Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the case of:	)	
	)	
Myron R. Wilson, Jr., M.D.,	)	DATE: July 31, 1991
	)	
Petitioner,	)	
	)	Docket No. C-258
- v. -	)	
	)	
	)	Decision No. CR146
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 June 4, 1990, that he was being excluded from participation in the Medicare and State health care programs for five years.[1]

Petitioner was advised that his exclusion resulted from the fact that his license to practice medicine in the State of Minnesota was surrendered while a formal disciplinary proceeding was pending before the Minnesota Board of Medical Examiners. Petitioner was further advised that his exclusion was authorized by section 1128(b)(4)(B) of the Act.

By letter of June 19, 1990, Petitioner requested a hearing before an administrative law judge (ALJ), and the case was assigned to me for hearing and decision.

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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.

During the initial prehearing conference, which I held on August 30, 1990, the parties agreed that the case could be decided through an exchange of documents in lieu of an in-person hearing. Also at this conference, Petitioner indicated that he would not be contesting whether the period of exclusion was reasonable, but would be contesting only whether there was a basis for the I.G. to exclude Petitioner under section 1128(b)(4)(B) of the Act. In my Order of August 31, 1990, however, I included as an issue whether, if there was a basis for the I.G. to exclude Petitioner, the proposed five-year exclusion would be extreme or excessive. On January 30, 1991, I heard oral argument concerning the I.G.'s motion for summary disposition on the issue of whether the I.G. had a basis upon which to exclude Petitioner. On February 8, 1991 I ruled that: 1) the I.G. had authority to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Act; and 2) there remained the potential for contested facts regarding the reasonableness of the proposed five-year exclusion.[2]

On February 22, 1991, I held another prehearing conference in this case to determine whether either party wanted an in-person hearing on the issue of whether the five-year exclusion imposed and directed against Petitioner by the I.G. was reasonable. Petitioner indicated that he wished to proceed through an exchange of stipulations and affidavits in lieu of an in-person hearing. The parties have submitted briefs and supporting documents. I heard oral argument in this case on June 28, 1991.

I have considered the arguments contained in the I.G.'s motion for summary disposition, Petitioner's response, and the I.G.'s reply; the positions of the parties as reflected in the oral argument; the parties joint stipulation of facts; and the applicable law and regulations. I incorporate in this decision my ruling of February 8, 1991 that the I.G. had a basis upon which to exclude Petitioner, and I now find that the five-year exclusion imposed and directed against Petitioner by the I.G. is reasonable under the circumstances of this case.

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[2] In Petitioner's response to the I.G.'s motion for summary disposition, Petitioner asserted that the period of exclusion was excessive and unreasonable. (P. Br. (1) 16).

ISSUE

Whether the five-year exclusion imposed and directed against Petitioner by the I.G. is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[3]

1. Petitioner is a psychiatrist who specializes in the care of adolescents. Petitioner held a license to practice medicine and surgery in the State of Minnesota until July 8, 1989. J. Ex. A, H; Stip. 1, 13, 36.

2. The Minnesota Board of Medical Examiners (Minnesota Board) is the Minnesota State agency with authority for the licensure of and, if necessary, the imposition of discipline against physicians and surgeons in Minnesota. J. Ex. D; Stip. 37.

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

I.G. Exhibits	I.G. Ex. (number/page)
I.G. Brief (12/3/90)	I.G. Br. (1) (page)
I.G. Reply Brief (1/11/91)	I.G. R. Br. (1) (page)
I.G. Brief (May 8, 1991)	I.G. Br. (2) (page)
I.G. Reply Brief (May 31, 1991)	I.G. R. Br. (2) (page)
Petitioner's Exhibits (12/14/90)	P. Ex. (1) (letter/page)
Petitioner's Exhibits (5/20/91)	P. Ex. (2) (number/letter/page)
Petitioner's Brief (12/14/90)	P. Br. (1) (page)
Petitioner's Brief (5/20/91)	P. Br. (2) (page)
Joint Stipulation of Facts	Stip. (page)
Joint Exhibits	J. Ex. (letter/page)
Findings of Fact and Conclusions of Law	FFCL (number)

3. In the event that the Minnesota Board receives a complaint alleging information that, if true, would be grounds for disciplinary action against a physician, it initiates a complaint review process by forwarding the complaint for investigation to the Office of the Minnesota Attorney General. The results of such investigation are forwarded to the Discipline Committee of the Minnesota Board (Discipline Committee), which may dismiss the complaint and decline to take any further action when there is insufficient evidence to warrant disciplinary action by the Minnesota Board. When the Committee determines there is sufficient evidence to justify further review of the matter, it schedules a conference with the physician against whom the complaint was made. J. Ex. D.

