Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Shahid M. Siddiqui, M.D.,	)	DATE: May 26, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-94-310
	)	Decision No. CR377
The Inspector General.	)	
	)	

DECISION

By letter (Notice) dated December 13, 1993, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs for a period of 15 years.[1] The I.G. informed Petitioner that he was being excluded due to his conviction in the New York State Supreme Court of a criminal offense related to the delivery of an item or service under the Medicaid program. The I.G. further advised Petitioner that an exclusion after such a conviction is mandated by section 1128(a)(1) of the Social Security Act (Act), and that section 1128(c)(3)(B) of the Act provides that the minimum period of exclusion for such an offense is five years.

In support of the 15-year exclusion, the Notice indicated that the I.G. was relying on the following aggravating factors: (1) the acts giving rise to Petitioner's conviction resulted in a financial loss to the Medicaid program of more than $1500; (2) the acts that resulted in

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[1] The State health care programs from which Petitioner was excluded are defined in section 1128(h) of the Social Security Act and include the Medicaid program under Title XIX of the Act. Unless the context indicates otherwise, I use the term "Medicaid" hereafter to refer to all State health care programs listed in section 1128(h).

Petitioner's conviction were committed over a two-year period; and (3) Petitioner was sentenced to incarceration. Prior to the hearing, the I.G. alleged additionally that Petitioner had been excluded from the New York Medicaid program since December 1984. In a letter dated March 14, 1994, Petitioner challenged his exclusion and requested a hearing.

The I.G. moved to dismiss Petitioner's hearing request on the grounds that it was untimely. In a ruling dated September 16, 1994, I denied the I.G.'s motion to dismiss and scheduled a prehearing conference. At Petitioner's request, I continued the prehearing conference until November 21, 1994. At the prehearing conference I scheduled an in-person hearing and set a schedule for the parties to exchange lists of witnesses and proposed exhibits prior to the hearing.

I conducted an in-person hearing in this case on February 17, 1995, in New York. At the beginning of the hearing, Petitioner was represented by an attorney. However, during the initial course of the proceeding, Petitioner dismissed his attorney, the attorney withdrew, and Petitioner stated that he desired to proceed pro se. Both parties presented documentary evidence and testimony of witnesses. At the close of the hearing, I set a schedule for the parties to file posthearing briefs and replies. The parties filed their briefs in accordance with the schedule I established at the hearing. Tr. 237-40.[2]

I have considered the evidence of record, the parties' arguments, and the applicable law and regulations. I find that, pursuant to sections 1128(a)(1) and

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[2] The parties' exhibits and posthearing briefs, the transcript of the hearing, and my findings of fact and conclusions of law will be cited as follows:

Petitioner's Brief	P. Br. at (page)
I.G.'s Brief	I.G. Br. at (page)
Petitioner's Exhibit	P. Ex. (number at page)
I.G.'s Exhibit	I.G. Ex. (number at page)
Transcript of Hearing	Tr. (page)
My Findings of Fact and Conclusions of Law	Findings (number)

1128(c)(3)(B) of the Act, the I.G. has the authority to exclude Petitioner and that the 15-year exclusion is reasonable. Therefore, I sustain the 15-year exclusion imposed and directed against Petitioner.

ISSUES

The issues in this case are:

1. Whether Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act.

2. Whether the 15-year exclusion imposed and directed against Petitioner by the I.G. is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. During the period of time relevant to this case, Petitioner was a cardiologist practicing in Brooklyn, New York. Tr. 185, 190.

2. Petitioner was president and secretary of M.M. Management Services, Inc. (M.M. Management) as of November 22, 1988. I.G. Ex. 30.

3. M.M. Management operated a group medical practice, consisting of two medical clinics in Brooklyn, New York. Tr. 185, 191.

4. M.M. Management had its own Medicaid provider number from sometime in 1988. Tr. 233.

5. On September 27, 1991, Petitioner and M.M. Management were indicted in the Supreme Court of the State of New York, County of Kings, on the following charges:

> a. one count of grand larceny in the first degree, in that, individually and as a high managerial agent of M.M. Management, from about October 1988 to about November 1990, Petitioner wrongfully took, obtained, and withheld property valued in excess of one million dollars by submitting or causing to be submitted numerous claims to the New York Medicaid Fiscal Agent for services that were not provided at all or were not provided by the physicians designated on the claim forms; and

b. twenty-seven counts of offering a false instrument for filing in the first degree, in that, individually and as a high managerial agent of M.M. Management, Petitioner submitted or caused to be submitted false claims for services supposedly rendered to Medicaid recipients on specified dates from February 6, 1989 through August 10, 1990.

I.G. Ex. 15 at 2-28.

