Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	DATE: August 21, 1992
The Inspector General,	)	
	)	
- v. -	)	Docket No. C-92-081
	)	Decision No. CR228
Timothy L. Stern, M.D.,	)	
	)	
Respondent.	)	
	)	

DECISION ON REMAND

The Inspector General (I.G.) and Timothy L. Stern, M.D. (Respondent), appealed from my October 10, 1991 decision where I found and concluded that Respondent violated section 1128A of the Social Security Act (Act) by submitting claims to the Medicare program for 688 services which Respondent knew, had reason to know, or should have known were not provided as claimed (DAB CR154) (Stern I). In that decision, I found that the I.G. had proven that Respondent had illegally submitted claims to Medicare, describing his services generally as office visits and local nerve blocks, when he actually had performed acupuncture treatments on his patients, a service for which Medicare does not cover or pay.

In Stern I, the I.G. sought penalties of $425,000, assessments of $70,648, and a 20 year exclusion of Respondent from Medicare and Medicaid programs. After considering the amount of the damages to the government, the number of services where liability was proven by the I.G., and weighing the aggravating and mitigating factors, I imposed penalties of $140,000, assessments of $45,000, and an exclusion of seven years.

On March 18, 1992, an appellate panel of the Departmental Appeals Board (DAB) issued a decision which upheld my findings and conclusions that Respondent violated section 1128A of the Act with regard to 688 services not provided as claimed. (DAB 1314) (Stern II). The appellate panel deleted and modified some of my findings regarding mitigating factors, and remanded the case to me "for the

sole purpose of reconsidering the sanctions to be imposed." Stern II at 2, 32.

BACKGROUND

I. The ALJ Decision In Stern I.

In Stern I, I reduced the amount of sanctions proposed by the I.G.: (1) because I found that the I.G. proved liability on fewer than the 707 services he alleged were not provided as claimed, (2) because I found that the damages to the government were inappropriately stated and considered, (3) because I gave less weight to aggravating factors than the I.G., and (4) because I found certain factors to be mitigating and the I.G. did not.

On appeal, both parties challenged my method of determining the amount of the sanctions. The I.G. argued that the imposed sanctions were inadequate. Respondent asserted that the penalties and assessments were punitive and that it was error not to review each claim separately and to render a decision on each service.

II. The Appellate Panel Decision In Stern II.

The appellate panel directed that I reconsider the sanctions to be imposed in light of the "deletions and modifications" they made to my findings of fact and conclusions of law (FFCL), and directed that I substantiate the sanctions in light of the factors they "identified in the statute and regulations." Stern II at 30, 32.

The appellate panel deleted FFCLs 179-183 and modified FFCL 184 in Stern I. They directed that, when I reconsidered the sanctions, I could not consider as mitigating factors: (1) Respondent's drug addiction, (2) Respondent's provision of other medical services to his patients, or (3) that some beneficiaries found Respondent to be a good doctor and benefitted from his treatments. Stern II at 20-31. They found no basis in fact or law for my findings that these were mitigating factors. Id.

The appellate panel suggested that I clarify whether any of 14 claims (which I found, in Stern I at FFCLs 132 and 181, to be for reimbursable services) should be deleted from the number of claims that would justify sanctions. Stern II at 18. The appellate panel also rejected

Respondent's contention that each claim should be considered separately in determining the sanctions to be imposed. Stern II at 18.

While the appellate panel deleted all my findings regarding mitigating factors, they stated that "the ALJ would still have considerable discretion in determining the amount or scope of any" sanctions. Stern II at 30-31. The appellate panel stated also that substantially less than the maximum authorized penalty may be appropriate even where only aggravating factors exist. Stern II at 30. [1] The appellate panel then suggested that since the claims in issue affected only 31 patients, the penalties might be substantially lower than the maximum, and that Respondent's financial condition might "still have some bearing" on the amount of penalties (even if not proven to be a mitigating factor). Stern II at 31.

III. Summary of the Parties' Arguments.

Based on the remand, the record in this case was reopened and redocketed as No. C-92-081 (Stern III). I then gave the parties the opportunity to apprise me of their positions. The parties filed written submissions, including the I.G.'s April 23, 1992 Brief (I.G. Brief), Respondent's May 7, 1992 submission and proposed exhibit, and the I.G.'s June 8, 1992 Response (I.G. Response).

On July 23, 1992, I conducted a telephone conference to discuss the amount of damages to the government and to allow final arguments.

The I.G. still seeks $425,000 in penalties, $70,648 in assessments, and a 20 year exclusion of Respondent from the Medicare and Medicaid programs. The I.G. argues that the sanctions imposed should be greater than the amount I found to be appropriate in Stern I, stating that I did not give sufficient weight to certain aggravating factors evidenced in the record. The I. G. asserts that my decision did not reflect a systematic analysis of the government's damages in determining the amount of penalties and assessments to be imposed on Respondent.

In addition to denying liability, Respondent argues that his financial condition is a mitigating factor and

---

[1] The I.G. proposed penalties of $601.98 per service claimed by Respondent, rather than the maximum $2,000. Stern II at 30.

supports a reduction in the penalties and assessments. He introduced additional evidence concerning his available financial resources on May 7, 1992 and I have marked that submission as Respondent's Exhibit 92-1 (R. Ex. 92-1). (R. Ex. 92-1 consists of a cover letter, a letter dated May 3, 1992 to Respondent's CPA, federal and state tax returns, and a "Financial Statement".)

