Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Arthur V. Brown, M.D.,	DATE: August 17, 1992
Petitioner,	Docket No. C-252
- v. -	Decision No. CR226
The Inspector General.	

DECISION

On April 18, 1990, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare and State health care programs for a period of ten years, pursuant to section 1128(a)(1) of the Social Security Act (Act). [1] The I.G. advised Petitioner that he was being excluded as a result of his conviction of a criminal offense related to the delivery of an item or service under the Medicaid program.

By letter dated June 5, 1990, Petitioner requested a hearing and the case was assigned to Administrative Law Judge Charles E. Stratton for hearing and decision. At the prehearing conference of November 1, 1990, counsel for Petitioner moved for, and was granted, a stay so that the parties could pursue settlement. The case was reassigned to me on April 15, 1991. On April 26, 1991, I ended the stay and conducted a prehearing telephone conference at which I established a schedule through which the case would proceed to hearing on October 22, 1991. Later, by joint request of the parties, I continued the hearing to February 12, 1992. On February 12, 1992, I held an in-person hearing in New York, New

[1] "State health care program" is defined by section 1128(h) of the Act to cover three types of federally financed health care programs, including Medicaid. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

York. The parties submitted post-hearing briefs[2] and reply briefs.

I have considered the evidence, the parties' arguments, and the applicable laws and regulations.[3] I conclude that the ten year exclusion imposed and directed against Petitioner by the I.G. is reasonable.

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[2] At the hearing, I gave each party 10 days to submit any clarifying information regarding Petitioner's status with Medicaid in the State of New York. I have received such information from the I.G. and admit it into evidence as I.G. Exhibit 13. Petitioner's counsel offered, and I tentatively accepted, Petitioner's Exhibits 11 and 12 into evidence. I now admit Petitioner's Exhibits 11 and 12 into evidence. The Transcript at pages 146-148 provides a record of the discussions of the parties with regard to the admission of these documents.

[3] The transcript, the parties' exhibits and briefs, and my findings of fact and conclusions of law are referred to as follows:

I.G.'s Exhibits	I.G. Ex. number/page)
Petitioner's Exhibits	P. Ex. (number/page)
I.G.'s Post Hearing Brief	I.G. Br. at (page)
Petitioner's Post Hearing Brief	P. Br. at (page)
I.G.'s Post Hearing Reply Brief	I.G. R. Br. at (page)
Petitioner's Post Hearing Reply Brief	P. R. Br. at (page)
Transcript	Tr. at (page)
My Findings of Fact and Conclusions of Law	FFCL (number)

ISSUES

The issues in this case are:

1. Whether Petitioner was convicted of a criminal offense related to the delivery of a health care item or service within the meaning of section 1128(a)(1).

2. Whether an exclusion of ten years is reasonable under the facts and circumstances of this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The regulations published on January 29, 1992 at 57 Fed. Reg. 3298 et seq. (42 C.F.R. § 1001 et seq.) are not applicable to this case. Charles J. Barranco, M.D., DAB CR187 (1992); Bruce G. Livingston, M.D., DAB CR202 (1992); Syed Hussaini, DAB CR193 (1992); Steven Herlich, DAB CR197 (1992); Stephen J. Willig, DAB CR192 (1992); Sukumar Roy, M.D., DAB CR205 (1992); Aloysius Murcko, M.D., DAB CR189 (1992); Narinder Saini, M.D., DAB CR217 (1992).

2. At all times relevant to this case, Petitioner was a licensed physician in the State of New York, engaged in general practice. I.G. Ex. 3/1.

3. Muneti Ambulette Service Corporation (Muneti) was a Medicaid provider of ambulette services. I.G. Ex. 2.

4. New York State regulations require that a health care provider or his authorized representative must receive prior approval from the Medicaid agency before providing ambulette service. The health care provider is required to state the medical reason as to why ambulette transportation is necessary. I.G. Ex. 1/2-3; Tr. at 94-5.

