Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Olufemi Okunoren, M.D.,	DATE: August 23, 1991
Petitioner,	
- v. -	Docket No. C-340
	Decision No. CR150
The Inspector General.	

DECISION

On November 30, 1990, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare and State health care programs.[1] The I.G. told Petitioner that he was being excluded as a result of his exclusion or suspension by the State of Mississippi Division of Medicaid (Mississippi Medicaid). The I.G. stated that the exclusion that he was imposing and directing against Petitioner was authorized by section 1128(b)(5) of the Social Security Act (Act). The I.G. excluded Petitioner until Mississippi Medicaid reinstated him.[2]

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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-financed health care programs, including Medicaid.

[2] Petitioner will be eligible to apply for reinstatement to Mississippi Medicaid on May 1, 1993. Mississippi Medicaid has discretion to grant or deny Petitioner's application for reinstatement. Therefore, the state exclusion imposed against Petitioner is effectively indefinite in duration. The term of the exclusion originally imposed and directed against Petitioner by the I.G. was also indefinite because it conditioned Petitioner's eligibility to apply for reinstatement to Medicare and Medicaid on his reinstatement by Mississippi Medicaid, rather than on his eligibility to apply for reinstatement by that state's Medicaid program.

Petitioner timely requested a hearing, and the case was assigned to me for a hearing and decision. Both the I.G. and Petitioner made motions for summary disposition. On May 16, 1991, I denied both parties' motions for summary disposition, ruling that there were disputed issues of material fact. On June 4, 1991, I held an in-person evidentiary hearing in this case in Jackson, Mississippi. During the hearing the I.G. proposed to modify Petitioner's exclusion to allow Petitioner to reapply for reinstatement to the Medicare and Medicaid programs on May 1, 1993, the date when Petitioner would be eligible to apply to Mississippi Medicaid for reinstatement.

Based on the evidence introduced at the hearing, and on applicable law, I conclude that an exclusion which would allow Petitioner to reapply for reinstatement to the Medicare and Medicaid programs on May 1, 1993, is not extreme or excessive. Therefore, I am entering a decision in this case which modifies the I.G.'s exclusion of Petitioner to a term running until May 1, 1993.

ISSUES

The issues in this case are whether:

1. the I.G. had authority to exclude Petitioner pursuant to section 1128(b)(5) of the Act;

2. the exclusion imposed and directed against Petitioner by the I.G. is so extreme or excessive as to be unreasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a physician who practiced medicine as a general practitioner in Mississippi from 1977 until December 1990.[3] Tr. 110 - 111; I.G. Ex. 1/2, 7.

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[3] The parties' exhibits, briefs, and transcript of the hearing will be referred to as follows:

I.G.'s Exhibits	I.G. Ex. (number/page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Motion	I.G. M. (page)

(continued...)

2. Petitioner was a Medicaid provider in Mississippi from 1978 until May 1, 1990. Tr. 111, 115; I.G. Ex. 4.

3. In a letter to Petitioner of April 10, 1990, Mississippi Medicaid suspended Petitioner as a Medicaid provider for three years, effective May 1, 1990. I.G. Ex. 4.

4. Mississippi Medicaid suspended Petitioner pursuant to a recommendation from the Mississippi Foundation for Medical Care, Inc. (MFMC) that Petitioner be suspended for three years and be required to make monetary restitution for unnecessary lab tests he performed. I.G. Ex. 3.

5. MFMC is the Peer Review Organization (PRO) for the State of Mississippi. MFMC has a contract with the State of Mississippi to review services rendered by Medicaid providers in Mississippi, and to make recommendations concerning provider sanctions. Tr. 47; I.G. Ex. 20/1 - 2, 13.

6. A MFMC review of Petitioner had found that Petitioner had: 1) poorly documented his reasons for ordering laboratory work; 2) ordered unnecessary laboratory work; 3) performed inadequate and very poor quality EKG's; 4) performed incomplete urine tests; 5) maintained inadequate records from which to ascertain his treatment of his patients; and 6) demonstrated a risk to patients by giving "inappropriate diagnosis" of patients' illnesses, thereby placing his patients at risk. I.G. Ex. 1/9 - 10.

