Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Chander Kachoria, R. Ph.,	DATE: August 7, 1992
Petitioner,	Docket No. C-92-032 Decision No. CR220
- v. -	
The Inspector General.	

DECISION

In this case, governed by section 1128(b)(1) of the Social Security Act (Act), the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) notified Petitioner, by letter dated November 4, 1991, that he was being excluded from participating in the Medicare and any State health care program, as defined in section 1128(h) of the Act, for a period of three years.[1] The I.G. informed Petitioner that his exclusion resulted from his conviction of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, in connection with the delivery of a health care item or service, within the meaning of section 1128(b)(1) of the Act.

Petitioner timely requested a hearing before an Administrative Law Judge (ALJ), and the case was assigned to me for a hearing and decision. The I.G. moved for partial summary disposition on the issue of authority to exclude, and Petitioner opposed the motion. I reserved

---

[1] Section 1128(h) of the Act defines "State health care program" to include 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.

ruling on the I.G.'s motion prior to the hearing. I conducted a hearing in Cleveland, Ohio, on March 3 and 4, 1992.

I have considered the evidence adduced at the hearing, the posthearing briefs and proposed findings and conclusions of the parties, and the applicable law. I conclude that the I.G. had authority to exclude Petitioner, and that the three year exclusion imposed and directed by the I.G. is appropriate and reasonable under the circumstances.

APPLICABLE STATUTE

Section 1128 of the Act is codified at 42 U.S.C. § 1320a-7. Section 1128(b)(1) of the Act permits the I.G. to exclude from Medicare, Medicaid, and related health care programs:

> . . . Any individual or entity that has been convicted, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

ISSUES

1. Whether new regulations promulgated and effective on January 29, 1992, are applicable to this case;

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

3. Whether a three year exclusion is reasonable under the circumstances of this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the entire record, the arguments, and the submissions of the parties, and being advised fully,

I make the following Findings of Fact and Conclusions of Law (FACLs):[2]

1. At all times relevant, Petitioner was a pharmacist licensed by the State of Ohio and the owner of Lakewood Pharmacy in Lakewood, Ohio. I.G. Ex. 7/4; Tr. I/201, 203.[3]

2. In September, 1988, Petitioner was indicted by the Grand Jury of the State of Ohio, within and for the County of Cuyahoga, on one count of theft and one count of filing a false insurance claim. I.G. Exs. 2/3-4; 4/36-37.

3. The theft count of the indictment charged that, between May 5, 1988 and July 6, 1988, Petitioner knowingly and by deception obtained or exerted control over money with the purpose to deprive the owner, Blue Cross-Blue Shield of Ohio (BCBSO), of said property or services, in violation of Ohio Rev. Code § 2913.02. The indictment recited that the value of the property or services was $300 or more, but less than $5000. I.G. Exs. 2/4; 4/37.

4. The other count of the indictment charged that between May 5, 1988 and July 6, 1988, Petitioner knowingly made or presented, or caused to be made or presented, to a health care insurer a claim for payment of a health care benefit for goods or services which Petitioner knew were not received, in violation of Ohio Rev. Code § 3999.22(A)(1). I.G. Exs. 2/3; 4/36.

---

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

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

Transcript	Tr. [volume]/[page]
Petitioner's Exhibit	P. Ex. [number]/[page]
I.G.'s Exhibit	I.G. Ex. [number]/[page]
Petitioner's Posthearing Brief	P. Br. [page]
I.G.'s Posthearing Brief	I.G. Br. [page]
Petitioner's Reply Brief	P. R. Br. [page]
I.G.'s Reply Brief	I.G. R. Br. [page]

5. The evidence which the Cuyahoga County Prosecuting Attorney (prosecutor) presented to the grand jury to obtain Petitioner's indictments consisted of reports of field investigations conducted by BCBSO and the report of an audit of Lakewood Pharmacy conducted for BCBSO by Heritage Information Systems, Inc. Tr. I/25; I.G. Ex. 4.

6. As part of BCBSO's investigation, Richard Rob, Manager of Financial Investigations for BCBSO, and several of his employees, conducted undercover shopping at Petitioner's pharmacy, using assumed names and subscriber cards issued to a fictitious group. Tr. I/43-44.