5. From approximately March, 1985 to approximately October, 1985, Petitioner was involved in a conspiracy with his brother, Stanley Brown, whereby they requested and received a kickback of $12.00 for each patient they referred to Muneti for ambulette transportation. Petitioner and his brother received a total of $2,700 in bribes and kickbacks from Muneti. I.G. Exs. 3, 4.

6. On February 24, 1988, Petitioner was convicted, in the United States District Court for the Southern District of New York, of two counts of conspiracy to solicit and receive Medicaid kickbacks and actually receiving Medicaid kickbacks in violation of section

1128B(b)(1) of the Act. Petitioner was sentenced to probation on each count for three years. Petitioner's probation terms were made to run concurrently. I.G. Exs. 1, 4.

7. On May 7, 1987, Petitioner was found guilty, in a New York State court, of 19 counts of offering a false instrument for filing in the first degree and for billing Medicaid for services to patients which Petitioner did not perform. The false Medicaid claims submitted by Petitioner exceeded $8,000 and occurred during the period January 1980 to July 1983. Petitioner was also found guilty of two counts of grand larceny. I.G. Exs. 6 and 7.

8. The State trial judge set aside the jury's verdict as to the 19 counts of filing a false instrument as being against the weight of the evidence. However, the trial judge was subsequently reversed on appeal, and Petitioner's conviction for 19 counts of filing a false instrument was reinstated. I.G. Ex. 7; I.G. R. Br. 5; P. Br. 3.

9. Petitioner's conviction for two counts of grand larceny was modified on appeal. The first larceny count was dismissed and the second count was reduced to petit larceny. Petitioner was sentenced on the petit larceny count to three years probation and a fine of $1,000. People v. Arthur Brown, 159 A.S.2d 716, 553 N.Y.S.2d 776 (2d Dept. 1990); Tr. at 74; P. Ex. 12; P. Br. at 1, 2; I.G. Ex. 8/8.

10. Petitioner was sentenced to five years probation for his conviction on the 19 counts of offering a false instrument for filing. I.G. Ex. 8/9.

11. On May 23, 1983, Petitioner was found guilty by a New York State court of criminal contempt for failure to produce patient records in accordance with a grand jury subpoena. The court sentenced Petitioner to 10 days in jail. I.G. Ex. 9; Tr. 133.

12. On July 18, 1983, Petitioner's conviction for contempt was subsequently upheld on appeal. I.G. Ex. 10.

13. Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1) and 1128(i) of the Act. FFCL's 5-8.

14. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the

Medicaid program, within the meaning of section 1128(a)(1) of the Act.

15. The Secretary of the United States 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.

16. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for a period of at least five years as required by the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

17. The remedial purpose of section 1128 of the Act is to protect federally-funded health care programs and their beneficiaries and recipients from providers who have demonstrated by their conduct that they cannot be trusted to handle program funds or treat beneficiaries and recipients.

18. Petitioner has demonstrated a consistent pattern of receiving kickbacks and filing false claims for a lengthy period of time from January 1980 to July 1983 and March 1985 to October 1985, a period of approximately four years. FFCL's 5 - 10.

19. The financial loss to the Medicaid program resulting from Petitioner's criminal misconduct amounted to at least $10,700, a significant amount of money. FFCL's 5, 7.

20. By a decision dated January 31, 1984, the New York State Department of Social Services (NYSDSS) excluded and disqualified Petitioner from participating in the New York State Medical Assistance Program (NYMAP), ordered restitution in the amount of $1,200,817.38 ($1,151,633.42 plus interest) and found that on May 23, 1983, Petitioner was convicted in a criminal contempt proceeding (pursuant to Section 750(a)(3) of the New York Judiciary Law) affirmed by the Appellate Division on November 15, 1983, and informed him that he could not request reinstatement for 10 years. I.G. Ex. 13.

21. Both the NYSDSS proceedings and Petitioner's criminal contempt conviction are significant factors evidencing Petitioner's lack of trustworthiness to be a program provider.

22. Petitioner places much of the blame for his problems on a former secretary's incompetence and unfamiliarity with Medicaid billing procedures. Tr. 125.

23. That Petitioner places some of the blame on his former secretary and inadvertent billing errors indicates that he does not fully appreciate nor comprehend the willful and fraudulent nature of his actions.

