Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Frank A. DeLia, D.O.,	)	Date: March 4, 1997
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-387
	)	Decision No. CR465
The Inspector General.	)	
	)	

DECISION

I find that the Inspector General (I.G.) is authorized, pursuant to section 1128(b)(1) of the Social Security Act (Act), to exclude Petitioner, Frank A. DeLia, D.O. However, I find that the five-year exclusion the I.G. imposed is not reasonable. I modify the exclusion to a term of three years.

I. Background

On July 19, 1996, the I.G. notified Petitioner that he was being excluded from participating in Medicare and State health care programs, including Medicaid, for a period of 10 years. The I.G. asserted that she was authorized to exclude Petitioner pursuant to section 1128(b)(1) of the Act. The I.G. based the length of the exclusion on the presence of alleged aggravating factors. On October 25, 1996, the I.G. advised Petitioner that she was modifying the exclusion to a period of five years. The I.G. based her determination to modify the exclusion on the presence of a mitigating factor of which the I.G. had not previously been aware.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. The parties agreed that the case could be heard and decided based on written submissions. The parties each submitted proposed exhibits, briefs and reply briefs.[1]

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[1] The I.G. submitted five proposed exhibits (I.G. Ex. 1 - 5). Petitioner submitted one proposed exhibit (P. Ex. 1). Neither the I.G. nor Petitioner objected to my receiving into evidence any of the proposed exhibits. I hereby receive into evidence

Petitioner requested oral argument. On February 20, 1997, I conducted oral argument, by telephone.[2] I base my decision in this case on the law, the evidence, and the parties' arguments.

II. Issues, findings of fact and conclusions of law

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

1. Petitioner is a physician.

2. On August 12, 1993, a superseding information was filed against Petitioner in the United States District Court for the Eastern District of Pennsylvania.

3. Petitioner was charged with conspiring with others, from about 1987 to about 1991, to devise a scheme and artifice to defraud and obtain money by means of knowing and intentional false and fraudulent pretenses, representations and promises.

4. The superseding information charged that the object of Petitioner's scheme was to obtain money from insurance companies by submitting false and fraudulent medical bills to inflate the value of personal injury claims against insurance companies and their insureds.

5. Petitioner was charged with directing his staff to prepare false and fraudulent bills and reports describing fictitious medical treatments that Petitioner and his staff had purportedly provided to accident patients. Petitioner was charged additionally with fabricating false and fraudulent progress notes describing the progress of recovery of his accident patients.

6. The superseding information charged Petitioner with committing several counts of mail fraud, in order to effectuate his criminal scheme.

I.G. Ex. 1 - 5 and P. Ex. 1.

[2] Neither party requested that a transcript be made of the oral argument. In light of that, I did not order that the oral argument be transcribed.

7. On August 13, 1993, Petitioner entered into a plea agreement with the United States government. Petitioner agreed to plead guilty to five counts of mail fraud arising from his scheme to defraud insurance companies.

8. In his plea agreement, Petitioner admitted that the loss and attempted loss to insurers which were attributable to him was between $350,000 and $500,000.

9. On October 23, 1995, a criminal judgment was imposed against Petitioner in the United States District Court for the Eastern District of Pennsylvania. Petitioner was found guilty of counts 1 - 4 and 8 of the superseding information.

10. Petitioner was sentenced to a term of incarceration of 10 months.

11. Petitioner was ordered to pay restitution in the amount of $120,000.

12. Beginning in December 1991, Petitioner provided substantial cooperation to prosecuting authorities.

13. Petitioner's cooperation, which he gave at considerable personal risk, led to the conviction of numerous other individuals.

14. Pursuant to section 1128(b)(1) of the Act, the I.G. may exclude an individual who has been convicted under federal law, in connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by any federal, State, or local government agency, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

15. A conviction for fraud may be the basis for an exclusion under section 1128(b)(1) of the Act, even where the fraud was not directed against a program that is operated by or financed by a federal, State or local government agency.

16. An exclusion imposed under section 1128(b)(1) of the act shall be for a period of three years, except that the exclusion may be for more than three years if aggravating factors establish a basis for a lengthier exclusion, or for less than three years if mitigating factors establish a basis for a shorter exclusion.

17. The I.G. proved that Petitioner was convicted of a criminal offense within the meaning of section 1128(b)(1) of the Act. Therefore, the I.G. is authorized to exclude Petitioner.

18. The I.G. proved the presence of an aggravating factor, in that the acts resulting in Petitioner's conviction, or similar acts, resulted in financial losses to entities exceeding $1,500 .

19. The I.G. proved the presence of an aggravating factor, in that Petitioner committed the Acts which resulted in his conviction, or similar acts, over a period of more than one year.