6. The same indictment also charged Petitioner, individually, with the following:

a. three counts of unlawful sale of a prescription for a controlled substance;

b. three counts of unauthorized practice of medicine; and

c. one count of falsifying business records.

I.G. Ex. 15 at 29-33.

7. On or about February 1, 1993, Petitioner entered into a plea agreement with the New York State Attorney General's office, in which Petitioner agreed to plead guilty to one count of grand larceny in the second degree. I.G. Ex. 1.

8. In signing the plea agreement, Petitioner admitted that he shared responsibility for wrongfully taking property from the New York Medicaid program between October 1988 and November 1990. I.G. Ex. 1 at 18-21.

9. On August 9, 1993, Petitioner was sentenced to a prison term of 15 to 45 months. I.G. Ex. 16 at 8.

10. Petitioner admitted, and I find, that his guilty plea, and the actions taken by the court indicating acceptance of his plea, constitute a "conviction" of a criminal offense, within the meaning of section 1128(i)(3) of the Act. Tr. 12.

11. Petitioner stipulated during the November 21, 1994, prehearing conference that his conviction was related to his delivery of services under the New York Medicaid program, thereby subjecting him to the mandatory minimum exclusion of five years under section 1128(a)(1) and section 1128(c)(3)(B) of the Act; Petitioner withdrew that stipulation at the hearing. Order and Notice of Hearing, dated December 14, 1994; Tr. 11-12.

12. 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. Findings 6-11.

13. The Secretary of the Department of Health and Human Services has delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21,662 (1983).

14. The I.G. had authority to impose and direct an exclusion pursuant to section 1128(a)(1) of the Act based upon Petitioner's conviction of an offense related to his delivery of services under the Medicaid program.

15. The I.G. was required to impose and direct an exclusion for at least five years, pursuant to section 1128(c)(3)(B) of the Act.

16. Regulations published on January 29, 1992 establish criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to sections 1128(a) and (b) of the Act. 42 C.F.R. Part 1001 (1992).

17. The regulations published on January 29, 1992 include criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to section 1128(a)(1) of the Act. 42 C.F.R. §§ 1001.101 and 1001.102.

18. On January 22, 1993, the Secretary published a regulation which directs that the criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to sections 1128(a) and (b) of the Act are binding also upon Administrative Law Judges, appellate panels of the Departmental Appeals Board, and federal courts in reviewing the imposition of exclusions by the I.G. 42 C.F.R. § 1001.1(b); 58 Fed. Reg. 5617-18 (1993).

19. The Administrative Law Judge's adjudication of the length of exclusion in this case is governed by the criteria set out in section 1128(a)(1) of the Act, section 1128(c)(3)(B) of the Act, and 42 C.F.R. § 1001.102. Findings 14-18.

20. By letter dated December 8, 1993, the I.G. excluded Petitioner pursuant to section 1128(a)(1) of the Act for a period of 15 years. I.G. Ex. 4.

21. An exclusion imposed pursuant to section 1128(a)(1) of the Act may be in excess of the five-year mandatory minimum period if any of the six aggravating factors set out in 42 C.F.R. § 1001.102(b) are found to be present.

22. Aggravating factors which may form a basis for imposing an exclusion in excess of five years against a party pursuant to section 1128(a)(1) of the Act may consist of any of the following:

> a. The acts resulting in a party's conviction, or similar acts, resulted in financial loss to Medicare or Medicaid of $1500 or more.
>
> b. The acts that resulted in a party's conviction, or similar acts, were committed over a period of one year or more.
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> c. The acts that resulted in a party's conviction, or similar acts, had a significant adverse physical, mental, or financial impact on one or more program beneficiaries or other individuals.
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> d. The sentence which a court imposed on a party for the above-mentioned conviction included a period of incarceration.
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> e. The convicted party has a prior criminal, civil, or administrative sanction record.
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> f. The convicted party was overpaid a total of $1500 or more by Medicare or Medicaid as a result of improper billings.

42 C.F.R. § 1001.102(b)(1)-(6) (paraphrase).

23. The I.G. has the burden of proving that aggravating factors specified in the regulations are present in this case. 42 C.F.R. § 1005.15(c).

24. If any of the six factors in 42 C.F.R. § 1001.102(b) are found to be present, thereby justifying an exclusion longer than five years, the three factors (and only those three factors) specified in 42 C.F.R. § 1001.102(c) may be considered mitigating, and a basis for reducing the portion of the exclusion that is in excess of the mandatory five years.

25. Mitigating factors which may offset the presence of aggravating factors may consist of only the following:

> a. A party has been convicted of three or fewer misdemeanor offenses, and the entire amount of financial loss to Medicare and Medicaid due to the acts which resulted in the party's conviction and similar acts, is less than $1500.
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> b. The record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that, before or during the commission of the offense, the party had a mental, emotional, or physical condition that reduced that party's culpability.
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> c. The party's cooperation with federal or State officials resulted in others being convicted of crimes, or in others being excluded from Medicare or Medicaid, or in others having imposed against them a civil money penalty or assessment.

