Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Sukumar Roy, M.D.,	DATE: June 8, 1992
Petitioner,	Docket No. C-92-054
- v. -	Decision No. CR205
The Inspector General.	

DECISION

In this case, governed by section 1128(b)(1) of the Social Security Act (Act), the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Petitioner, by letter dated November 4, 1991, that he was being excluded from participating in the Medicare and Medicaid programs for a period of three years.[1] Petitioner was advised that his exclusion resulted from his conviction of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, within the meaning of section 1128(b)(1) of the Act.

Petitioner timely requested a hearing before an Administrative Law Judge (ALJ), and the case was assigned to me for a hearing and decision. During the prehearing conferences I conducted on February 14 and 21, 1992, the I.G. and Petitioner expressed their desire to move for summary disposition and resolve this case without an in-person evidentiary hearing. Subsequently, I established

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act, 42 U.S.C. §1320a-7(h), to cover three types of federally-assisted programs, including State plans approved under Title XIX (Medicaid) of the Act. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

deadlines by which the parties were to submit their briefs, and the parties complied.

I have considered the parties' briefs, the I.G.'s exhibits,[2] the letters from Petitioner's attorneys, and the applicable law. I conclude that the I.G. had authority to exclude Petitioner, and the three year exclusion directed against Petitioner is appropriate and reasonable under the circumstances.

APPLICABLE STATUTE

Section 1128 of the Act is codified at 42 U.S.C. § 1320a-7. Section 1128(b)(1) of the Act permits the I.G. to exclude from Medicare, Medicaid, and related health care programs:

> . . . Any individual or entity that has been convicted, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

ISSUES

1. Whether new regulations promulgated on January 29, 1992, are applicable to this case;

2. Whether Petitioner was convicted of a criminal offense "related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct," within the meaning of section 1128(b)(1) of the Act; and

3. Whether a three year exclusion is appropriate and reasonable.

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[2] The I.G. filed 13 exhibits with his brief, accompanied by the required declarations. These are admitted into evidence as exhibits I.G. Ex. 1-13. I.G. Ex. 14 was filed by letter dated June 1, 1992, and admitted into evidence, without objection, by telephone conference on June 4, 1992.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the entire record, the arguments, and the submissions of the parties, and being advised fully, I make the following Findings of Fact and Conclusions of Law (FFCLs):[3] [4]

1. At all times relevant, Petitioner was a physician in the general practice of medicine in Ohio. I.G. Ex. 4/1 and Ex. 7/1.

2. The United States Postal Service filed a report, dated February 12, 1990, on a fraudulent billing scheme, whereby Mohsin Ijaz (Ijaz) hired Jagannadham Kottha (Kottha) to set up health fairs in shopping malls and solicit shoppers to have "free" blood tests for, among other things, cholesterol levels. I.G. Ex. 4/2.

3. Ijaz's laboratory, Bio-Med Laboratories (Bio-Med), analyzed the blood samples, and Petitioner and other doctors reviewed the test results. Letters would be sent to those tested thanking them and, if problems had been spotted, requesting that they contact a participating physician. I.G. Ex. 4/1-3.

4. Bio-Med submitted bills to Medicare and commercial insurance carriers with Petitioner's or other physicians' names certifying the medical necessity of the tests. Petitioner did not know his name appeared as a referring physician on the Bio-Med claim forms. Id. at 4; I.G. Ex. 14/2.

5. Petitioner received between $2,000.00 and $4,003.00 in compensation from Bio-Med. Id.; I.G. Ex. 7/1.

6. Subsequently, Petitioner and Kottha entered into a separate agreement to continue the health fairs without

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[3] Some of my statements in the sections preceding these formal findings and conclusions are also FFCLs. To the extent that they are not repeated here, they were not in controversy.

[4] Citations to the record in this Decision are as follows:

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

Ijaz or Bio-Med and expanded the tests to include pulmonary function screening and electrocardiograms (EKGs). I.G. Ex. 4/3,8.

