Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Shyam S. Mahajan, M.D.,	)	DATE: November 20, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-95-057
	)	Decision No. CR402
The Inspector General.	)	
	)	

DECISION

I. BACKGROUND

The action was brought by the Petitioner, Shyam S. Mahajan, M.D., to contest the reasonableness of the 10-year exclusion period imposed and directed by the Inspector General (I.G.) pursuant to section 1128(a)(1) of the Social Security Act (Act). Petitioner admits that he was convicted of criminal offenses related to the delivery of an item or service under a State health care program. Amended Order and Schedule for Filing Briefs and Documentary Evidence (Amended Order), dated April 25, 1995. Petitioner admits also that his convictions subject him to the mandatory provisions of the Act, which require the I.G. to impose and direct Petitioner's exclusion from participation in the Medicare and Medicaid[1] programs for a period of not less than five years. Act, sections 1128(a)(1) and (c)(3)(B). However, according to the I.G.'s notice of exclusion (Notice), the I.G. decided to add another five years to the minimum exclusion period specified by the Act because she determined that certain circumstances surrounding Petitioner's conviction were significant. Notice at 1, 2.

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[1] I use "Medicaid" as an abbreviation for all the State health care programs identified in section 1128(h) of the Act.

During the prehearing conference held on April 25, 1995, the parties agreed to waive an in-person hearing and to submit the case for decision based on a written record. Amended Order at 1, 2.[2] Both parties have filed motions and supporting evidence in accordance with my scheduling orders.[3]

I have reviewed and admitted all the exhibits submitted by the parties, with the exception of Petitioner's proposed exhibits 3, 4, 5, 8, and 9, which I find to be immaterial for the reasons detailed below.[4] Based on the record before me, I conclude that the exclusion of 10 years imposed and directed by the I.G. is excessive and that Petitioner's exclusion should be reduced to five years.

II. ISSUE

The only issue in this case is whether the I.G. has imposed and directed a period of exclusion (10 years) that is reasonable in length.

III. RULINGS ON THE ADMISSION OF PETITIONER'S PROPOSED EXHIBITS

In his brief, Petitioner cited decisions issued by administrative law judges holding that the aggravating

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[2] Paragraph 6 of the Amended Order summarizes summary judgment standards, which do not apply to the motions filed by the parties.

[3] Along with a motion, the I.G. filed a Brief in Support of Motion for Disposition on the Written Record (I.G. Br.), a Reply Brief (I.G. Reply), a Supplemental Brief (I.G. Supp. Br.), nine proposed exhibits, and a proposed Statement of Material Facts and Conclusions of Law (I.G. Prop. Facts).

Petitioner filed a Brief in Response to the I.G.'s Motion for Disposition on the Written Record (P. Br.), a Supplemental Brief (P. Supp. Br.), 11 proposed exhibits, and a proposed Statement of Material Facts and Conclusion of Law (P. Prop. Facts).

[4] Each of the admitted exhibits from the I.G. will be referenced as "I.G. Ex. (number) at (page)," and each of the admitted exhibits from Petitioner will be referenced as "P. Ex. (number) at (page)."

and mitigating factors in 42 C.F.R. § 1001.102 are not binding at the hearing level. P. Br. at 3 - 6. Therefore, he offered various proposed exhibits to show that he had no financial incentive to defraud the Medicare and Medicaid programs, that he is a highly skilled physician, and that he is remorseful for his crimes.

The I.G. correctly points out that, after the adjudication of those cases cited by Petitioner, the Department of Health and Human Services (DHHS) issued clarifying regulations on January 22, 1993, stating that the criteria contained in 42 C.F.R. § 1001.102 are binding upon administrative law judges. I.G. Reply at 1, 2; 42 C.F.R. § 1001.1(b). On this basis, the I.G. objects to the admission of Petitioner's proposed exhibits 2, 4, 5, 8, 9, and 11. I.G. Reply at 4. In addition, the I.G. objects to the admission of Petitioner's proposed exhibit 1 "to the extent it seeks to collaterally attack his conviction." I.G. Reply at 4.

A. I find inadmissible Petitioner's proposed exhibits 3, 4, 5, 8, and 9.

I rule the following proposed exhibits inadmissible pursuant to 42 C.F.R. § 1005.17(c) because (1) they are offered to support propositions which, even if true, I am precluded by the regulations from considering as a mitigating factor, and (2) they do not serve to rebut the I.G.'s evidence on the three aggravating factors she has asserted:

> Petitioner's proposed exhibit 3: This document lists the monetary amounts paid by the Pennsylvania Department of Welfare to Petitioner for professional services during the years 1983 to 1992. Petitioner offers these documents to show that his income from Medicaid represented only a small portion of his practice, and, therefore, he had no financial incentive to defraud the program. P. Br. at 5.
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> Petitioner's proposed exhibits 4 and 5: These are letters of support and commendations from members of the community, written after Petitioner pleaded nolo contendere to charges in State court. See P. Prop. Facts at 3. Petitioner offers these documents to show that his contributions of time, skill,

and financial support to his community have been a hallmark of his practice. P. Br. at 5.

Petitioner's proposed exhibit 8: This proposed exhibit consists of letters of recommendation and rating forms prepared by physicians who support Petitioner's application for a medical license in the State of North Carolina. Petitioner offers these documents to show that he has consistently provided high quality care to his patients for over two decades, which he believes reflects well on his character and trustworthiness. P. Br. at 7.

