Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Willeta J. Duffield,	)	DATE: August 14, 1992
	)	
Petitioner,	)	Docket No. C-92-063
	)	Decision No. CR225
- v. -	)	
	)	
The Inspector General.	)	
	)	

DECISION

This case is governed by section 1128 of the Social Security Act (Act). By letter dated January 14, 1992, the Inspector General (I.G.) notified Petitioner that she was being excluded from participation in the Medicare and State health care programs[1] for a period of three years. The I.G. advised Petitioner that her exclusion resulted from her conviction of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The I.G. further advised Petitioner that exclusions from the Medicare and Medicaid programs after such a conviction are authorized by section 1128(b)(3) of the Act.

By letter dated January 27, 1992, Petitioner requested a hearing before an Administrative Law Judge (ALJ), and the case was assigned to me for hearing and decision. During a telephone prehearing conference which I conducted on February 19, 1992, Petitioner stated that she did not contest the I.G.'s authority to exclude her pursuant to section 1128(b)(3). However, Petitioner contended that the length of the three year exclusion was unreasonable.

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[1] "State health care program" is defined by section 1128(h) of the Act, 42 U.S.C. § 1320a-7(h), to cover three type of federally-assisted programs, including State plans approved under Title XIX (Medicaid) of the Act. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

Counsel for the I.G. stated that there were no factual disputes and that this case could be decided on a motion for summary disposition. Petitioner agreed to a hearing on written submissions only because she had limited financial resources and she could not afford the services of an attorney.

On February 20, 1992, I convened a second prehearing conference to advise the parties that I had determined that the issue of the reasonableness of the length of the exclusion involved contested facts related to Petitioner's trustworthiness. I informed the parties that an in-person hearing would assist me in resolving factual disputes relevant to the appropriate length of the exclusion by providing me with the opportunity to observe the demeanor of Petitioner and other witnesses and to evaluate their credibility. When I informed Petitioner that the site of the hearing would be Ann Arbor, Michigan, she indicated that she would like to have the opportunity for an in-person hearing. I scheduled a hearing for March 31, 1992.

On March 26, 1992, the I.G. filed a motion for summary disposition. In view of the fact that there was insufficient time for Petitioner to respond to this motion or for me to rule on it prior to the March 31 hearing, I informed the parties that this case would proceed to hearing. I also indicated that I would address the issues raised by the motion in the decision I issued after the hearing. On March 31, 1992, I conducted a hearing in Ann Arbor, Michigan. Thereafter, the I.G. submitted a posthearing brief, to which Petitioner responded.

I have considered the evidence of record, the parties' arguments, and the applicable law. I conclude that the I.G.'s determination to exclude Petitioner from participation in Medicare and Medicaid programs for three years is excessive and that an exclusion for two years is reasonable under the circumstances of this case.

ADMISSIONS

As documented on page two of my February 25, 1992 Order and Notice of Hearing, Petitioner admits that she was "convicted" of a criminal offense and that the criminal offense relates to the "unlawful manufacture, distribution, prescription, or dispensing of a controlled substance", within the meaning of section 1128(b)(3) of the Act.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

Having considered the entire record, the arguments and submissions of the parties, and being fully advised herein, I make the following Findings of Fact and Conclusions of Law (FFCLs):

1. Petitioner is a licensed practical nurse who worked as a nurse from 1967 to 1988. From 1987 to 1988, she worked as a licensed practical nurse at a facility known as Cedar Knoll Nursing Home. I.G. Ex. 7/4; Tr. 22, 48.[3]

2. In approximately 1986, Petitioner was diagnosed as having breast cancer, and she subsequently underwent a mastectomy and chemotherapy. Tr. 29, 48; I.G. Ex. 7/11.

3. In a two count Information filed in the Michigan Circuit Court of the County of Jackson on April 20, 1987, Petitioner was charged with one count of delivering the controlled substance cocaine and one count of conspiring to deliver cocaine. The Information alleged that the offenses occurred on or about March 31, 1987. I.G. Ex. 6.

4. Pursuant to a plea agreement executed on September 10, 1987, Petitioner pled guilty to one count of conspiring to deliver cocaine and that day the court entered a judgment of conviction, based on its acceptance of her guilty plea. I.G. 7.

