

Department of Health and Human Services  
**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

In the Case of:	)	
	)	
David E. Scheiner, D.P.M.,	)	Date: April 21, 1997
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-450
	)	Decision No. CR471
The Inspector General.	)	
	)	

**DECISION**

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, David E. Scheiner, D.P.M., from participating in Medicare and other federally-funded health care programs, including Medicaid, for a period of five 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**

On July 19, 1996, the I.G. notified Petitioner that he was being excluded from participating in Medicare and other programs, including Medicaid, for a period of five 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. The I.G. advised Petitioner that she based the five-year term of the exclusion on the presence of factors in Petitioner's case which the I.G. determined to be aggravating.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. The parties agreed that the case could be heard and decided based on their written submissions, including briefs and exhibits. The I.G. submitted a brief, four proposed exhibits (I.G. Exs. 1 - 4), and a reply brief. Petitioner submitted a brief. The I.G. submitted two additional proposed exhibits with her reply brief, I.G. Ex. 5 and I.G. Ex. 6. 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.

## **II. Issues, findings of fact and conclusions of law**

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

1. Petitioner is a doctor of podiatry.
2. Petitioner was indicted in the United States District Court for the Eastern District of Pennsylvania. The indictment charged Petitioner, along with other named individuals, with devising a scheme and artifice to defraud and obtain money by means of knowingly making false and fraudulent pretenses, representations, and promises. The alleged purpose of the scheme and artifice was to obtain money from insurance companies by submitting false and fraudulent medical bills to inflate the value of personal injury claims.
3. On November 2, 1994, Petitioner pled guilty to Counts 1, 2, and 8 of the indictment. These three counts each alleged that Petitioner engaged in a specified act of mail fraud in furtherance of his criminal scheme and artifice.
4. In agreeing to plead guilty to counts 1, 2, and 8 of the indictment, Petitioner agreed that these offenses arose from his participation in a criminal scheme that occurred between 1988 and 1991.
5. In agreeing to plead guilty to counts 1, 2, and 8 of the indictment, Petitioner agreed that he had received payments of approximately \$27,000 for fraudulent medical bills.
6. In agreeing to plead guilty to counts 1, 2, and 8 of the indictment, Petitioner agreed to pay restitution of \$37,000 for unlawful proceeds he obtained from his fraudulent scheme.
7. Petitioner was sentenced to pay restitution in the amount of \$37,385.
8. Petitioner's participation in an unlawful scheme to defraud insurance companies lasted about three years.
9. Petitioner's participation in the unlawful scheme caused losses to insurance companies of at least \$27,000, and these losses were in connection with Petitioner's false claims for medical services provided by Petitioner.

10. Petitioner was sentenced to a term of imprisonment of 15 months.
11. 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.
12. Where the I.G. determines to exclude an individual pursuant to section 1128(b)(1) of the Act, the term of the 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.
13. In a case involving an exclusion under section 1128(b)(1) of the Act, an exclusion of more than three years may be justified where there exist aggravating factors that are not offset by mitigating factors.
14. Petitioner was convicted under federal law, in connection with the delivery of a health care item or service, of criminal offenses relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.
15. The I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(1) of the Act.
16. The I.G. proved the presence of an aggravating factor, in that the acts resulting in Petitioner's conviction, or similar acts, resulted in financial loss of \$1,500 or more to an insurance company.
17. The I.G. proved the presence of a second aggravating factor in that the acts that resulted in Petitioner's conviction, or other similar acts, were committed by Petitioner over a period of one year or more.
18. The I.G. proved the presence of a third aggravating factor in that the sentence that was imposed on Petitioner for his crimes included a period of incarceration.
19. Petitioner did not prove the presence of any mitigating factor.
20. The evidence which relates to the aggravating factors proved by the I.G. establishes Petitioner to be untrustworthy to provide care to beneficiaries and recipients of federally-funded health care programs.
21. A five-year exclusion of Petitioner is reasonable.

