Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Fred R. Spierer,	)	DATE: February 16, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-94-405
	)	Decision No. CR359
The Inspector General.	)	
	)	

DECISION

By letter dated July 21, 1994, the Inspector General (I.G.) notified Petitioner that, effective August 10, 1994, he was to be excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs[1] due to his conviction of a criminal offense related to the delivery of an item or service under the Medicaid program. The I.G. informed Petitioner further that, even though the relevant sections of the Social Security Act (Act) require a minimum exclusion of five years for this type of conviction, Petitioner was being excluded for a period of 10 years based on his "prior conviction of a program-related criminal offense and previous administrative sanction record."[2] The I.G. notified Petitioner also that the 10-year exclusion was in addition to a five-year exclusion that was previously imposed and directed against him by the I.G.

By letter dated August 1, 1994, Petitioner contested his 10-year exclusion, and the case was assigned to me for hearing and decision.

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

[2] As discussed herein, the I.G. alleged in her briefs additional facts and regulatory bases to justify the 10-year exclusion at issue.

The parties have agreed to submit the case for decision on a written record. Order and Schedule for Filing Briefs and Documentary Evidence, dated September 21, 1994. Having considered the parties' evidence, objections, and arguments,[3] I conclude that the 10-year exclusion imposed and directed against Petitioner by the I.G. is excessive. I have determined that Petitioner is subject to an exclusion period of only five years.[4]

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[3] The parties submitted various proposed exhibits, all of which I have admitted into evidence for the reasons stated herein. The exhibits submitted by Petitioner will be referenced as "P. Ex. 1 to 8," and those submitted by the I.G. will be referenced as "I.G. Ex. 1 to 22." In addition, the five pages of documents appended to the I.G.'s initial brief (consisting of the Declaration of Larry L. Bailey, a computer printout from the Colorado Department of Social Services, and a letter dated October 27, 1994) have been remarked and admitted as a group as I.G. Ex. 23. The Declaration of Alan K. Ballard, appended to the I.G.'s reply brief, has been remarked and admitted as I.G. Ex. 24.

The initial briefs filed by each side will be identified herein as "P. Br." and "I.G. Br." respectively. The parties' reply briefs will be identified as "P. Reply" and "I.G. Reply." (Both of Petitioner's briefs contain his Declarations and his arguments.)

I am aware there are duplicative exhibits submitted by both sides. However, because the parties have already made arguments referencing the exhibits they submitted, I thought it would be unduly complicated to delete the duplicative exhibits and renumber others at this point.

[4] On this day, I am issuing also a decision in the case of Chris Mark Spierer, DAB CR360 (1995). Petitioner and Chris Spierer are brothers. They were convicted in the same two states for their involvement in the same criminal enterprises. In 1994, the I.G. imposed and directed a 10-year exclusion against each brother for the same reasons. Both cases give rise to the same issues.

I am issuing separate decisions in the two cases because the cases have never been consolidated. Only Chris Spierer has retained a legal representative, and this representative and Petitioner live in different states. Petitioner and Chris Spierer's representative were not available at the same time to participate in a prehearing conference to discuss the feasibility of consolidating the cases. For these reasons, the cases have proceeded

(continued...)

ISSUES

The issues in this case are:

(a) Whether Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Act, and

(b) If so,

(i) whether Petitioner's conviction is related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act;

(ii) whether those affirmative defenses asserted by Petitioner bar the I.G. from imposing and directing an exclusion against Petitioner; and

(iii) whether the exclusion of 10 years is a reasonable length (or if the length is unreasonable, then the extent to which the exclusion should be lengthened or shortened).

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCL)

I. The I.G.'s Authority to Exclude Petitioner

1. Petitioner arrived in Colorado during January 1990. I.G. Ex. 5 at 3; I.G. Ex. 6 at 2.

2. During or about January 1990, Petitioner and others started a medical supply company called Solid Care Medical Supplies, Inc. (Solid Care), in Colorado. P. Br. at 4.