20. The I.G. proved the presence of an aggravating factor, in that Petitioner was sentenced to a period of incarceration for his crimes.

21. Petitioner proved the presence of a mitigating factor, in that Petitioner's cooperation with prosecuting officials resulted in the convictions of other individuals.

22. In light of the evidence which is relevant to aggravating and mitigating factors, a five-year exclusion is not reasonable.

23. A three-year exclusion is reasonable in this case.

III. Discussion

A. The Facts (Findings 1 - 13)

Petitioner is a physician. I.G. Ex. 3 at 1. On August 12, 1993, in a superseding information, the United States Attorney for the Eastern District of Pennsylvania charged Petitioner with engaging in a criminal scheme and conspiracy to defraud insurance companies. I.G. Ex. 3. The superseding information was consistent with a plea agreement that Petitioner entered into with the United States Attorney on August 13, 1993. I.G. Ex. 2. On October 23, 1995, Petitioner pleaded guilty to counts 1 - 4 and 8 of the superseding information. I.G. Ex. 1 at 1.

Petitioner pled guilty to a scheme and conspiracy that began in or about 1987 and continued until in or about 1991. I.G. Ex. 3 at 1. Petitioner admitted to joining with others to devise a scheme to fraudulently obtain money from insurance companies. Id. at 2. Petitioner admitted to implementing and furthering his scheme by directing his staff to prepare false and fraudulent bills and reports describing fictitious medical treatments that he and his staff had purportedly provided to patients of Petitioner who allegedly had been involved in accidents. Id. Petitioner admitted that he had furthered the scheme by fabricating false and fraudulent progress notes describing the progress of recovery of his patients. Id. Petitioner admitted also that, on specified occasions, he mailed to insurance companies and others documents, including claims for services, which he had prepared and submitted in furtherance of the scheme. Id. at 2 - 6, 10. Petitioner admitted that the loss or attempted loss to others which was attributable to his scheme was between $350,000 and $500,000. I.G. Ex. 2 at 10.

Petitioner's sentence for his crimes included a period of incarceration of 10 months. I.G. Ex. 1 at 2. The sentence included also restitution in the amount of $120,000. Id. at 4.

The sentence that was imposed on Petitioner reflected the fact that, beginning in December 1991, Petitioner provided substantial cooperation to prosecutors, which led to the conviction of other individuals. That cooperation was extraordinary. In a sentencing memorandum, the United States Attorney advised the United States District Court judge who sentenced Petitioner that:

> The sheer volume and extent of . . . [Petitioner's] record of cooperation, extending as it does from the time the postal inspectors first approached him in December of 1991, and continuing through to the present, almost defies description . . . [Petitioner] recorded a total of approximately forty fellow doctors, patients, or attorneys at the behest of law enforcement . . . [Petitioner] testified before investigating grand juries three times; gave trial testimony twice, against a total of five defendants; and perhaps most importantly, was the pivotal force which resulted in twenty-five guilty pleas, with additional ones sure to follow.

I.G. Ex. 4 at 2. The United States Attorney observed that the quantum of cooperation provided by Petitioner did not tell the full story of the extent to which he had cooperated. Not only was the amount of cooperation provided by Petitioner exceptional, but so were the circumstances of that cooperation. Id. at 2 - 3. Petitioner had, in most instances, served as a willing and committed participant in hastily scheduled recording sessions. Id. Petitioner routinely placed himself in compromising circumstances, including an investigation in which another witness was murdered. Id. The United States Attorney concluded that, but for the cooperation that Petitioner had provided, the government would not have been able to prosecute successfully the majority of cases which involved evidence provided by Petitioner. Id. at 3.

Petitioner's cooperation has continued to enable the government to prosecute and convict other individuals. In the period after the United States Attorney submitted his sentencing memorandum, Petitioner's cooperation resulted in charges and/or convictions against eight additional individuals. P. Ex. 1.

B. The applicable law (Findings 14 - 16)

1. The exclusion authority conferred under section 1128(b)(1) (Findings 14 - 15)

The I.G. excluded Petitioner pursuant to section 1128(b)(1) of the Act. This section authorizes the I.G. to exclude an individual:

> that has been convicted, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

The section states three elements that are prerequisites to the I.G. having authority to exclude an individual. First, the individual must be convicted of a criminal offense. Second, that conviction must be 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. Third, the conviction must be of an offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

Petitioner argues that the second of these three elements states the prerequisite that the conviction must, in some respect, relate to a health care service that is financed by a federal, State, or local government agency. I do not agree with this asserted interpretation of section 1128(b)(1). Section 1128(b)(1) does not derive exclusion authority only from those crimes which are committed against health care programs that are financed by a government. This section authorizes exclusions of individuals who are convicted either of a crime that is perpetrated in connection with the delivery of a health care item or service or that is perpetrated with respect to any act or omission in a program operated or financed by a federal, State, or local government agency. Thus, a crime that is committed in connection with a health care item or service is a basis for an exclusion under section 1128(b)(1), whether or not the object of that crime is a government-funded health care program. A crime that is committed against a government-funded program is a basis for an exclusion under section 1128(b)(1), whether or not the crime involves health care, and whether or not the program at issue funds health care.

