Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Abelard A. Pelaez, M.D.,	)	DATE: October 11, 1991
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-202
	)	
The Inspector General.	)	Decision No. CR157
	)	

DECISION

By letter dated October 24, 1989, the Inspector General (I.G.) notified Abelard A. Pelaez, M.D. (Petitioner) that he would be excluded from participation in the Medicare program and any federally-assisted State health care program (such as Medicaid), as defined in section 1128(h) of the Social Security Act (Act), for a period of six years.[1] The I.G. further advised Petitioner that his exclusion was due to his federal conviction of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Petitioner was informed that exclusions from Medicare and Medicaid programs after such a conviction are authorized by section 1128(b)(3) of the Act.

Petitioner timely requested a hearing before an Administrative Law Judge (ALJ) to contest his exclusion. The case was assigned to me for hearing and decision. On January 24, 1991, I conducted a hearing in Charleston, West Virginia. Thereafter, the parties filed post-hearing briefs.

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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 of the Act (Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

I have considered the evidence introduced by both parties at the January 24 hearing and the arguments contained in their post-hearing briefs. Based on the evidence, the arguments of the parties, and the applicable law, I conclude that the I.G.'s determination to exclude Petitioner for six years is reasonable. I, therefore, uphold the exclusion.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute

Section 1128 of the Act is codified at 42 U.S.C. 1320a-7 (1988). Section 1128(a) of the Act requires the exclusion from Medicare and Medicaid of those individuals or entities "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs. Section 1128(b) of the Act permits the exclusion of individuals or entities that lose their licenses, fail to supply payment information, or are convicted of criminal offenses relating to fraud, or, as in this case, to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

II. The Federal Regulations

The governing federal regulations are codified at 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.

ADMISSIONS

Petitioner has admitted that he was convicted of the offense for which he was excluded and that his conviction was for the type of offense contemplated by section 1128(b)(3). Tr./ 5.[2]

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[2] Citations to the record in this decision are as follows:

Petitioner's Exhibits	P. Ex. (number)/(page)
Petitioner's Brief	P. Br. (page)
I.G.'s Exhibits	I.G. Ex. (number)/(page)

(continued...)

ISSUE

The issue in this case is whether the length of the exclusion imposed and directed against Petitioner is reasonable and appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[3]

1. Petitioner held an unrestricted license to practice medicine and surgery in the State of West Virginia until February 10, 1988. I.G. Ex. 7/1.

2. On or about February 10, 1988, Petitioner entered into a Consent Order with the West Virginia Board of Medicine (Board of Medicine). I.G. Ex. 7/1, 5.

3. By signing the Consent Order, Petitioner admitted (a) that he had failed to comply with the Board of Medicine's 1985 order to cease prescribing controlled substances to his wife, and (b) that probable cause existed to charge Petitioner with violating West Virginia Code § 30-3-14(c)(13), which prohibits "prescribing, dispensing, administering, mixing or otherwise preparing a prescription drug, including any controlled substance under State or Federal law, other than in good faith and in a therapeutic manner in accordance with accepted medical standards. . . . " I.G. Ex. 7/1, 2.

4. Under the terms of the Consent Order, Petitioner's license to practice medicine was suspended for six months. The suspension was stayed and Petitoner was placed on probation for three years, during which time he was permitted to practice only under the supervision of a physician selected and approved by the Board of Medicine. I.G. Ex. 7/3.

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[2](...continued)

Transcript	Tr./(page)
Findings of Fact and Conclusions of law	FFCL (number)

[3] Some of my statements in the sections preceding these formal findings of fact 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.

5. Pursuant to the Consent Order, Petitioner agreed to pursue continuing education in prescribing practices and rational drug therapy. Petitioner also agreed to maintain a record of each and every prescription he wrote for Schedule II controlled substances during the three-year probationary period. I.G. Ex. 7/4.

