Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Arie Oren, M.D, Petitioner,	Date: August 28, 1997
- v. -	Docket No. C-97-201 Decision No. CR490
The Inspector General.	

DECISION

By letter dated December 18, 1996, the Inspector General (I.G.), United States Department of Health and Human Services, notified Arie Oren, M.D.(Petitioner), that he would be excluded from participation in Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs for a period of ten years. The I.G. imposed this exclusion pursuant to section 1128(b)(1) of the Social Security Act (Act), based on Petitioner's conviction in the United States District Court for the Eastern District of Pennsylvania for criminal offenses related to "fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct."

Petitioner requested review of his ten-year exclusion by letter dated February 5, 1997. A prehearing conference was held on March 19, 1997. During the conference, the parties agreed that the case could be heard and decided based on written submissions, including briefs and exhibits. The I.G. submitted a brief accompanied by 13 proposed exhibits (I.G. Ex. 1 - 13). Petitioner submitted a response brief. The I.G. submitted a reply brief. Petitioner did not object to my receiving into evidence the I.G.'s proposed exhibits, and I receive into evidence I.G. Ex. 1 - 13.

I affirm the I.G.'s determination to exclude Petitioner from participating in Medicare and other federally-funded health care programs, including Medicaid, for a period of ten years.

PETITIONER'S CONTENTIONS

Petitioner maintains that section 1128(b)(1) of the Act does not apply to his situation because the criminal offenses to which he pled guilty involved activity with private insurance companies. Petitioner argues that the I.G. has no authority to exclude him, inasmuch as he was not convicted of an offense against or involving a government-funded health care program. He further contends that, even if the statute does apply to such conduct as a result of a statutory amendment, his criminal offenses occurred before the 1996 amendment of the Act and that such amendment cannot, under the Ex-post Facto Clause of the Constitution, apply in his case. Petitioner also maintains that the length of exclusion is not reasonable because there are mitigating circumstances present in his case which make a ten-year exclusion excessive.

APPLICABLE LAW

Under section 1128(b)(1) of the Act, the Secretary may exclude "[a]ny individual or entity 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."[1]

42 C.F.R. § 1001.201(b)(1) provides that an exclusion imposed under section 1128(b)(1) of the Act shall be for a period of three years, unless specified aggravating or mitigating factors are present which form a basis for lengthening or shortening the period of exclusion.

42 C.F.R. § 1001.201(b)(2) provides that the following factors may be considered to be aggravating and a basis for lengthening the period of exclusion "(i) [t]he acts resulting in the conviction, or similar acts, resulted in financial loss of $1500 or more to a government program or to one or more other entities, or had a significant financial impact on program beneficiaries or other individuals. (The total amount of financial loss will be considered, including any amounts resulting from similar acts not adjudicated, regardless of whether full or partial restitution has been made); (ii) [t]he acts that resulted in the conviction, or similar acts, were committed over

[1] Congress amended section 1128 of the Act in 1996. One of the amendments to section 1128 creates a new section, section 1128(a)(3), which mandates a minimum exclusion of at least five years for any felony conviction for an offense formerly described by section 1128(b)(1). Section 1128(b)(1) is retained, but provides permissive exclusion authority for misdemeanor convictions only. The I.G. states in footnote 3 of her reply brief that section 1128(a)(3) applies to offenses which occur after the date of enactment of the 1996 amendment, and that the I.G. did not exclude Petitioner under this new exclusion authority.

a period of one year or more; (iii) [t]he acts that resulted in the conviction, or similar acts, had a significant adverse physical or mental impact on one or more program beneficiaries or other individuals; (iv) [t]he sentence imposed by the court included incarceration; or (v) [t]he convicted individual or entity has a prior criminal, civil, or administrative sanction record."

42 C.F.R.§ 1001.201(b)(3) provides that only the following factors may be considered as mitigating and a basis for reducing the period of exclusion: "(i) [t]he individual or entity was convicted of 3 or fewer misdemeanor offenses, and the entire amount of financial loss to a government program or to other individuals or entities due to the acts that resulted in the conviction and similar acts is less than $1500; (ii) [t]he record in the criminal proceedings, 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; (iii) [t]he individual's or entity's cooperation with Federal or State officials resulted in -- (A) [o]thers being convicted or excluded from Medicare or any of the State health care programs, or (B) [t]he imposition of a civil money penalty against others; or (iv) [a]lternative sources of the type of health care items or services furnished by the individual or entity are not available."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner was a licensed medical doctor who practiced medicine, among other places, at the C.H. Medical Center, Inc., in Philadelphia, Pennsylvania. I.G. Ex. 1 at 1.

