Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Paul G. Klein, D.P.M.,	DATE: May 19, 1994
Petitioner,	Docket No. C-93-072 Decision No. CR317
- v. -	
The Inspector General.	

DECISION

By letter dated March 17, 1993 (Exclusion Notice), the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Paul G. Klein, D.P.M. (Petitioner) that he was being excluded from participation in the Medicare program and from certain federally assisted State health care programs for a period of ten 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 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 ten years after taking into consideration circumstances which were unique to his case. The unique circumstances recited in the Exclusion Notice included the length of time in which Petitioner engaged in the program-related crimes and the financial

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[1] The State health care programs from which Petitioner was excluded are defined in section 1128(h) of the Social Security 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).

loss to the Medicaid program resulting from Petitioner's criminal activity.

Petitioner requested a hearing and the case was assigned to me. I convened a prehearing conference by telephone on June 3, 1993. During that conference, Petitioner indicated that he did not dispute that he was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program within the meaning of section 1128(a)(1) of the Act. The I.G. moved for summary disposition on the issue of whether it is reasonable to exclude Petitioner for a period of ten years. The I.G. filed a brief in support of her motion for summary disposition which was accompanied by proposed findings of fact and conclusions of law and 20 exhibits. Petitioner filed a brief in opposition to the I.G.'s motion for summary disposition which was accompanied by proposed findings of fact and conclusions of law and three exhibits. The I.G. filed a reply brief accompanied by two additional exhibits.

I convened another telephone conference on November 9, 1993. During that conference, I marked the 22 exhibits submitted by the I.G. as I.G. Ex. 1 - 22 and I admitted them into evidence. I marked the three exhibits submitted by Petitioner as P. Ex. 1 - 3 and I admitted P. Ex. 1 - 2 into evidence. I rejected P. Ex. 3 because it is a duplicate of the exhibit I had already admitted as I.G. Ex. 18. During the November 9 conference, I denied the I.G.'s motion for summary disposition and scheduled an in-person hearing to take place on December 8, 1993.

By letter dated November 29, 1993, Petitioner offered an additional exhibit. On December 8, 1993, I conducted an in-person hearing in New York City, New York. During that hearing, Petitioner withdrew the exhibit he had offered on November 29, 1993 because it was duplicative of evidence already in the record. Hearing Transcript (Tr.) at 5 - 6. Subsequent to the hearing, the I.G. filed a posthearing brief accompanied by proposed findings of fact and conclusions of law. Petitioner filed a posthearing submission consisting solely of proposed findings of fact and conclusions of law. He did not submit a posthearing brief. The I.G. submitted a posthearing reply brief.

I have considered the evidence of record, the parties' arguments, and the applicable law and regulations. I conclude that the ten-year exclusion which the I.G. imposed against Petitioner is reasonable.

ADMISSIONS

Petitioner admits that he was "convicted" of a criminal offense "related to" the delivery of an item or service under the Medicaid program, within the meaning of section 1128(a)(1) of the Act. Petitioner admits also that he is subject to a five-year minimum mandatory exclusion pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act. November 18, 1993 Order and Notice of Hearing at 2; Tr. at 4.

In addition, Petitioner admits that the following three aggravating factors are present in this case, pursuant to 42 C.F.R. § 1001.102: (1) the acts resulting in Petitioner's conviction resulted in a financial loss to Medicaid of $1500 or more (42 C.F.R. § 1001.102(b)(1)); (2) the acts resulting in Petitioner's conviction were committed over a period of one year or more (42 C.F.R. § 1001.102(b)(2)); and (3) the sentence which a court imposed as a result of Petitioner's conviction included a period of incarceration (42 C.F.R. § 1001.102(b)(4)). Id.

ISSUE

The issue in this case is whether the ten year exclusion directed and imposed against Petitioner by the I.G. is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCLs)

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

1. At all relevant times, Petitioner was a doctor of podiatric medicine. Tr. at 9; I.G. Ex. 13 at 46.

2. In 1989, the Office of the New York State Deputy Attorney General for Medicaid Fraud Control (State Attorney General) filed an Information in the Supreme Court of the State of New York, County of Westchester. The Information charged Petitioner with five counts of grand larceny in the second degree and 20 counts of offering a false instrument for filing in the first degree. I.G. Ex. 2.