Petitioner's proposed exhibit 9: This proposed exhibit consists of letters and completed forms from the International Society for Krishna Consciousness, stating that Petitioner performed approximately 600 hours of volunteer service from July 1, 1994 to June 13, 1995. Petitioner offers these documents to show that he is remorseful because he has so promptly completed the hours of community service to which he had been sentenced. P. Br. at 7.

B. The I.G.'s objections are overruled as to Petitioner's proposed exhibits 1, 2, and 11.

I overrule the I.G.'s objections to the following proposed exhibits and admit them into evidence:

Petitioner's proposed exhibit 1: This document consists of Petitioner's affidavit, in which he recounts his version of the facts that resulted in his convictions. I admit the document because the information is useful for background purposes. However, I give no weight to Petitioner's statements which endeavor to exculpate himself for the commission of the underlying offenses. See 42 C.F.R. § 1001.2007(d).

I admit Petitioner's proposed exhibit 1 also because it contains information relevant to the I.G.'s use of two aggravating factors. Asserting the

aggravating factors at 42 C.F.R. §§ 1001.102(b)(2) and (5), the I.G. contends that Petitioner's "drug convictions are 'similar acts' to the criminal acts underlying his program-related conviction" (I.G. Br. at 7) and his committing "drug crimes" during the period preceding his program-related offenses constitutes a prior criminal sanction record (I.G. Br. at 10).

Petitioner's proposed exhibit 2: This is a two-page document generated by the National Practitioner Data Bank. According to Petitioner, it shows that, for two decades prior to the convictions in issue, Petitioner had not been convicted of any criminal offense, had not been involved in any civil litigation relating to his medical practice, and had not been sanctioned by any government funded health care program. P. Br. at 4. This exhibit is admitted because it is relevant to Petitioner's defense against the I.G.'s contention that he has a prior criminal sanction record within the meaning of 42 C.F.R. § 1001.102(b)(5).

Petitioner's proposed exhibit 11: This is an executed Memorandum of Understanding between Petitioner and the Drug Enforcement Administration. Petitioner relies upon this document to argue that the 10-year exclusion imposed and directed by the I.G. is excessive, as shown by the Drug Enforcement Agency's decision to impose only a five-year probationary period against Petitioner. P. Br. at 9. Because the I.G. makes arguments for lengthening the exclusion based on Petitioner's convictions on drug-related offenses, and because the regulations do not specify the amount of time that should be associated with each aggravating or mitigating factor, I find Petitioner's proposed exhibit 11 to be relevant. I have therefore admitted it into evidence.

The remaining proposed exhibits offered by the parties were not subject to objections. I find all the remaining

proposed exhibits to be relevant and have admitted them into evidence.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In deciding to modify the exclusion to a period of five years, I make the following Findings of Fact and Conclusions of Law (FFCL). Where appropriate, I have noted after the FFCL those pages in this Decision where I discuss the FFCL in greater detail:

1. Petitioner is a physician, licensed to practice medicine in the State of Pennsylvania. P. Ex. 1.

2. Petitioner pled nolo contendere and was convicted in the Court of Common Pleas, Monroe County, Pennsylvania, to two counts of Theft by Deception. I.G. Ex. 7 at 1; I.G Ex. 9 at 1.

3. Also, Petitioner pled nolo contendere and was convicted in the Court of Common Pleas, Monroe County, Pennsylvania, of five additional counts relating to the sale or dispensing of drugs -- i.e., drug-related offenses or convictions -- which consisted of two counts of "Violation of the Medical Practice Act," two counts of "Refusal or Failure to Keep, Mark or Furnish Records," and one count of "Criminal Attempt to Sell Sample Drugs." I. G. Exs. 2 - 8.

4. On July 5, 1994, the court sentenced Petitioner to five years of probation; a fine $24,000; 600 hours of community service; and ordered him to pay $500 in restitution and the costs of his prosecution. I.G. Ex. 8.

5. Petitioner has admitted that he was convicted of criminal offenses related to the delivery of an item or service under a State health care program. Amended Order; P. Br. at 1, 2.

6. Petitioner admits also that his convictions subject him to the mandatory provisions of the Act, which require the I.G. to exclude him from participation in the Medicare and Medicaid programs for a period of not less than five years, pursuant to sections 1128(a)(1) and (c)(3)(B) of the Act. Amended Order; P. Br. at 1, 2.

7. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program, within the meaning of section 1128(i)(3) of the Act.

8. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program, within the meaning of section 1128(a)(1) of the Act. FFCL 4; see FFCL 1 - 3, 5 - 7.

9. The Secretary of DHHS (Secretary) is required to exclude for a period of at least five years any individual or entity convicted of a criminal offense related to the delivery of an item or service under the Medicare or Medicaid program. Act, sections 1128(a)(1) and (c)(3)(B); 48 Fed. Reg. 21,662 (1983).

10. The regulation codified at 42 C.F.R. § 1001.102 contains the only aggravating and mitigating factors which may be used in determining whether an exclusion based on a program-related conviction should be lengthened to a period of more than five years, or whether it should be reduced to period of not less than five years. 42 C.F.R. §§ 1001.1, 1001.102.

11. The period of exclusion may be lengthened if the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more. 42 C.F.R. § 1001.102(b)(2).

12. The two program-related offenses for which Petitioner was convicted took place from September 11, 1988 to January 6, 1992. I.G. Exs. 1, 7, 8.

