

Department of Health and Human Services  
**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

In the Case of:	)	
	)	
William D. Neese, M.D.,	)	Date: March 14, 1997
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-95-167
	)	Decision No. CR467
The Inspector General.	)	
	)	

**DECISION**

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, William D. Neese, M.D., from participating in Medicare and State health care programs, including Medicaid programs, for a period of 10 years. I find that the I.G. is authorized to exclude Petitioner pursuant to section 1128(a)(1) of the Social Security Act (Act). I find also that the 10-year exclusion imposed by the I.G. against Petitioner is reasonable.

**I. Background**

On June 16, 1995, the I.G. notified Petitioner that she was excluding him from participating in Medicare and State health care programs. The I.G. advised Petitioner that she was authorized to exclude him pursuant to section 1128(a)(1) of the Act because Petitioner allegedly had been convicted of a criminal offense related to the Medicare program. The I.G. advised Petitioner that the duration of the exclusion was based on the fact that Petitioner had been sentenced for his crimes to a period of incarceration.

Petitioner requested a hearing. At Petitioner's request, I agreed to stay the case until the completion of Petitioner's prison sentence. After Petitioner had completed his sentence, he advised me that he wished to have the case heard and decided. Petitioner and the I.G. agreed that the case could be heard and decided based on the parties' written submissions. I established a schedule for the parties to submit proposed exhibits and briefs.

The I.G. submitted a brief and six exhibits (I.G. Exs. 1 - 6). In her brief, the I.G. argued that the evidence established the presence of the aggravating factor, incarceration, that the I.G. had alleged in her notice letter. The I.G. argued also that the evidence established the presence of two additional aggravating factors. These additional aggravating factors are that Petitioner's crimes and related conduct resulted to a loss to Medicare of more than \$1500; and spanned a period of more than one year. Petitioner submitted a brief and several attachment. The attachments to Petitioner's brief are excerpts of regulations and a copy of a portion of an exhibit submitted by the I.G. and admitted in evidence. Petitioner did not assert that it was unfair for the I.G. to now assert the presence of three aggravating factors, as opposed to the one aggravating factor alleged in the I.G.'s notice of exclusion. Petitioner did not object to my receiving into evidence the I.G.'s exhibits. Therefore, I receive into evidence I.G. Exs. 1 - 6. I base my decision in this case on the law, the evidence, and the parties' arguments.

## **II. Issues, findings of fact and conclusions of law**

The issues in this case are whether the I.G. is authorized to exclude Petitioner pursuant to section 1128(a)(1) of the Act, and whether the 10-year exclusion that the I.G. imposed is reasonable. In deciding that the exclusion is authorized pursuant to section 1128(a)(1) and that it is reasonable, I make the following findings of fact and conclusions of law (Findings). I discuss each of my Findings in detail, below.

1. Section 1128(a)(1) of the Act mandates the I.G. to exclude any individual who is convicted of a criminal offense related to the delivery of an item or service under Medicare or a State health care program.
2. A crime that satisfies the definition of a criminal offense stated by section 1128(a)(1) of the Act is a criminal offense within the meaning of section 1128(a)(1), even if it might also fall within the definition of some other offense stated in one of the other parts of section 1128 of the Act.
3. A criminal conspiracy to defraud Medicare is a criminal offense within the meaning of section 1128(a)(1) of the Act.
4. The I.G. is required to exclude any individual who is convicted of a criminal offense as defined by section 1128(a)(1) of the Act for a minimum of five years.
5. The I.G. may exclude an individual who is convicted of a criminal offense as defined by section 1128(a)(1) where there exists evidence of an aggravating factor or factors which establishes the excluded individual to be so untrustworthy as to necessitate an exclusion for more than five years.

6. Petitioner is a doctor of osteopathy who practiced medicine in the State of Florida and who controlled a corporation which operated clinics at several locations in that State.
7. In May 1993, Petitioner was indicted on criminal charges in the United States District Court, Middle District of Florida, Tampa Division.
8. Petitioner was charged in the indictment with conspiring to defraud Medicare by generating and submitting false claims for Medicare items or services.
9. On December 5, 1994, Petitioner pled guilty to Counts 1 and 16 of the indictment. His plea included a plea of guilty to the overall conspiracy alleged in Count 1 of the indictment and to an act of mail fraud alleged in Count 16 of the indictment.
10. Petitioner's crimes caused a loss to Medicare of \$600,000.
11. Petitioner perpetrated his crimes over a period beginning in July 1987 and continuing until or through July 1989.
12. Petitioner's sentence for his crimes included two terms of imprisonment, each for 18 months, to run concurrently.
13. The I.G. proved that Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1).
14. The I.G. proved the existence of an aggravating circumstance in that Petitioner's fraudulent acts caused a loss to Medicare of more than \$1500.
15. The I.G. proved the existence of a second aggravating circumstance in that Petitioner perpetrated his fraud over a period of more than one year's duration.
16. The I.G. proved the existence of a third aggravating circumstance in that Petitioner was sentenced for his crimes to a period of incarceration.
17. Petitioner did not prove the existence of any mitigating circumstances.
18. The evidence which relates to the aggravating circumstances establishes Petitioner to be a highly untrustworthy individual.
19. A 10-year exclusion is reasonable.