42 C.F.R. § 1001.102(c)(1)-(3) (paraphrase).

26. Petitioner has the burden of proving that mitigating factors exist which justify reducing his exclusion. 42 C.F.R. § 1001.102(c)(1)-(3); 42 C.F.R. § 1005.15(c).

27. Petitioner admitted that the acts for which he was convicted resulted in losses to the Medicaid program of at least $200,000, and that he himself had received about $68,000 from the scheme. I.G. Ex. 1 at 32-33.

28. The I.G. proved that the acts for which Petitioner was convicted caused losses to the Medicaid program in the amount of $1.4 million. Tr. 116, 163-66; see also I.G. Ex. 25; P. Ex. 8.

29. The I.G. proved that an aggravating factor is present in that the acts that resulted in Petitioner's conviction resulted in losses to the New York Medicaid program in excess of $1500. Finding 28.

30. The I.G. proved that an aggravating factor is present in that the acts resulting in Petitioner's conviction were committed over a period in excess of one year. Finding 8.

31. The I.G. proved that an aggravating factor is present in that Petitioner was sentenced to incarceration. Finding 9.

32. Petitioner has been excluded from the New York State Medicaid program continuously since December 5, 1984. I.G. Ex. 29.

33. The I.G. proved that an aggravating factor is present in that Petitioner has a prior administrative sanction record. Finding 32.

34. The aggravating factors specified at 42 C.F.R. §§ 1001.102(b)(1), 1001.102(b)(2), 1001.102(b)(4), and 1001.102(b)(5) are present in Petitioner's case, and warrant imposition of a period of exclusion of 15 years.

35. Petitioner acknowledges that, during the period of time relevant to this case, October 1988 to November 1990, he was not permitted to bill Medicaid for services using his own provider number. Tr. 190.

36. Petitioner was the President and Secretary of M.M. Management, and after March 1989, the sole shareholder. I.G. Ex. 30; Tr. 196.

37. Petitioner owned the buildings and equipment in which the medical clinics were located. Tr. 216.

38. Petitioner controlled the money paid to M.M. Management by the Medicaid program. Tr. 216.

39. Petitioner paid the physicians employed by M.M. Management 30 percent of the reimbursements generated by their billings; the corporation, which he controlled, retained 70 percent. Tr. 234-35.

40. An auditor employed by the New York Medicaid Special Prosecutor's office traced Medicaid reimbursements from M.M. Management to Petitioner's personal bank accounts. I.G. Ex. 25 at 4.

41. The auditor traced transfers amounting to $950,000 from Petitioner's personal bank accounts to Swiss bank accounts. I.G. Ex. 25 at 4-5.

42. Petitioner appears to have used M.M. Management as an instrumentality to obtain funds from the Medicaid program at a time when he was not personally permitted to participate in the program. Findings 35-41.

43. As part of his plea bargain, Petitioner agreed to a $1.3 million civil settlement with the State. I.G. Ex. 1 at 4-10.

44. Petitioner repudiated the monetary settlement he had agreed to with the State and filed for bankruptcy protection. I.G. Ex. 28 at 3.

45. At his plea allocution, Petitioner sought to minimize his responsibility for the criminal conduct to which he pled guilty, admitting only that he knew of the improper billing and shared responsibility for it. I.G. Ex. 1 at 20, 22.

46. While testifying under oath before me, Petitioner stated that there were no improper billings and that those who had testified against him had fabricated evidence or offered perjured testimony. Tr. 184, 197, 202-05, 209, 211; P. Br. at 12-13.

47. Petitioner has never fully acknowledged his responsibility for the criminal conduct for which he was convicted. Tr. 184-236; Findings 45-46.

48. Rather than accepting responsibility for his own unlawful conduct or showing any remorse, Petitioner has repeatedly attempted to blame others for such conduct and minimize the extent of his personal monetary gain from the fraudulent Medicaid billing practices. Findings 45-47.

49. The apparent purpose of the unlawful billing practices to which Petitioner pled guilty, was to enable Petitioner to receive reimbursement from Medicaid while evading his prior exclusion from Medicaid. Findings 35-42.

50. Petitioner has failed to show any remorse for his conduct and is an untrustworthy provider who may, if given another opportunity, attempt to defraud Medicaid again for his own personal gain. Findings 35-49.

51. Petitioner has offered nothing sufficient to rebut the overwhelming and persuasive evidence in this case which demonstrates that Petitioner remains a threat to the Medicare and State health care programs. Findings 35-50.