13. Under 42 C.F.R. § 1001.102(b)(2), the I.G. has proved only the existence of an aggravating factor based on Petitioner's commission of his program-related offenses for the period from September 11, 1988 to January 6, 1992. Pages 8 to 10.

14. The I.G. has failed to prove that Petitioner's drug-related offenses are "similar acts" within the meaning of 42 C.F.R. § 1001.102(b)(2). Pages 10 to 11.

15. The period of exclusion may be lengthened if the acts that resulted in the conviction had a significant adverse financial impact on one or more program beneficiaries or other individuals. 42 C.F.R. § 1001.102(b)(3).

16. The I.G. has failed to prove the existence of the aggravating factor set forth at 42 C.F.R. § 1001.102(b)(3). Pages 11 to 14.

17. The period of exclusion may be increased if the convicted individual has a prior criminal, civil, or

administrative sanction record. 42 C.F.R. § 1001.102(b)(5).

18. The I.G. has failed to prove the existence of the aggravating factor set forth at 42 C.F.R. § 1001.102(b)(5). Pages 14 to 19.

19. If an exclusion under section 1128(a)(1) of the Act has been increased due to the existence of an aggravating factor, the period of exclusion may be reduced to a period not less than five years if the excluded individual was convicted of three or fewer misdemeanor offenses, and the entire amount of financial loss to the Medicare or Medicaid programs caused by the acts that resulted in the conviction, and similar acts, is less than $1500. 42 C.F.R. § 1001.102(c)(1).

20. Under the facts of this case and the nature of the aggravating factor proven by the I.G., Petitioner has proven the mitigating factor described at 42 C.F.R. § 1001.102(c)(1). Pages 19 to 22.

21. The I.G. has the burden of proving the reasonableness of the 10-year exclusion period by a preponderance of the evidence. Amended Order; 42 C.F.R. § 1001.2007(c).

22. The I.G. has failed to show by a preponderance of the evidence that any period of exclusion in excess of five years is reasonable. Pages 22 to 24.

23. An exclusion period of five years is reasonable in this case. Pages 22 to 24.

V. DISCUSSION

A. The I.G. has proven the aggravating factor at 42 C.F.R. § 1001.102(b)(2), in that the criminal acts that resulted in Petitioner's program-related convictions were committed from September 11, 1988 to January 6, 1992.

The regulation states that the following factor may be considered aggravating and a basis for lengthening the five-year exclusion required by law:

> [t]he acts that resulted in the conviction, or similar acts, were committed over a period of one year or more. . . .

42 C.F.R. § 1001.102(b)(2).

1. Analysis of the time period during which Petitioner committed his program-related offenses

As a result of his pleas of nolo contendere, Petitioner was convicted of offenses related to the Medicaid program. I.G. Exs. 8, 9. The two counts of Medicaid-related offenses to which he pled are:

> COUNT 4: [o]n or about September 11, 1988 through December 21, 1991, the Defendant [Petitioner], . . . on at least one of the occasions set forth in Exhibit A [I.G. Ex. 1 at 6 - 8] attached hereto, as a part of a continuing scheme to defraud, did knowingly and intentionally obtain the property of other persons, by representing to his Medical Assistance [Medicaid] patients that he was entitled to a $2.00 co-payment when, in fact, Department of Public Welfare Regulation . . . does not require co-payment for Medical Assistance recipients under the age of 18 years.
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> COUNT 5: [o]n or about September 19, 1988 through January 6, 1992, the Defendant [Petitioner], . . . on at least one of the occasions set forth in Exhibit B [I.G. Ex. 1 at 9 - 18] attached hereto, as part of a continuing scheme to defraud, did knowingly and intentionally obtain the property of other persons, namely his Medical Assistance [Medicaid] patients, by deception1266Kby representing to his Medical Assistance patients that they were required to make a $2.00 co-payment for services rendered by Mahajan under the Medical Assistance Program when, in fact, Mahajan was only entitled to a $1.00 co-payment under Medical Assistance Regulation . . . when the service provided was an office visit. . . .

I.. Ex. 1 at 3, 4, 6 - 18. The court's sentencing order describes the two offenses as "Theft by Deception." I.G. Ex. 8.

The foregoing evidence makes the aggravating factor at 42 C.F.R. § 1001.102(b)(2) applicable. The two continuing schemes to defraud Medicaid patients that resulted in Petitioner's convictions under Counts 4 and 5 of the

Information took place over a period of nearly three and one-half years -- i.e., from September 11, 1988 to January 6, 1992.

2. Analysis rejecting the additional period of one month asserted by the I.G. based on "similar acts"

The I.G. argues that the period under 42 C.F.R. § 1001.102(b)(2) covers an additional month because "[t]he criminal acts underlying Petitioner's drug convictions are 'similar acts' to the criminal acts underlying his program-related conviction." I.G. Br. at 7. The I.G. contends that, after Petitioner had stopped engaging in his program-related offenses, he continued to engage in criminal drug conduct for an additional period of one month (February 1992). Id.. The I.G. argues that the aggravating factor listed at 42 C.F.R. § 1001.102(b)(2) covers the total period of time during which Petitioner committed his program-related offenses and his drug-related offenses -- September 11, 1988 to February 1992. I.G. Br. at 7, 8; see I.G. Exs. 4, 5, 6.

