Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In The Case of:	
Marshall J. Hubsher, M.D.,	DATE: April 3, 1992
Petitioner,	
- v. -	Docket No. C-303 Decision No. CR188
The Inspector General.	

DECISION

On August 8, 1990, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare and Medicaid programs for five years, pursuant to section 1128(a) of the Social Security Act (Act), 42 U.S.C. §1320a-7(a). The I.G. advised Petitioner that he was being excluded as a result of his conviction of a criminal offense related to his participation in the Medicaid program.

By letter dated September 6, 1990, Petitioner requested a hearing. Thereafter, the I.G. filed a motion for summary disposition. Petitioner submitted a brief in response to the I.G.'s motion. The I.G. filed a reply brief. Petitioner was permitted to file a surreply brief. The I.G. was permitted to respond to Petitioner's surreply.

After submission of all briefs, Petitioner was offered the opportunity, which he had previously declined, to testify at an in-person hearing. On July 20, 1991, Petitioner requested an in-person hearing which was held on October 29, 1991 in New York City, New York.

The parties subsequently submitted posthearing briefs and reply briefs. Attached to Petitioner's posthearing brief, received by this office on January 13, 1992, was a Sample Form DEA-224[1] which purportedly came from a 1985

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[1] I infer from information contained in this document that "DEA" refers to "Drug Enforcement Administration".

revision of a DEA Physician's Manual. In his reply brief, the I.G. objected to admitting this document into evidence on the grounds that it is not probative of any issue in this case and that it was an untimely offer of evidence. The I.G. therefore requested that I strike this document from the record.

I have considered the I.G.'s objection to Petitioner's submission of the Sample Form DEA-224, and I deny his motion to strike it from the record. During the October 29, 1991 hearing I received into evidence a 1978 revision of a DEA Physician's Manual. At that time, I indicated to the parties that I would leave the record open for two weeks to give them the opportunity to see whether or not there have been subsequent revisions to this document. Tr. 18. I recognize that Petitioner submitted this subsequent revision to the 1978 version of the Physician's Manual after the two week period I gave the parties. However, the I.G. has failed to show how he is prejudiced by Petitioner's belated submission of this document. At the hearing I specifically told the parties that I would be interested in receiving subsequent versions of this document, and I expressly left the record open for that purpose. I therefore find that this document is relevant to these proceedings, and I do not find that the I.G. is prejudiced by the fact that Petitioner waited to submit it with his post-hearing brief when he was able to make arguments concerning it. Accordingly, I have admitted this document into evidence as P. Ex. 6.[2]

On January 29, 1992, the Secretary of the Department of Health and Human Services (the Secretary) promulgated new regulations containing procedural and substantive provisions affecting exclusion cases. I therefore gave the parties an opportunity to submit written comments on the issue of what, if any, effect these regulations had on the outcome of this case. The parties subsequently briefed this issue, and they agreed that the regulations promulgated on January 29, 1992 were not applicable to this case. Consequently, this is not at issue in this proceeding.

I have considered the evidence, the parties' arguments, and the applicable law. I conclude that the five year

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[2] Petitioner numbered this document P. Ex. 5. I have renumbered it P. Ex. 6 to reflect the fact that I already admitted five exhibits from Petitioner at the October 29, 1991 hearing.

exclusion imposed and directed against Petitioner by the I.G. is reasonable.

ADMISSIONS

Petitioner admitted that he was "convicted" within the meaning of section 1128(i) of the Act and that his conviction was for a criminal offense related to his participation in the Medicaid program. November 29, 1990 Prehearing Order.

ISSUE

The remaining issue in this case is whether the five year exclusion imposed and directed against Petitioner is reasonable and appropriate under the circumstances of this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner was licensed to practice medicine in the State of New York on October 22, 1976. I.G. Ex. 13.[3]

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[3] References to the record will be cited in this decision as follows:

I.G.'s Exhibit	I.G. Ex. (number/page)
Petitioner's Exhibit	P. Ex. (number/page)
I.G. Prehearing Brief	I.G. Preh. Br. (page)
Petitioner's Prehearing Response	P. Preh. Response (page)
I.G. Prehearing Reply	I.G. Preh. Reply (page)
P. Surreply	P. Surreply (page)
Transcript	Tr. (page)
I.G.'s Posthearing Brief	I.G. Posth. Br. (page)
Petitioner's Posthearing Brief	P. Posth. Br. (page)

2. Petitioner's medical specialty is psychiatry, and he is presently a practicing psychiatrist in the State of New York. Tr. 47, 134.

3. During the period from January 1, 1981 to July 31, 1984, Petitioner improperly accepted reimbursement from Medicaid for providing psychiatric services to Medicaid recipients in addition to accepting payment for these same services directly from the patients. Tr. 35-38, I.G. Ex. 1.

4. At the time his improper billing practices were being investigated, Petitioner altered a Medicaid prior approval form to make it appear that Medicaid had given him written authorization to accept direct payments from Medicaid recipients for his services. Tr. 40-42.

5. Petitioner falsely testified before a grand jury investigating his billing practices that Medicaid had given him written approval to accept payments from Medicaid patients. I.G. Ex. 1, Counts 13, 14, 16.

6. In 1985, the grand jury for the County Court, Nassau County, New York filed a 19 count indictment against Petitioner. I.G. Ex. 1.

7. Petitioner entered into a plea bargain in which he pled guilty to one count of grand larceny and to one count of tampering with public records. I.G. Ex. 3.

8. In pleading guilty to the grand larceny count, Petitioner admitted that he knowingly presented improper bills to Medicaid for reimbursement for psychiatric services when he had already received payment from patients. I.G. Exs. 1, 3/14.

9. In pleading guilty to the tampering with public records count, Petitioner admitted that he knowingly altered a public document with the intent to defraud the Medicaid program. I.G. Exs. 1, 3/14.

10. On January 14, 1987, the Nassau County Court accepted Petitioner's guilty plea. I.G. Ex. 3/16.

I.G. Posthearing Reply Brief	I.G. Posth. Reply Br. (page)
Petitioner's Posthearing Reply Brief	P. Posth. Reply Br. (page)

11. On April 24, 1987, the Nassau County Court sentenced Petitioner to four months of incarceration and to five years of probation. In addition, the court ordered Petitioner to pay restitution in the amount of $16,290 plus interest. The court also ordered that Petitioner should receive psychotherapy as directed by the Nassau County Department of Probation. I.G. Exs. 3/8; 4.

