DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	DATE: November 28, 1989
Elias Goldstein, D.C.,	
Petitioner,	Docket No: C-104
- v.-	DECISION CR 56
The Inspector General.	

DECISION OF ADMINISTRATIVE LAW JUDGE

On December 14, 1988, the Inspector General (the I.G.) notified Petitioner that he was being excluded from participation in the Medicare program and State health care programs for five years.[1] The I.G. told Petitioner that he was being excluded as a result of his conviction in a Florida court of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. Petitioner was advised that exclusion from participation in Medicare and Medicaid of individuals or entities convicted of such an offense is permitted by section 1128(b)(1) of the Social Security Act. The I.G. stated that the five-year exclusion imposed and directed against Petitioner was based on factors which included: (1) the length of the period of time during which the criminal acts resulting in Petitioner's conviction occurred; (2) the amount of the financial damage resulting from Petitioner's criminal activity; and (3) the fact that the sentence resulting from Petitioner's conviction included incarceration.

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act to include any State Plan approved under Title XIX of the Act (such as Medicaid). 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 held a hearing in Ft. Lauderdale, Florida, on August 8, 1989. Based on the evidence introduced at the hearing, and on applicable law, I conclude that there exists a basis in law and fact to impose and direct a substantial exclusion against Petitioner. However, given the presence of mitigating evidence, the five-year exclusion imposed and directed against Petitioner by the I.G. is excessive. A three-year exclusion will satisfy the remedial purpose of the exclusion law. Therefore, I am modifying the exclusion imposed and directed against Petitioner to a period of three years.

ISSUE

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a licensed chiropractor in the State of Florida. Tr. at 128.[2]

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[2] The exhibits, transcript of the hearing, and the parties' briefs will be cited as follows:

I.G.'s Exhibit	I.G. Ex. (number)/(page)
Petitioner's Exhibit	P. Ex. (number)/(page)
Transcript	Tr. at (page)
Brief in Support of the Inspector General's Decision	I.G.'s Brief at (page)
Petitioner's Post-Hearing Memorandum	P.'s Brief at (page)
Reply Memorandum of the Inspector General	I.G.'s Reply Brief at (page)

(continued...)

2. Petitioner was charged with criminal offenses in the State of Florida. I.G. Ex. 3.

3. On May 27, 1988, Petitioner was convicted on five counts of the criminal information filed against him. I.G. Ex. 4.

4. In Count Two, Petitioner was convicted of grand theft from Metropolitan Life Insurance Company. I.G. Ex. 3/2; 4/1.

5. This theft began on or about September 1, 1982, and ended on or about November 30, 1982, and the amount stolen by Petitioner was $100.00 or more. I.G. Ex. 3/2; 4/1.

6. In Count Three, Petitioner was convicted of grand theft from United States Fidelity and Guaranty Company. I.G. Ex. 3/3; 4/1.

7. This theft began on or about September 1, 1983, and ended on or about May 31, 1984, and the amount stolen by Petitioner was $100.00 or more. I.G. Ex. 3/3; 4/1.

8. In Count Four, Petitioner was convicted of an additional count of grand theft from United States Fidelity and Guaranty Company. I.G. Ex. 3/3; 4/1.

9. This theft began on or about November 1, 1983, and ended on or about December 31, 1983, and the amount stolen by Petitioner was $100.00 or more. I.G. Ex. 3/3; 4/1.

10. In Count Fifteen Petitioner was convicted of criminal fraud of Travelers Insurance Company. I.G. Ex. 3/9; 4/1.

11. This fraud involved Petitioner's filing of a false insurance claim on a policy that had been issued by Travelers Insurance Company to Arthur Williams. I.G. Ex. 3/9; 4/1.

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[2](...continued)
Petitioner's Reply to Brief in Support of the Inspector General's Decision — P.'s Reply Brief at (page)

12. This fraud began on or about April 1, 1985, and ended on or about August 31, 1985. I.G. Ex. 3/9; 4/1.

13. In Count Sixteen, Petitioner was convicted of an additional count of criminal fraud of Travelers Insurance Company. I.G. Ex. 3/9; 4/1.

14. This fraud involved Petitioner's filing of a false insurance claim on a policy that had been issued by Travelers Insurance Company to David Friedland. I.G. Ex. 3/9; 4/1.