7. Mississippi Medicaid is a State health care program within the meaning of sections 1128(h) and 1128(b)(5)(B) of the Act. I.G. Ex. 4/1, 3 - 4, 6/1, 8/1.

8. Petitioner was suspended from participation in a State health care program for reasons bearing on his professional performance. Findings 4 - 6.

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[3] (...continued)

Petitioner's Exhibits	P. Ex. (number/page)
Petitioner's Brief	P. Br. (page)
Petitioner's Motion	P. M. (page)
Transcript	Tr. (page)

9. Pursuant to section 1128(b)(5)(B) of the Act, the Secretary of the Department of Health and Human Services (Secretary) has authority to impose and direct an exclusion against Petitioner from participating in Medicare and Medicaid.

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

11. On November 30, 1990, the I.G. excluded Petitioner from participation in the Medicare and Medicaid programs. I.G. Ex. 8.

12. A remedial objective of section 1128(b)(5)(B) is to protect beneficiaries and program funds by excluding individuals or entities who have been found unfit to participate in a federally-funded State health care program. S. Rep. No. 109, 100th Cong. 1st Sess., reprinted in 1987 U. S. Code Cong. & Admin. News 682, 689.

13. On October 8, 1982, Petitioner was informed that Mississippi Medicaid had investigated and found that: 1) Petitioner had charged Medicaid for services which did not have the results documented in the medical records; and 2) Petitioner charged Medicaid for services recipients denied receiving. I.G. Ex. 10/1; See 42 C.F.R. 1001.125(b)(7).

14. In settlement of the above-mentioned investigation, Petitioner agreed to: 1) make restitution to Mississippi Medicaid for monies received; 2) one year's probation; 3) maintenance of medical records on all Medicaid eligible patients; and 4) make the medical records available to Mississippi Medicaid representatives. I.G. Ex. 11; See 42 C.F.R. 1001.125(b)(7).

15. On November 20, 1986, Petitioner was informed by Mississippi Medicaid that a review of the medical necessity of services rendered and procedures performed by Mississippi Medicaid providers had found that Petitioner's pattern of practice with regard to laboratory procedures fell significantly outside of his peer group. P. Ex. 1.

16. In 1986, Mississippi Medicaid medical consultants, using a random sample from Petitioner's paid claims, had reviewed Petitioner's laboratory procedures in conjunction with each patient's diagnosis. Their review indicated that, in many instances, the necessity of the

specific laboratory procedures was questionable for the specific diagnosis. P. Ex. 1.

17. Following this review, Mississippi Medicaid informed Petitioner that:

> To reiterate our policy, it is not the intention of the Medicaid Program to pay for services performed on a routine basis, but rather, to pay for those procedures which are specifically, medically indicated.

P. Ex. 1.

18. There is a pattern, established by specific treatment records in evidence, of Petitioner routinely ordering certain tests of some patients, specifically hemoglobins, hematocrits, urinalyses, and blood sugars, virtually every time those patients visited him. Tr. 56 - 58, 63 - 64, 77; P. Ex. 21, 22, 24, 26, 28, 32, 33, 34, 35, 36, 37, 40, 41, 42, 45, 46, 48.

19. There is nothing in the patient records that are in evidence in this case to show that Petitioner actually evaluated the tests that he ordered or that he systematically recorded the results of these tests in any way meaningful to the treatment of those patients. Tr. 138 - 141; P. Ex. 19 - 48.

20. There is no documented medical necessity for most of the laboratory tests ordered by Petitioner in these treatment records. Tr. 63; P. Ex. 19 - 48; I.G. Ex. 2/8 - 42.

21. By claiming Medicaid reimbursement for those tests, Petitioner sought reimbursement for unauthorized and unnecessary items or services. P. Ex. 19 - 48; Findings 18 - 20.

22. Petitioner knew or should have known that the Mississippi Medicaid program did not authorize reimbursement for the tests ordered by Petitioner. Finding 17.

23. Petitioner should have known that the tests systematically ordered by him were not medically justified. Finding 20.

24. Petitioner's explanation for ordering the tests in question -- that they were a form of preventive medicine for his impoverished black patients -- is not credible.