12. As of the date of Petitioner's conviction, section 1128(a) of the Act required the Secretary to suspend from participation in the Medicare and Medicaid programs any physician or other individual who had been convicted of a criminal offense related to that person's participation in the delivery of medical care or services under Titles XVIII (Medicare), XIX (Medicaid), or XX (block grants to states) of the Act. The law in effect as of Petitioner's conviction did not specify a minimum period of suspension.[4]

13. Petitioner was "convicted" of a criminal offense within the meaning the Act. Act, section 1128(i).

14. Petitioner was convicted of a criminal offense related to his participation in the delivery of medical care or services under the Medicaid program, within the meaning of the law in effect at the time of Petitioner's conviction.

15. 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. 21661 (May 13, 1983).

16. On August 8, 1990, the I.G. notified Petitioner that he was being excluded from participation in the Medicare and Medicaid programs for five years, pursuant to section 1128(a) of the Act.

17. The I.G. had the authority to exclude Petitioner pursuant to section 1128(a) of the Act. FFCL 13-15.

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[4] The Act was revised in August 1987 to require a minimum exclusion from participation in the Medicare and Medicaid programs of five years for any individual or entity "convicted of a criminal offense related to the delivery or an item or service" under Medicare or Medicaid. Pub. L. 100-93 (August 18, 1987). Many of the preexisting statute's provisions were retained without significant change as part of the revised statute. For purposes of simplicity, this decision will cite to the revised statute, except where specifically noted.

18. The remedial purpose of section 1128 of the Act is to assure that federally-funded health care programs and their beneficiaries and recipients are protected from individuals and entities who have demonstrated by their conduct that they are untrustworthy.

19. The two criminal offenses which formed the basis of Petitioner's 1987 conviction were both felonies. Felonies are serious criminal offenses. I.G. Ex. 2.

20. The grand larceny offense involved a large number separate claims which were submitted over a protracted period of time. FFCL 3.

21. The financial loss to the Medicaid program resulting from the grand larceny offense amounted to at least $16,000, a significant amount of money. FFCL 11; Tr. 35-38.

22. The grand larceny offense resulted in financial loss to Medicaid recipients. I.G. Ex. 4/3-4.

23. The fact that Petitioner attempted to conceal his wrongdoing by altering a Medicaid prior approval form is strong evidence that he is untrustworthy. FFCL 4.

24. The fact that Petitioner lied under oath to a grand jury investigating his billing practices is compelling evidence that Petitioner possesses a contempt for the law and those who enforce it. FFCL 5.

25. The serious nature of Petitioner's criminal offenses is reflected in that the sentence fashioned by the court, included incarceration and a lengthy probation. FFCL 11.

26. The serious nature of Petitioner's criminal offenses is reflected in the fact that Petitioner was suspended from the New York State Medicaid program in 1985 after his criminal indictment was filed, and he was suspended again in 1987 after his conviction. P. Preh. Br. 8; I.G. Preh. Reply 2-3; I.G. Ex. 12.

27. The serious nature of Petitioner's criminal offenses is reflected in the fact that they were one of three grounds for the action by the New York State Board of Regents to suspend Petitioner's medical license in 1988. I.G. Ex. 13.

28. The acts underlying Petitioner's 1987 conviction are a part of a larger pattern of dishonesty and misconduct. I.G. Exs. 13-16, 18.

29. Petitioner violated laws intended to regulate controlled substances on two separate occasions. In 1982, Petitioner was convicted of the misdemeanor offense of knowingly and intentionally possessing approximately 2,000 methaqualone tablets. In 1983, the Commissioner of Health found that Petitioner issued a prescription for a controlled substance with a false date in violation of the Public Health Law. These episodes are additional evidence that Petitioner is untrustworthy. I.G. Ex. 13; Tr. 121.

30. In 1988, Petitioner submitted to the United States Drug Enforcement Administration (DEA) an application for registration in which he falsely stated that he had never been convicted of a crime in connection with controlled substances. I.G. Ex. 14; Tr. 121.

31. Petitioner's explanation for misrepresenting his criminal history on his 1988 DEA application form was that he completed the form without reading it. Tr. 61-65; 120-121.

32. Although Petitioner's explanation for misstating his criminal history on the 1988 application form is not controverted by the record, it shows that Petitioner failed to recognize a duty to read questions before answering them on the DEA application form. This is evidence that Petitioner possesses a reckless disregard for making truthful statements to a government agency charged with enforcing laws related to controlled substances. FFCL 31.

33. As a result of his misstatement on his 1988 application form combined with his prior criminal record, the DEA restricted Petitioner's license to prescribe and dispense controlled substances in 1989. This is evidence of the serious nature of Petitioner's offenses. I.G. Exs. 15, 16.

34. Petitioner made misstatements under oath regarding his suspension from Medicaid at the 1989 DEA hearing. I.G. Ex. 15/36.

35. Petitioner explained these misstatements by asserting that there was an error in the transcript of the DEA hearing. This explanation is self-serving and highly suspect. Contrary to Petitioner's explanation, his misstatements conform to his pattern of disregarding the truth when it suits his own interests and is further evidence that Petitioner does not respect the importance of making truthful statements to government officials. Tr. 71.

36. Petitioner's statement in a brief submitted to me that he has had no legal problems since 1984 ignored the fact that several adverse legal actions had been taken against Petitioner after 1984. P. Preh. Br. 6. This statement is additional evidence of Petitioner's indifference to the truth.

37. Throughout this proceeding, Petitioner repeatedly and consistently disavowed that he possessed the requisite criminal intent at the time he committed his Medicaid-related offenses. Tr. 36, 40, 41, 54, 56, 94, 97.

38. Petitioner's testimony regarding his state of mind at the time he committed the Medicaid-related offenses is not credible, and it is additional evidence of his propensity to mischaracterize the truth when he believes that it is to his advantage to do so. FFCL 37.