15. This fraud began on or about April 1, 1985, and ended on or about August 31, 1985. I.G. Ex. 3/9; 4/1.

16. Petitioner was convicted under Florida law of criminal offenses relating to theft and fraud in connection with the delivery of a health care item or service. Findings 3-15.

17. On June 6, 1988, Petitioner was sentenced to serve three years' probation on each count of his conviction, the terms of probation to run concurrently. I.G. Ex. 5.

18. Additionally, Petitioner was sentenced to 90 days' incarceration. I.G. Ex. 5.

19. Petitioner was also sentenced to pay restitution in the amount of $2,130.00 to the Florida Department of Insurance Fraud. I.G. Ex. 5.

20. The criminal offenses for which Petitioner was convicted are criminal offenses as described in section 1128(b)(1) of the Social Security Act. Social Security Act, section 1128(b)(1).

21. The Secretary of the Department of Health and Human Services (the Secretary) had authority to impose and direct an exclusion against Petitioner from participating in Medicare and Medicaid, pursuant to section 1128(b)(1) of the Social Security Act. Social Security Act, section 1128(b)(1).

22. The Secretary delegated to the I.G. the duty to impose and direct exclusions pursuant to section 1128 of the Social Security Act. 48 Fed. Reg. 21662 (May 13, 1983).

23. On December 14, 1988, the I.G. notified Petitioner that he was being excluded from participation in the

Medicare and Medicaid programs as a result of his conviction of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct within the meaning of section 1128(b)(1) of the Social Security Act.

24. Petitioner was told that he was being excluded from participation in Medicare and Medicaid for a period of five years.

25. Petitioner was further advised that the length of his exclusion was, in part, based on the following circumstances: (1) the criminal acts that resulted in Petitioner's conviction were committed over a period exceeding one year; (2) financial damage resulting from Petitioner's criminal activity exceeded $1,500.00; and (3) the sentence resulting from Petitioner's conviction included a period of incarceration.

26. The exclusion provisions of section 1128 of the Social Security Act establish neither minimum nor maximum exclusion terms in circumstances where the I.G. has discretion to impose and direct exclusions. Social Security Act, section 1128(b)(1)-(14).

27. The Social Security Act mandates a five-year exclusion from participation in the Medicare and Medicaid programs for an individual convicted of a criminal offense related to the delivery of an item or service under the Medicare or Medicaid programs. Social Security Act, sections 1128(a)(1), (c)(3)(B).

28. The crimes committed by Petitioner are distinguishable from offenses mandating five-year exclusions by the fact that they were perpetrated against private health care insurers, rather than against the Medicare and Medicaid programs. Findings 3-16; Social Security Act, sections 1128(a)(1), (b)(1).

29. A remedial objective of section 1128 of the Social Security Act is to protect program beneficiaries and recipients and program funds by mandating or permitting the Secretary to disqualify or to direct disqualification from participation in Medicare and Medicaid of those individuals and entities who demonstrate by their conduct that they cannot be trusted to administer program funds. Social Security Act, section 1128.

30. An additional remedial objective of section 1128 of the Social Security Act is to deter individuals and

entities from engaging in conduct which jeopardizes the integrity of federally-funded health care programs. Social Security Act, section 1128.

31. The offenses of which Petitioner was convicted are serious criminal offenses, which resulted in his incarceration. Findings 16-17.

32. Petitioner perpetrated the conduct which resulted in his conviction over a period of more than one year, a lengthy period of time. Findings 4-15.

33. The amount of money stolen by Petitioner was substantial. Finding 19.

34. Given the seriousness of Petitioner's criminal acts, an exclusion is appropriate in this case. Findings 4-15; 32-34; Social Security Act, section 1128.

35. The investigation which led to Petitioner's convictions began in 1986. Tr. at 134-135.

36. Since the inception of the investigation of Petitioner, there have been no additional complaints concerning his billing practices. Tr. at 139.

37. Petitioner's claims for reimbursement have been audited by private insurers since 1986. Tr. at 136-137.

38. There have been no findings by private insurers that Petitioner has engaged in fraudulent practices concerning his reimbursement claims since 1986. Tr. at 139.

39. Petitioner's billing activity since 1986 serves to mitigate the need for a lengthy exclusion in this case. Findings 36-39; see 42 C.F.R. 1001.125(b)(6).