3. Petitioner was the Vice-President of Solid Care. P. Br. at 4, 12.

4. During an investigation of Solid Care by the Colorado Medicaid Fraud Control Unit, Petitioner admitted to an investigator that the plan articulated to him was for him and others to open a business in Colorado and illegally bill Colorado Medicaid by submitting fraudulent claims (e.g., "bill and bill and bill some more"). I.G. Ex. 6 at 2, 4.

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[4](...continued)
separately despite the fact that, on final analysis, they are very similar.

5. From January 1990 to June 1990, Petitioner was engaged in a scheme to defraud the Colorado Medicaid program by billing for items which were not needed by program recipients, which had not been ordered for program recipients, or which had not been delivered to program recipients. I.G. Ex. 6 at 3-4; I.G. Ex. 5 at 6-7; I.G. Ex. 23; FFCL 1-4.

6. The scheme involved also a plan to illegally obtain Medicaid "leads", i.e., names of Medicaid recipients, in Colorado. I.G. Ex. 5 at 5, 7; I.G. Ex. 6 at 5-6.

7. Petitioner admitted to an investigator that he was aware that a Solid Care employee was attempting to obtain Medicaid "leads" that were illegal to possess. Petitioner wished to obtain these leads so that Solid Care sales representatives would not have to make sales by going door to door. I.G. Ex. 5 at 5; I.G. Ex. 6 at 5.

8. Petitioner was aware also that the Solid Care employee was negotiating to pay $1 for each name obtained. I.G. Ex. 5 at 5.

9. In 1990, the Colorado Medicaid program paid Solid Care $65,497.53 in Medicaid reimbursement. I.G. Ex. 23.

10. Some time after June 1990, criminal complaints were filed against Petitioner and others in the County Court, Jefferson County, Colorado, charging Petitioner with, among other things, two counts of bribing a public servant and one count of conspiracy to commit bribery. I.G. Ex. 7, 8.

11. On or about November 5, 1990, Petitioner pled no contest to the count of conspiracy to commit bribery, which charged:

> On and before June 18, 1990, in the County of Jefferson, State of Colorado, [Petitioner], with the intent to promote and facilitate the commission of the crime of bribery, . . ., did unlawfully and feloniously agree with each other, and with a person or persons . . ., that one or more of them would engage in conduct which constitutes said crime and an attempt to commit said crime, and did agree to aid each other and such other person or persons in the planning and commission and attempted commission of said crime, and an overt act in pursuance of such conspiracy was committed by one or more of the conspirators . . . .

I.G. Ex. 7, 15.

12. On March 11, 1991, pursuant to his pleading no contest to the count of criminal conspiracy to commit bribery, Petitioner was convicted. The court suspended imposition of Petitioner's sentence on the condition that Petitioner perform 1000 hours of community service at the rate of 16 hours per month. I.G. Ex. 9.

13. I do not find credible Petitioner's denials of any involvement in a scheme to defraud the Colorado Medicaid program. FFCL 1-12.

14. Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Act. FFCL 10-12.

15. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program, within the meaning of section 1128(a)(1) of the Act. FFCL 14; See FFCL 1-13.

16. 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).

17. Based on Petitioner's conviction in Colorado, the I.G. had authority to impose and direct an exclusion against Petitioner pursuant to section 1128(a)(1) of the Act. FFCL 14-16.

18. The I.G. notified Petitioner of the exclusion at issue by letter dated July 21, 1994.

19. Based on the date of the I.G.'s notice to Petitioner (July 21, 1994), the exclusion necessarily took effect 20 days thereafter. 42 C.F.R. § 1001.2002(b); section 1128(c)(1) of the Act.

20. I cannot grant Petitioner's request to change the effective date of the exclusion at issue to November 5, 1990. 42 C.F.R. § 1001.2002(b); But see P. Br. at 15, 23.