2. On November 10, 1994, an indictment (No. 94-465) was filed in the United States District Court for the Eastern District of Pennsylvania charging Petitioner and 10 other defendants with crimes related to a scheme designed to obtain money from insurance companies by submitting false medical bills and personal injury, property, and disability claims. The indictment charged Petitioner with mail fraud, in violation of 18 U.S.C. § 1341; racketeering in violation of 18 U.S.C. § 1962(c); RICO conspiracy in violation of 18 U.S.C. § 1962 (d); and criminal forfeiture pursuant to 18 U.S.C. § 1963. I.G. Ex. 12 at 4, I.G. Ex. 13 at 1.

3. The charges referenced in the November 10, 1994 indictment arose out of an insurance fraud scheme involving a law office and three medical centers. The object of the scheme was to defraud insurance companies by filing false, fraudulent, and inflated personal injury claims that were supported by fraudulent medical bills and reports signed by Petitioner referring to treatment that was never rendered. I.G. Ex. 13 at 1 - 2.

4. On December 13, 1994, another indictment (No. 94-515) was filed in the United States District Court for the Eastern District of Pennsylvania charging Petitioner and eight other defendants with

offenses including mail fraud in violation of 18 U.S.C. § 1341; racketeering in violation of 18 U.S.C. § 1962(c); racketeering conspiracy in violation of 18 U.S.C. § 1962(d); aiding and abetting in violation 18 U.S.C. § 2; and racketeering forfeiture pursuant to 18 U.S.C. § 1963. I.G. Ex. 1, I.G. Ex. 3 at 1.

5. The essence of the charges contained in Indictment No. 94-515 against Petitioner and his co-defendants was that they staged automobile accidents and then reported these accidents to various insurance companies including health insurers to collect fees for services that were either not needed or never provided. I.G. Ex. 1, I.G. Ex. 3 at 4 - 5.

6. On June 5, 1995, Petitioner entered into a plea bargain in which he agreed to plead guilty to counts 38 and 40 of Indictment No. 94-465 (charging him with racketeering and criminal forfeiture) and counts 47 and 49 of Indictment No. 94-515 (also charging him with racketeering and criminal forfeiture); to forfeit $250,000; to pay a special assessment and to make full restitution; and to agree to consolidation of the two indictments for sentencing purposes. I.G. Ex. 2.

7. On March 8, 1996, Petitioner was convicted in the United States District Court for the Eastern District of Pennsylvania of the offenses of racketeering and criminal forfeiture pursuant to counts 47 and 49 of Indictment No. 94-515. I.G. Ex. 4.

8. As a result of his conviction Petitioner was ordered to pay restitution in the amount of $272,000. I.G. Ex. 4 at 4.

9. As a result of his conviction, Petitioner was sentenced to 24 months incarceration and three years of supervised release. I.G. Ex. 4 at 2.

10. On April 26, 1996, Petitioner was ordered to forfeit assets valued at $100,000 obtained through his racketeering. I.G. Ex. 5.

11. Petitioner's participation in an unlawful scheme to defraud insurance companies lasted from 1990 to the latter part of 1992. I.G. Ex. 1 at 15, I.G. Ex. 4 at 1.

12. Under section 1128(b)(1) of the Act, the I.G. is authorized to exclude any individual or entity that has been convicted, under federal or State law in connection with the delivery of a health care item of 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.

13. Where the I.G. determines to exclude an individual pursuant to section 1128(b)(1) of the Act, the term of the exclusion will be for a period of three years, in the absence of aggravating or mitigating

factors that would support an exclusion of more or less than three years.

14. In a case involving an exclusion under section 1128(b)(1) of the Act, an exclusion of more than three years may be justified where there exist aggravating factors that are not offset by mitigating factors.

15. Petitioner was convicted under federal law, in connection with the delivery of a health care item or service, of criminal offenses relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

16. The I.G. is authorized to exclude Petitioner pursuant to section 1128(b)(1) of the Act.

17. 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 loss of $1,500 or more to an insurance company.

18. The I.G. proved the existence of a second aggravating factor in that the sentence that was imposed on Petitioner for his crimes included a period of incarceration.

19. The I.G. proved the presence of a third aggravating factor in that the acts that resulted in Petitioner's conviction, or similar acts, were committed by Petitioner over a period of one year or more.

20. Petitioner did not prove the presence of any mitigating factor.

21. The evidence which relates to the aggravating factors proved by the I.G. establishes Petitioner to be untrustworthy to provide care to beneficiaries and recipients of federally-funded health care programs.