40. In light of the mitigating factors that are present in this case, a five-year exclusion of Petitioner is excessive. Findings 31-39; Social Security Act, section 1128.

ANALYSIS

There is no dispute in this case that Petitioner was convicted of criminal offenses relating to theft and fraud in connection with the delivery of health care items or services. Therefore, the I.G. has authority, pursuant to section 1128(b)(1) of the Social Security

Act, to impose and direct an exclusion against Petitioner from participating in the Medicare and Medicaid programs. The only contested issue is the reasonableness of the length of the exclusion -- five years -- that the I.G. determined to impose and direct against Petitioner.

In order to decide whether the I.G.'s exclusion determination is reasonable in a particular case, I must judge that determination in light of the evidence presented and the intent of the exclusion law. The purpose of the hearing is not to determine how accurately the I.G. applied the law to the facts before him, but whether, based on all relevant evidence, the exclusion comports with the legislative purpose. The hearing is, by law, de novo. Social Security Act, section 205(b). In a hearing on an exclusion, evidence which is relevant to the reasonableness of the exclusion will be admitted and considered, even if that evidence was not available to the I.G. at the time the exclusions were imposed and directed.

An exclusion will be held to be reasonable where, given the evidence of the case, it is shown to fairly comport with legislative intent. "The word 'reasonable' conveys the meaning that . . . [the I.G.] is required at the hearing only to show that the length of the . . . [exclusion] determined . . . was not extreme or excessive." (Emphasis added). 48 Fed. Reg. 3744 (Jan. 27, 1983). However, should I determine, based on the law and the evidence, that an exclusion is not reasonable, I have the authority to modify the exclusion. Social Security Act, section 205(b).

The I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid pursuant to section 1128(b)(1) of the Social Security Act. Section 1128(b)(1) gives the Secretary the discretion to impose and direct exclusions against individuals convicted of crimes, including theft and fraud, in connection with the delivery of a health care item or service. This section does not prescribe the minimum or maximum length of the exclusion that may be imposed.

Congress intended the exclusion law to be remedial in application. The law was intended to protect trust funds from the misconduct of larcenous individuals and entities. The exclusion law also embodied Congress' conclusion that the Secretary had a duty to protect program beneficiaries from individuals or entities whose

conduct demonstrated that they posed a threat to beneficiaries' and recipients' well-being.

This policy was evident in Congress' original enactment of the exclusion law in 1977. Successive revisions of the law have continued to express legislative purpose in progressively stronger terms.[3]

There are two ways that exclusions imposed and directed pursuant to this law advance the law's remedial purpose. First, the law insulates federally funded health care programs from untrustworthy providers until such time as they demonstrate that they can again be trusted to deal with trust fund monies, beneficiaries and recipients. Second, exclusions serve as examples to deter individuals and entities from engaging in unlawful conduct which jeopardizes the integrity of federally funded health care programs. See House Rep. No. 95-393, Part II, 95th Cong., 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News, 3072.

The remedial objective of deterrence may only be satisfied in a particular case by excluding an individual for a period of time, even where the evidence establishes that that person no longer poses a serious threat to the integrity of federally funded health care programs. On the other hand, exclusions fashioned solely to achieve the objective of deterrence may, given the evidence in a particular case, be punitive. Therefore, judging the reasonableness of an exclusion requires a balancing of the remedial considerations in light of the evidence.

Aside from this legislative policy, there is no statutory formula to calculate exclusions in cases involving

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[3] The exclusion law in effect prior to August 1987, required the Secretary to suspend from participation in the Medicare and Medicaid programs any physician or other individual who had been convicted of a criminal offense related to that person's participation in the delivery of medical care or services under Medicare, Medicaid, or block grants to states. The law did not specify minimum exclusion terms. The 1987 amendments extended the reach of the law to entities, added new categories of mandatory exclusions, specified a minimum five-year exclusion for cases in which mandatory exclusions were imposed, and enumerated circumstances in which the Secretary had discretion to impose exclusions. Social Security Act, section 1128(a)(1)-(2); (b)(1)-(14).

permissive exclusions. The I.G. argues that the felonies for which Petitioner was convicted are, but for the fact that they were perpetrated against private health care insurers, indistinguishable from offenses which would mandate a minimum five-year exclusion pursuant to section 1128(a)(1) of the Social Security Act.[4] Therefore, according to the I.G., the same policy considerations should apply to this case and a five-year exclusion of Petitioner is reasonable. I.G.'s Brief at 6.

