Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Sheldon Stein, M.D.,	)	DATE: July 19, 1991
	)	
Petitioner,	)	
	)	Docket No. C-342
- v. -	)	
	)	Decision No. CR144
The Inspector General.	)	
	)	

DECISION

In this case, governed by section 1128 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 23, 1990, that he was being excluded from participation in the Medicare and State health care programs until he obtained a valid license to practice medicine in the State of New York.[1] Petitioner was advised that his exclusion resulted from the revocation of his license to practice medicine in the State of New York by New York's Commissioner of Education. Petitioner was further advised that his exclusion was authorized by section 1128(b)(4)(A) of the Act.

By letter of January 12, 1991, Petitioner requested a hearing before an Administrative Law Judge (ALJ), and the case was assigned to me for hearing and decision.

I held a prehearing conference in this case on February 19, 1991. At that conference, I granted the parties' request to stay this action until March 26, 1991, in order for them to commence possible settlement

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act 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.

discussions. I held a second prehearing conference on March 26, 1991. At this conference, the parties informed me that they were unable to reach a settlement of the case. On April 18, 1991, I conducted an evidentiary in-person hearing in this case in Albany, New York.

Based on the evidence introduced by both parties at the hearing and on the applicable law, I conclude that the I.G. had authority to exclude Petitioner and that the exclusion imposed and directed against Petitioner by the I.G. is reasonable under the circumstances of this case.

APPLICABLE STATUTES AND REGULATIONS

1. The Federal Statute.

Section 1128 of the Act is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1990 Supp.). Section 1128(b)(4)(A) states that the Secretary may exclude any individual or entity from the Medicare and Medicaid programs whose license to provide health care has been revoked or suspended by any State licensing authority, or who otherwise lost such a license, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity.

2. The Federal Regulations.

The governing regulations (Regulations) are codified in 42 C.F.R. Parts 498, 1001, and 1002 (1990). Part 498 governs the procedural aspects of this exclusion case; Parts 1001 and 1002 govern the substantive aspects.

ISSUES

The issues in this case are:

> 1. whether Petitioner's license to practice medicine was revoked or suspended by a State licensing agency for reasons bearing on his professional competence, professional performance, or financial integrity, within the meaning of section 1128(b)(4)(A) of the Act;
>
> 2. whether the indefinite exclusion imposed and directed by the I.G. against Petitioner is reasonable and appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW [2] [3]

1. At all relevant times until June 3, 1990, Petitioner was a physician licensed to practice medicine in the State of New York and was a practicing orthopedic surgeon. Tr. 4; I.G. Ex. 1/1.

2. On March 30, 1988 (as amended on July 18, 1988), New York's Department of Health, State Board of Professional Medical Conduct, in a "Statement of Charges", charged Petitioner with 25 specifications of practicing with gross negligence and/or gross incompetence, one specification of practicing with negligence and/or incompetence on more than one occasion, and one specification of failing to maintain adequate records. I.G. Ex. 1

3. These charges pertained to Petitioner's orthopedic treatment, between January 1983 and August 1986, of seven patients who were referred to as patients A through G. I.G. Ex. 1.

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

[3] Citations to the record and to Board cases in this Decision are as follows:

I.G. Exhibits	I.G. Ex. (number/page)
I.G. Brief	I.G. Br. (page)
Petitioner's Exhibits	P. Ex. (number/page)
Petitioner's Brief	P. Br. (page)
Findings of Fact and Conclusions of Law	FFCL (number)
Departmental Appeals Board ALJ Decisions	DAB Civ. (docket no./ date)
Departmental Appeals Board Appellate Decisions	DAB App. (decision no./date)

4. These 27 specifications in the charges were principally concerned with Petitioner's allegedly faulty performance of a surgical procedure known as "open reduction and internal fixation", which consisted of the placement of plates and/or pins to patients' bones to repair fractures. I.G. Ex. 1, 6.

5. Pursuant to an in-person evidentiary hearing, a Hearing Committee of the New York Department of Health's State Board for Professional Medical Conduct (Hearing Committee), consisting of two physicians and a lay person, made 90 enumerated Findings of Fact and recommended that: 1) five allegations of gross negligence and/or gross incompetence be sustained; 2) so much of Specification 26 as recited the 17 allegations of negligence and/or incompetence be sustained; and 3) the allegation of failure to keep adequate records be sustained. I.G. Ex. 2.