22. A ten-year exclusion of Petitioner is reasonable.

DISCUSSION

Petitioner does not dispute that he has been convicted under federal law, in connection with the delivery of a health care item or service, of criminal offenses relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. Instead he maintains that section 1128(b)(1) of the Act does not apply in his case because he was convicted for activities related to defrauding private insurers. He contends that section 1128(b)(1) of the Act applies only if an individual is convicted of a criminal offense that is related to the delivery of an item or service under a government-funded health care program such as Medicare or a State Medicaid program.

I find no merit to this argument. I conclude that section 1128(b)(1) of the Act is clearly written to encompass Petitioner's criminal

offenses, without any "requisite", as he contends, that such offenses must be related to "a program operated by or financed in whole or part by any Federal, State, or local government agency." Petitioner's brief at 6.

Under section 1128(a)(1) of the Act, the I.G. is mandated to exclude an individual who is convicted of a program-related offense of the type described by Petitioner in his argument (i.e. involving a government-financed program such as Medicare or Medicaid). However, the I.G.'s exclusion authority is not limited to exclusions for convictions of program-related offenses. The other parts of section 1128, including section 1128(b)(1), authorize the I.G. to impose exclusions for a far broader range of offenses than the program-related offenses that are described in section 1128(a)(1).

Section 1128(b)(1) plainly provides that an exclusion may be imposed where an individual is convicted of an offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, that is committed in connection with the delivery of a health care item or service. There is no requirement in this section that the offense be directed against a government-funded program, although conviction of an offense against a government-funded program would constitute an additional basis for an exclusion under section 1128(b)(1).

The wording of the implementing regulations at 42 C.F.R. § 1001.201(a), which separates the statutory language into two distinct bases for exclusion (one involving defrauding of private parties and the other involving defrauding of government-funded programs) makes this interpretation clear that either situation justifies permissive exclusion under section 1128(b)(1) of the Act.[2]

The legislative history of this provision also establishes that Petitioner's interpretation is incorrect. Section 1128(b)(1) was enacted by Congress as part of the Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. 100-93 (the MMPPPA). By enacting the MMPPPA, Congress authorized the Secretary to exclude persons or entities who have already been convicted of offenses relating to financial integrity, "if the offenses occurred in delivering health care to patients not covered by public programs." S.

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[2] 42 C.F.R. § 1001.201 entitled "Conviction relating to program or health care fraud" states in part:(a) Circumstance for exclusion. The [I.G.] may exclude an individual or entity convicted under Federal or State law of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct -(1) In connection with the delivery of any health care item or service, including the performance of management or administrative services relating to the delivery of such items or services, or(2) 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.

Rep. No. 109, 100th Cong., 1st Sess. 7; reprinted in 1987 U.S.C.C.A.N. 687 (emphasis added). This provision therefore expanded the Secretary's authority beyond section 1128(a)(1) to permit the exclusion of individuals or entities convicted of criminal offenses which are not related to Medicare or Medicaid or the other State health care programs. In expanding the Secretary's authority, "Congress reasoned that those who cheat private health care payers cannot be trusted to deal honestly with program beneficiaries and recipients." William D. Miles, M.D., DAB CR354 (1995) at 3. See David E. Scheiner, D.P.M., DAB CR471 (1997); Chander Kachoria, R.Ph., DAB No. 1380 (1993).

Petitioner also contends that, even if section 1128(b)(1) of the Act applies in his case, such section was not enacted until August 21, 1996 and therefore cannot be a basis for his exclusion because he pled guilty to the offenses prior to August 21, 1996. Petitioner's brief at 7. Petitioner is mistaken. As stated above, section 1128(b)(1) of the Act was enacted by Congress as part of the MMPPPA. The MMPPPA was enacted in 1987, approximately eight years prior to Petitioner's agreement to plead guilty. I conclude that the 1987 statute covered the activities for which Petitioner was excluded under section 1128(b)(1).

I further find that the ten-year exclusion that the I.G. imposed against Petitioner is reasonable. The evidence relating to the aggravating factors established by the I.G. pursuant to 42 C.F.R. § 1001.201(b)(2) proves that Petitioner is a highly untrustworthy individual. Petitioner failed to establish the existence of any mitigating factors described in 42 C.F.R. §1001.201(b)(3). A ten-year exclusion will serve as a reasonable protection for federally-funded health care programs and the beneficiaries and recipients of those programs in view of the unrebutted evidence of Petitioner's lack of trustworthiness.