My reading of section 1128(b)(1) comports with the section's plain meaning. Moreover, it is consistent with the remainder of section 1128. Section 1128(a)(1) mandates exclusion of an individual who is convicted of a criminal offense related to the delivery of an item or service under Medicare or a State health care program. If the exclusion authority conferred by section 1128(b)(1) were limited only to cases

involving convictions of offenses related to government-run health care programs, then that section would, in large measure, duplicate the exclusion authority conferred under section 1128(a)(1). In that event, section 1128(b)(1) would appear largely to be pointless.

2. The standards for determining the length of exclusions imposed pursuant to section 1128(b)(1) (Finding 16)

Section 1128(b)(1) is a remedial enactment, as is the case with all of the other parts of section 1128 of the Act. The statutory purpose of the section is not to punish miscreants, but to protect federally-funded health care programs, and beneficiaries and recipients of those programs, from individuals who are untrustworthy. Therefore, in order to be reasonable, an exclusion imposed under section 1128(b)(1) must comport with the Act's remedial purpose.

The Secretary of the United States Department of Health and Human Services (Secretary) has published regulations which establish the standards which must be employed to impose exclusions under each of the parts of section 1128. 42 C.F.R. Part 1001. These regulations operate, in effect, as the Secretary's rules of evidence which define and limit the evidence which may be considered in deciding whether an exclusion is reasonable. The regulation which establishes the criteria for evaluating whether an exclusion imposed under section 1128(b)(1) is reasonable is at 42 C.F.R. § 1001.201.

The regulation provides that, in the absence of aggravating or mitigating factors, an exclusion imposed pursuant to section 1128(b)(1) shall be for a period of three years. 42 C.F.R. § 1001.201(b)(1). An exclusion may be for a period of more than three years, if there exist aggravating factors in a case that are not offset by, or which outweigh, mitigating factors. [redacted] 42 C.F.R. § 1001.201(b)(2). An exclusion may be for a period of less than three years, if there exist mitigating factors which are not offset by, or which outweigh, aggravating factors. 42 C.F.R. §§ 1001.201(b)(1); (b)(3).

Although the regulation establishes the rules of evidence which govern whether an exclusion imposed under section 1128(b)(1) is reasonable, it does not assign any specific weight to those factors. The Secretary has given discretion to the adjudicator to weigh, on a case-by-case basis, the evidence which relates to aggravating and/or mitigating factors, and to decide, based on that evidence, whether an exclusion is reasonable.

C. Evaluation of the evidence (Findings 17 - 23)

1. The I.G.'s authority to exclude Petitioner (Finding 17)

The unrefuted evidence in this case is that Petitioner was convicted of crimes that were perpetrated in connection with health care items or services. Consequently, Petitioner was convicted of a criminal offense within the meaning of section 1128(b)(1), and the I.G. is authorized to exclude him.

The necessary central element of Petitioner's criminal scheme was health care items or services that Petitioner provided to alleged accident victims. These services were the basis for falsified insurance claims and for additional criminal activity to support Petitioner's fraud. Thus, Petitioner's crimes were committed "in connection with" health care items or services and involved fraud, embezzlement, or other financial misconduct. That is all that is necessary to establish authority to exclude Petitioner under section 1128(b)(1). As I find above, it is not a necessary element of that authority to show that the crimes committed by Petitioner were in relation to government-funded health care programs.

2. Whether the five-year exclusion is reasonable (Findings 18 - 23)

The I.G. originally excluded Petitioner for a period of 10 years. Subsequently, she modified the exclusion to a period of five years. This reflected the I.G.'s review of evidence pertaining to the cooperation that Petitioner provided to prosecuting authorities. Based on that evidence, the I.G. determined that Petitioner had established the presence of a mitigating factor. The I.G. determined, however, that this mitigating factor did not offset evidence which established aggravating factors, to the extent that a reduction in the exclusion below a term of five years was warranted.

The I.G. proved the presence of three aggravating factors. These are as follows:

- The acts which resulted in Petitioner's conviction, or similar acts, caused losses of $1,500 or more to insurers. 42 C.F.R. § 1001.201(b)(2) (i). It is not possible to decide precisely how much loss Petitioner's criminal acts caused insurers to suffer. In any event, that loss was substantial. In agreeing to plead guilty, Petitioner acknowledged that the amount of loss or "attempted loss" that he caused was in a range between $350,000 and $500,000. I.G. Ex. 2 at 10. This admission does not differentiate between the losses that Petitioner caused and the losses he attempted to cause. Perhaps a better measure of the actual losses caused by Petitioner is his sentence to pay restitution in the amount of $120,000. I.G. Ex. 1 at 4.