3. In a second Information filed by the State Attorney General, Petitioner was charged with one count of

offering a false instrument for filing in the first degree. I.G. Ex. 3.

4. The State Attorney General also brought a civil action against Petitioner and others based on the damage caused to the New York State Medicaid program. I.G. Ex. 7.

5. On January 5, 1990, Petitioner, of his own free will and with the assistance of counsel, entered into a plea agreement, including a civil settlement, with the State Attorney General. I.G. Ex. 6, 7.

6. Pursuant to the plea agreement, the two Informations against him were consolidated and the single count charged in the second Information became count 26 of the consolidated Information. I.G. Ex. 6 at 5 - 6; I.G. Ex. 7.

7. In full satisfaction of the consolidated Information, Petitioner, pursuant to the plea agreement, pled guilty to two felony counts: (1) grand larceny in the second degree, and (2) offering a false instrument for filing in the first degree. I.G. Ex. 6, 7.

8. In pleading guilty to the grand larceny charge, Petitioner admitted that during the period from 1983 to 1986, acting in concert with others, he submitted and caused to be submitted numerous Medicaid reimbursement claims which falsely stated that Medicaid recipients had been provided with expensive orthotic devices and foot appliances when, in fact, less expensive stock appliances and devices had been supplied. I.G. Ex. 6, 7.

9. In pleading guilty to the grand larceny charge, Petitioner admitted that as a result of his false claims, he intentionally caused the New York State Medicaid program to pay to various entities in which he had a financial interest $1,084,708 to which these entities were not entitled. I.G. Ex. 6, 7.

10. In pleading guilty to offering a false instrument for filing, Petitioner admitted that, on or about November 17, 1993, he intentionally sought to defraud the New York State Medicaid program by falsely stating that an orthotic lab had furnished a specified orthopedic appliance to a Medicaid patient when he knew that the appliance had not been provided as claimed. I.G. Ex. 6, 7.

11. The court accepted Petitioner's guilty pleas and sentenced him to incarceration for a total of 365 days.

The court sentenced Petitioner to two periods of incarceration consisting of 45 weeks of four-day weekends on the first charge and 45 weeks of four-day weekends and one five-day weekend on the second charge. I.G. Ex. 7 at 1; I.G. Ex. 21.

12. After Petitioner served a number of his weekends in jail, the court modified the remainder of his jail sentence to house arrest. Tr. at 23, 34.

13. Pursuant to the plea agreement, Petitioner agreed to pay restitution to the New York State Medicaid program with monies and properties worth approximately $400,000. I.G. Ex. 7, 8.

14. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program, within the meaning of section 1128(a)(1) of the Act. FFCLs 2 - 13; November 18, 1993 Order and Notice of Hearing at 2.

15. The Secretary of DHHS (Secretary) has delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21,662 (1983).

16. By letter dated March 17, 1993, the I.G. excluded Petitioner pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act for a period of ten years.

17. The I.G. had authority to impose and direct an exclusion against Petitioner pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act. FFCLs 1 - 16.

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

19. 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).

20. 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. FFCLs 18, 19.

21. An exclusion imposed pursuant to section 1128(a)(1) of the Act must be for a period of at least five years. Act, sections 1128(a)(1), 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

22. 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).

23. 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).

24. 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).

25. In evaluating the reasonableness of the ten year exclusion, it is necessary to weigh the evidence relevant to the aggravating and mitigating factors enumerated in the regulations in a manner that is consistent with the goals of the Act. Act, section 1102(a).

26. 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.

27. Petitioner was convicted of joining with other podiatrists in executing a scheme which resulted in the theft of $1,084,708 from the New York State Medicaid program. FFCLs 8, 9.

28. That crimes for which Petitioner was convicted resulted in financial loss to the Maryland Medicaid program in excess of $1500 is an aggravating factor that may justify excluding Petitioner for more than five years. FFCL 27; 42 C.F.R. § 1001.102(b)(1).