Respondent argues that the imposed penalties and assessments should not exceed the actual amount of money paid to him by Medicare, which amounts only to approximately $9,000. Respondent argues further that $9,000 is the only true amount of real damages to the government, and that imposition of the excessive amounts of sanctions sought by the I.G. are punitive and counterproductive to Respondent's rehabilitation. Finally, Respondent argues that the I.G. has misled the DAB by overstating the government's damages and including damages that are outside the scope of this present action.

The I.G. argued that financial condition cannot be considered a mitigating factor in this case, and that R. Ex. 92-1 or any other information regarding Respondent's financial condition is not reliable or relevant. I.G. Response.

RULING On R. Ex. 92-1

The I.G. has challenged the admission of R. Ex. 92-1, asserting that the record should not be reopened and that the exhibit is unreliable. I.G. Response at 2-5.

However, I find that R. Ex. 92-1 (Financial Statement) is relevant to the issues in this case because the governing federal regulations require consideration of financial resources available to a respondent when determining the amount of penalties and assessments. 42 C.F.R. § 1003.106(b)(4) (1989). Moreover, the appellate panel in Stern II suggested that I consider whether Respondent's financial condition has some bearing on the amount of sanctions to be imposed. Stern II at 31. Accordingly, I admit the Financial Statement into evidence as R. Ex. 92-1.

I find also that Respondent's Financial Statement is not independently verified by a CPA. See I.G. Response at 3. Since Respondent's own CPA was not willing to vouch for the truthfulness or accuracy of Respondent's data, and since I do not have confidence in Respondent's credibility, ordinarily I would not have given this

evidence much weight. However, Respondent's brother, Arthur Stern, a lawyer and officer of the courts of New York State, stated during the July 23, 1992 telephone conference that he vouched for the accuracy of the financial data and that he was intimately familiar with Respondent's available financial resources. Arthur Stern has been credible in the past and I have no reason to doubt his word now. Accordingly, I have accorded the Financial Statement some probative value.

ISSUES

The main issue is whether the sanctions proposed by the I.G. are reasonable and appropriate. The subordinate issues are:

1. Whether the failure of the I.G to prove liability for all 707 services listed in his Notice letters to Respondent requires a reduction in the sanctions proposed by the I.G.

2. Whether any of 14 services identified in Stern I at FFCLs 132 and 181 should be deleted.

3. Whether the I.G.'s failure to prove all of the damages he alleged requires a reduction in the sanctions proposed by the I.G.

4. Whether Respondent proved any mitigating factors which would require a reduction of the sanctions proposed by the I.G.

SUMMARY OF THIS DECISION

After following the appellate panel's mandate in Stern II, I find and conclude that the evidence in the record requires imposition of penalties of $345,000, assessments of $70,648, and an exclusion from Medicare and Medicaid programs for ten years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Findings of Fact And Conclusions Of Law set forth in my decision in Stern I remain unchanged, unless modified here.

1. The I.G.'s expert witness identified 14 instances in which Respondent's medical records reflected that some reimbursable service had been provided by Respondent. Transcript (Tr.) II/1541-1549.

2. Only eight of the 14 services identified by the I.G.'s expert were at issue in this proceeding; six were not. Tr. II/1541, 1542, 1545-1549; attachment to I.G.'s Notice at 5-14.

3. Upon re-examining the eight services at issue which were identified by the I.G.'s expert and identified in Stern I at FFCLs 132 and 181, I find that count 291, a claim for services to Eloise Jenkins on May 7, 1985, was provided at the level of service claimed by Respondent. Tr. II/1546-54; I.G. Posthearing Brief at 114, n.27. This leaves seven services at issue, of the original 14.

4. Count 291 is deleted from the number of services that justify sanctions, leaving 687 services which were claimed by Respondent in violation of section 1128A of the Act.

5. Respondent submitted or caused to be submitted to the Medicare carrier, Blue Shield of Western New York (BSWNY), claims on behalf of Medicare beneficiaries for 687 items or services which he knew, had reason to know, or should have known were not provided as claimed, in violation of section 1128A of the Act.

6. Upon re-examining the remaining seven services in issue (of the 14 services identified by the I.G.'s expert), I find that these seven services claimed (counts 208, 347, 349, 361, 372, 377, 378) would have been reimbursable, if properly claimed, because a service was provided, in addition to acupuncture, albeit at a lower level than claimed.

7. Congress intended that section 1128A sanctions be primarily remedial in nature and that there be some reasonable relationship between the determination of the sanctions and the amount of damages to the government.

8. In determining the amount of penalties and assessments to be imposed, and the length of exclusion, section 1128A of the Act and its implementing regulations

direct the ALJ to consider several factors which may be aggravating or mitigating. 42 U.S.C. § 1320a-7a; 42 C.F.R § 1003.106.

9. The I.G. has the burden of proving the existence of any aggravating factors by a preponderance of the evidence.

10. Respondent has the burden of proving the existence of any mitigating circumstances by a preponderance of the evidence.