I find that there is not an adequate basis in the record for concluding that Petitioner's drug-related offenses are similar to his schemes for collecting excess co-payments from his Medicaid patients. The court that accepted his pleas and imposed sentence on him described his Medicaid-related offenses as two counts of "Theft by Deception" and his drug-related offenses as "Violation of the Medical Practice Act"[5] (two counts), "Refusal or Failure to Keep, Make or Furnish Records" (two counts), and "Criminal Attempt to Sell Sample Drugs." I.G. Ex. 8.

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[5] Petitioner was convicted on two counts of "Violation of the Medical Practice Act" in having dispensed prescription drugs to two patients without the use of a safety closure package. I.G. Exs. 2, 6.

There is a discrepancy in the court's nolo contendere plea order and sentencing order in that the former order states Petitioner pled to Count 1 of Information 687 ("Dispensing of Drugs without Proper Label"), whereas the latter order states that Petitioner pled to Count 2 of Information 687 ("Violation of the Medical Practice Act"). I.G. Exs. 7, 8, and 9. I agree with the I.G. that the sentencing order contains the correct information with respect to Petitioner's plea under Information 687. I.G. Br. at 5, n.1 (citing also I.G. Exs. 8, 9).

The elements of Petitioner's drug-related offenses are not similar to those in the two counts of "Theft by Deception." I.G. Exs. 1 - 6. For example, in the drug-related charges, there was no allegation of intentional misrepresentation, fraud, deception, or unjust enrichment. There is no evidence that the patients identified in the drug-related counts were beneficiaries or recipients of Medicare or Medicaid, or that either program was involved. See, e.g., I.G. Ex. 1 at 6 - 18; I.G. Exs. 2, 4. The partial overlap of time during which Petitioner committed drug-related offenses and program-related offenses does not make the two types of offenses similar in nature.

Accordingly, I conclude that the I.G. has succeeded in proving the applicability of the aggravating factor at 42 C.F.R. §1001.102(b)(2) based only on Petitioner's schemes to overcharge Medicaid copayments from September 11, 1988 to January 6, 1992.

B. Under 42 C.F.R. § 1001.102(b)(3), the I.G. has failed to prove her allegation that Petitioner's program-related offenses had a significant adverse financial impact on program beneficiaries or other individuals which would justify lengthening the period of exclusion.

The regulation states that the following factor may be considered aggravating and a basis for increasing the five-year exclusion required by law:

> [t]he acts that resulted in the conviction, or similar acts, had a significant adverse physical, mental or financial impact on one or more program beneficiaries or other individuals. . . .

42 C.F.R. § 1001.102(b)(3).

1. Analysis rejecting the I.G.'s arguments and supporting evidence on the allegation that Petitioner's offenses had significant adverse financial impact on Medicaid recipients

The I.G. argues that Petitioner illegally required a co-payment of $2.00 from each of the more than 40 Medicaid patients under the age of 18 identified on the list

incorporated by Count 4,[6] and the I.G. maintains that Petitioner repeatedly overcharged by $1.00 the copayment due from many of the Medicaid patients identified on the list incorporated by Count 5.[7] I.G. Br. at 8, 9. According to the I.G., one Medicaid patient identified by Count 5 was overcharged by $1.00 on 17 different occasions. I.G. Br. at 9. The I.G. reasons that, because Petitioner continuously charged such amounts to a group of individuals with very low income, he caused them significant financial harm within the meaning of the aggravating factor at 42 C.F.R. § 1001.102(b)(3). I.G. Br. at 9. The I.G. does not argue that any asserted "similar act" caused significant adverse financial impact within the meaning of 42 C.F.R. § 1001.102(b)(3).

I do not find the aggravating factor cited by the I.G. at 42 C.F.R. § 1001.102(b)(3) applicable in this case. The actual language of the charges to which Petitioner pled nolo contendere and for which he was convicted does not establish the extent of the financial impact alleged by the I.G.. As discussed already, the evidence establishes that, for nearly three and one-half years, Petitioner participated in two criminal schemes to defraud Medicaid recipients. However, the charges themselves allege only that "on at least one of the occasions set forth" in each of the two lists appended to Counts 4 and 5, Petitioner obtained an excessive copayment amount as part of each scheme. I.G. Ex. 1 at 3 - 4. When Petitioner pled nolo contendere to Counts 4 and 5, he did not identify which of the patients listed on the attachments he had overcharged the copayment. I.G. Exs. 7 - 9. Nor did Petitioner volunteer that he had charged and obtained an excessive copayment on more than the single occasion charged in each count. Id.. Therefore, the totality of the evidence proves only that, on at least one unspecified occasion, one unspecified Medicaid patient under the age of 18 paid $2.00 unnecessarily, and, on at least one unspecified occasion, one unspecified Medicaid

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[6] This list appears as Exhibit A to Information No. 558. I.G. Ex. 1 at 6 - 8. The I.G. refers to this list in her brief as Exhibit A.

[7] This list appears as Exhibit B to Information No. 558. I.G. Ex. 1 at 9 - 18. The I.G. refers to this list in her brief as Exhibit B.

patient over the age of 18 paid $1.00 unnecessarily.[8] I.G. Ex. 1 at 3 - 4; I.G. Exs. 7 - 9.

