Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
William D. Miles, M.D.,	DATE: January 30, 1995
Petitioner,	
- v. -	Docket No. C-94-348 Decision No. CR354
The Inspector General.	

DECISION

On March 14, 1994, the Inspector General (I.G.) notified Petitioner that he was being excluded for five years from participating in the following programs: Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services. The I.G. advised Petitioner that he was being excluded because he had been convicted of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, in connection with the delivery of a health care item or service, within the meaning of section 1128(b)(1) of the Social Security Act (Act).

The I.G. stated that the length of Petitioner's exclusion was based in part on the I.G.'s determination that Petitioner was convicted of a criminal offense related to fraud and/or other financial misconduct resulting in financial loss to Medicaid and two other entities in excess of $1500. The I.G. stated further that the determination to exclude Petitioner for five years was based in part also on evidence that the criminal acts which resulted in Petitioner's conviction, or similar acts, were committed over a period of one year or more.

Petitioner requested a hearing. The case was assigned to me for a hearing and a decision. I conducted a prehearing conference by telephone, at which the parties agreed that there was no need for an in-person hearing. The parties agreed that the case could be heard and

decided based on their submissions of exhibits and briefs.

The I.G. submitted five exhibits (I.G. Exs. 1-5). Petitioner did not object to their admission into evidence. Petitioner submitted four exhibits (P. Exs. 1-4). The I.G. did not object to their admission into evidence. I admit into evidence I.G. Exs. 1-5 and P. Exs. 1-4.

I have considered the evidence, the 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 the five-year exclusion which the I.G. imposed is reasonable, and I sustain it.

I. Issues, findings of fact, and conclusions of law

Petitioner has not disputed that he was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act. He does not dispute that the I.G. is authorized to exclude him. He asserts that the five-year exclusion which the I.G. imposed is unreasonable, arguing that in light of the evidence, the exclusion ought to be reduced to a term of one year. Therefore, the issue in this case is whether the five-year exclusion which the I.G. imposed is reasonable, and if it is not reasonable, the extent to which it ought to be modified. In finding the exclusion to be reasonable, I make the following findings of fact and conclusions of law. In setting forth these findings and conclusions, I cite to relevant portions of my decision, at which I discuss my findings and conclusions in detail.

1. Under applicable regulations, an individual who is excluded pursuant to section 1128(b)(1) of the Act must be excluded for three years, unless aggravating or mitigating factors exist which provide a basis for lengthening or shortening the exclusion. Page 3.

2. The I.G. proved the presence of an aggravating factor, in that Petitioner was convicted of having obtained unlawfully more than $1,500 from Medicaid and two other entities. Pages 5-6.

3. The I.G. proved the presence of an additional aggravating factor, in that the crimes that Petitioner committed were committed over a period of more than one year. Pages 6-7.

4. There are no mitigating factors present in this case. Pages 7-8.

5. The evidence relating to the aggravating factors proven by the I.G. establishes Petitioner is untrustworthy, justifying an exclusion of five years. Pages 8-9.

II. Discussion

A. Governing law

Congress enacted section 1128 of the Act to protect the integrity of federally-funded health care programs. Among other things, the law was designed to protect program beneficiaries and recipients from individuals who have demonstrated by their behavior that they threaten the integrity of federally-funded health care programs or that they could not be entrusted with the well-being and safety of beneficiaries and recipients. Syed Hussani, DAB CR193 (1992) (citing S. Rep. No. 109, 100th Cong., 1st Sess., reprinted in 1987 U.S.C.C.A.N. 682). Congress included non-governmental health care programs within the purview of section 1128(b)(1) as an additional means of protecting program beneficiaries and recipients. H.R. Rep. No. 393, Part II, 95th Cong., 1st Sess., reprinted in 1977 U.S.C.C.A.N. 3072. Congress reasoned that those who cheat private health care payers cannot be trusted to deal honestly with program beneficiaries and recipients.

Regulations establish a framework for deciding whether a party is trustworthy in a particular case, and if not, the length of the exclusion which is reasonable in that case. These regulations are contained in 42 C.F.R. Part 1001. The regulation which governs the length of exclusions imposed under section 1128(b)(1) of the Act is 42 C.F.R. § 1001.201(b). This regulation establishes a baseline exclusion of three years for individuals who are convicted of criminal offenses within the meaning of section 1128(b)(1) of the Act. It provides that an exclusion may be imposed for a period of more than three years in a particular case if any of certain specified aggravating factors are present in that case. Those factors are stated in 42 C.F.R. § 1001.201(b)(2)(i) - (v).