4. In 1972 Petitioner developed a residential treatment center and school for adolescents, The Constance Bultman Wilson Center (Center) in Faribault, Minnesota. Petitioner was the president, chief executive officer, and psychiatrist-in-chief at the Center. Stip 3-12.

5. Petitioner practiced solely as an adolescent psychiatrist and in that capacity wrote articles and made professional presentations. His clinical practice was limited to treating patients at the Center. At no time since 1971 has Petitioner maintained a private office or private clinical practice. Stip. 13.

6. In April 1982, the Discipline Committee of the Minnesota Board informed Petitioner by Notice of Conference (Notice) that it had received complaints of unprofessional conduct by Petitioner at the Center. These complaints alleged Petitioner's sexual misconduct with patients and Petitioner's impairment due to alcohol and drug abuse. P. Ex. (1) B; Stip 38.

7. By letter of June 10, 1982, the Minnesota Board informed Petitioner that it had decided to close its investigation regarding allegations of unprofessional conduct in Petitioner's practice of medicine. However, the Minnesota Board advised Petitioner that it would retain all the records relating to its investigation. It also informed Petitioner that if similar complaints were received in the future, the Minnesota Board might reopen its file and reconsider the allegations in light of any new information received. P. Ex. (1) D; Stip. 38.

8. By letter of June 10, 1982, the Discipline Committee specifically advised Petitioner as to concerns it had regarding Petitioner's practice of medicine at the Center. These concerns included that:

> a) It appeared that there were no clearly defined boundaries between when a person was a patient, employee, or friend of Petitioner's. The Minnesota Board felt that this situation had the potential for confusion and misinterpretation by individuals who fit into more than one category regarding Petitioner's conduct. The Minnesota Board stated that steps should be taken to remedy the situation.
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> b) The Discipline Committee was concerned with regard to Petitioner's prescription of medications. Petitioner was told to never prescribe medicine for himself or for anyone who was not his psychiatric patient.
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> c) The Discipline Committee was concerned about allegations regarding Petitioner's use of alcohol and the availability of alcohol when minor patients of the Center were present. The Discipline Committee stated that even if minors were not served alcohol, alcohol should not be used in such a way as to be accessible to minors. The Discipline Committee stressed that this was particularly true in a health care setting, especially one in which the distinction between the doctor's patients, employees, and friends was not clear.
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> d) What Petitioner interpreted as nonsexual touching had been interpreted by others as sexual. The Discipline Committee stated that this fact had been made abundantly clear by the allegations of several former patients or employees. The Discipline Committee told Petitioner that he should alter his conduct so as to avoid any such interpretation being made. P. Ex. (1) D.

9. Petitioner moved from Minnesota to California in 1986. Stip. 19-28.

10. On April 6, 1989, the Discipline Committee of the Minnesota Board sent Petitioner a new Notice, based upon an investigation conducted by the Office of the Minnesota Attorney General. The Notice stated that on May 4, 1989, the Discipline Committee of the Minnesota Board would

hold a conference to discuss with Petitioner his ability to practice medicine and surgery with reasonable skill and safety to patients. J. Ex. E, F, G; Stip. 39, 40.

11. This 1989 Notice contained allegations similar to those set forth in the 1982 Notice, and added allegations concerning two new patients, neither of whom filed complaints with the Board. The 1989 Notice also alleged that Petitioner's written submission to the Minnesota Board on May 6, 1982, concerning his physician/patient relationship with patient number 2 (so termed in the 1989 Notice), was inconsistent with testimony Petitioner gave under oath in a 1987 civil suit. J. Ex. E; Stip. 39, 40.

12. On the basis of such a conference, the Discipline Committee of the Minnesota Board was empowered to take any one of the following actions: 1) conclude the matter based upon its determination that there were insufficient grounds for discipline; 2) enter into a stipulation with Petitioner permitting the full Minnesota Board to issue a mutually agreed upon disciplinary order or remedy; or, 3) resolve the matter with a "contested case hearing." J. Ex. E/6-7; Stip. 41.