22. I do not have authority to hear and decide Petitioner's argument that the I.G. abused her discretion in determining to exclude Petitioner.

### **III. Discussion**

#### **A. The relevant facts (Findings 1 - 10)**

Petitioner is a doctor of podiatry. I.G. Ex. 1 at 1. He was indicted on federal criminal charges in the United States District Court for the Eastern District of Pennsylvania. I.G. Ex. 1. The indictment charges that Petitioner, along with other named individuals, devised a scheme and artifice to defraud and obtain money by means of false and fraudulent pretenses, representations and promises. Id. at 1 - 2. The object of this scheme and artifice was to obtain money from insurance companies by submitting [REDACTED] and fraudulent medical bills to inflate the value of personal injury claims. Id. [REDACTED] The indictment charges Petitioner with perpetrating this scheme and artifice from in or about 1988 until in or about 1991. Id.

The indictment asserts specifically that Petitioner, along with another named individual, prepared false and fraudulent medical bills, reports and progress notes, describing fictitious medical treatments that they had purportedly provided to personal injury patients. I.G. Ex. 1 at 2<sup>1</sup>. It asserts [REDACTED] Petitioner, along with the other individual, caused to be mailed to insurance companies, and to attorneys who represented these patients, the fraudulent bills, reports, and progress notes, to be used to document these patients' claims. Id. at 3. The indictment charges that insurance companies were induced to issue checks to Petitioner and the other individual, as reimbursement for the fraudulent medical bills. Id. The indictment charges also that Petitioner, along with other defendants, utilized the United States mails to further their scheme and artifice. Id. at 3 - 6.

On April 19, 1994, Petitioner agreed to plead guilty to three counts of the indictment. I.G. Ex. 3. Each of these counts alleges that Petitioner perpetrated a specified act of mail fraud in furtherance of his scheme and artifice. I.G. Ex. 1 at 3 - 6. In agreeing to plead guilty to these three counts, Petitioner admitted that the counts arose from his participation in a scheme to defraud insurance companies by submitting fraudulent and inflated medical bills to insurance companies. I.G. Ex. 3 at 1 - 3. Petitioner admitted that the scheme transpired between 1988 and 1991. I.G. Ex. 3 at 1. Petitioner admitted additionally that he had received approximately \$27,000 in payment of the fraudulent bills which he

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<sup>1</sup> The other named individual, Frank A. DeLia, was the petitioner in another case which I decided. Frank A. Delia, D.O., DAB CR465 (1997). At Part III.C.2. of this decision, I discuss the evidence which distinguishes this case from DeLia.

had submitted or caused to be submitted as part of the scheme. I.G. Ex. 3 at 4. Petitioner agreed to pay restitution of \$37,000 for the unlawful proceeds he had received from participating in the scheme. I.G. Ex. 3 at 2.

On November 10, 1994, Petitioner pled guilty to Counts 1, 2, and 8 of the indictment. I.G. Ex. 2. Petitioner was sentenced to a term of imprisonment of 15 months. Id. at 2. He was sentenced to pay restitution of \$37,385. Id. at 4.

The facts of this case establish that:

- Petitioner participated in a scheme to defraud insurance companies by submitting fraudulent bills and treatment records to those companies for fictitious medical services that Petitioner alleged to have provided. This is evident from the counts of the indictment to which Petitioner pled guilty, and is evident also from Petitioner's agreement to plead guilty. I.G. Exs. 1, 2, 3.
- Petitioner perpetrated his crimes over a period of about three years.
- Petitioner's criminal acts caused substantial damages to insurers. Petitioner admitted to having defrauded insurers in the amount of \$27,000. I.G. Ex. 3 at 4. However, the evidence establishes that the damages he caused were actually much greater than \$27,000. Petitioner agreed to pay restitution in the amount of \$37,000, and was sentenced to pay restitution in the amount of \$37,385. I.G. Ex. 2 at 4; I.G. Ex. 3 at 2. Petitioner's agreement to plead guilty recites that, for purposes of calculating Petitioner's sentencing guideline range, the loss and attempted loss attributable to Petitioner is between \$120,000 and \$200,000. I.G. Ex. 3 at 4.