39. Throughout this proceeding, Petitioner has attempted to minimize his culpability by providing unconvincing rationalizations for his misconduct. This leads to the conclusion that Petitioner has not fully accepted responsibility for his offenses and that he cannot be trusted to handle Medicare and Medicaid trust funds. Tr. 35, 40, 43, 73, 76.

40. The psychological evidence of record establishes that Petitioner has suffered from a personality disorder characterized by an inclination to defy authority, break rules, and take risks. This is additional evidence that the remedial purpose of the Act would be served by a lengthy exclusion. P. Exs. 1, 3.

41. The opinion of Petitioner's treating psychotherapist that Petitioner has completely recovered from his personality disorder and that he is unlikely to engage in unlawful conduct in the future is unconvincing because it is contradicted by other evidence of record. P. Ex. 2; FFCL 35-39.

42. Statements made by the physician assigned to monitor Petitioner during the period his license to practice medicine in New York is under probation is not probative on the issue of whether Petitioner has recovered from his personality disorder and is contradicted by other evidence of record. P. Ex. 4; FFCL 35-39, 41.

43. The evidence showing that Petitioner is a competent physician is not probative as to whether he can be trusted to handle Medicare and Medicaid trust funds.

44. I do not have authority to change the effective date of the exclusion. Act, section 1128.

45. A lengthy exclusion is needed in this case to satisfy the remedial purposes of the Act.

46. The five year exclusion imposed and directed by the I.G. is reasonable.

RATIONALE

The I.G. excluded Petitioner from participating in the Medicare and Medicaid programs for five years, pursuant to section 1128(a) of the Act. The exclusion is based on Petitioner's January 14, 1987 conviction of offenses related to his participation in the Medicaid program. Petitioner does not dispute that he was convicted of an offense related to his participation in the delivery of medical care or services under the Medicaid program. The law in effect as of the date of Petitioner's conviction did not prescribe a minimum period of exclusion. The remaining issue in this case is whether the length of Petitioner's exclusion is reasonable. Resolution of this issue depends on analysis of the evidence of record in light of the exclusion law's remedial purpose. Lakshmi N. Murty Achalla, M.D., DAB 1231 (1991).

Section 1128 is a civil statute and Congress intended it to be remedial in application. The remedial purpose of the exclusion law is to enable the Secretary to protect federally-funded health care programs from misconduct. Such misconduct includes fraud or theft against federally-funded health care programs. It also includes neglectful or abusive conduct against program recipients and beneficiaries. See, S. Rep. No. 109, 100th Cong., 1st Sess. 1, reprinted in 1987 U.S. Code Cong. and Admin. News 682. It has been held that the offense of intentionally submitting billings which cause an overpayment to a provider by a federally-funded health care program adversely impacts the fiscal integrity of the affected program. Daniel B. Salyer, DAB CR106 (1990).

When considering the remedial purpose of section 1128, the key term to keep in mind is "protection", the prevention of harm. See, Webster's II New Riverside University Dictionary 946 (1984). Through exclusion, individuals who have caused harm, or demonstrated that they may cause harm, to the federally-funded health care programs or their beneficiaries or recipients are no longer permitted to receive reimbursement for items or

services which they provide to program beneficiaries or recipients. Thus, untrustworthy providers are removed from positions which provide a potential avenue for causing future harm to the program or to its beneficiaries or recipients. See Vladimir Coric, M.D., DAB CR135 (1991).

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

The determination of when an individual should be trusted and allowed to reapply for reinstatement as a provider in the federal programs is a difficult issue. It is subject to discretion. The federal regulations at 42 C.F.R. 1001.125(b) guide me in making this determination.[5] 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 demonstrate trustworthiness. Leonard N. Schwartz, DAB CR36 (1989).

Since the exclusion remedy is not intended to be a punishment for wrongdoing, the regulations should not be applied as sentencing guidelines to the facts of a case to determine the punishment a provider "deserves". Instead, the regulations provide guidance as to the factors that should be considered in order to make inferences about a provider's trustworthiness and the length of time a provider should be excluded to ensure that a provider no longer poses a risk to the covered programs and to their beneficiaries and recipients. While I do not analyze an exclusion as redress for past harmful conduct, evidence of past harmful acts by an excluded party may demonstrate a propensity by that party to commit such acts or similar misconduct in the future.

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[5] These regulations were adopted by the Secretary prior to the enactment of the 1987 Amendments to the Act. As of the date of Petitioner's conviction, the 1987 Amendments to the Act were not in effect. The parties do not dispute that the regulations and the statutory law in effect at the time of Petitioner's conviction apply to this case.

The hearing in an exclusion case is, by law, de novo. Act, section 205(b)(1). 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 provider'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 provider.

A determination of the length of time necessary to establish that a provider is no longer a threat to the covered programs and to their beneficiaries and recipients necessitates an evaluation of the myriad facts of each case, including the nature of the offense committed by the provider, the circumstances surrounding the offense, whether and when the provider sought help to correct the behavior which led to the offense, and how far the provider has come towards rehabilitation. Victor M. Janze, M.D., DAB CR101 (1990).

There is no precise formula which can be applied to calculate when a provider should be trusted and allowed to reapply for participation in the federally-funded health care programs. The totality of the circumstances of each case must be evaluated in order to reach a determination regarding the appropriate length of an exclusion.

The uncontroverted evidence in this case establishes that in 1985 the grand jury for the County Court, Nassau County, New York State filed a 19 count indictment against Petitioner. FFCL 6. Petitioner entered into a plea agreement, and pursuant to that agreement he pled guilty to one count of grand larceny and to one count of tampering with public records. FFCL 7. On January 14, 1987, the Nassau County Court accepted Petitioner's guilty plea. FFCL 10. The crimes to which Petitioner pled guilty are felonies, and felonies are serious criminal offenses. FFCL 19.

The seriousness of these offenses is in some measure reflected in the sentence fashioned by the Nassau County Court. The court sentenced Petitioner to four months of incarceration and to five years of probation.[6] In

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[6] Petitioner stated at page three of his posthearing reply brief that his term of probation was subsequently reduced from a term of five years to a term

addition, the court ordered Petitioner to pay restitution in the amount of $16,290 plus interest.[7] FFCL 11, 25. Pursuant to this order, Petitioner paid the State of New York $21,444.55. He also reimbursed two of his Medicaid patients in amounts totaling $6,500 for the money he wrongfully took directly from them. The court also ordered that Petitioner receive psychotherapy as directed by the Nassau County Department of Probation. I.G. Ex. 4/3-4, 8.