6. A "controlled substance" is a "drug or other substance or immediate precursor, included in schedule I, II, III, IV, or V of [21 U.S.C. 812]." 21 U.S.C. 811(a)(1)(A), (C).

7. Drugs or other substances listed in Schedules I through V have a potential for abuse. Tr./16.

8. The lower the number of the schedule in which a controlled substance is listed, the less the medical value of that substance, and the greater the potential for abuse. Tr./16-17.

9. Regulations of the Drug Enforcement Administration of the United States Department of Justice (DEA) require persons who wish to dispense and prescribe controlled substances to be registered with DEA. I.G. Ex. 3, 3A/1.

10. Petitioner was registered with DEA until his registration number expired on March 31, 1988. I.G. Ex. 3, 3A/2.

11. On or about December 15, 1988, the Grand Jury for the United States District Court for the Southern District of West Virginia indicted Petitioner on four felony counts of prescribing controlled substances using an expired DEA registration number, in violation of 21 U.S.C. 843(a)(2). I.G. Ex. 3, 3A.

12. The indictment alleged that during the months of April through July of 1988, Petitioner knowingly, intentionally, and without authority, used and caused the use, of an expired DEA registration in the course of dispensing and prescribing of controlled substances. I.G. Ex. 3, 3A/2, 4, 9, 14.

13. On January 10 through 12, 1989, Petitioner was tried by a jury in the United States District Court for the Southern District of West Virginia (District Court). I.G. Ex. 5.

14. Petitioner was found guilty of the four felony counts charged in the indictment. I.G. Ex. 4/1; 5/339.

15. On April 28, 1989, the District Court sentenced Petitioner to terms of 15 months' incarceration and one year of supervised release on each of the four counts on which he was convicted, the sentences to run concurrently. I.G. Ex. 4/2-3.

16. The District Court also ordered Petitioner to pay the sum of $20,200, comprised of a $5,000 fine, a $200 special assessment, and $15,000 to cover the cost of incarceration. I.G. Ex. 4/5.

17. In imposing Petitioner's sentence, the Judge departed upward from the sentencing guidelines of two to eight months' incarceration because he found that Petitioner had shown a disregard for criminal and civil regulation over a period of years. I.G. Ex. 5/356, 358.

18. On June 1, 1989, the Board of Medicine revoked Petitioner's license to practice medicine, citing Petitioner's convictions and certain violations of the Consent Order as unprofessional conduct. I.G. Ex. 8/5-7.

19. By order dated October 5, 1989, DEA denied Petitioner's applications to renew his registration under the Controlled Substances Act. I.G. Ex. 10.

20. Petitioner was "convicted" of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, within the meaning of Section 1128(b)(3) and 1128(i) of the Act.

21. Pursuant to section 1128(b)(3) 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.

22. 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).

23. By letter dated October 24, 1989, the I.G. notified Petitioner that he was being excluded from participating in the Medicare and Medicaid programs for six years, pursuant to section 1128(b)(3) of the Act.

24. There is no length or period of exclusion mandated by statute for section 1128(b)(3) exclusions. The exclusion provisions of section 1128 of the Act do not establish a minimum or maximum period of exclusion to be imposed and directed in cases where the I.G. has

discretion to impose and direct exclusions. Act, sections 1128(b)(1)-(14).

25. The regulations set forth the factors to be considered in determining the length of mandatory exclusions. Those factors provide guidance in determining the appropriate length of permissive exclusions. The factors include: (1) the number and nature of the offenses; (2) the nature and extent of any adverse impact the violations have on beneficiaries; (3) the amount of the damages incurred by the Medicare, Medicaid, and social services programs; (4) the existence of mitigating circumstances; (5) the length of the sentence imposed by the court; (6) any other facts bearing on the nature and seriousness of the violations; and (7) the previous sanction record of the excluded individual. 42 C.F.R. 1001.125(b)(1)-(7).

