Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Bali S. Reddy,	DATE: September 20, 1995
Petitioner,	
- v. -	Docket No. C-95-029 Decision No. CR394
The Inspector General.	

DECISION

On October 19, 1994, the Inspector General (I.G.) notified Petitioner, Bali S. Reddy, that he was being excluded from participating in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs for three years.[1] The I.G. told Petitioner that he was being excluded under section 1128(b)(1) of the Social Security Act (Act) based on his conviction of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

Petitioner requested a hearing, and the case was assigned to Administrative Law Judge Joseph K. Riotto for a hearing and decision. Judge Riotto held a telephone prehearing conference in this case on March 2, 1995. During the conference, both parties agreed that the case could be decided by written submissions and that an in-person evidentiary hearing was not necessary. The parties agreed further that the only issue in the case is whether the three-year exclusion the I.G. imposed against Petitioner is reasonable. March 9, 1995 Order and Schedule for Filing Briefs and Documentary Evidence. The parties submitted proposed exhibits and briefs.

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[1] Unless the context indicates otherwise, in this decision I use the term "Medicaid" to represent all programs other than Medicare from which Petitioner was excluded.

Due to Judge Riotto's ill health, the case was reassigned to me on September 7, 1995. On September 14, 1995, I held a telephone prehearing conference. During the conference, the parties confirmed that Petitioner was not contesting the I.G.'s authority to exclude him under section 1128(b)(1). Therefore, the only issue in this case is whether the three-year exclusion imposed by the I.G. is reasonable.

The I.G. submitted seven exhibits (I.G. Ex.(s) 1 - 7). Petitioner did not object to the admission into evidence of I.G. Exs. 1 - 7. However, I am admitting into evidence only I.G. Exs. 2 - 7. I am not admitting I.G. Ex. 1 into evidence. I.G. Ex. 1 is a copy of the I.G.'s October 19, 1994 notice letter to Petitioner, which is already of record in this case.[2] Petitioner submitted two unmarked exhibits. The I.G. has not objected to Petitioner's exhibits. I have marked these two exhibits as Petitioner's exhibits (P. Ex.(s)) 1 and 2 and I have admitted them into evidence.

I have considered the evidence, applicable law and regulations, and the parties' arguments. I conclude that the I.G. had authority to exclude Petitioner pursuant to section 1128(b)(1) of the Act. I conclude also that there exist no mitigating factors in this case which justify reducing the exclusion below the minimum three-year period imposed by the I.G. Therefore, I sustain the three-year exclusion which the I.G. imposed against Petitioner.

I. Issue, Findings of Fact, and Conclusions of Law

Only one issue has been raised in this case. That issue is whether the three-year exclusion imposed against Petitioner by the I.G. is reasonable. Below I make specific findings of fact and conclusions of law in addressing and deciding this issue. In setting forth my findings and conclusions, I cite to relevant portions of my decision, at which I discuss my findings and conclusions in detail.

1. Regulations mandate that at least a three-year exclusion be imposed pursuant to section 1128(b)(1) of

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[2] Paragraph 8(f) of the March 9, 1995 Order and Schedule for Filing Briefs and Documentary Evidence directed specifically that the parties should not file such record documents as exhibits in this case.

the Act in a case where there exist no mitigating factors. Pages 3 - 4.

2. Petitioner did not prove that mitigating factors exist in this case. Pages 6 - 7.

3. I do not have the authority to declare a regulation to be ultra vires the Act or the Administrative Procedure Act, nor do I have the authority to declare a regulation, or the application of a regulation to a particular individual, to be unconstitutional. Pages 4 - 6.

II. Discussion

A. Governing law

The I.G. imposed Petitioner's exclusion pursuant to section 1128(b)(1) of the Act. This section permits the exclusion from Medicare and Medicaid of individuals who have been convicted, 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. Social Security Act, section 1128(b)(1).