6. The Hearing Committee further recommended that Petitioner's medical license be revoked "for the consistent pattern of negligence and incompetence evidenced by the Respondent in his practice of the profession." I.G. Ex. 2/51.

7. On June 30, 1989 (with a clarifying addition of January 12, 1990), New York's Commissioner of Health recommended that New York's Board of Regents: 1) accept the recommendation of the Hearing Committee in full; and 2) issue an order adopting and incorporating as its determination the recommendations of the Hearing Committee. I.G. Ex. 3.

8. On February 16, 1990, New York's Regent's Review Committee unanimously recommended that the Hearing Committee's 90 Findings of Fact be adopted by the Board of Regents. However, the Regent's Review Committee recommended that Petitioner's license not be revoked. I.G. Ex. 4.

9. The Regent's Review Committee considered: 1) Petitioner's relative youth at the time of the incidents in question; 2) the significant education and training taken by Petitioner to improve his skills since those incidents; 3) Petitioner's unblemished record since the incidents; 4) the significant praise and favorable evaluation of Petitioner by physicians working directly with him in treating patients; 5) the difficult medical nature of the cases involved; and 6) Petitioner's being found guilty of only seven of the 27 specifications of the charges. I.G. Ex. 4/5 - 6.

10. While the Regent's Review Committee did not unanimously agree on the recommended measure of discipline, they did unanimously agree that revocation was:

> not appropriate in this case as it overlooks both the difficult and close medical issues involved in the charges and the respondent's own circumstances and efforts to correct any deficiencies in his practice of orthopedics. Revocation, in our unanimous opinion, would be a regressive penalty, depriving this relatively young doctor, who has shown exceptional effort in striving to improve his medical skills in the area of orthopedics, from utilizing his significant skills to serve the public. I.G. Ex. 4/6.

11. By a vote of two to one, the Regent's Review Committee recommended that: 1) Petitioner be censured and reprimanded upon each specification of the charges of which they recommended he be found guilty; 2) Petitioner be placed on two years probation, the terms to include monitoring Petitioner's practice and continuing education in orthopedics and patient management. The third Regent's Review Committee member, "taking a more serious view of the actual misconduct, while still acknowledging the significance of the mitigating factors," recommended that: 1) Petitioner's license be suspended for two years upon each specification of charges for which they recommended he be found guilty; 2) the suspensions run concurrently; 3) Petitioner be placed on two years' probation, terms to include monitoring Petitioner's practice and continuing education in orthopedics and patient management. I.G. Ex. 4/6 - 8.

12. On March 30, 1990, New York's Commissioner of Education ordered, pursuant to a March 23, 1990 vote of the Board of Regents of the University of the State of New York, that: 1) the Hearing Committee's 90 Findings of Fact and Conclusions as to Petitioner's guilt be accepted and the Commissioner of Health's recommendation be accepted; 2) Petitioner was guilty of the charges as determined by the Hearing Committee and the Commissioner of Health; and 3) the recommendation of the Regents Review Committee be modified as to the measure of discipline, "based upon the serious nature of the misconduct committed and in agreement with the hearing committee and Commissioner of Health, respondent's license to practice as a physician in the State of New York be revoked . . ." I.G. Ex. 5.

13. Petitioner was eligible to apply for restoration of his license one year from the effective date of service of the Order. The Order stated that Petitioner's application would not automatically be granted. I.G. Ex. 5.

14. Petitioner was eligible to apply for reinstatement of his medical license in the State of New York on June 3, 1991. Petitioner is currently submitting his application for reinstatement. P. Br. 13; Tr. 4.

15. On December 18, 1990, the State of New Jersey, Department of Law and Public Safety, Division of Consumer Affairs, State Board of Medical Examiners, promulgated a Consent Order in the matter of the suspension of Petitioner's license to practice medicine and surgery in New Jersey. This matter was opened following the revocation of Petitioner's license to practice medicine in New York. I.G. Ex. 7/1 - 2.

16. New Jersey suspended Petitioner's license to practice medicine for one year, but stayed that suspension under the following conditions: 1) Petitioner was to discontinue the performance of open reductions and internal fixations for one year, or until his New York license was restored; 2) Petitioner was to undertake 100 hours of continuing medical education in the field of orthopedic surgery: 3) Petitioner was to pay the costs of the matter; and 4) prior to reinstatement of full surgical privileges, Petitioner was to personally appear before the Board for an inquiry as to his compliance with the terms of the Order. I.G. Ex. 7/2 - 3.