7. Although Petitioner was listed as referring physician and certified the tests as medically necessary, he did not see the patients before the tests were performed. Id. at 3.

8. Petitioner reviewed the test results and, through two of his companies, and later an outside billing service, was responsible for preparing and submitting bills to Medicare and commercial insurance carriers. Id.

9. One of Petitioner's companies, Eastern Medical Group, Inc., collected $7,432.17, of which Petitioner paid Kottha $3800.00 and himself $1,000.00. I.G. Ex. 7/3.

10. Two counts of fourth degree felony theft were filed against Petitioner, in the State of Ohio Cuyahoga County Common Pleas Court, for knowingly and by deception obtaining or exerting control over more than $300.00, but less than $5,000.00, with the purpose to deprive the owners, Blue Cross/Blue Shield of Ohio and Community Mutual Insurance Company, of that property. I.G. Ex. 1.

11. Petitioner was convicted of both counts, following a jury trial, and sentenced to serve two concurrent six month terms, fined $2,500.00, and ordered to pay court costs and make restitution of $325.00 to Blue Cross/Blue Shield of Ohio and $310.00 to Community Mutual Insurance Company. I.G. Ex. 2 and Ex. 3.

12. Petitioner's jail sentence was suspended on the condition that he pay all fines and costs within 90 days, serve two years probation, and perform 60 hours of court community service. I.G. Ex. 3.

13. As a result of the conviction, the State Medical Board of Ohio revoked Petitioner's license to practice medicine and surgery. I.G. Ex. 10/3.

14. The Secretary of DHHS (Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21661. (May 13, 1983).

15. The permissive exclusion provisions of section 1128(b)(1)-(14) of the Act do not establish minimum or maximum periods of exclusion.

16. The regulations concerning permissive exclusions pursuant to section 1128(b), to be codified at 42 C.F.R. § 1001, subpart C, promulgated at 57 Fed. Reg. 3298, 3330-42 (January 29, 1992), were not intended to apply retroactively to appeals of I.G. exclusion determinations that were pending before ALJs at the time the regulations were promulgated.

17. The regulations concerning permissive exclusions pursuant to section 1128(b), to be codified at 42 C.F.R. § 1001, subpart C, promulgated at 57 Fed. Reg. 3298, 3330-42 (January 29, 1992), were not intended to govern ALJ review of I.G. exclusion determinations.

18. The major purposes of section 1128 of the Act are to: (1) protect Medicare beneficiaries and Medicaid recipients from incompetent practitioners and inappropriate or inadequate care; (2) protect the Medicare and Medicaid programs from fraud and abuse; and (3) deter individuals from engaging in conduct which is detrimental to the Medicare and Medicaid programs and to the respective beneficiaries and recipients of those programs.

19. Petitioner was "convicted" of a criminal offense, within the meaning of section 1128(i) of the Act. FFCL 11.

20. Petitioner's felony conviction is a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, within the meaning of section 1128(b)(1) of the Act. FFCL 1-11.

21. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs. FFCL 1-20.

22. The trustworthiness of a Petitioner is a consideration in determining an appropriate period of exclusion.

23. In addition to indicia of trustworthiness, the reasonableness of the length of Petitioner's exclusion may be determined by reviewing: (1) the number and nature of the offenses; (2) the nature and extent of any adverse impact the violations have had on beneficiaries; (3) the amount of damages incurred by the Medicare, Medicaid, or social services programs; (4) the existence of mitigating circumstances; (6) any other factors bearing on the nature and seriousness of the violations; and (7) the

previous sanction record of Petitioner. 42 C.F.R. § 1001.125(b)(1)-(7).

24. It is an aggravating factor that Petitioner's crimes established a pattern of criminal offenses lasting several months. FFCL 2-13.

25. The fact that the court imposed a serious penalty against Petitioner as a result of his criminal conviction is an aggravating factor which I have considered in my determination of an appropriate length of exclusion. FFCL 11.