11. The aggravating and mitigating factors that must be considered are:

a. the nature and circumstances under which the requests for payment were made;

b. the degree of a respondent's culpability;

c. the existence of prior offenses;

d. the financial condition of a respondent;

e. any other matters that justice may require.

42 C.F.R. § 1003.106, 1003.107.

12. With regard to the nature and circumstances of the claims, the I.G. proved that it is an aggravating factor that: (a) the claims at issue were presented over a lengthy period of time; (b) there were a substantial number of claims involved; and (c) that the $42,875 claimed for the 687 services at issue was substantial.

13. With regard to the degree of Respondent's culpability, the I.G. proved that Respondent acted with knowledge and reckless disregard for Medicare rules and regulations. He knowingly disseminated false information about the Medicare program to Medicare beneficiaries and the public at large. Respondent assured patients that electrical stimulation treatments would be reimbursed by Medicare, thereby inducing the patients to undergo electrical stimulation treatments and to pay Respondent at the time of treatment (or to take a Medicare assignment from them) when he knew or had reason to know that the services provided were not reimbursable under Medicare.

14. The I.G. did not prove the existence of prior offenses as an aggravating factor. I.G. Posthearing Brief at 175.

15. It is an aggravating factor that Respondent has a history of misrepresenting facts. Stern I at FFCL 149-171.

16. Respondent did not prove that his financial condition would impair his ability to continue as a health care provider (i.e., that it was a mitigating factor).

17. The implementing regulations require that Respondent's known financial resources must be considered in determining the amount of the penalties and assessments. 42 C.F.R. § 1003.106(b)(4).

18. Respondent's Financial Statement, which is part of R. Ex. 92-1, is not independently verified by a CPA.

19. I find believable the statements of Arthur Stern, Respondent's brother, which were made during the July 23, 1992 telephone conference, concerning Respondent's financial resources.

20. While I do not find Respondent to be a credible witness, I find Respondent's Financial Statement to be an accurate and honest account of his net worth and I have considered it in determining the amount of penalties and assessments. See FFCL 19.

21. The $121,247 stated net worth of Respondent, by his own account, is a substantial amount.

22. Justice requires consideration, as a mitigating factor, that the I.G.'s expert concluded that a reimbursable service was performed in seven of the 687 services remaining in issue, albeit at a lower level than claimed.

23. Justice requires me to consider that Respondent lives a life which emphasizes rehabilitation and recovery from drug abuse and its underlying causes; in addition, Respondent and his brother reported on July 23, 1992 that Respondent now works in excess of 40 hours per week as a counselor at a substance abuse rehabilitation agency.

24. The I.G. did not prove all of the aggravating factors which he alleged, including that Respondent has knowingly practiced acupuncture without appropriate authorization and has resisted paying restitution under a previous plea agreement.

25. The I.G.'s proposed penalties, assessments, and exclusion were based on his assertion that 707 services

were not provided as claimed, whereas I have concluded that 687 were not provided as claimed.

26. Based on the government's damages in this case, Respondent's known financial resources, and the other factors and circumstances set out in section 1128A of the Act and the implementing regulations, the imposition of penalties in the amount of $425,000 and an exclusion of 20 years are not reasonable. The imposition of assessments in the amount of $70,648 is reasonable.

27. Penalties of $345,000, assessments of $70,648, and an exclusion of ten years are reasonable in this case.

DISCUSSION

I. The I.G. Proved That Respondent Claimed 687 Services In Violation Of Section 1128A Of The Act.

The I.G. alleged that Respondent claimed reimbursement from Medicare for 707 services in violation of section 1128A of the Act. In Stern I, I found that the I.G. proved liability with regard to 688 services claimed by Respondent. The appellate panel in Stern II stated that I correctly determined that the I.G. proved that Respondent violated section 1128A of the Act by using the terms "office visit" and "local nerve blocks" on claims submitted to Medicare to mask the acupuncture treatment he actually delivered to his patients. Stern II, at 13. The appellate panel stated that "the FFCLs provide numerous detailed and frequently overlapping reasons in support of the ultimate conclusion concerning at least 674 claims." Stern II at 18.

The appellate panel requested that I clarify whether any of 14 claims identified by the I.G.'s expert "should be deleted from the number of claims that would justify" the sanctions. Stern II at 18-19. The I.G.'s expert witness identified 14 instances in which Respondent's medical records reflected that some reimbursable service had been provided by Respondent. FFCL 1.

Upon re-examining the 14 services identified by the I.G.'s expert, and identified in Stern I at FFCLs 132 and 181, I find that only eight of those 14 services were at issue in this proceeding. FFCL 2. I find, also, that count 291, a claim for services to Eloise Jenkins on May 7, 1985, was provided at the level of service claimed by Respondent. FFCL 3. The I.G.'s expert testified that this service "where an allergic reaction was treated with epinephrine ... would be covered under Medicare and

reimbursable." Tr. II/1547. The expert did not qualify his statement, as he had done elsewhere, by adding that the service should have been claimed at a lower level.