II. Petitioner's Arguments to Bar Imposition of the Exclusion at Issue

21. Petitioner did not prove that he was granted immunity from the imposition of criminal or civil sanctions against him. I.G. Ex. 19; But see P. Br. at 6-7, 12, 14, 22.

22. In this administrative proceeding, Petitioner is not permitted to plead his innocence, challenge the law under which he was convicted, or otherwise collaterally attack

the merits of his conviction. 42 C.F.R. § 1001.2007(d); But see P. Br. at 7-8, 22.

23. I cannot give effect to Petitioner's contention that, during plea negotiations, State prosecutors violated his rights under the U.S. Constitution by failing to warn him that he might be excluded from the Medicare and Medicaid programs. FFCL 22; But see P. Br. at 7-9, 22.

24. Petitioner did not prove that the I.G.'s determination to exclude him under section 1128(a)(1) of the Act is time-barred or violative of his procedural due process rights. But see P. Br. at 14-15.

III. Framework for Determining the Length of an Exclusion

25. An exclusion imposed and directed pursuant to section 1128(a)(1) of the Act must be for a period of at least five years. Act, sections 1128(a)(1), 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

26. The regulations issued by the Secretary list the only factors that may be considered in determining the length of an exclusion under section 1128(a)(1) of the Act. 42 C.F.R. § 1001.102.

27. The following aggravating factors, if present, may justify lengthening an exclusion for a program-related conviction to a period in excess of five years:

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 imposed by the court on a party included incarceration;

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

f. The convicted party has been overpaid at any time 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).

28. If any of the aggravating factors listed at 42 C.F.R. § 1001.102(b) is present and supports an exclusion of longer than five years, the following three mitigating factors may be considered for reducing or offsetting the effects of the aggravating factors:

> 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).

29. The aggravating and mitigating factors listed in the regulations must be evaluated in a manner consistent with the remedial purposes of the Act. See Act, section 1102(a).

30. Section 1128 of the Act is intended to protect the integrity of federally-funded health care programs and the welfare of program beneficiaries and recipients 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.

31. The I.G. has the burden of proving that aggravating factors specified in the regulations are present in this case and support excluding Petitioner for a total of 10 years. See 42 C.F.R. § 1005.15(c).

32. Petitioner has the burden of proving that mitigating factors exist and support reducing the portion of the exclusion that exceeds five years. 42 C.F.R. § 1001.102(c)(1)-(3); See 42 C.F.R. § 1005.15(c).

IV. Aggravating Facts Asserted by the I.G.

33. Prior to working for Solid Care in Colorado, Petitioner had worked for or with several other suppliers of medical equipment in the State of California, including Systematic Health Services (SHS) and Emooko Medical Supplies. I.G. Ex. 5; P. Br. at 1-2.

34. On July 6, 1992, Petitioner was convicted in the Superior Court of the State of California, Orange County, pursuant to his having pled guilty to the following felony count:

> On or about September 8, 1989, in the County of Orange, State of California, [Petitioner] unlawfully solicited and received remuneration from Systematic Health Services Company in return for referring Medi-Cal beneficiaries to Emooko Medical Supply Company so that Emooko Medical Supply Company could furnish and arrange to furnish merchandise . . . and . . . for ordering and arranging to order merchandise for which payment may be made under the Medi-Cal Act, in violation of section 14107.2, subdivision (a) of the Welfare and Institutions Code, a felony.

I.G. Ex. 12, 13; P. Ex. 5.

35. By letter dated March 23, 1993, the I.G. notified Petitioner that he was being excluded from the Medicare and Medicaid programs pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act for a period of five years, based on his conviction in Orange County, California. I.G. Ex. 14.

36. There is no regulation or statute which requires the I.G. to impose and direct exclusions based on the timing of convictions.

37. At the time Petitioner was convicted in Colorado, Petitioner had no prior criminal or civil sanctions record within the meaning of 42 C.F.R. § 1001.102(b)(5). FFCL 10-12.