13. Petitioner was permitted to be represented by counsel at the conference. J. Ex. E/7.

14. Petitioner asked that the conference be rescheduled and it was set for June 15, 1989. J. Ex. D; Stip. 42.

15. In the interim, Petitioner and the Minnesota Board entered into settlement negotiations. J. Ex. D; Stip. 43.

16. Petitioner and the Minnesota Board were represented by counsel during these settlement negotiations. J. Ex. H/3.

17. Petitioner and the Discipline Committee of the Minnesota Board drafted a Stipulation and Order, which was then presented to the full Minnesota Board for approval, obviating the need for a conference. J. Ex. H.

18. In this Stipulation and Order, Petitioner denied all complaints under investigation. However, the parties stipulated that due to the passage of time and to the fact that Petitioner no longer resided in Minnesota and had represented that he had retired from practice in Minnesota and in the interest of settling the matter and to avoid the necessity for further proceedings, Petitioner agreed to: 1) resign his license to practice medicine and surgery in Minnesota; and 2) not reapply for

a license to practice medicine and surgery in Minnesota. The Minnesota Board agreed to close its files in the matter, but reserved the right to reopen the files should Petitioner ever seek re-licensure in Minnesota. J. Ex. H.

19. On July 8, 1989, the Minnesota Board adopted, implemented, and issued this Stipulation and Order accepting Petitioner's surrender of his license to practice medicine and surgery in Minnesota. J. Ex. H.

20. 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.

21. Section 1128(b)(4)(B) of the Act authorizes exclusions from the Medicare and Medicaid programs for any individual or entity who surrendered a license while a formal disciplinary proceeding was pending before a State licensing agency and the proceeding concerned the individual's or entity's professional competence, professional performance or financial integrity.

22. On June 4, 1990, pursuant to section 1128(b)(4)(B) of the Act, the I.G. excluded Petitioner from participating in the Medicare program and directed that he be excluded from participating in Medicaid for five years.

23. There do not exist any disputed issues of material fact in this case that pertain to the I.G.'s authority to exclude Petitioner; therefore, summary disposition on that issue is appropriate. See Federal Rules of Civil Procedure, Rule 56.

24. The interpretation of a federal statute or regulation is a question of federal, not state, law. United States v. Allegheny County, 322 U.S. 174, 183 (1944).

25. Petitioner surrendered to a state licensing authority his license to practice medicine and surgery while a formal disciplinary proceeding was pending which concerned his professional competence, professional performance, or financial integrity within the meaning of section 1128(b)(4)(B) of the Act. FFCL 1 - 24.

26. The I.G. had discretion to exclude Petitioner from participation in Medicare and to direct his exclusion from participation in Medicaid. Act, Section 1128(b)(4)(B).

27. The Center has at no time been a Medicare provider. No Medicaid reimbursement has been sought by the Center since 1976. Stip. 29.

28. Petitioner has never been a Medicare provider. Petitioner has not sought Medicaid reimbursement since 1976. Stip 30.

29. In 1985, Petitioner retired from active clinical practice treating patients at the Center and, in 1986, he retired from management of the Center. Stip 27.

30. From 1986 to 1989 Petitioner was a teacher/lecturer at Harbor-UCLA Medical Center teaching fellows in Child and Adolescent Psychiatry. No doctor/patient contact was involved. Petitioner did not seek clinical or admitting privileges, nor did he receive any compensation for his teaching. Stip. 31.

31. Petitioner is currently teaching fellows in Child and Adolescent Psychiatry at Cedars-Sinai Medical Center, a UCLA affiliate, in Los Angeles. No doctor/patient contact is involved. Petitioner did not seek clinical or admitting privileges and receives no compensation. Stip. 32.

32. Harbor-UCLA Medical Center, Cedars-Sinai Medical Center, and UCLA are all Medicare providers. Stip. 33.

33. The policy of Cedars-Sinai Medical Center is that anyone with a non-current or inactive medical license would not be permitted to provide patient care or to teach at the facility. Declaration of Harry F. McDonagh, May 31, 1991.

34. Petitioner holds an inactive license to practice medicine in the State of California. Stip. 35.

35. To activate his license to practice medicine in California, Petitioner needs only to complete 50 hours of continuing education. J. Ex. B.

