Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Buford Gibson, Jr., M.D.,	)	Date: October 10, 1997
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-97-127
	)	Decision No. CR499
The Inspector General.	)	
	)	

DECISION

I conclude that the 10-year exclusion imposed and directed against Petitioner, Buford Gibson, Jr., M.D., from participating as a provider in Medicare and other federally financed health care programs is reasonable.

PROCEDURAL HISTORY

By letter dated November 19, 1996, the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Petitioner that, as a result of his conviction of a criminal offense related to the delivery of an item or service under the Medicaid (Medi-Cal) program, he was being excluded for 10 years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.[1] The I.G. further advised Petitioner that exclusion is mandated by section 1128(a)(1) of the Social Security Act (Act),[2] that a five-year minimum period of exclusion is required by section 1128(c)(3)(B) of the Act, and that Petitioner's 10-year period of exclusion took into consideration certain specified aggravating factors.

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[1] Unless otherwise indicated, hereafter I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

[2] Those parts of the Act discussed herein are codified in 42 U.S.C. § 1320a-7.

By letter dated December 20, 1996, Petitioner filed a request for hearing. Petitioner asserts that his conviction was not related to the delivery of an item or service under Medicare and indicates that he did not bill Medicare for any services during this time. Petitioner also challenges the length of his exclusion, stating that if he must be excluded, a five-year exclusion should suffice to accomplish the remedial purposes of the Act.

The I.G. filed her Brief in Support of Exclusion, with 10 exhibits (I.G. Ex. 1-10). Petitioner filed his Brief in Support of Non-Exclusion or Limited Exclusion, with four exhibits (P. Ex. 1-4). The I.G. filed her Reply Brief, with three additional exhibits (I.G. Ex. 11-13). Petitioner filed his Reply Brief.[3]

Petitioner does not object to the admission into evidence of the exhibits submitted by the I.G., and I admit into evidence I.G. Ex. 1 through 13. The I.G. objects to the admission into evidence of the exhibits submitted by Petitioner. I.G. R. Br. at 4. Over the I.G.'s objection, I admit into evidence P. Ex. 1 through 4. No facts of decisional significance are in dispute and, consequently, there is no need for an in-person hearing.

Based on the law, the evidence before me, and the parties' written arguments, I conclude that Petitioner's 10-year period of exclusion comports with the remedial purposes of the Act and is reasonable. Accordingly, I affirm the 10-year exclusion.

ISSUES

The first issue is whether Petitioner's conviction is related to the delivery of an item or service under Medicare or Medicaid.

The second issue is whether the 10-year exclusion which the I.G. imposed and directed against Petitioner is unreasonable. 42 C.F.R. § 1001.2007(a)(1)(ii).

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[3] In this Decision, I refer to the parties' submissions as follows:

I.G. Submissions	Petitioner's Submissions
Brief in Support of Exclusion [I.G. Br.]	Brief in Support of Non-Exclusion or Limited Exclusion [P. Br.]
Reply Brief [I.G. R. Br.]	Reply Brief [P. R. Br.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCL)

1. Petitioner, a physician trained in adult and child psychiatry, was licensed to practice medicine in the State of California. I.G. Ex. 10, 11.

2. Petitioner pled guilty to Grand Theft "(f)rom on or about May 18, 1991, to on or about January 31, 1992," in Count 3 of an Information filed in Superior Court, State of California, County of Los Angeles (Superior Court). I.G. Ex. 1, 4, 5, 6, 7, 8.

3. As enhancements to Count 3, Petitioner admitted to Special Allegations of Excessive Taking, in an amount in excess of $150,000, plus an additional amount in excess of $100,000, totalling an amount in excess of $250,000. I.G. Ex. 1, 4, 5, 6, 7.

4. In November 1995, the Superior Court sentenced Petitioner to five years' probation, requiring, among other things, that he pay restitution to Medi-Cal (California's Medicaid program) in the amount of $500,000, either jointly with his two co-defendants or severally. I.G. Ex. 6, 7.

5. Petitioner was convicted of a criminal offense, within the meaning of section 1128(i) of the Act. FFCL 2-4. 42 U.S.C. § 1320a-7(i).

