

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
John A. Sayegh, M.D.,)	Date: October 20, 1998
)	
Petitioner,)	
)	
- v. -)	Docket No. C-98-213
)	Decision No. CR551
The Inspector General.)	
)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, John A. Sayegh, M.D., from participating in Medicare and other federally funded health care programs, including Medicaid, for a period of three years. I find that the I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(1) of the Social Security Act (Act) and that the duration of the exclusion is reasonable.

I. Background

By letter dated December 31, 1997, the I.G. notified Petitioner that he was being excluded from participating in Medicare and other programs, including Medicaid, for a period of three years. The I.G. advised Petitioner that he was being excluded pursuant to section 1128(b)(1) of the Act, because Petitioner had been convicted in a federal court of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. The I.G. imposed the minimum exclusion period permitted under the governing regulations found at 42 C.F.R. § 1001.201.

Petitioner filed a request for a hearing to review the I.G.'s action. The parties agreed that the case could be heard and decided based on their written submissions, including briefs and exhibits. Petitioner submitted a brief, accompanied by 15 proposed exhibits (P. Exs. 1-15) and a surreply brief. The I.G. did not object to my receiving into evidence the Petitioner's proposed exhibits. The I.G. submitted a brief, accompanied by six proposed exhibits (I.G. Exs. 1-6) and a reply brief. Petitioner did not object to my receiving into evidence the I.G.'s proposed exhibits. I hereby receive into evidence I.G. Exs. 1-6 and P. Exs. 1-15.

II. Applicable Law

Under section 1128(b)(1) of the Act, the Secretary may exclude --

[a]ny 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 an 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.¹

42 C.F.R. § 1001.201(b)(1) provides that --

an exclusion imposed under section 1128(b)(1) of the Act shall be for a period of three years, unless specified aggravating or mitigating factors are present which form the basis for lengthening or shortening the period of exclusion.

42 C.F.R. § 1001.201(b)(2) provides that the following factors may be considered to be aggravating and a basis for lengthening the period of exclusion:

(i) [t]he acts resulting in the conviction, or similar acts, resulted in financial loss of \$1500 or more to a government program or to one or more other entities, or had a significant financial impact on program beneficiaries or other individuals. (The total amount of financial loss will be considered, including any amounts resulting from similar acts not adjudicated, regardless of whether full or partial restitution has been made); (ii) [t]he acts that resulted in the conviction, or similar acts, were committed over a period of one year or more; (iii) [t]he acts that resulted in the conviction, or similar acts, had a significant adverse physical or mental impact on one or more program beneficiaries or other individuals; (iv) [t]he sentence imposed by the court included incarceration; or (v) [t]he convicted individual or entity has a prior criminal, civil or administrative sanction record.

¹ Congress amended section 1128 of the Act, effective August 21, 1996. One of the amendments to section 1128 creates a new section, section 1128(a)(3), which mandates a minimum exclusion of at least five years for any felony conviction for an offense formerly described by section 1128(b)(1). Section 1128(b)(1) is retained, but provides permissive exclusion authority for misdemeanor convictions only. Because section 1128(a)(3) applies to offenses which occurred after the date of enactment of the 1996 amendment, the I.G. did not exclude Petitioner under this new exclusion authority.

42 C.F.R. § 1001.201(b)(3) provides that only the specific factors delineated there may be considered as mitigating and a basis for reducing the period of exclusion. In this case, the regulation provides for consideration of the following mitigating factor:

. . . (iii) [t]he individual's or entity's cooperation with Federal or State officials resulted in --(A) [o]thers being convicted or excluded from Medicare or any of the State health care programs, or (B) [t]he imposition of a civil money penalty against others.

42 C.F.R. § 1001.2002 provides that --

(a) [i]f the I.G. determines that exclusion is warranted, it will send a written notice of this decision to the affected individual or entity; (b) [t]he exclusion will be effective 20 days from the date of the notice.

42 C.F.R. § 1005.4(c)(5) provides that --

[t]he ALJ does not have the authority to . . . Review the exercise of discretion by the O.I.G. to exclude an individual or entity under section 1128(b) of the Act, or determine the scope or effect of the exclusion.