The I.G. proved the presence of three aggravating factors, consisting of the following:

> 1) The acts resulting in Petitioner's conviction, or similar acts, resulted in financial loss of $1,500 or more to a government program or to one or more other entities. 42 C.F. R. § 1001.201(b)(2)(i). Petitioner's fraud caused very substantial losses to be incurred by
> entities other than government programs. The financial losses to non-government entities caused by Petitioner's fraud approximated $272,000. I make this conclusion based on Petitioner's sentence that he pay restitution for his crimes in the amount of $272,000. I infer that the amount of restitution is at least an approximation of the damages that Petitioner caused by his fraud. I.G. Ex. 4 at 4.
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> 2) The acts that resulted in Petitioner's conviction, or other similar acts, were committed by Petitioner over a period of one

year or more. 42 C.F.R. § 1001.201(b)(2)(ii). Petitioner perpetrated his crimes from 1990 to the latter part of 1992. I.G. Ex. 1 at 15, I.G. Ex. 4 at 1.

3) The sentence that was imposed upon Petitioner for his crimes included a period of incarceration. 42 C.F.R. § 1001.201(b)(2)(iv). Petitioner was sentenced to 24 months' incarceration. I.G. Ex. 4 at 2.

The evidence which relates to the aggravating factors established by the I.G. proves Petitioner is a highly untrustworthy individual. Petitioner's lack of trustworthiness is established by his ongoing involvement in a massive scheme to defraud insurers. Petitioner's protracted involvement in that scheme demonstrates that he is capable of engaging in well-organized and complex fraud. His fraud was persistent and deliberate, not random or impulsive. The extent to which Petitioner persisted in defrauding insurers is established by the large losses he caused insurers to incur.

I find that Petitioner has not proved the existence of any mitigating factors. Petitioner contends that, based on the fact that his Plea Agreement (I.G. Ex. 2) contained a provision requiring him to "cooperate fully and truthfully with the government" by agreeing to "provide truthful, complete and accurate information and testimony," he has proved the existence of a mitigating factor under 42 C.F.R § 1001.201(b)(3)(iii). I.G. Ex. 2 at 2. Petitioner points out that the applicable sentencing guidelines specify that he be sentenced to a term of incarceration in the range of 33 to 41 months. He asserts that, as a result of his cooperation, he was sentenced to incarceration for a period of only 24 months. Petitioner's brief at 8 - 9.

Whether Petitioner cooperated with the federal government after his federal conviction does not, without more, determine the existence of a mitigating factor. The regulations governing the factors that may be considered are clear. Petitioner has the burden of proving a mitigating factor, which is in the nature of an affirmative defense, under 42 C.F.R. § 1001.201 (b)(3)(iii). See Jose Ramon Castro, M.D., DAB CR259 (1993); James H. Holmes, M.D., DAB CR270 (1993); Joel Fass, DAB CR349 (1994). His burden consists of proving: (1) that he cooperated with officials; and (2) that his cooperation resulted in the conviction, exclusion, or imposition of a civil money penalty against another individual or individuals. 42 C.F.R. § 1001. 201(b)(3)(iii).

Petitioner has failed to meet this burden. Even if the evidence offered by Petitioner concerning his cooperation with prosecuting authorities proves that he cooperated with them and that they considered the information which he supplied to be valuable, there is no evidence that Petitioner's cooperation has led to the conviction or exclusion of other individuals or the imposition of civil money penalties against others. It was found in Tito B. Trinidad, M.D., DAB

CR468 (1997) that a petitioner failed to meet this standard although he had proved that he in fact cooperated with prosecuting authorities. In that case, the petitioner's cooperation was the "principal reason that the United States Attorney moved to have Petitioner's sentence of incarceration set at a level below that which is normally required for the crimes of which Petitioner was convicted." Id. at 7.[3] In the absence of any evidence that others were convicted, excluded or fined as a result of his cooperation, however, the petitioner failed to prove the presence of a mitigating factor. Bali S. Reddy, DAB CR394 (1995).

Petitioner in this case has not shown that his alleged cooperation with Federal or State government officials resulted in others being convicted or excluded from Medicare or any of the State health care programs or in the imposition of a civil money penalty. 42 C.F.R. § 1001.201.(b)(3)(iii).

CONCLUSION

I conclude that the I.G. was authorized to exclude Petitioner, pursuant to section 1128(b)(1) of the Act. I find that the ten-year exclusion is reasonable and I sustain it.

_____/s/_____
Joseph K. Riotto
Administrative Law Judge

[3] The regulation at issue in Trinidad is 42 C.F.R. § 1001.102(c)(3). The language in that regulation is virtually the same as the language in 42 C.F.R. § 1001.201(b)(3)(iii), the regulation at issue in this case. I conclude that the reasoning in Trinidad applies to this case.