36. A remedial objective of section 1128 of the Act is to protect the integrity of federally funded health care programs, and their recipients and beneficiaries, from individuals who demonstrate by their conduct that they cannot be trusted to deal with program funds or to provide items or services to recipients and beneficiaries.

37. An ancillary remedial objective of section 1128 of the Act is to deter individuals from engaging in conduct which jeopardizes the integrity of federally-funded health care programs.

38. The regulations set forth in 42 C.F.R. 1001.125(b) are essentially inapplicable to this case.

39. 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 was so extreme or excessive as to be unreasonable. 48 Fed. Reg. 3744 (January 27, 1983).

40. If true, the allegations contained in the Minnesota Board's 1989 Notice are very serious, raise important questions concerning Petitioner's competency to practice medicine, and any repetition of the practices alleged would place Petitioner's patients at significant risk.

41. Petitioner chose to surrender his license rather than contest the charges against him. FFCL 18.

42. The legislative history of section 1128(b)(4)(B) raises a presumption of the truthfulness of the allegations which led to the surrender of a practitioner's license to practice medicine while a formal disciplinary proceeding was pending before a State licensing authority and the proceeding concerned the individual's professional competence, professional performance, or financial integrity. See S. Rep. No. 109, 100th Cong., 1st Sess. 3, reprinted in 1987 U.S. Code Cong. & Admin. News, 682, 688.

43. Petitioner offered essentially the same evidence previously reviewed by the Minnesota Board to deny the allegations and rebut the presumption. He additionally relied on the list of his accomplishments and awards described in his curriculum vitae.

44. Petitioner offered no evidence to show that he had changed his conduct to comport with the Discipline Committee's recommendations in its letter to him of June 10, 1982. FFCL 8.

45. Considering the nature of the allegations against Petitioner, any continuation of such activities could place beneficiaries and recipients of the Medicare and Medicaid programs at risk.

46. The exclusion imposed and directed against Petitioner by the I.G. is neither extreme nor excessive. FFCL 1-45.

RATIONALE

Petitioner, an adolescent psychiatrist, surrendered his license to practice medicine in the State of Minnesota in the face of allegations of unprofessional conduct. In my Ruling of February 8, 1991, I found that the I.G. had the authority to exclude Petitioner from participation in the Medicare and Medicaid programs. The only issue now before me is whether or not the length of the exclusion imposed and directed against Petitioner is reasonable. I now find and conclude that the five-year exclusion imposed and directed against Petitioner by the I.G is reasonable.

In deciding whether or not an exclusion under section 1128(b)(4)(B) 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 threaten 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., 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)(B) will likely have an adverse financial impact on the person against whom the exclusion is imposed (although this may not be true in Petitioner's case as he is not being compensated for his teaching and is otherwise not in clinical practice). 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)(B), nor is there a requirement that a petitioner be excluded until he or she obtains a license from the state where their license was surrendered. However, an exclusion until a petitioner obtains a license from the state where his or her license was surrendered 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.

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, 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).

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) may guide me in making this determination. See Vincent Barratta, M.D., DAB Civ. Rem. C-144, aff'd DAB App. 1172 (1990); Leonard N. Schwartz, DAB Civ. Rem. C-62 (1989). However, these regulations were adopted by the Secretary to implement the law as it existed prior to adoption of the 1987 revisions to section 1128, which revisions included

section 1128(b)(4)(B). They specifically apply only to exclusions for program-related offenses (convictions for criminal offenses related to the Medicare and Medicaid programs). This case involves the surrender of a license for reasons which are not concerned with program violations and where there has been no immediate program impact, no program damages, no incarceration, and no previous record of sanctions against Petitioner. Thus, these regulations are largely inapplicable.

However, in making a determination concerning the reasonableness of an exclusion, 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)(B) case necessitates an examination of the following considerations: 1) the nature of the license surrender and the circumstances surrounding it; 2) the impact of the surrender on the Medicare and Medicaid programs; 3) whether and when the individual surrendering the license recognized the gravity of the conduct that initiated the disciplinary proceeding; 4) the type and quality of help sought to correct the behavior leading to the license surrender; and 5) the extent to which the individual has succeeded in rehabilitation. See Thomas J. DePietro, R.Ph., DAB Civ. Rem. C-282 (1991).

