Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Gerald A. Snider, M.D.,	)	DATE: August 1, 1997
	)	
Petitioner,	)	
	)	
v.	)	Docket No. C-97-185
	)	Decision No. CR484
The Inspector General.	)	
	)	

DECISION

I conclude that the 10-year exclusion imposed and directed against Petitioner, Gerald A. Snider, M.D., from participating in Medicare and other federally financed health care programs is excessive and not reasonable. I further conclude that Petitioner should be, and is hereby, excluded from participation in those programs for a period of eight years.

PROCEDURAL HISTORY

By letter dated December 10, 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 Medicare program, he was being excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs for a minimum period of 10 years.[1] The I.G. further advised Petitioner that exclusion is mandated by section 1128(a)(1) of the Social Security Act (Act)[2], that section 1128(c)(3)(B) of the Act requires

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[1] Unless otherwise indicated, I hereafter 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.

that the minimum period of exclusion shall be not less than five years, and that an additional five-year period of exclusion was being imposed upon a finding of certain specified aggravating factors.

By letter dated February 6, 1997, Petitioner filed a request for hearing, asserting that the 10-year period of exclusion imposed by the I.G. was unreasonable and excessive, and requesting that the exclusion be reduced to the minimum five-year period required by the Act.

During a March 14, 1997 telephone conference, the parties agreed that the only issue present in this appeal is whether Petitioner should be excluded from participation in the Medicare and Medicaid programs for 10 years -- five years in addition to the mandatory five-year exclusion. In addition, the parties agreed that this case should be decided on the basis of written submissions, waiving the right to an in-person hearing.

Pursuant to a briefing schedule agreed upon by the parties hereto, the parties have submitted, and I have admitted into evidence and/or made a part of the record in this case, the following documents:

a). Petitioner's initial brief with attached Appendix; (I hereby direct that the Appendix be marked and admitted into evidence as Petitioner's Exhibit 1).

b). I.G.'s initial brief with attached exhibits 1 through 5;

c). Petitioner's reply brief;

d). I.G.'s reply brief;

e). I.G.'s Motion to Supplement the Record with attached exhibit dated August 26, 1993 - Corrected Final Order issued by the Oklahoma State Board of Medical Licensure and Supervision. (This document as submitted was incorrectly marked as I.G. Exhibit 1. I hereby direct that said document be remarked as I.G. Exhibit 6);

f). Petitioner's Objection and Response to the I.G.'s Motion to Supplement the Record;

g). Petitioner's Notice of Resolution of his Criminal Appeal with attached Order and Judgment of the United States Court of Appeals for the Tenth Circuit, dated May 13, 1997. (I hereby direct that this document be marked as Petitioner's Exhibit 2);[3]

h). Petitioner's Correction of Typographical Error;

i). I.G.'s Motion to Close the Record;

j). Petitioner's Response to I.G.'s Motion to Close the Record;

k). I.G.'s Reply to Petitioner's Response to the Motion to Supplement the Record.[4]

By Order dated June 23, 1997, I advised the parties that I had received all of the above, was closing the record, and would proceed to render a decision.

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

I.G. Initial Brief - I.G. Br.
I.G. Reply Brief - I.G. R. Br.
Petitioner's Initial Brief - P. Br.
Petitioner's Reply Brief - P. R. Br.
I.G.'s Exhibits - I.G. Ex. -
Petitioner's Exhibits - P. Ex. -

References to other submissions in the text of this decision are made using the complete title of the submission.

[4] The I.G. objects to Petitioner's Response to the Motion to Supplement the Record for the reason that Petitioner's Response was untimely. The I.G. attached two proposed exhibits to its brief showing that Petitioner's Response was filed two days late. While I am not pleased with Petitioner's tardiness, I have elected to waive the filing deadline in this case and to receive Petitioner's Response into the record in the interests of having a full and complete record before me prior to adjudicating this case. Accordingly, I hereby overrule the objection of the I.G. and admit Petitioner's Response to the I.G.'s Motion to Supplement the Record. Further, having so ruled, the attached two I.G. exhibits, which have been remarked as I.G. Proposed Exhibits 7 and 8, are immaterial and are not admitted into evidence.