38. Based only on the timing of the exclusions she imposed and directed against Petitioner, the I.G. has proven the existence of a prior administrative sanction record, namely the exclusion imposed in 1993. 42 C.F.R. § 1001.102(b)(5); FFCL 35.

39. The I.G. has not proved that Petitioner's actions resulted in the loss of $1500 or more to any Medicaid program or programs. See, e.g., I.G. Ex. 7-10, 12, 13, 23; P. Ex. 5; 42 C.F.R. § 1001.102(b)(1).

40. The I.G. alleged, but did not prove, that the acts resulting in Petitioner's conviction in Colorado, or similar acts, caused significant physical, mental, or financial harm to any program beneficiary or individual. See, e.g., I.G. Br. at 43 - 44; 42 C.F.R. § 1001.102(b)(3).

41. The I.G. has not proved that Petitioner was overpaid $1500 or more by Medicare or Medicaid due to improper billings, as required by 42 C.F.R. § 1001.102(b)(6). See, e.g., I.G. Ex. 7-10, 12, 13, 23; P. Ex. 5.

42. Petitioner's conviction in Colorado did not result in an order of incarceration. See 42 C.F.R. § 1001.102(b)(4); I.G. Ex. 9.

43. The acts that resulted in Petitioner's conviction in Colorado were committed during a period of less than one year. FFCL 1-5; see 42 C.F.R. § 1001.102(b)(2).

44. For the period after June 1990, there is no evidence that Petitioner engaged in any activity similar to those that resulted in his program-related convictions in California or Colorado.

45. The State of Colorado has never attempted to prove that Petitioner had engaged in any criminal activity in Colorado prior to his arrival in Colorado in January 1990. See FFCL 10.

46. The State of California never charged Petitioner with having engaged in any criminal activity prior to September 8, 1989 or after November 9, 1989. I.G. Ex. 10-12.

47. The State of California had no probable cause for believing that Petitioner had engaged in any program-related offense during any period outside of September to November, 1989. I.G. Ex. 3.

48. The I.G. has not proved her contention that the acts resulting in Petitioner's Colorado conviction, or similar acts, were committed over a period of one year or more. See 42 C.F.R. § 1001.102(b)(2); FFCL 45-47.

49. Under section 1128(a)(1) of the Act, an exclusion of longer than five years will be reasonable in those cases where the evidence relevant to an individual's prior administrative sanction record proves that a five-year exclusion will be inadequate for satisfying the remedial purposes of the Act. See FFCL 29-30.

50. The evidence concerning Petitioner's prior administrative sanction record does not show that a five-year exclusion for his Colorado conviction would be

inadequate for satisfying the remedial purposes of the Act. See FFCL 17-19, 38.

VI. I.G.'s Use of Facts that Predate her Prior Exclusion Determination

51. Petitioner's conviction in California occurred prior to the I.G.'s determination to impose and direct the exclusion at issue based on his Colorado conviction. FFCL 34-35.

52. Petitioner did not appeal the five-year exclusion imposed and directed against him by the I.G. in March 1993 based on his California conviction. FFCL 35.

53. Even if, prior to June 1990 (see FFCL 44-47), Petitioner's actions that resulted in his conviction in Colorado, or similar acts, had

> a) caused at least $1500 in losses to one or more Medicaid programs, or
>
> b) taken place over the period of one year or longer, or
>
> c) caused significant adverse physical, mental, or financial impact on any program beneficiary or other individual,

the I.G. would have had the discretion to consider such facts in setting the length of Petitioner's exclusion in her 1993 determination for his conviction in California. 42 C.F.R. §§ 1001.102(b)(1)-(3).

54. The I.G. had the discretion to consider the California court's order regarding incarceration as an aggravating factor in determining the length of Petitioner's exclusion in 1993. 42 C.F.R. § 1001.102(b)(4); P. Ex. 5.