5. On October 28, 1987, the court sentenced Petitioner to a one year suspended sentence of incarceration, eighteen months probation, a fine in the amount of $100, and court costs in the amount of $350. In addition, the

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

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

I.G. Exhibits	I.G. Ex. (number)/(page)
Petitioner's Exhibits	P. Ex. (number)/(page)
Hearing Transcript	Tr. (page)

5. On October 28, 1987, the court sentenced Petitioner to a one year suspended sentence of incarceration, eighteen months probation, a fine in the amount of $100, and court costs in the amount of $350. In addition, the court ordered that Petitioner refrain from contact with controlled substances unless prescribed by a physician and that Petitioner engage in substance abuse counseling as required by Petitioner's probation officer. I.G. Ex. 8.

6. On September 12, 1988, in an Information filed in the Michigan Circuit Court for the County of Jackson, Petitioner was charged with one count of delivering cocaine. The Information alleged that the offense occurred on or about June 6, 1988. I.G. Ex. 2.

7. The June 6, 1988 offense occurred while Petitioner was still on probation for her September 10, 1987 conviction. FFCL 5.

8. On February 22, 1989, Petitioner pled guilty to the charge of delivering cocaine on June 6, 1988, and that day the court entered a judgment based on its acceptance of her guilty plea. I.G. Ex. 1.

9. On April 20, 1989, the court sentenced Petitioner to incarceration for a period of not less than two years and not more than forty years and recommended that she receive substance abuse counseling. I.G. Ex. 4/5.

10. In a two count administrative complaint filed before the Michigan Board of Nursing (Michigan Nursing Board) on March 16, 1989, Petitioner was charged with violating the Public Health Code, based on her 1987 and 1989 drug convictions. I.G. Ex. 10.

11. Petitioner stipulated to the allegations contained in the administrative complaint, and, in a Consent Order dated June 23, 1989, the Nursing Board revoked Petitioner's license, effective that date, for an indefinite period. The Order states that in the event Petitioner applies for reinstatement of her license, she would be required to establish her fitness to practice nursing. I.G. Ex. 11.

12. Petitioner was in prison from April 1989 to April 1990. Tr. 9; FFCL 9.

13. Petitioner was on a "tether program" from April 1990 to April 1991. Tr. 9, 48.

14. As a participant in the tether program, Petitioner was considered to be an inmate in prison. However, she was allowed to go to work and come home as long as she wore a monitor on her ankle known as a tether. During this period, authorities periodically tested Petitioner for drug use and checked to see that she went to work as required. Tr. 9.

15. While Petitioner was on the tether program, she returned to work as a nurse's aide in the Cedar Knoll Nursing Home. She continued to work there in that position until her exclusion in January 1992. Tr. 17, 19.

16. In September 1990, while Petitioner was on the tether program, she began to meet every Tuesday with a minister of the Jehovah's Witnesses, for Bible study sessions. Petitioner has attended these meetings regularly since that time, and she has begun also to attend Bible study meetings on other days of the week. Tr. 35 - 39.

17. The last time authorities tested Petitioner for drug use was when she was on the tether program. Tr. 43.

18. After her release from the tether program in April 1991, Petitioner was placed on parole for a period of one year. P Ex. 1.

19. During the period Petitioner was on parole, she attended a drug counseling program which was provided to her free of charge for nine months. She stopped receiving this counseling in December 1991 because her parole was coming to an end and it was no longer provided to her free of charge. Tr. 41, 46 - 47.

20. Petitioner has attended Narcotics Anonymous meetings as often as her work schedule permits since approximately April 1990. Tr. 44 - 45.

21. Petitioner's mother died approximately a year before the hearing in this case on March 31, 1992. Tr. 32.

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

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

24. The Secretary of the Department of Health and Human Services (the Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

25. On January 14, 1992, the I.G. excluded Petitioner from participating in the Medicare program and directed that she be excluded from participating in Medicaid.

26. The I.G. had the authority to exclude Petitioner pursuant to section 1128(b)(3) of the Act. FFCL 22 - 24.

27. The I.G. excluded Petitioner for a period of three years.

28. Section 1128(b)(3) of the Act does not establish a minimum or maximum length for exclusions brought under that section.