26. It is an aggravating factor that Petitioner's conduct was motivated by considerations of unlawful and personal gain. FFCL 5 and 9.

27. The fact that Petitioner does not have a prior record of criminal convictions is a neutral factor.

28. The fact that Petitioner cooperated with the Postal Inspector is a mitigating factor and was considered in determining an appropriate length of exclusion. I.G. Ex. 7; P. Br. 1.

29. Petitioner's timely compliance with all the terms of his sentence is a mitigating factor. P. Br. 1.

30. Petitioner's misconduct establishes that he is an individual who is not trustworthy to deal with program funds or with beneficiaries or recipients.

31. The remedial considerations of section 1128 of the Act will be served in this case by a three year period of exclusion.

DISCUSSION

1. Regulations published on January 29, 1992, do not establish criteria which govern my decision in this case.

On January 29, 1992, new federal regulations applicable to exclusion cases were published at 57 Fed. Reg. 32918 et seq. (new regulations). The substantive provisions which the I.G. claims govern an 1128(b)(1) hearing can be found at Part 1001 of the new regulations; the relevant regulations regarding the procedural aspects of the appeal can be found at Part 1005.

The I.G. argued that, as the new regulations were effective when published, they are now binding on this

proceeding. In particular, the I.G. cited 42 C.F.R. § 1001.201, which sets forth the I.G.'s authority to exclude parties, based on a criminal conviction related to a program or health care fraud. The I.G. further asserted that this section of the new regulations established a "benchmark" exclusion of three years which must be adopted by the I.G. unless specified aggravating or mitigating factors permit the exclusion to be lengthened or shortened. It is, therefore, the I.G.'s position that the new regulations require me to ratify the three year exclusion imposed upon Petitioner.

Under 42 C.F.R. § 1001.201(a) of the new regulations:

> The OIG [I.G.] may exclude an individual or entity convicted under Federal or State law of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct-
>
> > (1) In connection with the delivery of any health care item or service . . . or (2) With respect to any act or omission in a program operated by, or financed in whole or in part by, any Federal, State or local government agency.

Section 1001.201(b)(1) provides that:

> An exclusion imposed in accordance with this section will be for a period of 3 years, unless aggravating or mitigating factors listed in paragraphs (b)(2) and (b)(3) of this section form a basis for lengthening or shortening that period.

Section 1001.201(b)(2) of the new regulations provides a list of specific factors which the I.G. may consider aggravating and which may serve to lengthen an exclusion. Section 1001.201(b)(3)'s list supplies factors that may be considered mitigating and used as a basis for reducing the period of exclusion.

The I.G. argued that I should apply the new regulations to this case because, he asserted, these rules are the law in effect at the time of my decision. I.G. Br. 11. According to the I.G., the new regulations apply to this case and mandate a three year exclusion. Petitioner takes no position regarding the applicability of the new regulations.

A. The recently promulgated regulations do not apply to exclusion cases in which the I.G.'s Notice of Exclusion was issued prior to January 29, 1992.

Application of section 1001.201 of the new regulations to the instant case would alter retroactively Petitioner's right to a de novo hearing as provided in section 205(b) of the Act and is contrary to precedent of the Departmental Appeals Board (DAB) and Petitioner's due process rights. Under section 205(b) of the Act, Petitioner is entitled to a de novo hearing. These hearings generally consider whether: 1) the I.G. has authority under the Act to impose the exclusion; and 2) the exclusion comports with the remedial purposes of the Act. Charles J. Barranco, M.D., DAB CR187 at 18 (1992). "In reaching a determination as to whether an exclusion meets the remedial purpose of the Act, the ALJ may consider all evidence regarding the reasonableness of an exclusion, including that which may not have been available to the I.G. when the decision to exclude was made." Id., citing Eric Kranz, M.D., DAB 1286 at 7-8 (1992); Bernardo G. Bilang, M.D., DAB 1295 at 9 (1992).