29. The crimes which Petitioner perpetrated against the New York State Medicaid program were committed over a period of approximately three years. FFCL 8.

30. That the crimes for which Petitioner was convicted were committed over a period exceeding one year is an aggravating factor that may justify excluding Petitioner for more than five years. FFCL 29; 42 C.F.R. § 1001.102(b)(2).

31. The sentence imposed against Petitioner for his crimes against the New York State Medicaid program included a period of incarceration. FFCL 11.

32. That the sentence imposed against Petitioner for his crimes against the New York State Medicaid program included a period of incarceration is an aggravating factor that may justify excluding Petitioner for more than five years. FFCL 31; 42 C.F.R. § 1001.102(b)(4).

33. The aggravating factors present in this case establish that Petitioner committed serious criminal offenses which damaged the integrity of federally financed health care programs. FFCLs 27 - 32.

34. The aggravating factors present in this case establish Petitioner to be a threat to the integrity of federally financed health care programs. FFCL 33.

35. In the absence of any offsetting mitigating factor, the aggravating factors present in this case would justify excluding Petitioner for more than five years. FFCLs 25 - 34; 42 C.F.R. § 1001.102(b)(1) - (6).

36. Petitioner's wife suffered a serious and debilitating illness over a protracted period of time, beginning shortly after her marriage to Petitioner in 1979, and worsening over time. Tr. at 11 - 15.

37. Petitioner was under considerable stress because of his wife's illness. Tr. at 15 - 17, 25 - 28.

38. The sentencing judge was aware of the medical condition of Petitioner's wife. Tr. at 22 - 23, 34; I.G. Ex. 22.

39. The sentencing judge structured the sentence to provide for weekend incarceration. FFCL 11.

40. The sentencing judge provided for weekend incarceration so that Petitioner would be available to care for his ill wife. I.G. Ex. 22 at 5 - 6, 16, 18.

41. The sentencing judge modified Petitioner's sentence to house arrest to allow Petitioner to be available to care for his ill wife. FFCL 12; Tr. at 23, 34.

42. There is no evidence that, as 42 C.F.R. § 1001.102(c)(2) requires, the criminal court made a finding on the record, that before or during the commission of his crimes, Petitioner suffered from a

mental, emotional, or physical condition that reduced his culpability.

43. The mitigating factor identified at 42 C.F.R. § 1001.102(c)(2) is not present in this case. FFCL 42.

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

45. The aggravating factors in this case establish that a ten-year exclusion is reasonable to satisfy the remedial purposes of the Act. FFCL 22 - 34.

DISCUSSION

Petitioner does not dispute that he was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act. In addition, Petitioner does not dispute that the Act requires that he be excluded for a minimum of five years, based on his conviction of a program-related offense. What is at issue here is whether it is reasonable to exclude Petitioner for a period of ten years.

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

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

The controlling regulations for exclusions imposed pursuant to section 1128(a)(1) of the Act are contained in 42 C.F.R. §§ 1001.101 and 1001.102. The standard for adjudication contained in the regulations mandates that,

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

The regulations specifically identify those factors which may be classified as aggravating and those factors which may classified as mitigating. Under the regulatory scheme, evidence which relates to factors which are not among those specified as aggravating and mitigating is not relevant to adjudicating the length of an exclusion and cannot be considered.[2]

The regulation governing exclusions imposed pursuant to section 1128(a)(1) contains no formula for assigning weight to aggravating and mitigating factors once such factors are established by the parties. In the preamble to the regulations, the comments include the following:

> We do not intend for the aggravating and mitigating factors to have specific values; rather, these factors must be evaluated based on the circumstances of a particular case.
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> * * * *
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> The weight accorded to each mitigating and aggravating factor cannot be established according to a rigid formula, but must be determined in the context of the particular case at issue.