6. Petitioner's conviction is based on his participation in the submission of false claims to Medi-Cal for psychiatric services which were, in fact, provided by non-physicians. I.G. Ex. 8.

7. Petitioner's conviction is related to the delivery of an item or service under Medi-Cal, which is a State health care program within the meaning of section 1128(a)(1) of the Act. 42 U.S.C. §§ 1320a-7(a)(1), 1320a-7(h); FFCL 4-6.

8. The Secretary of DHHS (Secretary) has delegated to the I.G. the authority to exclude individuals from participation in Medicare and to direct their exclusion from participation in Medicaid. 48 Fed. Reg. 21,662 (1983); 53 Fed. Reg. 12,993 (1988).

9. The I.G. was required to exclude Petitioner from participating in Medicare and to direct his exclusion from participating in Medicaid for at least five years. Act, sections 1128(a)(1), 1128(c)(3)(B); 42 U.S.C. §§ 1320a-7(a)(1), 1320a-7(c)(3)(B).

10. The evidence proves two aggravating factors, either of which may be considered as a basis for lengthening the period of exclusion beyond the mandatory five years. 42 C.F.R. § 1001.102(b)(1), (6); FFCL 3, 4.

11. The evidence is insufficient to prove two other aggravating factors alleged by the I.G. 42 C.F.R. § 1001.102(b)(2), (3).

12. None of the mitigating factors applies. 42 C.F.R. § 1001.102(c)(1)-(3).

13. The evidence relevant to the two aggravating factors proves Petitioner to be untrustworthy to the extent that a 10-year exclusion is reasonably necessary to protect the integrity of federally financed health care programs, and to protect program beneficiaries and recipients.

14. The 10-year exclusion imposed and directed against Petitioner by the I.G. comports with the remedial purposes of the Act and, consequently, is reasonable. FFCL 1-13.

DISCUSSION

The I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid, pursuant to section 1128(a)(1) of the Act.[4] The evidence proves that Petitioner was convicted under California law of a criminal offense, Grand Theft. The Grand Theft charge was predicated on Petitioner's involvement in a scheme to defraud the Medi-Cal program by generating false claims to Medi-Cal for psychiatric services which were, in fact, provided by non-physicians. FFCL 6. Further, Petitioner was ordered to pay restitution to Medi-Cal, which is a State Medicaid program. FFCL 4. Thus, Petitioner's Grand Theft conviction is related to the delivery of an item or service under Medi-Cal. 42 U.S.C. § 1320a-7(a)(1), 42 U.S.C. § 1320a-7(h). See Tito B. Trinidad, M.D., DAB CR468, at 6 (1997), and Niranjana B. Parikh, M.D., DAB No. 1334, at 5-6 (1992).

Consequently, a five-year exclusion is required as a matter of law as a result of Petitioner's Grand Theft conviction. It is not necessary that Petitioner's conviction involve Medicare, as Petitioner seems to argue; a conviction related to a State health

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[4] Section 1128(a)(1) of the Act states:

> Sec. 1128 (a) Mandatory Exclusion.-The Secretary shall exclude the following individuals and entities from participation in any program under title XVIII and shall direct that the following individuals and entities be excluded from participation in any State health care program (as defined in subsection (h)): (1) CONVICTION OF PROGRAM-RELATED CRIMES-Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program.

care program, such as Medi-Cal, also triggers exclusion. Petitioner never asserted that his conviction was not related to Medi-Cal. 42 U.S.C. §§ 1320a-7(a)(1), 1320a-7(h); I.G. R. Br. at 2-4.

Aggravating factors specified in the regulations may be considered to be a basis for lengthening the period of exclusion. The reasonableness of the length of any exclusion imposed for a period of more than five years will be decided based on the presence of, and the weight assigned to, certain aggravating and offsetting mitigating factors, if any, which the regulations identify. 42 C.F.R. § 1001.102(b)(1)-(6), (c)(1)-(3).