The I.G. would have me apply the new regulations to exclude Petitioner for a three year period unless aggravating or mitigating factors are present. To apply the new regulations to mandate a three year "benchmark" exclusion would substantially alter the de novo hearing rights of Petitioner. Barranco at 20-21; See Stephen J. Willig, DAB CR192 at 17-18 (1992). Such a result cannot have been intended by the Secretary when promulgating the new regulations. Barranco at 23; Willig at 24. Section 205(b) of the Act does not place any restrictions on the scope or breadth of hearings held to review a decision of the I.G. to exclude an individual. Barranco at 18. Therefore, I will not construe the rules in any way that would interfere with or restrict hearings.

The publication of the new regulations in the Federal Register stated an effective date of January 29, 1992, but contained no guidance as to whether they were to apply to pending cases. There is a presumption that administrative rules should not be applied retroactively unless their language specifically requires that application. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). A statutory grant of rulemaking authority will not generally be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. Id.

The I.G. has cited Bradley v. Richmond School Board, 416 U.S. 696, 716-22 (1974) for the proposition that:

> Courts should retroactively apply the law at time of decision unless failure to do so would result in "manifest injustice" based on (1) the nature of the parties (when private parties, retroactive application discouraged) [sic]; (2) the nature of their rights ("matured or unconditional rights" militate against retroactive application); and (3) the nature of the change in law upon those rights (does the new law alter constitutional responsibility or substantive obligations).

I.G. Br. 13.

Retroactive application of section 1001.102 would adversely impact on Petitioner's due process rights and his ability to obtain a fair hearing as contemplated by the Act. The I.G.'s November 4, 1991, letter excluding Petitioner placed him on notice of his right to a hearing under the old regulations. It would be patently unfair, and a violation of due process, to allow the I.G. to exclude Petitioner under established procedures, and then, just before Petitioner's hearing, change the rules of the game in such a way as to affect substantially Petitioner's rights.

At the time the I.G. notified Petitioner of his exclusion under section 1128(b)(1), Petitioner had the right to a de novo hearing under section 205(b) of the Act. See Francis Craven, DAB CR143 at 9 (1991); Joyce Faye Hughey, DAB CR94 at 6(1990), aff'd, DAB 1221 (1991). The issues at such a hearing would have been: 1) whether the I.G. had the authority to exclude Petitioner; and 2) whether the exclusion imposed on Petitioner by the I.G. was reasonable in view of all the circumstances of the case, such that the exclusion was not extreme or excessive. Kelly R. Pyne, DAB CR161 at 7-8 (1991); Hughey, DAB 1221 at 7. Under the I.G.'s interpretation of the new regulations, a permissive exclusion under section 1128(b)(1) becomes an exclusion that garners a three year term. The I.G.'s position is that I should apply a three year "benchmark" standard to every section 1128(b)(1) exclusion unless specific mitigating or aggravating factors are present. I.G. Br. 10-11. The I.G.'s interpretation is simply inconsistent with the notion of a de novo proceeding as provided by section 205(b)(1) of the Act, and as interpreted by DAB precedent. At the time of Petitioner's exclusion, the I.G. could have excluded him for any period of time that could be proven to be reasonable, if it was not extreme or excessive.

See Joel Davids, DAB CR137 at 7-8 (1991); Hughey, DAB CR94 at 7. Now, in the middle of the process, the I.G. would have me change this standard to a presumption of a three year exclusion.

The I.G.'s interpretation of the regulation conflicts with DAB decisions as to the meaning of sections 205(b) and 1128(b) of the Act and excluded parties' rights to de novo hearings. "Section 1128(b) does not require the I.G. to impose an exclusion in every case in which he finds that an individual has engaged in conduct that would authorize an exclusion." Willig at 15, citing Bernardo G. Bilang, M.D., DAB CR141 at 8 (1991), aff'd, DAB 1295 (1992); Kranz, DAB 1286 at 9.