26. There are substantial reasons for a lengthy exclusion in this case: (1) Petitioner disregarded the regulations designed to safeguard the prescribing of controlled substances, after being warned by DEA officials that his registration had expired; (2) even before Petitioner's conviction, the Board of Medicine had disciplined Petitioner for failing to prescribe controlled substances in an accepted therapeutic manner; (3) Petitioner was sentenced to 15 months' incarceration; (4) Petitioner was sentenced to one year supervised release following his imprisonment; (5) the judge who sentenced Petitioner departed upward from the sentencing guidelines because of Petitioner's disregard for civil and criminal regulation; (6) Petitioner's license to practice medicine was revoked; and (7) Petitioner's applications to renew his DEA registration were denied.

27. Petitioner established that: (1) Petitioner is 57 years of age (Tr./58; P. Br. at 2); (2) Petitioner has two minor children to support (id.); (3) Petitioner is not trained for any type of employment outside the medical field (Tr./59); (4) Petitioner has been unable to find employment outside the medical field (Tr./59; P. Br. at 3); (5) prior to his conviction, Petitioner had no criminal record (Tr./68); (6) Petitioner served his prison sentence without incident and is complying with the terms of his supervised release (Tr./68-69; P. Br. at 3); (7) Petitioner practiced in his specialties of gastroenterology and radiology with a high degree of competence (P. Ex. 1, 2, 4, 5, 8-11, 14-16); Petitioner completed a course in Rational Drug Therapy, as required by the Consent Order (Tr./69; P. Br. at 3). This evidence does not establish that the I.G.'s determination

concerning the length of Petitioner's exclusion is unreasonable.

28. Petitioner did not establish that he practiced in a medically underserved area.

29. Petitioner has not proven that an exclusion of six years is unreasonable.

30. The I.G.'s determination to exclude Petitioner from participation in the Medicare or Medicaid programs for six years is reasonable. FFCL 1-26; see also 42 C.F.R. 1001.125(b)(1)-(7).

DISCUSSION

I. Petitioner Was "Convicted" Of A Criminal Offense "Relating To The Unlawful Manufacture, Distribution, Prescription, Or Dispensing Of A Controlled Substance", Within The Meaning Of Section 1128(b)(3) Of The Act.

Section 1128(b)(3) of the Act authorizes the I.G. to exclude from participation in the Medicare and Medicaid programs individuals who have been "convicted" of criminal offenses "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance". On January 12, 1989, Petitioner was found guilty by a jury of knowingly, intentionally, and without authority dispensing and prescribing controlled substances using an expired DEA registration. FFCL 11. Petitioner admits, and I find and conclude, that he was "convicted" within the meaning of section 1128(i) and that his conviction was for a type of criminal offense enumerated in section 1128(b)(3) of the Act. FFCL 12, 14, 20.

II. A Six-Year Exclusion Is Appropriate And Reasonable In This Case.

Petitioner has admitted, and I have concluded, that Petitioner was "convicted" of a criminal offense that falls within the scope of section 1128(b)(3) of the Act. Therefore, the I.G. was authorized to impose an exclusion. The remaining issue is whether the six-year exclusion imposed in this case is appropriate and reasonable. For the reasons set out below, I conclude that a six-year exclusion is reasonable.

As I stated in Falah R. Garmo, R.Ph., DAB Civ. Rem C-222 (1990) (citing Victor M. Janze, M.D., DAB Civ Rem. C-212

(1990), and Charles J. Burks, M.D., DAB Civ. Rem. C-111 (1989), in making a determination regarding the length of an exclusion, I am guided by the purpose behind the exclusion law. Congress enacted section 1128 of the Act to protect the Medicare and Medicaid programs from fraud and abuse and to protect the beneficiaries and recipients of those programs from impaired and incompetent practitioners and inappropriate or inadequate care. S. Rep. No. 109, 100th Cong., 1st Sess. 1; reprinted in 1987 U.S. Code Cong. & Admin. News 682, 708.