Accordingly, I deleted count 291 from the number of claims that justify sanctions, leaving 687 services claimed in violation of section 1128A of the Act by Respondent. The I.G.'s proposed penalties, assessments, and exclusion were based on his assertion that 707 services were not provided as claimed. I have concluded, however, that 687 services were not provided as claimed. This requires a slight reduction in the sanctions proposed.

II. Congress Intended That Section 1128A Sanctions Be Primarily Remedial.

Section 1128A of the Act was enacted by Congress to provide a civil mechanism to protect federally-financed health care programs from fraud and abuse. Scott v. Bowen, 845 F.2d 856 (9th Cir. 1988): Mayers v. U.S. Dept. of Health and Human Services, 806 F.2d 995, 997 (11th Cir. 1986), aff'g, William J. Mayers, D.C., DAB CR1 (1985); cert. denied, 484 U.S. 822 (1987).

Congress provided penalties and assessments to make the government whole for the damages caused by violations of section 1128A. Bernstein v. Sullivan, 914 F.2d 1395, 1397 (10th Cir. 1990). However, the intent of Congress may be negated if the sanctions are so excessive so as to transform them from a "civil remedy into a criminal penalty." Mayers at 998. Penalties and assessments which are grossly disproportionate to the costs sustained by the government would make them punitive and not remedial. United States v. Halper, 490 U.S. 435 (1989); Mayers at p. 999; Chapman v. U.S. Dept. of Health and Human Services, 821 F.2d 523 (10th Cir. 1987); Mayers at 999.

While section 1128A penalties and assessments cannot be excessive, they must be great enough to (1) enable the I.G. to recoup the financial loss to the government and the costs of bringing a violator to justice and (2) send a strong message to other would be offenders to deter them from engaging in illegal practices. Mayers at 999.

The exclusion is designed to protect federally financed health care programs from future misconduct by a respondent. Anesthesiologists Affiliated, DAB CR65 at 58 (1990), aff'd, 941 F.2d 678 (8th Cir. 1990). The exclusion gives an errant provider time to become

rehabilitated and trustworthy. The exclusion also serves to deter others from engaging in similar misconduct. Manocchio v. Sullivan, 768 F. Supp. 814 (S.D. Fla. 1991), aff'd, 961 F.2d 1539 (11th Cir. 1992); Greene v. Sullivan, 731 F. Supp. 838, 840 (E.D. Tenn. 1990); Dewayne Franzen, DAB 1165 (1990); see also, 57 Fed. Reg. 3744 (January 29, 1992).

III. There Are Maximum And Minimum Sanctions Provided For By Section 1128A And Its Implementing Regulations.

Section 1128A of the Act and its implementing regulations provide for maximum penalties of up to $2,000 for each item or service not provided as claimed and assessments of not more than twice the amount claimed, "in lieu of damages sustained by the United States". Section 1128A(a); 42 C.F.R. § 1003.103, 1003.104, and 1003.106.

In this case, the maximum penalties that may be imposed are $1,374,000 ($2,000 multiplied by the 687 claims proved by the I.G. to be false or improper). The I.G. seeks $425,000, or approximately $600 per claim.

The maximum assessments provided for by section 1128A and the regulations are $85,826, or twice the amount claimed by Respondent on the 687 claims ($42,875 multiplied by two). The I.G. seeks $70,648, slightly less than the maximum. [2]

While there are no minimum amounts for penalties or assessments set forth in section 1128A of the Act or its legislative history, section 1003.106(c)(3) of the regulations states that the penalties and assessments should never be less than double the approximate amount of damages sustained by the government, unless there are extraordinary mitigating circumstances. 42 C.F.R. § 1003.106(c)(3). [3]

---

[2] The amount of $42,875 claimed by Respondent was computed from the I.G.'s "schedule of false claims," attached to the I.G.'s amended Notice, dated November 9, 1989. The parties agreed at the July 23, 1992 telephone conference that Respondent was paid $9,000 on the claims in issue.

3 The appellate panel in Stern II at 19-20 refers to the preamble to the regulations, rather than the appropriate sections of the regulations (i.e., §§ 1003.106(c)(3) and (d)) (1989).

There is no maximum or minimum length of exclusion set by the statute or regulations. See 42 C.F.R. § 1003.107.

IV. Section 1128A And Its Implementing Regulations Require Consideration Of Several Factors To Determine The Amount Of The Sanctions.

The actual amounts of the sanctions should be determined only after considering several factors listed under five broad categories in the statute and the regulations. These categories of factors are: (1) the nature of claims presented and the circumstances under which the claims were presented, (2) the degree of culpability, (3) the history of prior offenses, (4) the financial condition of the person presenting the claims, and (5) such other matters as justice may require. 42 C.F.R. § 1003.106. Section 1003.106(b) of the regulations (which is entitled "determinations regarding the amount of penalties and assessments") contains some general guidelines for the interpretation and application of these factors, which are referred to as aggravating and mitigating factors.

V. Several Factors Should Be Weighed To Determine The Amount Of The Sanctions.

The guidelines in section 1003.106 do not ascribe specific weight to be given to these five categories of factors or circumstances listed in the statute and regulations.