ISSUE

The issue before me is whether Petitioner should be excluded from participation in the Medicare and Medicaid programs for a period in excess of the five years mandated by statute, and, if so, for what additional period.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant hereto, Petitioner was a medical doctor licensed by the State of Oklahoma to provide medical services to patients. At the time of the acts leading to his conviction, Petitioner was a salaried physician employed at Muskogee Family Medical Services, Inc. and the medical director of the Azalea Park, Tower Hill, Heritage, Broadway Manor, York, and Pleasant Valley Nursing Homes ("Nursing homes"), all located in Muskogee, Oklahoma. I.G. Ex. 3.

2. On August 3, 1995, a federal grand jury, sitting in the United States District Court for the Northern District of Oklahoma (the Court), returned an indictment against Petitioner charging him with one count of conspiracy to commit Medicare fraud, in violation of 18 U.S.C. § 371. I.G. Ex. 3.

3. On December 1, 1995, Petitioner was found guilty on the one count described in the indictment after a trial by jury in the Court. I.G. Ex. 4.

4. On May 22, 1996, the Court entered judgment finding Petitioner guilty of Conspiracy to Commit Medicare Fraud, a violation of 18 U.S.C. § 371 (a felony) and ordered that Petitioner be imprisoned for a term of twelve months and one day, and ordered Petitioner to make restitution of $190,000 to the Health Care Financing Administration of the Department of Health and Human Services. I.G. Ex. 4; P. Ex. 1 at 93.

5. From January 1991 to August 1992, in return for remuneration received and in anticipation of further remuneration, Petitioner referred approximately 70 patients to another provider (Moore), all of whom were Medicare beneficiaries. P. Ex. 1 at 86.

6. Petitioner's criminal conviction for Conspiracy to Commit Medicare Fraud relates to the delivery of a Medicare item or service within the meaning of section 1128(a)(1) of the Act. I.G. Ex. 4.

7. On December 23, 1996, the Court entered an Amended Judgment against Petitioner, reaffirming the original sentence of imprisonment but correcting the amount of restitution he was ordered to make from $190,000 to $119,532. P. Ex. 1 at 102-106.

8. After entry of the Court's judgment, Petitioner initiated an appeal to the United States Court of Appeals for the Tenth Circuit. In that appeal, Petitioner did not contest the validity of his conviction but contended that the Court should have sentenced him to probation rather than incarceration, and that the restitution order should have been just $5,698. P. Br. at 1.

9. On May 13, 1997, the Tenth Circuit Court of Appeals entered an Order and Judgment denying relief as to the sentence and agreeing that the amount of restitution should be $119,532. P. Ex. 2.

10. 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).

11. The I.G. was required to exclude Petitioner from participating in Medicare and to direct his exclusion from participation in Medicaid for at least five years. Act, sections 1128(a)(1), 1128(c)(3)(B).

12. The I.G. proved four aggravating factors, three of which may be considered in this case as a basis for lengthening the period of exclusion beyond the mandatory five years. 42 C.F.R. §§ 1001.102(b)(1), (2), and (4).

13. None of the mitigating factors set forth in 42 C.F.R. § 1001.102(c) applies in this case.

14. Although the I.G. has proven the existence of four aggravating factors, Petitioner has proven by a preponderance of the evidence that reduced weight should be assigned to those factors when considering the length of exclusion.

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

16. The 10-year exclusion imposed and directed against Petitioner by the I.G. does not comport with the remedial purposes of the Act, is excessive, and consequently is not reasonable.

17. An eight-year exclusion is supported by the facts. An eight-year exclusion comports with the remedial purposes of the Act and is reasonable given the totality of the evidence.

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. The I.G. proved and Petitioner does not contest: (1) that Petitioner was convicted of a criminal offense under federal law and (2) that the conviction related to the delivery of an item or service under Medicare.

Petitioner acknowledges that an exclusion of at least five years is required as a matter of law and that aggravating factors specified in the regulations may be considered to be a basis for lengthening the period of exclusion. P. Br. at 11.[5]

A. Aggravating.

Below, I discuss the evidence relating to the establishment of the aggravating factors alleged by the I.G. in this case and the weight I have assigned to each of those factors in reaching my decision as to the length of time Petitioner should be excluded from participation in the Medicare and Medicaid programs.