Congress concluded that, ordinarily, an exclusion is justified where providers surrender their licenses to practice health care to avoid the imposition against them of adverse findings and sanctions by state licensing authorities. The legislative history to section 1128(b)(4)(B) suggests Congressional recognition of the probability that providers who surrender their licenses to provide health care in the face of disciplinary charges ordinarily do so in order to avoid the stigma of an adverse finding. See S. Rep. No. 109, 100th Cong., 1st Sess. 3, reprinted in 1987 U.S. Code Cong. & Admin. News, 682, 688. This amounts to a legislative finding that an inference of culpability ought to attach to those providers who resign their licenses in the face of state disciplinary actions. See Bernardo G. Bilang, M.D., DAB Civ. Rem. C-298 at 14 (1991); John W. Foderick, M.D., DAB App. 1125 (1990).

To prove his trustworthiness and to rebut any presumption of untrustworthiness, Petitioner has relied primarily on the record before the Minnesota Board in 1982 and 1989, and on the information contained in his curriculum vitae

as amplified in the stipulation of facts. He asserts that he committed no program violations, he has caused no harm to the programs, and he has not been a recent participant in the Medicare program. (P. Br. (2) 16, 17, 19, 21-22). Petitioner emphasizes his lack of a potential threat to beneficiaries and recipients based on his inactive license to practice medicine in California and the fact that it is "highly improbable" that he would re-enter clinical practice (P. Br. (2) 19, 21, 24). However, I do not find these assertions persuasive evidence as to Petitioner's trustworthiness, and I do not conclude from them that Petitioner would present no threat to the Medicare and Medicaid programs or to beneficiaries and recipients of those programs.

Petitioner asserts that he surrendered his license to practice medicine in Minnesota due to: 1) the passage of time following these incidents; 2) the fact that he no longer resided in Minnesota; and 3) that he had retired from active practice. FFCL 18. Petitioner maintains in this action that he is innocent of the charges brought against him by the Minnesota Board and is trustworthy. However, Petitioner is an adolescent psychiatrist and the allegations in the Minnesota Board's 1989 Notice specifically concern Petitioner's relationship with several adolescent patients over a lengthy period of time. FFCL 1, 6, 10, 11. If these allegations are true, Petitioner potentially poses a serious risk of harm to any patient he might treat. As one of the patients (whose allegations precipitated the Notice letters to Petitioner stated): ". . . the consequence of my relationship with Dr. Wilson has not only been the persistence of the original symptoms but also the development of a variety of additional ones. The ultimate affect has been one of increasing emotional, physical, and mental distress, exhaustion, and eventual debilitation." J. Ex. F/19. Rather than personally respond to these allegations, Petitioner surrendered his license and agreed not to practice in Minnesota again.

Thus, the veracity of these 1989 allegations has never been determined by the Minnesota Board. From the description of the process preceding the allegations of the Minnesota Board, it is evident that the Minnesota Attorney General's Office and the Disciplinary Committee of the Minnesota Board, upon reviewing the investigatory material, concluded that there was sufficient evidence to warrant initiation of a second license revocation proceeding against Petitioner. FFCL 3, 10, 11. It is unlikely that the Minnesota Board would have closed Petitioner's case if he had merely resubmitted the materials offered in connection with the 1982 proceeding

without the proceeding leading to some remedial action. New allegations of misconduct had been raised and Petitioner's veracity was placed in question based on his sworn testimony in a civil action involving one of the complainants to the Minnesota Board. FFCL 11. Instead of appearing personally and vigorously defending his reputation and competency to practice medicine in Minnesota, Petitioner surrendered his license in return for some equivocal language in the Stipulation and Order concerning the staleness of the allegations and the difficulties of proof. FFCL 18. Congress has indicated in such circumstances that a presumption exists that a practitioner who surrenders his license in the face of charges is equally as culpable as someone who is found guilty at the end of a contested license revocation proceeding.

Although Petitioner was aware of this presumption and that it could be the basis for an exclusion from the Medicare and Medicaid programs if not rebutted, he chose not to come forward for an in-person evidentiary hearing to demonstrate his trustworthiness to be a program provider.[4] Instead, Petitioner only submitted his academic credentials, his curriculum vitae (which lists his academic honors and professional achievements in adolescent psychiatry), his curriculum vitae's amplification in the stipulation of facts, and the materials he submitted on his own behalf to the Minnesota Board in 1982 (P. Ex. (2) 1, which includes a statement by Petitioner concerning the charges, as well as affidavits of friends and co-workers from 1982 on his behalf) as proof of his trustworthiness.