However, section 1003.106 (c)(1) of the regulations states that the penalties and assessments should be set at an amount sufficiently below the maximum permitted if there are substantial or several mitigating circumstances. If there are substantial or several aggravating circumstances, the aggregate amount of the penalties and assessments should be set closer to the maximum. Section 1003.107 of the regulations provides that the determination to exclude and the duration of an exclusion should be made by taking into account the circumstances set forth in section 1003.106 of the regulations. Finally, section 1003.106(d) surprisingly states that the "guidelines set forth in this section are not binding" (emphasis added).

The preamble to the regulations specifically states that "fixed numbers" have been "eliminated" as "triggering devices" and "we believe that increased flexibility is preferable." 48 Fed. Reg. 38827 (Aug. 26, 1983). See Dean G. Hume, DAB CR40 at 21-29 (1989). Since the

regulations provide guidelines and flexibility, logic suggests that other section 1128A decisions be compared in determining the appropriate sanctions. This could assist in ascribing weight to the aggravating or mitigating circumstances which are found in this case.

A. The Nature and Circumstances of the Claims Presented.

An aggravating circumstance exists where the requests for payment were of several types, occurred over a lengthy period of time, were large in number, indicated a pattern of making such requests for payment, or where the amount was substantial. 42 C.F.R. § 1003.106(b).

It is a mitigating circumstance if the nature and circumstances of the requests for payment were all of the same type, occurred within a short period of time, were few in number, and the total amount requested was under $1,000. Id.

The I.G. proved that the claims for services at issue were provided over a lengthy period of time (more than one year), were a substantial number (687 services not provided as claimed), indicated a pattern, and involved a substantial amount ($42,875 claimed and approximately $9,000 paid to Respondent). The I.G. did not prove that the requests for payment were for several types of services.

I gave these aggravating circumstances great weight in Stern I and do so here. The appellate panel in Stern II did not question my findings regarding these circumstances. [4] [5]

---

[4] When proposing the amount of sanctions to be imposed here, the I.G. alleged that there were 707 services improperly claimed. As I stated above, since the I.G. only proved 687 were false or improper, the penalties and assessments should be reduced accordingly.

[5] I have compared this case to other section 1128A decisions issued by the DAB and I find that the sanctions proposed by the I.G. here are consistent with other cases (when comparing the amount paid, the amount claimed, and the number of items to the amount of the penalties and assessments). For example, in Mayers, the respondents submitted requests for payments for 2,702 items (totalling $145,550, for which they were paid $24,697), and these were but a small part of a larger

(continued...)

B. Respondent's Culpability

Knowledge of wrongdoing is an aggravating factor and "unintentional or unrecognized error" is a mitigating factor if a respondent "took corrective steps promptly after the error was discovered." 42 C.F.R. § 1003.106(b)(2); 48 Fed. Reg. 38831 (Aug. 26, 1983).

I found in Stern I that the I.G. proved that it is an aggravating circumstance that Respondent knew that the services he claimed were not provided as claimed. I also found that Respondent had reason to know and had a reckless disregard for the Medicare rules in that he knowingly ignored the requirements when presenting claims to Medicare. The appellate panel agreed with my findings and stated in Stern II at 9-10 that Respondent had knowledge of his wrongdoing.

While I found that Respondent had actual knowledge, I concluded in Stern I that much of this behavior was due to Respondent's drug addiction. I concluded that the I.G. proved culpability as an aggravating factor, but I found that this aggravating circumstance was mitigated because of Respondent's drug addiction. [6]

However, the appellate panel in Stern II at 21-25 stated that my finding that Respondent's drug addiction was mitigating was "not supported by substantial evidence in the record and lacks legal justification." The appellate panel asserted that mitigating culpability because of drug addiction would send the wrong message to the public and that Respondent did not substantiate why he should be permitted to present additional evidence on this issue. Finally, the appellate panel deleted FFCL from my decision in Stern I. See Stern II at 25.

---

[5] (...continued)
pattern of activity. The penalties and assessments totalled $1,791,100. In Corazon C. Hobbs, DAB CR57 (1989), the respondent submitted claims for 111 services (totalling $2,026.02, for which she was paid $1030.22). The penalties and assessments were $51,797.81. This comparison reveals that penalties of $425,000, and assessments of $70,648 might be reasonable in this case if warranted by the facts and circumstances.

[6] This finding is supported by the American Medical Association's position that drug addiction is a disease.

Thus, Respondent's drug addiction cannot be considered to mitigate the severity of his culpability. Because the appellate panel directed me to reconsider the sanctions without regard to Respondent's drug addiction as a factor mitigating his culpability, I have, accordingly, increased the sanctions to be imposed on Respondent by a moderate amount. [7] [8]

C. History Of Prior Offenses

Lack of prior offenses is not a mitigating factor. George A. Kern, DAB CR12 at 67 (1987). The I.G. conceded that there are no specific prior offenses "which could be construed as aggravating." I.G. Posthearing Brief at 175.

However, the I.G. urges me to consider Respondent's prior improper actions. I.G. Brief at 10-12. The I.G. did not prove these prior actions to be an aggravating factor under this category. Anesthesiologists, at 60-61. See I.G. Posthearing Brief at 175.

Accordingly, I have given this factor no consideration in determining the amount of the sanctions to be imposed.

