Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Stanley Karpo, D.P.M.,	)	DATE: February 1, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-92-082
	)	Decision No. CR356
The Inspector General.	)	
	)	

DECISION

By letter dated March 6, 1992 (notice), the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Stanley Karpo, D.P.M., (Petitioner) that he was being excluded from participation in the Medicare program and any State health care program as defined in section 1128(h) of the Social Security Act (Act), for a period of eight years.[1] The I.G. advised Petitioner that he was being excluded pursuant to section 1128(a) of the Act, based on his conviction of a criminal offense related to the delivery of an item or service under the Medicare and Medicaid programs.

The I.G. advised Petitioner further that, in cases of exclusions imposed pursuant to section 1128(a) of the Act, section 1128(c)(3)(B) of the Act requires a minimum exclusion of five years. However, the I.G. determined to exclude Petitioner for eight years, after taking into consideration the following allegations which were recited in the Notice: (1) the criminal acts that resulted in the conviction were committed over a period of four years; (2) financial damage to the programs related to the criminal activity was over $1500; and (3) Petitioner's sentence which resulted from the criminal conviction included incarceration.

---

[1] In this decision, I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

Petitioner requested a hearing, and the case was assigned to Administrative Law Judge Charles Stratton, my predecessor in this case. Judge Stratton stayed this case indefinitely so that the parties could attempt to negotiate a settlement. However, settlement negotiations were unsuccessful, and Judge Stratton conducted a conference call with the parties on July 13, 1994. During that conference call, the parties agreed that the only issue to be adjudicated is the reasonableness of the I.G.'s determination that Petitioner should be excluded for a period of eight years. The parties agreed that the case could proceed on submissions of written documentation in lieu of an in-person evidentiary hearing. Judge Stratton gave the I.G. until August 19, 1994, to file a "motion for disposition of the case without an in-person hearing," a brief in support of the motion, and the evidence in support of the I.G.'s arguments. He gave Petitioner until September 16, 1994 to file a brief in response, along with any documentary evidence Petitioner had to support his argument. Also, Judge Stratton allowed the I.G. until September 30, 1994 to file a reply.

The I.G. then filed a document styled as a "motion for summary disposition," a supporting brief, and nine exhibits. Petitioner did not file any response within the time allotted, and he did not seek an extension of time or provide any reason for his not filing a response.

On October 24, 1994, more than five weeks after the deadline set by Judge Stratton, the Civil Remedies Division received a brief from Petitioner. The brief was not accompanied by supporting documentary evidence. Because Petitioner did not serve a copy of his filing on the I.G., the Division sent a copy of Petitioner's brief by facsimile to the I.G.

The case was reassigned to me shortly before Judge Stratton's death. On November 2, 1994, I conducted a telephone conference with the parties. During that conference, the parties reiterated that they did not wish to have an in-person hearing in this case, but instead they requested that I decide the case based on the written record. I noted that although Judge Stratton ordered the I.G. to style her motion as one for disposition based upon the written record, the I.G. styled her motion as a motion for summary disposition. The I.G. stated that she wished to restyle the motion she filed on behalf of the I.G. as a motion for disposition in the I.G.'s favor on the basis of the record. She bases her new motion upon the arguments and exhibits already presented to date.

Petitioner stated that he wanted me to construe his submission as a cross-motion for disposition in his favor based on the written record. Petitioner explained also that the delay in filing was due to the fact that he moved from Pennsylvania to Florida and that he had trouble gathering papers which were necessary to write his response. Even though the I.G. objected to the late submission of Petitioner's brief, I accepted Petitioner's late brief into the record, for the reason he had set forth. For the same reason, I gave Petitioner additional time to file evidence in support of his affirmative argument.

Pursuant to the parties' agreement, I have disposed of this case based on the written arguments and documents filed by the parties.[2] I have admitted into evidence those proposed exhibits submitted by the parties. I hold in favor of the I.G. for the reasons that follow.