17. Petitioner appealed the revocation of his license to practice medicine in New York. On March 28, 1991, an appellate panel of New York's Supreme Court, Appellate Division, Third Judicial Department (N.Y. Appellate Division), upheld the revocation of Petitioner's license. I.G. Ex. 6.

18. The N.Y. Appellate Division found that: 1) the determination to revoke Petitioner's license was supported by substantial evidence and that there was no "irrational prejudice" exhibited against Petitioner by the state's expert witness; and 2) the punishment imposed by the Board of Regents was not disproportionately harsh in light of the nature of the offenses. I.G. Ex. 6/2 - 3.

19. The N. Y. Appellate Division specifically found that the patients affected by Petitioner's misconduct all had to undergo subsequent painful and risky surgery as a

result of his conduct. Several of Petitioner's patients suffered deformities, infection, necrosis, and wound dehiscence, and one 13-year-old patient also sustained nerve and muscle damage. I.G. Ex. 6/2.

20. The N.Y. Appellate Division specifically took into consideration: 1) the letters of recommendation from Petitioner's colleagues; 2) that the misconduct occurred relatively early in Petitioner's medical career; and 3) that Petitioner has since participated in significant amounts of continuing education. I.G. Ex. 6/2.

21. The Secretary of DHHS (the Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662, May 13, 1983.

22. Section 1128(b)(4)(A) of the Act authorizes the I.G. to impose and direct exclusions of individuals whose license to provide health care has been revoked or suspended by any State licensing authority, for reasons bearing on the individual's professional competence, professional performance, or financial integrity.

23. On November 23, 1990, the I.G. excluded Petitioner from participation in the Medicare program and directed that he be excluded from participation in the Medicaid program, pursuant to section 1128(b)(4)(A) of the Act.

24. The I.G. had a basis upon which to impose and direct an exclusion against Petitioner. FFCL 12.

25. The I.G. excluded Petitioner until such time as he received a license to practice medicine in New York.

26. After taking into consideration all of Petitioner's arguments against revocation of his license, the Board of Regents decided that Petitioner's conduct was so serious that his license should be revoked, and the N.Y. Appellate Division unanimously upheld the revocation. These arguments included Petitioner's assertions before me that: 1) his revocation was based on six cases out of thousands; 2) since these cases he has maintained an unblemished record for medical practice; 3) the New York State Society of Orthopaedic Surgeons believes he should be licensed; 4) his license was not revoked in New Jersey; 5) he is no danger to the public; 6) he has completed 500 hours of continuing medical education in orthopedic surgery; 7) his colleagues support him. P. Br. 6, 9 - 10; FFCL 2 - 20.

27. Petitioner now wants to do an orthopaedic fellowship at the State University of New York, where he would be treating Medicare and Medicaid patients. Petitioner is able to take this fellowship because he has a New Jersey license, and New York does not require that a physician have a New York license for fellowship positions. The restrictions on his New Jersey license, however, will not apply to the fellowship, as it is a supervised position. Tr. 67 - 68, 97 - 98.

28. Petitioner never acknowledged the gravity of his conduct towards these patients, and is still arguing that it was not as a result of his surgery that the patients in question may have suffered deformities, infection, necrosis, or nerve and muscle damage. Tr. 93 - 94.

29. The exclusion imposed and directed against Petitioner by the I.G. is reasonable and appropriate. FFCL 1 - 28.

DISCUSSION

Petitioner, a practicing orthopedic physician, had his license to practice medicine revoked by the State of New York. Petitioner acknowledges that the I.G. had a technical basis to exclude him from participation in the Medicare and Medicaid programs under section 1128(b)(4)(A) of the Act. Tr. 5. Petitioner believes, however, that because the I.G.'s authority to exclude under section 1128(b)(4)(A) is permissive, the I.G. should have exercised his permissive authority and chosen not to exclude him, given what Petitioner perceives are overwhelming mitigating factors in his case. P. Br. 1 - 11. Petitioner further argues that, even if the I.G. acted properly in excluding Petitioner from the Medicare and Medicaid programs, there is no justification to exclude Petitioner until he obtains his license to practice medicine again in New York. I disagree.