> Moreover, in circumstances where section 1128(b) authorizes the I.G. to impose an exclusion and where an exclusion is determined remedially to be necessary, section 1128(b) does not set a minimum length of exclusion. As with the question of whether to impose a permissive exclusion at all, the issue of the length of any exclusion that is imposed turns on the remedial basis for the exclusion and the evidence which is unique to each case.

Willig at 15.

Finally, an appellate panel recently found in the case of Behrooz Bassim, M.D., DAB 1333 (1992), that to apply the new regulations to a case in midstream, absent specific and uncontroverted guidance to do so, would constitute a violation of Petitioner's due process rights. The appellate panel also found that application of the new regulations to such a case would result in derogation of section 205(b) of the Act, which guarantees Petitioner a de novo hearing. Accordingly, I find that the January 29, 1992, regulations, as interpreted by the I.G. to provide for a three year exclusion, do not apply to the case before me.

B. The new regulations apply only to the I.G.'s determination as to whether to exclude a party or entity, not to my determination as to the length of exclusion.

The plain language of the new regulations is most instructive in interpreting whether or not to apply them to the instant case. They specifically state: "The OIG may exclude." Section 1001.201. As stated by

Administrative Law Judge Steven T. Kessel in Willig at 19, the new regulations establish:

> criteria to be employed by the I.G. in making exclusion determinations. Each subpart of Part 1001 refers only to "the OIG." "OIG" is defined by 42 C.F.R. § 1001.2 to mean "Office of Inspector General of the Department of Health and Human Services." 57 Fed. Reg. 3330. The comments to Part 1001 of the Regulations provide that "[t]he basic structure of the proposed regulations in this part set forth for each type of exclusion the basis or activity that would justify the exclusion, and the considerations the OIG would use in determining the period of exclusion." 57 Fed. Reg. 3299 (emphasis added).

Therefore, the plain language of section 1001.201 and the comments of Part 1001 provide strong evidence that this provision is to be applied to the I.G.'s determination only and does not control my determination in this case. I do note, however, that the new regulations at Part 1005, which govern procedural aspects of exclusion cases, do apply to these cases. See also, Willig at 21 n.10 and 22-23.

2. Petitioner was "convicted," in connection with the delivery of a health care item or service, of a criminal offense "relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct," within the meaning of section 1128(b)(1) of the Act.

There is no doubt that Petitioner was "convicted" of two counts of felony theft in an Ohio State court, within the meaning of section 1128(i) of the Act. FFCL 11, 19.

Further, Petitioner's theft convictions involved false medical billings to insurance carriers, Blue Cross/Blue Shield of Ohio and Community Mutual Insurance Company. Therefore, his convictions were in connection with the delivery of a health care item or service, within the meaning of section 1128(b)(1) of the Act. FFCL 1-11, 20. Accordingly, there is no question as to the I.G.'s authority to impose and direct an exclusion against Petitioner from participating in the programs. Petitioner requested, however, that the exclusion be stayed pending appellate review of the convictions. The relevant exclusion statutes do not provide for a

suspension of an exclusion, pending court review of the underlying conviction.[5]

I conclude that, pursuant to the provisions of section 1128(b)(1) of the Act, the I.G. properly imposed and directed an exclusion against Petitioner.

3. Three years is a reasonable period of exclusion to be imposed and directed against Petitioner.

The remaining issue involves the appropriate period of exclusion imposed and directed against Petitioner. The length of an exclusion must be judged in light of the evidence and the intent of the exclusion law and will be found reasonable if determined to be neither extreme nor excessive. 48 Fed. Reg. 3722 (1983).