III. Issues, findings of fact, and conclusions of law

The issues in this case are: (1) whether the I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(1) of the Act; and (2) whether the three-year exclusion imposed by the I.G. is reasonable. I make the following findings of fact and conclusions of law (FFCL) to support my decision that the exclusion is authorized and reasonable:

1. Petitioner practiced medicine in Kansas City, Kansas, doing business as Primary Medical Care. I.G. Ex. 4.
2. Petitioner obtained money from insurance companies by submitting false health insurance claims to insurance companies for medical services never rendered, during a period of approximately three years. I.G. Ex. 4.
3. Petitioner received payments for these claims from private insurance companies totaling \$17,188.83. I.G. Ex. 2.
4. On April 19, 1995, the U.S. Attorney for the District of Kansas ("Government") filed an indictment charging Petitioner and three other defendants with 31 counts of criminal acts. Counts 2 through 16 encompassed mail fraud, in violation of 18 U.S.C. § 1341. I.G. Ex. 4.

5. On August 7, 1995, Petitioner entered into a plea agreement and agreed to cooperate with the Government. P. Ex. 4.
6. On November 2, 1995, Petitioner pled guilty to counts 2, 15, and 16 (mail fraud). The remainder of the charges were dropped, pursuant to the plea agreement. I.G. Ex. 2.
7. Petitioner was "convicted" within the meaning of section 1128(i) of the Act. I.G. Ex. 2.
8. Petitioner was convicted of criminal offenses "relating to fraud, theft, embezzlement, and breach of fiduciary responsibility or other financial misconduct," in connection with the delivery of a health care item or service within the meaning of section 1128(b)(1) of the Act. 42 U.S.C. § 1320a-7(b)(1). I.G. Ex. 2.
9. On Counts 2, 15, and 16, Petitioner was sentenced to incarceration for 12 months, to run concurrently; supervised release for two years, to run concurrently; and payment of restitution in the amount of \$17,188.83. I.G. Ex. 2.
10. Two other defendants (Julian Nunez, M.D. and Nereyda Nunez) were tried and convicted. P. Ex. 7.
11. On October 23, 1995, the Government filed a motion citing Dr. Sayegh's cooperation with the Government. P. Ex. 6.
12. On August 12, 1997, the I.G. notified Dr. Sayegh of its intent to exclude him from participation in Medicare, Medicaid, Maternal and Child Health Services Block Grants, and Block Grants to States. I.G. Ex. 6. On December 31, 1997, the I.G. notified Petitioner that he was being excluded from participation in Medicare, Medicaid, Maternal and Child Health Services Block Grant, and Block Grants to States. I.G. Ex. 1.
13. The effective date of the exclusion was January 20, 1998. I.G. Ex. 1.
14. Pursuant to section 1128(b)(1) of the Act, the Secretary of the Department of Health and Human Services has authority to impose and direct exclusions against Petitioner from participation in the Medicare and State health care programs.²
15. The Secretary has delegated to the I.G. the duty to impose and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21,662 (1983).

² The term "State health care plans/programs" is used interchangeably here with the term "Medicaid."

16. Section 1128(b)(1) of the Act provides for the permissive exclusion from Medicare and State health care programs of individuals convicted, under federal or State law, 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. 42 U.S.C. § 1320a-7(b)(1).
17. The I.G. was authorized to exclude Petitioner, pursuant to 1128(b)(1) of the Act. 42 U.S.C. § 1320a-7(b)(1). FFCL 7, 8, 16.
18. The regulatory provisions governing permissive exclusions state that exclusions based on health care fraud convictions will be for a period of three years unless aggravating or mitigating factors form a basis for lengthening or shortening that period. 42 C.F.R. § 1001.201(b)(1).
19. Petitioner proved the existence of a mitigating factor. FFCL 5, 10, 11.
20. The aggravating factors established by the I.G. prove Petitioner to be untrustworthy and outweigh the mitigating factor proved by Petitioner. FFCL 2, 3, 7, 8, 9.
21. The exclusion which the I.G. imposed against Petitioner pursuant to section 1128(b)(1) of the Act is reasonable and appropriate.

IV. Petitioner's contentions

Although Petitioner concedes that he has been convicted of a criminal offense within the scope of section 1128(b)(1) of the Act, he cites factors in his case which he maintains warrant mitigation of the exclusion period. He cites his cooperation with the United States Attorney's Office for the District of Kansas and points out that his cooperation brought about the convictions of two additional defendants (Julian Nunez, M.D. and Nereyda Nunez). He alleges that the I.G. failed to consider his cooperation and that the length of his exclusion should therefore be reduced.