24. Petitioner's conviction for criminal contempt demonstrates a tendency to conceal his improprieties regarding the billing and treatment of Medicaid patients. FFCL 11.

25. The serious nature of Petitioner's conviction in federal court is reflected in the fact that, based on that conviction, his license to practice medicine in the State of New York was suspended for one year. Tr. 124.

26. The serious nature of Petitioner's conduct is reflected in the fact that NYSDSS excluded him from participating in NYMAP for a minimum of 10 years. FFCL 20.

27. Petitioner has demonstrated a consistent pattern of initiating and committing fraudulent acts which are harmful to the Medicaid program and which show a high degree of culpability. FFCL's 18, 22 - 24.

28. The review procedures outlined by Petitioner's current office manager, Ms. Joan Levy, will be insufficient to protect the program from the type of deliberate fraud perpetrated by Petitioner in the past. Tr. 110 - 112.

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

30. The ten year exclusion imposed and directed by the I.G. is reasonable.

RATIONALE

1. Petitioner was "convicted" of a criminal offense related to the Medicare or Medicaid programs.

Section 1128(a)(1) of the Act mandates the exclusion of individuals who have been "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs. On February 24, 1988, Petitioner was convicted in federal court of conspiracy to solicit and receive Medicaid kickbacks and actually receiving Medicaid kickbacks, in violation of section 1128B(b)(1) of the Act. FFCL 6. Petitioner received a sentence of three years probation. Id. Petitioner's conviction stemmed from his receipt of a

kickback of $12.00 for each patient he and his brother conspired to refer and actually referred to Muneti Ambulette Service Corporation.[4] FFCL 5.

Petitioner does not contest that he was convicted of a criminal offense but seems to contend it is not program-related, due to the absence of "false or unnecessary billings" or "actual loss to the federal treasury based on any conduct of Dr. Arthur Brown". P. Br. at 7. Petitioner's argument is without merit.

There is no doubt that Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act. Section 1128B(b)(1), the specific provision of law, that Petitioner was convicted of violating, involved the Medicaid program. Moreover, an appellate panel of the Departmental Appeals Board recently held in Niranjana B. Parikh, M.D. et al., DAB 1334 (1992) that a conviction for accepting kickbacks for authorizing the purchase of medical equipment was sufficiently related to the delivery of an item or service under Medicare or Medicaid to support an exclusion under section 1128(a)(1) of the Act. In rejecting arguments that the excluded provider played no role in the delivery of the items, but only prescribed them, the panel relied on the plain meaning of sections 1128B(b)(1) and 1128(a)(1) of the Act and the common sense connection between the criminal offense and delivery of program items and services. The panel also rejected the argument there was "no fraud" or the programs were not "victimized and harmed" as a result of the kickbacks. Parikh at 5 - 6.

Additionally, the anti-kickback provisions of the Act were enacted to protect the Medicare and Medicaid programs from the increased costs or abusive practices which result from health care decisions affected by provider self-interest, rather than by legitimate considerations such as cost, quality, and necessity of services. Napoleon S. Maminta, M.D., DAB 1135 (1990); Hanlester Network, et al., DAB 1275 at 20 (1990); see, Parikh at 6. One obvious concern that is being remedied by these provisions is that kickbacks for program services will generate services that are not properly

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[4] Although not defined in the record, ambulette (as opposed to ambulance) patients are patients who need to be transported but who do not need a trained medical technician or a medically equipped vehicle to transport them. Typically, ambulette service involves transporting non-emergency patients to and from doctors' offices, hospitals and clinics.

based on need, cost, or quality. Such services have an adverse financial impact on the program and may have an equally adverse impact on the quality of care that beneficiaries and recipients receive. This is the precise reason that Congress made program-related kickbacks a criminal act under section 1128B(b)(7), which provides the I.G. with authority to exclude under section 1128(a)(1) and provides a separate basis for exclusion (when there is no conviction) under section 1128(b)(7) of the Act.

In sum, Petitioner's federal criminal conviction for receiving kickbacks in connection with ambulette transportation services rendered under the Medicaid program is a program-related conviction under section 1128(a)(1) of the Act.