57 Fed. Reg. 3314, 3315.

Thus, in evaluating the reasonableness of an exclusion, I am required to explore in detail, and assign appropriate weight to, those regulatory factors which are aggravating and mitigating. While the regulations limit the specific

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[2] I describe the permissible aggravating factors in FFCL 23. I describe the permissible mitigating factors in FFCL 24.

factors which I may consider in evaluating the reasonableness of an exclusion, I am still guided by the goals of the Act in assigning weight to the factors which are specified in the regulations. The regulations promulgated by the Secretary cannot do more than interpret and implement the Act itself. Section 1102(a) of the Act authorizes the Secretary to publish only those rules and regulations "not inconsistent with this Act, as may be necessary to the efficient administration of the functions with which [she] is charged under this Act." Thus, the regulations should be applied to produce a result which is consistent with that required by the underlying statute. In evaluating the reasonableness of an exclusion, I must weigh those factors which the regulations direct me to consider in a manner that is consistent with the purposes of the Act.

Section 1128 of the Act is a civil statute and Congress intended it to be remedial in application. The remedial purpose of the exclusion law is to protect the integrity of federally financed health care programs and the welfare of the programs' beneficiaries and recipients. The exclusion law is intended to protect program funds and beneficiaries and recipients from providers who have demonstrated by their conduct that they pose a threat to the integrity of such funds, or to the well-being and safety of beneficiaries and recipients. See S. Rep. No. 109, 100th Cong., 1st Sess. 1 (1987), reprinted in 1987 U.S.C.C.A.N. 682. In view of the fact that the regulations' intent is to implement the Act's remedial purpose, I must decide, using the regulatory factors, whether an exclusion is reasonably necessary to protect the integrity of federally-financed health care programs and the welfare of the programs beneficiaries and recipients. William F. Middleton, DAB CR297, at 8 (1993), declined review, Feb. 7, 1993.

My authority in hearing and deciding cases pursuant to section 1128 of the Act remains de novo. See section 205(b) of the Act as incorporated by section 1128(f) of the Act; 42 C.F.R. § 1005.20. I am not charged with an appellate review of the I.G.'s actions, nor am I directed to conduct an inquiry as to whether the I.G.'s agent has discharged his or her duty competently in a particular case. The purpose of my inquiry is not to determine how accurately the I.G. applied the law to the evidence which was before the I.G. Instead, the purpose of my inquiry is to evaluate the reasonableness of the exclusion de novo.

A de novo evaluation does not mean that I have unbridled discretion to modify an exclusion. I must sustain the

exclusion if, based on an independent review, I conclude it comports with the regulations' criteria and the remedial purpose of the Act. I must modify the exclusion if, based on an independent review, I conclude that it does not comport with the criteria contained in the regulations and with the remedial purpose of the Act. Once either the I.G. or Petitioner proves the existence of an aggravating or mitigating factor, I must evaluate fully the significance of that factor as it relates to the reasonableness of the Petitioner's exclusion.

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

In the present case, the I.G. contends that the following three aggravating factors are present in this case: (1) petitioner was convicted of a program-related offense involving a financial loss to the Medicaid program in an amount greater than or equal to $1500 pursuant to 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 pursuant to 42 C.F.R. § 1001.102(b)(2); and (3) Petitioner's sentence included a period of incarceration pursuant to 42 C.F.R. § 1001.102(b)(4).[3] Petitioner does not dispute the existence of any of these aggravating factors.

Since it is undisputed that these three aggravating factors are present in this case, it is possible to lengthen the period of exclusion beyond the minimum five-year period. While the presence of these factors makes it possible for the I.G. or me to increase the period of

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[3] The Exclusion Notice mentioned only two of these aggravating factors. The Exclusion Notice referred to the financial impact of Petitioner's crimes and the duration of his criminal activity, but it did not mention that Petitioner's sentence included incarceration. I have accepted evidence concerning Petitioner's incarceration, even though it was not mentioned in the Exclusion Notice because the hearing before me is de novo and because the I.G. provided Petitioner adequate notice of her intent to assert this additional factor as an aggravating factor in the first prehearing conference held in this case. The I.G. argued that this aggravating factor is applicable to this case in her motion for summary disposition and Petitioner was given ample opportunity to rebut the evidence and arguments which the I.G. made pertaining to this factor.

exclusion beyond the minimum five-year period, it does not require the I.G. or me to do so. 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). The regulations do not mandate an increase in the exclusion period solely on the basis of the presence of one or more aggravating factors. Rather, what controls the exclusion period is the relative weight of the material evidence of such factors in the context of the total record.