52. Petitioner has not proved the presence of any mitigating factors which may be used as a basis for offsetting any aggravating factors. 42 C.F.R. § 1001.102(c)(1)-(3).

53. The remedial purpose of section 1128 of the Act is to protect federally funded health care programs and their beneficiaries and recipients from providers who

have demonstrated by their conduct that they cannot be trusted to handle program funds or to treat beneficiaries and recipients.

54. A lengthy exclusion is needed in this case to satisfy the remedial purposes of the Act and to protect the Medicare and Medicaid programs and their beneficiaries and recipients from future misconduct by Petitioner.

55. The multiple and significant aggravating factors present in this case, with no offsetting mitigating factors present, justify excluding Petitioner for 15 years. 42 C.F.R. § 1001.102(b).

56. The 15-year exclusion imposed and directed against Petitioner by the I.G. is not extreme or excessive. Findings 1-55.

57. The 15-year exclusion imposed and directed against Petitioner by the I.G. is reasonable. Findings 1 - 56.

RATIONALE

I. Petitioner was "convicted" within the meaning of section 1128(i) of the Act of a criminal offense related to the delivery of an item or service under Medicaid and is subject to a minimum mandatory exclusion of five years pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

Petitioner admits that he was convicted of a criminal offense, in that he pled guilty to one count of grand larceny in the second degree. Petitioner argues that his conviction was not related to the delivery of an item or service under Medicaid. P. Br. at 7, 11-12. Instead, Petitioner contends he was convicted of an offense related to fraud within the meaning of section 1128(b)(1). I reject Petitioner's argument.

In pleading guilty under the indictment, Petitioner admitted that he obtained reimbursement from the New York Medicaid program by submitting claims for services that either were not provided, or were not provided by the physician identified in the claim. The indictment on its face establishes that Petitioner's conviction was related to the Medicaid program. The federal courts, as well as appellate panels and administrative law judges of the Departmental Appeals Board (DAB) have repeatedly held that financial crimes which deprive the Medicaid program of funds are related to the delivery of items or services

under Medicaid. Jack W. Greene, DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835 and 838 (E.D. Tenn. 1990); Napoleon S. Maminta, DAB 1135, at 14 (1990).

Moreover, it is well settled that the I.G. has no discretion to impose a permissive exclusion for conduct that is program-related and falls within the ambit of the mandatory exclusion provision of section 1128(a), even if the conduct also can be fairly characterized under either the permissive or mandatory exclusion provisions. Greene, DAB 1078, at 9-11 (1989); Maminta at 14; Charles K. Wheeler and Joan K. Todd, DAB 1123, at 6-7 (1990); Domingos R. Freitas, DAB CR272, at 33-34 (1993). Consequently, there is no basis for Petitioner's argument (P. Br. at 7, 11-12) that a "permissive" rather than "mandatory" exclusion is appropriate in this case.

II. The aggravating factors present in this case are a basis for lengthening the period of exclusion beyond the minimum period of five years.

The I.G. excluded Petitioner from participating in the Medicare and Medicaid programs for 15 years. Petitioner argues that "[t]he reasonable length of exclusion should be five years." P. Br. at 2, 3. The issue in this case is whether the I.G. is justified in excluding Petitioner for 15 years.

Regulations published on January 29, 1992 establish criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to sections 1128(a) and (b) of the Act. 42 C.F.R. Part 1001 (1992). Finding 16. These regulations include criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to section 1128(a)(1) of the Act. 42 C.F.R. §§ 1001.101 and 1001.102; Finding 17.

On January 22, 1993, the Secretary published a regulation which directs that the criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to sections 1128(a) and (b) of the Act are binding also upon Administrative Law Judges, appellate panels of the DAB, and federal courts in reviewing the imposition of exclusions by the I.G. 42 C.F.R. § 1001.1(b); 58 Fed. Reg. 5617-18 (1993); Finding 18. This regulation was made applicable to cases which were pending on or after January 22, 1993, the clarification's publication date. It is undisputed that the present case was pending after January 22, 1993 because the I.G.'s notice to Peititioner informing him that he had been excluded for fifteen years is dated December 14, 1993. I

must now apply to this case the criteria for determining the length of exclusions set forth in sections 1128(a)(1) and 1128(c)(3)(B) of the Act and 42 C.F.R. § 1001.102. Finding 19.

The standard for adjudication contained in 42 C.F.R. § 1001.102 provides that, in appropriate cases, an exclusion imposed pursuant to section 1128(a)(1) of the Act may be in excess of the five-year mandatory minimum period if any of the six aggravating factors set out in 42 C.F.R. § 1001.102(b) are found to be present. Finding 21.

