Department of Health and Human Services

# DEPARTMENTAL APPEALS BOARD

## Civil Remedies Division

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| In the Case of: | ) | |
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| Dr. Abdul Abassi, | ) | DATE: August 31, 1995 |
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| Petitioner, | ) | |
| | ) | |
| - v. - | ) | Docket No. C-93-122 |
| | ) | Decision No. CR390 |
| The Inspector General. | ) | |
| | ) | |

## DECISION

In this Decision, I conclude that the 15-year exclusion that the Inspector General (I.G.) imposed against Petitioner from participating in Medicare and other federally financed health care programs is excessive. I modify the exclusion to a term of eight years.

### I. Background

On July 13, 1993, the I.G. notified Petitioner that he was being excluded from participating, for a period of 15 years, in the following programs: Medicare, Medicaid, Maternal and Child Health Services Block Grant, and Block Grants to States for Social Services. The I.G. told Petitioner that he was being excluded because he had been convicted of a criminal offense related to the delivery of an item or service under Medicaid.

Petitioner requested a hearing. The case was assigned originally to Administrative Law Judge Charles Stratton. At the request of Petitioner, Judge Stratton stayed the case. The case was reassigned to me after Judge Stratton's death. In early 1995, Petitioner requested that the stay be removed and that a hearing be held. I scheduled an in-person hearing. On May 24, 1995, I held an in-person hearing in New York City.

I base my Decision in this case on the law, the evidence which I received at the hearing, and on the arguments which the parties made in their posthearing briefs.

II. Issue

Petitioner admits that he was convicted of a criminal offense related to the delivery of an item or service under the New York Medicaid program. ALJ Ex. 1 at 4.[1] Petitioner admits also that the I.G. was required to exclude Petitioner, pursuant to section 1128(a)(1) of the Social Security Act (Act), for at least five years. See Id. Therefore, the only issue in this case is whether the 15-year exclusion imposed by the I.G. is reasonable.

In deciding to modify the exclusion to a term of eight years, I make the following findings of fact and conclusions of law. After each finding or conclusion, I state the page or pages of this Decision at which I discuss the finding or conclusion in detail.

1. The Act requires the Secretary, or her lawful delegate, the I.G., to exclude for at least five years any individual or entity who is convicted of an offense described in section 1128(a)(1) of the Act. Pages 3 - 4.

2. Regulations provide that an exclusion of more than five years may be imposed in any case where there exist factors which the regulations define as aggravating, and that are not offset by factors which the regulations define as mitigating. Pages 3 - 4.

3. The I.G. proved that there exist two aggravating factors. Pages 4 - 6.

4. Petitioner did not prove that there exist any mitigating factors. Pages 6 - 8.

5. The evidence which is relevant to the aggravating factors does not prove that Petitioner is so untrustworthy as to require a 15-year exclusion. Pages 8 - 10.

6. The degree of untrustworthiness established in this case proves that an exclusion of eight years is reasonably necessary to protect the integrity of federally financed health care programs. Pages 8 - 10.

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[1] I refer to the exhibits and transcript as follows: Petitioner's Exhibit - P. Ex. (number at page); I.G.'s Exhibit - I.G. Ex. (number at page); Administrative Law Judge Exhibit - ALJ Ex. (number at page); Transcript - Tr. (page).

## III. Discussion

### A. Governing law

The I.G. imposed Petitioner's exclusion pursuant to section 1128(a)(1) of the Act. This section mandates the exclusion of any individual or entity who has been convicted of a criminal offense related to the delivery of an item or service under Medicare or under any State health care program, including the New York Medicaid program. Exclusions imposed under section 1128(a)(1) must be for a minimum of five years. Act, section 1128(c)(3)(B).

The purpose of the exclusion law is remedial. Congress intended that the Act, including section 1128(a)(1), be applied 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. Exclusions imposed pursuant to section 1128 (including exclusions of more than five years imposed under section 1128(a)(1)) have been found reasonable only insofar as they are consistent with the Act's remedial purpose. Robert Matesic, R.Ph., d/b/a Northway Pharmacy, DAB 1327, at 7 - 8 (1992); Rosaly Saba Khalil, M.D., DAB CR353, at 9 (1995).

Prior to 1993, there were no regulations governing the administrative adjudication of exclusions imposed pursuant to section 1128. In cases decided prior to 1993, appellate panels and administrative law judges of the DAB held that the criteria used to evaluate the trustworthiness of excluded parties, and the reasonableness of exclusions, were derived from the Act itself. These criteria encompassed any evidence relevant to an excluded party's trustworthiness to provide care. Matesic, DAB 1327, at 7 - 8.