7. During the course of their undercover shopping, which occurred between May 5, 1988 and July 6, 1988, BCBSO investigators presented 47 prescriptions which were filled by Petitioner. I.G. Exs. 4/4; 13/1.

8. BCBSO concluded that Petitioner dispensed a generic substitute for 33 of the 47 prescriptions, while billing BCBSO for the more expensive brand name drug. I.G. Exs. 4/4; 13/1.

9. BCBSO concluded that, as to 5 of the 47 prescriptions, Petitioner dispensed a smaller quantity than that prescribed, but billed BCBSO for the full quantity prescribed. I.G. Exs. 4/4; 13/1.

10. At the request of BCBSO investigator Rob, on or about October 5, 1988, Petitioner signed a statement in which he acknowledged that, as to some of the undercover prescriptions, he had substituted generic drugs, but had billed BCBSO for brand name drugs. Tr. I/57-59; I.G. Ex. 4/33-35.

11. The total value of the undercover prescriptions which were improperly billed to BCBSO was more than $300, although the value of each individual prescription was less than $300. Tr. I/26.

12. On March 22, 1989, Petitioner appeared in the Cuyahoga County Court of Common Pleas (court) and pled guilty to the theft count of the indictment. I.G. Ex. 2/2.

13. Petitioner's plea was accepted by the court. I.G. Exs. 2/2; 14/9.

14. The prosecutor recommended nullification of the count of the indictment charging Petitioner with

submitting false insurance claims and the court nullified that count. I.G. Exs. 2/2; 14/4, 9.

15. Petitioner was convicted of a criminal offense. Act, section 1128(i).

16. Petitioner was convicted of an offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, in connection with the delivery of a health care item or service. Act, section 1128(b)(1).

17. The Secretary of DHHS 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).

18. The I.G. had authority to exclude Petitioner from participation in the Medicare and Medicaid programs pursuant to section 1128(b)(1) of the Act. FFCLs 15-17.

19. The permissive exclusion provisions of section 1128(b)(1)-(4) of the Act do not establish minimum or maximum periods of exclusion.

20. The regulations concerning permissive exclusions pursuant to section 1128(b) of the Act, promulgated and effective January 29, 1992, 57 Fed. Reg. 3298, 3330-42 (to be codified at 42 C.F.R. § 1001, subpart C), were not intended to apply retroactively to appeals of I.G. exclusion determinations that were pending before ALJs at the time the regulations were promulgated.

21. The regulations concerning permissive exclusions pursuant to section 1128(b) of the Act, promulgated at 57 Fed. Reg. 3330-42 (to be codified at 42 C.F.R. § 1001, subpart C), were not intended to govern ALJ review of I.G. exclusion determinations.

22. The major purposes of section 1128 of the Act are: (1) to protect Medicare beneficiaries and Medicaid recipients from incompetent practitioners and inappropriate or inadequate care; (2) to protect the Medicare and Medicaid programs from fraud and abuse; and (3) to deter individuals from engaging in conduct which is detrimental to the Medicare and Medicaid programs and to the respective beneficiaries and recipients of those programs.

23. A determination that an exclusion is reasonable turns on the question of a Petitioner's trustworthiness.

24. Evidence bearing on Petitioner's trustworthiness may include the nature and seriousness of Petitioner's offense, the circumstances surrounding the offense, and how far the Petitioner has come toward rehabilitation.

25. On April 26, 1989, Petitioner was sentenced to serve one and one-half years in a correctional center and to pay court costs. The sentence was suspended on condition that Petitioner serve 30 days in the county jail, remain on probation for three years, perform 220 hours of community service, and pay a fine of $2500 and court costs. I.G. Exs. 2/1; 12/11.

26. The sentence imposed on Petitioner was the maximum sentence for the crime of which he was convicted. Tr. I/33.

27. It is evidence of the seriousness of Petitioner's crime that the judge in Petitioner's criminal case imposed the maximum sentence.

28. It is evidence of Petitioner's untrustworthiness that his conviction was based on a pattern of criminal offenses lasting, at a minimum, for several months.