ADMISSIONS

During the conference call on July 13, 1994, Petitioner admitted that (1) he was convicted of a criminal offense; (2) the criminal offense was related to the delivery of an item or service under Medicaid; (3) he was incarcerated; (4) the acts resulting in the conviction resulted in financial loss to Medicaid; and (5) the acts that resulted in the conviction were committed over a period of one year. Petitioner admitted also that

---

[2]The parties' briefs will be cited as follows:

I.G.'s Brief	I.G. Br. at (page)
Petitioner's Brief	P. Br. at (page)
I.G.'s Reply Brief	I.G. Reply
I.G. Exhibits	I.G. Ex. (number) at (page)
P. Exhibits	P. Ex. (number) at (page)

The I.G. submitted nine exhibits with her initial brief. I admit I.G. exhibits 1 - 9 into evidence. On November 4, 1994, Petitioner submitted two exhibits with his brief. However, Petitioner's exhibits were not marked properly. The document identified as "Government Exhibit B" is now marked at P. Ex. 1. The document identified as "Government Exhibit C" is now P. Ex. 2. I admit P. Ex. 1 and 2 into evidence.

certain of the aggravating factors enumerated by regulation were present in this case. These aggravating factors may justify lengthening the period of his exclusion beyond the minimum five years required by statute, but the regulation does not mandate lengthening the exclusion to a period of eight years. 42 C.F.R. § 1001.102(b).

ISSUE

The sole issue in this case is whether the eight-year exclusion directed and imposed against Petitioner by the I.G. is reasonable.

FINDING OF FACT AND CONCLUSIONS OF LAW (FFCL)

1. On July 22, 1991, Petitioner entered a plea of guilty to 23 counts of Medicaid fraud in violation of 62 Pa. Cons. Stat. Ann. § 1407(a)(1). I.G. Exs. 2 and 6 at 1.

2. On July 22, 1991, Petitioner entered a plea of guilty to one count of theft by deception against the Medicare program in violation of 18 Pa. Cons. Stat. Ann. § 3922. I.G. Exs. 4 and 6 at 1.

3. On July 22, 1991, Petitioner entered also a plea of guilty to one count of theft by deception against the Pennsylvania Blue Shield (PBS) private business program. I.G. Exs. 5 and 6 at 1.

4. Petitioner's criminal conduct against the Medicare and Medicaid programs and Pennsylvania Blue Shield began during December 1987 and continued until February 1990. I.G. Exs. 2, 4 - 6.

5. On October 15, 1991, Petitioner was sentenced to serve eight to 23 months of imprisonment and seven years of probation; he was ordered to pay a fine of $15,000 and prosecution costs. I.G. Ex. 6 at 2.

6. As part of his sentence, Petitioner was ordered also to pay $36,653 in restitution to the Pennsylvania Department of Public Welfare; $4,500 to the office of the Attorney General; and $3,501.75 to Pennsylvania Blue Shield. I.G. Ex. 6 at 1.

7. Petitioner committed fraud against the Medicaid, Medicare, and Pennsylvania Blue shield programs by billing those programs for items and services which Petitioner did not provide and by receiving payments to which he was not entitled. I.G. Exs. 1 - 6.

8. By letter dated March 6, 1992, the I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in State health care programs, pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

9. By letter dated March 19, 1992, Petitioner requested a hearing to contest his exclusion.

10. A remedial purpose of section 1128 of the Act is to protect the integrity of federally funded health care programs and the welfare of beneficiaries and recipients of such programs from individuals and entities who have been shown to be untrustworthy. See S. Rep. No. 109, 100th Cong., 1st Sess. 1 (1987), reprinted in 1987 U.S.C.C.A.N. 682.

11. The Secretary of DHHS (Secretary) 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).

12. The I.G. had authority to impose and direct an exclusion against Petitioner pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act. FFCL 1 - 11.

13. The I.G. must impose and direct an exclusion of not less than five years if a provider has been convicted of a program-related offense. Sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

14. The regulations published on January 29, 1992 contain the sole criteria to be employed by the I.G. in determining the extent to which an exclusion imposed and directed pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act should be lengthened to a period lasting more than five years. 42 C.F.R. §§ 1001.101, 1001.102.

15. On January 22, 1993, the Secretary published a regulation which clarifies that the criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to section 1128 of the Act are binding also upon administrative law judges, appellate panels of the Departmental Appeals Board, and the federal courts in their review of the reasonableness of the

exclusion period imposed and directed by the I.G. 42 C.F.R. § 1001.1(b); 58 Fed. Reg. 5617, 5618 (1993).

16. My adjudication of the length of the exclusion in this case is governed by the criteria contained in 42 C.F.R. §§ 1001.101, 1001.102. FFCL 14, 15.