Contrary to the arguments in the I.G.'s brief, I decline to draw the general inference of severe financial impact based on the probable low-income levels of Medicaid recipients. I believe the regulations require a case-by-case approach, based on the evidence in the record. When DHHS was issuing the final regulations containing the relevant aggravating factors, it addressed the public's concern that circumstances such as "significant impact on the programs or individuals" may exist in every case and could be used by the I.G. to increase the exclusion period routinely. 57 Fed. Reg. 3315 (1992). DHHS stated that, "[o]ur experience has shown that none of the aggravating factors included in these final regulations are present in every case[;]" and an aggravating factor is one that "does not automatically exist in every case. . . ." Id.. DHHS emphasized also that, for a factor to be considered as aggravating, the impact on programs or individuals must be more than minimal -- "that is, it must have been significant." Id..

Based on these considerations, I do not find it appropriate to adopt the generalization suggested by the I.G. -- that, because Petitioner's fraudulent schemes involved only Medicaid recipients (who presumably have low-income levels), therefore, any and all of the individuals who might have been victimized by Petitioner would necessarily have suffered significant adverse financial detriment when one or more individuals, on any or all of the days alleged in Counts 4 and 5, paid

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[8] The lists appended to Counts 4 and 5 are not fully consistent with the allegations stated in those Counts that Petitioner illegally received the copayment amount of $2.00 from Medicaid recipients under the age of 18 and that Petitioner illegally received an excess co-payment amount of $1.00 from Medicaid patients over the age of 18. I.G. Ex. 1. Part of the list corresponding to Count 4 seeks to show that Petitioner received only $1.00 from certain program recipients under 18 years of age. I.G. Ex. 1 at 6, 7. Similarly, the list corresponding to Count 5 seeks to show that, in one instance, Petitioner collected only $.50 in excess co-payment from a patient over the age of 18. I.G. Ex. 1 at 10. Solely for the sake of convenience, I have been discussing the overcharge received by Petitioner from any Medicaid patient listed for Count 4 as $2.00 and the overcharge received by Petitioner from any Medicaid patient listed for Count 5 as $1.00.

Petitioner either $1.00 or $2.00 in excess of what the law permitted.

2. Analysis of the order of restitution contained in the I.G.'s evidence

The I.G.'s briefs do not contain arguments based on the fact that the sentencing order submitted by the I.G. shows that the court directed Petitioner to pay a fine of $2500 for each of his program-related convictions and, in addition, to pay restitution in the amount of $500 under Count 4 (the program-related conviction involving Medicaid patients under the age of 18). See I.G. Ex. 8. I agree with the I.G.'s apparent concession that the foregoing facts do not establish the applicability of 42 C.F.R. § 1001.102(b)(3). The fines were imposed pursuant to State laws, and the court did not direct Petitioner to make the fines payable to individuals. I.G. Ex. 8. Therefore, the fines that Petitioner was ordered to pay do not evidence any financial hardship any individual may have suffered.

Petitioner's obligation to pay restitution in the amount of $500 under Count 4, in the absence of any other evidence such as instructions by the court to make the amount payable to individual Medicaid patients either directly or through the State, is also not sufficient for proving that Petitioner's deeds caused a significant financial impact on one or more program beneficiaries or other individuals. See 42 C.F.R. § 1001.102(b)(3). Additionally, the $500 in restitution Petitioner must pay under Count 4 far exceeds the total amount he might have overcharged his Medicaid patients, even if he had pled guilty to all the incidents alleged on the list attached to Count 4. I.G. Ex. 1 at 6 - 8. Therefore, the sentencing order which directed Petitioner to pay restitution of $500 does not prove that one or more individuals have suffered significant adverse financial impact within the meaning of 42 C.F.R. § 1001.102(b)(3).

C. Under 42 C.F.R. § 1001.102(b)(5), the I.G. has failed to prove her allegation that Petitioner had a prior criminal, civil, or administrative sanction record which would justify lengthening the period of exclusion.

The regulation states that the following factor may be considered aggravating and a basis for lengthening the period of exclusion:

> [t]he convicted individual or entity has a prior criminal, civil or administrative sanction record. . . .

42 C.F.R. § 1001.102(b)(5).

In her Notice, the I.G. did not cite the foregoing factor in explaining her reasons for imposing and directing a 10-year exclusion. However, the I.G. did state in the Notice that she considered the following evidence:

> [c]ourt documents indicate that you were also convicted of violating the Medical Practice Act by dispensing prescription drugs in non-conforming packages; that you criminally attempted to sale [sic] drug samples by repackaging drugs originally marked "Sample" or other similar inscription; and that you failed to keep records, for two years, [of] controlled substances that you administered, dispensed, distributed, purchased or sold.

The I.G.'s briefs attempt to link the foregoing facts to the aggravating factor listed in 42 C.F.R. § 1001.102(b)(5). I.G. Br. at 10; I.G. Supp. Br. at 3 - 6.

1. Analysis rejecting the I.G.'s arguments under section 1128(b)(3) of the Act based on the health risks allegedly created by Petitioner's drug-related offenses

The I.G. asserts the applicability of 42 C.F.R. § 1001.102(b)(5) by contending that the I.G. would be justified in imposing an exclusion under section 1128(b)(3) of the Act[9] on the basis of Petitioner's drug-

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[9] Section 1128(b)(3) provides in relevant parts:

> (b) PERMISSIVE EXCLUSION. -- The Secretary may exclude the following individuals . . .
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> (3) CONVICTION RELATING TO CONTROLLED SUBSTANCE. -- Any individual . . . that has been convicted . . . of a criminal offense relating to the unlawful manufacture, distribution, prescription,

related convictions. I.G. Br. at 9. According to the I.G., patients were subjected to a risk of physical harm by Petitioner's sale of sample drugs, dispensing of drugs in an improper container, and failing to keep required records of dispensed drugs. I.G. Br. at 6, 10. The I.G. reasons that, because Petitioner's drug-related crimes bear directly upon Petitioner's treatment of patients, and one of the primary goals of the exclusion statute is to prevent harm to patients, it follows that Petitioner's criminal drug convictions should be given effect in this forum. I.G. Supp. Br. at 5.