1. Financial loss to Medicare.

42 C.F.R. § 1001.102(b)(1) provides that if the acts resulting in the conviction, or similar acts, resulted in a loss to Medicare of $1500 or more, that fact will be considered an aggravating factor in determining the length of exclusion. The regulation further provides that the entire amount of the loss to the program will be considered, including amounts from similar acts not

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[5] It is noted that Petitioner erroneously refers to 42 C.F.R. § 1001.201, rather than § 1001.102, which is applicable in this case. However, the aggravating factors listed in both sections are not materially different for purposes of this case.

adjudicated, and regardless of whether full or partial restitution has been made.

When imposing its original exclusion of 10 years, the I.G relied upon the Court's initial judgment that Petitioner make restitution to HCFA in the amount of $190,000. I.G. Br. at 5; I.G. Ex. 1. The Court later amended that judgment to correct a clerical error, and ordered the Petitioner to make restitution in the amount of $119,532. P. Ex. 1 at 102-106. There is no evidence that the I.G. relied upon any evidence other than the amount of restitution Petitioner was ordered to pay in computing the amount of loss sustained by Medicare. Indeed, the I.G. argues that "[t]he restitution amount of $190,000[6] should be deemed the amount of damages sustained by Medicare as a result of the acts resulting in Petitioner's conviction." I.G. Br. at 5. In support of its position, the I.G. cites a number of prior Civil Remedies Division decisions where the administrative law judge (ALJ) explicitly used the restitution order amount to determine the presence of this aggravating factor. I.G. R. Br. at 10, 11, citing Scott Gladstone, M.D., DAB CR331 (1994); Martin Weissman, et al., DAB CR116 (1991); and Arthur D. Freiberg, D.P.M., DAB CR63 (1990). Further, the I.G. notes it is especially reasonable to rely upon the order of restitution in this case inasmuch as the Court considered and relied upon a Presentence Investigation Report (PIR) which found in pertinent part as follows:

> In some cases referred by Snider pursuant to the remuneration agreement, Moore or Crossland actually performed psychological testing or limited treatment, although Crossland was not an approved Medicare Provider and further, was not qualified to conduct the tests. Medicare's review of patients' files, moreover, revealed that in many cases the listed services were simply not performed. Moore submitted . . . and Medicare reimbursed Moore a total of $241,952 for those claims, resulting in a loss of $241,952 to Medicare. The portion of that loss that was both reasonably foreseeable by Snider and within the scope of his agreement with Moore is not less than $119,532, which is the total paid by Medicare for psychological testing billed by Moore. Therefore, the

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[6] The I.G. Brief was prepared prior to the time it was aware that the Court had amended the amount of restitution.

> improper benefit conferred in this case which can be attributed to Snider is $119,532.

See P. Ex. 1 at 86; P. Br. at 9; I.G. R. Br. at 9.

While the undersigned would agree that the Court's restitution figure contained in the initial judgment is clearly evidence which must be considered in determining the amount of loss to Medicare, the cases cited by the I.G. also indicate clearly that it is not the **only** evidence which the ALJ may consider. In Gladstone, for example, the ALJ considered evidence of unadjudicated felony counts and photocopies of Medicaid reimbursement checks in addition to the restitution order.

Here, Petitioner asks the undersigned to consider the fact that, despite the order of restitution, the exact amount of loss to the Medicare program has not been determined. This, he asserts, is because, as indicated in the PIR above, some of the patients he referred (under what the Court and jury determined to be an illegal kickback scheme) actually did receive psychological testing and limited treatment. He asserts "Medicare suffered no 'losses' to the extent" that services, subsequently billed to Medicare, were actually performed. P. Br. at 12.

Further, Petitioner asks the undersigned to consider the fact that even if the order of restitution were considered to be dispositive of the issue of loss to the Medicare program, the amended order substantially reduces the amount of loss from $190,000 to $119,532 and that reduction should accordingly reduce the weight given to this aggravating factor in determining the length of Petitioner's exclusion. P. Br. at 12-13.