The seriousness of Petitioner's criminal offenses is also reflected in the fact that on June 27, 1985, the New York State Department of Social Services suspended Petitioner from the New York Medicaid Program. This action was based on Petitioner's 1985 indictment.[8] In addition, on February 28, 1987 Petitioner was again suspended from the New York State Medicaid Program for a period of two years. This action was based on his conviction for grand larceny and tampering with public records. I.G. Ex.12.

The seriousness of Petitioner's criminal offenses is additionally reflected in the fact that on April 12, 1988, the New York State Board of Regents suspended Petitioner's license to practice medicine for a period of five years. The Board of Regents stayed execution of the suspension for the last 42 months of the five year period, and during this 42 month period it placed

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of two and a half years.

[7] Petitioner was charged with two counts of grand larceny. The sum of the restitution ordered by the court, $16,290, is the sum of money Petitioner was charged with stealing under both of these counts. Thus, while Petitioner's plea agreement required him to plead guilty to only one count of grand larceny, he was ordered to make restitution for the amounts enumerated as stolen in both counts. I.G. Exs. 1; 3/8.

[8] Attachment C to Petitioner's prehearing brief is a June 27, 1985 letter in which the New York State Department of Social Services notified Petitioner of his suspension following his indictment. Petitioner did not introduce this document into evidence at the October 29, 1991 hearing, and therefore it has not been admitted into evidence in this proceeding. I therefore rely on the uncontroverted statements made by the parties in their briefs to support my finding that Petitioner was suspended from the New York State Medicaid Program following his indictment in 1985. I.G. Preh. Reply Br. 2-3; P. Preh. Br. 8.

Petitioner on probation. The terms of the probation provide that Petitioner must undergo psychiatric examination four times a year by a psychiatrist who must certify that Petitioner is competent to practice medicine. The Board of Regents found three grounds for this action, and one of these three grounds was Petitioner's 1987 conviction for grand larceny and tampering with public records. I.G. Ex. 13.

During his October 29, 1991 hearing before me, Petitioner testified regarding the acts underlying his 1987 conviction. In discussing the grand larceny conviction, Petitioner admitted that he accepted payment from two patients to compensate him for the extra time it took him to travel to their homes for therapy sessions and to defray the cost of gasoline incurred by him in driving to their homes. Petitioner explained that these patients were unable to travel to his office for therapy because they suffered from anxiety attacks in open spaces, and that this was the condition for which he was treating them. These two patients were Medicaid recipients, and Petitioner admitted he improperly accepted reimbursement for his services from Medicaid in addition to accepting direct payment for the same services from these patients. Petitioner also admitted that he accepted these payments from these two patients for therapy sessions occurring once or twice a week over a three and a half year period, and that the total amount of damage to the Medicaid program as a result of his misconduct was approximately $16,000.[9] Tr. 35-38.

The offenses to which Petitioner admitted involve a large number of separate claims which were submitted over a three and a half year period of time. The uncontroverted evidence establishes that Petitioner's offenses do not represent an isolated event, but instead Petitioner represent an ongoing pattern of illegal conduct over a prolonged period of time. I infer from the number of offenses, as well as their duration, that Petitioner has

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[9] During the October 29, 1991 hearing, Petitioner stated that he accepted money over the normal charge for services from the father of a third patient. He explained that the financial transactions involving this third patient were not made part of the criminal indictment because the money was paid by a relative of the patient rather than by the patient. Tr. 39. Petitioner also stated that he made house calls to two additional patients, but that he did not accept additional compensation for his time and gas because these patients lived near his office. Tr. 90.

a propensity to engage in conduct that is harmful to the Medicaid program. In addition, the evidence establishes that as a result of his improper billing practices, Petitioner received approximately $16,000 to which he was not entitled. This is a substantial sum of money, and this evidence shows that Petitioner's actions resulted in significant monetary damage to the Medicaid program.

Petitioner contends that a five year exclusion is unduly harsh in this case because the number of patients involved was small compared to the total number of patients he treated and that the amount of money involved was small compared to his total income during the three and half year period in which the crimes occurred. While Petitioner admits to wrongdoing, he attempts to minimize his wrongdoing by asserting that he did not gain as much financially as other perpetrators of Medicaid fraud. Tr. 30, 58, 73.

These arguments are unpersuasive. First, I do not find that the amount of money involved in this case is small. While the amounts involved in this case are not excessively large, I do not characterize them as being insignificant. In addition, it is not necessary for me to compare the level of Petitioner's crimes with other known episodes of Medicaid fraud in order for me to conclude that Petitioner's conduct independently shows that he is an untrustworthy provider. I find that the fact that Petitioner was convicted of a grand larceny offense involving over $16,000 of Medicaid funds raises serious questions about his ability to be trusted to handle Medicare and Medicaid funds.

In addition to the grand larceny offense, Petitioner was convicted of tampering with public records. The facts underlying this offense raise additional questions about his trustworthiness. Petitioner testified at the October 29, 1991 hearing that at the time his billing practices were being investigated, he became very nervous because he "thought there was going to be an arrest". Petitioner testified that he went to the Office of Prior Approval for Medicaid, that he asked for his prior approval form for the patient he knew was the subject of the investigation at the time, and that he altered the document by adding the words "patient pays for gas". Tr. 40-42. The record also contains excerpts from sworn testimony which Petitioner gave to the grand jury investigating his billing practices in which Petitioner used the prior approval form which he had altered to support his testimony that Medicaid had given him written authorization to accept direct payments from patients. I.G. Ex. 1, Counts 13, 14, 16.

This evidence shows that Petitioner's initial reaction when he feared his wrongdoing might be discovered was to engage in criminal activity to conceal it by altering a Medicaid prior approval form. This reflects poorly on Petitioner's character, and is compelling evidence that Petitioner is untrustworthy. Not only did Petitioner alter a public record, but he lied to a grand jury in an attempt to mislead the grand jury regarding his culpability. This conduct persuasively demonstrates that Petitioner possesses a contempt for the law and those who enforce it.