The six factors mentioned at 42 C.F.R. § 1001.102(b)(1)-(6) are the only ones classified by the regulations as aggravating factors.[3] The I.G. has the burden of proving that aggravating factors exist which justify increasing an exclusion imposed pursuant to section 1128(a)(1) beyond the minimum mandatory five-year period. Finding

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[3] In the Notice sent to Petitioner informing him of his exclusion, the I.G. stated that the following circumstances were taken into consideration in arriving at Petitioner's period of exclusion: (1) the statutory fines and penalties imposed by the court amounted to more than $500,000; (2) the commission of the crime evinced planning and premeditation; and (3) Petitioner agreed to be excluded from the Medicaid program for 10 years. Subsequent to the Notice, but prior to the hearing, the I.G., in her exchange of proposed exhibits dated January 19, 1995, provided notice to Petitioner that he was previously administratively sanctioned by New York State Medicaid. See, I.G. Ex. 29. Despite this disclosure, Petitioner argues that he had no advance knowledge that the I.G. would be recommending a 15-year exclusion against him in these proceedings based in part on Petitioner's prior administrative sanction. Petitioner contends that his due process rights were abridged when the I.G. failed to specifically inform him in the Notice that his prior administrative sanction would be used as an aggravating factor in these proceedings. P. Br. at 14. I disagree. Approximately one month prior to the hearing, in the exchange of exhibits, the I.G. provided a copy of I.G. Ex. 29 to Petitioner. This exhibit clearly raised the issue of the presence of a prior administrative sanction and the potentiality that it would be relied upon by the I.G. in establishing the presence of the aggravating factor at § 1001.102(b)(5). I.G. Ex. 29. Furthermore, the factual circumstances of this prior administrative sanction were addressed by the parties at the hearing.

23. In this case, the I.G. contends that the aggravating factors identified at 42 C.F.R. §§ 1001.102(b)(1), 1001.102(b)(2), 1001.102(b)(4), and 1001.102(b)(6) are present.

A. The evidence establishes that the aggravating factor identified at 42 C.F.R. § 1001.102(b)(1) is present.

Under the regulations, it is an aggravating factor if an excluded individual's acts caused the loss of more than $1500 to the Medicare or Medicaid programs. The I.G. has alleged that Petitioner's acts resulted in losses of $1.4 million to the New York Medicaid program. Petitioner argues that the Medicaid program lost far less than that amount. P. Br. at 12-13. However, even accepting Petitioner's version of the amounts in question, there is no dispute that the losses exceeded $1500. Findings 27-29. Thus, the aggravating factor is present.

At his plea allocution, Petitioner admitted that M.M. Management received between $200,000 and $300,000 from the New York Medicaid program as a result of submitting claims for services that were not provided as claimed. I.G. Ex. 1 at 20. He admitted that he, personally, received approximately $68,000 of the proceeds. I.G. Ex. 1 at 32-33; Tr. 8-9; P. Br. at 13. These admissions by Petitioner establish that his acts resulted in financial losses to Medicaid far in excess of the regulatory threshold, even without the additional amounts alleged by the I.G.

However, the I.G. has offered evidence which demonstrates that Petitioner and M.M. Management caused the Medicaid program to lose over $1 million. Cecilia Leong, an auditor employed by the New York Special Prosecutor for Medicaid Fraud Control, testified that from February 1988 to November 1990, the Medicaid program paid M.M. Management over $2.5 million, of which at least $1.4 million was paid based on improper billings. Tr. 116-17, 163-66; see also I.G. Ex. 25; P. Ex. 8.

Petitioner argues that Ms. Leong's calculation of the amount of loss to the Medicaid program was fabricated. P. Br. at 13. He argues also that the assumptions on which she based her calculations were unfounded. For example, Petitioner alleges that a physician perjured herself when she testified before the grand jury that M.M. Management billed Medicaid improperly for her services because she was not qualified to perform or interpret certain tests. Id. Petitioner's attempts to discredit Ms. Leong's testimony are unavailing, however.

Petitioner's suggestion that Ms. Leong "concocted" the figures is completely unsupported by the record and is not credible. Additionally, Petitioner's suggestion that certain incriminating testimony against him was perjured amounts to a collateral attack on his conviction -- that is, an attempt to argue that he was not guilty of the offense to which he pled guilty. Petitioner is not permitted to collaterally attack his conviction in these proceedings.

I find credible the I.G.'s allegation that Petitioner's conduct caused losses of approximately $1.4 million. In addition to Ms. Leong's testimony, the $1.4 million figure is further corroborated by the fact that, as part of his plea agreement, Petitioner negotiated a civil settlement with the State of New York in which he agreed to pay approximately $1.3 million. I.G. Ex. 1 at 4-11.[4]

I therefore conclude that the acts which resulted in Petitioner's conviction caused losses of approximately $1.4 million to the New York Medicaid program. The aggravating factor identified at 42 C.F.R. § 1001.102(b)(1) is thus present in Petitioner's case.