### **III. Discussion**

#### **A. Governing law (Findings 1 - 5)**

The I.G. excluded Petitioner pursuant to section 1128(a)(1) of the Act. Section 1128(a)(1) mandates the I.G. to exclude any individual who is convicted of a criminal offense related to the delivery of an item or service under Medicare or under a State health care program, including a Medicaid program.

Section 1128(a)(1) is a part of a statute in which Congress conferred a range of exclusion authorities on the I.G. In another part of the same law, section 1128(b)(1), the I.G. is authorized to exclude an individual who is convicted of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by any federal, State, or local government agency.<sup>1</sup>

Section 1128(a)(1) specifically addresses crimes against Medicare and State health care programs. Section 1128(b)(1) is written broadly so as to cover crimes against private insurers as well as federal, State, and local programs other than Medicare or State health care programs. An offense which falls within the narrower reach of section 1128(a)(1) would literally fall within the broader reach of section 1128(b)(1), inasmuch as an offense against Medicare or a State health care program may also be described as an offense against a program operated by or financed in whole or in part by any federal or State agency.

However, the overlap between these two parts of section 1128 does not create ambiguity. It is evident from the structure and context of section 1128 that Congress intended the more stringent exclusion requirements of section 1128(a)(1), and not the less stringent requirements of section 1128(b)(1), to apply to any case involving a criminal offense related to the delivery of an item or service under Medicare or a State

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<sup>1</sup> Prior to July 1996, section 1128(a)(1) mandated an exclusion of any individual who is convicted of an offense within the meaning of that section. Section 1128(b)(1) gave the I.G. discretion to exclude any individual who is convicted of an offense within the meaning of that section. The mandatory minimum exclusion period for an individual excluded under section 1128(a)(1) was five years, whereas there was no statutory minimum exclusion period for an individual excluded under section 1128(b)(1). In July 1996, Congress amended the mandatory exclusion requirement of section 1128(a) to include the offenses that formerly were described in section 1128(b)(1). Act, section 1128(a)(3). The exclusion in this case was imposed prior to the effective date of the July 1996 amendment, and the I.G. does not argue that the amendment applies retroactively to this case.

health care program. In enacting section 1128, Congress decided that a crime against Medicare or a State health care program established the perpetrator to be so untrustworthy as to require an exclusion. Thus, where an offense can be characterized both as an offense within the meaning of section 1128(a)(1) and section 1128(b)(1), the I.G.'s exclusion authority is to be found in section 1128(a)(1).

There is no question that a conspiracy to defraud Medicare is a crime that is related to the delivery of Medicare items or services within the meaning of section 1128(a)(1). A necessary element of the crime is a claim for reimbursement for a Medicare item or service.

Section 1128(c)(3)(B) of the Act requires that an exclusion imposed pursuant to section 1128(a)(1) be for a minimum of five years. Implicitly, the Act authorizes the I.G. to exclude for more than five years an individual who is convicted of a criminal offense as defined by section 1128(a)(1) if the circumstances warrant an exclusion of more than five years.

Section 1128 of the Act, of which section 1128(a)(1) is a part, is a remedial statute. Its purpose is not to punish individuals, but to protect federally funded health care programs and their beneficiaries and recipients from individuals who are established to be untrustworthy. An exclusion imposed pursuant to section 1128 or any of its parts is reasonable if it relates reasonably to the legislative purpose of the Act. Congress concluded that an individual who is convicted of a program-related criminal offense within the meaning of section 1128(a)(1) has established by his or her criminal misconduct that he or she is so untrustworthy as to necessitate an exclusion of at least five years. But, Congress also recognized the possibility that such an individual may be so untrustworthy as to require an exclusion of more than five years.