An administrative law judge is obligated to decide, using the factors contained in the regulations, whether an exclusion of a particular length is reasonably necessary to protect the integrity of federally financed health care programs and the welfare of the programs' beneficiaries and recipients. Rosaly Saba Khalil, M.D., DAB CR353, at 10 (1995); Dr. Abdul Abassi, DAB CR390, at 3-4 (1995). Evidence that does not fall within any of the aggravating or mitigating factors contained in the regulations will not be considered as evidence of a party's trustworthiness. Abassi, DAB CR390, at 3-4.

Petitioner asserts that his motivation was and is to serve the poor and the underserved, that his patients loved him, that the quality of his care was great, and that he gave to the community and actively participated in his church. P. Br. at 4-6. Petitioner's assertions may be true, but they do not affect my evaluation of the reasonableness of Petitioner's exclusion. The regulations limit the factors which an administrative law judge can consider as relevant to an excluded party's trustworthiness to provide care.

Although the I.G. alleges four aggravating factors (42 C.F.R. § 1001.102(b)(1), (2), (3), (6)), I find that only two aggravating factors apply in Petitioner's case (42 C.F.R. § 1001.102(b)(1) and (6)). No mitigating factors apply in Petitioner's case.

I. Aggravating factors

Below, I discuss the four aggravating factors asserted by the I.G., 42 C.F.R. § 1001.102(b)(1), (2), (3), (6). I discuss also the weight I have assigned to the two aggravating factors that have been proved, taking the most weighty first. 42 C.F.R. § 1001.102(b)(1) and (6).

A. Financial loss to Medicaid

The most weighty aggravating factor in Petitioner's case is the financial loss to Medicaid. 42 C.F.R. § 1001.102(b)(1).

The threshold that triggers this aggravating factor is $1,500. California's Medicaid program, Medi-Cal, lost at least $500,000,[5] as confirmed by the $500,000 in restitution to Medi-Cal required under the plea agreement to be paid by Petitioner and his two co-defendants, either jointly or severally. I.G. Ex. 6 at 1.

The more-than-$500,000 loss to Medi-Cal is far greater than the $1,500 threshold that triggers this aggravating factor (42 C.F.R. § 1001.102(b)(1)) and demonstrates the magnitude of Petitioner's untrustworthiness. The more-than-$500,000 loss to Medi-Cal persuades me that Petitioner's period of exclusion must be lengthened significantly beyond the mandatory five years.

B. Overpayment to Petitioner

The next most weighty aggravating factor is the overpayment to Petitioner by Medi-Cal as a result of the improper billings. 42 C.F.R. § 1001.102(b)(6).

The threshold that triggers this aggravating factor is $1,500. The amount of Petitioner's illegal gain is evidenced by his admission during his guilty plea to two enhancements to Count 3, Special Allegations of Excessive Taking, in excess of the amounts of $150,000 (the first Special Allegation) and $100,000 (the second Special Allegation). I.G. Ex. 1 at 6-7; I.G. Ex. 4, 5, 6, 7. Thus, Petitioner illegally gained in excess of $250,000.

Petitioner's illegal gain is further confirmed by the $500,000[6] in restitution to Medi-Cal that Petitioner is required to pay under the plea agreement, either jointly with his two co-defendants or severally. I.G. Ex. 6 at 1.

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[5] Evidence from outside the Court proceedings indicates the loss to Medi-Cal caused by Petitioner and his two co-defendants was actually in excess of 1.2 million dollars. I.G. Ex. 3 at 1.

[6] Further, the company co-owned by Petitioner and his two co-defendants, the Institute of Advanced Therapy (I.A.T.), was the vehicle that Petitioner and his two co-defendants used to bill Medi-Cal illegally. The illegal gain to I.A.T. actually exceeded 1.2 million dollars, according to an auditor from the Financial Crimes Unit of the California State Attorney General's Office. This evidence was from outside the Court proceedings. I.G. Ex. 3 at 1.

The $250,000 or more of illegal gain to Petitioner goes far beyond the $1,500 threshold that triggers this aggravating factor and underscores his untrustworthiness. Again I am persuaded that Petitioner's period of exclusion must be lengthened significantly beyond the mandatory five years.

C. Insufficient proof that Petitioner's acts were committed over a period of one year or more

The I.G. asserts that the acts resulting in Petitioner's conviction, or similar acts, were committed over a period of one year or more. 42 C.F.R. § 1001.102(b)(2). While that may be true, it has not been proved to my satisfaction in the record before me.