I find that there is sufficient evidence to justify a lengthy exclusion based on the criminal offenses underlying Petitioner's conviction alone. The record, however, contains additional evidence which is damaging to Petitioner. The I.G. has brought forward substantial evidence showing that Petitioner's 1987 conviction was a part of a larger pattern of dishonesty and entanglements with the law.

As stated above, Petitioner's 1987 Medicaid-related conviction was one of three grounds for the April 12, 1988 decision of the New York State Board of Regents to suspend Petitioner's license to practice medicine. In addition to being found guilty of professional misconduct for his Medicaid-related conviction, Petitioner was found to be guilty of professional misconduct for a 1982 conviction of the offense of knowingly and intentionally possessing approximately 2,000 methaqualone tablets in violation of 21 U.S.C. §844.[10] The third ground for Petitioner's license suspension was that he was found guilty of professional misconduct based on a 1983 finding by the Commissioner of Health that he issued a prescription for a controlled substance with a false date in violation of Article 33 of the Public Health Law. I.G. Ex. 13. It is apparent from this evidence that on two occasions, Petitioner violated laws intended to regulate controlled substances. These episodes, when viewed in combination with his Medicaid violations, reinforce my conclusion that Petitioner is untrustworthy.

In addition to having his license to practice medicine suspended by the New York State Board of Regents in 1988, the DEA restricted Petitioner's license to prescribe and dispense controlled substances in 1989. On April 3, 1988, a few weeks before his license to practice medicine was suspended by the Board of Regents, Petitioner

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[10] The brand name of methaqualone was Quaalude. Tr. 113.

submitted an application for registration to the DEA for the purpose of obtaining permission to handle controlled substances in the course of his medical practice. Petitioner falsely stated on this application form that he had never been convicted of a crime in connection with a controlled substance. I.G. Ex. 14. Thereafter, the DEA issued an Order to Show Cause based on Petitioner's previous criminal record and on the fact that he had made a material misrepresentation on his application for registration. A hearing was held on July 28, 1989, but no findings were made on the issues raised in the Order to Show Cause. Instead, Petitioner and the DEA negotiated a settlement of the case in which the parties agreed that when New York State permitted Petitioner to practice medicine, his license to prescribe and dispense controlled substances would carry several agreed upon restrictions. I.G. Exs. 15, 16.

Petitioner concedes that the statement on his April 3, 1988 DEA application that he had never been convicted of a controlled substance violation is not true. Tr. 121. He asserts, however, that this misrepresentation was not intentional. At the hearing Petitioner testified that his 1982 conviction of the offense of possessing 2,000 methaqualone tablets was a misdemeanor. Petitioner stated that an earlier version of the registration application had asked whether the applicant had ever been convicted of a felony in connection with controlled substances. Petitioner explained that every time he completed this registration application subsequent to his 1982 conviction for methaqualone possession, he had truthfully answered "no" to this question because that was a misdemeanor conviction rather than a felony conviction. According to the Petitioner, this question was unexpectedly changed on the application form in 1988. Instead of specifically asking whether the applicant was convicted of a felony in connection with controlled substances, it was broadened to ask whether the applicant was convicted of any crime in connection with controlled substances. Petitioner testified that at the time he completed the application form in 1988, he assumed that the question was the same as it had been in the past. He therefore automatically answered "no" to this question without reading it because he had always answered "no" in the past. Tr. 61-65; 120-121.

I am disturbed by the glib and self-serving quality of Petitioner's explanation for his failure to answer truthfully the question regarding his prior criminal record on the 1988 registration application. Petitioner's explanation is not contradicted by any evidence of record, and therefore I do not find that he

intentionally intended to mislead DEA authorities regarding his prior criminal record when he completed the 1988 application form. However, even if Petitioner's explanation for this misrepresentation is true, I would still find that his conduct is evidence of a lack of trustworthiness. Petitioner's explanation is troubling because it shows a willingness on Petitioner's part to answer questions on DEA registration applications without reading with care the questions he is answering. Certainly Petitioner had a duty to read carefully the questions he was answering because a failure to do so would put him at risk of providing false information to the DEA. At the very least, answering a question without even reading it is evidence of a reckless disregard for the need to make truthful statements to a federal government agency with oversight responsibilities related to controlled substances.

This conclusion is reinforced by the fact that Petitioner provided other self-serving explanations for erroneous statements he has made. For example, in his February 14, 1991 prehearing brief, Petitioner made the statement before this tribunal that "in the past seven years I have had no problems with any insurance program and have had no legal problems". P. Preh. Br. 6. It is true that Petitioner has not committed any offenses which formed the basis of a criminal conviction since 1984. However, this statement is misleading because it fails to mention other adverse legal actions taken against Petitioner since 1984. Petitioner's statement that he has had no legal problems in the past seven years glosses over the New York State Board of Regents 1988 suspension of his license to practice medicine and the 1989 restriction of his DEA license to prescribe and dispense controlled substances.

Petitioner explained this statement by asserting that the typist mistakenly typed "have had no legal problems", and that he was at fault because he "should have proofread more carefully." P. Preh. Surreply 4. As with Petitioner's explanation for misrepresenting his prior criminal record on his DEA application, this explanation is not contradicted by evidence of record. However, it is troubling because it is another example of Petitioner's indifference to making truthful statements about his past legal problems and of his reliance on self-serving excuses when his conduct is challenged.

Similarly, the transcript of the July 28, 1989 DEA hearing shows that Petitioner made misstatements under oath regarding his suspension from Medicaid. Although Petitioner was suspended from the New York State Medicaid

Program in 1985 after his indictment and in 1987 after his conviction, he testified before the DEA Administrative Law Judge that he did not remember receiving any notice from the New York Department of Social Services advising him that he was suspended from the Medicaid program. I.G. Ex. 15/36. Petitioner explained this misrepresentation by asserting that the question he was asked at the DEA hearing was whether he had ever been excluded from Medicare rather than from Medicaid. He claimed that the transcript of the hearing was in error. Petitioner also admitted that he reviewed the transcript after the hearing, but he did not have an opportunity to correct it. Tr. 71. Petitioner's testimony before me regarding the transcript error in the DEA proceeding strains credulity. However, even if it is true, his failure to correct a transcript which he stated he reviewed is another example of his propensity to mislead government authorities when it serves his purposes to do so.