He also asserts that he is remorseful for his actions, that he has made amends for his wrongdoing through his payment of monetary restitution and incarceration, and that the remedial purposes of the Act are not served by, in his view, belatedly punishing him after he has been rehabilitated.

Finally, he asserts that the I.G. unreasonably delayed his exclusion from the Medicare and State health care plans and that this provides an additional basis for reducing the length of the exclusion.

V. Discussion

A. The I.G. was authorized to exclude Petitioner.

The I.G. excluded Petitioner pursuant to section 1128(b)(1) of the Act. As of December 31, 1997, the date that the I.G. imposed the exclusion, section 1128(b)(1) provided that the I.G. had authority to exclude an individual who:

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.

Therefore, in reviewing the reasonableness of the length of Petitioner's exclusion, the first requirement is that Petitioner must have been convicted of a criminal offense under federal or State law. The record reflects that a judgment of conviction was entered in Petitioner's case, and he was sentenced by the United States District Court for the District of Kansas. I.G. Ex. 2. This judgment was based upon the Court's acceptance of Petitioner's guilty plea on November 2, 1995. I.G. Ex. 2. Petitioner was thus convicted within the meaning of section 1128(i)(3) of the Act.

I further find that the criminal misconduct for which Petitioner has been convicted is within the scope of section 1128(b)(1). The record reflects that Petitioner was found guilty of three counts of mail fraud in violation of 18 U.S.C. § 1341, as a result of his role in submitting false claims for health care services not actually rendered. Where an individual is convicted of an offense involving the submission of fraudulent or false health care claims for reimbursement, the offense is committed in connection with the delivery of health care items and services and subjects the individual to permissive exclusion under section 1128(b)(1) of the Act. Joel Fass, DAB CR349 (1994); see also Erol Ucer, M.D., DAB CR416 (1996); William D. Miles, M.D., DAB CR354 (1995); Michael M. Bouer, R.Ph., DAB CR345 (1994). And, in fact, Petitioner does not dispute the I.G.'s authority to impose sanctions in light of his conviction. P. Br. at 4.

B. The length of the exclusion is reasonable.

Although Petitioner concedes that he was convicted of a crime within the scope of section 1128(b)(1) of the Act and that the I.G. had authority to exclude him, Petitioner has argued in his brief that his three-year exclusion should be reduced due to the presence of mitigating factors which he alleges were not considered by the I.G. in determining the length of the exclusion.

i. Mitigating factors.

The regulations at 42 C.F.R. § 1001.201(b)(2) and (3) make it plain that only evidence which relates to one or more of the defined aggravating or mitigating factors may be considered as a basis for increasing or shortening an exclusion. Petitioner seeks to establish the existence of the mitigating factor found at 42 C.F.R. § 1001.201(b)(3)(iii), which permits consideration that: "[t]he individual's or entity's cooperation with Federal or State officials resulted in-- (A) Others being convicted or excluded from Medicare or any of the Federal or State health care programs"

Petitioner also asserts that he is remorseful for his wrongdoing and has been appropriately rehabilitated. The assertion of remorse does not relate to any of the mitigating factors described by 42 C.F.R. § 1001.201(b)(3), and therefore, even if true, is not relevant.

The only relevant argument Petitioner makes with respect to mitigating factors is that he fully cooperated with the Government and that his cooperation resulted in the convictions of two individuals. P. Br. at 5. Petitioner alleges that the I.G. did not consider evidence of this cooperation. I now consider such evidence.

It is Petitioner's burden to prove the existence of mitigating factors. James H. Holmes, DAB CR270 (1993). The evidence Petitioner proffers to demonstrate his cooperation with the Government is the Government's Motion and Memorandum for Downward Departure, which states, among other things, that "the cooperation of defendant Sayegh . . . was a major contributing factor in the Nunez defendants' being convicted." P. Ex. 6. The motion also characterizes the cooperation as "substantial." *Id.* I find that in proffering this motion, Petitioner has met his burden to prove the existence of a mitigating factor.

ii. Aggravating factors.