#### **B. The governing law (Findings 11 - 13)**

The I.G. excluded Petitioner pursuant to section 1128(b)(1) of the Act. As of July 19, 1996, 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.

The version of section 1128(b)(1) that was in effect as of July 19, 1996 did not provide for a minimum exclusion where the I.G. elected to impose one, or for a minimum mandatory exclusion.<sup>2</sup>

Petitioner asserts that the I.G. has authority to exclude an individual only if that individual is convicted of a criminal offense that is related to the delivery of an item or service under a federally-funded health care program, such as Medicare or a State Medicaid program. I do not agree with this argument. Under section 1128(a)(1) of the Act, the I.G. is mandated to exclude an individual who is convicted of a program-related offense of the type described by Petitioner in his argument. However, the I.G.'s exclusion authority is not limited to exclusions for convictions of program-related offenses. The other parts of section 1128, including section 1128(b)(1), authorize the I.G. to impose exclusions for a far broader range of offenses than the program-related offenses that are described in section 1128(a)(1).

Section 1128(b)(1) plainly provides that an exclusion may be imposed where an individual is convicted of an offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, that is committed in connection with the delivery of a health care item or service. There is no requirement in this section that the offense be directed against a government-funded program, although conviction of an offense against a government-funded program would constitute an additional basis for an exclusion under section 1128(b)(1).

The purpose of an exclusion imposed under any of the parts of section 1128 of the Act, including section 1128(b)(1), is remedial, and not punitive. An exclusion is reasonable insofar as it is intended to protect federally-funded health care programs and the beneficiaries and recipients of those programs from an individual who has demonstrated by his or her conduct that he or she is not trustworthy to provide care under those programs.

The Secretary has published regulations which establish criteria for determining the length of exclusions imposed pursuant to the version of section 1128(b)(1) that was in effect as of the date of the imposition of the exclusion against Petitioner. The criteria identified by these regulations are the factors that the

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<sup>2</sup> On July 31, 1996, Congress amended section 1128 of the Act. One of the amendments to section 1128 creates a new 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), occurring after the date of enactment of the 1996 amendments. Section 1128(b)(1) is retained, but provides permissive exclusion authority for misdemeanor convictions only. I am not considering this case under the 1996 amendments to section 1128, inasmuch as Petitioner was convicted prior to July 31, 1996, the date of enactment of the 1996 amendments.

Secretary has determined are relevant in measuring the trustworthiness of an excluded individual or entity. The governing regulation for an exclusion imposed pursuant to section 1128(b)(1) is 42 C.F.R. § 1001.201.

The regulation provides that an exclusion imposed pursuant to section 1128(b)(1) will be for a period of three years, unless there exist aggravating or mitigating factors which would support the imposition of an exclusion of more than or less than three years. 42 C.F.R. § 1001.201(b)(1). The aggravating factors which, if present in a case involving an exclusion imposed under section 1128(b)(1) of the Act, may establish a basis for an exclusion of more than three years, are stated at 42 C.F.R. § 1001.201(b)(2). The mitigating factors which, if present in a case involving an exclusion imposed under section 1128(b)(1) of the Act, may offset aggravating factors, or which may establish a basis for an exclusion of less than three years, are stated at 42 C.F.R. § 1001.201(b)(3). The regulation makes 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.

Although 42 C.F.R. § 1001.201 establishes the exclusive criteria for determining the length of an exclusion imposed under section 1128(b)(1) of the Act, it does not direct that an exclusion of any particular length be imposed in a case where aggravating or mitigating factors are established. The administrative law judge must weigh any evidence which relates to one or more of the defined aggravating or mitigating factors to decide what the evidence shows as to an excluded individual's trustworthiness to provide care.