One of the most glaring and disturbing examples of Petitioner's propensity to sacrifice the truth when it is convenient for him to do so occurred at the October 29, 1991 hearing before me. During that hearing Petitioner repeatedly and consistently maintained that he did not know that accepting money from Medicaid recipients for making house calls was wrong at the time that he was doing it. Tr. 36, 54, 56, 94, 97. Petitioner also stated that at the time that he tampered with the prior approval form, he did not think that it was wrong because a Medicaid official was present when he did it and the official did not stop him. Tr. 40-41. This testimony directly contradicts statements made by Petitioner at his plea allocution. In pleading guilty to grand larceny and tampering with a public record, Petitioner unequivocally stated that he knew what he was doing was wrong at the time that he did it, and that he had the requisite criminal intent at the time he committed these crimes. I.G. Ex. 3/12-14.

Petitioner may have thought that claiming that he did not know that accepting money from Medicaid recipients and tampering with a public record were wrong at the time that he committed these offenses would minimize his culpability in my eyes. However, this testimony has the opposite effect. I do not consider this testimony as evidence of Petitioner's trustworthiness. To the contrary, I find that it again betrays a willingness to say whatever he believes will impress a fact-finder, regardless of its truthfulness. Petitioner's present characterization of the facts underlying his 1987

conviction is probative of his untrustworthiness, not of his trustworthiness.

Petitioner chose to enter into a plea agreement in 1987 because at the time he perceived it to be the most advantageous alternative available to him. Tr. 43. At the time he pled guilty, he admitted to knowingly and intentionally engaging in criminal activity. Petitioner was not forced to plead guilty to the allegations contained in the indictment. Instead, he voluntarily gave up the right to have the facts underlying his offenses examined in court when he thought that it was in his interest to do so. Now, insulated from the repercussions of the criminal justice system, Petitioner attempts to achieve the best of both worlds by denying that he had criminal intent at the time he committed the acts. This attempt to excuse his criminal conduct is highly suspect. Petitioner's testimony before me regarding his state of mind at the time of his criminal offenses is simply not credible, particularly when it is viewed in context with his other self-serving explanations.

Counsel for the I.G. confronted Petitioner with the discrepancy between his statements regarding his intent at the plea allocution and at the October 29, 1991 hearing before me. Petitioner offered the unconvincing explanation that he thought that when he offered a guilty plea he was admitting only that he had become aware that his grand larceny and tampering offenses were wrong by the time he entered the plea, and that he was not admitting that he knew that they were wrong at the time that he committed them. Petitioner testified that the judge at his plea allocution asked, "Do you know what you did was wrong?" rather than "You knew what you did was wrong?". When the transcript of the plea allocution was read to Petitioner to show that this testimony was incorrect, Petitioner gave the familiar, but unpersuasive, explanation that the transcript was in error. Tr. 96-97.

I find Petitioner's testimony disavowing criminal intent at the time he committed the Medicaid offenses troubling because it is another example of his willingness to dissemble and misrepresent the facts under oath. In addition, it is evidence that Petitioner continues to be untrustworthy, and that he therefore still poses a threat to the Medicare and Medicaid programs.

In addition, while Petitioner perfunctorily acknowledges that he <u>now</u> knows that the offenses underlying his 1987 conviction were wrong, I find that some of the statements

he made at the October 29, 1991 hearing show that he still does not fully comprehend the consequences of his past conduct. When asked what assurances he could provide that program beneficiaries and recipients would not be harmed by his future conduct, Petitioner answered, "Well, I don't think I've ever done anything to harm any patients, financially or emotionally or in any way . . ." Tr. 76. It is inconceivable that Petitioner can claim the Medicaid patients from whom he accepted money to which he was not entitled were not harmed financially by these actions. Furthermore, it is likely that these individuals suffered some mental distress when they discovered that their treating psychiatrist, a person whom they presumably trusted, was improperly taking money from them. Petitioner's failure to recognize the impact of his actions on his patients shows that he still does not take full responsibility for his actions.

The October 29, 1991 hearing transcript is replete with statements in which Petitioner attempts to minimize his culpability by providing rationalizations for his conduct. Petitioner attempted to downplay the seriousness of his conduct by referring to the affected patients as "just two patients out of hundreds in the Medicaid" and characterizing the amount of money he had misappropriated as "pretty small". Tr. 35, 58. He also asserted that his grand larceny was not so bad because one of the affected patients had parents who were "upper middle class". Tr. 137. Petitioner also tried to minimize the significance of his wrongdoing by pointing out that he did not file claims for services which were never performed and that he thought he was doing something good because he was going to the trouble of making house calls. Tr. 43, 73. In recounting the circumstances underlying his conviction for tampering with public records, Petitioner stated that a Medicaid official "let me do this". Tr. 40. These statements show that Petitioner is capable of distorted thinking in which he denies and rationalizes his wrongdoing. As long as Petitioner is unwilling to fully appreciate the wrongfulness of his actions, I do not feel confident that he can be trusted to observe Medicare and Medicaid regulations in the near future.

This evidence is consistent with psychological evidence of record. Following his indictment in 1985, Petitioner was evaluated by Dr. Joshua H. Werblowsky, M.D., on the advice of his lawyer. In a detailed report dated August 27, 1985, Dr. Werblowsky described Petitioner's history and his findings. Dr. Werblowsky diagnosed a "mixed personality disorder". In describing this disorder, Dr. Werblowsky stated that Petitioner "deals with stressful

situations by using defenses of extreme denial" and that he "reaches almost magical thinking as though if he thinks something, then it won't happen to him". Dr. Werblowsky also stated that Petitioner "has difficulty dealing with authority figures" and that his rebellion manifests itself in being disorganized and engaging in risk-taking behavior. Dr. Werblowsky also stated that Petitioner's risks can "begin with legal things and end up in illegal areas." I.G. Ex. 3. Dr. Werblowsky recommended that Petitioner seek intensive psychotherapy to treat this personality disorder.