B. The evidence establishes that the aggravating factor identified at 42 C.F.R. § 1001.102(b)(2) is present.

Section 1001.102(b)(2) of the regulations provides that it is an aggravating factor if the acts that resulted in an individual's conviction, or similar acts, were committed over a period of one year or more. In the present case, Petitioner pled guilty to count one of the indictment, which charged that Petitioner and M.M. Management had obtained money based on false claims submitted to the Medicaid program between October 1988 and November 1990. By pleading guilty, Petitioner admitted that he had engaged in the conduct charged. In his brief, however, Petitioner asserts that he only admitted to engaging in criminal acts during a period of a few months in 1989. P. Br. at 14. The minutes of Petitioner's plea allocution show that Petitioner at first tried to minimize his involvement with M.M. Management, but after an off-the-record discussion with

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[4] Petitioner agreed to surrender over $800,000 in cash and property and additionally to execute a confession of judgment in the amount of $500,000. Petitioner later repudiated this agreement and filed for bankruptcy protection. I.G. Ex. 28 at 2-3; Tr. 9.

his attorney, Petitioner admitted his responsibility in the scheme, as charged in the indictment. I.G. Ex. 1 at 20. Thus, the aggravating factor identified in 42 C.F.R. § 1001.102(b)(2) is present in this case.

C. The evidence establishes that the aggravating factor identified at 42 C.F.R. § 1001.102(b)(4) is present.

It is an aggravating factor under the regulations if the sentence imposed on an excluded individual as a result of a program-related conviction included incarceration. 42 C.F.R. § 1001.102(b)(4). In the present case, Petitioner was sentenced to State prison for an indeterminate period of between 15 and 45 months. I.G. Ex. 16 at 8. While Petitioner asserts that the court treated him unfairly in imposing a jail sentence, he does not deny that he was sentenced to incarceration. P. Br. at 14. Thus, the aggravating factor is present in this case.

D. The evidence establishes that the aggravating factor identified at 42 C.F.R. § 1001.102(b)(5) is present.

The regulations provide that it is an aggravating factor if the excluded individual has a prior civil, criminal, or administrative sanction record. 42 C.F.R. § 1001.102(b)(5). The I.G. proved that Petitioner was excluded from the New York Medicaid program in December 1984 and has remained excluded since that time. I.G. Ex. 29. Petitioner admits that he was subject to a Medicaid "suspencion [sic]" in August 1984 and permanent disqualification in November 1989. P. Br. at 14. Thus, the aggravating factor is present in this case.

III. There are no mitigating factors present in this case.

Petitioner has not offered any credible evidence to rebut the I.G.'s showing as to the presence of aggravating factors. Nor has Petitioner offered evidence to prove that any of the mitigating factors enumerated in the regulations are present in this case.

Petitioner offered P. Ex. 3 in an attempt to show that the length of his exclusion should be decreased. The exhibit is a certificate of relief from civil disabilities issued by the justice who sentenced Petitioner. Administrative Law Judges of the DAB have

held that such certificates apply only to State forfeitures and cannot bind federal officials who seek to impose federal remedies. Janet Wallace, L.P.N., DAB CR155 (1991), aff'd DAB 1326 (1992). Thus, the certificate of relief from civil disabilities cannot be considered to be a mitigating factor regarding Petitioner's exclusion under federal law.

Additionally, Petitioner argues that his exclusion should be for a period less than 15 years because he was entrapped to commit the acts for which he was convicted. P. Br. at 15. As was the case with his unsupported assertion that incriminating testimony was perjured, Petitioner's entrapment argument is no more than a thinly disguised attempt to argue that he is not in fact guilty of the crime to which he pled guilty.

IV. A 15-year exclusion is reasonable.

The multiple aggravating factors present in Petitioner's case lead to the conclusion that Petitioner has been and remains a highly untrustworthy individual. Petitioner has offered nothing to rebut the aggravating factors. He has not proved the existence of even one mitigating factor under the regulations. Petitioner has engaged in conduct which caused such immense financial harm to the Medicaid program in the past. Therefore, the risk that he might again engage in such conduct warrants a lengthy exclusion to protect the programs. Moreover, the conduct which led to Petitioner's conviction demonstrates a high degree of culpability on Petitioner's part, and his continuing failure to accept responsibility for that conduct indicates that he is likely to continue to pose a threat to federally funded programs in the future.

I have already concluded, above, that an aggravating factor is present in this case because Petitioner, through his corporation, M.M. Management, defrauded the New York Medicaid program of approximately $1.4 million. This factor alone warrants an exclusion well beyond the mandatory minimum of five years. This amount is indicative of the enormous harm caused to the Medicaid program by Petitioner. Petitioner's conviction demonstrates that he is an individual who is capable of engaging in fraud on a grand scale.