55. If at any time Petitioner had been overpaid a total of $1500 or more by a Medicaid program due to improper billings submitted prior to June 1990 (see FFCL 1-9), the I.G. had the discretion to consider such facts as an aggravating factor in setting the length of Petitioner's exclusion in 1993 for his conviction in California. 42 C.F.R. § 1001.102(b)(6).

56. The regulation at 42 C.F.R. § 1001.102 is not intended to punish an individual repeatedly, and for increasingly longer periods, on the basis of the same set of facts. FFCL 29-30.

57. Under the facts of this case, a 10-year exclusion would be unreasonable even if Petitioner's circumstances could be interpreted as satisfying the literal language of those aggravating factors listed in 42 C.F.R. § 1001.102(b). FFCL 27, 35, 55-56.

VII. Mitigating Fact Asserted by Petitioner

58. In the opinion of the Chief Special Investigator for the Medicaid Fraud Control Unit, a division of the Colorado Attorney General's Office, it is likely that Petitioner's agreement to testify against co-defendants was a factor which led two co-defendants to plead guilty. I.G. Ex. 19.

59. The I.G. does not dispute that Petitioner cooperated with Colorado State officials, within the meaning of 42 C.F.R. § 1001.102(c)(3)(i). I.G. Br. at 33 n.7, 34; I.G. Reply at 28 n.3, 29.

60. The mitigating factor listed at 42 C.F.R. § 1001.102(c)(3)(i) is present in this case. I.G. Ex. 19.

61. The other mitigating factors at 42 C.F.R. § 1001.102(c)(3) are not present in this case.

62. Even if any of the aggravating factors alleged by the I.G. supported an exclusion of more than five years, Petitioner's cooperation with Colorado officials would make unreasonable a term of exclusion in excess of five years. See FFCL 58-60.

DISCUSSION

I. Rulings on Petitioner's Objections to the I.G.'s Exhibits

As a preliminary matter, I have considered Petitioner's objections to the I.G.'s exhibits. Many of his objections are based on his contention that the I.G.'s exhibits contain hearsay and unproven facts gathered for litigation. P. Reply at 1 - 6. Petitioner argues also that certain of the I.G.'s exhibits contain inaccurate or incomplete information, such as whether he had been working in California as an "independent contractor" or "employee" of SHS and Emooko. E.g., P. Reply at 2, 5. Other aspects of Petitioner's objections are based on his unproven contentions, such as his having been granted immunity from liability[5], and his having been prosecuted

[5] Petitioner alleged that the I.G. failed to produce the "immunity agreement" in accordance with the Best Evidence Rule. P. Reply at 5.

in California for having taken actions in aid of the State's investigation of Medicaid fraud. E.g., P. Reply at 5.

For the reasons specified in my findings (e.g., FFCL 21-24), I have overruled Petitioner's objections based on the alleged existence of an "immunity agreement" and Petitioner's allegations of innocence of the crimes for which he has been convicted.

To the extent that Petitioner's other objections relate to the admissibility of the I.G.'s exhibits, I note first that the Federal Rules of Evidence are not binding in administrative proceedings. I note further that only irrelevant, immaterial, or privileged evidence must be excluded in the case before me. 42 C.F.R. § 1005.17. Evidence of crimes, wrongs, or other acts is admissible for purposes such as showing motive, opportunity, intent, or the existence of a scheme. 42 C.F.R. § 1005.17(g). Moreover, the regulation on the application of aggravating and mitigating factors does not limit me to considering only non-hearsay statements or those facts previously proven in court. 42 C.F.R. §§ 1001.102(b) and (c).