Section 1128 of the Act is a remedial statute. Congress intended that it be applied to protect the integrity of federally funded health care programs, and the welfare of program beneficiaries and recipients, from individuals and entities who have been shown to be untrustworthy. Exclusions imposed pursuant to section 1128 have been found reasonable only insofar as they are consistent with the Act's remedial purpose. Robert Matesic, R.Ph., d/b/a Northway Pharmacy, DAB 1327, at 7 - 8 (1992); Rosaly Saba Khalil, M.D., DAB CR353, at 9 (1995); Dr. Abdul Abassi, DAB CR390, at 3 (1995).

Prior to 1993, there were no regulations governing the administrative adjudication of exclusions imposed pursuant to section 1128. Before then, administrative law judges and appellate panels of the Departmental Appeals Board had held that the criteria by which they evaluated the trustworthiness of excluded parties, and the reasonableness of exclusions, derived from the Act itself. These criteria encompassed any evidence relevant to an excluded party's trustworthiness to provide care. Matesic, DAB 1327, at 7 - 8.

In January 1993, regulations at 42 C.F.R. Part 1001 became binding on administrative law judges and appellate panels of the Departmental Appeals Board. 42 C.F.R. Part 1001; 42 C.F.R. § 1001.1(b). Among other things, the regulations at 42 C.F.R. Part 1001 direct the I.G. to exclude an individual who has been convicted of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct committed in connection with the delivery of a health care item or service. 42 C.F.R. § 1001.201(a). The regulations direct further that, in the absence of certain enumerated aggravating or mitigating factors, the length of the individual's exclusion is to be three years. 42 C.F.R. § 1001.201(b).

As a consequence of the regulations, in any case in which the reasonableness of an exclusion is at issue, I am obligated to decide 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 by using only the aggravating and mitigating factors contained in the regulations. Abassi, DAB CR390, at 4; Khalil, DAB CR353, at 10. The regulations limit the factors which I may consider as relevant to an excluded party's trustworthiness to provide care. I may no longer, for example, consider evidence relating to a party's rehabilitation, as evidence of that party's trustworthiness. See Matesic, DAB 1327, at 7 - 8. Such evidence does not fall within any of the aggravating or mitigating factors contained in the regulations. Abassi, DAB CR390, at 4.

B. The reasonableness of Petitioner's exclusion

Petitioner is not contesting whether or not the I.G. had a basis upon which to exclude him.[3] Petitioner is contesting only the reasonableness of his three-year exclusion. In support of his contention, Petitioner makes a number of arguments in which he asserts that the regulations at 42 C.F.R. Part 1001 are either ultra vires

[3] Petitioner admits that he was convicted of one count of an attempt to offer or pay a kickback or bribe in connection with the furnishing of goods and services for which payment may be made by health care insurance or by a health care corporation. Petitioner's brief (P. Br.) at 2 - 3.

or unconstitutional. Petitioner asserts also that mitigating factors exist in his case.[4]

Specifically, Petitioner argues that the regulations governing his case, as set forth at 42 C.F.R. Part 1001, are invalid for the following reasons: 1) the regulations are ultra vires the Act; 2) they subject him to double jeopardy in violation of his Fifth Amendment rights under the United States Constitution; and 3) they violate his due process rights under the Fifth Amendment. Additionally, Petitioner challenges the regulation at 42 C.F.R. § 1001.1(b), which assertedly binds administrative law judges, the Departmental Appeals Board, and federal courts, on the following grounds: 1) the regulation was issued without following procedures prescribed by the Administrative Procedure Act; 2) it does not follow the proper delegation of authority to or from the Secretary of the Department of Health and Human Services (Secretary); and 3) it was published in violation of President Clinton's moratorium on newly published regulations. P. Br. at 3 - 14.