Tr. 78, 96, 102, 113 - 115, 125 - 128, 132, 134; I.G. Ex. 7, 14, 19/1; P. Ex. 2.

25. Over a lengthy period of time, Petitioner has systematically ordered unnecessary laboratory tests of Mississippi Medicaid recipients and persisted in claiming reimbursement for those tests in violation of Mississippi Medicaid payment criteria. See 42 C.F.R. 1001.125(b)(1); Findings 4, 6, 13, 16, 17, 18, 20.

26. Petitioner's persistent ordering of unnecessary laboratory tests of Mississippi Medicaid recipients and his presentation of reimbursement claims for such unnecessary tests constitutes a deliberate attempt by Petitioner to obtain program funds to which he was not entitled. Such efforts, to the extent they may have succeeded, were a waste of scarce program funds. Tr. 79 - 80.

27. Petitioner's assertion that his systematic ordering of laboratory tests of Mississippi Medicaid recipients and claiming reimbursement from Mississippi Medicaid for such tests was a legitimate practice of preventive medicine is not a defense to his acts, because Petitioner knew or should have known that Mississippi Medicaid had determined that such tests were not reimbursable. See 42 C.F.R. 1001.125(b)(4); Findings 17, 22.

28. Petitioner's pattern of ordering tests which were not medically justified and claiming reimbursement from Mississippi Medicaid for those tests when he knew or should have known that they were not reimbursable items or services establishes that Petitioner is not a trustworthy provider of care. Findings 17 - 22.

29. Petitioner's lack of trustworthiness is further established by his refusal to admit that his conduct was improper. Tr. 141 - 142.

30. Given Petitioner's lack of trustworthiness, a substantial exclusion from participating in Medicare and Medicaid is reasonable.

31. An exclusion of Petitioner from Medicare and Medicaid until May 1, 1993 is neither extreme or excessive. Findings 1-30; See 42 C.F.R. 1001.125(b).

ANALYSIS

In this case, Petitioner contests both the basis for his exclusion and the reasonableness of the length of his

exclusion. I find that the I.G. is authorized to exclude Petitioner and that the exclusion proposed by the I.G. during the hearing in this case on June 4, 1991, is reasonable.

1. The I.G. had authority to exclude Petitioner pursuant to section 1128(b)(5)(B).

Section 1128(b)(5)(B) of the Act permits the I.G. to exclude from the Medicare and Medicaid programs any individual or entity which has been suspended or excluded from participation, or otherwise sanctioned, under:

> a State health care program, for reasons bearing upon the individual's or entity's professional competence, professional performance, or financial integrity.

In a section 1128(b)(5)(B) proceeding, the Act only requires that two preconditions be met to establish the I.G.'s authority to exclude a party: 1) the party must have been suspended or excluded from a State health care program; and 2) the reasons for the party's suspension or exclusion must bear on that party's professional competence, professional performance, or financial integrity.

The I.G.'s authority to impose and direct exclusions pursuant to section 1128(b)(5) is derivative, emanating from a State's exclusion or suspension proceeding. A petitioner may challenge the I.G.'s authority to impose and direct an exclusion under this section by asserting that the prerequisite sanction has not been imposed. However, a petitioner may not challenge the I.G.'s authority to impose and direct an exclusion by asserting that such sanction was unfairly imposed, or by raising other collateral arguments to attack the sanction process. See Charles W. Wheeler and Joan K. Todd, DAB App. 1123 (1990); Andy E. Bailey, C.T., DAB App. 1131 (1990); Leonard P. Harman, DAB Civ. Rem. C-162 (1990).

There is no question in this case that Mississippi Medicaid, a State health care program, suspended Petitioner. See Findings 4, 7. The only question remaining is whether the reasons for the suspension concerned Petitioner's professional competence, professional performance, or financial integrity. The evidence in this case establishes that the reasons for Petitioner's suspension from the State program concerned his professional performance.