At the oral argument of June 28, 1991, Petitioner cited as an additional basis of his trustworthiness his continued support from the Board of Directors of the Wilson Foundation and his lack of removal from a policy position. Such argument is of little significance, since Petitioner controls the Foundation as its Chairman and Chief Executive Officer. J. Ex. A. Moreover, when there were allegations of his misconduct in the mid 1980's, Petitioner resigned his active medical position with the Foundation in Minnesota and left to start a new facility in California. FFCL 9.

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[4] My Ruling of February 8, 1991 dealt in detail with the basis for this presumption of untrustworthiness. Subsequently, I gave him several opportunities to present evidence to counter this presumption in an in-person hearing, but he chose to rely on a paper record.

The record is replete with opportunities for Petitioner to have directly confronted the Minnesota Board's allegations. However, in each instance, Petitioner instead relied on counsel to defend him in Petitioner's absence. I am concerned that Petitioner does not yet understand the seriousness of the allegations and their obvious negative implications on his competence to continue to practice medicine, especially adolescent psychiatry. His voluntary early withdrawal from clinical practice concerns me, especially in light of his academic credentials and interest in innovative psychiatric treatment. Petitioner may have realized that he might present a risk to his patients. He may have responded to that risk solely by withdrawing from practice, rather than admit that his past behavior in Minnesota warranted remedial action and rehabilitative measures.

Significantly, Petitioner has not demonstrated to me that he ever addressed the Discipline Committee's concerns, or in any way modified his behavior to comport with the Discipline Committee's recommendations. It is possible that these recommendations, which went to the heart of Petitioner's practice of adolescent medicine, may never have been addressed and the behavior in question may never have been modified. If I could be assured that Petitioner would not engage in clinical practice in the future, the need for an exclusion from the programs would be lessened. However, Petitioner maintains an inactive license which can readily be activated with only 50 hours of continuing education courses. Also, the record is equivocal as to whether Petitioner can continue to teach at Cedars-Sinai Medical Center without an active license and direct patient care. See FFCL 31, 33.

When I evaluate the evidence in this case as it regards Petitioner's trustworthiness, I find that Petitioner surrendered his license in the face of particularly serious allegations of misconduct which lasted over a lengthy period of time. If these allegations are true, and if Petitioner ever re-entered clinical practice, Petitioner's conduct could have devastating implications on the fragile psyches of disturbed psychiatric patients who might be program beneficiaries or recipients. Petitioner has given me no evidence that he ever confronted these allegations, nor has he given me any evidence as to whether or not he addressed the grave concerns raised by the Discipline Committee. I do not know whether Petitioner changed his behavior with regard to the Discipline Committee's recommendations, or how far his rehabilitation of his behavior may have progressed. Where the danger of harm to patients is great, a lengthy exclusion is justified to insure that program recipients

and beneficiaries are protected from even a slight possibility that they will be exposed to such danger. Bernard Lerner, M.D., DAB Civ. Rem. C-48 at 9 (1989); Michael D. Reiner, R.M.D., DAB Civ. Rem. C-197 (1990); Norman C. Barber, D.D.S., DAB Civ. Rem. C-198 (1991).

I am unable to conclude that Petitioner did commit the practices alleged against him by the Minnesota Board. Equally, I am unable to conclude that he did not commit such practices. He did surrender his license and agreed never to practice medicine in Minnesota when faced with allegations of the Minnesota Board. Petitioner's surrender of his license in such circumstances raises the presumption of his lack of trustworthiness. He has failed to provide convincing evidence to rebut such presumption. He chose not to participate in an in-person hearing where: 1) he could respond personally to the charges of the Minnesota Board; and 2) his trustworthiness could be evaluated through an assessment of his demeanor and credibility. In sum, I do not find that Petitioner has demonstrated his trustworthiness to me in such a way that I can find that the exclusion directed and imposed against Petitioner by the I.G. is so extreme or excessive as to be unreasonable.

CONCLUSION

Based on the evidence in this case and the law, I conclude that the five-year exclusion imposed against Petitioner from participating in the Medicare and Medicaid programs is reasonable. Therefore, I sustain the exclusion imposed against Petitioner, and I enter a decision in favor of the I.G.

/s/

Edward D. Steinman
Administrative Law Judge