29. The Secretary did not intend that the regulations promulgated on January 29, 1992, concerning permissive exclusions under section 1128(b)(3) of the Act, 42 C.F.R. § 1001.401, apply retroactively to appeals of I.G. exclusion determinations that were pending before ALJs at the time the regulations were promulgated.

30. The remedial purpose of section 1128 of the Act is to protect the integrity of federally-funded health care programs and the welfare of beneficiaries and recipients of such programs from individuals and entities who have been shown to be untrustworthy.

31. Petitioner's drug abuse was in part a response to the stress caused by her breast cancer and its treatment. Tr. 29, 48.

32. The fact that Petitioner succumbed to the stress of illness by abusing drugs is disturbing because she is at risk for abusing drugs in response to stress in the future. FFCL 2, 31.

33. The offense of conspiring to deliver cocaine, of which Petitioner was convicted in 1987, is a serious criminal offense. FFCL 4.

34. Petitioner did not stop abusing drugs after her 1987 conviction. Tr. 46.

35. The fact that Petitioner did not stop abusing drugs after her first conviction raises serious questions about her trustworthiness. FFCL 34.

36. The offense of delivering cocaine, of which Petitioner was convicted in 1989, is a serious criminal offense, especially since it was the second conviction for a drug-related crime. FFCL 8, 33, 35.

37. The seriousness of Petitioner's 1989 offense is reflected in the fact that the court sentenced Petitioner to incarceration for a period of not less than two years. FFCL 9.

38. The serious nature of Petitioner's offenses is reflected in the Michigan Nursing Board's decision to revoke Petitioner's nursing license for an indefinite period of time. FFCL 11.

39. The conduct underlying Petitioner's convictions occurred over a lengthy period of time. FFCL 3, 6.

40. Petitioner's substance abuse disorder jeopardized the welfare of patients. FFCL 1, 3, 6.

41. The trauma of incarceration motivated Petitioner to stop abusing drugs, and she has not abused drugs since that time. Tr. 46, 49.

42. Petitioner's performance of her nursing duties was good before her 1987 conviction, and her work performance improved even more after she returned to work while she was on the tether program. Tr. 17, 18, 26.

43. Petitioner's unlawful conduct did not have an adverse impact on her patients. FFCL 42.

44. Petitioner's unlawful conduct was not intended to cause harm to patients. FFCL 42 - 43.

45. Petitioner benefitted from a nine month drug counseling program offered to her during her parole. Tr. 46.

46. The fact that Petitioner did not relapse into drug addiction after her mother died is evidence that she has made progress in her rehabilitation. FFCL 21, 41.

47. Petitioner's determination to remain free of controlled substances is evidenced by her attendance at Bible study and Narcotics Anonymous meetings. FFCL 16, 20.

48. Petitioner volunteered to undergo drug testing in the future, and this shows that she is confident that she will remain free of controlled substances. Tr. 41.

49. In light of the progress Petitioner has made toward rehabilitation, a three year exclusion is extreme and excessive.

50. Under the circumstances of this case, the remedial considerations of the Act will be served by a two year exclusion.

DISCUSSION

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

Section 1128(b)(3) of the Act authorizes the I.G. to exclude from participation in the Medicare and Medicaid programs individuals or entities who have been "convicted, under Federal or State law, of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance".

The first criterion that must be satisfied in order to establish that the I.G. had the authority to exclude Petitioner under section 1128(b)(3) of the Act is that Petitioner must be convicted of a criminal offense. The undisputed facts establish that: (1) on February 22, 1989, Petitioner pled guilty to the charge of delivering a controlled substance in violation of Michigan State law, and (2) on that same day the Michigan Circuit Court of the County of Jackson accepted Petitioner's guilty plea. FFCL 6, 8. Section 1128(i)(3) defines the term "convicted" of a criminal offense to include those circumstances in which a plea of guilty by an individual or entity has been accepted by a federal, State, or local court. I conclude that Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(b)(3) and 1128(i)(3) of the Act.[4]

The second criterion that must be satisfied in order to find that the I.G. has the authority to exclude Petitioner under section 1128(b)(3) is that the criminal offense must relate to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The undisputed facts establish that Petitioner was convicted of delivering a controlled