The purpose of exclusions, as envisioned by Congress, is remedial. The intent is: 1) to protect the integrity of federally funded health care programs from fraud and abuse; and 2) to protect program beneficiaries and recipients from practitioners who have demonstrated by their behavior that they could not be entrusted with the well-being and safety of the beneficiaries and recipients. See S. REP. NO. 109, 100th Cong., 1st Sess. 1-2 (1987), reprinted in 1987 U.S.C.C.A.N. 682. The exclusions advance this remedial purpose by removing from sanctioned practitioners the ability to affect adversely the programs or beneficiaries and recipients until such time as the excluded parties have demonstrated their trustworthiness. Also, as an ancillary benefit, the threat of exclusions serves to deter providers from engaging in conduct antithetical to the programs and their beneficiaries and recipients. See Hughey, DAB CR94 at 5.

Because section 1128(b) exclusions are permissive, there is no statutory minimum mandatory exclusion period. The I.G. has argued, however, that the new regulations

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[5] On April 30, 1992, an Ohio appellate court affirmed Petitioner's convictions in Ohio v. Sukumar Roy, No. 60403 (Ohio App., April 30, 1992). I have not been provided any further information on whether Petitioner has or will appeal this decision. If, however, Petitioner does appeal further and is successful in having the State convictions overturned or vacated, he would be reinstated into the programs effective as of the date of the original exclusion. See 42 C.F.R. § 3005(a)(1) of the new regulations.

establish a three year benchmark for permissive exclusions and that unless Petitioner introduced evidence of mitigating factors under the new regulations, I must affirm the length of the exclusion as imposed. As discussed supra, however, I have determined that the new regulations are not applicable to this proceeding. Therefore, neither the three year benchmark nor the mitigating and aggravating factors of the new regulations, as interpreted by the I.G., are germane here. I will decide this case using current precedent, which grants me the authority to modify an exclusion if I determine that its length is unreasonable. Craven, DAB CR143, at 9.

In determining the reasonableness of an exclusion's length, I have relied in past cases, to some extent, on regulations adopted by the Secretary for mandatory exclusions involving program-related offenses (convictions for criminal offenses relating to the delivery of an item or service under the Medicare and Medicaid programs). See, e.g., Craven at 11-13; Davids at 10-12. These regulations require the I.G. to consider aggravating factors related to the seriousness and program impact of the offense and to balance those factors against any mitigating factors that may exist which demonstrate trustworthiness. See 42 C.F.R. § 1001.125(b)(1)-(7).

Additionally, as discussed supra, under law and past precedent I have granted Petitioner de novo review. Section 205(b) of the Act; Tommy N. Troxell, M.S., DAB CR96 at 8 (1990). Thus, in deciding the appropriate length of the exclusion, I do not consider how accurately the I.G. applied the law to the facts before him. Rather, I make an independent assessment, based on a review of all the evidence before me, by balancing the purposes of the Act with any mitigating or aggravating factors. The above-noted regulations are instructive as broad guidelines for this analysis. See Vincent Baratta, M.D., DAB 1172 at 10-11 (1990). Therefore, my review of the reasonableness of the three year exclusion will include a determination of whether the length imposed serves the legislative purpose, and, in doing so, I will consider all the mitigating and aggravating factors, as appropriate, in 42 C.F.R. § 1001.125(b).

The record shows that Petitioner was indicted and convicted of two counts of fourth degree felony theft for knowingly and by deception obtaining or exerting control of property for the purpose of depriving the owners, Blue Cross/Blue Shield of Ohio and Community Mutual Insurance Company, of property in the amounts of $325.00 and

$310.00, respectively. I.G. Ex. 1 and Ex. 2. As a result, Petitioner was sentenced to a prison term of six months on each count, a $2,500.00 fine, court costs, and restitution. The prison terms were suspended on the condition that Petitioner pay the fines and court costs, serve two years probation, and perform 60 hours of court community service. I.G. Ex. 3/4. Because of the convictions, the State Medical Board of Ohio revoked Petitioner's license to practice medicine and surgery. I.G. Ex. 10/3.