17. An exclusion imposed pursuant to section 1128(a)(1) of the Act may be for a period in excess of five years if there exist aggravating factors, the effects of which are not offset by mitigating factors. 42 C.F.R. § 1001.102(b), (c).

18. 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 and 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.

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.

d. The sentence which a court imposed on a party for the above-mentioned conviction included incarceration.

e. The convicted party has a prior criminal, civil, or administrative sanction record.

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).

19. If aggravating factors are present, the mitigating factors that may have an offsetting effect are limited to 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.

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.

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).

20. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicare and Medicaid programs, within the meaning of section 1128(a)(1) of the Act. FFCL 1 - 7.

21. Petitioner is subject to an exclusion of at least five years. Act, sections 1128(a)(1), 1128(c)(3)(B); FFCL 20.

22. In evaluating the reasonableness of the eight-year exclusion, it is necessary to weigh the evidence relevant to the aggravating and mitigating factors enumerated in the regulations in a manner that is consistent with the goals of the Act. See FFCL 10.

23. The criminal conduct for which Petitioner was convicted caused a loss in excess of $1500 to the Medicare and State health care programs and justifies an exclusion of more than five years. FFCL 6; 42 C.F.R. § 1001.102(b)(1).

24. The criminal conduct for which Petitioner was convicted, or similar acts, occurred over a period of more than one year and justifies an exclusion of more than five years. I.G. Exs. 2 and 6 at 1; FFCL 4; 42 C.F.R. § 1001.102(b)(2).

25. Petitioner's sentence for his program-related convicted included incarceration for eight to twenty-three months and justifies an exclusion of more than five years. 42 C.F.R. § 1001.102(b)(4); FFCL 5.

26. The existence of aggravating factors in this case permits Petitioner to introduce evidence of the mitigating factors contained at 42 C.F.R. § 1001.102(c)(1) - (3); FFCL 19.

27. The State court judge who sentenced Petitioner directed him to participate in the Impaired Physician's program, AA (Alcoholics Anonymous), or NA (Narcotics Anonymous). P. Ex. 2.

28. The evidence does not include any finding by the court in the criminal proceedings that Petitioner's culpability had been reduced due to any physical, mental, or emotional condition that existed before or during the commission of his offenses. I.G. Ex. 6; P. Ex. 1.

29. Petitioner did not prove the presence of any mitigating factors which may be used as a basis for offsetting the effects of the aggravating factors established by the I.G. 42 C.F.R. § 1001.102(c)(1) - (3).

30. The aggravating factors present in this case establish that an eight-year exclusion is reasonable to satisfy the remedial purposes of the Act.

31. The statement by the State court judge at sentencing that Petitioner will be precluded from doing Medicaid work for five years or less does not estop the I.G. from excluding Petitioner from the Medicare and Medicaid programs for eight years. See P. Ex. 2 at 3; FFCL 1 - 30.

32. By operation of law, Petitioner's exclusion became effective 20 days after the date of the I.G.'s notice letter. 42 C.F.R. § 1001.2002(b).

33. The effective date of Petitioner's exclusion cannot be altered in this proceeding. FFCL 32.

34. The I.G.'s issuance of the notice of exclusion on March 6, 1992 was reasonably timed. See FFCL 3, 5, 8.

THE PARTIES' POSITIONS

I.G.'s Arguments

The I.G. believes that she was justified in increasing the minimum mandatory five-year exclusion period by three years. I.G. Br. at 6. The regulations list six aggravating factors that may form the basis for

lengthening an exclusion under section 1128(a)(1) of the Act, and the I.G. relied on three of those factors in imposing an eight-year exclusion in this case. First, the I.G. took into account the fact that Petitioner's criminal acts were committed over a period of one year or more. 42 C.F.R. § 1001.102(b)(2). The I.G. contends that criminal acts underlying Petitioner's conviction show that this conduct involved a number of criminal acts which Petitioner committed between December 1987 and February 1990. I.G. Exs. 2 - 5.

Under a second aggravating factor, the I.G. contends that increasing the period of exclusion is warranted because the acts which resulted in Petitioner's conviction have caused $1500 or more in financial losses to the Medicare and Medicaid programs. 42 C.F.R. § 1001.102(b)(1). The I.G. points out that Petitioner was sentenced to pay approximately $45,000 in restitution to Medicare, Medicaid, and Pennsylvania Blue Shield. The I.G. states that the $45,000 in restitution that Petitioner was ordered to pay is substantially in excess of the $1500 threshold contained in the regulations, and, as such, warrants an increase in Petitioner's period of exclusion. I.G. Br. at 8.