Whether the I.G.'s exhibits contain unreliable or inaccurate information goes to the issue of what weight, if any, should be given to certain portions of the I.G.'s exhibits. For example, the statements made by co-conspirators to describe Petitioner's involvement are nondispositive and may even be not credible in parts. However, such statements may be accorded weight to the extent they are consistent with other, more reliable, evidence of record, such as the statements Petitioner made to investigators. Petitioner has noted his disagreement with certain statements and conclusions of witnesses, and he has placed before me his version of the contested facts. The regulations provide that relevant evidence may be excluded in the interests of fairness. 42 C.F.R. § 1005.17(d). However, I do not find the probative value of any relevant evidence offered by the I.G. to be substantially outweighed by the danger of unfair prejudice to Petitioner or of confusion of the issues before me. 42 C.F.R. § 1005.17(d).

For the foregoing reasons, I have admitted into evidence all of the I.G.'s exhibits. However, I have also given due consideration to Petitioner's arguments and evidence refuting the I.G.'s exhibits.

II. Under the Facts of this Case, the I.G. is Precluded from Imposing an Exclusion of Longer than Five Years

Section 1128 of the Act mandates an exclusion of at least five years where an individual has been convicted of a

criminal offense related to the delivery of an item or service under the Medicare or Medicaid programs. Act, sections 1128(a)(1) and (c)(3)(B). The I.G. introduced credible and persuasive evidence of Petitioner's involvement in a scheme to defraud the Colorado Medicaid program, thus establishing that Petitioner's subsequent conviction in Colorado State court on one felony count of criminal conspiracy was program-related within the meaning of the Act. FFCL 1-15. The I.G.'s authority to impose an exclusion of at least five years is derived from Petitioner's criminal conviction. Act, section 1128(a)(1). Petitioner's conviction remains valid to date. Therefore, Petitioner's assertions of innocence and lack of criminal intent do not bar the imposition of an exclusion. FFCL 22.

Neither can Petitioner bar the exclusion by asserting, as he has, that the State granted him immunity from future liabilities during plea bargaining. See FFCL 21. The State denied the allegation (I.G. Ex. 19), and Petitioner has produced no evidence to support his contention. In addition, the State has no de facto or apparent authority to speak on behalf of the I.G. If Petitioner believes that his guilty plea was improperly secured, he must seek his remedies in the courts of Colorado. The exclusion at issue is barred only if the State of Colorado has overturned or set aside his conviction, neither of which event has occurred. See FFCL 12.

Petitioner alleges as an additional affirmative defense that the I.G.'s exclusion determination of July 21, 1994 is time-barred under 42 C.F.R. § 1004.130(a). P. Br. at 14-15. That regulation applies only to actions involving a Peer Review Organization's recommendations to the I.G. under section 1156 of the Act.[6] The regulations specify no time limit for the I.G. in cases involving exclusions under section 1128(a)(1) of the Act. Thus, there is no support for Petitioner's contention that the exclusion at issue is time-barred. FFCL 24.

I have rejected also Petitioner's request to modify the effective date of his exclusion. FFCL 20. Petitioner asked that I set the effective date of his exclusion at November 5, 1990, to coincide with his guilty plea in Colorado. P. Br. at 15, 23. However, the Act states that the exclusion shall go into effect in accordance with the requirements specified in regulations promulgated by the Secretary. Act, Section 1128(c)(1).

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[6] Moreover, the regulation cited by Petitioner does not preclude the I.G. from imposing a sanction after 120 days of the Peer Review Organization's recommendation; the recommendation takes effect automatically if the I.G. fails to act after 120 days. 42 C.F.R. § 1004.130.

The Secretary's regulation states that the exclusion shall go into effect 20 days from the date of the I.G.'s notice letter. 42 C.F.R. § 1001.2002(b). Here, the I.G. issued the notice letter to Petitioner on July 21, 1994, and the exclusion took effect 20 days thereafter by operation of law. FFCL 18-19. I have no authority to alter the foregoing consequence.