The facts of this case are that a State sanction proceeding was initiated against Petitioner in August 1989. Petitioner was charged with violating his duty under law to provide services to Medicaid recipients which met professionally recognized standards of care. The initial notice which was issued to Petitioner in that State sanction proceeding charged that Petitioner had violated his obligations under section 1156 of the Social Security Act. That notice asserted that Petitioner had: 1) provided services that were not medically necessary; 2) provided services which did not meet professionally recognized standards of care; and 3) provided services not supported by the appropriate evidence of medical necessity and quality of the services in a form and fashion as may be required. These assertions were in turn based on charges that Petitioner: poorly documented his laboratory work, ordered unnecessary laboratory tests, performed inadequate and incomplete testing, provided incomplete documentation regarding his treatment of Medicaid recipients, and inappropriately diagnosed his patients' medical conditions. These State charges ultimately led to Petitioner's suspension from the Mississippi Medicaid program. The I.G. based his exclusion determination on that suspension.

Section 1128(b)(5)(B) does not define the term "professional performance." However, the plain meaning of the Act encompasses performance of professional duties consistent with professionally recognized standards of care and the requirements of law. See Leonard P. Harman, D.O., DAB Civ. Rem. C-162 at 7 (1990). The evidence in this case establishes that the State sanction against Petitioner was based on the State agency's finding that Petitioner had failed to carry out his professional duties to Medicaid recipients in a manner consonant with legal requirements and consistent with professionally recognized standards or care. Therefore, the prerequisites exist to establish authority for the I.G. to impose and direct an exclusion against Petitioner.

Petitioner raises several arguments concerning the fairness of the State proceeding which led to his suspension from the Mississippi Medicaid program, and ultimately, the I.G.'s exclusion determination. These include Petitioner's assertion that he was denied due process in the State proceeding and that he was not granted a hearing at the State agency level. As I note above, the I.G.'s authority to impose and direct an exclusion under section 1128(b)(5) derives from the sanction which is imposed against a party under a State health care program. A party may not challenge that

authority by arguing that the underlying State action was procedurally defective or unfair.[4]

Petitioner also argues that the I.G. is required by law to make an independent determination concerning Petitioner's professional competence or performance before imposing and directing an exclusion pursuant to section 1128(b)(5). He contends that the I.G. may not rely on State agency findings as authority for his exclusion determination.

There is no question that there must exist evidence of a petitioner's lack of trustworthiness to support the duration of an exclusion imposed under part (b) of section 1128 of the Act. See Part 2 of this Analysis, infra. However, the authority to impose and direct an exclusion under section 1128(b)(5) derives from action taken by a State agency. If that action has been taken, and it is for the reasons stated in section 1128(b)(5), then the I.G. has the authority to impose and direct an exclusion. His authority to impose and direct an exclusion does not depend on his making an independent determination that a party has engaged in conduct which would serve as a basis for an exclusion or suspension imposed by a State agency.

Petitioner also asserts that the Secretary failed to comply with certain statutory duties imposed on him by section 1156 of the Act, before imposing and directing an exclusion against Petitioner. According to Petitioner, the Secretary was without authority to impose and direct an exclusion against Petitioner in light of his failure to discharge these statutory duties.

There is no requirement under section 1128(b)(5) that the Secretary, or his delegate, the I.G., comply with other unrelated sections of the Act before imposing and directing an exclusion against a party. The authority to impose and direct an exclusion under section 1128(b)(5) derives exclusively from the actions taken by a State agency. If the requisite actions have been taken, then the authority to impose and direct an exclusion exists.

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[4] I am not suggesting that a party may not appeal the State sanction in the appropriate forum. If that appeal succeeds, then the I.G. would no longer have derivative authority to impose and direct an exclusion against the party. However, that is different from what Petitioner seeks to do in this case, which is, in effect, to challenge the State action in this proceeding.

I make no findings in this decision concerning what duties the Secretary or the I.G. might have been required to fulfill or discharge had they proceeded against Petitioner pursuant to section 1156 of the Act. Section 1156, which empowers the Secretary to impose and direct an exclusion against a party based on the recommendations of a peer review organization, was not the statutory basis for the exclusion which the I.G. imposed and directed in this case.[5]

2. An exclusion of Petitioner until May 1, 1993, is not extreme or excessive.

Section 1128 is a civil remedies statute. The remedial purpose of section 1128 is to enable the Secretary to protect federally-funded health care programs and their beneficiaries and recipients from individuals and entities who have proven by their misconduct that they are untrustworthy. Exclusions are intended to protect against future misconduct by providers. Manocchio v. Sullivan, No. 90-8114, slip op. 1 (S.D. Fla., July 12, 1991).

