

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
Stanley Z. Felsenberg, M.D.,	)	Date: December 2, 1998
Petitioner,	)	
- v. -	)	Docket No. C-98-202
The Inspector General.	)	Decision No. CR558
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**DECISION**

By letter dated April 10, 1997, the Inspector General (I.G.), United States Department of Health and Human Services, notified Stanley Felsenberg, M.D., Petitioner, that he would be excluded for a period of 10 years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.<sup>1</sup> The I.G. imposed this exclusion pursuant to section 1128(b)(1) of the Social Security Act (Act), based on Petitioner's conviction in the United States District Court for the District of Maryland for mail fraud in violation of 18 U.S.C. § 1341 and for aiding and abetting in violation of 18 U.S.C. § 2.

Petitioner filed a request for review of the I.G.'s action. The I.G. moved for summary disposition. The parties agreed that the case could be decided based on their written submissions and that an in-person hearing would not be necessary. The I.G. submitted a brief accompanied by three proposed exhibits (I.G. Exs. 1-3). Petitioner submitted a response brief. Petitioner also submitted two proposed exhibits (P. Exs. 1 and 2). The I.G. submitted a reply brief. Petitioner did not object to my receiving into evidence the I.G.'s proposed exhibits, and I receive into evidence I.G. Exs. 1-3. The I.G. did not object to my receiving into evidence Petitioner's proposed exhibits and I receive into evidence P. Exs. 1 and 2.

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<sup>1</sup> In this decision, I use the term "Medicaid" to refer to these State health care programs.

I affirm the I.G.'s determination to exclude Petitioner from participating in Medicare and other federally funded health care programs, including Medicaid, for a period of 10 years.

#### 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 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."<sup>2</sup>

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."

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<sup>2</sup> Congress amended section 1128 of the Act in 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 occur 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 following factors may be considered as mitigating and a basis for reducing the period of exclusion: "(i) [t]he individual or entity was convicted of 3 or fewer misdemeanor offenses, and the entire amount of financial loss to a government program or to other individuals or entities due to the acts is less than \$1500; (ii) [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; (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; or (iv) [a]lternative sources of the type of health care items or services furnished by the individual or entity are not available."

#### **PETITIONER'S CONTENTIONS**

Petitioner contends that his culpability in the criminal matter was not significant. He explains that his signature was on file with insurance companies and he suggests that he was not aware of the actual billing procedures. In this regard he states he notified State officials of the improper billings when he became aware of them.

Petitioner also cites a number of factors in his case which he maintains warrant mitigation of the exclusion period. He maintains that important aggravating factors, i.e., that the acts had a significant adverse physical or mental impact on program beneficiaries and that the petitioner had a prior criminal or administrative sanction, are absent in his case. He asserts that his incarceration should not be considered an aggravating factor because the criminal court in sentencing him had to consider under sentencing guidelines the amount of money involved and the period of time over which the criminal acts were committed. He maintains that, as these factors are also listed aggravating factors under the exclusion regulations, by considering the period of incarceration, the I.G. has piggybacked these factors, unfairly exagerrating their effect.

Petitioner also argues that his period of exclusion is unreasonable due to the presence of a mitigating factor not considered by the I.G. in his case. He asserts that his cooperation with the government resulted in the conviction and sentencing of two individuals, who had participated in the fraudulent scheme. Further, he maintains that the resulting convictions led to restitution by the same two individuals. Petitioner asserts that this factor was not present at the time of his exclusion. He maintains that his cooperation with the

government and the alleged resulting convictions and restitution offset the aggravating factors in his case and that therefore only a three-year exclusion is warranted.

Finally he asserts that the period of exclusion should be effective retroactive to the date of his plea agreement, on December 26, 1995.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCL)

1. During the period of time relevant to this case, Petitioner was licensed to practice as a physician in Maryland. I.G. Exs. 1 and 3.

2. During the period of time relevant to this case, Petitioner was a sole practitioner with offices in two locations in Maryland, which provided medical and physical therapy services. I.G. Exs. 1 and 3.