Additional evidence of Petitioner's propensity to cause harm to the Medicaid program is found in his actions with respect to his restitution agreement with New York State. As I noted above, as part of his plea agreement, Petitioner stipulated to a civil settlement with New York

State in the amount of approximately $1.3 million. Petitioner agreed to that settlement on the record before a judge and then repudiated the agreement and filed for bankruptcy protection. The State then sued him for over $5 million in restitution and civil penalties. Before the bankruptcy judge, the State successfully argued that the amounts it sought were nondischargeable. I find that Petitioner's repudiation of his agreement to repay $1.3 million of the money he fraudulently obtained from the Medicaid program indicates that he continues to pose a threat to federally funded health care programs.

In addition to the harm caused to Medicaid, another aggravating factor under the regulations is that the conduct to which Petitioner pled guilty did not involve an isolated incident, but a continuous and intentional course of conduct over a two-year period. The duration of the conduct is relevant to the length of an exclusion because, it may be indicative of increased culpability. I conclude that, in this case, the duration of Petitioner's unlawful conduct is indicative of increased culpability. Moreover, Petitioner had controlling authority in M.M. Management and received a substantial portion of the fruits of that illegal conduct. Findings 35-43. Therefore, Petitioner's culpability in M.M. Management's improper billing scheme was substantial.

Throughout his testimony before me, Petitioner sought to minimize his responsibility for and involvement with M.M. Management and the false billings to which he pled guilty. Petitioner repeatedly testified that he had no management or ownership interest in M.M. Management prior to March 1989. E.g., Tr. 195, 215. However, on cross-examination, Petitioner retreated from that position, initially stating that he became the treasurer of M.M. Management prior to March. Petitioner asserted that his role was merely to act as the corporation's bank, simply holding funds, but not exercising any policy role. Tr. 215. The I.G. then introduced I.G. Ex. 30, a corporate resolution of M.M. Management, dated October 22, 1988, signed by Petitioner as President and Secretary of the corporation. Petitioner acknowledged that the signatures on I.G. Ex. 30 were his. Tr. 222. I conclude that Petitioner's testimony about his responsibilities in M.M. Management was contradictory, evasive, and contrary to the wealth of evidence demonstrating that he was the principal individual who devised, implemented, and benefited from unlawful conduct.

Further, Petitioner acknowledged that, after March 10, 1989, he was the sole shareholder, President, and Secretary of M.M. Management. Tr. 196. But, even as to

the period of time when he admitted he controlled the corporation, he stated that no improper billings occurred (Tr. 202-03, 209), or attempted to place the blame for the improper billing practices on other physicians (Tr. 197, 205-06). Obviously, to contend that no improper billing occurred flies in the face of Petitioner's guilty plea, in which he admitted engaging in the conduct charged in the indictment. Nor do I find credible Petitioner's assertion that, in essence, he fell victim to the illegal practices of others.

Instead, the evidence suggests to me that Petitioner may have created M.M. Management specifically to permit him to continue to benefit from Medicaid billings at a time when he was excluded from the New York Medicaid program. Petitioner acknowledged that, as of August 1984, he was not permitted personally to bill the Medicaid program for his services. Tr. 190. Yet, as the President and Secretary of M.M. Management, at least since November 22, 1988, Petitioner benefitted financially from the Medicaid billings submitted by M.M. Management. Petitioner admitted that he personally received at least $68,000 as a result of the scheme. It is more likely, however, that the amount of money Petitioner received was much greater. Petitioner admitted, in response to my question, that he retained 70 percent of the money Medicaid paid to M.M. Management. Tr. 235. Ms. Leong, the Medicaid auditor, traced Medicaid payments to Petitioner's personal bank accounts, and then traced transfers of $950,000 from those accounts to Swiss bank accounts. I.G. Ex. 25 at 4-5. This evidence demonstrates a high degree of culpability on Petitioner's part, both as to the large amount of Medicaid funds he diverted and as to his attempts to place the proceeds of his scheme out of the reach of enforcement authorities.

The high degree of Petitioner's culpability in the scheme involving M.M. Management is further evidenced by the fact that the New York State Supreme Court sentenced him to a significant period of incarceration. As discussed above, a sentence including incarceration is an aggravating factor under the regulations.