29. In his testimony before me, Petitioner denied that he intentionally dispensed generic drugs to customers while billing BCBSO for brand name drugs. Petitioner asserted that the misbillings were the result of computer errors, or that members of his staff had made mistakes. Tr. II/270-71.

30. Petitioner testified that he sometimes dispensed smaller quantities than prescribed in cases where he had insufficient quantities of a drug in stock. In such cases, he testified that he informed customers of the discrepancy and offered to deliver the remainder of the prescription to the customer's home or to provide the remainder on the customer's next visit. Tr. I/205-07.

31. BCBSO investigator Rob testified that Petitioner was the pharmacist on duty when the undercover purchases were made. Tr. I/53-54.

32. BCBSO investigative reports of the undercover shopping at Petitioner's pharmacy indicate that Petitioner did not inform investigators on the occasions when he had dispensed lesser quantities of drugs than that prescribed. I.G. Ex. 13/5-6, 33, 47, 74-76, 86-87, 88-89, 113-115.

33. Petitioner's testimony, attempting to explain how BCBSO investigators could have obtained brand name drugs labeled as generics and prescriptions filled with a lesser quantity of the prescribed drugs, is not credible.

34. It is an indication of Petitioner's untrustworthiness that he has failed to acknowledge his wrongdoing or take responsibility for his actions.

35. In an order dated January 13, 1992, the Ohio Board of Pharmacy concluded that Petitioner had committed acts of dishonesty and unprofessional conduct in the practice of pharmacy. The Board of Pharmacy suspended Petitioner's license to practice pharmacy for one year, fined him $2500, and fined Lakewood Pharmacy $5000. The Board set aside 10 months of Petitioner's license suspension. I.G. Ex. 7.

36. It is evidence of Petitioner's untrustworthiness that the Board found that he had committed acts of dishonesty in the practice of pharmacy.

37. Petitioner's misconduct establishes that he is an individual who is not trustworthy to deal with program funds or with beneficiaries and recipients.

38. It is evidence of Petitioner's rehabilitation that: (1) he promptly complied with the terms of his probation, including paying restitution to BCBSO (Tr. II/251, 254); (2) he successfully completed a jurisprudence examination required by the Ohio State Board of Pharmacy (Tr. II/262); and (3) BCBSO monitored Petitioner's billing practices since his conviction and noted no further discrepancies (Tr. I/66).

39. The evidence of Petitioner's rehabilitation is not strong enough to overcome the need for an exclusion based on the evidence of Petitioner's untrustworthiness.

40. The remedial purposes of section 1128 of the Act will be served in this case by a three year period of exclusion.

41. I do not have authority in this case to entertain constitutional challenges to Petitioner's exclusion.

DISCUSSION

1. Regulations published on January 29, 1992, do not establish criteria which govern my decision in this case.

On January 29, 1992, new federal regulations applicable to exclusion cases were published at 57 Fed. Reg. 3298 et seq. (new regulations). The I.G. has argued that, because the new regulations were effective on publication, they are now binding in this proceeding. In particular, the I.G. relies on the regulation found at 57 Fed. Reg. 3331 (to be codified at 42 C.F.R. § 1001.201), which establishes a "benchmark" exclusion of three years for individuals who have been convicted of a crime related to health care fraud. It is the I.G.'s position that the new regulations require me to uphold the three year exclusion imposed on Petitioner in this case.

The I.G.'s position is without merit in light of the decision in Behrooz Bassim, M.D., DAB 1333 (1992). In that case, an appellate panel of the DAB held that, as interpreted by the I.G., the new regulations effected a substantive change in the right of a petitioner to a de novo hearing to challenge his exclusion pursuant to section 1128(b)(4) of the Act. For that reason, the panel held that retroactive application of the new regulations would deprive petitioner of due process. I conclude that application of the new regulations to the present case, nothwithstanding the fact that it arises under section 1128(b)(1) rather than under section 1128(b)(4), would similarly materially alter Petitioner's substantive rights. Therefore, I conclude that the new regulations do not apply to this case.[4]

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

---

[4] In light of the Bassim decision, I do not need to consider the merits of the I.G.'s position as to the meaning of the new regulations as applied at the hearing level. I note, however, that in Sukumar Roy, M.D., DAB CR205 (1992), I reasoned that the regulation cited by the I.G. establishes criteria to be used by the I.G. in making exclusion determinations, but does not establish criteria binding on an ALJ in conducting a de novo review of the reasonableness of an exclusion. Id. at 10-11. See also Charles J. Barranco, M.D., DAB CR187 (1992); Stephen J. Willig, M.D., DAB CR192 (1992).