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[4] The record shows that Petitioner had previously been convicted of the offense of unlawfully conspiring to deliver cocaine. FFCL 4.

substance in violation of Michigan State law. The criminal offense of delivering a controlled substance in violation of a State statute on its face constitutes the unlawful distribution of a controlled substance, within the meaning of section 1128(b)(3) of the Act. Therefore, the undisputed facts satisfy the requirement that the criminal offense relates to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

Petitioner admitted during the February 19, 1992 prehearing conference that she was "convicted" of a criminal offense "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance". See February 25, 1992 Order and Notice of Hearing at p. 2. The record supports these admissions. Thus, I conclude that the undisputed facts establish that the I.G. had the authority to impose and direct an exclusion against Petitioner from participation in the Medicare and Medicaid programs.

II. The three year exclusion imposed and directed against Petitioner is unreasonable.

Having concluded that the undisputed facts establish that the I.G. has the authority to exclude Petitioner, I must next consider whether the length of the three year exclusion imposed and directed against Petitioner is reasonable. On January 29, 1992, the Secretary published regulations which, among other things, establish criteria to be employed by the I.G. in determining the length of exclusions to be imposed pursuant to section 1128(b)(3) of the Act. 42 C.F.R. § 1001.401. These regulations also include provisions which govern appeals of such exclusions. 42 C.F.R. Part 1005. In considering the issue of the reasonableness of the length of the exclusion, the threshold question is whether these regulations apply to this case.

A. The new regulations promulgated on January 29, 1992, do not govern the disposition of this case.

The I.G. asserts that, as the new regulations were effective when they were published on January 29,1992, they apply to any exercise of ALJ authority on and after that date. According to the I.G., such application is not retroactive, since there has been no final administrative decision and therefore the regulations would not be altering the outcome of the final agency action. I.G. Motion for Summary Disposition at 7.

The I.G. also cites Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974), for the proposition that "a court must apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary". Bradley at 711. The I.G. contends that there is no statutory direction or legislative history that would negate the application of the new regulations to this case. The I.G. also asserts that manifest injustice would not result from the application of the new regulations to this case. I.G. Motion for Summary Disposition at 7 - 10.

According to the I.G., section 1001.401 of the new regulations is applicable in cases, such as this, where an individual or entity has been convicted of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Section 1001.401(c)(1) provides that:

> An exclusion imposed in accordance with this section will be for a period of 3 years, unless aggravating or mitigating factors listed in paragraphs (b)(2) and (b)(3) of this section form a basis for lengthening or shortening that period.

Section 1001.401(b)(2) of the new regulations provides a list of specific factors which the I.G. may consider aggravating and which may serve to lengthen the exclusion. Section 1001.401(b)(3) provides a list of specific factors which the I.G. may consider mitigating and which may serve to shorten the exclusion. The I.G. contends that the specific factors enumerated in section 1001.401(b)(3) are the only factors which may be considered as a basis for shortening the three year exclusion. The I.G. states that Petitioner did not present any evidence showing that the mitigating factors specified in section 1001.401(b)(3) of the regulations are present, and there is no basis for imposing an exclusion for a period that is less than three years in duration. I.G. Motion for Summary Disposition at 10 - 11.

The I.G. also cites section 1005.4 of the new regulations in support of his argument that I have no authority to find the regulations invalid or to review the I.G.'s exercise of discretion to exclude or to review the scope or effect of such exclusion. The I.G. avers that I must affirm the three year exclusion in this case and that I do not have the authority to reduce it under the new regulations. The I.G. concludes that since I do not have

regulations. The I.G. concludes that since I do not have the authority to reduce the three year exclusion under the facts of this case, there is no need for an in-person hearing and summary disposition is appropriate. I.G. Motion for Summary Disposition at 11 - 12.

Petitioner did not address the issue of the applicability of the new regulations to this case.

The publication of the new regulations stated an effective date of January 29, 1992, but contained no guidance as to whether they were to apply to pending cases. It is a generally accepted principle of law that where retroactive application of a law would impose greater liabilities and affect substantive rights, then the law should be prospective only. United States v. Murphy, 937 F. 2d 1032 (6th Cir. 1991). Absent a specific instruction in the Act or regulations directing that the regulations apply to pending cases, I conclude that the Secretary did not intend that the regulations be applied retroactively in a manner that would strip parties of previously vested rights or privileges.