In considering the arguments of the parties with respect to this issue, the undersigned has reviewed the record as a whole. It is important to have an understanding of the background of this case in making a decision both as to whether the criteria for this aggravating factor have been met and the weight to give to this factor when considering the period of exclusion.

The PIR states that Petitioner entered into an agreement on January 23, 1991 with two psychologists, Thomas M. Crossland and James O. Moore, whereby Petitioner would refer patients to them, and in return the psychologists would perform services, bill Medicare for same, and then reimburse 12 percent of the Medicare allowable fee to Petitioner as a consulting fee. P. Ex. 1 at 10.

At the time of the agreement and subsequent thereto, Petitioner was the medical director for four different nursing homes, and in that capacity, and subsequent to his agreement with Moore and Crossland, he ordered psychological testing "for the majority of his nursing home and home bound patients." P. Ex. 1 at 84. From January 1991 to August 1992, in return for remuneration received and in anticipation of further remuneration, Petitioner referred approximately 70 patients to Moore, all of whom were Medicare beneficiaries. Moore submitted approximately $478,000 in claims to Medicare as a result of referrals from Petitioner, and Medicare reimbursed Moore a total of $241,952. Petitioner only received $5,697.92 from Moore in reimbursement. Id. at 84, 86.[7]

Petitioner was ultimately indicted and convicted, after trial by jury, of Conspiracy to Commit Medicare Fraud by knowingly and willfully soliciting and receiving remuneration, including kickbacks and bribes, in exchange for the referral of patients for services paid by Medicare, in violation of 42 U.S.C. § 1320a-7b(b)(1). I.G. Ex. 4; P. Ex. 1 at 95-99, 103-106; P. Br. at 8.

The PIR noted that Petitioner's role in the overall conspiracy was minor in comparison to that of Moore. It was Moore who recruited Petitioner; there was no evidence that the referral agreement contemplated extensive fraudulent billings for services that were never provided; and Petitioner lacked knowledge of the overall conduct of Moore. Moore received almost all of the proceeds of the offense. P. Ex. 1 at 88.

The PIR further noted, however, that in his capacity as medical director for the several nursing homes, Petitioner occupied a position of both public and private trust. He had exclusive authority to determine whether referrals for psychological services were appropriate and necessary, and patients were reliant on Petitioner to make appropriate decisions regarding their medical care. He abused his discretion and significantly facilitated the commission of the offense by making inappropriate referrals. P. Ex. 1 at 87.

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[7] According to the PIR, Moore submitted a number of bills to Medicare, seeking and receiving reimbursement for services which were not performed. P. Ex. 1 at 85, 86. Moore did not stand trial, but instead entered a plea, and was sentenced to five years' probation and ordered to pay restitution of $48,945. P. Ex. 1 at 84; P. Br. at 7.

In determining the amount of restitution which the Court required of Petitioner, it considered the statements of the PIR. According to the PIR, the total loss to Medicare was $241,952, the amount paid to Moore. The evidence further indicates that the Court attributed $119,532 of that amount to Petitioner as being "reasonably foreseeable," being the total paid by Medicare for psychological testing billed by Moore. P. Ex. 1 at 86-87.

Inasmuch as the evidence indicates that Petitioner referred a majority of his nursing home and home bound patients to Moore, regardless of indicators for such referrals, and inasmuch as Petitioner was aware, by virtue of his agreement with Moore that at least some testing would be done, and inasmuch as Moore would not have been able to submit any of his fraudulent billings to Medicare but for the inappropriate and illegal referrals from Petitioner, the evidence supports a conclusion that Petitioner's illegal kickback agreement with Moore actually resulted in a financial loss to Medicare in the amount of $241,952, taking into account the entire loss to the Medicare program. This is true regardless of whether the psychological services for which Medicare was billed were actually performed. In light of the fact that all referrals to Moore were done under an illegal agreement, Moore could not lawfully perform the services for which he billed, and had Medicare known of the agreement, it could not have paid for those services.

Accordingly, I conclude that Petitioner's arguments to the effect that (1) the order of restitution reflects a sum greater than Medicare's loss and (2) that the weight given to this aggravating factor should be reduced because the order of restitution was later corrected, to be without merit. I further conclude that as a result of Petitioner's acts resulting in his conviction, that is, the illegal kickback agreement with Moore, Medicare sustained a loss in the amount of $241,952, for none of Moore's fraudulent activities could have occurred without there first being a referral from Petitioner.