- The acts which resulted in Petitioner's conviction, or similar acts, were committed by Petitioner over a period of more than one year. 42 C.F.R. § 1001.201(b)(2)(ii). Petitioner's criminal acts extended over a period of more than three years. His criminal scheme began in or about 1987 and ended in or about 1991. I.G. Ex. 3 at 1.

- Petitioner was sentenced to a period of incarceration as punishment for his crimes. 42 C.F.R. § 1001.201(b)(iv). He was sentenced to a term of 10 months' imprisonment. I.G. Ex. 1 at 2.

On first examination, the evidence as to aggravating factors shows Petitioner to be a highly untrustworthy individual. He planned and executed a complex, elaborate, and highly detailed criminal scheme, which defrauded insurers of large sums of money. He enlisted the cooperation of others to implement his scheme. Petitioner executed his scheme over a lengthy period of time.

In key respects, however, the evidence as to aggravating factors is not quite so damaging as it appears to be. While it is true that Petitioner executed his criminal scheme over a long period of time, it is true also that there is no evidence that Petitioner has engaged in criminal activity for many years. The evidence which shows that Petitioner was extraordinarily untrustworthy as of 1991, is diluted in some respects by the many intervening years in which Petitioner has not been shown to have engaged in any unlawful activity. The last illegal act which may be attributed to Petitioner occurred in 1991, approximately six years ago. I would place a great deal more weight on the evidence pertaining to aggravation, had it related to events which occurred more recently than in 1991. Moreover, while it is true that Petitioner was incarcerated, his sentence reflects the extensive cooperation that he provided to prosecuting officials. It is much shorter than it would have been, had Petitioner not provided that cooperation.

Petitioner proved the presence of a mitigating factor. His cooperation with prosecuting officials led to the conviction of other individuals. 42 C.F.R. § 1001.201(b)(3)(iii)(A). The evidence concerning the amount of cooperation that Petitioner provided, and the circumstances under which he provided that cooperation, is evidence that Petitioner went to extraordinary lengths to atone for his crimes. The large number of individuals whose convictions are due to Petitioner's cooperation is impressive. Equally impressive is the number of investigations that Petitioner participated in and the time frame of about four years during which he cooperated. But, impressive as this evidence may be, it is not so impressive as is the fact that Petitioner cooperated, despite substantial potential risk to his personal safety. I.G. Ex. 4 at 2 - 3.

The five-year exclusion that the I.G. imposed is not reasonable when it is considered in light of the evidence pertaining to the aggravating factors and the mitigating factor. The I.G. placed too much weight on the evidence which established the presence of aggravating factors, and the I.G. did not give adequate weight to evidence which

established the presence of a mitigating factor. In light of that, I modify the exclusion to a term of three years.

As I find above, the impact of the evidence pertaining to aggravating factors is diminished substantially by the fact that all of Petitioner's criminal activity occurred in the remote past. Even under an exclusion that is modified to a term of three years, Petitioner will not be eligible for reinstatement until 1999, about eight years from the most recent evidence of misconduct. Eight years is ample time to assure that Petitioner has become trustworthy.

Furthermore, the evidence of mitigation that exists in this case is extraordinary proof of Petitioner's efforts to regain a trustworthy status. My decision to modify the exclusion to a term of three years is based, in large measure, on the evidence of mitigation, which I conclude outweighs the evidence of aggravation.

Petitioner urges that I modify the exclusion to a term of six months. He asserts that the evidence of mitigation is such strong proof that Petitioner is trustworthy that a modification to a six-month exclusion is reasonable.

I do not agree with Petitioner's argument that his exclusion should be modified to a term of six months. A six-month exclusion would mean, effectively, that Petitioner now would be eligible to apply for reinstatement. I am not satisfied that Petitioner is so trustworthy that immediate consideration of reinstatement is appropriate in this case. Although the evidence of mitigation goes a long way to negate the evidence relating to aggravation, it does not completely obliterate the fact that, at one time, Petitioner was a highly untrustworthy individual who engaged in a concerted criminal enterprise. A three-year exclusion provides a reasonable safeguard to federally-funded programs, beneficiaries, and recipients, given the facts of this case.

IV. Conclusion

I conclude that the I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(1) of the Act. I conclude that the five-year exclusion imposed by the I.G. is unreasonable. I modify the exclusion to a term of three years.

/s/

Steven T. Kessel
Administrative Law Judge