The regulation provides also that certain enumerated mitigating factors may be a basis for reducing an exclusion imposed pursuant to section 1128(b)(1) of the Act. The factors which may be mitigating are stated in

42 C.F.R. § 1001.201(b)(3)(i)-(iv). A mitigating factor or factors may offset an aggravating factor or factors. The presence of a mitigating factor may also constitute a basis for reducing an exclusion below the three-year benchmark, either where no aggravating factors exist, or where the presence of a mitigating factor offsets the presence of an aggravating factor or factors.

Although the regulation requires consideration of only enumerated aggravating factors and mitigating factors in deciding whether to lengthen or shorten an exclusion, the regulation is not intended to serve as a mechanical basis for determining the length of an exclusion. In any case, the ultimate question remains whether the petitioner is not trustworthy to provide care to program beneficiaries and recipients. The factors enumerated in the regulation are indicia of trustworthiness or a lack of trustworthiness. Thus, where aggravating factors or mitigating factors exist in a particular case, they, and the evidence which explains the petitioner's conduct which resulted in the presence of aggravating factors or mitigating factors must be weighed carefully in order to determine whether the exclusion comports with the Act's remedial purpose. William F. Middleton, DAB CR297 at 10-11 (1993).

B. Relevant facts

Petitioner is a licensed psychiatrist, who established a professional corporation, known as Psychiatric Medicine of Virginia, P.C. I.G. Ex. 2, page 1. Petitioner was charged by a 13-count federal indictment with the criminal offense of mail fraud related to his delivery of health care services in violation of 18 U.S.C. § 1341. I.G. Ex 2.

Count One of the indictment charged Petitioner with a scheme to defraud Medicaid, the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), and Blue Cross/Blue Shield of Virginia (BC/BS/VA) (the health care plans). It asserted that Petitioner submitted reimbursement claims to these health care plans which falsely represented that certain procedures or services had been rendered. I.G. Ex. 2, page 7. It charged also that Petitioner presented reimbursement claims which asserted that he had performed certain procedures when, in fact, other members of his staff had performed them. Id. It charged additionally that Petitioner claimed reimbursement for his services under incorrect procedure codes. Id. at 6-7.

The indictment alleged at Count One that Petitioner presented claims to the health care plans which falsely represented the services he performed in an attempt to defraud these health care plans. I.G. Ex. 2, pages 6-7. By representing falsely that: 1) he had provided services that he had not, in fact, provided; 2) he had provided services that were, in fact, provided by others; and, 3) he had performed more complicated or lengthy services than he had in fact performed, Petitioner was able to submit claims for reimbursement which he was not entitled to receive. Count One charged that Petitioner had perpetrated his fraudulent scheme during a period beginning in or about January 1987 and ending in or about October 1991. Id. at 6. It charged that, during this period, Petitioner submitted false and fraudulent claims for services totalling in excess of $38,000. Id. at 7.

Petitioner pled guilty to Count Ten of the indictment, which charged him with using the United States Postal Service to fraudulently obtain funds from BC/BS/VA, through the submission of a claim form for a patient with the initials C.M. I.G. Ex. 2, page 17; I.G. Ex. 3, page 1. Although Count Ten alleges a single charge of mail fraud, that Count incorporates by reference all of the allegations contained in paragraphs one through 15 of Count One of the indictment. Id. Thus, Count Ten describes a fraud which was committed by Petitioner in furtherance of a much broader scheme to defraud various health care plans.

In agreeing to plead guilty to Count Ten, Petitioner agreed also to pay restitution in the amount of $38,500.00. I.G. Ex. 5, page 2. He stipulated that this sum constituted: "the 'loss' in this case for purposes of readily provable relevant conduct." Id.

Petitioner was sentenced to serve five years of probation and to pay restitution in the amount of $38,500. I.G. Ex. 3, pages 2-4. Petitioner was sentenced also to receive mental health counseling at the direction of the probation office. Id. at 8.

C. The presence of aggravating factors

The I.G. argues that there are two aggravating factors present here. First, she asserts that the conduct resulting in Petitioner's conviction, or similar acts, resulted in a loss to health care plans of more than $1500. 42 C.F.R. § 1001.201(b)(2)(i). Second, she contends that the I.G. has proved that the conduct resulting in Petitioner's conviction, or similar acts,

transpired over a period exceeding one years's duration. 42 C.F.R. § 1001.201(b)(2)(ii).