In considering the weight to be given to this factor, I would, if it were the only aggravating factor to be considered, impose an exclusion of one additional year, over the five years mandated by the Act. I assign this weight taking into consideration the fact that although the Medicare program sustained a substantial loss due to Petitioner's act, he himself benefitted hardly at all. It is clear from the evidence that Moore was the principal perpetrator of the fraud evidenced here and

clearly is the one whose direct fraudulent activity had the greater bearing on the loss sustained by Medicare.

2. Acts committed over a period of one year or more.

42 C.F.R. § 1001.102(b)(2) provides that if the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more, that factor may be considered to be aggravating and a basis for lengthening the period of exclusion.

Both the Petitioner and the I.G. agree that the acts which formed the basis of the conviction were committed over a period of one year or more. Petitioner contends that the duration in question begins March 1, 1991 and continued until June 13, 1992. P. Br. at 13; P. Ex. 1 at 7, 8. These dates coincide with the first and last payments from Moore to Petitioner under their agreement.

The I.G. argues that Petitioner was found guilty of count one of the indictment, and that the indictment charges Petitioner with committing illegal acts beginning on or about January 1991 and continuing through about August 27, 1992. I.G. Br. at 6; I.G. R. Br. at 11; I.G. Ex. 3 at 4.

The PIR which Petitioner offered into evidence indicates that Petitioner referred patients to Moore under their agreement during the period from January 1991 to August 1992, in return for and in anticipation of remuneration; and on or about August 27, 1992, Petitioner sent a letter to Moore demanding payment of an additional $10,840 representing sums owed by Moore to Petitioner under their agreement. P. Ex. 1 at 86.

I conclude that the acts which formed the basis of Petitioner's conviction were committed over a period of 20 months, beginning in January 1991 and concluding in August 1992. Accordingly, the duration of the acts resulting in Petitioner's conviction was in excess of one year and may be considered an aggravating factor in determining the length of Petitioner's exclusion.

The fact that the referral activity lasted for a period of 20 months is disturbing. As the medical director for four nursing homes and thus responsible for patient care, Petitioner should have been aware, after talking to patients, that there was reason to question whether all of the tests which Moore reported performing were actually being performed. The government did not charge him with such knowledge, and thus at the very least one

is left with the impression that Petitioner showed little concern for his patients. The evidence indicates that he did not stop referring patients to Moore until several months after Moore stopped paying for the referrals. Petitioner's failure to take an interest in his patients, after referring them to Moore, and continuing this process for a period of 20 months, enabled Moore to significantly expand his opportunity to make fraudulent claims to the government. The purpose of the exclusion provision is remedial, not punishment. Here, remedial action is clearly necessary. Directors and administrators of nursing homes have a high degree of responsibility to their patients. Petitioner, as noted in the PIR, breached both the public and private trust placed in him, and it must be emphasized that such conduct cannot be tolerated.

In considering the weight which should be attributed to this factor, I would exclude Petitioner for an additional period of one and one-half years beyond the five year mandatory exclusion period, were it the only factor considered aggravating under the regulation.

3. Incarceration included in sentence.

42 C.F.R. § 1001.102(b)(4) provides that if incarceration is included in the sentence, that factor may be considered aggravating and a basis for lengthening the period of exclusion.

Both parties agree, and the record reflects, that Petitioner was sentenced to one year and one day of incarceration. P. Br. at 14; I.G. R. Br. at 14; P. Ex. 1 at 96. Accordingly, a third aggravating factor has been established.

The fact that the Court chose to incarcerate Petitioner reflects its view of the gravamen of the offense. However, it must also be noted that the maximum sentence which could have been imposed for this offense was for a term of five years, and using the court's sentencing guidelines, as indicated in its Order and Judgment, the Court stated the suggested range was for a term of 12 to 18 months. I.G. Ex. 4 at 5; P. Ex. 1 at 93, 99. The evidence shows that the Court chose to impose the minimum sentence of 12 months and added one day in order to make the Petitioner eligible for "good time" and early release. P. Ex. 1 at 101.