2. The I.G. was required to exclude Petitioner for a minimum period of five years in this case.

have previously found that Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program, within the meaning of section 1128(a)(1) of the Act. Thus, the I.G. has authority to impose and direct an exclusion against Petitioner pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act. Congress has mandated that the minimum exclusionary period be five years.

3. Regulations published by the Secretary on January 29, 1992 are not applicable to this case.

On January 29, 1992, the Secretary published new regulations (Parts 1001 - 1007) pertaining to his authority under the Medicare and Medicaid Patient and Program Protection Act (MMPPPA), Public Law 100-93, to exclude individuals and entities from reimbursement for services rendered in connection with the Medicare and Medicaid programs.[5] These regulations also included amendments to the civil money penalty authority of the Secretary under the MMPPPA. For purposes of this proceeding, the specific regulatory provisions relating to mandatory exclusions under section 1128(a)(1) of the Act (section 1001.102) and appeals of such exclusions (Part 1005) must be considered in terms of their applicability to this case.

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[5] These regulations can be found at 42 C.F.R. § 1001 et seq., 57 Fed. Reg. 3298 et seq.

The I.G. argues that the new regulations became effective upon publication on January 29, 1992. I.G. Br. 3. Petitioner argues that the new regulations should not be applied to this case because the hearing request was made prior to the publication of the new regulations. Tr. 143.

I conclude that my review of the reasonableness of the exclusion imposed and directed against Petitioner is not governed by the new regulations' criteria for determining exclusions under section 1128(a)(1). The regulations contained in Part 1001 of the new regulations, and 42 C.F.R. § 1001.102 in particular, were not intended by the Secretary to govern hearings as to the reasonableness of exclusion determinations. Bruce G. Livingston, D.O., DAB CR202 (1992) (Livingston); Charles J. Barranco, M.D., DAB CR187 (1992) (Barranco); Syed Hussaini, DAB CR193 (1992); Steven Herlich, DAB CR197 (1992); Stephen J. Willig, DAB CR192 (1992); Sukumar Roy, M.D., DAB CR205 (1992); Aloysius Murcko, M.D., DAB CR189 (1992); Narinder Saini, M.D., DAB CR217 (1992) (Saini). Even if the Part 1001 regulations do govern such hearings, an appellate panel of the Departmental Appeals Board recently held they do not apply in cases involving exclusion determinations made prior to the regulations' publication date. Behrooz Bassim, M.D., DAB 1333 at 5 - 9 (1992).

I further conclude that it was not the Secretary's intent to retroactively apply the new regulations to unlawfully strip parties, including Petitioner, of previously vested rights. Therefore, the new Part 1001 regulations were not intended to apply to cases pending as of the date of their publication (assuming they establish criteria for administrative review of exclusions). I have previously addressed this issue in depth in my decisions in Barranco at 16 - 27 and Livingston at 8 - 10. ALJ Steven T. Kessel has addressed this issue in depth in his decision in Saini at 11 - 19. For purposes of this case, I incorporate the rationale in Barranco, Livingston and Saini that Petitioner's de novo hearing rights would be substantially adversely affected and it would be manifestly unjust to apply the new regulations.

4. A ten year exclusion is appropriate and reasonable.

Since the minimum mandatory exclusion of five years is applicable to Petitioner, the issue before me is whether the I.G. is justified in excluding Petitioner for ten years. Resolution of this issue depends on analysis of the evidence of record in light of the remedial purposes of the Act. Lakshmi N. Murty Achalla, M.D., DAB 1231

(1991); Joel Davids, DAB 1283 (1991); Robert Matesic, R.Ph., d/b/a Northway Pharmacy, DAB 1327 (1992).

Congress enacted the exclusion law to protect the integrity of federally funded health care programs. Among other things, the law is designed to protect program beneficiaries and recipients from individuals who have demonstrated by their behavior that they threaten the integrity of federally funded health care programs or that they could not be entrusted with the well-being and safety of beneficiaries and recipients. S. Rep. No. 109, 100th Cong., 1st Sess., reprinted in 1987 U.S.C.C.A.N. 682.