However, in determining whether the length of an exclusion is reasonable, it is the responsibility of the administrative law judge to consider and weigh *all* of the relevant evidence brought to bear in this case. The regulation at 42 C.F.R. § 1001.201(b)(2) sets forth the aggravating factors which may be considered in determining the length of an exclusion. I find that the I.G. proved the presence of three aggravating factors, to be weighed against the mitigating factor offered by Petitioner. The three aggravating factors consist of the following:

- The acts resulting in Petitioner's conviction, or similar acts, caused financial loss of \$1,500 or more to a government program or to one or more other entities. 42 C.F.R. § 1001.201(b)(2)(i). Petitioner's fraud caused very substantial losses to be incurred by entities other than government programs. Petitioner admitted to having defrauded insurers of \$17,188.83. I.G. Ex. 2 at 5.

- The acts that resulted in Petitioner's conviction, or other similar acts, were committed by Petitioner over a period of one year or more. 42 C.F.R. § 1001.201(b)(2)(ii). Petitioner admitted to having perpetrated his crimes over a period of about three years, beginning in approximately 1990 and ending in 1993. I.G. Ex. 4 at 9.
- The sentence imposed on Petitioner for his crimes included a period of incarceration. 42 C.F.R. § 1001.201(b)(2)(iv). Petitioner was sentenced to 12 months' imprisonment. I.G. Ex. 2 at 2.

iii. Petitioner's lack of trustworthiness.

Even considering Petitioner's evidence of mitigation, the evidence which relates to the aggravating factors established by the I.G. makes the imposition of the minimum three-year exclusion period reasonable. I note that in weighing the aggravating factors against mitigating circumstances, it is not the mere presence of a greater number of aggravating factors which forms the basis for my decision here. As the Appellate panel has previously held in Barry D. Garfinkel, M.D., DAB 1572 (1996), it is the quality of the circumstances -- whether aggravating or mitigating, which is to be dispositive in analyzing evidence of these factors. Garfinkel at 31.

In this case, the aggravating factors established by the I.G. prove Petitioner to be an untrustworthy individual. Petitioner's lack of trustworthiness is established by his approximately three-year involvement in a massive scheme to defraud insurers. His fraud was persistent and deliberate, not random or impulsive. The extent to which Petitioner persisted in defrauding insurers is established by the large losses he caused insurers to incur.

In weighing Petitioner's untrustworthiness against his cooperation with the Government, I find that his cooperation with the Government is overcome by his untrustworthiness to provide care. In Garfinkel, the Appellate panel held that "[t]he mitigating factors must be more important or significant than the aggravating factors to support finding that the benchmark period proposed by the I.G. is beyond the reasonable range under the circumstances." Id. at 11. Petitioner's only evidence of his cooperation is the Government's motion, discussed supra, which uses only broad characterizations of Petitioner's cooperation. Petitioner offers no additional evidence of specific circumstances which illustrate cooperation so "substantial" in nature as to overcome the evidence of the aggravating circumstances. The evidence of aggravation offsets the evidence of mitigation, and proves that the minimum three-year exclusion Petitioner received is reasonable.

C. The lack of authority to change the effective date of the exclusion.

Petitioner additionally asserts that the I.G. engaged in unreasonable delay in determining to impose an exclusion against him. Petitioner argues that the I.G. delayed imposing an exclusion for two years and two months after Petitioner's conviction. P. Br. at 5. Petitioner asserts that it is arbitrary and capricious for the I.G. to commence an exclusion so long after conviction and sentencing. Petitioner argues that the remedial purposes of the Act require protecting the integrity of federal programs, rather than punishing their participant providers. Petitioner further argues that by delaying the imposition of the exclusion, the effect of the exclusion is punitive rather than remedial. P. Br. at 6.

The timing of a determination by the I.G. to exclude an individual is an act of discretion. I have no authority to decide whether the I.G. exercised her discretion reasonably in deciding when to impose the exclusion. 42 C.F.R. § 1005.4(c)(5). Moreover, once the I.G. has exercised her discretion to impose an exclusion, the regulation fixes the effective date of the exclusion at 20 days from the date of the notice of exclusion. 42 C.F.R. § 1001.2002(b).

VI. Conclusion

I conclude that the I.G. was authorized to exclude Petitioner, pursuant to section 1128(b)(1) of the Act. I find the three-year exclusion to be reasonable and I sustain it.

/s/

Joseph K. Riotto
Administrative Law Judge