The key term is "protection," the prevention of harm. See Websters II New Riverside University Dictionary 946 (1984). As a means of protecting the Medicare and Medicaid programs and their beneficiaries and recipients, Congress chose to mandate, and in other instances to permit, the exclusion of individuals and entities. Through the exclusion law, individuals and entities who have caused harm, or may cause harm, to the program or its beneficiaries or recipients are no longer permitted to receive reimbursement for items or services which they provided to Medicare beneficiaries or Medicaid recipients. Thus, individuals are removed from a position which provides a potential avenue for causing harm to the programs. An exclusion also serves as a deterrent to other individuals and entities against errant or deviant behavior which may result in harm to the Medicare and Medicaid programs or their beneficiaries and recipients.

No statutory minimum mandatory exclusion period exists for section 1128(b)(3) exclusions. The determination of when an individual should be trusted and allowed to reapply for participation as a provider in the Medicare and Medicaid programs is a difficult issue and is one which is subject to discretion; there is no mechanical formula. The federal regulations provide some guidance which may be followed in making this determination.

The regulations provide that the length of Petitioner's exclusion may be determined by reviewing: 1) the number and nature of the offenses; 2) the nature and extent of any adverse impact the violations have had on beneficiaries; 3) the amount of the damages incurred by the Medicare, Medicaid, and social services programs; 4) the existence of mitigating circumstances; 5) the length of sentence imposed by the court; 6) any other facts bearing on the nature and seriousness of the violations; and 7) the previous sanction record of Petitioner. See 42 C.F.R. 1001.125(b).

These regulations were adopted by the Secretary (and his delegate, the I.G.) to implement the Act prior to the 1987 Amendment. The regulations specifically apply only to exclusions for "program related" offenses. To the extent that they have not been repealed, however, they embody the Secretary's intent that they continue to apply, at least as broad guidelines, to the cases in which discretionary exclusions are imposed. See Garmo, supra at 10; Leonard N. Schwartz, R.Ph., DAB Civ. Rem. C-62 at 12 (1989). In addition to the factors listed above, given congressional intent to exclude untrustworthy individuals from participation in Medicare and Medicaid programs, I also consider those circumstances which indicate the extent of an individual's or entity's trustworthiness.

By not mandating that exclusions from participation in the Medicare and Medicaid program be permanent, Congress has allowed the I.G. the opportunity to give individuals a "second chance." The placement of a limit on the period of exclusion allows an excluded individual or entity the opportunity to demonstrate that he or she can and should again be trusted to participate in the Medicare and Medicaid programs as a provider of items and services to beneficiaries and recipients. A determination of an individual's current and future trustworthiness thus necessitates an appraisal of the crime for which that individual was convicted, the circumstances surrounding it, whether and when that individual sought help to correct the behavior which led to the criminal conviction, and how far that individual has come towards rehabilitation.

A. The nature of Petitioner's crime was not a mere technicality.

Petitioner argues that the six-year exclusion imposed by the I.G. is unduly harsh. He urges me to draw a distinction between a conviction for prescribing or dispensing controlled substances for non-therapeutic purposes and one where the illegality did not involve prescription for non-therapeutic purposes, as Petitioner asserts is the case here. In essence, Petitioner appears to be arguing that his conviction involved a mere technical violation of the controlled substances law and therefore should be regarded as less serious than a situation involving the sale or distribution of controlled substances for illicit purposes. These arguments go to the nature of the crime of which Petitioner was convicted and the circumstances surrounding it.

Under certain circumstances, it might be possible to view the failure promptly to renew an expired DEA registration as a mere technicality which would not reflect negatively on Petitioner's trustworthiness as a provider of services to the Medicare and Medicaid programs. However, in the present case, I am unable to draw the conclusion that Petitioner's conviction involved a mere technicality.