Federally-funded health care programs are no more obligated to deal with dishonest or untrustworthy providers than any purchaser of goods or services would be obligated to deal with a dishonest or untrustworthy supplier. The exclusion remedy allows the Secretary to suspend his contractual relationship with those providers of items or services who are dishonest or untrustworthy. The remedy enables the Secretary to assure that federally-funded health care programs will not continue to be harmed by dishonest or untrustworthy providers of items or services. The exclusion remedy is closely analogous to the civil remedy of termination or suspension of a contract to forestall future damages from a continuing breach of that contract.

Exclusion may have the ancillary benefit of deterring providers of items or services from engaging in the same or similar misconduct as that engaged in by excluded providers. However, the primary purpose of an exclusion

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[5] Some confusion may have been created by virtue of the fact that, in this case, the State agency referred to section 1156 in describing the nature of Petitioner's duties to recipients and his violations of those duties. However, Mississippi Medicaid ultimately proceeded against Petitioner based on its authority under State law, and the I.G. based his exclusion determination on the action taken by Mississippi Medicaid.

is the remedial purpose of protecting the trust funds and beneficiaries and recipients of those funds. Deterrence cannot be a primary purpose for imposing an exclusion. Where deterrence becomes the primary purpose, section 1128 no longer accomplishes the civil remedies objectives intended by Congress. Punishment, rather than remedy, becomes the end.

> [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

United States v. Halper, 490 U.S. 435, 448 (1989).

Therefore, in determining the reasonableness of an exclusion, the primary consideration must be the degree to which the exclusion serves the law's remedial objective of protecting program recipients and beneficiaries from untrustworthy providers. An exclusion is not excessive if it does reasonably serve these objectives.

The hearing in an exclusion case is, by law, de novo. Act, section 205(b). Evidence which is relevant to the reasonableness of the length of an exclusion will be admitted in a hearing on an exclusion, whether or not that evidence was available to the I.G. at the time the I.G. made his exclusion determination. Evidence which relates to a petitioner's trustworthiness or the remedial objectives of the exclusion law is admissible at an exclusion hearing, even if that evidence is of conduct other than that which establishes statutory authority to exclude a petitioner.

The purpose of the hearing is not to determine how accurately the I.G. applied the law to the facts before him, but whether, based on all relevant evidence, the exclusion comports with legislative intent. Because of the de novo nature of the hearing, my duty is to objectively determine the reasonableness of the exclusion by considering what the I.G. determined to impose in light of the statutory purpose and the evidence which the parties offer and I admit. The I.G.'s thought processes in arriving at his exclusion determination are not relevant to my assessment of the reasonableness of the exclusion.

Furthermore, my purpose in hearing and deciding the issue of whether an exclusion is reasonable is to decide

whether the determination was extreme or excessive. 48 Fed. Reg. 3744 (Jan. 27, 1983). Should I determine that an exclusion is extreme or excessive, I have authority to modify the exclusion, based on the law and the evidence. Social Security Act, section 205(b).

The Secretary has adopted regulations to be applied in exclusion cases. The regulations specifically apply to exclusion cases for "program-related" offenses (convictions for criminal offenses relating to Medicare or Medicaid). The regulations express the Secretary's policy for evaluating cases where the I.G. has discretion in determining the length of an exclusion. The regulations require the I.G. to consider factors related to the seriousness and program impact of the offense and to balance those factors against any factors that may exist demonstrating trustworthiness. 42 C.F.R. 1001.125(b)(1) - (7). In evaluating the reasonableness of an exclusion, I consider as guidelines the regulatory factors contained in 42 C.F.R. 1001.125(b).