The presence of aggravating factors in a given case means that an exclusion of more than five years may be reasonable. 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 providing protection against untrustworthy providers. 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.

In this case, the evidence offered by the I.G. which pertains to aggravating factors identified in the regulations leads to the conclusion that Petitioner is a highly untrustworthy individual.

Evidence adduced by the I.G. shows that the State Attorney General charged Petitioner with committing crimes directed against the New York States Medicaid program. Petitioner was charged with five counts of grand larceny and 21 counts of offering a false instrument for filing. FFCLs 2, 3.

On January 5, 1990, Petitioner, of his own free will and with the assistance of counsel, entered into a plea agreement with the State Attorney General. FFCL 5. Pursuant to the plea agreement, Petitioner pled guilty to two felony counts: one count of grand larceny and one count of offering a false instrument for filing, in full satisfaction of all the criminal charges against him. FFCL 7.

In pleading guilty to the grand larceny charge, Petitioner admitted that during the period from 1983 to 1986, acting in concert with others, he submitted and caused to be submitted numerous Medicaid reimbursement claims which falsely stated that Medicaid recipients had been provided with expensive orthotic devices and foot appliances when, in fact, less expensive stock appliances

and devices had been supplied. FFCL 8. Petitioner admitted that as a result of these false claims, he intentionally caused the New York State Medicaid program to pay to various entities in which he had a financial interest $1,084,708 to which these entities were not entitled. FFCL 9. In pleading guilty to offering a false instrument for filing, Petitioner admitted that he intentionally sought to defraud the New York State Medicaid program by falsely stating that an orthotic lab had furnished a specified orthopedic appliance to a Medicaid patient when he knew that the appliance had not been provided as claimed. FFCL 10.

Pursuant to the plea agreement, Petitioner agreed to pay restitution to the New York State Medicaid program with monies and properties worth approximately $400,000. FFCL 13. In addition, Petitioner was sentenced to a total of 365 days incarceration. FFCL 11.

The first aggravating factor cited by the I.G. is that the acts resulting in the conviction, or similar acts, resulted in financial loss to Medicare and the State health care programs of $1,500 or more. 42 C.F.R. § 1001.102(b)(1). The uncontroverted evidence of record shows that the standard for this aggravating factor has been amply met. Petitioner pleaded guilty to joining with others in executing a scheme which resulted in the theft of more than a million dollars to the Medicaid program. Petitioner's criminal offenses cost the Medicaid program an enormous amount of money. To underscore the enormity of Petitioner's theft, the State Attorney General characterized Petitioner's criminal activities as "this nation's largest Medicaid podiatry fraud" in a press release issued by that office on January 5, 1990. I.G. Ex. 8 at 1.

Petitioner, noting that he and others paid restitution to the Medicaid program, contends that the impact of his crimes was less than that alleged by the I.G. In evaluating the weight to be given to the financial loss to the New York State Medicaid program in this case, the regulations specifically require me to consider the entire amount of financial loss to the Medicaid program, "regardless of whether full or partial restitution has been made." 42 C.F.R. § 1001.102(b)(1). By pleading guilty, Petitioner admitted that his crimes cost the Medicaid program over a million dollars. The regulations do not allow me to decrease the weight I accord this factor based on the fact that Petitioner paid restitution to the Medicaid program.

Moreover, the uncontroverted evidence of record shows that Petitioner did not engage in an isolated instance of criminal misconduct. On the contrary, Petitioner pled guilty to submitting numerous false claims over a protracted period of time spanning three years. By his own admission, Petitioner engaged in a long-term scheme to steal money from the Medicaid program. Thus, the second aggravating factor cited by the I.G., that the criminal activity last a year or more, has also been amply satisfied. 42 C.F.R. § 1001.102(b)(2).