Many of the arguments Petitioner has raised were considered by administrative law judges prior to 1993. At that time, administrative law judges determined that the Part 1001 regulations did not apply to administrative hearings. Bertha K. Krickenbarger, R.Ph., DAB CR250 (1993); Tajammul H. Bhatti, M.D., DAB CR245 (1992); Sukumar Roy, M.D., DAB CR205 (1992); Steven Herlich, DAB CR197 (1992); Stephen J. Willig, M.D., DAB CR192 (1992); Aloysius Murcko, D.M.D., DAB CR189 (1992); Charles J. Barranco, M.D., DAB CR187 (1992). In those decisions, the administrative law judges concluded that the Secretary did not intend that the Part 1001 regulations apply to govern administrative adjudications of I.G. exclusion determinations. One reason for the conclusion cited in these decisions was the concern that these regulations, if they were found to govern administrative adjudications, might be found to be either ultra vires the Act or unconstitutional. It was concluded that the Secretary did not intend the Part 1001 regulations to be applied in a way that might result in an ultimate decision that the regulations were ultra vires the Act or unconstitutional.

However, the regulations published on January 22, 1993, make clear that these regulations govern administrative hearings as to exclusions imposed under section 1128 of

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[4] The I.G. has not alleged that aggravating factors exist in this case.

the Act. Jose Ramon Castro, M.D., DAB CR259 (1993); 42 C.F.R. § 1001.1(b). As a delegate of the Secretary, I have no independent authority to rule on the validity or constitutionality of regulations issued by the Secretary. Moreover, the regulation at 42 C.F.R. § 1005.4(c)(1) specifically precludes me from ruling on the validity of the regulations Petitioner challenges. Thus, I am without authority to consider Petitioner's arguments as to whether the regulations are lawful or constitutional.

Petitioner asserts also that mitigating factors exist in this case. Petitioner asserts specifically that: 1) his conviction was not program-related; 2) he has divested all ownership in the laboratory which was implicated along with Petitioner in the criminal charges which resulted in Petitioner's conviction; and 3) he has cooperated with the Michigan State Attorney General's Office (State) in the prosecution of a number of kickback schemes. P. Br. at 2.

Under the regulations defining the mitigating factors I am allowed to consider, it is irrelevant whether Petitioner's conviction was program-related or whether Petitioner has divested his ownership in the laboratory that was implicated along with Petitioner in the criminal charges that resulted in Petitioner's conviction. The regulations list only four factors which I may consider as mitigating and a basis for reducing Petitioner's three-year exclusion. These factors are whether: 1) an individual was convicted of three or fewer misdemeanors with a loss to the victims of the crime aggregating less than $1500; 2) the sentencing court determined that the convicted individual had a mental, emotional, or physical condition before or during the commission of the offense that reduced the individual's culpability; 3) the convicted individual's cooperation with federal or State officials resulted in others being convicted, excluded, or subjected to a civil money penalty; or 4) no alternative sources of the types of items or services provided by the convicted individual are available. 42 C.F.R. § 1001.201(b)(3)(i) - (iv). Only Petitioner's third assertion, that he has cooperated with State officials in the prosecution of kickback schemes, might, if proved, constitute a mitigating factor under the regulations. 42 C.F.R. § 1001.201(b)(3)(iii).

Petitioner has the burden of proving a mitigating factor under 42 C.F.R. § 1001.201(b)(3)(iii). His burden here consists of proving: 1) that he cooperated with State officials; and 2) that his cooperation resulted in the conviction, exclusion, or imposition of a civil money

penalty against another individual or individuals. Abassi, DAB CR390, at 7.

There is some evidence of record that Petitioner may have cooperated with State officials. P. Ex. 1; I.G. Ex. 6 at 7. However, there is no evidence of record that Petitioner's cooperation with State officials resulted in the conviction, exclusion, or imposition of a civil money penalty against any other individual or individuals. See Abassi, DAB CR390, at 8.

I conclude that Petitioner did not prove the presence of a mitigating factor within the meaning of 42 C.F.R. § 1001.201(b)(3)(iii). Assuming that Petitioner proved that he has cooperated with State officials, Petitioner has not proved that his cooperation with State officials resulted in others being convicted, excluded, or subjected to a civil money penalty.

III. Conclusion

I conclude that the I.G. was authorized to exclude Petitioner for three years. In the absence of mitigating factors, the regulations governing this case mandate that the I.G. exclude Petitioner for three years. Thus, I sustain Petitioner's three-year exclusion.

/s/

Steven T. Kessel
Administrative Law Judge