The Secretary of the United States Department of Health and Human Services (the Secretary) has published regulations which establish the criteria for evaluating the trustworthiness of those individuals who are excluded under any of the parts of section 1128 of the Act, including section 1128(a)(1). These regulations are contained in 42 C.F.R. Part 1001. The regulation which specifically applies to exclusions imposed pursuant to section 1128(a)(1) is 42 C.F.R. § 1001.102.

This regulation establishes the exclusive criteria which may be used to evaluate the trustworthiness of an individual who is excluded pursuant to section 1128(a)(1). The regulation provides that, under section 1128(a)(1), an exclusion of more than five years may be reasonable if there exists evidence in an individual's case establishing the presence of any factors defined by the regulation to be aggravating which is not offset by evidence establishing the presence of any factors defined by the regulation to be mitigating. 42 C.F.R. § 1001.102(b)(1) - (6), (c)(1) - (3).

I may not consider evidence which does not relate to one of the defined aggravating or mitigating factors in deciding whether an exclusion imposed pursuant to section 1128(a)(1) is reasonable. In effect, 42 C.F.R. § 1001.102 is the Secretary's conclusion of what evidence may be relevant to establishing trustworthiness.

However, evidence which establishes the presence of aggravating or mitigating factors is only the starting point in deciding whether an exclusion imposed pursuant to section 1128(a)(1) is reasonable. The regulation authorizes an exclusion of more than five years where there exist aggravating factors that are not offset by mitigating factors. It does not direct that an exclusion of more than five years, or of any particular length in excess of five years, be imposed in such a case. The determination of what is reasonable is left to the judgment of the administrative law judge in a hearing concerning an exclusion of more than five years imposed pursuant to section 1128(a)(1) of the Act.

In order to evaluate the reasonableness of an exclusion imposed pursuant to section 1128(a)(1), I must decide how any evidence that relates to an aggravating or mitigating factor defines the trustworthiness of an excluded individual. Evidence that meets the test of one of the aggravating or mitigating factors may show that an individual is relatively trustworthy or relatively untrustworthy.

For example, an aggravating factor is established pursuant to 42 C.F.R. § 1001.102(b)(1), if the evidence proves that the acts resulting in an individual's conviction of a program-related offense, or similar acts, resulted in financial loss to Medicare or to a State health care program of \$1500 or more. Assuming that evidence which proves the existence of this factor exists in a case, I would look at that evidence as a gauge of the excluded individual's trustworthiness to provide care. Proof that an individual caused a financial loss greatly in excess of \$1500 would be evidence that the individual is a highly untrustworthy individual. By the same token, evidence that an individual caused a financial loss of \$1500 or only slightly more than that amount, while establishing an aggravating factor, might not by itself prove the individual to be so untrustworthy as to require more than the minimum five-year exclusion.

#### **B. The relevant facts (Findings 6 - 12)**

Petitioner is a doctor of osteopathy who practiced medicine in the State of Florida. I.G. Ex. 1 at 1. Petitioner controlled and operated a corporation, Doctors Diagnostic and Medical Centers, Inc., which operated health care clinics at a variety of locations in the State of Florida. Id.

In May 1993, Petitioner was indicted on criminal charges in the United States District Court, Middle District of Florida, Tampa Division. I.G. Ex. 1; I.G. Ex. 3 at 1. Count 1 of the indictment charged that, from July 1987 through on or about July 24, 1989, Petitioner conspired to defraud the United States by impeding, obstructing, and

defeating the lawful operations of the Medicare Part B insurance program. I.G. Ex. 1 at 3 - 4. The indictment charged that Petitioner conspired with others to defraud Medicare by: inducing Medicare beneficiaries to undergo unnecessary medical tests; performing tests that were not medically indicated or necessary; falsifying medical documentation which made these tests appear to be necessary; and presenting fraudulent reimbursement claims for tests. Id. at 4 - 8. Count 16 of the indictment charged Petitioner additionally with one count of mail fraud in perpetrating his conspiracy against Medicare. Id. at 13 - 14.

In December 1994, Petitioner pled guilty to Counts 1 and 16 of the indictment. I.G. Ex. 4 at 1. Petitioner entered his plea of guilty pursuant to a plea agreement. I.G. Ex. 5. In agreeing to plead guilty, Petitioner admitted that he had caused losses to Medicare of \$600,000. Id. Petitioner agreed to pay restitution in the amount of \$600,000. I.G. Ex. 4 at 5. Petitioner was sentenced to a term of imprisonment of 18 months for each of the two counts of the indictment to which Petitioner pled guilty, with the two sentences to run concurrently. Id. at 2.