As for the reasonableness of the I.G.'s determination that Petitioner should be excluded for a total of 10 years pursuant to his conviction in Colorado, I have found against the I.G. on that issue. FFCL 57, 62. I have concluded that the length of the exclusion is to be evaluated in accordance with the factors enumerated in 42 C.F.R. § 1001.102 and the remedial purposes of the Act. FFCL 27-30. The presence of a factor deemed "aggravating" by the regulation does not mean that the exclusion period must be lengthened. See FFCL 29.

Even though the I.G. has alleged the presence of five aggravating factors[7] associated with Petitioner's conviction in Colorado, she has proven only the presence of one aggravating factor: Petitioner's prior administrative sanction record. FFCL 38. This factor was met only by virtue of the I.G.'s having earlier imposed a five-year exclusion against Petitioner for having been convicted in California of a program-related offense. FFCL 35, 38, 52. The I.G.'s evidence on the other four aggravating factors she alleged was either non-existent or inadequate. FFCL 39-41, 48.

For example, there was no evidence of record to support the I.G.'s contention that Petitioner's actions caused a significant adverse physical, mental, or financial impact on program beneficiaries or other individuals. See 42 C.F.R. § 1001.102(b)(3). FFCL 40. Also, I examined the periods of time contained in the charges filed against Petitioner by the States of Colorado and California, together with the reports of their investigators. Such evidence showed that, at most, Petitioner was believed to have engaged in wrongful program-related activities for a period of approximately eight months (i.e., from some time in September 1989 until June 1990). I found no credible support for the I.G.'s contention that the criminal acts that resulted in Petitioner's conviction in Colorado, or like activities by Petitioner, took place over a period of one year or more. See 42 C.F.R. § 1001.102(b)(2). FFCL 48.

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[7] There are six aggravating factors listed in 42 C.F.R. § 1001.102(b). The I.G. did not allege that Petitioner's sentence in Colorado included incarceration under 42 C.F.R. § 1001.102(b)(4).

Further, I found lacking the I.G.'s evidence on the amount of financial loss to the programs and the amount of overpayments that have resulted from improper billings. FFCL 39, 41. The financial loss or overpayments must be at least $1500 to be considered aggravating. 42 C.F.R. §§ 1001.102(b)(1) and (6). To prove the existence of these aggravating factors, the I.G. relied upon certain post-exclusion statements from an investigator with the Colorado Medicaid Fraud Control Unit. See I.G. Ex. 23. The investigator examined the State's record of Medicaid payments to Petitioner's employer, Solid Care, for the period from January 1 to December 31, 1990 (which payments totaled $ 65,497.53), as well as certain Patient Order forms seized from Solid Care. Id. The investigator stated as his conclusion that 50 percent of the Medicaid payments (i.e., $32,748.77) had been fraudulently obtained by Solid Care for the year 1990. Id. However, there is no adequate explanation of why the investigator concluded that 50 percent ($32,748.77) of the payments were fraudulently obtained or why any or all of that amount should be attributed to Petitioner's endeavors. I did not find credible the investigator's conclusion, and I did not find that the I.G. had adequately met her burden of showing the existence of the two aggravating factors under 42 C.F.R. §§ 1001.102(b)(1) and (6).

As for Petitioner's prior administrative sanction record, I concluded that the presence of this aggravating factor did not make reasonable the I.G.'s lengthening the exclusion period. FFCL 50.[8] As stated in the agency's commentaries to the regulation at issue, the weight accorded to each aggravating factor "cannot be established according to a rigid formula, but must be determined in the context of the particular case at issue." 57 Fed. Reg. 3316 at 3325 (1992).

In this case, the existence of a prior administrative sanction record reflects only the I.G.'s timing of her exclusion notices to Petitioner. Petitioner was convicted in Colorado before he was convicted in California, even though he had engaged in criminal acts in California before he left to work in Colorado. FFCL 12, 33-34. Only because the I.G. imposed first an exclusion for Petitioner's later-dated California conviction, Petitioner had a prior administrative sanction record when the I.G. later imposed and directed a 10-year exclusion for his Colorado conviction.