1. Petitioner's license to practice medicine in New York was revoked by a State licensing authority for reasons bearing on his professional competence, professional performance, or financial integrity, within the meaning of section 1128(b)(4)(A) of the Act.

Petitioner has admitted that his license was revoked by the State of New York, and that the revocation concerned his professional competence, professional performance, or financial integrity. Tr. 5. In order for the I.G. to have a basis on which to exclude, all that Congress required, pursuant to section 1128(b)(4)(A), was that an

individual's license be revoked by a State licensing authority, for reasons bearing on his professional competence, professional performance, or financial integrity. I find that basis has been met in this case (see FFCL 12) and that the I.G. had the authority to exclude Petitioner.

2. The I.G. properly exercised his discretion to exclude Petitioner in this case.

Congress promulgated section 1128(b)(4)(A) to:

> protect Medicare and Medicaid patients from practitioners who lose their licenses in one State, move to another State, and continue to treat program beneficiaries. The provisions of this bill would permit the Secretary to exclude such persons from Medicare in all States and to require the state to exclude them from participation in any State health care program.

S. Rep. No. 109, 100th Cong., 1st Sess. 1, reprinted in 1987 U.S. Code Cong. & Admin. News, 682, 688. While Congress did not mandate a minimum or maximum period of exclusion in this instance, Congress clearly envisioned that unless the exclusion was for "minor infractions not relating to quality of care," Congress intended some period of exclusion for practitioners who lost their licenses. Id.

Petitioner argues that because section 1128(b)(4)(A) is a permissive statute, the I.G. should have chosen not to exclude him. He argues that because the purpose of section 1128 is to ensure the quality of care provided to Medicare and Medicaid beneficiaries and recipients, and because he believes he has overwhelmingly demonstrated that he has met that standard, a reasoned evaluation by the I.G. would be to keep Petitioner in the programs. P. Br. 3 - 4. Petitioner's arguments are misplaced. They relate more to the reasonableness of the length of his exclusion. Given the revocation of Petitioner's license, which was upheld by the N.Y. Appellate Division, it was proper for the I.G. to determine to exclude Petitioner for some length of time.

Furthermore, while an ALJ does have the authority to determine whether there is a legal basis for a permissive exclusion, an ALJ does not have authority under the Act to decide whether or not the I.G. should have exercised his discretion in making a determination to exclude a petitioner. An ALJ also has the authority to decide whether the length of the exclusion imposed and directed

against a petitioner is reasonable and appropriate. See 42 C.F.R. 1001.128(a); Jack W. Greene, DAB App. 1078 at 17 (1989); Betsy Chua, M.D. and Betsy Chua, M.D., S.C., DAB Civ. Rem. C-139 at 9-10 (1990), aff'd DAB App. 1204 at 5 (1990).

3. Exclusion of Petitioner until such time as he regains his license to practice medicine in the State of New York is reasonable and appropriate.

In order to modify an exclusion imposed and directed against a petitioner by the I.G., I must find that the length of the exclusion imposed was so extreme or excessive as to be unreasonable. See 48 Fed. Reg. 3744 (January 27, 1983). In deciding whether or not an exclusion under section 1128(b)(4)(A) is reasonable, I must review the evidence with regard to the purpose of section 1128 of the Act. Joel Davids, DAB Civ. Rem. C-278 (1991); Roderick L. Jones, DAB Civ. Rem. C-230 (1990); Frank J. Haney, DAB Civ. Rem. C-156 (1990).

Congress enacted the exclusion law to protect the integrity of federally funded health care programs. Among other things, the law was designed to protect program recipients and beneficiaries from individuals who have demonstrated by their behavior that they threatened the integrity of federally funded health care programs or that they could not be entrusted with the well-being and safety of beneficiaries and recipients. See S. Rep. No. 109, 100th Cong., 1st Sess. 1, reprinted in 1987 U.S. Code Cong. and Admin. News 682.

There are two ways that an exclusion imposed and directed pursuant to section 1128 of the Act advances this remedial purpose. First, an exclusion protects programs and their beneficiaries and recipients from untrustworthy providers until they demonstrate that they can be trusted to deal with program funds and to serve beneficiaries and recipients. Second, an exclusion deters providers of items or services from engaging in conduct which threatens the integrity of programs or the well-being and safety of beneficiaries and recipients. See H. R. Rep. No. 393, Part II, 95th Cong. 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News 3072.