Petitioner asserts that he has provided information to, and cooperated with, prosecuting authorities. He has not offered corroborating evidence to substantiate this assertion. For purposes of this decision, however, I accept as true Petitioner's assertions of cooperation. There is no evidence to show that any cooperation or information that Petitioner provided to prosecuting authorities led to the indictment of and conviction of other individuals or entities or the imposition of civil remedies against other individuals or entities.

### **C. Evaluation of the evidence (Findings 13 - 19)**

#### **1. The I.G.'s authority to exclude Petitioner (Finding 13)**

As I hold at Part III.A. of this decision, section 1128(a)(1) of the Act requires the I.G. to exclude any individual who is convicted of a criminal offense related to the delivery of an item or service under Medicare. The evidence in this case establishes that Petitioner was convicted of such an offense. Petitioner pled guilty to conspiring to defraud Medicare. His crime was related directly to Medicare items or services.

Petitioner argues that his conviction was of an offense within the meaning of the generic fraud provisions of section 1128(b)(1) of the Act. It is true that Petitioner's conviction could be described as an act of financial misconduct directed against a federally funded health care program. But, as I hold at Part III.A., the authority to exclude lies under section 1128(a)(1) of the Act where the crime is related to the delivery of an item or service under Medicare, even if that crime could be described also as a crime as is defined under section 1128(b)(1). Petitioner's crimes were directed at Medicare. There is no doubt that the I.G.'s authority to exclude lies under section 1128(a)(1).

## 2. The length of the exclusion (Findings 14 - 19)

I find that the 10-year exclusion that the I.G. imposed against Petitioner is reasonable. The evidence in this case establishes Petitioner to be a highly untrustworthy individual. An exclusion of 10 years is reasonably necessary to protect federally funded health care programs and beneficiaries and recipients of these programs from Petitioner.

The I.G. proved the existence of three aggravating factors. First, the I.G. proved that the acts resulting in Petitioner's conviction, or similar acts, resulted in financial loss to Medicare of more than \$1500. 42 C.F.R. § 1001.102(b)(1). Petitioner admitted to having caused loss to Medicare in the amount of \$600,000. I.G. Ex. 5.

Second, the I.G. proved that the acts that resulted in Petitioner's conviction, or similar acts, were committed by Petitioner over a period of more than one year. 42 C.F.R. § 1001.102(b)(2). Count 1 of the indictment, to which Petitioner pled guilty, elaborates a criminal conspiracy of approximately two years' duration. I.G. Ex. 1 at 3 - 4.

Third, the I.G. proved that Petitioner was sentenced to incarceration for his crimes. 42 C.F.R. § 1001.102(b)(4). Petitioner was sentenced to two 18-month periods of incarceration, to run concurrently. I.G. Ex. 4 at 5.

I do not find that Petitioner proved the existence of any mitigating factors. Petitioner would have proved the presence of a mitigating factor had he proved that his cooperation with prosecuting authorities resulted in others being convicted of criminal offenses or led to the imposition of civil remedies against others. See 42 C.F.R. § 1001.102(c)(3). But, Petitioner did not prove the necessary elements of this mitigating factor. Although I accept as true Petitioner's assertions that he has cooperated with, and provided information to, prosecuting authorities, I find no credible evidence to prove that any cooperation he provided, or any information he supplied, led to the conviction of others or to the imposition of civil remedies against others.

The evidence which relates to the aggravating factors proved by the I.G. establishes Petitioner to be a highly untrustworthy individual. It shows that, for a two-year period, Petitioner presided over a criminal enterprise which defrauded Medicare of \$600,000. The elaborate nature of Petitioner's criminal scheme, its widespread operations in several clinics, and the size of Petitioner's fraud, all contribute to a picture of Petitioner as an individual who is capable of planning and executing systematic crimes against federally funded health care programs, without regard to the adverse consequences to these programs or to the beneficiaries and recipients of program funds. Given that, a 10-year exclusion is reasonable.



Although I do not find that Petitioner established a mitigating factor in this case, I would sustain the 10-year exclusion that the I.G. imposed, even if Petitioner had proved that his cooperation had led to the conviction of, or the imposition of civil remedies against, others. I would not find the overwhelming evidence that Petitioner is untrustworthy to be negated by evidence that Petitioner provided cooperation to prosecuting authorities after they had detected and exposed Petitioner's criminal enterprise even if Petitioner's cooperation resulted in convictions of others or the imposition of civil remedies against others.

#### **IV. Conclusion**

I conclude that the I.G. is authorized to exclude Petitioner pursuant to section 1128(a)(1) of the Act. I conclude that the 10-year exclusion imposed against Petitioner by the I.G. is reasonable.

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**Steven T. Kessel**  
Administrative Law Judge