### **C. Application of the governing law to the relevant facts (Findings 14 - 22)**

#### **1. The I.G.'s authority to exclude Petitioner (Findings 14 - 15)**

The I.G. is authorized to exclude Petitioner under section 1128(b)(1) of the Act. Petitioner was convicted in a federal court of criminal offenses relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct committed in connection with the delivery of health care items or services. The gravamen of the scheme and artifice to which Petitioner pled guilty was fraud against health insurers arising from fictitious claims by Petitioner for health services purportedly provided by him.

Petitioner argues that the I.G. has no authority to exclude him, inasmuch as Petitioner was not convicted of an offense against or involving a federally-funded health care program. However, as I discuss at part III.B. of this decision, the I.G.'s exclusion authority is not limited to exclusions for convictions of program-related offenses. The I.G. is authorized to exclude Petitioner because Petitioner was convicted of an offense that is described under section 1128(b)(1) of the Act.

## 2. Whether the exclusion is reasonable (Findings 16 - 22)

The five-year exclusion that the I.G. imposed against Petitioner is reasonable. The evidence relating to the aggravating factors established by the I.G. pursuant to 42 C.F.R. § 1001.201(b)(2) proves that Petitioner is a highly untrustworthy individual. Petitioner offered no evidence to establish the presence of any mitigating factors described in 42 C.F.R. § 1001.201(b)(3). A five-year exclusion will serve as a reasonable protection for federally-funded health care programs and the beneficiaries and recipients of those programs in view of the un rebutted evidence of Petitioner's lack of trustworthiness.

The I.G. proved the presence of three aggravating factors, consisting 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 health insurers of \$27,000. That amount comprises only a portion of the financial damages that Petitioner's fraud caused non-government entities. He was sentenced to pay restitution of more than \$37,000. For sentencing purposes, the total loss or attempted loss attributed to Petitioner was estimated at between \$120,000 and \$200,000.
- 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 1988 and ending in 1991.
- The sentence that was imposed on Petitioner for his crimes included a period of incarceration. 42 C.F.R. § 1001.201(b)(2)(iv). Petitioner was sentenced to 15 months' imprisonment.

The evidence which relates to the aggravating factors established by the I.G. proves Petitioner to be a highly untrustworthy individual. Petitioner's lack of trustworthiness is established by his approximately three-year involvement in a massive scheme to defraud insurers. Petitioner's protracted involvement in that scheme demonstrates that he is capable of engaging in well-organized and complex fraud. 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.

As I find above, Petitioner has not offered any evidence to prove the presence of a mitigating factor. There is no evidence in this case to offset the evidence relating to the aggravating factors proved by the I.G., and, hence, there is nothing which would suggest that Petitioner is trustworthy to provide care.

Petitioner argues that, in this case, the exclusion is unnecessary, because it unreasonably burdens Petitioner and does not protect the public welfare. Petitioner's Brief at 6 - 7. Essentially, Petitioner asserts that the stigma attached to his conviction, his incarceration, along with a State-imposed 60-month suspension of Petitioner's license to practice podiatry, is sufficient protection and that additional protection is not warranted. Additionally, Petitioner asserts that he is remorseful for his crimes.

None of these assertions relate to any of the mitigating factors described by 42 C.F.R. § 1001.201(b)(3) and, therefore, even if true, they are not relevant. Furthermore, I am not persuaded that these contentions, even if relevant and probative, overcome the evidence of untrustworthiness established by the evidence relating to aggravation. On balance, this evidence of aggravation proves a five-year exclusion to be reasonable, even if I consider Petitioner's assertions about the imposition against him of other sanctions and his remorse.