There is no dispute that Petitioner was initially approached by Kottha in the summer of 1988 and asked to review blood tests for Bio-Med, and, at that time, Kottha worked for Ijaz, the owner of Bio-Med. Kottha set up health fairs, called Health-O-Ramas, at shopping malls and solicited shoppers to have their blood tested for, among other things, cholesterol levels. Bio-Med analyzed the blood samples, and Petitioner and other doctors would review the test results. None of the doctors saw the patients at the time of the tests. I.G. Ex. 4/2. Although the tests were advertised as "free," Bio-Med would submit bills to Medicare and commercial insurance carriers using Petitioner's and other doctors' names to certify the medical necessity of the tests. I.G. Ex. 4/2. Petitioner received between $2000.00 and $4003.00 during this two to three month period. I.G. Ex. 4/3 and Ex. 7/1. Petitioner stated that, although he was compensated by Bio-Med for reviewing the tests, he never saw any of the patients listed on the forms and did not know that Bio-Med was using his name on the bills. I.G. Ex. 7/1.

Subsequently, Kottha and Petitioner agreed to set up health fairs at shopping malls without Bio-Med and to include pulmonary function screening and EKG tests. Id. In addition to reviewing the tests, Petitioner was now responsible for preparing and submitting the bills to Medicare and commercial insurance carriers. Again, the tests were advertised as "free" to those tested, although the tests were routinely billed to their insurance carriers. The billing was done by Petitioner's companies, Community Medical and Industrial Clinic and Eastern Medical Group, Inc., and later by an outside billing service. Although Petitioner did not see the "patients," he was listed as "referring physician" and annotated the insurance billings to indicate that the tests were medically necessary. Petitioner stated that, with the exception of the above, he could not recall having submitted insurance claims without having seen the patient. Id. at 3; I.G. Ex. 4/1.

Petitioner stated that, through January 6, 1989, Eastern Medical Group, Inc., deposited $7,532.17 in insurance payments, of which $3,800.00 was paid to Kottha and $1,000.00 to Petitioner. I.G. Ex. 4/3.

There are several aggravating factors in this proceeding which support affirmation of the three year exclusion. The evidence in this case establishes a pattern of criminal offenses by Petitioner over a several month period. See 42 C.F.R. § 1001.125(b)(1). The seriousness of Petitioner's offenses is, in some measure, reflected in the sentence imposed, which included two six month terms of incarceration (suspended), a significant period of probation (24 months), community service, and fines. See 42 C.F.R. § 1001.125(b)(5). The evidence also establishes that Petitioner's conduct was motivated by considerations of unlawful and personal gain.[6]

The I.G. argued that Petitioner's submitted mitigating circumstances are no longer factors under 42 C.F.R. § 1001.201(b)(3). However, as discussed above, this proceeding is being decided under current precedent. Therefore, I will consider Petitioner's proffered mitigating circumstances.

Petitioner first argued that the amount for which he was convicted, $635.00, was small. However, while the record is not specific on the exact amounts received by Petitioner during the course of the activities which led to his conviction, it does show that he received considerably more than the $635.00.

Petitioner also asserted that he was not involved in any "scheme" and was not the principal in the activities at issue. He argued that the only written indication of a "scheme" was a hand written memorandum of understanding signed only by himself. He and his attorney in the criminal case also stated that Petitioner was tainted because his trial was not separated from that of Ijaz. Petitioner's Attorney's Letter, dated April 21, 1992, at 1. Whether there was a "scheme" with another party is not relevant to Petitioner's own criminal actions, which are well documented. Also, he was convicted in a jury

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[6] The I.G. noted that Petitioner was on probation from the Ohio licensing board at the time his license to practice medicine and surgery was revoked. I do not consider this an aggravating factor, as the reason for the probation is completely unrelated to the conduct for which Petitioner was convicted and which formed the basis for the license revocation.

trial on two felony counts. Further, while Petitioner may have been only a participant during the time he worked with Bio-Med, there is no doubt that he was a principal during the period he and Kottha held their own health fairs. During this latter period, Petitioner also instructed his employees on the billing of the insurers, collected the money, paid Kottha, and had sole responsibility to review the test results.