Given the fact that incarceration is an aggravating factor, the Court's decision to impose only the minimum sentence and its action, further, to facilitate Petitioner's early release, significantly diminishes the weight I assign to this factor.

If this were the only aggravating factor present in this case, I would exclude Petitioner for a period of one-half year over and above the mandatory five year exclusion.

4. Prior record of administrative sanction.

42 C.F.R. § 1001.102(b)(5) provides that if the convicted individual has a prior criminal, civil, or administrative sanction record, that factor may be considered aggravating and a basis for lengthening the period of exclusion.

Ruling on Objection to I.G.'s Motion to Supplement the Record

On May 14, 1997, the I.G. filed a motion to supplement the record on the basis of newly discovered evidence, to wit: a Corrected Final Order issued by the Oklahoma State Board of Medical Licensure and Supervision (Oklahoma State Board) to Petitioner on August 26, 1993. This was offered as I.G. Ex. 6. Petitioner does not challenge the admission of this newly discovered evidence, but argues that what has been marked as I.G. Ex. 6 may not be considered as an aggravating factor when considering the reasonableness of the exclusion period. Both parties agree that pursuant to 42 C.F.R. § 1001.102(b)(5), one aggravating factor which may be considered is whether Petitioner has a "prior criminal, civil or administrative sanction record." The parties disagree, however, as to the meaning of the word "prior." Petitioner argues that the intent of this regulation, similar to criminal sentencing guidelines, is to allow the courts to increase punishment for those who have previously broken the law, been punished, but have chosen to nevertheless break the law again. Based on my discussion below, I admit I.G. Ex. 6.

Petitioner cites a number of State court decisions for the proposition that:

> [t]he regulation sets forth a prior sanction record as an aggravating factor because a prior sanction record shows an unwillingness to comply with the law. 57 Fed. Reg. 3316 (1992). **The words "prior sanction," together with the administratively noticed fact of an**

> **unwillingness to comply with the law, mean that sanctions should have been imposed at different times, which would have given the individual an opportunity to comply with the law.**

Petitioner's Objection and Response to the Inspector General's Motion to Supplement the Record, at 2 (quoting Shyam S. Mahajan, M.D., DAB CR402 (1995) (emphasis in Petitioner's brief)).

The facts of this case show that the criminal acts which resulted in Petitioner's exclusion occurred between January 1991 and August 27, 1992, while the reprimand from the Oklahoma State Board was issued on August 26, 1993, **after** the events which are the subject of the present action. Accordingly, Petitioner argues that the Oklahoma State Board reprimand is not a **prior** sanction as contemplated by the regulation.

I am not persuaded by the argument of Petitioner's counsel. First, it must be noted here that the words "prior sanction" are **not** used in this regulatory context together with the words "unwillingness to comply with the law." In some types of cases, where there has been an offense, a sanction, and then a repeated offense of the same or a similar nature, willingness to comply with the law may be a critical factor in imposing a penalty. That language is not included in the regulation set forth at 42 C.F.R. § 1001.102(b)(5), however. It is further noted that the purpose of an exclusion under any of the parts of section 1128 of the Act is remedial, and not punitive. This singularly important fact differentiates this case from those State cases cited by Petitioner wherein the issue was the length of criminal sentence to impose. Here, the I.G. is not seeking to punish Petitioner, but rather is seeking "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." David E. Scheiner, D.P.M., DAB CR471 (1997). The governing statute and implementing regulations here do not turn on an individual's "willingness to comply with the law". Rather, they focus on the individual's trustworthiness to participate in a voluntary program wherein he is called upon to provide critical medical care and to handle large sums of federal money to provide that care.

To the extent that both the Act and its implementing regulations seek to determine an individual's trustworthiness, the examination of that individual's entire record, up to and including the day upon which a

decision on that trustworthiness is rendered, is in keeping with both the spirit and the plain language of the law.

It is my ruling that Petitioner's objection should be and is hereby overruled.