The I.G. correctly notes that the only distinction between the offenses of which Petitioner was convicted and those for which an exclusion of at least five years is mandated is that in Petitioner's case, the offenses were perpetrated against private insurers and in those cases in which exclusion is mandated, the offenses must be perpetrated against either Medicare or Medicaid. However, this is a meaningful distinction. Congress elected to require that individuals or entities convicted of offenses against Medicare or Medicaid be excluded for a minimum period. It did not enact this requirement for individuals or entities convicted of offenses directed against private health insurers. By not mandating exclusions of parties convicted of the latter class of offenses, Congress intended that the Secretary weigh all relevant remedial considerations on a case-by-case basis. Therefore, the five-year exclusion imposed against Petitioner in this case cannot be justified by simply equating Petitioner's offenses with the kinds of offenses for which exclusions of at least five years are mandated.

That is not to suggest that there is no benefit to comparing the facts of this case with circumstances which mandate exclusions. Congress made evident its concern that certain conduct posed a serious threat to the

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[4] Section 1128(a)(1) of the Social Security Act mandates exclusion of an individual or entity who is convicted of an offense related to the delivery of an item or service under the Medicare program. The exclusion law requires a minimum exclusion of five years for an individual or entity who is excluded pursuant to section 1128(a)(1). Social Security Act, section 1128(c)(3)(B). Criminal offenses consisting of theft or fraud against Medicare or Medicaid have been found to fall within the purview of section 1128(a)(1). Jack W. Greene v. The Inspector General, Civil Remedies Docket No. C-56 (1989), appeal docketed, Appellate No. 89-59, Decision No. 1078 (1989).

integrity of federally financed health care programs. The similarities between the offenses for which Petitioner was convicted with those for which exclusion is mandated suggest that this case is a case where a legitimate basis exists to impose and direct a significant exclusion.

The Secretary has adopted regulations to be applied in exclusion cases. The regulations specifically apply only to exclusions for "program-related" offenses (convictions for criminal offenses related to Medicare and Medicaid). However, they do express the Secretary's policy for evaluating cases where permissive exclusions may be appropriate. Thus, the regulations are instructive as broad guidelines for determining the appropriate length of exclusions in cases where the Secretary has authority to exclude individuals and entities. In determining the exclusion to be imposed, the regulations require the I.G. to consider factors related to the seriousness and program impact of the offense and to balance those factors against any mitigating factors that may exist. 42 C.F.R. 1001.125(b)(1)-(7).

The evidence in this case establishes that Petitioner was convicted of five felony offenses involving theft or fraud against private health care insurers. These are serious criminal offenses, and their seriousness is in some respects underscored by the facts that the offenses were committed over a relatively lengthy period of time, involved a substantial amount of money, and that the sentence imposed on Petitioner included a period of incarceration. See 42 C.F.R. 1001.125(b)(1),(3),(5), and (6). I conclude from this evidence, as well as from the similarity between offenses committed by Petitioner and offenses which mandate exclusion, that a significant exclusion is merited in this case. An exclusion will serve to protect the integrity of federally funded health care programs by deterring other providers of services from engaging in the criminal conduct for which Petitioner was convicted.

However, there also exists evidence in this case which establishes that a five year exclusion is not necessary to achieve the exclusion law's remedial objectives. The evidence establishes that, since 1986, when Petitioner first became the subject of an investigation, he has rendered thousands of services under the intensive scrutiny of health care insurers without evidence of additional unlawful conduct. The absence of dishonest conduct by Petitioner shows that: (1) he has learned that

unlawful conduct will not be tolerated and (2) there exists little danger that Petitioner is now likely to engage in theft or fraud against Medicare or Medicaid. Thus, while a five-year exclusion would certainly serve the purposes of deterrence, its effect on Petitioner would be punitive, given his record beginning in 1986 as an honest provider of services.

The I.G. objects to my considering any evidence generated after the investigation which led to Petitioner's conviction. According to the I.G., "(A)ctions taken subsequent to the investigation, such as steps taken to increase . . . [Petitioner's] record-keeping system, are likely products of the investigation rather than of voluntary remorse and, consequently, are not mitigating." I.G.'s Reply Brief at 6. The I.G. cites as support for this contention Social Security Administration Appeals Council decision in an exclusion case, In the Case of Jaimie Blasquez, M.D., Case No. 000-97-0016 (1986).