The I.G. contends also that a third aggravating factor is present in this case because Petitioner's sentence included a period of incarceration as set forth in 42 C.F.R. § 1001.102(b)(4). I.G. Br. at 9. A prison term of eight to 23 months was imposed by the State court as part of the punishment for Petitioner's crimes. I.G. Ex. 6.

The I.G. summarizes the necessity for imposing an eight-year exclusion by arguing that the three aggravating factors surrounding Petitioner's conviction show that he "has posed and continues to pose a very serious threat to the integrity of the Medicare and Medicaid programs and programs beneficiaries and recipients." I.G. Br. at 9.

Petitioner's Arguments

In his responsive brief, Petitioner asserts that he suffered from a "severe major depression, chemical overdose and dependency," and that his "medical disability" resulting from these conditions is a mitigating circumstance in this case. Petitioner did not submit any documents with his responsive brief to support this contention.

On November 4, 1994, Petitioner filed documents which he believes support the contention that there are mitigating circumstances in this case. Petitioner submitted a document which has the caption "Trial/Plea/Sentence." P. Ex. 1. Petitioner contends that, at page two of this document, under the section entitled "Special Conditions of Probation/Parole," Judge William T. Nicholas, the State court judge, "acknowledges and directs monitoring under the Impaired Physician Program." Petitioner avers that this program is "designed and monitored by the State Regulatory Board for Disabled Professionals." Moreover, in referring back to the Impaired Physician Program, Petitioner states "[i]n the petitioner's case, major depression aggrevated [sic] in part by substance abuse. This monitoring is ongoing and current." Petitioner appears to be arguing that the State court judge acknowledged that Petitioner had a medical disability at the time of sentencing and that in fact this disability is a mitigating factor of reduced culpability pursuant to 42 C.F.R. § 1001.102(c)(2).

Petitioner argues also that the transcript of the sentencing refers to the fact that Petitioner " . . . will not be able to do any Medicaid work for a period of five years by statute." P. Ex. 2 at 3. Petitioner appears to be interpreting this statement by the State court judge as a mandate that he would be excluded only for five years or less but certainly not more than five years.

Finally, Petitioner argues that the effective date of his exclusion should have been December 1990 rather than on or about March 26, 1992, as provided in the notice letter of March 6, 1992.

ANALYSIS

1. The aggravating factors present in this case justify lengthening the period of exclusion to the eight years imposed and directed by the I.G.

The controlling regulations for exclusions imposed pursuant to section 1128(a)(1) of the Act were codified at 42 C.F.R. §§ 1001.101 and 1001.102. In accordance with the plain language of section 1128(c)(3) of the Act, the regulations state that no exclusion imposed under section 1128(a)(1) may be for less than five years. The regulations further provide that, in appropriate cases, an exclusion imposed under section 1128(a)(1) may be for a period greater than five years when certain enumerated

aggravating factors are present and not offset by any enumerated mitigating factors. 42 C.F.R. § 1001.102(b)(1) - (6); 42 C.F.R. § 1001.102(c)(1) - (3).

The regulations provide that six circumstances may be considered aggravating and a basis for lengthening the term of Petitioner's exclusion beyond the five-year mandatory period. 42 C.F.R. § 1001.102(b)(1) - (6). The presence of aggravating factors in a given case means that an exclusion of more than five years may be reasonable. The regulations use the word "may" to indicate the permissive, discretionary use of these aggravating factors as a basis for lengthening the exclusion period. 42 C.F.R. § 1001.102(b). What controls the exclusion period is the relative weight of the material evidence of such factors in the context of the total record. Paul G. Klein, D.P.M., DAB CR317 (1994).

Any exclusion imposed for more than five years under section 1128(a)(1) of the Act must comport with the remedial purposes of protecting the programs, and those individuals served by the programs, against untrustworthy health care providers. By legislation, Congress has deemed untrustworthy those individuals convicted of program-related fraud offenses. Section 1128 of the Act. I am bound by the legislative determination that five years is the minimally reasonable period for the exclusion at issue. Id. Through the promulgation of regulations specifying the effect that may be given to certain enumerated factors, the Secretary has taken administrative notice that the presence of certain circumstances imply that the convicted individuals are especially untrustworthy; therefore, the programs and their beneficiaries and recipients may need to be protected from such individuals for more than the five-year minimum mandated by statute. See 42 C.F.R. § 1001.102. At bottom, the inter-related issues of reasonableness and trustworthiness before me concern only the period of exclusion that is in excess of five years.