However, in January 1993, regulations published originally in January 1992, became binding on administrative adjudicators. 42 C.F.R. Part 1001; 42 C.F.R. § 1001.1(b). The regulations established criteria by which the length of exclusions imposed pursuant to section 1128 are to be evaluated. These regulations provide that, in cases involving exclusions imposed pursuant to section 1128(a) of the Act, the reasonableness of the length of any exclusion imposed for a period of more than five years will be decided based on the presence of, and the weight assigned to, certain aggravating and mitigating factors which the regulations

identify. 42 C.F.R. § 1001.102(b)(1) - (6), (c)(1) - (3).

In any case in which the reasonableness of an exclusion is at issue, I am obligated to decide, using the factors contained in the regulations, whether an exclusion of a particular length is reasonably necessary to protect the integrity of federally financed health care programs and the welfare of the programs' beneficiaries and recipients. Khalil, DAB CR353, at 10. One consequence of the regulations is to limit the factors which I may consider as relevant to an excluded party's trustworthiness to provide care. I may no longer, for example, consider evidence relating to a party's remorse for his or her crimes, nor may I consider evidence relating to a party's rehabilitation, as evidence of that party's trustworthiness. See Matesic, DAB 1327, at 7 - 8. Such evidence does not fall within any of the aggravating or mitigating factors contained in the regulations.

An exclusion must not be punitive. It must comport with the Act's remedial purpose. The presence of aggravating factors in a case is not in and of itself a basis to exclude a party for a particular length of time. In a case involving an exclusion imposed pursuant to section 1128(a)(1), the presence of an aggravating factor or factors not offset by the presence of a mitigating factor or factors, does not automatically justify an exclusion of more than five years. The regulations contain no formula for assigning weight to aggravating and mitigating factors once the presence of any of these factors is established. It is apparent both from the regulations themselves, and from the Act's remedial purpose that, I must explore in detail, and assign appropriate weight to, those factors which are aggravating or mitigating.

### B. The program-related crimes committed by Petitioner

Petitioner is a physician. ALJ Ex. 1 at 1; Tr. at 32 - 33.[2] On August 7, 1991, Petitioner was indicted in the Supreme Court of the State of New York, Bronx County, on felony charges related to the New York Medicaid program.

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[2] At the hearing, I admitted the following exhibits into evidence: ALJ Ex. 1; I.G. Exs. 1 through 15, inclusive; P. Exs. 1 through 12, inclusive. None of the exhibits offered by either party was rejected.

I.G. Ex. 1; ALJ Ex. 1 at 1. On June 19, 1992, after a jury trial, Petitioner was convicted on 18 counts. I.G. Ex. 2 at 1; I.G. Ex. 3; ALJ Ex. 1 at 2.

Petitioner was convicted of one count of grand larceny in the third degree, and 17 counts of offering a false instrument for filing in the first degree. I.G. Ex. 3 at 1. The gravamen of these offenses is that Petitioner submitted or caused to be submitted false Medicaid claims to a fiscal agent for the New York Medicaid program. I.G. Ex. 1 at 2.

During a six-month period, from November 1987 to May 1988, Petitioner engaged in fraud against the New York Medicaid program totalling $75,000. The exhibits relating to Petitioner's indictment and conviction do not describe his crimes in detail. See I.G. Exs. 1 - 4. It is not clear from these exhibits precisely how Petitioner defrauded the New York Medicaid program. The exhibits prove that Petitioner engaged in fraud beginning on or about November 1, 1987 and continuing to about May 1, 1988. I.G. Ex. 1 at 1 - 20. That fraud consisted of submitting, or causing to be submitted, false Medicaid reimbursement claims for radiological services. Id. Petitioner was sentenced to pay restitution in the amount of $75,000. I.G. Ex. 2; I.G. Ex. 4 at 31.

Petitioner essentially denies committing crimes, notwithstanding the proof of his indictment and conviction. According to Petitioner, he was an innocent bystander to a scheme to defraud the New York Medicaid program that was perpetrated by others. I find Petitioner's explanation of his conduct to be self-serving and not credible.[3]

Petitioner testified that, beginning in March 1987, he rented an office which he sublet to two physicians. Tr. at 40 - 41. He testified that he closed the office in June 1987, in response to complaints from neighborhood

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[3] I did not receive Petitioner's testimony as evidence relating to the issue of whether he committed program-related crimes. Petitioner conceded that he was convicted of program-related crimes. Moreover, the evidence establishing his indictment and conviction of criminal offenses related to the delivery of items or services under the New York Medicaid program is irrefutable proof of his conviction of an offense within the meaning of section 1128(a)(1) of the Act. I received Petitioner's testimony as evidence about the possible presence of aggravating and mitigating factors.

residents about the patients who were visiting the office. Tr. at 43.