D. Financial Condition of Respondent

The financial condition of a respondent should constitute a mitigating circumstance if the penalties or assessments, without reduction, would jeopardize the ability of a respondent to continue as a health care provider. 42 C.F.R. § 1003.106 (b)(4). Respondent has not demonstrated that the sanctions imposed here would jeopardize his ability to continue as a health care provider.

However, the regulations also require that in "all cases, the resources available to the respondent will be

---

[7] Also, I have compared this case to the other section 1128A decisions issued by the DAB and found that generally the I.G. has proven actual knowledge on the part of most respondents who have violated section 1128A.

[8] While I mitigated somewhat in Stern I, based on drug addiction, I reduced the penalties and assessments proposed by the I.G. primarily because I concluded that a substantial number of other services had been provided and that patients benefitted from Respondent's care.

considered when determining the amount of the penalty and assessment." Id. Thus, the ALJ should consider a respondent's financial condition. It is apparent that the I.G. did not take into consideration Respondent's financial condition.

As I stated earlier, I have given some weight to Respondent's Financial Statement. Although the I.G. suggests that Respondent may have failed to disclose all of his assets, by Respondent's own account of his net worth, $121,247 is a substantial amount of money. See I.G. Response at 4-5. Accordingly, Respondent's financial condition does not require a reduction in the sanctions. [9]

E. Other Factors As Justice May Require

1. Damages to the government

(a) Measurable damages related to the false claims submitted by Respondent

The statute, the regulations, and case law all single out the approximate amount of damages to the government as the most important factor to be used in determining the appropriate amount of penalties and assessments because they are intended to make the government whole. Mayers at 999.

Damages to the government include the amounts paid by the Medicare program to Respondent and the costs of bringing Respondent to justice. Mayers at 998-999; Berney R. Keszler, DAB CR107 (1990); 48 Fed. Reg. 38831 (Aug. 26, 1983); H.R. Rep. No. 158, 97th Cong., 1st Sess. 329, 461-462 (1981), reprinted in 1981 U.S.C.C.A.N. at 727-28.

Here, the I.G. proved that Respondent improperly claimed reimbursement from Medicare for 687 services not performed as claimed. The amount paid to Respondent on

---

[9] I note that even if Respondent's net worth were three or four times what Respondent claims it to be, the amount of sanctions proposed by the I.G. could be construed as punitive, rather than remedial, if they are disproportionate to the amount of damages to the government. In other words, consideration of net worth is important, but any determination of sanctions is more closely tied to the amount of damages.

these 687 claims is approximately $9,000. [10] The costs of investigating and prosecuting Respondent's unlawful conduct in this case is approximately $165,000. See I.G.'s April 23, 1992 Brief at 12. Accordingly, the measurable damages to the government are about $174,000, including the $9,000 paid to Respondent by the Medicare program and the $165,000 in expenses to the government to bring Respondent to justice. [11] [12]

(b) Indirect damages related to the false claims submitted by Respondent

There are other damages to the government resulting from the false claims submitted by Respondent which cannot be quantified, but which should be considered in determining the appropriate amount of sanctions. Edward J. Petrus, M.D., DAB 1264 at 37 (1991). This includes the $42,875 claimed by Respondent in this case and the fact that Respondent's illegal and improper activities damaged the integrity and reputation of the Medicare program and its

---

[10] While it is not directly relevant to this case (because the claims were not the claims in issue in this case), I note that Respondent was ordered to pay only $11,000 in restitution to the Medicare beneficiaries involved in his prior criminal action.

[11] I have not considered the costs of conducting the hearing or any of the proceedings in this administrative action because to do so would have a chilling effect on the rights of respondents to a full and fair hearing.

[12] The I.G. argued that payments made to Respondent in past cases are to be included in the amount of damages in this case. I.G. April 23, 1992 Brief at 10-14. The I.G. seems to include these amounts in his calculation of damages related to the claims in issue. These past damages have no direct relation to the claims in issue. Accordingly, I have not included these past damages in the amount of related damages which I used as the figure for determining the minimum amount of penalties and assessments. The figure provided in section 1003.106(c)(3) of the regulations is twice the amount of damages. (Since the damages related to the claims in issue amount to $174,000, the minimum amount of penalties and assessments here would be $348,000). I have, however, given some consideration to the fact that Respondent has caused damage to the Medicare program in the past as an aggravating factor.

carrier BSWNY. Mayers at 998; Chapman at 529; Hume at 29-30; Keszler at 34-39; Tr. II/1329. Also, the I.G. proved that Respondent's activities caused harm to the Medicare beneficiaries by misleading them. [13] While the number of Medicare beneficiaries involved in this case is only 31, harm to even one beneficiary is serious.

When compared to other section 1128A cases, the indirect damages in this case are slightly more significant than the average case where false claims have been submitted to the Medicare or Medicaid programs.

(c) Past damages to the government which are unrelated to the false claims in issue

Respondent received large sums from Medicare in the past by improperly claiming reimbursement. I.G. Ex. 75-4 at 29; Tr II/101. In addition, extensive sums have been expended in the past to monitor, educate, investigate, and prosecute Respondent. Tr I/168,586. The I.G. seems to include these past damages in his calculations of the total amount of damages in this case. See I.G. Brief at 10-12. I find that it would be erroneous to include these past damages to calculate the amount of damages to the government in this action. These are not the damages the regulations refer to in section 1003.106(c)(3) for purposes of calculating the minimum amount of penalties and assessments. [14] However, even though these past damages are not directly relevant to the actual damages incurred by the government in this action, I have considered these expenses, find them to be significant, but have given them minimal weight as an aggravating factor.