I find the I.G.'s foregoing arguments immaterial and premature regarding the I.G.'s discretion to impose an exclusion under section 1128(b)(3) of the Act. According to the Notice, the I.G. did not in fact use section 1128(b)(3) as a basis for excluding Petitioner in this case. The absence of the required antecedent notice of proposal to exclude and opportunity for Petitioner to respond suggests that the I.G. has not yet considered the imposition of a permissive exclusion under section 1128(b)(3) of the Act. See 42 C.F.R. § 1001.2001. The I.G.'s failure to exercise her discretion under section 1128(b) of the Act is not reviewable or remediable by me. 42 C.F.R. § 1005.4(c)(5).

I find that the I.G.'s arguments on the health risks allegedly created by Petitioner's drug-related offenses are also immaterial. There is no indication that the acts underlying the section 1128(a)(1) exclusion -- i.e., Petitioner's schemes for charging and collecting excess Medicaid copayments -- have placed Medicaid patients at physical risk. Moreover, whether or not Petitioner's program-related offenses have caused health risks, the aggravating factor at 42 C.F.R. § 1001.102(b)(5) is not applicable unless there is a prior sanction record. Even though the Act is intended to protect the health of program beneficiaries and recipients, health risks to individuals do not serve as a substitute for a prior sanction record under 42 C.F.R. § 1001.102(b)(5).

2. Analysis rejecting the I.G.'s arguments on the existence of a prior criminal sanction record

The I.G. argues that a prior criminal sanction record exists because Petitioner's criminal drug conduct occurred over an eight-month period -- June 4, 1991 to February 7, 1992 -- which "overlapped and extended" the

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or dispensing of a controlled substance.

period during which Petitioner was engaged in his schemes to defraud Medicaid patients -- September 11, 1988 until January 6, 1992. I.G. Br. at 9. Based on the asserted overlap and extension, the I.G. concludes, "[t]herefore, some of the criminal drug conduct occurred prior to some of Petitioner's program-related criminal acts." I.G. Br. at 9, 10; I.G. Prop. Facts at 4 (# 24 and # 25). However, the I.G.'s supplemental brief poses a hypothetical set of facts to suggest the existence of a "prior criminal record":

> . . . in this case, had Petitioner been convicted of the five drug misdemeanors a year before his conviction of the program-related crimes which triggered his exclusion, the cited aggravating factor [42 C.F.R. § 1001.102(b)(5)] would have authorized the I.G. to consider the prior drug conviction and increase the exclusion length as appropriate.

I.G. Supp. Br. at 3, 4; see also I.G. Supp. Br. at 5.[10] I find that the requirement of 42 C.F.R. § 1001.102(b)(5) that "[t]he convicted individual . . . has a prior criminal . . . sanction record" has not been satisfied by the I.G.'s arguments or the evidence. I will address each of the I.G.'s contentions.

First, as correctly pointed out by Petitioner, the I.G. is attempting to use the timing of Petitioner's conduct as a prior criminal sanction record. P. Br. at 8. Petitioner objected to the I.G.'s approach, noting that the I.G. has not cited any authority in support. Id.. The I.G. has not responded with any authorities or arguments on why she considers the timing of Petitioner's conduct sufficient to satisfy the regulation's requirement for a prior criminal sanction record.

Even if Petitioner's conduct could be considered a prior criminal sanction record, the I.G.'s brief is factually

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[10] The I.G. submitted the following argument also, which is consistent with her hypothetical use of a prior criminal sanction record in this case:

> . . . a conviction for the crimes cited above, which could be considered as an aggravating factor if it were to occur before the conviction for the two misdemeanor program-related offenses . .

I.G. Supp. Br. at 5.

incorrect in asserting that Petitioner committed some of his drug offenses before he committed his Medicaid-related offenses. Petitioner's two schemes to defraud Medicaid patients took place continuously from September 11, 1988 to January 6, 1992. I.G. Ex. 1 at 3, 4; I.G. Exs. 7 - 9. As noted in the I.G.'s brief, Petitioner's drug-related offenses began on June 4, 1991. I.G. Br. at 9. None of the drug-related offenses of record had taken place before September 11, 1988. I.G. Exs. 2 - 8. The fact that four of Petitioner's drug-related offenses took place during February 1992, one month after his program-related offenses (I.G. Exs. 3 - 6), fails also to support the I.G.'s theory that a prior criminal record exists.

There is no basis for concluding that Petitioner was convicted of drug-related offenses before he was convicted of program-related offenses. Petitioner was convicted of drug offenses at the same time he was convicted of the program-related offenses: on May 6, 1994. I.G. Exs. 7, 8. The court imposed sanctions on July 5, 1994 for all of Petitioner's convictions. I.G. Ex. 8. There is no evidence that Petitioner had any criminal, civil, or administrative sanction record that predated those events. P. Ex. 2.

The 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 the sanctions should have been imposed at different times, which would have afforded the individual an opportunity to comply with the law. Thus, "prior sanction" does not apply to the situation before me, where Petitioner was convicted of all of his offenses on the same day and sentenced on all of his convictions on the same day.