Petitioner acknowledged that the physicians who rented the office from him used that office to generate false Medicaid reimbursement claims for sonograms. Tr. at 42 - 43. However, he denied that he was aware of this fraud during the time that he sublet the office to the physicians. Tr. at 44 - 45. Petitioner asserted that he first became aware that these physicians may have engaged in fraud in 1991, after being contacted by investigators. Id. Petitioner acknowledged also receiving a kickback from an individual, Mabbo Babassi, which, evidently, was in some respects related to a scheme to defraud Medicare. Tr. at 56, 66 - 67. However, the record of this case is unclear as to how this payment relates to the crimes of which Petitioner was convicted. Petitioner denied that he ever received reimbursement checks from the New York Medicaid program. Tr. at 56.

C. The presence of aggravating factors

The July 13, 1993 notice of exclusion which the I.G. sent to Petitioner told him that he was being excluded for a period of 15 years, based on the alleged presence of three aggravating factors. According to the I.G., the alleged aggravating factors consisted of the following:

- Petitioner's crimes caused financial damage to the New York Medicaid program of more than $200,000.

- Petitioner was sentenced to imprisonment for one year.

- Petitioner committed his criminal acts over a two-year period, from 1986 - 1988.

The evidence in this case establishes the presence of two aggravating factors. First, the I.G. proved that Petitioner engaged in crimes resulting in financial loss to the New York Medicaid program in excess of $1500. 42 C.F.R. § 1001.102(b)(1). As I find above, Petitioner committed fraud against the New York Medicaid program in the amount of $75,000 (not the more than $200,000 alleged by the I.G.).

Second, Petitioner was sentenced to incarceration. 42 C.F.R. § 1001.102(b)(4). The evidence establishes that Petitioner was sentenced to a term of one year in prison, as was alleged by the I.G. I.G. Ex. 4 at 30 - 32.

The I.G. did not prove the presence of a third aggravating factor, the alleged commission of crimes by Petitioner during a period of more than one year. See 42 C.F.R. § 1001.102(b)(2). As I find above, Petitioner committed his crimes over a period of six months.[4]

D. The absence of mitigating factors

Petitioner asserts that the two aggravating factors proved by the I.G. are offset by a mitigating factor. He contends that, subsequent to his conviction, he cooperated with prosecuting authorities, resulting in the conviction of other individuals. See 42 C.F.R. § 1001.102(c)(3)(i).

Petitioner did not prove that his cooperation with prosecuting authorities resulted in the conviction of other individuals. Therefore, I do not find that Petitioner proved the presence of the mitigating factor described in 42 C.F.R. § 1001.102(c)(3)(i).

Petitioner has the burden of proving the presence of a mitigating factor. His burden here consisted of proving that: (1) he cooperated with prosecuting authorities; and (2) that his cooperation resulted in the conviction of another individual or individuals.

Petitioner proved the first element of his burden. The evidence establishes that, subsequent to his conviction, Petitioner cooperated with prosecuting authorities by supplying them with information concerning the possible criminal activities of other individuals. I.G. Ex. 13; I.G. Ex. 15 at 2; P. Ex. 1; Tr. at 48 - 55.

However, the evidence does not prove that Petitioner's cooperation has so far resulted in the conviction of others. The prosecuting authorities whom Petitioner has communicated with have not stated or suggested that Petitioner's cooperation has led to or contributed to the conviction of other individuals. See I.G. Ex. 13; I.G. Ex. 15 at 2; P. Ex. 1. Petitioner did not offer any meaningful evidence to prove that any individual was convicted as a result of Petitioner's cooperation. Petitioner testified that one person pled guilty to criminal charges after Petitioner had supplied information about that person to prosecuting authorities. Tr. at 51 - 53. Petitioner averred that he was willing

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[4] The I.G. did not assert, either at the hearing or in her posthearing brief, that she had proven the presence of this third alleged aggravating factor.

to testify against that individual had he not pled guilty. Id. However, Petitioner did not offer any evidence to show that his cooperation affected that individual's decision to plead guilty.

The I.G. and Petitioner dispute the meaning of the term "resulted in" as set forth at 42 C.F.R. § 1001.102(c)(3)(i). It is not necessary for me to decide the meaning of that term in order for me to conclude that Petitioner did not prove that his cooperation resulted in the conviction of another person. Even the broadest definition of the term "resulted in" would require evidence of some causal relationship between the individual's cooperation and the conviction of another individual in order to prove the presence of a mitigating factor. Here, there is no evidence of any causal relationship between Petitioner's cooperation with prosecuting authorities and the conviction of another individual.