The I.G. is authorized to exclude an individual pursuant to section 1128(b)(1) of the Act if that individual has been convicted, in connection with the delivery of a health care item or service, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. Therefore, in order to justify Petitioner's exclusion, the I.G. must prove three elements: 1) that Petitioner was "convicted" of a criminal offense; 2) that the offense for which Petitioner was convicted was a financial crime of the type described; and 3) that the crime was committed in connection with the delivery of a health care item or service. Here, the I.G. has met his burden of proving that Petitioner's exclusion was authorized.

Section 1128(i)(3) specifies that an individual is "convicted" when a plea of guilty or nolo contendere has been accepted by a court. Petitioner pled guilty to one count of theft. FFCL 12. The court accepted Petitioner's guilty plea. FFCL 13. Therefore, Petitioner was convicted within the meaning of section 1128(i) of the Act.

The crime of theft, to which Petitioner pled guilty, is one of the crimes enumerated in section 1128(b)(1) as justifying an exclusion. Petitioner's conviction was connected with the delivery of a health care item or service. Petitioner pled guilty to a charge that he committed theft against BCBSO, a third-party payor of health benefits. FFCLs 3, 12. Petitioner committed the theft for which he was convicted by dispensing generic drugs to his customers while billing BCBSO for the more expensive brand name drugs and by billing BCBSO for larger quantities than he actually dispensed. FFCLs 8-10. Previous decisions construing section 1128(a)(1) of the Act indicate that where a health care program or payor is the victim of a crime, the crime is "related to" the delivery of an item or service. Moreover, those decisions have held that the precise conduct of dispensing generic drugs while billing for brand name drugs is related to the delivery of an item or service. Napoleon S. Maminta, M.D., DAB 1135 (1990).[5]

---

[5] In Maminta, an appellate panel of the DAB held that a conviction is related to the delivery of an item or service under Medicare or Medicaid if either program is the victim of the offense. The petitioner in the Maminta case was convicted of converting to his own use a Medicare reimbursement check that was intended to be paid

(continued...)

The precise conduct which led to Petitioner's conviction has also been held to be related to the delivery of a health care item or service. In Larry W. Dabbs, R.Ph., et al., DAB CR151 (1991), an ALJ held that pharmacists who pled guilty to mislabeling drugs had been convicted of a criminal offense "related to" the delivery of an item or service under Medicaid within the meaning of section 1128(a)(1) of the Act. The indictments in that case showed that petitioners had dispensed generic drugs to undercover agents posing as Medicaid recipients, but had placed labels on the drugs and filed Medicaid claims indicating that they had dispensed brand name drugs. The ALJ concluded that this conduct was related to the delivery of an item or service under Medicaid because the delivery of a Medicaid item or service was an element in the chain of events giving rise to the offense. Id. at 6.

Similarly, in the present case, Petitioner dispensed generic drugs to BCBSO investigators posing as subscribers. Petitioner then submitted claims to BCBSO indicating that he had dispensed brand name drugs. BCBSO reimbursed Petitioner based on the cost of the more expensive brand name drugs, rather than on the cost of the generic drugs actually dispensed. The delivery of health care items or services -- here, delivery of generic drugs to BCBSO investigators -- was an element in the chain of events giving rise to the offense for which Petitioner was convicted. Therefore, the offense was

---

[5] (...continued)
to another health care provider. The present case involves a different factual situation from that of Maminta. The victim of Petitioner's crime was BCBSO, a private health insurer, rather than the Medicare or Medicaid program. Nevertheless, the rationale of the Maminta decision is equally applicable here. BCBSO, like Medicare and Medicaid, is a third party payor of health benefits. Petitioner's theft occurred in the course of seeking reimbursement from BCBSO for prescription drugs, a health care benefit. Therefore, as was true in Maminta, Petitioner's conviction was connected to the delivery of a health care item or service because BCBSO was the victim of Petitioner's crime.