In previous cases where the I.G. persuaded me to uphold an increased period of exclusion based on a "prior sanction record," the I.G. had proven the existence of a prior sanction record meeting the above definition. In addition, there was relevant evidence establishing the extent of the excluded individual's unwillingness or inability to act in accordance with his legal obligations, which continued to pose threats to the programs and which could be remedied only by a lengthened exclusion. See, e.g., Paul O. Ellis, R.Ph., DAB CR283 (1993). By contrast, the I.G. has not proven the existence of a prior sanction record in this case. Nor does the evidence in this case suggest that, after Petitioner had committed various offenses and was

sentenced on July 5, 1994, he failed to learn from his mistakes or failed to become a law-abiding citizen. See P. Ex. 2.

Therefore, I find the use of an alleged "prior sanction record" for lengthening Petitioner's exclusion to be inappropriate and inconsistent with the regulation's remedial purpose for providing adequate, but not excessive, protection for the Medicare and Medicaid programs and their beneficiaries and recipients. See 57 Fed. Reg. 3316 (1992).

D. Based on the facts of this case, the mitigating factor at 42 C.F.R. § 1001.102(c)(1) exists.

Where the excluded individual or entity is convicted of three or fewer misdemeanor offenses, and the entire amount of financial loss to the Medicare or Medicaid programs due to the acts that resulted in the conviction and similar acts is less than $1500, a mitigating factor exists and may be used to reduce or offset the lengthening of an exclusion based on aggravating factors. 42 C.F.R. § 1001.102(c)(1).

Initially, Petitioner did not assert any mitigating factor because, as I discussed above, he contended that the regulations containing the aggravating and mitigating factors were not applicable at the hearing level. By order dated August 9, 1995, I ruled that the criteria contained in 42 C.F.R. § 1001.102 were applicable and afforded the parties an opportunity to file additional submissions on the issue of whether the mitigating factor set forth at 42 C.F.R. § 1001.102(c)(1) is applicable. Both parties have now addressed the issue.

Having received the parties' arguments and evidence on this issue, I will determine whether or not a mitigating factor exists, in order to resolve the pending dispute concerning the applicability of 42 C.F.R. § 1001.102(c)(1). However, as discussed below, the I.G. has not shown by the preponderance of the evidence that the minimum mandatory period of exclusion should be increased based on the aggravating factor she has proven. Therefore, whether or not the mitigating factor at 42

C.F.R. § 1001.102(c)(1) exists in this case does not materially affect the outcome of the case.

1. Analysis of whether the amount of financial loss to the programs due to Petitioner's program-related offenses, and similar acts, is less than $1500

In opposing the use of the mitigating factor at 42 C.F.R. § 1001.102(c)(1), the I.G. has not alleged that the programs have incurred a loss of $1500 or more due to the acts that resulted in Petitioner's program-related convictions or similar acts. Whether or not Petitioner's drug-related offenses constitute "similar acts," there is no evidence that Petitioner's drug-related offenses have had any financial impact on the programs. The excess copayments Petitioner collected in the perpetration of his program-related crimes were from his Medicaid patients, not from the Medicaid program itself. I.G. Ex. 1 at 3, 4. Even if one could construe Petitioner's collection of excess copayment amounts from his patients as having a financial impact on the Medicaid program itself, the maximum amount Petitioner might have collected from all individuals listed in counts 4 and 5 of the relevant Information totals less than $1500. Id..

For these reasons, use of the mitigating factor listed at 42 C.F.R. § 1001.102(c)(1) is not precluded by the amount of financial damage to the Medicare or Medicaid programs.

2. Analysis of whether Petitioner was "convicted of 3 or fewer misdemeanor offenses"

The record is clear that Petitioner has a total of seven misdemeanor convictions, two of which are program-related. I.G. Exs. 7, 8. The I.G. acknowledges that there are not any Departmental Appeals Board decisions interpreting the phrase, "convicted of 3 or fewer misdemeanor offenses." I.G. Supp. Br. at 2. Also, Petitioner notes that the Secretary of DHHS has never issued any official interpretation of the phrase. P. Supp. Br. at 2. However, both parties have cited case authorities and established regulatory construction principles in urging opposite interpretations of the phrase "convicted of 3 or fewer misdemeanor offenses." 42 C.F.R. § 1001.102(c).

The I.G. argues that I should give effect to the plain and natural meaning of the words in issue and apply all seven of Petitioner's misdemeanor convictions to preclude

the use of the mitigating factor. I.G. Supp. Br. at 2, 3. The I.G. argues also that the mitigating factor at issue should not be limited to program-related misdemeanor convictions because other parts of the regulation are not so limited -- for example, 42 C.F.R. § 1001.102(b)(5) permits the I.G. to increase an exclusion based on prior convictions for any type of offense. I.G. Supp. Br. at 4. Petitioner argues that I should not give force to one phrase in isolation, but should, instead, give effect to all provisions possible in order to derive a harmonious and comprehensive meaning from the regulation. P. Supp. Br. at 2, 3.

I conclude that it is not appropriate to assign a broad reading to the phrase "convicted of 3 or fewer misdemeanor offenses" given the limitation stated by the regulation itself. As explained at 42 C.F.R. § 1001.102(c), "[o]nly if any of the aggravating factors set forth in paragraph (b) of this section justifies an exclusion longer than 5 years, may mitigating factors be considered as a basis for reducing the period of exclusion to no less than 5 years." Thus, the mitigating factor at issue should be interpreted in the context of what aggravating factors have been proven by the I.G. for the purpose of lengthening the exclusion in the first instance.