The I.G. asserts that manifest injustice would not result from the application of the new regulations to this case. I disagree.

At the time the I.G. notified Petitioner of his exclusion under section 1128(b)(3), Petitioner had the right to a de novo hearing under section 205(b)(1) of the Act. These hearings generally consider whether: 1) the I.G. has authority under the Act to impose the exclusion; and 2) the exclusion comports with the remedial purposes of the Act. Charles J. Barranco, M.D., DAB CR187 at 18 (1992). In reaching a determination as to whether an exclusion comports with the remedial purpose of the Act, the ALJ may consider all evidence relevant to the reasonableness of an exclusion, including that which may not have been available to the I.G. when the decision to exclude was made. Id.

The I.G. would have me apply the new regulations to exclude Petitioner for a three year period unless specific aggravating or mitigating factors are present. This interpretation is inconsistent with the notion of a de novo hearing as provided by section 205(b)(1) of the Act and is contrary to precedent of the Departmental Appeals Board (DAB). To the extent that the regulations deprive parties of the opportunity for a full hearing as to the reasonableness or their exclusions, those regulations would, if applied to determinations made prior to the regulations' effective date, strip parties

of previously vested rights under sections 1128(b) and 205(b)(1) of the Act. There is nothing in the regulations which can be interpreted as a directive to apply them in a way which would produce such a consequence. Such an application would create manifest injustice and would be an unlawful retroactive application of the new regulations, a result not intended by the Secretary.

Moreover, an appellate panel recently found, in the case of Behrooz Bassim, M.D., DAB 1333 (1992), that to apply the new regulations to a case midstream, absent specific and uncontroverted guidance to do so, would constitute a violation of Petitioner's due process rights. The appellate panel found also that application of the new regulations to such a case would result in derogation of section 205(b)(1) of the Act, which guarantees Petitioner a de novo hearing. Accordingly, I find that the January 29, 1992, regulations, as interpreted by the I.G. to require a three year exclusion in this case, do not apply.

Even assuming arguendo that the new regulations apply to this proceeding, there remains the question of whether Part 1001.401 is binding on a hearing held under section 205(b)(1) of the Act. The plain language of these regulations strongly suggests that the Secretary intended that they control the I.G. in making his exclusion determination, but the Secretary did not intend them to apply to de novo administrative review of exclusion actions. Section 1001.401 specifically states: "The OIG may exclude . . . " As stated in Stephen J. Willig, M.D., DAB CR192 at 19 (1992), the new regulations establish:

> criteria to be employed by the I.G. in making exclusion determinations. Each subpart of Part 1001 refers only to "the OIG." "OIG" is defined by 42 C.F.R. § 1001.2 to mean "Office of Inspector General of the Department of Health and Human Services." 57 Fed. Reg. 3330. The comments to Part 1001 of the Regulations provide that '[t]he basic structure of the proposed regulations in this part set forth for each type of exclusion the basis or activity that would justify the exclusion, and the considerations the OIG would use in determining the period of exclusion.' 57 Fed. Reg. 3299 (emphasis added).

Therefore, the plain language of section 1001.401 and the comments of Part 1001 indicate that this provision is to be applied to the I.G.'s determination only and does not control my determination in this case. Until an

appellate panel interprets these regulations as the I.G. contends, I shall continue to apply them consistent with my obligation under the Act to consider a myriad of facts to determine the length of time necessary to establish that Petitioner is not likely to repeat the type of conduct which precipitated the exclusion. Robert Matesic R. Ph. d/b/a Northway Pharmacy, DAB 1327 at 12 (1992).

B. The remedial purpose of the Act is satisfied in this case by a two year exclusion.

In deciding whether an exclusion under section 1128(b)(3) is reasonable, I must analyze the evidence of record in light of the exclusion law's remedial purpose. Bernard Lerner, M.D., DAB CR60 at 8 (1989).

Section 1128 is a civil statute and Congress intended it to be remedial in application. The remedial purpose of the exclusion 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 beneficiaries and recipients. See S. Rep. No. 109, 100th Cong., 1st Sess. 1, reprinted in 1987 U.S.C.C.A.N. 682.