In addition, the third aggravating factor cited by the I.G., that the sentence imposed by the court include incarceration, is met in this case. 42 C.F.R. § 1001.102(b)(4). The court which sentenced Petitioner for his offenses found them to be of such severity as to merit incarceration for 365 days. The fact that Petitioner was sentenced to incarceration for 365 days underscores the seriousness of the crimes to which Petitioner pled guilty and leads to the conclusion that the sentencing judge considered Petitioner's crimes to be serious.

Petitioner attempts to minimize his culpability by characterizing his criminal offenses as merely "technical" violations of the law. June 17, 1993 Prehearing Order and Schedule for Filing Motion for Summary Disposition (June 17, 1993 Prehearing Order) at 2 - 3. Petitioner's assertion is without merit. The uncontested facts establish that Petitioner was convicted of two felonies based on his voluntary pleas of guilty. By pleading guilty to these offenses, Petitioner admitted that he deliberately filed numerous false Medicaid claims from 1983 to 1986 and that these actions cost the Medicaid program more than a million dollars. By any standard, the criminal offenses to which Petitioner pled guilty are serious. Petitioner's attempt to minimize the gravity of his criminal misconduct by characterizing his offenses as "technical" violations is unpersuasive.

The weight of the aggravating factors, singly and together, establishes Petitioner to be a highly untrustworthy individual. Through his deliberate, larcenous actions in filing numerous false Medicaid claims over a three-year period, Petitioner cost the Medicaid program over a million dollars. As a result, Petitioner was sentenced to incarceration for 365 days. The existence of these aggravating factors leads to the conclusion that Petitioner has been and is capable of engaging in criminal misconduct that causes great damage to the financial integrity of the Medicaid program. As I have stated before, the purpose of the exclusion law is

to protect public health funds from unscrupulous providers. In view of the foregoing, I conclude that absent any mitigating evidence, the minimum five-year exclusion is not sufficient to protect the federally-financed health care programs in this case. The aggravating factors present in this case justify an exclusion substantially longer than five years.

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

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

Petitioner's central argument is that the ten-year exclusion is unreasonable because the mitigating factor set forth at 42 C.F.R. § 1001.102(c)(2) is present in this case. Tr. at 6 - 8. That regulation provides that it is a mitigating factor when:

> [t]he 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 . . .[4]

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[4] The regulations identify two additional mitigating factors. One of the additional mitigating factors is present when the excluded provider is convicted of three or fewer misdemeanor offenses and the entire loss to the programs is less than $1,500. 42 C.F.R. § 1001.102(c)(1). Petitioner does not contend that this mitigating factor is present in this case and the evidence shows that it does not apply. The other mitigating factor exists when the excluded provider's cooperation with authorities resulted in others being convicted or excluded or the imposition against anyone of a civil money penalty or assessment. While Petitioner asserted in the initial prehearing conference that his cooperation with authorities presumably resulted in

(continued...)

Petitioner contends that the sentencing judge in the underlying criminal proceeding "took into account the stress Petitioner was under due to his wife's illness in reaching his sentencing determination." Petitioner's posthearing submission at 4. Petitioner argues that this conforms with the requirements of the mitigating factor enunciated at 42 C.F.R. § 1001.102(c)(2).

Evidence adduced by Petitioner shows that his wife has indeed suffered from a serious illness over a period of years. Petitioner testified at the in-person hearing that shortly after his marriage in 1979, his wife was diagnosed as having ulcerative colitis. In the beginning, this condition was "mild" and it "gradually progressed" over the next seven years. In order to treat this condition, Petitioner's wife was put on high dosages of cortisone. The cortisone affected her adrenal gland, and she developed a condition called adrenal insufficiency. Tr. at 11.

Petitioner's wife's medical condition deteriorated, and in 1987, she underwent the first of three surgeries performed at Mt. Sinai Hospital in New York. Tr. at 12. The three surgeries were not successful and Petitioner's wife continued to have a decrease in the quality of life. Petitioner's wife was then treated at the Mayo Clinic in Minnesota on approximately six occasions. In addition, the adrenal insufficiency was worsening, and Petitioner's wife was hospitalized on several occasions for shock. Tr. at 12 - 15.