An exclusion imposed and directed pursuant to section 1128 of the Act advances this remedial purpose. The principal purpose is to protect programs and their beneficiaries and recipients from untrustworthy providers until the providers demonstrate that they can be trusted to deal with program funds and to properly serve beneficiaries and recipients. As an ancillary benefit, the exclusion deters other providers of items or services from engaging in conduct which threatens the integrity of the programs or the well-being and safety of beneficiaries and recipients. H. R. Rep. No. 393, Part II, 95th Cong. 1st Sess., reprinted in 1977 U.S.C.C.A.N. 3072.

My purpose in hearing and deciding the issue of whether an exclusion is reasonable is not to second guess the I.G., but to decide whether the length of the exclusion imposed by the I.G. was extreme or excessive. 48 Fed. Reg. 3744 (1983); Abelard A. Pelaez, M.D., DAB CR157 at 14 - 15 (1991); Barranco at 29 - 30.

An appellate panel in The Hanlester Network, et al., DAB 1347 (1992) recently restated the Departmental Appeals Board's view of considerations used in evaluating trustworthiness:

> - the circumstances of the misconduct and the seriousness of the offense, in particular the commission of misconduct in the nature of a program-related crime, see [The Hanlester Network, et al,] DAB 1275, at 52 [(1991)];
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> - "the degree to which a [Petitioner] is willing to place the programs in jeopardy," even if no actual harm is accomplished, id. at 52; [footnote omitted]

- the failure to admit misconduct, or express remorse, or evidence rehabilitations, see e.g., Olufemi Okonuren, M.D., DAB 1319, at 13 (1992); Robert Matesic R.Ph. d/b/a Northway Pharmacy, DAB 1327, at 12 (1992); and

- the "likelihood that the offense or some similar abuse will occur again," see e.g., Matesic, at 8.

Hanlester DAB 1347 at 46 - 47.

In applying these factors to determine 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. I have done this regarding the Petitioner and I have reached the following conclusions regarding his trustworthiness to be a program provider.

At all times relevant to this case, Petitioner was a licensed physician in the State of New York engaged in general practice. FFCL 2. The I.G. based its authority to exclude Petitioner on a 1988 conviction in federal court of conspiracy with his brother to solicit and receive Medicaid kickbacks and actually receiving such kickbacks, in violation of section 1128B(b)(1) of the Act, for which he was sentenced to concurrent terms of three years probation. I.G. Ex. 12; FFCL 6.[6] Petitioner's conviction stemmed from his receipt of $12.00 per patient, which amounted to $2,700 in bribes and kickbacks, for referring ambulette patients during the period of March 1985 to October 1985. FFCL 5.

Such a scheme is patently illegal. As I stated previously, Congress has made program-related kickbacks a

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[6] In addition to being a program related offense under section 1128(a)(1), Petitioner's conviction for receipt of a kickback is actionable under section 1128(b)(7). By enacting section 1128(b)(7), Congress specifically authorized an exclusion for the solicitation or receipt of a kickback. While the I.G. chose not to proceed against Petitioner under this section, the fact that Congress found such conduct to be sufficiently egregious to enact a specific provision prohibiting such conduct is one justification for the consideration of Petitioner's kickback conviction as warranting a lengthy exclusion.

basis for criminal convictions and for exclusions under sections 1128(a)(1) and (b)(7) of the Act. Using the Hanlester guidelines cited above, Petitioner's criminal conduct in accepting kickbacks for services rendered under the Medicaid program is clearly serious, involved a substantial amount of money in kickbacks and bribes, and occurred over a significant period of time. By dividing the $12.00 kickback amount into the total amount received by Petitioner and his brother, it becomes readily apparent that they were involved in 225 separate instances of tainted ambulette transportation services. This is in itself a significant amount. This criminal conduct is not the result of carelessness or sloppy bookkeeping but of repeated instances of intentional conduct that were illegal. When considered with Petitioner's other criminal conduct, which will be discussed below, I am concerned that there is a strong likelihood of a repetition of such conduct in the future, which would have an adverse impact on the program and its beneficiaries and recipients.