The facts underlying Petitioner's conviction indicate that Petitioner intentionally prescribed controlled substances after receiving specific advice that he was no longer permitted to do so. On April 19, 1988, Petitioner met with DEA agents and an Assistant U.S. Attorney in connection with an investigation of another physician. At the end of that meeting, one of the DEA agents informed Petitioner that his DEA registration had expired. The DEA agent testified at Petitioner's criminal trial that she informed Petitioner that he was not permitted to prescribe any controlled substances until his DEA registration was renewed.

Petitioner testified at his trial, and again at the hearing in this case, that the DEA agent instructed him that he could not prescribe Schedule II controlled substances, but that he was permitted to prescribe Schedule III and IV controlled substances. Petitioner testified that, to the extent he prescribed controlled substances after the April 19 meeting, he did so in good faith in reliance on his understanding of the DEA agent's instructions. Apparently, the jury in Petitioner's criminal trial did not believe Petitioner's explanation, because they found Petitioner guilty of knowingly prescribing controlled substances using an expired DEA registration.

At the hearing in this case, Petitioner reiterated his purported understanding of the instructions he received from the DEA agent. I do not find Petitioner's testimony convincing. I simply cannot credit Petitioner's contention that a DEA agent advised him that he could legally prescribe certain schedules of controlled substances, but not others, at a time when his DEA registration was no longer in force.[4]

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[4] As discussed more fully below, a January 1988 Consent Order entered into by Petitioner and the Board of Medicine placed significant restrictions on Petitioner's ability to prescribe Schedule II controlled substances. For this reason, it appears more likely that Petitioner had ceased or limited his prescription of those drugs

(continued...)

Petitioner also introduced as an exhibit a written chronology encompassing his explanation of the sequence of events leading to his conviction. See P. Ex. 13. The written chronology recites that Petitioner took immediate steps to renew his DEA certificate. Id./3. Even Petitioner's version of the facts, however, acknowledges that he did not complete the application for renewal until May 27, 1988, more than a month after the April 19 meeting. The written statement also asserts that Petitioner believed that when DEA cashed his checks for the renewal fees, this indicated that his application had been approved. Id./5. However, Petitioner did not receive his bank statement showing that the checks had been negotiated until about July 13, 1988. Id. By this time, Petitioner had already written all of the prescriptions which formed the basis for counts one through three of his indictment. Thus, even Petitioner's statement demonstrates that he wrote prescriptions for controlled substances during a period when he knew that his DEA registration had expired.[5]

Federal law and regulation concerning the prescription of controlled substances reflect a legislative conclusion that these substances are potentially dangerous to the health and safety of consumers. Because of the potential for harm and abuse, Congress has decided that these substances must be strictly regulated. Undoubtedly the laws and regulations work at times to inconvenience physicians, as well as pharmacists and consumers. But any inconvenience which results to these parties reflects the legislative determination that strict controls must

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[4](...continued)
before the April 19, 1988 meeting ever occurred, and that his explanation of the DEA agent's instructions constituted a rationalization after the fact that would appear consistent with his actual prescribing pattern.

[5] Petitioner states that he knew of numerous other physicians who had failed to renew their DEA certificates in a timely manner, but who had nonetheless been granted renewal and had not been prosecuted. See P. Ex. 13/2. This argument does nothing to aid Petitioner's case. Presumably, in these instances, the failure to renew was an oversight which the physician corrected when it was discovered. Thus, to the extent these physicians wrote prescriptions using expired DEA certificates, they did so unknowingly. Petitioner was convicted of knowingly writing prescriptions using an expired certificate. Petitioner apparently has never disputed that he knew, as of April 19, 1988, that his DEA certificate was expired.

be maintained for the public good. No individual has the right to exempt himself from inconvenient aspects of this system of controls, regardless of his motivation. See Thomas Andrew Hunter, DAB Civ. Rem. C-337 (1991).

Therefore, I conclude that the nature of the crime of which Petitioner was convicted was not merely a technical violation. Instead, the conviction indicates that Petitioner treats cavalierly the laws and regulations designed to safeguard the prescription and dispensing of controlled substances. Indeed, Petitioner has demonstrated a pattern of reinterpreting official instructions regarding his prescription practices.

