the I.G.'s modified position. The presence of aggravating factors in a given case, not offset by mitigating factors, means that an exclusion of more than five years may be appropriate. However, any exclusion imposed for more than five years under section 1128(a)(1) of the Act and 42 C.F.R. § 1001.102(b) and (c) must still comport with the remedial purpose of establishing protection against untrustworthy parties. Thus, the aggravating factors established in a given case must be weighed carefully to decide whether they support a conclusion that a party is sufficiently untrustworthy as to merit an exclusion of a particular length.

A 10-year exclusion is reasonable here. The evidence offered by the I.G. which pertains to aggravating factors identified in the regulations shows Petitioner to be a highly untrustworthy individual. Petitioner engaged in a carefully planned and executed scheme to defraud the Maryland Medicaid program. Findings 2 - 6. Petitioner executed his scheme over a protracted period of time, approximately two years, and he succeeded in his criminal enterprise to the extent that he extracted unlawfully thousands of dollars from the Maryland Medicaid program. The court which sentenced Petitioner for his offenses found them to be of such severity as to merit incarceration.

There is some dispute about the precise financial impact of Petitioner's crimes on the Maryland Medicaid program. The I.G. contends that Petitioner's crimes resulted in unlawful reimbursement to Petitioner in excess of \$74,000. Petitioner, noting that he paid restitution of about \$24,000, contends that the impact of his crimes was less than that alleged by the I.G. I cannot conclude from the evidence before me that Petitioner defrauded the Maryland Medicaid program of more than \$74,000, as is asserted by the I.G. The criminal charge to which Petitioner pled guilty asserts that Petitioner made false claims in excess of \$74,000. It does not recite how much Petitioner actually received by virtue of these false claims. On the other hand, Petitioner agreed to pay restitution of more than \$24,000 to the State of Maryland. His agreement constitutes an admission that his crimes resulted in compensation to him for false claims of at least that amount.

However, I find that Petitioner's admitted theft of more than \$24,000, coupled with evidence showing that Petitioner schemed deliberately to defraud the Maryland Medicaid program and executed that scheme over a protracted period, is sufficient to prove that Petitioner is a highly untrustworthy individual. In this case, a 10-year exclusion is justified because the evidence which I received proves that Petitioner is an individual who is capable of executing a deliberate and well-planned scheme to defraud federally financed health care programs.

CONCLUSION

I conclude that the I.G. had authority to exclude Petitioner pursuant to section 1128(a)(1) of the Act. I conclude further that the 10-year exclusion which the I.G. imposed against Petitioner is reasonable.

/s/

Steven T. Kessel
Administrative Law Judge