In this case, Petitioner argues that excluding him is unreasonable because: 1) his laboratory testing was done as part of his preventive medicine practice; 2) there are no professionally recognized criteria for determining when laboratory tests are medically necessary in any given case; 3) Mississippi's black, low-income population has a high incidence of hypertension and diabetes, the leading cause of serious kidney disease; 4) early detection and treatment would prevent kidney disease and is cost effective; 5) the I.G.'s own witness, Dr. Hatten, agreed that laboratory tests such as those administered by Petitioner are proper screening devices for the early detection of illnesses which could lead to serious illnesses if not detected and treated early; and 6) no evidence of harm to patients' health and safety was offered as regards Petitioner's use of these routine diagnostic tests.

I find that Petitioner is a manifestly untrustworthy provider. The evidence in this case establishes that Petitioner systematically ordered laboratory tests of Medicaid recipients under circumstances where there was no documentation supporting any need for such tests. Petitioner ordered these tests in circumstances where there was no evidence that his patients suffered from conditions whose diagnosis and treatment would benefit from the laboratory testing which Petitioner ordered. Frequently, the complaints manifested by Petitioner's patients were totally unrelated to the tests which Petitioner ordered. In some cases, Petitioner persisted in ordering repetitive laboratory testing of patients

where initial test results did not reveal the presence of medical problems. Furthermore, Petitioner persisted in claiming reimbursement for unnecessary laboratory tests from Mississippi Medicaid after Mississippi Medicaid explicitly told Petitioner that his pattern of ordering tests was not medically justified.

The I.G. offered credible evidence through the testimony of Dr. Hatten, a board-certified internist, that the tests ordered by Petitioner were not medically necessary to diagnose and treat the conditions for which patients sought treatment from Petitioner. Tr. 63. Dr. Hatten also credibly testified that such tests were not necessary for the purpose claimed as justification by Petitioner, routine screening for the presence of hidden diseases. Tr. 78. I conclude that, while some testing may be justified to screen Medicaid recipients for conditions such as diabetes or hypertension, the tests ordered by Petitioner of his patients showed no meaningful relationship to the end of legitimate preventive testing.

As Dr. Hatten noted in his testimony, meaningful screening would be performed at regular intervals, with testing performed about once a year adequate to uncover disease. Tr. 96. Presumably, screening would bear some relationship to the medical signs and symptoms demonstrated by patients. However, in this case Petitioner ordered that his patients be tested on every visit, regardless of the frequency of such visits, and regardless of the medical signs and symptoms which the patients manifested. Tr. 112 - 114.

Petitioner insisted at the hearing that all his tests were medically necessary for the medical care of his patients. He stated:

> I didn't do anything wrong. I'm not into ripping anybody off, no. My practice was perfect. I did not get involved in anything that can be -- that may appear to anybody that I'm financially greedy or anything like that, that may affect my financial integrity.

Tr. 142.

I do not find Petitioner to be a credible witness. His own treatment records contradict his testimony. These records belie Petitioner's assertion that he set up procedures to routinely test his patients, whom he states were ignorant of their health, for hidden illnesses. (Tr. 112 - 113). The medical records in evidence do not

show that patients saw Petitioner for regularly scheduled routine testing. To the contrary, the medical records demonstrate that Petitioner was visited sporadically by his patients who saw him for treatment of specific complaints such as trauma or episodic illnesses. Petitioner routinely ordered laboratory tests of a patient when that patient came in for treatment of a specific illness or injury. P. Ex. 19 - 48. I can discern no pattern of routine preventive testing in Petitioner's treatment records.

While the medical records in evidence establish that Petitioner routinely ordered many laboratory tests of Medicaid recipients, they do not demonstrate that Petitioner engaged in any meaningful interpretation of the test results and in follow-up treatment of patients in cases where treatment was indicated. Legitimate preventive screening demands that someone interpret test results. There is no evidence in these records that Petitioner ever meaningfully interpreted the results of the "preventive" laboratory tests he ordered. In fact, in some cases where the laboratory work came back as abnormal, Petitioner does not appear to have pursued the cause of the abnormality. P. Ex. 31, 34, 39, 42, 46, 47; I.G. Ex. 2/17, 22, 23, 30, 34, 35, 38, 39, 39, 40.