Petitioner asserts additionally that the I.G. delayed unreasonably in determining to impose an exclusion against him. Petitioner argues that the I.G. delayed imposing an exclusion by about 18 months from the date that Petitioner pled guilty. Petitioner's Brief at 5 - 6. Petitioner asserts that the I.G. has a duty to impose an exclusion promptly upon learning about conduct that might be a basis for an exclusion and that she failed to exercise that duty here.

This argument is, essentially, an argument that the I.G. ought to be estopped from excluding Petitioner because she delayed in making an exclusion determination in Petitioner's case. 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. 42 C.F.R. § 1005.4(c)(4).

Moreover, it is not apparent from the record of this case that the I.G. delayed her determination to impose an exclusion of Petitioner. There is no evidence which establishes the date when the I.G. first learned of Petitioner's conviction.

It is not unreasonable for an excluded individual to question the length of an exclusion on the ground that, because of the late date of the imposition of the exclusion, the exclusion establishes a date when the individual may apply for reinstatement that is so far off in the future that the exclusion is effectively punitive, and not remedial. The evidence here is that Petitioner perpetrated his last criminal act in 1991. He pled guilty in November 1994. The exclusion was imposed in July 1996, for a term of five years, meaning that Petitioner will not be eligible to apply for reinstatement until early August 2001. Thus, Petitioner ■

will not be eligible for reinstatement until about 10 years after the date that he perpetrated his last criminal act.

I have considered whether the five-year exclusion is unreasonable, given that Petitioner will not be eligible for reinstatement until about 10 years after he last committed a crime. I conclude that, although the relatively remote date of Petitioner's crimes mutes substantially the force of the evidence of aggravation, the level of untrustworthiness manifested by Petitioner in committing those crimes is so great that the exclusion is reasonable.<sup>3</sup> The crimes that Petitioner engaged in manifested a great deal of calculation and determination. The evidence establishes Petitioner to be an individual who is capable of executing a complex and protracted criminal scheme. There is no credible evidence in the record of this case to prove that Petitioner does not now remain capable of criminal behavior, or to prove that Petitioner will not be capable of engaging in such behavior prior to the date when he will be eligible for reinstatement.

As I note above, I recently heard and decided the case of an exclusion of Petitioner's co-perpetrator. Frank A. DeLia, D.O., DAB CR465 (1997). In that case, I found that the exclusion of five years was unreasonable and I modified it to a term of three years. Id. at 8 - 10. Each case must stand or fall on its own merits. I do not find that my rationale in DeLia directs a particular outcome in another case. However, the excluded individual in DeLia was Petitioner's co-perpetrator. For that reason, I believe it appropriate to explain why I am sustaining the five-year exclusion in this case, as opposed to my decision to modify the exclusion to a term of three years in DeLia.

In DeLia, I found that, as in this case, the excluded individual perpetrated his last crime in 1991. I observed that the evidence as to aggravation was, in some respects, diluted by that fact. DAB CR465 at 9. I did not conclude, however, that the five-year exclusion was necessarily unreasonable because of the remote date of the excluded individual's last crime. I based my decision as to reasonableness primarily on the fact that, in [REDACTED] there was strong evidence of mitigation.

In DeLia, as opposed to this case, the evidence of mitigation offset the evidence of aggravation. The excluded individual cooperated with prosecuting authorities and his cooperation led to the conviction of other individuals. That is a mitigating factor which is not present in this case. See 42 C.F.R. § 1001.201(b)(3)(iii). I found that not only did a mitigating factor exist, but that the extent and quality of cooperation given by the excluded individual demonstrated efforts by that individual to become trustworthy, which offset the

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<sup>3</sup> Had the evidence established that Petitioner engaged in crimes more recently than in 1991, I would have been inclined to sustain an exclusion of more than five years in this case.

evidence of aggravating factors proved by the I.G. DAB CR465 at 9 - 10. The excluded individual cooperated with prosecuting authorities over an extended period of time and, in doing so, jeopardized his own safety.

**IV. Conclusion**

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

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**Steven T. Kessel**  
Administrative Law Judge