An exclusion imposed and directed pursuant to section 1128(b)(4)(A) will likely have an adverse financial impact on the person against whom the exclusion is imposed. However, the law places program integrity and the well-being of beneficiaries and recipients ahead of the pecuniary interests of providers. An exclusion is not punitive if it reasonably serves the law's remedial

objectives, even if the exclusion has a severe adverse financial impact on the person against whom it is imposed.

No statutory minimum mandatory exclusion period exists in cases where the I.G.'s authority arises from section 1128(b)(4)(A), nor is there a requirement that a petitioner be excluded until he or she obtains a license from the state where their license was revoked. However, an exclusion until a petitioner obtains a license from the state where his or her license was revoked is not per se unreasonable. See Lakshmi N. Murty Achalla, M.D., DAB App. 1231 at 9 (1991); Richard L. Pflepsen, D.C., DAB Civ. Rem. C-345 (1991); John W. Foderick, M.D., DAB App. 1125 (1990).

By not mandating that exclusions from participation in the programs be permanent, however, Congress has allowed the I.G. the opportunity to give individuals a "second chance." An excluded individual or entity has the opportunity to demonstrate that he or she can and should be trusted to participate in the Medicare and Medicaid programs as a provider. See Achalla, supra.

The determination of when an individual should be trusted and allowed to reapply to the I.G. for reinstatement as a provider in the Medicare and Medicaid programs is a difficult issue. It is subject to discretion without application of any mechanical formula. The federal regulations at 42 C.F.R. 1001.125(b) guide me in making this determination. This hearing is, by reason of section 205(b) of the Act, de novo. Evidence which is relevant to the reasonableness of an exclusion is admissible whether or not that evidence was available to the I.G. at the time the I.G. made his exclusion determination. I do not, however, simply substitute my judgment for that of the I.G. An exclusion determination will be held to be reasonable where, given the evidence in the case, it is shown to fairly comport with legislative intent. "The word 'reasonable' conveys the meaning that . . . [the I.G.] is required at the hearing only to show that the length of the [exclusion] determined . . . was not extreme or excessive." (Emphasis added.) 48 Fed. Reg. 3744 (1983).

Given congressional intent to exclude untrustworthy providers, I also consider those circumstances which indicate the extent of an individual's or entity's trustworthiness. Essentially, I evaluate the evidence to determine whether the exclusion comports with the legislative purposes outlined above. Thus, a determination of an individual's trustworthiness in a

section 1128(b)(4)(A) case necessitates an examination of the following considerations: 1) the nature of the license revocation and the circumstances surrounding it; 2) the impact on the Medicare and Medicaid programs; 3) whether and when that individual recognized the gravity of the conduct that initiated the license revocation action; 4) the type and quality of help sought to correct the behavior leading to the license revocation; and 5) the extent to which the individual has succeeded in rehabilitation. See Thomas J. DePietro, R.Ph., DAB Civ. Rem. C-282 (1991).

Petitioner has submitted an exhaustive amount of evidence purporting to show that he is no longer a threat to the Medicare and Medicaid programs and that he is a trustworthy provider. Petitioner has submitted letters attesting to his competence from physicians who have worked with him, audited his work, or are otherwise acquainted with his work. P. Ex. 4, 6, 7, 13. He also submitted his reappointment to Vasser Brothers Hospital in 1989, letters of support from patients, evidence as to continuing education courses he has taken (although there is a dearth of information regarding the content of these courses), an amicus brief on Petitioner's behalf filed with the N.Y. Appellate Division by the New York State Society of Orthopaedic Surgeons (which did not persuade the five judge panel to overturn Petitioner's license revocation), a 1990 Board certification in arthroscopic surgery, and a current Drug Enforcement Administration certificate. P. Ex. 5, 8, 9, 11, 12, 15, 17.