In a letter dated November 29, 1989 to MFMC, Petitioner stated that financially he would be better off declining Medicaid patients, but that would be contrary to his ethic of providing care for the needy. I.G. Ex. 14/1. However, on August 22, 1989 Petitioner had written MFMC to tell them that 85 percent of his patients were on Medicaid, an apparently significant percentage of his income. I.G. Ex. 19/1; Tr. 111. Petitioner's protestations to the contrary, Petitioner depended on Mississippi Medicaid reimbursement as a major source of remuneration. I conclude from Petitioner's pattern of ordering unnecessary tests and claiming reimbursement from Mississippi Medicaid for those tests that Petitioner was interested in maximizing his remuneration, regardless of the absence of medical necessity for the tests that he ordered.

Further, the evidence establishes that Petitioner persisted in claiming reimbursement from Mississippi Medicaid for unnecessary tests notwithstanding the fact that Mississippi Medicaid explicitly advised him that such tests were not reimbursable. As early as November 20, 1986, Mississippi Medicaid told Petitioner that the tests he was ordering and for which he was claiming reimbursement were neither necessary nor reimbursable. Petitioner's actions are thus egregious in two ways.

First, Petitioner ordered unnecessary laboratory tests of Medicaid recipients, and second, Petitioner persisted in claiming reimbursement for such tests notwithstanding the fact that Mississippi Medicaid told him that the tests were unnecessary and not reimbursable.

The fact that Petitioner persisted in ordering and claiming reimbursement from Mississippi Medicaid for unnecessary laboratory tests over a lengthy period of time despite being told by Medicaid that his actions were improper is strong evidence that Petitioner is not a trustworthy provider of care. See 42 C.F.R. 1001.125(b)(1). That evidence is reinforced by Petitioner's refusal to acknowledge in his statements to Mississippi Medicaid and in his testimony at the hearing which I conducted that he had done anything that was improper. See 42 C.F.R. 1001.125(b)(6). Notwithstanding strong evidence to the contrary, Petitioner asserted that his practice in ordering and claiming reimbursement for laboratory tests was "perfect." Tr. 142. Petitioner's refusal to concede even the possibility that he had engaged in improper practices proves not only his failure to accept responsibility for his acts, but strongly suggests a propensity to commit additional similar misconduct in the future.

My conclusion that Petitioner is not a trustworthy provider of care is in some respects reinforced by evidence that Petitioner has a history of untrustworthy behavior as regards the Medicaid program. See 42 C.F.R. 1001.125(b)(7). In 1982, Petitioner settled a complaint by Mississippi Medicaid concerning allegations that he had charged Medicaid for services which were not properly documented and for services Medicaid recipients denied receiving. His settlement included both payment of restitution and a term of probation. Finding 14.

Petitioner's pattern of behavior is longstanding, and I have no indication that Petitioner would not again attempt in some way to bill Medicaid for services to which he was not entitled or subject patients to unnecessary testing in the future. His denial of any mistake on his part and his continued insistence that MFMC and Mississippi Medicaid are wrong persuades me that Petitioner is a continuing threat to the programs. It is precisely because Petitioner is capable of contravening the law when he finds the law to be a hindrance, and because he does not accept the wrongfulness of his conduct, that I find Petitioner to be untrustworthy. See Thomas Andrew Hunter, DAB Civ. Rem. C-337 (1991).

I conclude that an exclusion until May 1, 1993, is not extreme or excessive, in light of Petitioner's lack of trustworthiness. Petitioner manifests a longstanding propensity to engage in conduct which could jeopardize the integrity of the Medicare and Medicaid programs. I have no assurance that Petitioner will not repeat his wrongful conduct if afforded the opportunity to do so.

CONCLUSION

Based on the law and the evidence, I conclude that the exclusion proposed by the I.G. at the June 4, 1991 hearing in this case, that Petitioner be excluded until May 1, 1993, is not extreme or excessive. Therefore, I modify the exclusion originally imposed and directed by the I.G. to an exclusion from participating from Medicare and Medicaid effective until May 1, 1993.

/s/

Steven T. Kessel
Administrative Law Judge