"related" to the delivery of a health care item or service."

Petitioner points to a number of alleged defects which, he argues, render his conviction invalid. For example, he contends that he was entrapped into committing the acts for which he was convicted and that he was not given notice of his constitutional rights before he was asked to fill out and sign an incriminating statement. Regardless of the merits of these contentions, they are irrelevant to the present proceedings. Numerous decisions of the DAB have held that an exclusion is justified by the fact that a conviction has occurred. See, e.g., Dewayne Franzen, DAB 1165 at 8 (1990). It is not necessary or appropriate for me to look behind that conviction to test its validity. Any legal challenges Petitioner may have to the validity of his conviction must be addressed to the court which accepted his guilty plea. Francis Schaenboen, R. Ph., DAB 1249 at 9 (1991).

For these reasons, I conclude that Petitioner was convicted of the criminal offense of theft in connection with the delivery of a health care item or service. The I.G. therefore had authority to exclude Petitioner pursuant to section 1128(b)(1).

3. The three year exclusion imposed and directed by the I.G. is reasonable.

The remaining issue involves the reasonableness of the period of exclusion imposed and directed against Petitioner. An exclusion is reasonable so long as it is not extreme or excessive. 48 Fed. Reg. 3722 (1983). I conclude that the three year exclusion imposed and

---

[6] I have already noted that the Maminta and Dabbs cases arose under section 1128(a)(1) of the Act, rather than under section 1128(b)(1) as is the case here. The relevant language of section 1128(a)(1) mandates the exclusion of individuals or entities convicted of criminal offenses "related to" the delivery of an item or service under Medicare or Medicaid. Section 1128(b)(1) permits the exclusion of individuals or entities convicted of specified types of criminal offenses "in connection with the delivery of a health care item or service." I recognize that the operative language of the two provisions is not identical. However, the ordinary meaning of "related to" and "in connection with" is sufficiently similar to be accorded a similar interpretation.

directed against Petitioner in this case is neither extreme nor excessive, and I uphold it.

As an initial matter, Petitioner argues that his exclusion is unreasonable because the I.G. may have been operating under a merit pay system that rewarded decision-makers for excluding health care providers. P. Br. at 9-10. With his brief, Petitioner submitted a copy of the decision in Melashenko v. Bowen, No. CV-F-87-533 (E.D. Cal., June 19, 1990), which held that the merit pay system then in effect deprived practitioners of due process by giving I.G. decision makers a pecuniary interest in the outcome of their decisions. Id. Slip op. at 9. Petitioner also submitted documents which purport to be performance rating sheets for James F. Patton, the I.G.'s Director of Health Care Administrative Sanctions, covering the period 1989 through 1991. Petitioner did not list these documents in his exhibit list prior to the hearing in this case, nor did he seek to admit them into evidence at the hearing. Moreover, Petitioner has not argued that there exists good cause for his failure to introduce them earlier. For this reason, I decline to admit these documents into evidence, and I do not consider Petitioner's arguments based on them.[7]

Petitioner also contends that his exclusion is unreasonable because the I.G. arbitrarily delayed imposing the exclusion. P. Br. at 8-9. Petitioner argues that his exclusion should not be "tacked on" after the period of probation imposed by the court has been served. Whatever the equities of Petitioner's argument, it is unavailing here. It is well-settled that I have no authority to decide when an exclusion is to begin. Samuel W. Chang, M.D., DAB 1198 (1990); Mark E. Silver, D.P.M., DAB CR139 (1991).

---

[7] Even were I to admit Petitioner's exhibits and consider his arguments, these exhibits do not prove that I.G. officials had an improper pecuniary interest in the outcome of exclusion determinations during the time in question. See Edward J. Petrus, Jr., M.D., et al., Docket No. C-147 (Ruling Denying Motion to Dismiss, October 9, 1990). The I.G. argues that the proffered documents show that Director Patton's performance is judged based on the number of sanctions processed in a year, rather than the number of exclusions imposed. Moreover, I would conclude that I do not have the authority to consider alleged constitutional defects in the deliberative process of the I.G. in deciding whether or not to exclude a provider. See Betsy Chua, M.D., et al., DAB 1204 (1990).