The final aggravating factor which I have found to be present in this case is that Petitioner was subject to a prior administrative sanction, specifically, exclusion from the New York Medicaid program. This factor may indicate an individual's untrustworthiness by showing that an individual has engaged in some improper conduct in the past. The basis for Petitioner's prior Medicaid exclusion is not disclosed in the record. However, I find evidence of Petitioner's untrustworthiness, not only

in the fact of his prior exclusion, but in his testimony about that exclusion before me. Petitioner first testified that he was audited by Medicaid in 1984, but was not excluded until November 1989. Tr. 185-86. Petitioner later testified that after August 1984 he was appealing his exclusion and a final decision was issued in October 1989. Tr. 229-30. The I.G. introduced a document which indicates that Petitioner has been continuously excluded from Medicaid since 1984. Petitioner's contradictory statements regarding his previous sanction record are further evidence that he is not trustworthy to be a provider of services under Medicare or Medicaid.

The multiple aggravating factors present in this case demonstrate that Petitioner has, in the past, engaged in conduct which has caused serious harm to the Medicaid program. Moreover, the evidence before me convinces me that Petitioner continues to be a threat to the Medicare and State health care programs and that he is likely to remain so for a lengthy period of time. Petitioner has attempted to minimize the overall impact of his conduct and has failed to accept any more than the most ephemeral of responsibility for his actions. Therefore, I cannot be assured that the conduct for which Petitioner was convicted will not recur in the future.

In view of the foregoing, I conclude that, absent any mitigating evidence, the minimum five-year exclusion is not sufficient to protect the federally financed health care programs in this case.

I find that the presence in this case of the aggravating factors specified at 42 C.F.R. §§ 1001.102(b)(1), 1001.102(b)(2), 1001.102(b)(4), and 1001.102(b)(5) warrant imposition of a 15-year exclusion of Petitioner from Medicare and State health care programs.[5] The

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[5] Petitioner argues that imposition of the 15-year exclusion violates his constitutional rights. P. Br. at 15. My delegation of authority to hear and decide exclusion cases brought pursuant to section 1128 does not include the authority to rule on the constitutionality of either federal statutes or the I.G.'s actions. 42 C.F.R. § 1005.4(c)(1), (4). However, there are several compelling reasons why Petitioner's argument is without merit. The double jeopardy protection of the Fifth Amendment of the Constitution does not apply here because the civil sanctions imposed by the I.G. can be lawfully imposed against Petitioner despite his criminal

(continued...)

Medicare and Medicaid programs are vulnerable to unscrupulous providers. The remedial purpose of section 1128 of the Act is to protect the integrity of federally funded health care programs and their beneficiaries and recipients from providers who have demonstrated by their conduct that they cannot be trusted to handle program funds or to treat beneficiaries and recipients. Petitioner's unlawful conduct is the type of misconduct Congress sought to prevent when it enacted section 1128 of the Act. There is nothing in the record to suggest that Petitioner has recognized the nature of the harm he caused the Medicaid program. He has demonstrated a lack of understanding of the significance of the unlawfulness of his conduct. I find that a lengthy exclusion is needed in this case to satisfy the remedial purposes of the Act and to protect the Medicare and Medicaid programs and its beneficiaries and recipients from future misconduct by Petitioner.

By any standard, the criminal conduct for which Petitioner was convicted is serious. That conduct demonstrates that Petitioner bore a high degree of

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[5] (...continued)
conviction and the application of collateral civil remedies for Medicaid fraud. United States v. Halper, 490 U.S. 435 (1989); Abbate v. United States, 359 U.S. 187 (1959). Under Halper, in order for the remedy to be punitive, it must bear no reasonable relationship to either the costs sustained by the Department or to the remedial purpose of the Act. Wesley Hal Livingston, et al, DAB CR240, at 67-68, (1992). Halper specifically related to the punitive nature of a civil monetary penalty. However, the Supreme Court's admonition as to determining when a remedy is punitive could arguably apply where the exclusion is not reasonably related to the remedial purposes of the Act. Wesley Hal Livingston, et al, DAB CR240, at 67-68, (1992). My Decision makes clear that the remedial purposes of the Act require that Petitioner be excluded for 15 years.

Petitioner's due process rights have been protected throughout this hearing. This hearing was granted over the objections of the I.G. who had sought a dismissal. Rather than being cruel and unusual punishment, the exclusion has been found to be reasonable and necessary to protect future program participants from Petitioner's threat of repeated unlawful conduct. Accordingly, there is no basis for Petitioner's assertions that the 15-year exclusion violates the Fifth, Eighth, and Fourteenth Amendments of the Constitution.

culpability for acts which caused immense harm to the Medicaid program over a lengthy period of time. The multiple and significant aggravating factors present in this case, with no offsetting mitigating factors present, justify excluding Petitioner for 15 years. I conclude that the 15-year exclusion imposed and directed against Petitioner by the I.G. is not extreme or excessive, and therefore, must stand.

CONCLUSION

Based on the law and the evidence, I conclude that the 15-year exclusion imposed and directed against Petitioner by the I.G. is reasonable and must stand.

/s/

Edward D. Steinman
Administrative Law Judge