I disagree with the I.G.'s contention. As is noted supra, an administrative hearing in an exclusion case is a de novo hearing. Social Security Act, section 205(b). The purpose of the hearing is to test the reasonableness of the exclusion, and not the accuracy of the I.G.'s exclusion determination. If I accepted the I.G.'s analysis, then the hearing would essentially become an appellate review of the I.G.'s determination. This circumscribed review would deny the Petitioner the rights given to him by section 205(b) of the Social Security Act.

Furthermore, the Blasquez decision does not support the I.G.'s argument. The Blasquez case involved an exclusion imposed for a program-related crime pursuant to the statute which predated the current exclusion law.[5] The administrative law judge who heard that case identified a number of mitigating factors which in his opinion established that the exclusion imposed against the petitioner in Blasquez was unreasonable. These included: the need for petitioner's services, the unsophisticated nature of petitioner's office operation, the "hard time"

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[5] The Secretary would not have had authority to exclude Petitioner pursuant to the law which was in effect as of the date of the Blasquez decision. See note 3, supra. The Blasquez decision does not address the remedial objectives which would be served by an exclusion imposed pursuant to the present exclusion law.

petitioner served in prison, the personal trauma petitioner experienced in selling his residence in order to make restitution for his crimes, petitioner's participation in community service, and the nature of petitioner's violations, and his age.

The Appeals Council analyzed each of the factors identified by the administrative law judge and concluded that these factors neither singly nor collectively established that the exclusion imposed on petitioner was unreasonable. It did not hold that it was improper for the administrative law judge to have considered evidence as to these factors. Indeed, the Appeals Council in Blasquez reaffirmed that a hearing in an exclusion case is de novo, stating that "(U)nder the regulations, the hearing before an administrative law judge is a de novo proceeding so that he must consider the question of the length of the period of . . . [exclusion] under the criteria of the regulations . . . as if it had not been previously considered." Blasquez at 4.

In deciding that the administrative law judge's decision as to the reasonableness of the exclusion was not supported by the record, the Appeals Council in Blasquez observed that "(M)itigating factors basically entail those considerations or conditions which occur prior to a criminal investigation such as a practitioner's mental health, advanced age, or a catastrophic situation within his immediate family requiring great financial sacrifice." Blasquez at 6. It is apparent from the context of this observation that, in discussing "mitigating factors," the Appeals Council was referring to evidence which explains a petitioner's motivation for committing a crime. This evidence is relevant in an exclusion case, because a petitioner's motivation will shed light on the likelihood that he will repeat the offenses of which he was convicted. Logically, evidence as to motivation will consist of evidence arising prior to the date that an investigation into a petitioner's conduct is initiated.

However, evidence as to a petitioner's motivation is only a part of the spectrum of evidence which can potentially be considered on the issue of trustworthiness. The evidence which I admitted concerning Petitioner's post-investigation billing practices is relevant because it relates to Petitioner's propensity to repeat the crimes of which he was convicted. That evidence is not made irrelevant by virtue of the fact that it was generated

after the date Petitioner became aware that he was under investigation.

I conclude that in this case the remedial objectives of the exclusion law would best be served by a three-year exclusion. An exclusion of three years will function as an effective deterrent. The imposition of a three-year exclusion also takes into consideration evidence which establishes that Petitioner is unlikely to repeat his unlawful conduct.

CONCLUSION

Based on the evidence of this case and the law, I conclude that the I.G. had authority to exclude Petitioner from participating in Medicare and to direct that Petitioner be excluded from participating in Medicaid. I conclude further, that based on the evidence of this case, a substantial exclusion is justified. However, I conclude that the five-year exclusion imposed and directed by the I.G. is excessive. The remedial purpose of the exclusion law will be served by a three-year exclusion. Therefore, pursuant to section 205(b) of the Social Security Act, I modify the exclusion imposed and directed against Petitioner to a term of three years.

The terms and conditions of the notice to Petitioner from the I.G., dated December 14, 1988, otherwise remain in full force and effect.

/s/

Steven T. Kessel
Administrative Law Judge