Section 1128 is a remedial statute. It serves the remedial purposes of protecting the financial integrity of federally funded health care programs and protecting program beneficiaries and respondents from practitioners who have demonstrated that they are not trustworthy to provide care to beneficiaries and recipients. See S. Rep. No. 109, 100th Cong., 1st Sess. 1-2, reprinted in 1987 U.S.C.C.A.N. 682. Exclusions pursuant to section 1128 also serve the ancillary benefit of deterring providers from engaging in conduct which may be harmful to the programs or their beneficiaries and recipients. See Joyce Faye Hughey, DAB CR94 at 5 (1990), aff'd DAB 1221 (1991).

Exclusions pursuant to section 1128(b) are permissive; no statutory minimum period of exclusion is required. See Eric Kranz, M.D., DAB 1286 at 11 (1991). The I.G. argues, however, that the new regulations establish a three year "benchmark" for permissive exclusions and that unless I find evidence of specific mitigating factors enumerated in the new regulations, I must affirm the length of the exclusion as imposed. I have concluded in point 1, above, that the new regulations are not applicable to this proceeding. Therefore, I need not consider whether the new regulations would require me to uphold a three year exclusion absent proof of the specified mitigating factors.

The state of the exclusion law prior to promulgation of the new regulations was that petitioners and respondents seeking to challenge the I.G.'s determination to impose an exclusion pursuant to section 1128(b) were entitled to a de novo review of the reasonableness of that determination. See Bassim, DAB 1333 at 8, 11. Under that standard, the evidence in a given case is examined with a view to making findings concerning a petitioner's culpability and other matters relevant to determining a petitioner's trustworthiness to participate in the Medicare and Medicaid programs. Id. at 8. Trustworthiness is a term of art which encompasses various factors bearing on whether or not a petitioner poses a risk to the Medicare or Medicaid programs or to their beneficiaries and recipients. Id. at 13; see also Hanlester Network, et al., DAB 1347 at 45 (1992).

In prior cases, the DAB has approved use of the factors listed in 42 C.F.R. § 1001.125 (1989) as general guidance as to the types of evidence that may be relevant to a petitioner's trustworthiness. See, e.g., Kranz, DAB 1286 at 8; Vincent Baratta, M.D., DAB 1172 at 10-11 (1990). Application of these factors requires that a balance be struck between the seriousness of the offense and any

factors that may demonstrate trustworthiness. Kranz, DAB 1286, at 8.

In the present case, the I.G. has presented evidence of the seriousness of Petitioner's offense. The I.G. has presented additional evidence which establishes that Petitioner is not trustworthy to deal with federally funded health care programs and their beneficiaries and recipients. Petitioner has attempted to diminish his culpability for the crime of which he was convicted. However, I do not find his explanations credible. Petitioner presented some evidence of rehabilitation. Nevertheless, I conclude that the three year period of exclusion is a reasonable period to require Petitioner to demonstrate that he is again trustworthy to participate in the Medicare and Medicaid programs.

Petitioner was indicted and pled guilty to a single felony count of theft. FFCL 12. The count of the indictment to which he pled guilty recited that he had knowingly and by deception obtained or exerted control over money with the purpose to deprive the owner, BCBSO, of the money. FFCL 3. Thus, by pleading guilty, Petitioner admitted that he had knowingly committed acts involving deception. As an initial matter, Petitioner's conviction of such a crime is strong evidence that he poses a risk to federally funded health care programs.

The conclusion reached by the sentencing court as to the seriousness of Petitioner's crime and his culpability is also relevant to the question of Petitioner's trustworthiness. See e.g., David Cooper, R.Ph., DAB CR88 (1990). In the present case, the court that accepted Petitioner's guilty plea and imposed sentence on him viewed Petitioner's crime as serious. The court imposed the maximum sentence, one and one half years in the correctional center. FFCLs 25-26. The term of incarceration was suspended on condition that Petitioner serve 30 days in the county jail, pay a $2500 fine and court costs, and perform 220 hours of community service. FFCL 25.