The Grand Theft count to which Petitioner pled guilty specifies a period of more-than-eight months, "(f)rom on or about May 18, 1991, to on or about January 31, 1992." I.G. Ex. 1 at 6; I.G. Ex. 4, 5, 6, 7; FFCL 3.

Petitioner may have committed similar acts in addition to those specified in the Grand Theft count to which he pled guilty. If one considers the similar acts charged in the indictment, alleged to have been committed at various times from May 18, 1991 through December 1992, Petitioner's acts took place over approximately a 19-month period. I.G. Ex. 1. In addition, there was also the warning letter to Petitioner from California's Attorney General, dated January 14, 1991, advising Petitioner that only services provided by licensed physicians may be billed to Medi-Cal under procedure code 90844, and that "(u)sing this procedure code to bill the Medi-Cal program for services rendered by non-physicians constitutes fraud." I.G. Ex. 2. This letter leads me to believe that Petitioner may have committed similar acts before, as well as after, the more-than-eight month period covered by the Grand Theft count to which he pled guilty.

Nevertheless, I am unable to glean reliable specifics of similar acts from the evidence to substantiate the allegation that Petitioner's pattern of repeated similar acts occurred over a period of one year or more. When Petitioner pled guilty, he admitted to committing acts that constitute Grand Theft during a period of more-than-eight months. I make no finding beyond the more-than-eight months that he admitted.

D. Insufficient proof that Petitioner's acts had significant adverse impact on program beneficiaries or others

The I.G. asserts that the acts which resulted in Petitioner's conviction, or similar acts, had a significant adverse physical, mental, or financial impact on one or more program beneficiaries or other individuals. 42 C.F.R. § 1001.102(b)(3).

The evidence of record is insufficient to show "that I.A.T.'s Medi-Cal patients paid substantial amounts in inflated co-insurance and deductibles," as argued by the I.G. I.G. Br. at 16. I do not know whether Medi-Cal patients pay any portion of covered services. No evidence was presented to me regarding what portion, if any, Medi-Cal patients pay of covered services.

The evidence is also insufficient to show that beneficiaries or others were harmed by psychotherapy treatments by non-physicians. I.G. Ex. 9 at 2.

Absent specific evidence of significant adverse physical, mental, or financial impact, I conclude that this aggravating factor has not been proved.

II. Mitigating factors

I can only consider the mitigating factors identified by the regulations. 42 C.F R. § 1001.102(c)(1)-(3). None of the mitigating factors applies in Petitioner's case.

III. Collateral attack on Petitioner's conviction

Petitioner argues that he did not "handle any money" and did not do the billing at I.A.T. P. Br. at 2-3. Petitioner's arguments are unavailing, however, because he may not argue the merits of his criminal case in this administrative proceeding. His arguments amount to a collateral attack on his conviction. The correct forum for the Petitioner to have dealt with the circumstances of his criminal case was the State court in which he was charged criminally. Francis Shaenboen, R.Ph., DAB No. 1249, at 9 (1991). Paul R. Scollo, D.P.M., DAB No. 1498, at 14 (1994).

The regulations which apply in this case provide that --

> When the exclusion is based on the existence of a conviction, . . . the basis for the underlying determination is not reviewable and the individual or entity may not collaterally attack the underlying determination, either on substantive or procedural grounds. . .

42 C.F.R. § 1001.2007(d).

An appellate panel of the Departmental Appeals Board discussed the reasoning behind this rule, with regard to a mandatory exclusion taken under section 1128(a)(2) of the Act, in the case

of Peter J. Edmonson, DAB No. 1330 (1992). In Edmonson, the appellate panel held:

> It is the fact of the conviction which causes the exclusion. The law does not permit the Secretary to look behind the conviction. Instead, Congress intended the Secretary to exclude potentially untrustworthy individuals or entities based on criminal convictions. This provides protection for federally funded programs and their beneficiaries and recipients, without expending program resources to duplicate existing criminal processes.