In 1985, following his indictment, Petitioner sought psychological counseling on his own initiative from Dr. Richard C. Grossman, Ph.D., a psychotherapist.[11] In a report dated April 16, 1987, Dr. Grossman stated that he had been treating Petitioner on an ongoing basis since July 1985. Dr. Grossman described Petitioner's history and his findings, and he concurred with Dr. Werblowsky's diagnosis of a "mixed personality disorder". Dr. Grossman also agreed with Dr. Werblowsky's assessment that this personality disorder is characterized by a need to rebel against authority and order, and an inclination to take risks.[12] P. Ex. 1.

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[11] Petitioner testified that Dr. Grossman is not a licensed psychologist or psychiatrist. Tr. 78-79, 83.

[12] I note that Dr. Grossman stated in his April 16, 1987 report that Petitioner "was aware that Medicaid did not allow [payments for housecalls]", but that he "did not think it was a serious crime". With regard to Petitioner's tampering with a public document offense, Dr. Grossman stated that Petitioner "knew that Medicaid general policy was not to allow written additions to an already filed report". P. Ex. 1/1. Although Petitioner may not have realized the full gravity of these offenses when he committed them, these statements by Dr. Grossman provide additional evidence for the conclusion that, contrary to his testimony before me, Petitioner was aware that the offenses which formed the basis of his 1987 conviction were illegal when he committed them. When asked about these statements, Petitioner suggested that Dr. Grossman may have meant that Petitioner knew he had engaged in wrongdoing when he began psychotherapy in 1985. Tr. 56. I do not accept Petitioner's interpretation of these statements. I find that when these statements are read in context with the entire report, it is clear that Dr. Grossman meant to say that Petitioner knew that his offenses were wrong at the time that he committed them. Any other interpretation would

These reports provide convincing psychological evidence that Petitioner has suffered from a personality disorder that results in a tendency to take risks, to break rules, and to rationalize his wrongdoing. I find the opinions of Dr. Werblowsky and Dr. Grossman regarding the nature of Petitioner's personality disorder persuasive because they corroborate each other and they are supported by other evidence of record showing that Petitioner has repeatedly contravened the law and that he has repeatedly demonstrated a disregard for the truth when it appeared to be to his advantage to do so.

Petitioner contends that the role his diagnosed mental condition played in contributing to his wrongdoing should be considered a "mitigating" circumstance. P. Preh. Br. 9-10. Given congressional intent to exclude untrustworthy individuals from participation in federally-funded programs, it is reasonable to conclude that "mitigating" factors would constitute those factors which would lead to the conclusion that an individual is trustworthy and no longer poses a threat to covered programs and beneficiaries and recipients of program funds. Leonard N. Schwartz, R. Ph., DAB CR36 (1989). The fact that Petitioner has suffered from a personality disorder which is characterized by a need to defy authority and a propensity to take risks and which contributed to his conduct underlying his conviction for Medicaid fraud leads to a conclusion that he is less, not more, trustworthy. See Id. at 13. A personality disorder of the nature described in the psychological evidence of record is not a factor which indicates that the interests of the Medicare and Medicaid programs can be protected by reducing the period of exclusion. This is particularly true in this case in the absence of convincing evidence of record that Petitioner has recovered from this disorder.

Petitioner contends that his personality disorder should be considered a "mitigating" factor because the judge presiding over the criminal proceedings directed him to receive psychotherapy. Petitioner argues that it can be inferred from this that the judge "did understand it was an emotional disorder which caused me to commit those crimes". Tr. 74. It is true that the sentencing judge directed that as part of his criminal sentence, Petitioner should "receive therapy as directed by Probation". I.G. Ex. 4/8. However, this statement

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render Dr. Grossman's opinion that Petitioner had an unhealthy propensity to take risks and to break rules meaningless.

alone is not sufficient to establish that the judge had concluded that Petitioner suffered from a mental condition before or during the commission of his offenses which reduced his culpability. On the contrary, the fact that Petitioner was sentenced to serve time in prison shows that the judge concluded that Petitioner showed a high level of culpability for his offenses.

Petitioner also contends that while he may have suffered from a mixed personality disorder in the past, he is now completely recovered from this condition. Petitioner argues that in light of the fact that he no longer suffers from this personality disorder, there is no reason to think that he will engage in unlawful conduct in the future. Tr. 72. In support of this contention, Petitioner submitted the February 12, 1991 report of Dr. Grossman.[13] In that report, Dr. Grossman opines:

> As the result of long term treatment, [Petitioner] had successfully recovered from this mental disorder. Please note that since this disorder is usually nonrecurring, it is reasonable to posit that [Petitioner] would no longer risk violating Medicaid and Medicare regulations now or at any time in the future. I.G. Ex. 2/2.

Also in the report, Dr. Grossman states that Petitioner "has become honest and sensitive" and that he has developed "an appropriate maturity about personal and professional responsibilities and commitments." I.G. Ex. 2/4.

While I accept that Petitioner may have benefitted from his treatment sessions with Dr. Grossman, I do not find that Dr. Grossman's statements are sufficient to establish that Petitioner no longer poses a threat to the Medicare and Medicaid programs. I accord little weight to Dr. Grossman's conclusory statement that Petitioner "has become honest" because it is not consistent with my impressions of Petitioner's testimony at the October 29, 1991 hearing. During that hearing, Petitioner repeatedly

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[13] It is unclear from the record whether Dr. Grossman was still treating Petitioner at the time this letter was written. Dr. Grossman refers to Petitioner as his "former patient". Petitioner, however, testified that he received treatment from Dr. Grossman approximately once a week from 1985 through 1989, and that after that he has continued to see him approximately once a month up until the time of the October 29, 1991 hearing. Tr. 52-53.

offered self-serving testimony which lacked credibility. This leads to the conclusion that the pattern of dishonesty Petitioner has displayed in the past continues to be present. Moreover, the tone which permeated Petitioner's testimony was that he repeatedly blamed naivete, misunderstanding, and bad luck for his misconduct. This shows that Petitioner continues to engage in destructive thought processes in which he rationalizes and excuses his wrongdoing rather than accepting responsibility for it. Thus, it appears that Petitioner may still be suffering the ill effects of his personality disorder rather than being cured of it. Moreover, the probative value of Dr. Grossman's opinion regarding Petitioner's recovery is further undermined by the fact that Dr. Grossman is not a licensed psychologist or psychiatrist.[14]