Petitioner disputes that either of the aggravating factors alleged by the I.G are applicable to his case. Regarding the first aggravating factor asserted by the I.G., Petitioner argues that the amount of loss caused by his criminal conduct is only $931.75, and therefore, less than the $1500 amount specified as an aggravating factor in the regulations. Petitioner asserts that he was found guilty of committing only one incident of fraud, involving a fraudulent payment for C.M.'s treatment, as described in Count Ten of the indictment. He contends that Count Ten cannot be read reasonably to include paragraphs one through 15 of Count One, because to do so would contravene the principles of federal criminal jurisprudence and the federal sentencing guidelines. Thus, he maintains that findings as to the financial loss he engendered should be limited to the payment he received from BC/BS/VA as a result of his request for payment in the case of C.M.

Petitioner argues also that the acts that resulted in his conviction were not committed over a period of one year or more, and therefore, the second aggravating factor alleged by the I.G. is also not present here. Petitioner contends that the length of time during which the criminal conduct occurred must be limited to a three and a half month period, which began with C.M.'s treatment and ended when payment was received from BC/BS/VA for this treatment. Again Petitioner relies on principles of federal criminal jurisprudence and the federal sentencing guidelines as support for this argument.

I conclude that the record in this case establishes the presence of the two aggravating factors asserted by the I.G. First, I find that the amount of loss caused by Petitioner's crime and by similar acts was greater than $1500. The charge to which Petitioner pleaded guilty incorporates by reference a scheme which involved $38,500.00 in fraud. Petitioner has acknowledged defrauding health care financing plans of this amount, and his sentence to pay restitution of $38,500.00 reflects Petitioner's admission.

Second, I find that the acts that resulted in Petitioner's conviction and similar acts were committed over a period exceeding one year. Count One of the indictment, incorporated by reference in Count Ten, alleges a scheme which transpired over a greater than one year period. Furthermore, by acknowledging that he defrauded health care plans of the amount alleged in

Count One of the indictment, Petitioner tacitly admitted that he committed fraudulent acts over a more than one-year period.

As I find above, the allegations of the first 15 paragraphs of Count One of Petitioner's indictment were incorporated by reference into Count Ten. A fair reading of Count Ten is that it incorporated the scheme described in the first 15 paragraphs of Count One and asserted a specific unlawful act as an act in furtherance of that scheme. I conclude that, by pleading guilty to Count Ten, Petitioner admitted not only to committing the specific crime charged in that Count, but to committing the scheme which that crime furthered.

This is evident, not only from a reasonable reading of Count Ten, but from the plea agreement entered into by Petitioner and by the sentence which was imposed against Petitioner. In pleading guilty, Petitioner acknowledged that he had defrauded health care plans of $38,500.00, the total fraud which was charged in Count One of the indictment. He was sentenced to pay restitution in that amount, which surely reflected his admission of culpability.

I am not persuaded by Petitioner's characterization of federal criminal practice and sentencing guidelines that, for purposes of this case, I may not read his plea to Count Ten as constituting an admission by Petitioner of the underlying scheme and its impact on health care financing programs. This case does not involve the question of the reasonableness of Petitioner's sentence for his crime, but involves the reasonableness of a remedial exclusion imposed under section 1128 of the Act. I see nothing in section 1128 of the Act which suggests that federal criminal practice or sentencing guidelines impose strictures on the way in which I am to read and interpret a criminal charge or a plea to that charge for purposes of determining whether an exclusion is reasonable.

Moreover, the aggravating factors which the I.G. asserts exist in this case are not based solely on the crime to which Petitioner pleaded guilty. In deciding whether these two aggravating factors are present, I may look not only at the specific crime to which Petitioner pled, but at evidence relating to similar acts committed by Petitioner. Thus, 42 C.F.R. § 1001.201(b)(2)(i) states that an aggravating factor shall exist if the acts resulting in the conviction, or similar acts, resulted in a financial loss of $1,500 or more to a government program or to other entities. Additionally, 42 C.F.R. §

1001.201(b)(2)(ii) states that an aggravating factor shall exist if the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more.

Here, Petitioner has acknowledged committing acts similar to the count of mail fraud to which he pleaded guilty. He has admitted defrauding the health care plans of $38,500.00. Although he did not admit specifically to committing that fraud over a one year period, Petitioner did plead guilty to Count Ten of the indictment. Count Ten of the indictment incorporates by reference Count One of the indictment. Count One of the indictment alleges that Petitioner's scheme to defraud the health care plans occurred over more than a one-year period. Moreover, the $38,500 that Petitioner admitted defrauding from the health care plans is identical to the amount ($38,500) that Count One of the indictment charged that Petitioner wrongfully obtained from approximately October 1987 through January 1991. Thus, Petitioner admitted to defrauding the health care plans by means of a scheme which lasted almost four years.