Based on this evidence, Petitioner has argued before me that: 1) his revocation was based on six cases out of thousands; 2) since these cases he has maintained an unblemished record for medical practice; 3) the New York State Society of Orthopaedic Surgeons did not believe Petitioner's license should be revoked; 4) New Jersey did not revoke his license, but only put conditions on it; 5) he is no present danger to the public; 6) he has completed over 500 hours of continuing medical education in orthopedic surgery, much of it involving hands on practice in the techniques of open reduction and internal fixation; and 7) his colleagues find him a knowledgeable, caring and competent physician. P. Br. 6, 9 - 10. These are all arguments he previously made before the Board of Regents and the N.Y. Appellate Division against his license revocation, and which they found did not mitigate against their decision to revoke his license. FFCL 2 - 20, 26.

Petitioner has not submitted any additional substantive evidence as to his trustworthiness to practice surgery as an orthopedic surgeon. The two highest authorities reviewing Petitioner's license revocation determined that a one year revocation of his medical license was indicated. FFCL 12, 13, 17, 18. The N.Y. Appellate Division specifically found that "the truth remains that the patients affected by petitioner's misconduct all had to undergo subsequent surgery with its attendant pain and risks as a result of his conduct. Several patients suffered deformities, infection, necrosis, and wound dehiscence, while one patient, a 13-year-old girl, also sustained nerve and muscle damage. In light of this type of serious consequences to petitioner's patients as a result of his conduct, we cannot conclude that revocation of his license was a disproportionately harsh punishment." I.G. Ex. 6/2 - 3; FFCL 19.

This is not a case of a petitioner seeking modification of his exclusion so that he can practice medicine in another state in which he has a license.[4] Petitioner now wants to practice medicine in the State of New York in a fellowship position. In this position, Petitioner can practice medicine in New York utilizing his New Jersey license and circumvent both his license revocation in New York and the restrictions New Jersey placed on his license. FFCL 27. Participation as a provider in the Medicare and Medicaid programs is a prerequisite to the fellowship position.

In order for me to determine Petitioner's trustworthiness, I must first be able to find that Petitioner has acknowledged the gravity of the conduct which led to his license revocation. Until Petitioner does this, he cannot go far towards rehabilitating his trustworthiness. In this case Petitioner has never fully acknowledged that he may have made mistakes in his treatment of the patients in question, in spite of the fact that <u>every</u> tribunal reviewing Petitioner's conduct found that he practiced with gross negligence and/or gross incompetence in the treatment of the patients in question. FFCL 5, 7, 8, 12, 17. Even Petitioner's own witness stated that, "I think some of the [Petitioner's] techniques were not as exacting as I would have liked . .

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[4] In Petitioner's January 12, 1990, request for a hearing in this case, Petitioner asserted that he had job offers in and might relocate to another state. However, Petitioner now asserts that, although he continues to practice in New Jersey, he wants to take up a fellowship position in New York. P. Br. 13.

. and I think that there were some that the results were not as good as you would have wanted." Tr. 112. Petitioner still argues, however, that his license revocation came about not because of any deficiencies on his part, but because there was a conflict of interest between the administration of the hospital where he performed the surgeries in question and a general surgeon at the hospital at which he operated on the patients in question and that the State's expert witness was biased against him. Petitioner raised both these issues in his N.Y. State actions and the State found against him in both instances. Tr. 80 - 81, 100 - 101, 103 - 104; FFCL 18.

While it is commendable of Petitioner to have taken significant amounts of continuing education in various fields of orthopedics (this shows that Petitioner does realize, to some extent, that he needed remedial education), I cannot find that Petitioner has come so far along in his rehabilitation as to make his exclusion by the I.G. so extreme or excessive as to be unreasonable. In essence, what Petitioner is asking me to do is to find that his license revocation was unreasonable and that he is currently trustworthy to participate in the Medicare and Medicaid programs. The evidence in this case simply does not support such an outcome.

The evidence is that the State of New York has adjudicated Petitioner's competency through every licensing body in the State and in the Appellate Division of the State courts. I find the conclusions reached by those authorities to be persuasive. Moreover, Petitioner has not shown that his exclusion is unreasonable. Thus, given Petitioner's stated desire to practice medicine in the State of New York in a fellowship program, I find and conclude that Petitioner should be excluded until such time as New York's licensing authorities restore his license to practice medicine.

CONCLUSION

Based on the material facts and the law, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs was authorized by section 1128(b)(4)(A) of the Act. I further conclude that an exclusion until Petitioner regains his license to practice medicine in the State of New York is reasonable and appropriate in this case.

/s/

Charles E. Stratton
Administrative Law Judge