42 C.F.R. § 1001.102(b)(5) provides that if the convicted individual or entity has "a prior criminal, civil or administrative sanction record" that fact may be considered to be aggravating and a basis for lengthening the period of exclusion. The language of the regulation clearly indicates that **at the time the decisionmaker is determining the length of the exclusion** he may look to see if the convicted individual has a prior **record.** With respect to this regulation, at least, the word "prior" refers to a time period before the decisionmaker determines the length of the exclusion. It does not mean that the offense from whence the record comes must have occurred prior to the offense for which the individual was convicted.[8]

Petitioner also argues that even if I.G. Ex. 6 is admissible, it should be accorded little weight as it has little bearing on the issue of Petitioner's trustworthiness. As noted above, the I.G. has submitted additional evidence showing that on August 26, 1993, Petitioner was formally reprimanded, by the Oklahoma State Board, for his "excessive prescribing of controlled dangerous substances without documentation of medical need." I.G. Ex. 6 at 2.

I have previously ruled herein that I.G. Ex. 6 is admissible evidence of a prior record of administrative sanction and accordingly the evidence does establish a fourth aggravating factor in this case. However, I have not yet ruled on the weight to be assigned to the new evidence as a basis for lengthening the period of exclusion.

The I.G. correctly points out that "part of the ALJ's function is to examine the evidence surrounding aggravating factors for indicia of untrustworthiness . . . that poses a risk to program funds and beneficiaries." The I.G. argues that the record of a prior administrative

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[8] It is acknowledged that this ruling may be contrary to that in Mahajan, although the facts in that case were dissimilar to those before me here. To the extent there is conflict, prior ALJ decisions, while useful as a guide, are not legally binding precedent.

sanction shows that Petitioner "over-medicated nursing home patients with 'controlled dangerous substances' on a daily basis over lengthy periods of time," and concludes that "[i]f this does not evince untrustworthiness and a potential risk to program beneficiaries, then it is hard to imagine what would."[9]

Petitioner states that the sanction involved three patients who were apparently addicted to various narcotics before they came under Petitioner's care and he was working with these patients in an attempt to help them overcome their drug addiction while at the same time managing their pain. He attempted to do so by gradually reducing the amount of narcotics and switching them to alternative medications. The I.G. objects to this argument as being unsubstantiated by the evidence. However, the I.G. introduced the record of a prior sanction into evidence and cannot now object when Petitioner attempts to explain the circumstances surrounding it. Further, Petitioner notes that a close reading of the document indicates that: (1) Petitioner would not have been reprimanded if he had documented each patient's medical need; (2) that a follow-up prescription survey was to be conducted, and there was no evidence of any further administrative, civil, or criminal sanction; (3) the reprimand is not based on intentional fraudulent conduct or conduct motivated by financial gain; and (4) that the level of sanction, formal reprimand, is modest.[10]

The record of administrative sanction suggests that Petitioner's explanation of the circumstances surrounding that sanction is true. I note that as part of its order, the Oklahoma State Board "urged," but did not order, Petitioner to obtain independent consultation with a qualified addictionologist for any patient requiring controlled dangerous substances over a long period of time. I.G. Ex. 6 at 2. The fact that the Oklahoma State Board only urged Petitioner to obtain independent consultation, and did not order him to do so, indicates that the Oklahoma State Board felt Petitioner was trustworthy enough to continue to prescribe narcotic medications for his patients. The fact that he was only

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[9] See Inspector General's Reply to Petitioner's Response to the Motion to Supplement the record, dated June 13, 1997 at 5.

[10] See Petitioner's Objection and Response to the Inspector General's Motion to Supplement the Record, dated May 29, 1997 at 4, 5.

reprimanded, when indeed much more serious sanctions were available, is also indicia that the Oklahoma State Board, at least, felt Petitioner was trustworthy enough to return to his medical practice.

While I have found that I.G. Ex. 6 is admissible to the extent that it can be considered as an aggravating factor, and I have in fact considered it, I do not find that this record, standing alone, raises the level of Petitioner's untrustworthiness or requires any additional remedial action in the way of extended exclusion. I attribute no additional weight to this evidence and impose no further exclusion resulting from it.

B. Mitigating factors.

Petitioner has asked that I take into consideration the circumstances surrounding his conviction as mitigating factors in reducing the amount of time he is excluded from participating in Medicare. Chiefly among these he argues that his motivation for entering into the agreement with Moore was to ensure that his patients were not unwisely "evicted" from the nursing homes because of government required Preadmission Screenings and Annual Resident Reviews (PASARR Exams). He also argues that he entered into the agreement with Moore only on the advice of his legal counsel assuring him that he was not violating the law. P. Br. at 2-5, 15.