Petitioner attempts to reduce the significance of his taking kickbacks and bribes by arguing that no "false or unnecessary billings were charged against [him]" or there was "no actual loss to the federal treasury based upon any conduct of [Petitioner]". P. Br. at 7. Petitioner is no less culpable of accepting illegal kickbacks because he was not the one who billed the program. Muneti, the ambulette transportation provider, would not have been able to bill Medicaid without Petitioner's authorization that such services were medically necessary. The validity of such authorization is questionable when the medical practitioner is receiving an illegal kickback for it. This is the precise type of conduct that Congress has deemed illegal and harmful to the program.

In 1987, Petitioner was convicted in State court in New York of 19 counts of offering a false instrument for filing during the period of January 1980 to July 1983.[7]

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[7] Actually, the false claims that Petitioner was convicted of filing were NYMAP claim forms. However, NYMAP is a Title XIX (Medicaid) program. As such, it is a federally assisted State health care program within the meaning of section 1128(h). Also, the relevant counts specifically state that Petitioner filed the claim forms with NYMAP knowing that the forms contained false statements and false information with respect to the care, services, and supplies provided to a Medicaid recipient.

Petitioner was found guilty also of two counts of grand larceny, but, on appeal, those counts were reduced to one count of petit larceny.[8] FFCL's 7-9. Petitioner's conviction stemmed from his billing Medicaid for services that he had not performed in the amount of over $8,000. FFCL 7. Petitioner was sentenced on the 19 counts of offering a false instrument for filing to five years probation. FFCL 10. Petitioner was sentenced to three years probation and a $1,000 fine on the petit larceny count. FFCL 9. This conviction shows that Petitioner was actively involved in the planning and furtherance of a variety of schemes to defraud Medicaid.

I find it particularly disturbing that Petitioner engaged in other criminal activities involving the Medicaid program during the period of January 1980 to July 1983, in addition to soliciting and receiving illegal kickbacks during a period in 1985. Moreover, Petitioner must have had some serious concerns that his conduct in the 1980 to 1983 period was illegal, based on his conviction of criminal contempt for failing to produce patient records in accordance with a grand jury subpoena. The court made specific findings that 1) Petitioner had failed to keep his patients' records for six years, as required by New York statute; and 2) the clear inference from Petitioner's conduct is that his refusal to produce these records is "willful". I.G. Ex. 9/3, 5. The court also found no credence in Petitioner's contention that a fire at his home had destroyed the patient records. I.G. Ex. 9/5, 6. By failing to produce the patient records, Petitioner was purposefully attempting to block the grand jury investigation into his criminal conduct and reduce the extent of his exposure for his illegal activities. Again, this was not an inadvertent act but an act involving a high degree of culpability. It further demonstrates that Petitioner has little regard for the Medicaid program or the people it serves.

The serious nature of Petitioner's actions is manifested also in the fact that NYSDSS excluded Petitioner for a ten year period based on his "inadequate, unnecessary, inappropriate, contraindicated medical care, service and treatment" and found Petitioner also to have

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[8] As stated earlier, the trial judge set aside the jury's guilty verdict as to all of the 19 counts of offering a false claim for filing and the two grand larceny counts. However, he was subsequently reversed on appeal, and the 19 counts of offering remained, while the two grand larceny counts were changed to one count of petit larceny.

"demonstrated a pattern for disregarding established program policies, accepted medical specialty standards and procedures." I.G. Ex. 13.

Petitioner argues that the I.G.'s April 18, 1990, decision to exclude him was based in part on his conviction for two counts of grand larceny, which was subsequently modified to one count of petit larceny. P. Br. 2. Petitioner also argues that the I.G. failed to take into consideration that the trial judge set aside the jury verdict as being against the weight of the evidence. P. Br. 2 - 3. Petitioner offers as evidence of his trustworthiness the fact that his medical license has been returned to probationary status after being suspended for one year. P. Br. 3. Petitioner contends that the I.G. improperly relied on information that did not take into account that his conviction had been modified by an appellate court. P. Br. 6. Lastly, Petitioner argues that the I.G.'s decision to exclude is improper because it came almost two years after he was convicted.