Petitioner monitored his wife's condition and administered medication. Tr. at 32, 35 - 37. Petitioner testified that he was "basically really destroyed" and "worn down" by his wife's problems. Tr. at 16, 25. The offenses of which Petitioner was convicted occurred during the period from 1983 - 1986. Petitioner testified that during this period, he was running himself "ragged"

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[4](...continued)
actions taken against others involved in this criminal activity, he did not develop this argument in his written briefs or at the hearing. The record is devoid of evidence establishing the existence of this mitigating factor. Quite the contrary, the record contains affidavits from two attorneys from the State Attorney General's office which unequivocally state that any cooperation provided by Petitioner in the course of the investigation and prosecution of the underlying criminal proceeding did not result in others being convicted or excluded. I.G. Ex. 9 at 3; I.G. Ex. 12 at 3.

because he was working 104 hours a week and trying to take care of his wife. Tr. at 25. He stated that it was a "constant battle" to try to get her disease under control before it got worse. Petitioner testified that his wife's condition nevertheless worsened, and that he continued to be under considerable stress due to her illness. Petitioner stated that, even during his criminal prosecution, his primary concern was his wife's medical care. Tr. at 15 - 17, 25 - 28. As part of his plea agreement, the State Attorney General agreed to set aside some of the monies Petitioner paid in restitution in a special medical account to pay for his wife's medical expenses during the period that he was incarcerated. Tr. at 20.

The sentencing judge was aware of Petitioner's wife's medical condition. FFCL 38. The plea agreement was made part of the record in the court, and the sentencing judge acknowledged that he had read the plea agreement. Tr. at 22. In addition, while Petitioner was sentenced to incarceration for a period of 365 days, he was not required to serve this sentence on 365 consecutive days. Instead, the judge sentenced him to serve it on 90 four-day weekends to be followed by one five-day weekend. FFCLs 11, 39. The sentencing judge provided for weekend incarceration so that Petitioner would be available to take care of his ill wife. FFCL 40. On three separate occasions, the sentencing judge modified the sentence to allow Petitioner to be available to take care of his wife, even on a weekend. Tr. at 23, 34. In addition, after Petitioner had been incarcerated for a number of weekends, his wife's condition worsened. The sentencing judge responded by modifying the remainder of Petitioner's sentence to house arrest so that Petitioner could be available to care for his wife. FFCLs 12, 41.

I have evaluated the evidence of record, and I conclude that the mitigating factor identified at 42 C.F.R. § 1001.102(c)(2) is not present in this case. Petitioner's wife suffered a serious and debilitating illness over a protracted period of time. At the hearing, both Petitioner and his wife testified about the effect Petitioner's wife's illness had on him. This testimony reveals that Petitioner was under considerable stress because of his wife's ill health. While there is evidence that Petitioner was under a great deal of stress due to his wife's illness, this alone is not sufficient to establish the mitigating factor described at 42 C.F.R. § 1001.102(c)(2).

The regulation provides that a party's mental condition can be considered as a mitigating factor <u>only</u> if:

> [t]he 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 . . .

42 C.F.R. § 1001.102(c)(2). The requirement that the threshold condition identified by the regulation be met first is critical. As Judge Kessel stated in the case of John M. Thomas, Jr., M.D., et al., DAB CR281 (1993), an administrative law judge "may not consider as 'mitigating,' evidence concerning a party's mental state and culpability unless this threshold condition is first proved by an excluded party." Thomas, DAB CR281 at 18 n. 9.

In this case, the threshold condition identified by the regulation has not been met. While there is evidence that Petitioner was under stress at the time that he committed his criminal offenses due to his wife's illness, neither Petitioner nor his wife testified that Petitioner's stress was responsible for or contributed to his criminal misconduct. The record is devoid of persuasive evidence showing that the stress Petitioner was under at the time he engaged in his criminal misconduct lessened his culpability.