The Ohio State Board of Pharmacy similarly concluded that Petitioner had engaged in dishonesty and unprofessional conduct in the practice of pharmacy. FFCL 35. As a result of this finding, the Board of Pharmacy suspended Petitioner's license to practice pharmacy and imposed substantial fines. Id. This finding by the Board of Pharmacy is additional evidence of Petitioner's untrustworthiness.

The I.G. argues that it is evidence of Petitioner's untrustworthiness that he engaged in wrongful activity for over one year. I.G. Br. at 20-21. The I.G. points to an audit of Lakewood Pharmacy conducted as part of the BCBSO investigation of Petitioner. The audit reached the conclusion that Petitioner had been substituting generic drugs for brand name drugs during all of 1987 and part of 1988. I.G. Ex. 6/9. While Petitioner apparently paid restitution to BCBSO in an amount based on the audit results, Tr. I/60-62, Petitioner argues that the audit was flawed because it failed to account for inventory on hand at the time he purchased the pharmacy. P. Br. at 3. I make no finding as to whether Petitioner's wrongful conduct extended over more than a year. It is evidence of untrustworthiness, without more, that the conduct to which Petitioner pled guilty extended over several months. See Sukumar Roy, M.D., DAB CR205 at 15.

In arguing that he is trustworthy, Petitioner attempts to minimize his culpability by arguing that he was entrapped into committing the offenses, that he was coerced into signing an incriminating statement, and that someone else must have been responsible for dispensing the prescriptions in question. See, e.g., Tr. I/167-68; II/270-71. Petitioner's contentions are not credible. BCBSO investigator Rob testified that when he conducted undercover shopping at Petitioner's pharmacy, he simply presented prescriptions to be filled, but did not engage in further conversation. Tr. I/52. Moreover, investigator Rob testified that when he visited Lakewood Pharmacy, Petitioner was the pharmacist on duty. Tr. I/53. Finally, both investigator Rob and agent Reed of the Ohio State Board of Pharmacy testified that they made no threats to Petitioner at the time he filled out and signed the statement admitting he had dispensed generic drugs while billing for brand name drugs. Tr. II/325, 358-59, 373-74.

I find it significant that Petitioner, who was represented by counsel throughout the criminal proceedings which resulted in his conviction, raises the issues of entrapment and coercion of his confession for the first time before me. If the facts were as Petitioner asserts, it seems that his counsel would have been unlikely to advise him to plead guilty.

I am concerned also that Petitioner may continue to pose a risk to the Medicare and Medicaid programs and their beneficiaries and recipients because he has failed to accept any responsibility for his wrongful conduct. In his testimony before me, Petitioner engaged in elaborate rationalizations as to how his computer or some employee

could have been responsible for the billing "errors" that resulted in the overcharges to BCBSO. Even if I were persuaded that Petitioner's explanations were plausible, which I am not, I would still expect Petitioner to accept ultimate responsibility for the misbillings and mislabelings as the Pharmacist in charge. Petitioner has not done even this.

Petitioner argues that it is evidence of his trustworthiness that an audit by another third party payor revealed no discrepancies. P. Br. at 7. However, Petitioner did not introduce this audit into evidence. Moreover, the fact that Petitioner did not overcharge another third party payor does not lessen his culpability for overcharging BCBSO.

There are some signs that Petitioner may have begun to rehabilitate himself. For example, Petitioner promptly complied with the terms of his probation, including paying restitution to BCBSO. Tr. II/251, 254. See Roy, DAB CR205 at 17. Petitioner also successfully completed a jurisprudence examination required by the Ohio State Board of Pharmacy. Tr. II/262. Additionally, investigator Rob testified that BCBSO had monitored Petitioner's billing practices since his conviction and had noted no further discrepancies. Tr. I/56. However, this evidence is not sufficient to overcome the strong evidence of Petitioner's untrustworthiness. Given the serious nature of Petitioner's crime and the potential for harm to federally funded health care programs and their beneficiaries and recipients should Petitioner again engage in the type of conduct which led to his conviction, a three year exclusion is reasonable.

CONCLUSION

For the reasons stated, I conclude that the three year exclusion imposed and directed by the I.G. against Petitioner is reasonable. I therefore uphold the exclusion.

/s/

Charles E. Stratton
Administrative Law Judge