I disagree with Petitioner's assertions. Under section 1005(b) of the Act, Petitioner is entitled to a de novo hearing. Therefore, the factors that went into the I.G.'s determination as to whether an exclusion was warranted and the length of such an exclusion are of little relevance to my determination here. It is not my function to second guess the I.G. in the exercise of his discretion in moving to exclude Petitioner. I have little or no authority to review the I.G.'s exercise of prosecutorial discretion. To the contrary, my limited responsibility in this hearing is the determination of two issues -- whether the I.G. had the authority to exclude Petitioner under the mandatory minimum provisions of the Act and whether an exclusion of ten years is reasonable. In essence, my primary interest is to determine when in the future Petitioner will be sufficiently trustworthy to be a program participant without risk to beneficiaries and recipients, in light of his past criminal activity.

Petitioner has provided me with the unsworn statements of ten persons who testify to his good character, honesty and his genuine concern for his patients. P. Exs. 1 - 10. At the February 12, 1992, hearing, four people testified on behalf of Petitioner. Mr. Michael Hoffman testified that he has known Petitioner for four or five years, that he uses Petitioner as his personal physician and that Petitioner would not cheat or steal from any government program in the future. Tr. 103 - 109. Ms. Joan Levy testified that she has known Petitioner for

one year, is currently Petitioner's office manager, and that, in her opinion, Petitioner would not be a threat to the Medicare program. Tr. 109 - 115. Ms. Josephine Gubin testified that she has known Petitioner since 1987, when he became her personal physician. She also testified that Petitioner would not be a threat to the Medicare program. Tr. 115 - 118. Mr. Edward Held, Esq. testified that he has known Petitioner for approximately three years. He also testified that Petitioner would not be a threat to the Medicaid program.

While I have no doubt that all of these people have had positive experiences in dealing with Petitioner, I find their statements and testimony do not have much probative value because all of the live testimony and all but one of unsworn statements are from persons who have known Petitioner only over the recent past and do not know the details and extent of his past criminal actions involving the program. Out of all of the statements submitted and testimony proffered by Petitioner, only one is based on a knowledge of Petitioner's activities since 1976. P. Ex. 3. The rest of the statements and testimony are from people who have been acquainted with Petitioner for a much shorter period of time, some for only a year. P. Exs. 1,2, 4 - 10. Such evidence based on witnesses' personal experiences with Petitioner and their impressions of him as a doctor has very little value in assessing Petitioner's trustworthiness to be a program provider in light of his prior fraudulent financial schemes. The witnesses' personal assessment of Petitioner's conduct arising from his providing medical treatment is not deserving of significant weight in assessing Petitioner's trustworthiness to be a program provider. My assessment of his trustworthiness to be a program provider is based primarily on Petitioner's past criminal offenses involving financial schemes to defraud the Medicaid program and prevent a full investigation of his criminal conduct.

Petitioner's unlawful acts show that he is an individual who is capable of engaging in fraudulent schemes for his own personal gain. His actions show also that he has a propensity to commit offenses harmful to the financial integrity and honest operation of federally-funded health care programs. Petitioner has shown persistence in perpetrating a variety of schemes, over a lengthy period of time. Petitioner's conviction for contempt shows his propensity to attempt to circumvent investigation into his illegal acts. He has made minimal efforts to rehabilitate himself and has not shown any genuine remorse for his actions. His recent changes in office procedures and practices are cosmetic and will not

adequately ensure that Petitioner will not engage in the future in a criminal scheme for his own personal gain and at the detriment of the program and its beneficiaries and recipients. FFCL 28.

A lengthy exclusion is needed to provide Petitioner with an opportunity to demonstrate that he once again can be trusted to be a program provider. In light of the record of his criminal behavior and the paucity of evidence minimizing the current risk to the program, I am unable to conclude that the ten year exclusion imposed and directed against Petitioner is "extreme or excessive" and should be reduced.

CONCLUSION

Based on the law and the evidence, I conclude that the ten 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