More importantly, even if Petitioner had provided persuasive evidence that his stress reduced his culpability, which he has not, he would still have to show that the record of the criminal proceedings demonstrates that the criminal court determined that his stress reduced his culpability. Petitioner has not pointed to anything in the record of the criminal proceedings (including the sentencing documents) demonstrating that the court determined that the stress he was under due to his wife's illness reduced his criminal culpability. The minutes of the plea and sentencing proceedings as well as the plea agreement are devoid of any evidence showing that the court determined that Petitioner had a mental, emotional or physical condition before or during the commission of his criminal offenses that reduced his culpability. I.G. Ex. 6, 7, 21, and 22.

There is no dispute that the sentencing judge in the criminal proceeding was aware that Petitioner's wife was ill. The record shows that the reason Petitioner's sentence was structured to provide for weekend incarceration was to enable Petitioner to be available to care for his ill wife. It was Petitioner's wife's

serious medical condition at the time of Petitioner's plea and sentence and not any condition Petitioner had before or during the commission of the offenses that resulted in Petitioner's sentence of weekend incarceration. I.G. Ex. 22 at 5 - 6, 18. There is nothing in the record which leads to the conclusion that Petitioner was sentenced to weekend incarceration due to a finding by the court that Petitioner was afflicted with a condition that reduced his culpability. Instead, the evidence of record leads to the conclusion that Petitioner was sentenced to weekend incarceration based on a humanitarian concern for Petitioner's wife's medical condition.

Further, after Petitioner had served a number of weekends in jail, the sentencing judge reduced his sentence to house arrest. Again, there is nothing to indicate that the sentencing judge modified the sentence to house arrest due to a determination that Petitioner had reduced culpability. Rather, Petitioner's wife's condition had worsened, and the court again acted humanely to allow Petitioner to be available to care for his wife. Tr. at 23, 34.

There is no evidence that, as 42 C.F.R. § 1001.102(c)(2) requires, the criminal court made a finding on the record that before or at the time of the commission of his crimes, Petitioner suffered from a condition that reduced his culpability. Indeed, the prosecutor present at the plea and sentence attests that the sentencing judge made no such findings. I.G. Ex. 9 at 2. Therefore, the mitigating factor at 42 C.F.R. § 1001.102(c)(2) does not apply to this case.

Petitioner has pointed to various other factors which he contends should be viewed as mitigating. Petitioner argues that the illnesses afflicting his wife as well as his child should be considered as mitigating. June 17, 1993 Prehearing Order at 2. While these illnesses have understandably caused Petitioner and his family much suffering, they do not fall within the parameters of any of the three mitigating factors set forth in the regulations.

Petitioner asserts that his exclusion, coupled with the restitution he paid to the New York Medicaid program and the demands caused by his wife's illness, make it difficult for him to provide for his family. June 17, 1993 Prehearing Order at 2; Tr. at 15, 38. The economic problems Petitioner may be experiencing are extraneous to the issues in this proceeding. Economic hardship does

not fall within the parameters of any of the three mitigating factors listed in the regulations.

Petitioner also testified about the effects of a childhood fireworks injury which resulted in the loss of his left thumb and required extensive reconstructive surgery. Tr. at 24. Petitioner implied that this condition may be mitigating. However, the record in the criminal proceeding is devoid of any reference whatsoever to this injury. Therefore, there is no basis to find that this injury is a mitigating factor contemplated by the regulations.

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

IV. A ten-year exclusion is reasonable.

The severe, multiple aggravating factors present in this case establish that Petitioner was and is a threat to the integrity of federally-financed health care programs. Petitioner's crimes were committed as part of a long-term scheme to defraud Medicaid, and the crimes resulted in over a million dollars being fraudulently obtained from Medicaid. Petitioner was convicted of two felonies which resulted in a sentence of incarceration. Petitioner has failed to show that there is even one mitigating factor present in this case. In the absence of any offsetting mitigating factors, the aggravating factors in this case establish that a ten-year exclusion is reasonable to satisfy the remedial purposes of the Act. The ten-year exclusion imposed and directed against Petitioner by the I.G. must stand.

CONCLUSION

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

It is so Ordered.

/s/

Charles E. Stratton
Administrative Law Judge