Id. at 4. See also Anthony Accaputo, Jr., DAB No. 1416 (1

As for Petitioner's argument that he was unaware that his plea could serve as the basis for the I.G.'s exclusion, a similar argument was rejected in the case of Douglas Schram, R.Ph., DAB CR215 (1992), aff'd, DAB No. 1372 (1992). In rejecting Petitioner's argument, the Administrative Law Judge cited U.S. v. Suter, 755 F.2d 523, 525 (7th Cir. 1985), and noted that the court had held that a defendant in a criminal proceeding does not have to be advised of all the possible consequences which may flow from his plea. These consequences may include, as is the case here, temporarily being barred from the receipt of government reimbursement for professional services. See Paul Karsch, DAB CR454 (1997), and Thomas Malik, DAB CR357 (1995).

IV. Reasonableness of the 10-year exclusion

Petitioner deliberately and systematically defrauded Medi-Cal, California's Medicaid program, to obtain illegal payments for the company co-owned by Petitioner and his two co-defendants, I.A.T. FFCL 6; I.G. Ex. 3. The theft by I.A.T. from Medi-Cal may have exceeded the $500,000 in restitution they were ordered to repay to Medi-Cal.

I.A.T. billed Medi-Cal for psychotherapy provided by a licensed physician [Petitioner] when the "services" had instead been provided by licensed psychologists or even unlicensed personnel. FFCL 6. Even after having been warned by California's Attorney General to stop submitting these false claims to Medi-Cal, Petitioner persisted in the illegal scheme. I.G. Ex. 2. Petitioner's guilty plea acknowledges his responsibility. Petitioner maintains that because Medicare was not involved, but only California's Medi-Cal program, the State of California's judgment should suffice, because it is reasonable and designed to accomplish the remedial purpose of the judgment. Alternatively, Petitioner argues that if the exclusion must be upheld, a five-year exclusion is reasonable to accomplish the remedial purpose.

I disagree with Petitioner and, instead, agree with his Probation Officer, who wrote: "The incidents in question are interpreted as being a sophisticated assault on the system which aids in the weakening of the fabric of society." I.G. Ex. 10 at 17. Petitioner's Probation Officer assessed the "Circumstances in Aggravation" as follows:

> 1. THE PLANNING, SOPHISTICATION OR PROFESSIONALISM WITH WHICH THE CRIME WAS CARRIED OUT, OR OTHER FACTS, INDICATE PREMEDITATION.
>
> 2. THE DEFENDANT [PETITIONER] TOOK ADVANTAGE OF A POSITION OF PUBLIC TRUST OR CONFIDENCE TO COMMIT THE CRIME.

I.G. Ex. 10 at 17-18.

Mandatory exclusions pursuant to section 1128(a)(1) of the Act are not punitive actions, but administrative remedies designed to protect federally funded health care programs. Larry White, R.Ph., DAB No. 1346, at 3 (1992), cited in Paul R. Scollo, D.P.M., DAB No. 1498, at 15 (1994). Not only did Petitioner take hundreds of thousands of dollars from Medi-Cal illegally, but he did so after having been warned by California's Attorney General that if he persisted he would be prosecuted criminally:

> On receipt of this letter, you have been formally advised that any continued practice by you and/or your associates to bill the Medi-Cal program, for services rendered by non-physicians under procedure code 90844 (billing as though the services were actually rendered by a physician), will result in a criminal prosecution for submission of false claims to the Medi-Cal program . . .

I.G. Ex. 2 (dated January 14, 1991).

Petitioner's high degree of culpability and the magnitude of the two aggravating factors convince me that the 10-year period of exclusion imposed and directed against Petitioner is necessary to protect Medicare and Medicaid and the programs' beneficiaries and recipients. The 10-year period of exclusion should allow the I.G. adequate time to assess Petitioner's performance and to determine whether Petitioner is trustworthy to provide services to beneficiaries and recipients of the Medicare and Medicaid programs.

CONCLUSION

The I.G.'s determination to exclude Petitioner for 10 years from participating in Medicare, and to direct that he be excluded for 10 years from participating in Medicaid, comports with the remedial purposes of the Act and is, thus, reasonable. Accordingly, I affirm the 10-year exclusion.

/s/

Jill S. Clifton

Administrative Law Judge