B. The circumstances surrounding Petitioner's conviction demonstrate a pattern of disregarding official instructions concerning the prescribing of controlled substances.

The conduct that led to Petitioner's conviction appears to be part of a long-standing pattern of irresponsible behavior by Petitioner involving the prescription of controlled substances.

In a letter dated November 5, 1985, the West Virginia Board of Medicine wrote to Petitioner, requiring him to cease prescribing any controlled substances, including demerol, to his then wife, Kay Pelaez. The Board of Medicine warned Petitioner that its investigation suggested that Petitioner might have violated W. Va. Code § 30-3-14, which prohibits

> Prescribing, dispensing, administering, mixing or otherwise preparing a prescription drug, including any controlled substance under state or federal law, other than in good faith and in a therapeutic manner in accordance with accepted medical standards and in the course of the physician's . . . professional practice.

See I.G. Ex. 6.

Subsequently, in January, 1988, Petitioner entered into a Consent Order with the Board of Medicine in which he admitted that, on numerous occasions, he had not complied with the Board's 1985 order. In the Consent Order, Petitioner further admitted that probable cause existed to file disciplinary charges against him for violation of the statutory provision quoted above.

As part of the Consent Order, Petitioner and the Board of Medicine agreed that Petitioner would be disciplined by having his license placed on probation for three years. During the probationary period, Petitioner was to practice under the supervision of another physician, to keep a record of every Schedule II controlled substance which he prescribed, and to permit the Board of Medicine to inventory any Schedule II controlled substances that were kept in his offices.

In his direct testimony at the hearing in this case, Petitioner stated that he had not prescribed any medication for his wife after the Board of Medicine issued its 1985 Order. Tr./60. On cross examination, Petitioner stated that he had been coerced into entering the Consent Order. Tr./90. However, in response to further cross examination, Petitioner admitted that he had renewed prescriptions for Schedule III controlled substances such as Valium and Tylenol #3 (with codeine) for his wife. Tr./87-90. Petitioner explained that, in his view, he had complied with the Board of Medicine's Order. He contended that he had not prescribed demerol for his wife after the Board issued its Order, and that the Board's concern in its Order was that Petitioner's wife may have been addicted to demerol. Tr./89.

I find that the Board of Medicine's 1985 Order clearly states that Petitioner was not to prescribe <u>any</u> controlled substances to his wife. Apparently, the Board of Medicine's concerns were not limited to the prescription of demerol. Based on the Consent Order and on Petitioner's testimony before me, I conclude that Petitioner did prescribe controlled substances for his wife after being ordered not to do so by the Board of Medicine. I further find that Petitioner's testimony on this subject was less than forthright. These factors indicate a lack of trustworthiness on Petitioner's part.

Taken together with Petitioner's conviction, his behavior in relation to the Board of Medicine's 1985 Order suggests a pattern of disregarding official orders aimed at controlling his prescribing practices. Perhaps Petitioner feels that, as a physician, he knows better than the Board of Medicine or the DEA how he should be prescribing. In any event, in each instance Petitioner appears to have rationalized after the fact that the official orders he received authorized him to act as he did.

I also note that the U.S. District Judge who sentenced Petitioner similarly concluded that Petitioner demonstrated a pattern of disregarding civil and criminal

regulations over a number of years. On that basis, the Judge departed upward from the federal sentencing guidelines and imposed a sentence of 15 months' incarceration. I.G. Ex. 5/358.

Based on these facts, I conclude that the circumstances surrounding Petitioner's criminal conviction and discipline by the Board of Medicine indicate that he believes that he can reinterpret statutes, regulations, and official orders to suit the needs of his practice. These circumstances indicate a lack of trustworthiness.