When considering the remedial purpose of section 1128, the term to keep in mind is "protection", the prevention of harm. 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.

By not mandating that exclusions from participation in the programs be permanent, however, Congress has allowed the I.G. the opportunity to give individuals a "second chance". An excluded individual or entity has the opportunity to demonstrate that he or she can and should be trusted to participate in the Medicare and Medicaid programs as a provider. Lakshmi N. Murty Achalla, M.D., DAB 1231 (1991).

The hearing is, by reason of section 205(b)(1) of the Act, de novo. Evidence which is relevant to the reasonableness of an exclusion is admissible, whether or not that evidence was available to the I.G. at the time

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.

However, I do not substitute my judgment for that of the I.G.. An exclusion determination will be held to be reasonable where, given the evidence in the case, it is shown to fairly comport with legislative intent. "The word 'reasonable' conveys the meaning that . . . [the I.G.] is required at the hearing only to show that the length of the [exclusion] determined . . . was not extreme or excessive." (Emphasis added.) 48 Fed. Reg. 3744.

The determination of when an individual should be trusted and allowed to reapply to the I.G. for reinstatement as a provider in the Medicare and Medicaid programs is a difficult issue. It involves consideration of multiple factual circumstances. The appellate panel in Matesic provided a listing of some of these factors, which include:

> 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, how far the provider has come toward rehabilitation, and any other factors relating to the provider's character and trustworthiness.

Matesic, DAB 1327 at 12.

It is evident that in evaluating these factors I must attempt to balance the seriousness and impact of the offense with existing factors which may demonstrate trustworthiness. The totality of the circumstances of each case must be evaluated in order to reach a determination regarding the appropriate length of an exclusion.

In weighing these factors, I conclude that the three year exclusion imposed against Petitioner in this case is unreasonable and that an exclusion for a period of two years will serve the remedial purpose of the Act. In reaching this determination, I recognize that Petitioner has already suffered extensive financial losses as a result of the related criminal proceedings and that a two year exclusion may have a severe financial impact on Petitioner. However, the remedial considerations of the

Act must take precedence over the financial consequences that an exclusion may have on Petitioner.

The evidence in this case establishes that Petitioner is an individual who is highly susceptible to the temptations of addictive drugs. Petitioner's drug abuse occurred over a protracted period of time. She testified that her drug abuse began in 1986 and did not end until she was incarcerated in 1989, a period of three to four years. Tr. 45 - 46. It is disturbing that she engaged in this self-destructive behavior in spite of her medical background and her knowledge of the dangers posed by this conduct. Tr. 48.

The record shows that she was convicted not once, but twice, for offenses involving drugs. In 1987, she was convicted of the offense of conspiring to deliver cocaine. FFCL 4. The power of Petitioner's addiction was so strong that even a criminal conviction did not deter her from continuing her drug abuse. Petitioner continued to use drugs while she was on probation for her first drug offense. This continued use of drugs resulted in a second conviction for an offense involving drugs. In 1989, she was convicted of the offense of delivering cocaine. FFCL 7, 8. The fact that Petitioner was convicted twice of offenses involving drugs is strong evidence of her susceptibility to drug addiction. It shows that she is an individual who is at risk for relapsing and engaging in this conduct in the future.

To Petitioner's credit, she was a competent and caring nurse throughout the period of her drug addiction. FFCL 42. There is no evidence that Petitioner's conduct resulted in any harm to her patients or that she engaged in behavior with the intent to harm them. FFCL 43 - 44. Although Petitioner's conduct did not actually harm her patients, I find that her substance abuse disorder endangered her patients' welfare. FFCL 40. In her capacity as a health care provider, Petitioner was in a position to perpetrate serious harm to patients had she attempted to care for them while she was under the influence of a controlled substance. Moreover, the fact that third parties were involved in the acts leading to Petitioner's convictions raises serious questions about Petitioner's trustworthiness. Petitioner was convicted of conspiring to deliver cocaine and of delivering cocaine. Delivering controlled substances to other individuals created the possibility of harm to these individuals. While there is no evidence that the third parties who were to receive the controlled substances from Petitioner were patients, the fact that Petitioner

involved others in her destructive conduct shows a disturbing disregard for the welfare of others.