Petitioner also submitted a March 28, 1991 letter from Dr. Peter J. Stein, a Board-certified psychiatrist, in support of his claim that he is recovered from his personality disorder. Dr. Stein has met with Petitioner every three months since his medical license was suspended in 1988 to determine his "capacity to practice psychiatry". Dr. Stein stated that Petitioner is trustworthy and that there "has been no evidence of any psychological limitation that would hamper his capacity to practice Psychiatry in a sound and responsible manner". While it is encouraging that Dr. Stein finds Petitioner fit to practice psychiatry, this letter is not probative on the issue of whether Petitioner has recovered from his personality disorder. In addition, Petitioner's competency to practice medicine provides no probative evidence that he can be trusted to deal in an

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[14] It is curious that Dr. Hubsher, a psychiatrist, would seek psychotherapy from an individual who did not possess at least the professional qualifications that he himself possesses. Petitioner testified that the reason he chose Dr. Grossman to be his psychotherapist is that he had experience treating other physicians "who had similar problems with Medicaid or Medicare". Tr. 78. As the I.G. pointed out in his posthearing brief, having "problems with Medicaid or Medicare" is not a psychological illness, but rather a legal matter. I.G. Posth. Br. 29. In addition, Dr. Grossman's letter contained several statements which were highly critical of the I.G. This raises questions about whether Dr. Grossman is an unbiased professional, and undermines the probative value of his opinion regarding Petitioner's recovery.

honest and forthright manner with the financial aspects of federally-funded health programs. Dr. Stein has not treated Petitioner for this condition. He sees Petitioner only once every three months for the limited purpose of monitoring his fitness to practice medicine. The record does not show to what extent Dr. Stein is aware of Petitioner's personality disorder, and therefore Dr. Stein's statements are not probative on the issue of Petitioner's recovery from that condition. In addition, the fact that the State of New York is still monitoring Petitioner is evidence that Petitioner has not proven to the licensing authority in New York that he is trustworthy. P. Ex. 4.

The record also contains character evidence in support of Petitioner's contention that he no longer poses a threat to Medicare and Medicaid programs. Rabbi Harry Katz, a former patient, testified that he was satisfied with Petitioner's treatment, that he found Petitioner to be trustworthy, and that he would refer others to Petitioner for treatment. Tr. 144, 149. Although I do not doubt the good faith of Rabbi Katz, his assurances as to Petitioner's trustworthiness are outweighed by the evidence which establishes that Petitioner has displayed a consistent pattern of dishonesty and illegal conduct dating back to the early 1980s. While Rabbi Katz's favorable opinion of Petitioner's medical skills may be accurate, it does not derogate from the strong evidence in this case showing that Petitioner cannot be trusted to adhere to Medicare and Medicaid billing requirements.

Petitioner argues that a five year exclusion is unfair because the New York Department of Social Services suspended him from the New York Medicaid program approximately five years prior to the August 8, 1990 Notice of exclusion by the I.G. Petitioner claims that an additional exclusion of five years, after his suspension from the New York State Medicaid program in 1985, results in an excessively lengthy exclusion. In addition, Petitioner argues that if the I.G. wanted to exclude him from the Medicare program, "then he should have tried to exclude me for the same five year time period that Medicaid excluded me". Petitioner contends that because he has been suspended from the New York State Medicaid program since 1985, his exclusion from Medicare should be applied retroactively. P. Preh. Br. 8-9.

My authority to hear and decide cases under section 1128 does not include authority to change the commencement date of an exclusion. A State may impose its own sanction which can be effective before, or extend beyond

the period set by the I.G. I do not have the authority to backdate the exclusion imposed and directed against Petitioner by the I.G. Samuel W. Chang, M.D., DAB 1198 (1990) at 9-11.[15]

I conclude that the five year exclusion imposed and directed by the I.G. in this case is reasonable. In reaching this conclusion, I am cognizant of the fact that Petitioner had already effectively been suspended from the New York State Medicaid program for a period of five years at the time of his exclusion from Medicaid and Medicare in 1990. I am also aware of the fact that over three and a half years elapsed between the date of Petitioner's criminal conviction and the date of the I.G.'s exclusion determination.[16] Petitioner is a manifestly untrustworthy individual. The psychological evidence of record establishes that Petitioner has suffered from a personality disorder which is characterized by a need to rebel against authority, break rules, and take risks. This assessment is corroborated by other evidence showing that as far back as 1982, Petitioner was convicted of a controlled substance violation; that in 1983 he violated another regulation pertaining to controlled substances; that he was guilty of Medicaid fraud occurring over a three and a half year period; that he tampered with public records in an attempt to cover up this fraud; that he lied to a grand jury; that he has made misstatements regarding his criminal record to the DEA; and that as recently as of the date of the October 29, 1991 hearing he refused to fully acknowledge his unlawful conduct. Instead, Petitioner continues to engage in a pattern of dissembling and evading the truth. Petitioner has

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[15] I note that under the facts of this case, to give Petitioner's exclusion retroactive effect to 1985, as Petitioner urges, would have the bizarre result of commencing the exclusion before the date of the conviction on which it is based.

[16] There is no "statute of limitations" in section 1128. The I.G. has authority under section 1128(a) to impose and direct exclusions against a provider, so long as he can establish that the provider has been convicted of a criminal offense as described in that section. Ultimately, the question which must be asked in determining whether an exclusion is reasonable is whether it is needed to protect federally funded health care programs. Petitioner's conduct after his conviction is relevant to reaching a determination regarding this issue.

offered me no meaningful assurance that he will not engage in future wrongdoing. Had the I.G. moved more promptly to exclude Petitioner, an exclusion longer than five years might have been reasonable. In light of the facts of this case, including the date when the I.G. imposed and directed the exclusion, a protective period of five years is not excessive.

CONCLUSION

Based on the law and the evidence, I conclude that the five-year exclusion from participating in Medicare and Medicaid imposed and directed against Petitioner is reasonable. I therefore sustain the exclusion.

/s/

Edward D. Steinman
Administrative Law Judge