In this case, the I.G. has proven that the following three aggravating factors are present and justify lengthening Petitioner's exclusion to eight years:

> (1) The acts resulting in a party's conviction, or similar acts, resulted in financial loss to Medicare and Medicaid of $1500 or more. 42 C.F.R. § 1001.102(b)(1).

(2) The acts that resulted in a party's conviction, or similar acts, were committed over a period of one year or more. 42 C.F.R. § 1001.102(b)(2).

(3) The sentence which a court imposed on a party for the above-mentioned conviction included incarceration. 42 C.F.R. § 1001.102(b)(5).

The I.G. has not alleged, nor has she offered any evidence to show, that the acts that resulted in Petitioner's conviction, or similar acts, had a significant adverse physical, mental, or financial impact on one or more program beneficiaries or other individuals; that Petitioner has a prior criminal, civil, or administrative sanction record; or that Petitioner 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)(3), (4), (6).

I find that Petitioner's lack of trustworthiness is demonstrated by the fact that he was sentenced to pay approximately $45,000 in restitution to Medicare, Medicaid, and Pennsylvania Blue Shield as a result of the criminal acts underlying his conviction. The I.G. explained that the joint federal-state investigation into Petitioner's criminal conduct had initially uncovered reliable evidence that Petitioner's fraud caused him to have been significantly overpaid. The I.G. further explained that such evidence resulted in the suspension of his Medicare payments under the separate regulatory authority of 42 C.F.R. § 405.371(b)(2). I.G. Br. at 8; I.G. Ex. 7.[3] Petitioner has introduced nothing to rebut the I.G.'s evidence indicating that he has done very extensive fiscal damage to the Medicare and Medicaid programs. Moreover, the evidence implies that Petitioner may have damaged the Medicare program to an even greater extent had his Medicare payments not been suspended pursuant to another provision of the Secretary's regulations. I therefore find that the acts for which Petitioner was convicted, or similar acts, have caused damage to the Medicaid program in excess of the $1500 threshold specified by the Secretary's regulations. Accordingly, I find that the I.G. has shown that the

---

[3]The I.G. states that a suspension of Medicare payments under section 405.371(b) is a remedy different than the exclusion remedy at issue; therefore, the I.G. was not obligated to count the period of suspension of Medicare payments as a credit to be applied to the eight-year exclusion at issue. I.G. Br. at 8 (citing Christino Enriquez, M.D., DAB CR119, at 7 - 9 (1991)). I agree.

aggravating circumstance defined at 42 C.F.R. § 1001.102(b)(1) is present.

The evidence shows that the criminal acts that Petitioner pled guilty to were committed over a period of one year or more. 42 C.F.R. § 1001.102(b)(2). The criminal acts underlying Petitioner's conviction show that his fraudulent conduct involved criminal acts which he committed between December 1987 and February 1990. I.G. Exs. 2, 4 - 6. Based on the foregoing evidence of Petitioner's conviction, I find that the I.G. has shown as well that the aggravating circumstance defined at 42 C.F.R. § 1001.102(b)(2) is present in this case.

I was not persuaded by the I.G.'s contention that the requirements of 42 C.F.R. § 1001.102(b)(2) were satisfied also by Petitioner's actions after his conviction in State court. Because this section of the regulation states that the duration of Petitioner's bad acts is aggravating if the acts that led to the conviction, or similar acts, were committed over a period of one year or more. The I.G. contends that Petitioner continued "to thwart the [federal] government's efforts to resolve the civil false claims aspect of his case resulting from his conviction." I.G. Br. at 7; I.G. Exs. 8 - 9.

The I.G.'s evidence shows that Petitioner and the U.S. Attorney's office had entered into an oral agreement to settle the federal false claims case; but, before the settlement agreement was reduced to writing, Petitioner changed his mind and later argued that an agreement had never been reached. I.G. Ex. 8 at 7. The I.G. claims that "Petitioner's lack of candor on this issue forced the government to expend additional time and limited resources to litigate the issue of the validity of the settlement agreement through the Third Circuit Court of Appeals." I.G. Br. at 7; I.G. Exs. 8 - 9. Thus, the I.G. contends, Petitioner's reneging on his oral agreement is a "similar act" under 42 C.F.R. § 1001.102(b)(2).