It is significant that the Michigan Nursing Board considered Petitioner's conduct to be so serious that it revoked her nursing license for an indefinite period of time. FFCL 10, 11, 38. In addition, the seriousness of Petitioner's offenses is reflected in the fact that, after her second conviction, the court sentenced her to incarceration. FFCL 9, 37.

In an effort to explain the circumstances leading to her addiction, Petitioner testified that she became involved in drugs at a difficult period in her life when she was diagnosed as having breast cancer. Petitioner stated that the stresses caused by this illness and its treatment, which included a mastectomy and chemotherapy, was a strong factor leading to her drug addiction. FFCL 2, 31. Although I appreciate that this was an extremely difficult period in Petitioner's life, I am still troubled that Petitioner dealt with these stresses by succumbing to drug abuse. This raises questions about her trustworthiness because it shows a propensity to escape from stress through drug addiction. FFCL 32.

Petitioner's susceptibility to drug addiction establishes her to be an untrustworthy individual. This, coupled with the fact that the nature of a substance abuse disorder jeopardizes the welfare of Petitioner's patients, demonstrates the need to protect Medicare and Medicaid beneficiaries and recipients from Petitioner. Were the evidence that I just discussed the only evidence relevant to Petitioner's trustworthiness, I would certainly sustain the full three year exclusion imposed by the I.G..

However, this evidence presents an incomplete picture. There is also evidence that, notwithstanding Petitioner's history of drug abuse, Petitioner has made commendable progress in rehabilitating herself.

The record shows that Petitioner's incarceration in 1989 was a turning point for her. Petitioner testified that the trauma of incarceration caused her to stop denying her addiction and motivated her to stop abusing drugs. Indeed, there is no evidence that Petitioner has used drugs since her incarceration, and there is ample evidence that she is determined to continue to take steps to remain free of controlled substances in the future. FFCL 41.

Petitioner was in jail from April 1989 to April 1990. FFCL 12. Presumably she did not present problems to authorities because she was released from prison in April 1990 and placed on the tether program. FFCL 13. As a participant in the tether program, Petitioner was considered to be a prison inmate. However, she was allowed to live at home and to work, as long as she cooperated in wearing a monitor on her ankle, known as a tether. Petitioner also had to submit to periodic drug tests. In addition, she was subjected to spot checks to confirm that she actually attended work as required. FFCL 14.

During this period, Petitioner returned to work as a nurse's aide. FFCL 15. Two coworkers of Petitioner gave convincing testimony that she was a model employee. Although they had no complaints about her work performance prior to her incarceration, they indicated that her work performance and attitude were even better when she returned to work. FFCL 42. This is strong evidence of a desire on Petitioner's part to responsibly meet her professional obligations.

Upon her release from prison, Petitioner began to attend Narcotics Anonymous meetings. FFCL 20. This is evidence that Petitioner, on her own initiative, is taking affirmative steps to gain the support she needs to stop abusing drugs. FFCL 47.

During the period that Petitioner was on the tether program, she began to attend weekly Bible study groups with a minister of the Jehovah's Witnesses. Petitioner's minister testified that Petitioner has been faithful in attending these weekly meetings and that over the course of time she has begun to increase her attendance at religious meetings to two or three times a week. FFCL 16. Petitioner's minister testified that, while she has not specifically discussed the subject of drugs with Petitioner, she has been impressed with Petitioner's efforts to stop associating with people who will encourage her to abuse drugs. Tr. 35, 38. This evidence demonstrates Petitioner's determination to change patterns of behavior which encourage drug abuse. Tr. 47.

In April, 1991, Petitioner was released from the tether program and placed on parole. FFCL 18. During this period, Petitioner's parole agent got Petitioner into a drug counseling program. This program was made available to Petitioner free of charge for a period of nine months, and Petitioner testified that she benefitted from it immensely. FFCL 19, 45. A letter from Petitioner's rehabilitation counselor stated that Petitioner "appeared

invested in her therapy and dedicated toward abstinence." P. Ex. 2.

Petitioner also produced a letter from her parole agent, dated March 16, 1992, stating that she had been on parole from April 1991 and was scheduled to be released in April 1992. The agent stated that while Petitioner was on the tether program, she complied with all rules and regulations required of her and she tested negative for drug use. The agent also described her as a "model parolee" and indicated that she "has adjusted well back into the mainstream of society". P. Ex. 1.