D. The absence of mitigating factors

Petitioner argues that a mitigating factor exists in this case. Petitioner cites to the court's note in the sentencing document that Petitioner undergo mental health counseling, "at direction of probation office," as support for his argument that the court found Petitioner to have a mental or emotional condition. I.G. Ex. 3 at 8. Petitioner contends, in essence, that this note proves the presence of a mitigating factor pursuant to 42 C.F.R. § 1001.201(b)(3)(ii).

42 C.F.R. § 1001.201(b)(3)(ii) states that the following factor may be considered as a basis for reducing an individual's period of exclusion:

The record in the criminal proceeding, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional or physical condition, before or during the commission of the offense, that reduced the individual's culpability.

The court's suggestion that Petitioner undergo mental health counseling at the direction of the probation office does not prove that the judge who sentenced Petitioner found that he had a mental condition that reduced his culpability. That Petitioner's sentence included giving the probation office the option of ordering Petitioner to receive mental health counseling

certainly suggests that the judge who sentenced Petitioner concluded that such counseling might be an appropriate element of Petitioner's probation or rehabilitation. That, in turn, creates an inference that the sentencing judge found that Petitioner might be suffering from a mental or emotional problem. However, there is nothing in any of the exhibits that are in evidence to suggest that the judge found that these possible problems reduced Petitioner's culpability for his crime. Indeed, it is not clear from these exhibits at what point these problems may have developed, or that they had any bearing on the crime to which Petitioner pleaded guilty to.

This case is distinguishable from John M. Thomas, Jr., M.D. and Texoma Orthopedic Associates, d/b/a Orthopedic and Sports Medicine Center of North Texas, DAB CR281 (1993). In that case, the I.G. conceded in her notice letter and posthearing brief that the judge who sentenced the petitioner found that he had a mental illness, during the commission of his offense, that diminished his culpability. Thus, unlike the present case, a mitigating factor was proven in Thomas.

Thus, I find no evidence in this case that the court found Petitioner's culpability to be reduced due to the presence of a mental or emotional condition. Petitioner has not established the presence of any mitigating factor.

E. The basis for the five-year exclusion

The record demonstrates the presence of two aggravating factors in this case. There is no evidence which establishes the presence of any mitigating factors. The presence of aggravating factors is not offset by mitigating factors and is a basis for imposing an exclusion of more than three years' duration. However, as I hold at Part A of this section, that does not mean that an exclusion of any particular duration is necessarily justified. I must still consider the evidence relating to the aggravating factors as evidence of Petitioner's lack of trustworthiness and decide from this evidence whether or not an exclusion of more than three years is justified, and if so, for what duration.

In this case, the evidence establishing the existence of aggravating factors establishes also that Petitioner is a highly untrustworthy individual. Petitioner has admitted to an extensive scheme, carried out over a period of nearly four years, to defraud several health care plans. The duration of the fraud suggests that Petitioner

engaged in a pattern of criminal activity which required planning and persistence to execute. The financial impact of Petitioner's crimes on the health care plans was substantial. He has admitted to having received wrongfully $38,500.00. Damages in that amount could not have been caused by simple inadvertence. It is reasonable to infer from the amount of damages caused by Petitioner, and the period of time during which he perpetrated his fraud, that he is capable of causing significant and extensive harm to both private and federally-financed health care programs.

Furthermore, the unrebutted evidence which describes the manner in which Petitioner perpetrated his fraud reinforces the inference of culpability and untrustworthiness that arises from the amount of fraud and the period of time during which Petitioner committed that fraud. The allegations to which Petitioner pleaded guilty establish a conscious and willful plan on Petitioner's part to systematically misrepresent his services to not one, but several, health care plans.

I conclude from the evidence that relates to the aggravating factors proven by the I.G. that Petitioner is a highly untrustworthy individual. Thus, a five year exclusion is reasonably necessary to protect federally-financed health care programs and their beneficiaries and recipients from the possibility that Petitioner may engage in conduct that is harmful to them.

CONCLUSION

Based on applicable regulations and the evidence, I find the five-year exclusion which the I.G. imposed against Petitioner to be reasonable and I sustain it.

/s/

Steven T. Kessel
Administrative Law Judge