However, I am unable to conclude from Petitioner's litigation of the settlement agreement that he had engaged in acts similar to those that resulted in his conviction for Medicaid fraud. Many excluded individuals appeal their criminal convictions without success. Absent extenuating circumstances, individuals should be at liberty to exercise their legal rights and advance their legal theories without incurring an additional period of exclusion as a consequence. Here, the federal courts did not find fraud or bad faith in Petitioner's refusal to execute the settlement agreement. I.G. Exs. 8

- 9. Therefore, I do not think it appropriate to lengthen his exclusion further because he disputed the existence of an agreement in another forum or caused the government to expend its resources in other litigation.

As required by the relevant regulations, I have reviewed also the evidence relevant to the sentence imposed by the court. In this case, Petitioner's sentence included up to 23 months of incarceration. I.G. Ex. 6. The mere presence of a term of incarceration in the sentence imposed by the court is sufficient to trigger the aggravating factor at 42 C.F.R. § 1001.101(b)(4). Under established constitutional principles, the sentence of up to 23 months should correspond to the seriousness of Petitioner's offense and the extent of his culpability. Therefore, I find that the I.G. has proven that Petitioner's exclusion should be lengthened also due to the aggravating factor listed at 42 C.F.R. § 1001.101(b)(4).

As my discussions of the evidence indicate, I am affirming the eight-year exclusion imposed and directed by the I.G. in this case due to the extent to which three aggravating factors were met in this case. This is not a case in which the bare essentials of the regulatory definitions for three aggravating factors were met. The I.G.'s evidence on the three aggravating factors was very strong, unrebutted, and persuasive. The evidence leaves no real doubt that Petitioner defrauded the Medicaid program for large amounts of money over a number of years, and his offenses were considered serious, as evidenced by his sentence to serve eight to 23 months in prison. Under the Secretary's regulation at 42 C.F.R. § 1001.102(b), the extent and seriousness of his offenses are indicative of a high degree of untrustworthiness in the future. I therefore conclude that the I.G. has met her burden of showing that an eight-year exclusion is reasonable in order to advance the remedial goals of the Act.

2. Petitioner has failed to meet his burden of showing that the eight-year exclusion is unreasonable.

The regulations provide that, if any enumerated aggravating factor is present and justifies an exclusion of more than five years, then certain mitigating factors may be considered as a basis for reducing the exclusion to a period of not less than five years. 42 C.F.R. § 1001.102(c).

In his responsive brief, Petitioner asserted that he suffered from a "severe major depression, chemical

overdose and dependency" and that his "medical disability" resulting from these conditions is a "mitigating circumstance" in this case. Subsequently, Petitioner submitted documents which he believes support this contention.

Petitioner submitted a document captioned "Trial/Plea/Sentence." P. Ex. 1. He contends that, under the heading of "special conditions," the State court judge:

> acknowledges and directs monitoring under the Impaired Physician Program. This program is designed and monitored by the State regulatory Board for Disabled Professionals. In the petitioner's case, major depression aggrevated [sic] in part by substance abuse. This monitoring is ongoing and current.

P. Ex. 1 at 2.

Petitioner has asserted that he has a "severe major depression, chemical overdose and dependency." However, he has not proven the existence of a mitigating factor within the meaning of 42 C.F.R. § 1001.102(c)(2). As I instructed in the prehearing conferences and prehearing orders, Petitioner had the burden of proving those facts that would support his affirmative arguments.[4] The parties introduced into evidence the sentencing report and three pages from the guilty plea colloquy. I.G. Ex. 6; P. Exs. 1, 2. These documents do not show that, when the State court judge was sentencing Petitioner, the judge determined that Petitioner had a mental, emotional, or physical condition before or during the commission of the offense that reduced Petitioner's culpability. 42 C.F.R. § 1001.102(c)(2). There is no doubt that Petitioner had drug or alcohol problems at the time of sentencing, which prompted the State court judge to

---

[4]As reflected in my Summary of Prehearing Conference and Schedule for Filing Submissions dated November 7, 1994, I read to the parties and written down for their reference the precise language of the mitigating factor codified at 42 C.F.R. § 1001.102(c)(2), and I extended the filing period to enable Petitioner to submit any relevant document Petitioner had to support his assertion of this mitigating factor.

authorize treatment.[5] However, Petitioner has offered no proof that the State court judge made any analysis of whether Petitioner's culpability was reduced by the presence of a mental, emotional, or physical condition that existed before or during the commission of his crimes.