At the hearing, I received evidence from Petitioner concerning his conduct after his conviction. This evidence established that Petitioner has pursued his medical studies and that he presently has a fellowship in cardiology at Columbia University. Tr. at 45. The evidence includes also Petitioner's testimony that he has paid $30,000 of the $75,000 restitution that he was ordered to pay. Tr. at 48. It includes also a letter from Richard S. Harrow, the prosecutor in the criminal case against Petitioner. I.G. Ex. 13; P. Ex. 1. In that letter, Mr. Harrow opines that Petitioner is sincerely remorseful and that Petitioner should be given a second chance to pursue his medical career. Id.

This evidence would have been relevant to the issue of Petitioner's trustworthiness to provide care under the criteria for evaluating trustworthiness established by the Matesic decision. However, it does not relate to any of the mitigating factors listed in 42 C.F.R. § 1001.102(c). Therefore, I cannot consider this evidence to be relevant, either to the issue of whether mitigating factors were established by Petitioner, or to the broader issue of Petitioner's trustworthiness to provide care to Medicare beneficiaries and Medicaid recipients.

### E. Evaluation of the length of exclusion

The presence of two aggravating factors in this case, not offset by a mitigating factor, means that an exclusion of more than five years may be reasonable. However, as I hold at Part III.A. of this Decision, the presence of these factors does not mean that an exclusion of any

particular length in excess of five years is reasonable. I conclude that an exclusion of eight years is reasonable in this case. My conclusion is a measure of the Petitioner's lack of trustworthiness, as established by the aggravating factors proved by the I.G. and the lack of any mitigating factor.

The evidence pertaining to the two aggravating factors established by the I.G. proves that Petitioner committed crimes which had a serious financial impact on the New York Medicaid program. Petitioner engaged in a series of fraudulent acts over a six-month period that defrauded Medicaid of $75,000. The persistence with which Petitioner engaged in his misconduct, as evidenced by the 18 separate criminal counts of which he was convicted, coupled with the damages he caused, suggests a high degree of untrustworthiness. This evidence proves the need for an exclusion of more than five years to protect the integrity of federally financed health care programs.

However, the evidence in this case does not prove that Petitioner's conduct was so egregious as to justify a level of untrustworthiness meriting a 15-year exclusion. An exclusion of 15 years is so lengthy that, depending upon the age and particular circumstances of the individual, it may effectively permanently preclude that individual from participating as a provider in federally funded health care programs. Exclusions of 15 years or more should be imposed only on the most untrustworthy individuals. Such exclusions are justified in cases where an individual demonstrates by his or her conduct that he or she is so untrustworthy that it is possible that he or she may never again become a trustworthy provider of items or services under federally funded programs.

There are cases in which a provider's conduct, as is demonstrated by the aggravating factors proved by the I.G., is so egregious as to justify an exclusion of 15 years. In Khalil, I sustained a 15-year exclusion. In that case, the petitioner had been a willing and active participant in a massive fraud scheme against the New York Medicaid program. I found that her conduct caused Medicaid to be defrauded of more than $1,900,000. Khalil at 11. She was overpaid more than $135,000 as a direct consequence of her fraud. Id. at 12. Her crimes were so serious that she was sentenced to 41 months of incarceration. Id.

The evidence in this case does not establish that Petitioner manifests the level of culpability, or lack of trustworthiness, that I found the petitioner manifested

in Khalil. Petitioner's crimes, while serious, are of a lesser magnitude than those that were established to have been committed by the petitioner in Khalil.

The total damages caused by Petitioner in this case to the New York Medicaid program are substantially less than were caused by the Petitioner in Khalil. Perhaps more significant, the record in this case is practically silent as to the nature of Petitioner's involvement in the crimes of which he was convicted. By contrast, the record in Khalil was replete with evidence that proved that the petitioner in that case was an active and eager participant in a scheme to defraud the New York Medicaid program. The length of the sentence imposed on the Petitioner in this case -- one year's imprisonment -- is additional evidence that Petitioner's crimes are of a lesser degree than those committed by the petitioner in Khalil, who was sentenced to 41 months in prison.

## IV. Conclusion

I conclude that the I.G. was authorized to exclude Petitioner for more than five years. The exclusion of 15 years that the I.G. imposed is excessive, because it is not supported by the evidence relating to the aggravating factors proved by the I.G. An eight-year exclusion is reasonable. Therefore, I sustain an exclusion of Petitioner for a period of eight years.

/s/

Steven T. Kessel
Administrative Law Judge