C. Petitioner has not demonstrated significant rehabilitation.

There are some indications in the record before me that Petitioner may be beginning to rehabilitate himself. Petitioner served his prison sentence without incident and is complying with the terms of his probation. Indeed, the record contains a letter of appreciation recognizing that Petitioner displayed extra effort and dedication to his job in the prison laundry. P. Ex. 20. Petitioner has pursued continuing medical education in prescribing practices. Tr./69. However, Petitioner did not undertake these efforts voluntarily, but only after being ordered to do so by the Court or the Board of Medicine. Therefore, I cannot accord great weight to these facts.

I find it particularly troubling that Petitioner has not acknowledged the wrongfulness of his actions. In testimony before me and in his written statement, Petitioner still asserts that a DEA agent instructed him that he could prescribe Schedule III and IV controlled substances using an expired DEA certificate. The jury in Petitioner's criminal trial did not find Petitioner's explanation convincing; nor do I. Petitioner appears to feel that he has been unjustly singled out for punishment. Tr./102. As long as Petitioner is unwilling to acknowledge that he has prescribed controlled substances improperly and illegally in the past, I do not feel confident that he can be trusted to observe appropriate prescribing practices in the near future.

D. Petitioner has not shown that an exclusion of six years is unreasonable.

My purpose in hearing and deciding the issue of whether an exclusion is reasonable is not to second-guess the I.G.'s determination, but to decide whether that

determination was extreme or excessive. 48 Fed. Reg. 3744 (Jan. 27, 1983). In this case, I conclude that the exclusion imposed by the I.G. is not extreme or excessive and is reasonable and appropriate.

The I.G. proved a number of facts which indicate Petitioner is untrustworthy and thus justify a lengthy exclusion. As discussed above, Petitioner disregarded the regulations designed to safeguard the prescribing of controlled substances, after being warned by DEA officials that his registration had expired. Moreover, even before Petitioner's conviction, the Board of Medicine had disciplined Petitioner for failing to prescribe controlled substances in an accepted therapeutic manner. The Judge who sentenced Petitioner departed upward from the sentencing guidelines because of Petitioner's disregard for civil and criminal regulation; Petitioner's sentence included 15 months' incarceration and one year supervised release following his imprisonment. Finally, following his conviction, Petitioner's license to practice medicine was revoked and Petitioner's applications to renew his DEA registration were denied.

Petitioner established a number of facts that, to my mind, do not reflect one way or another on his trustworthiness as a health care provider. These facts include Petitioner's age (57), his responsibility for the support of his two minor children, his lack of training for any type of employment outside the medical field, and his present unemployment.

Petitioner established that, prior to his conviction, he had no criminal record. However, while the presence of a prior criminal record might indicate a greater lack of trustworthiness on Petitioner's part, the absence of such prior convictions does not indicate that he is trustworthy.

Petitioner also introduced evidence to show that he practiced in his specialties of gastroenterology and radiology with a high degree of competence (P. Ex. 1, 2, 4, 5, 8-11, 14-16). This evidence might suggest that Petitioner can be trusted to provide competent care to program beneficiaries and recipients. However, evidence of Petitioner's competence does not convince me that he can be trusted to observe appropriate prescribing practices.

There was some testimony at the hearing concerning the demographics of the area of West Virginia in which Petitioner formerly practiced. However, there was no

evidence to substantiate that Petitioner practiced in a medically underserved area.

I have considered all the evidence which Petitioner introduced. However, I conclude that Petitioner has not proven that an exclusion of six years is unreasonable. Therefore, the I.G.'s determination to exclude Petitioner from participation in the Medicare or Medicaid programs for six years is reasonable and appropriate. FFCL 1-26; see also 42 C.F.R. 1001.125(b)(1)-(7).

CONCLUSION

Based on the evidence in this case and the law, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for six years is reasonable and appropriate. Therefore, I am entering a decision in favor of the I.G. in this case.

IT IS SO ORDERED

/s/

Charles E. Stratton
Administrative Law Judge