Thus, Petitioner has failed to show that there is a mitigating factor in this case pursuant to 42 C.F.R. § 1001.102(c)(2). Petitioner has not attempted to prove the existence of mitigating factors with regard to 42 C.F.R. § 1001.102(c)(1) and (3). The eight-year exclusion imposed and directed by the I.G. remains reasonable, notwithstanding Petitioner's assertion of a mental or emotional impairment.

3. The reasonableness of the eight-year exclusion is not affected by Petitioner's other legal arguments and evidence.

Petitioner points out that, during his sentencing, the State court judge told Petitioner that Petitioner "will not be able to do any Medicaid work for a period of five years by statute." P. Ex. 2 at 3. Petitioner appears to be interpreting this statement by the State court judge as a mandate that he would be excluded for only five years or less.

I have read the portion of the sentencing colloquy submitted by Petitioner. The judge's words show that he was endeavoring to make Petitioner aware that collateral consequences may arise from his guilty plea. P. Ex. 2 at 3. To give an example of the possible collateral consequences, the judge identified the possibility of an exclusion from the Medicaid program for five years or less. Id. The judge was not attempting to give a complete description of all federal and State sanctions that might ensue. I saw no indication that the judge in the State proceeding was attempting to limit the I.G.'s authority to act pursuant to federal law. Also, there was no reasonable basis for Petitioner to conclude that the State court judge had been given authority to bar or limit the imposition of federal sanctions at a later time.

---

[5] I make no findings specifically related to the medical problems that confronted Petitioner during or subsequent to his conviction. His condition at those periods does not constitute a mitigating factor cognizable under the Secretary's regulation.

More importantly, I cannot alter the mandatory provisions of the federal exclusion laws and regulations relied on by the I.G. in this case. See 42 C.F.R. § 1005.4. If what Petitioner is arguing here is that his guilty plea and resultant conviction were invalid because he was not made aware of all of its possible consequences, Petitioner must seek his remedy in State court. He cannot collaterally attack his conviction on substantive or procedural grounds in this forum. 42 C.F.R. § 1001.2007(d).

Petitioner asserts also that the effective date of the exclusion should be changed to December 1990, when he was formally charged with the counts to which he later pled guilty. Petitioner believes that the I.G. is unnecessarily punishing him by instituting the untimely exclusion action in March 1992. Petitioner believes that this delay has "a result not of protection but more of cruel and unusual punishment with no gain, only to harm." P. Br. at 5.

As a matter of law, an exclusion must take effect 20 days from the date of the I.G.'s notice of exclusion. 42 C.F.R. § 1001.2001. An administrative law judge is without the authority to change the effective date of any exclusion imposed and directed by the I.G. Id. Also, an administrative law judge lacks the authority to compel the I.G. to send out notices of exclusions by any date certain. The regulations are clear that the effective date of an exclusion is not a reviewable issue in this administrative proceeding. 42 C.F.R. § 1001.2007.

Also, on the facts of this case, I reject Petitioner's allegation that he was harmed by the I.G.'s failure to exclude him until March 26, 1992. There is no proof of harm to Petitioner. Moreover, the chronology of events does not support the argument that the I.G. unduly delayed Petitioner's exclusion.

Prior to his guilty plea and conviction in the latter part of 1991, the I.G. had no basis for imposing an exclusion under section 1128(a) of the Act. The I.G. did not have possession of all facts relevant to determining the length of an exclusion until some time after October 1991. Thereafter, the regulation required the I.G. to send out a notice of her intent to exclude Petitioner, and the regulations provided Petitioner with a time period for responding to the I.G.'s notice of intent. 42 C.F.R. § 1001.2001. The foregoing facts have persuaded me that the I.G. acted with due diligence in imposing and directing the exclusion at issue by issuing her notice of exclusion on March 6, 1992.

CONCLUSION

For the foregoing reasons, I uphold the eight-year exclusion imposed and directed against Petitioner by the I.G.

/s/

Mimi Hwang Leahy
Administrative Law Judge