If "similar acts" or a prior sanction record existed and established the aggravating factors at 42 C.F.R. §§ 1001.102(b)(2),(3), then "convicted of 3 or fewer misdemeanor offenses" should mean the misdemeanor convictions that form the basis of the exclusion, as well as any misdemeanor convictions that constituted the individual's "similar acts" or prior sanction record. However, under the particular facts of this case, the I.G. did not prove the existence of a prior sanction record or any "similar acts" that may justify lengthening the period of Petitioner's exclusion. The only aggravating factor proven by the I.G. is the length of time over which Petitioner committed his two Medicaid-related offenses. Therefore, under the facts of this case, "convicted of 3 or fewer misdemeanor offenses" means only Petitioner's two program-related misdemeanor convictions.

E. The I.G. has failed to prove that an exclusion of more than five years is reasonable under the facts of this case.

Even though 42 C.F.R. § 1001.102 specifies the evaluation criteria for lengthening or decreasing an exclusion beyond the minimum mandatory period, there exists no

formula for determining what period of time should correspond with each aggravating or mitigating factor. Prior 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. Behrooz Bassim, M.D., DAB 1333, at 13 (1992). 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.

As noted by Administrative Law Judge Steven Kessel, the presence of an aggravating or mitigating factor in a case may permit an inference about a party's trustworthiness; be however, more about the party's trustworthiness may explained and developed by the evidence concerning the mitigating or aggravating factors. John M. Thomas, DAB CR281, at 15 - 16 (1993). This approach is consistent with DHHS's acknowledgement that it intentionally did not assign specific values to aggravating and mitigating factors in the regulations, choosing instead for the factors to be "evaluated based on the circumstances of the case." 57 Fed. Reg. 3314 (1992). Exclusions of more than five years imposed under section 1128(a)(1) of the Act have been found reasonable only to the extent that the evidence shows that they comport with the Act's remedial purpose of protecting the integrity of federally funded health care programs and the health of the programs' beneficiaries and recipients. See Robert M. Matesic, R.Ph., DAB 1327 (1992).

In my prehearing order, I informed the I.G. of her burden to show the reasonableness of the 10-year exclusion she directed and imposed. Amended Order. This allocation is consistent with my authority and was not objected to by the I.G.. See 42 C.F.R. § 1005.15(c). The regulation specifies that the standard of proof is the preponderance of the evidence. 42 C.F.R. § 1001.2007(c). There is adequate evidence establishing the existence of one aggravating factor. However, very little else is proved beyond its existence. The evidence does not adequately explain or develop the issue of trustworthiness (i.e., the extent to which remedial action is needed). The totality of the I.G.'s evidence consists of the charges against Petitioner, Petitioner's pleas, and the sentencing order. I.G. Exs. 1 - 9. These documents do

not disclose adequate information concerning what extent, if any, beyond the statutorily mandated five years, remedial action is needed for the protection of the programs or its beneficiaries and recipients.

For example, as discussed above, the wording of the criminal charges to which Petitioner pled nolo contendere constitutes the only proof that the Petitioner had committed his two program-related offenses over a combined period of nearly three and one-half years. I.G. Ex. 1. However, even though Petitioner was convicted of having schemed to defraud Medicaid patients for nearly three and one half years, there is no proof that Petitioner has defrauded more than one Medicaid recipient on a single occasion for one or two dollars under each of his two schemes. I.G. Exs. 1, 7, 8. Nor is there evidence proving that Petitioner had attempted to obtain money on more than "at least one" instance specified in each count. The fact that the State of Pennsylvania has classified Petitioner's "Theft by Deception" offenses as misdemeanors also militates against according great weight to the length of time during which he schemed to defraud Medicaid patients. Id.. Even though the I.G. has submitted the sentencing order as evidence relevant to the reasonableness of the 10-year exclusion (I.G. Ex. 8), I am unable to draw conclusions concerning how heavily Petitioner was sanctioned, or how serious the sentencing court considered Petitioner's program-related misdemeanor offenses, without information concerning the potential ranges and nature of penalties that the court might have imposed.

The mere presence of an aggravating factor does not mean that an exclusion of any particular length beyond the five years is reasonable. Dr. Abdul Abassi, DAB CR390, at 8 (1995). Even though the evidence relevant to Petitioner's mitigating factor is also not illuminating, the burden was on the I.G. to prove the reasonableness of the exclusion period she imposed and directed. The evidence does not adequately show that the aggravating factor in this case carries a great deal of weight, or even what amount of weight it carries. The evidence does not preponderate in favor of an exclusion in excess of five years.

If I were to take into consideration Petitioner's mitigating factor, the most that can be concluded from the evidence on the reasonableness issue is that, whatever amount of untrustworthiness might be implied by the mere existence of a single aggravating factor proven by the I.G., that amount has been negated by the equally ambiguous amount of trustworthiness implied by the

existence of a single mitigating factor proven by Petitioner.

Accordingly, I find that the I.G. has failed to prove the reasonableness of the 10-year exclusion period she imposed and directed. Nor has she proven the reasonableness of any exclusion period in excess of five years.

VI. CONCLUSION

I reduce Petitioner's period of exclusion to the minimum five years mandated by law.

/s/

Mimi Hwang Leahy

Administrative Law Judge