The I.G. argues, and I agree, that Petitioner has attempted to mount a collateral attack on the underlying conviction. Petitioner's opportunity to raise these arguments with the Court has come and gone, apparently without success. I.G. R. Br. at 3. As the I.G. further notes, the regulations prohibit any collateral attack on the underlying determination, either on substantive or procedural grounds. Id.; 42 C.F.R. § 1001.2007(d). Accordingly, I am not permitted to consider Petitioner's arguments relating to the circumstances surrounding his conviction in reaching my decision herein.

The term "mitigating factors," for purposes of this proceeding, has a precisely defined meaning under the regulations. 42 C.F.R. § 1001.102(c) provides that **only** the following factors may be considered: (1) three or fewer misdemeanor offenses and loss to the program of less than $1500; (2) a mental, physical, or emotional condition reducing culpability; or (3) cooperation with the government resulting in others being convicted or excluded or the imposition of a civil money penalty or assessment by the I.G.

None of the mitigating factors listed above applies in this case.

With respect to the first mitigating factor listed above, Petitioner stipulates that he was convicted of a felony. P. Br. at 15.

Petitioner argues that based upon the advice of counsel, he believed that the arrangement which led to his conviction was lawful and that this factor should be considered in determining the length of suspension. Reliance on bad legal advice does not equate with a mental, physical, or emotional condition reducing culpability and is not a mitigating factor under the regulations. There is no evidence of a mental, physical, or emotional condition reducing culpability.

Petitioner admits that he did not cooperate with the government in the prosecution of others for the reason that "once Moore had made a deal with the government, there was no one left to prosecute other than Dr. Snider." P. Br. at 16.

C. Reasonableness of the exclusion.

The I.G. argues that a 10-year exclusion is reasonable when three aggravating factors are met, and cites a prior ALJ decision upholding a 10-year exclusion in a case with three aggravating factors. I.G. Br. at 7. Further, the I.G. argues that because there are four aggravating factors in this case, the ALJ should increase the exclusionary period beyond the 10 years originally imposed. I.G. R. Br. at 16.

I do not find the I.G.'s argument to be persuasive. As Petitioner correctly points out, the issue is not the number of aggravating factors that have been proven in a given case; instead, the issue is what the evidence relating to any of the factors says about Petitioner's trustworthiness. P. R. Br. at 1. The I.G. seems to also recognize this in principle, citing Mahajan, DAB CR402, at 22 (1995) for the proposition that

> [p]rior to the implementation of regulations containing aggravating and mitigating factors, administrative law judges relied on the concept of "trustworthiness" to determine the amount of risk that a party might pose in relationship to the harm Congress has sought to prevent. Thus, the term "trustworthiness" reflects the extent of the needed remedial action. . . . **The fundamental concept of "trustworthiness" continues to apply since the**

> **implementation of regulations such as 42 C.F.R. § 1001.102, although it is now applied to the inferences that may be drawn from evidence relevant to the aggravating and mitigating factors specified by regulations.**

Inspector General's Reply to the Petitioner's Response to the Motion to Supplement the Record, at 4, 5 (emphasis in the I.G.'s brief).

Here, I do not find that the evidence suggests Petitioner to be as untrustworthy as the I.G. contends, nor do I find Petitioner to be as exemplary and without risk as he would contend. The evidence, taken as a whole, supports a finding that a reasonable exclusion lies somewhere in between the minimum five years sought by Petitioner and the ten or more years sought by the I.G.

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 does not comport in its entirety with the remedial purposes of the Act, and is not wholly reasonable. Having considered the trustworthiness of Petitioner and the inferences from the evidence relevant to the aggravating factors in this case, I find that Petitioner should be, and is, hereby excluded from participating in the Medicare program for a period of eight years, being three years in addition to the mandatory five-year exclusion required by law. Further, the I.G. shall direct that Petitioner be excluded from participating in Medicaid for a similar eight-year period.

/s/

Stephen J. Ahlgren

Administrative Law Judge