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[8] In earlier decisions, I have more fully explained why the factors contained in 42 C.F.R. §§ 1001.102(b) and (c) must be interpreted and applied in a manner consistent with the purposes of the Act. Leonard S. Dino, DAB CR260, at 16-19 and 35-36 (1993); Paul O. Ellis, DAB CR283, at 20 (1993).

Also, I have made certain alternative findings related to the I.G.'s present use of facts that pre-dated her March 1993 decision to sanction Petitioner based on his conviction in California. See FFCL 51-57. I did so in order to address the I.G.'s use of factors that pre-date March of 1993 when she imposed a five-year exclusion based on Petitioner's program-related conviction in California. As discussed above, most of the aggravating factors asserted by the I.G. to support the 10-year exclusion at issue turn on facts that pre-dated the California conviction and the I.G.'s decision to impose a five-year exclusion for it. In addition, I have accorded no weight to Petitioner's California conviction in this proceeding because, in March 1993, the I.G. had already imposed a five-year exclusion based on the California conviction. FFCL 56-57. Petitioner never appealed the earlier imposed five-year exclusion based on his California conviction. FFCL 52. The weight attached by the I.G. to Petitioner's California conviction yielded an unreasonable result that is not consistent with the remedial purposes of the Act.

I do not read the relevant regulation as meaning that the I.G. may lengthen a subsequently imposed exclusion merely because facts pre-dating the earlier imposed exclusion permit the argument or conclusion that certain aggravating factors were present. Nor do I believe that the regulation on aggravating factors should be read to mean that the I.G. is authorized to impose more than one exclusion for the same program-related conviction. Even though Petitioner's California conviction is a "prior" conviction in the sense that it occurred before the I.G. imposed and directed the 10-year exclusion at issue (42 C.F.R. § 1001.102(b)(5), FFCL 51), the linchpin of the regulatory scheme is the Act's remedial purposes. The exclusion authorized by section 1128(a)(1) cannot be punitive in nature.

As a matter of law, an exclusion of five years is the minimum period necessary for protecting the fiscal integrity of the programs and the health of those people the programs serve. Act, sections 1128(a)(1) and (c)(3). FFCL 25; see also FFCL 30. In this case, the evidence relevant to the aggravating factors does not prove that the remedial purposes of the Act would be met by the I.G.'s using facts that pre-date the earlier exclusion she directed and imposed against Petitioner. Nor has the I.G. shown by evidence relevant to those aggravating factors she alleges that the remedial purposes of the Act will be advanced by increasing the minimum mandatory period of exclusion because Petitioner was convicted in California and had received a five-year exclusion from the I.G. as a consequence. Therefore, I do not find reasonable the I.G.'s subsequently imposing an exclusion of more than five years for Petitioner's Colorado conviction.

Having found no basis for increasing the length of Petitioner's exclusion to a period of more than five years, I do not need to address Petitioner's evidence on mitigation. 42 C.F.R. § 1001.102(c). Nevertheless, I have made findings on Petitioner's alleged cooperation with authorities to avoid leaving any potential issue unresolved. I have found in favor of Petitioner under 42 C.F.R. § 1001.102(c)(3) primarily because the I.G. stipulated to the existence of this mitigating factor in her briefs. FFCL 59-60. Petitioner's cooperation with authorities is evidence that he has discontinued his illegal activities and is willing to comply with the law (see FFCL 58). Therefore, even if any aggravating factor warranted adding additional time to Petitioner's exclusion, I would reduce the period of his exclusion to five years based on this mitigating factor. FFCL 62.

CONCLUSION

For the foregoing reasons, I reverse the I.G.'s determination to exclude Petitioner for a period of 10 years and reduce the length of Petitioner's exclusion to five years. This five-year exclusion took effect 20 days after the Inspector General issued her notice letter dated July 21, 1994.

/s/

Mimi Hwang Leahy
Administrative Law Judge