3. On October 10, 1995, a criminal indictment was filed in the United States District Court for the District of Maryland (District Court) alleging that, beginning on or about January 1991 through April 1995, Petitioner participated in an illegal scheme to defraud private insurance companies of money to which he was not entitled. I.G. Exs. 1 and 3.

4. According to the October 10, 1995 indictment and Petitioner's plea agreement, the scheme involved submitting false and fraudulent claims totaling between \$200,000 and \$350,000 for physical and medical therapy services which were either never rendered or were rendered by unlicensed third parties who were not authorized to provide such treatment. I.G. Exs. 1 and 3; FFCL 3.

5. According to the indictment, Petitioner, in furtherance of the fraudulent scheme, caused these false claims to be placed in the United States mail for delivery to various State and private insurers, in violation of 18 U.S.C. § 1341. I.G. Exs. 1-3; FFCL 3 and 4.

6. According to the indictment, Petitioner as part of the fraudulent scheme, received payment from various insurance companies through the United States mail, in violation of 18 U.S.C. § 1341 after submitting the false and fraudulent claims. I.G. Exs. 1 and 3; FFCL 3-5.

7. Before the District Court, on July 29, 1996, Petitioner pled guilty to one count of mail fraud in violation of 18 U.S.C. § 1341 and to one count of aiding and abetting in violation of 18 U.S.C. § 2. I.G. Ex. 2.

8. As a result of his conviction, Petitioner was sentenced to 12 months in prison. I.G. Ex. 2.

9. Under section 1128(b)(1) of the Act, the I.G. is authorized to exclude 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.

10. Where the I.G. determines to exclude an individual pursuant to section 1128(b)(1) of the Act, the term of exclusion will be for a period of three years, in the absence of aggravating or mitigating factors that would support an exclusion of more or less than three years.

11. Petitioner's criminal conviction constitutes a conviction within the scope of section 1128(i)(3) of the Act.

12. Petitioner was convicted under federal 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.

13. The I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(1) of the Act.

14. Petitioner did not prove the presence of any mitigating factors.

15. The three aggravating factors, established by the I.G., prove Petitioner to be untrustworthy. FFCL 3, 4, and 8.

16. Petitioner's 10-year exclusion is reasonable and appropriate.

#### DISCUSSION

To sustain its exclusion, the I.G. must demonstrate that Petitioner was 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. Section 1128(b)(1) of the Act. Therefore, 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 District Court. This judgment was based upon the District Court's acceptance of Petitioner's guilty plea on July 29, 1996.

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) and properly results in his exclusion. The record reflects that Petitioner pled guilty to one count of mail fraud in violation of 18 U.S.C. § 1341 and one count of aiding and abetting in violation of 18 U.S.C. § 2 as a result of his role in submitting false claims for health care services not actually rendered or rendered by unlicensed persons. 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).

Although Petitioner concedes that he was convicted for a crime within the scope of section 1128(b)(1) of the Act, he alleges that his culpability was not significant. In particular, he asserts that his signature was on file with insurance companies and he implies that he was not familiar with billing procedures. Arguments such as these amount to a collateral attack on his conviction, which the Departmental Appeals Board (DAB) has previously held to be an ineffectual argument in the context of an exclusion appeal as the I.G. and the administrative law judge (ALJ) are not permitted to look beyond the fact of conviction. Paul R. Scollo, D.P.M., DAB No. 1498 (1994); Ernest Valle, DAB CR309 (1994); Peter Edmondson, DAB No. 1330 (1992).

Petitioner has argued in his brief that his 10-year exclusion should be reduced due to the presence of mitigating factors. He maintains that he was not so culpable of the criminal offense for which he was convicted; that he notified authorities when he discovered the improper scheme; and that he fully cooperated with the government and his cooperation resulted in the conviction and in restitution made by two persons involved in the fraudulent scheme. Petitioner has the burden to prove the existence of mitigating factors. James H. Holmes, M.D., DAB CR270 (1993). Petitioner has not established any of the mitigating factors listed at 42 C.F.R. § 1001.201(b)(3).