I am impressed by the assessments of Petitioner made by her rehabilitation counselor and her parole agent. Petitioner's rehabilitation counselor and her parole agent are both professionals who have nothing to gain by making comments favorable to Petitioner. Petitioner's rehabilitation counselor's job requires her to make judgments about substance abusers' motivation to recover from their addictions. Petitioner's parole agent's job requires him to make judgments about the trustworthiness of individuals convicted of crimes. Petitioner's rehabilitation counselor and her parole agent have both worked closely with Petitioner, and I give a great deal of weight to their opinions. I infer from this evidence that Petitioner has demonstrated a strong determination to recover from her drug addiction and that her efforts to rehabilitate herself have been successful since her 1989 incarceration.

During the March 31, 1992 hearing, Petitioner's sister testified that Petitioner's mother died approximately a year ago. FFCL 21. It is fair to say that the death of Petitioner's mother would be a stressful event for Petitioner, and I find that the fact that Petitioner did not respond to this stressful event by relapsing into drug abuse is an encouraging sign that she has made progress in her rehabilitation. FFCL 46.

Petitioner asserts that, in light of her efforts at rehabilitation, she should be reinstated into the Medicare and Medicaid programs immediately. Tr. 51. Petitioner asserted that the remedial purpose of the Act would be served if she were to be allowed to participate in the Medicare and Medicaid programs immediately. In addition, she offered to submit to random drug testing for a period of three years. Tr. 41.

I am impressed that Petitioner volunteered to submit to random drug tests in the future, and I find that this is evidence that she is confident that her rehabilitation is

complete. If I could modify the exclusion so as to permit Petitioner to participate in the Medicare and Medicaid programs as long as she tests negative for drug use for a period of three years, I might do so. However, my authority is limited to determining whether the length of the three year exclusion is reasonable. I do not have the authority to fashion an exclusion in the way that Petitioner suggests. Walter J. Mikolinski, Jr., DAB 1156 at 5 - 16 (1990). See Corrine B. Kohn, DAB CR129 (1991).

Having considered all the evidence, I find that an exclusion of three years is unreasonable. I am satisfied that Petitioner has not used controlled substances since her incarceration in 1989 and that she is strongly motivated to remain free from controlled substances in the future. Petitioner was released from prison in April 1990, and she has lived at home and worked since that time. The I.G. did not exclude Petitioner until January 1992. This means that, at the time of her exclusion, she had already shown that she was capable of remaining free of controlled substances outside the confines of a prison cell for a period of almost two years. Under these circumstances, I find that an exclusion of three years is excessive.

On the other hand, I do not accept Petitioner's assertion that the evidence establishes that she should be entrusted with caring for Medicare and Medicaid patients immediately. While I am persuaded that Petitioner's abstinence from drug use since her release from prison in April 1990 provides some evidence that she is trustworthy, it is not a sufficient period of time to establish that she will remain free of controlled substances in the future. From April 1990 to April 1991, Petitioner was subject to close supervision while she was on the tether program. After her release from the tether program in April 1991, she continued to be supervised by a parole agent until April 1992. Thus, at the time of the March 31, 1992 hearing, Petitioner had demonstrated that she was able to abstain from drug use outside of the confines of prison cell for almost two years, but she had not had any opportunity to demonstrate that she was able to abstain from drug use during a period when she was not subjected to the scrutiny of law enforcement authorities.

The evidence establishes that Petitioner is at risk for abusing drugs. Furthermore, the potential dangers to Petitioner's future patients are great should Petitioner relapse. Under these circumstances, an exclusion for a period of two years is necessary to determine that Petitioner's unlawful conduct will not recur.

The remedial purposes of the exclusion law will be served in this case by a two year exclusion. The two year exclusion period will provide a sufficient period of time to test Petitioner's assurances that she will not abuse drugs in the future.

CONCLUSION

Based on the evidence in this case and the law, I conclude that the three year exclusion imposed against Petitioner is excessive and unreasonable, and I modify it to two years.

/s/

Charles E. Stratton
Administrative Law Judge