---

[13] There are no allegations and no proof that Respondent physically harmed any patients.

[14] If these damages were factored into the amount of damages used to compute the minimum amount of penalties and assessments, as the I.G. seems to suggest, the amount of penalties and assessments would be much higher than the I.G. has actually proposed. It would be helpful if the I.G. would reveal how he calculates his proposed penalties and assessments. The guidelines in section 1003.106 of the regulations suggest that, after doubling the approximate amount of related damages, the ALJ should consider the effect of the aggravating and mitigating circumstances and adjust the penalties and assessments accordingly.

2. Respondent's provision of other services and impact on Medicare beneficiaries

In Stern I, I mitigated the penalties and assessments, in part, because I found that Respondent provided some medical services to his patients, as needed, which would have been reimbursable if properly documented and not falsely claimed. In addition, I found that some patients found both the acupuncture and the other services to be beneficial. See Stern I at FFCLs 179-181. [15]

In Stern I, I contrasted this case with others, such as Kern, Hume, and Raymond C. Reynaud, DAB CR4 (1985), where respondents submitted claims in situations where no services or treatments were performed. I also considered this case to be somewhat analogous to the case of Corazon C. Hobbs, DAB CR57 (1989), where prescription medications were prescribed by telephone for Medicaid recipients and then Medicaid was improperly billed for an office visit. Finally, in Stern I, I took into consideration that, even though Medicare does not pay for the treatments of electro-acupuncture and injections of marcaine, Dr. Gilies, an international expert on the treatment of pain, thought these treatments to be an effective treatment for pain. See, Myers v. Secretary of Health and Human Services, 893 F. 2d 840, 846 (6th Cir. 1990).

The appellate panel in Stern II ruled that it was error to rely on my findings regarding the provision of other services by Respondent and my finding that Respondent's acupuncture treatments were an effective treatment for pain or that Medicare beneficiaries benefitted from Respondent's services and found him to be a good doctor (FFCLs 179-180). Accordingly, upon reconsideration of

---

[15] The medical records submitted by the parties show that some other medical services besides electro-acupuncture or injections of marcaine were provided to Medicare beneficiaries. Respondent was a physician and treated some patients with medical modalities as well as with acupuncture. These notations in the medical records were corroborated by testimony from Respondent's patients, including those patients testifying on behalf of the I.G. See Stern I at FFCL 98, 103,109-111. Also, one of the I.G.'s medical experts identified one service which he considered to be sufficiently documented to be reimbursable, and seven services at a lower level of service than claimed. Tr.II/1541, 1542, 1545-1547, 1549.

these factors, I have significantly increased the penalties and assessments to be imposed.[16]

3. The I.G.'s expert identified some services in issue as having been provided by Respondent at a lower level of service than claimed

In Stern I, I found it to be mitigating that the I.G.'s medical expert "identified 14 items which he considered to be reimbursable, although most of them at a lower level of service than claimed." In Stern II, the appellate panel concluded that the term "most" left open the possibility that some of the 14 items were fully reimbursable as claimed and directed that I clarify whether any of the 14 should be deleted.

As stated much earlier, I have concluded that count 291, a service to Eloise Jenkins, was provided as claimed, and I have deleted it.

Of the 13 services remaining, out of the 14 services referred to by the I.G.'s expert, only one other is referred to, without qualification, as being reimbursable. That service was the surgical removal of a toenail, provided to Eloise Jenkins on February 13, 1984. The attachment to the I.G.'s Notice of sanctions does not list such a date, although it does list February 13, 1985. The medical record supporting the claim for February 13, 1985 does not indicate that a surgical removal of a toenail occurred on that date. I.G. Ex. 9-34. Accordingly, I conclude that the expert must have been referring to an item or service which was not among those in question in this case.

In all other instances (of the 14 services the appellate panel directed that I reconsider), the I.G.'s expert qualified his statement that the service could be considered reimbursable; he added that the service would be covered at a lower level than claimed. Tr. II/1542, 1549. As with the Eloise Jenkins service on February 13, 1984 (for surgical removal of a toenail), only seven dates referred to by the expert correspond with dates of items or services listed on the I.G.'s attachment to his

---

[16] While I reduced the penalties and assessments proposed by the I.G. in Stern I by a small amount because of my finding that Respondent's culpability was slightly mitigated by drug addiction, the major reduction was due to these two factors (Respondent's provision of other services and his impact on beneficiaries).

Notice. Thus, I conclude that the expert's testimony included some items or services which were not at issue in this case.

In summary, one item or service (item 291) was fully reimbursable as claimed, and seven items or service were reimbursable at a lower level than claimed (counts 208, 347, 349, 361, 372, 377, and 378). These latter seven are considered in mitigation. This requires a slight reduction in the penalties and assessments proposed.[17]

4. Respondent's rehabilitation

Justice requires me to consider the effect of the penalties and assessments on Respondent's recovery and rehabilitation. Respondent has taken many positive steps towards rehabilitation. He has begun to overcome his self-destructive behavior. Arthur Stern reported at the July 23, 1992 telephone conference that Respondent is now working full-time as a drug abuse counselor. Respondent apparently is dealing constructively with the very problem, which, in my opinion, brought about his downfall. This is a mitigating consideration.