Petitioner stated, and it is unrebutted by the I.G., that because he has timely fulfilled all the terms of his sentence, his probation is now inactive (he is not required to report monthly). P. Br. 1. He has not been implicated in any additional misconduct. See id. at 1-2.

The fact that Petitioner cooperated with the Postal Inspector who came to his office to interview him is a mitigating factor. See P. Br. 1; Petitioner's Attorney's Letter, dated April 21, 1992, at 1.

Petitioner also offered explanations for several items noted in the Postal Inspector's reports at I.G. Ex. 4, 5, 6, and 7, and stated that:

> Petitioner asked Kottha to discontinue the health fairs after receiving multiple complaints from individuals who had been tested;
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> Petitioner has seen thousands of Medicare and welfare patients for over 20 years without complaint;
>
> Petitioner is appealing both the convictions and the State license revocation;
>
> No insurance company notified Petitioner regarding any irregularities;
>
> Other health fairs continue to occur in the area.
>
> Exclusion will result in the loss of hundreds of patients, and Petitioner has a family to support; and
>
> Petitioner offered to see one-third of his Medicare and welfare patients free of charge for one year in lieu of exclusion. P. Br. 1-3.

None of these are mitigating factors. The fact that this is Petitioner's first problem with the Medicaid and Medicare programs and that he has no prior convictions is a neutral factor. Discontinuing a criminal activity

after complaints are received cannot be considered mitigating. The failure of insurance companies to notify Petitioner of problems does not mean there were none; it could mean the companies were unaware that Petitioner was authorizing medically unnecessary tests. Whether there are other legal or illegal health fairs is not relevant to Petitioner's crimes. Nor can Petitioner's loss of income be considered. While there is always some financial loss to an excluded party, the goal of the exclusion is not to punish the excluded party but to protect the programs and beneficiaries and recipients from further abuse. Remedial considerations take precedence over the personal consequences that an exclusion may have for an excluded party. Petitioner's appeals of his convictions and license revocation are not mitigating factors. However, as noted, if Petitioner were successful in overturning or vacating the convictions, he would be reinstated. See n.5, supra. Lastly, Petitioner's offer to see one-third of his Medicare and Medicaid patients free for one year, in lieu of an exclusion, is not a mitigating factor. It has no bearing on whether he would become trustworthy to participate in the programs at the conclusion of his exclusion, nor whether he has become trustworthy enough to reduce the exclusion.

In summary, the only mitigating factors are Petitioner's initial cooperation with the Postal Inspector and his timely fulfillment of all the requirements of his sentence. These, however, are not sufficient to overcome the seriousness of Petitioner's crimes. Given their gravity, potential for adverse effect on the programs, and the distrust the actions could instill in beneficiaries and recipients toward the programs, it is reasonable to affirm the three year exclusion. Petitioner should note that three years is a relatively short exclusion. However, I conclude that there is no need for a longer exclusion to assure Petitioner's trustworthiness. The three year exclusion will provide for reasonable protection for the programs and their beneficiaries and recipients.[7] It may also have the additional benefit of deterring other providers from engaging in conduct similar to Petitioner's.

My conclusion that the exclusion is reasonable does consider Petitioner's circumstances. His lack of any additional crimes, and the rapidity with which Petitioner completed his sentences, are encouraging signs that

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[7] See, e.g., Craven, DAB CR143 at 13; Davids, DAB CR137 at 12-13.

Petitioner has made a good beginning toward recovering the trustworthiness he should have to participate in the programs.

CONCLUSION

Based on the law and the undisputed material facts in the record of this case, I conclude that Petitioner is subject to the permissive exclusion provisions of section 1128(b)(1) of the Act and that three years is a reasonable and appropriate period of exclusion.

IT IS SO ORDERED.

/s/

Charles E. Stratton
Administrative Law Judge