Petitioner's claims that he allegedly was not so culpable in the scheme and that he notified authorities of the scheme do not relate to any of the mitigating factors described by 42 C.F.R. § 1001.201(b)(3), and therefore even if true, are not relevant. The only relevant argument that 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 as well as restitution made by the same two

individuals. Petitioner contends that the I.G. did not consider this factor. I have considered Petitioner's claim but find it to be without merit. Other than Petitioner's unsubstantiated assertions, there is no evidence in the record on this issue. As Petitioner has the burden on this issue, I find that he has not met such burden and conclude that Petitioner has not proved the existence of any mitigating factors. Even if Petitioner had met his burden and proved that his cooperation led to the conviction of two other individuals and that these individuals made restitution, these facts would not necessarily offset the impact of aggravating factors.

In determining whether the length of an exclusion is reasonable, it is the responsibility of the ALJ to consider and evaluate 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. The three aggravating factors consist of the following:

The acts resulting in Petitioner's conviction, or similar acts, caused financial loss of \$1500 or more to a government program or to one or more other entities. 42 C.F.R. § 1001.201(b)(2)(i). I find that Petitioner's fraud caused very substantial losses to be incurred by entities other than government programs. The record reflects that these losses totaled between \$200,000 and \$350,000. I.G. Exs. 1 and 3.

The acts that resulted in Petitioner's conviction, or similar acts, were committed by Petitioner over a period of one year or more. 42 C.F.R. § 1001.201(b)(2)(ii). The record establishes that Petitioner perpetrated his crimes over a four-year period from January 1991 until April 1995. I.G. Exs. 1 and 3.

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 in prison. I.G. Ex. 2.

Petitioner contends that only two of the aggravating factors cited by the I.G. can reasonably be considered by the ALJ in making a final determination in his case: the amount of money involved in the scheme and the length of time over which the acts occurred. P. Brief at 4. He asserts that it is unfair for the ALJ to consider the period of incarceration as, under sentencing guidelines, the period of incarceration was determined in part by the amount of money involved in the scheme and the length of time over which the acts occurred. I find no merit in this claim. The regulations clearly state that any of the factors listed as

aggravating may be used as a basis for lengthening the period of exclusion.

In his brief, Petitioner also suggests that mitigating and aggravating factors should be assigned weights in making an appropriate determination as to the length of exclusion. The concept of assigning a weight value to either aggravating or mitigating factors has been rejected in several DAB decisions addressing the issue of the length of an exclusion. See Gerald A. Snider, M.D., DAB No. 1637 (1997) (DAB reverses ALJ decision where weight values were assigned to aggravating factors).

Considering Petitioner's evidence of mitigation and the I.G.'s evidence of aggravating factors, I find that the aggravating factors in Petitioner's case make the imposition of the 10-year exclusion reasonable. I note that in evaluating these factors, 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 No. 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 four-year involvement in a 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 the insurers to incur. I therefore find that the 10-year exclusion is reasonable and appropriate.

Petitioner additionally asserts that the I.G. unreasonably delayed the imposition of his exclusion. He asserts that the exclusion should be retroactive to the date of his plea. I find no merit in this claim. The timing of a determination by the I.G. to exclude is an act of discretion. "An administrative law judge has no authority to alter the effective date of an exclusion designated by the I.G. where the I.G. acted within the discretion afforded by the statute and regulation in setting the effective date." Soni M. Geourzoung, M.D., DAB CR286 (1993) at 5; Shanti Jain, M.D., DAB 1398 (1993); see also 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 the exclusion. 42 C.F.R. § 1001.2002(b).

**CONCLUSION**

I conclude that the I.G. was authorized to exclude Petitioner, pursuant to section 1128(b)(1) of the Act. I find that the 10-year exclusion is reasonable and I sustain it.

/s/

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**Joseph K. Riotto**  
**Administrative Law Judge**