---

[17] The remaining six services of the original 14 are services which are not at issue in this case. Even if these six services were at issue in this case, their mitigating effect on the amount of sanctions imposed would be de minimis. I note that these six do serve to corroborate Respondent's testimony that there were many instances in which he provided medical services other than acupuncture to patients.

The appellate panel in Stern II at 27 stated that even if the 14 services were all found to have been performed at a lower level of service, this could not be considered mitigating because this only amounts to about two percent of the 687 claims in issue. They said "this percentage is too small in our view to justify the use of other services as a mitigating factor." I find it illogical to ignore the two percent. Instead, fairness dictates that the sanctions be mitigated by two percent, or whatever percentage is appropriate by reason of the facts (in this case, seven services out of 687, or a little over one percent).

VI. The Amount Of The Penalties, Assessments, And The Length Of The Exclusion, As Modified Here, Are Supported By The Record.

After reviewing all of the evidence in the record, including the aggravating and mitigating factors and considerations, reviewing the appellate panel's decision in Stern II, and reviewing all the section 1128A decisions issued by the DAB, I conclude that civil monetary penalties of $345,000, assessments of $70,648, and an exclusion from Medicare and Medicaid programs for ten years is sufficient to protect the Medicare program and its beneficiaries and to serve the remedial purposes of section 1128A of the Act. See Hume at pp. 29-30; Keszler at pp. 34-39.

A. Computing the assessments

As discussed previously, the amount of assessments is tied closely to the amount claimed by a respondent. The regulations prohibit imposing more than twice the amount claimed and state that assessments are designed to compensate the government in lieu of damages sustained.

Here, Respondent claimed $42,875 from Medicare on 687 claims for services which he did not perform as claimed. While he was paid only approximately $9,000, he did cause great expense to the Department in bringing him to justice.

Because the assessments are designed primarily to make the government whole, and, upon reconsideration, I find that the intent of Congress is best expressed by imposition of the total amount of assessments proposed by the I.G., the amount of $70,648. This amount is near to the maximum of $85,826 in assessments which could be imposed.

B. Computing the penalties

Penalties are appropriate here because the assessments alone cannot compensate the government fully for the harm caused by Respondent.

The penalties were arrived at not by a mechanical formula, but by an analysis of and a weighing of all of the aggravating and mitigating factors and considerations, including the damages to the government, and by reviewing each section 1128A decision issued by the DAB. In so doing, I have assessed the severity of the wrongs

committed against the Medicare program and its beneficiaries by Respondent in comparison to other section 1128A cases. I seek to make the government whole for the damages and expenses caused by Respondent and to insure that the penalties and assessments are not punitive or counterproductive to Respondent's rehabilitation.

I find that penalties of $345,000 will best comport with the intent of Congress in this instance.

C. Computing the exclusion

In determining the length of the exclusion, it is important to consider the degree to which Respondent is trustworthy and rehabilitated. See, Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). The ALJ must also consider the same criteria that are used to determine the penalties and assessments. 42 C.F.R. § 1003.107.

In addition, I have considered that Respondent's violation of section 1128A of the Act is similar to the kind of misconduct that would presently result in a minimum mandatory exclusion of at least five years under section 1128 of the Act. See, Jack W. Greene, DAB 1078 (1989), aff'd. sub. nom., Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). The legislative history to the 1987 amendments to section 1128 of the Act makes it clear that Congress intended to provide for exclusions of greater than five years in appropriate cases.

In addition, I have considered Respondent's past history of making false representations, such as the misleading statements made to State licensing authorities. This evidence is relevant for purposes of determining the length of exclusion because it has a bearing on Respondent's trustworthiness. See Hanlester Network, et al., DAB 1275 at 52 (1992); Lakshmi N. Achalla, M.D., DAB 1231 (1991).

There is evidence that Respondent has remained drug-free for several years and has made constructive changes in his life. The fact that Respondent is taking positive steps to rebuild his life and is involved in positive activities that are of service to others speaks well for his intentions. However, because of Respondent's history of failure to respect and honor Medicare rules and regulations, it would be best for the Medicare and Medicaid programs to exclude him for a period of ten

years to insure that, if and when he applies for readmission to the programs, he is totally trustworthy and fully capable of handling the responsibilities entrusted to a Medicare medical provider.[18]

CONCLUSION

Following the directives and suggestions of the appellate panel in Stern II, I have reconsidered and determined that penalties of $345,000, assessments of $70,648, and an exclusion of ten years from the Medicare and Medicaid programs are the appropriate sanctions in this case.

/s/

Charles E. Stratton
Administrative Law Judge

[18] I note that Respondent has not participated in Medicare or Medicaid since 1987, when he relinquished his medical license as part of his criminal plea agreement. He was also suspended from the Medicare and Medicaid programs in a prior exclusion action. When Respondent is eligible again to participate in the programs, he will have been excluded, in effect, for approximately 15 years.