Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
The Inspector General,	DATE: November 9, 1992
- v. -	Docket No. C-92-381 Decision No. CR240
Wesley Hal Livingston and Shoals Medical Equipment and Supply Co., Inc.	
Respondents.	

DECISION

On April 19, 1991, the Inspector General (I.G.) notified Respondents Wesley Hal Livingston (Respondent Livingston) and Shoals Medical Equipment and Supply Company, Inc. (Respondent Shoals) that he intended to impose civil monetary penalties, assessments, and exclusions against them pursuant to section 1128A of the Social Security Act (Act). The I.G. asserted that Respondents had presented or caused to be presented Medicare reimbursement claims which Respondents knew, had reason to know, or should have known were false, fraudulent, or for items or services which were not provided as claimed. On July 8, 1991, the I.G. sent an amended notification to Respondents, in which he asserted that Respondents had presented or caused to be presented additional claims that were in violation of the Act and that were not listed in the April 19, 1991 notice letter.

The I.G. contended that Respondents presented or caused to be presented claims for 183 items or services in violation of the Act.[1] The I.G. advised Respondents that

[1] There was a numbering error in the I.G.'s July 8, 1991 letter which made it appear as if the I.G. was alleging that Respondents had presented or caused to be presented 184 claims in violation of the Act. In fact, the I.G. alleged that Respondents had presented or caused to be presented 183 claims in violation of the Act.

he had determined to impose assessments against them of $97,437.60 and penalties of $304,000.00, for a total of $401,437.60. The I.G. also advised Respondents that he had determined to exclude them from participating in the Medicare, Medicaid, Maternal and Child Services Block Grant, and Social Services Block Grant programs (Titles XVIII, XIX, V, and X, of the Act, respectively) for a period of five years.[2]

Respondents requested a hearing and the case was assigned to me for a hearing and a decision. I held a hearing in Mobile, Alabama, from April 27 - May 1, 1992, and in Florence, Alabama, on May 8, 1992. The parties submitted posthearing briefs and reply briefs.

I have carefully considered the evidence, the applicable law and regulations, and the parties' arguments. I conclude that Respondents presented or caused to be presented 173 Medicare reimbursement claims which were false, fraudulent, or for items or services which were not provided as claimed.[3] I do not find that Respondents knowingly presented Medicare reimbursement claims which were false, fraudulent, or for items or services which were not provided as claimed. I conclude that Respondents had reason to know or should have known that the claims at issue were false, fraudulent, or for items or services which were not provided as claimed. Respondents therefore presented or caused to be presented 173 claims in violation of the Act. I impose assessments against Respondents, jointly and severally,

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[2] The programs from which a party may be excluded under the Act are referred to in the Act as "Medicare" and "State health care" programs. "State health care program" is defined by section 1128(h) of the Act to include all of the above mentioned programs other than Medicare. Unless the context indicates otherwise, I refer hereinafter to programs, other than Medicare, from which a party may be excluded under the Act as "Medicaid."

[3] I find that the I.G. did not prove that 10 of the 183 claims at issue were false, fraudulent, or for items or services that were not provided as claimed. These claims were for items or services which Respondent Shoals asserted it provided between April 1, 1985, and February 1, 1986, to Medicare beneficiary Amos Odom (Counts 81 - 83 and 172 - 178, as stated in the I.G.'s April 19, 1991, and July 8, 1991 notice letters to Respondents).

of $85,000.00. I impose penalties against Respondents, jointly and severally, of $300,000.00. I exclude each Respondent for five years.

ISSUES

The issues in this case are whether:

1. Either Respondent presented or caused to be presented Medicare reimbursement claims which that Respondent knew, had reason to know, or should have known were false, fraudulent, or for items or services which were not provided as claimed.

2. An assessment, penalty, or an exclusion should be imposed against either Respondent, and, if so, for what amounts, or for what period of time.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As a convenience to the parties, I have organized the following Findings of Fact and Conclusions of Law (Findings) by subject headings. The headings are not Findings and they do not alter the meaning of my Findings.

A. Respondents and their home oxygen equipment rental business

1. Respondent Livingston is trained as and has worked as a respiratory therapist. I.G. Ex. 534/2 - 3, /8 - 9, /22; Tr. at 1407.[4]

2. A respiratory therapist is a health care provider who furnishes care to patients who suffer from chronic breathing problems. Tr. at 1150 - 1151.

3. In Alabama, there are neither education nor licensing requirements to qualify individuals to work as respiratory therapists. I.G. Ex. 534/3; Tr. at 1466.

4. The care provided by respiratory therapists includes administering tests to patients to determine whether

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[4] I refer to the Inspector General's exhibits as "I.G. Ex. (exhibit number)/(page)." I refer to Respondents' exhibits as "R. Ex. (exhibit number)/(page)." I refer to the transcript as "Tr. at (page)."

patients qualify for oxygen equipment for home use. See Tr. at 1052 - 1053, 1150 - 1151.

5. Tests administered by respiratory therapists may include arterial blood gas studies (ABGs) and ear oximetry tests. I.G. Ex. 17/2; Tr. at 1053, 1151, 1157 - 1158, 1194.

6. An ABG involves withdrawing blood from a patient's artery and testing it to determine the degree of oxygen pressure (PO2) in the patient's arterial blood. I.G. Ex. 17/2; Tr. at 420 - 421, 569 - 571.

7. The PO2 level in a patient's arterial blood evidences the extent to which that patient's breathing is impaired. Tr. at 569 - 570.

8. Blood withdrawn from a vein (venous blood) has a lower PO2 level than arterial blood, and cannot be substituted legitimately for arterial blood for the purpose of conducting an arterial blood gas study. Tr. at 1166; See Tr. at 1185, 1197.

9. An oximetry test determines the oxygen saturation of a patient's blood by measuring the passage of light through that patient's ear lobe. I.G. Ex. 17/2; Tr. at 1193 - 1194.

10. The care provided by respiratory therapists includes maintaining oxygen equipment provided to patients for use in their homes. Tr. at 1055.

11. Respondent Livingston incorporated Respondent Shoals in January, 1983. I.G. Ex. 541; Tr. at 1409.

12. Respondent Shoals maintained its principal office in Florence, Alabama. I.G. Ex. 533/333; I.G. Ex. 534/6.

13. Respondent Shoals was organized to provide medical equipment, including oxygen equipment, to patients, to be used by them in their homes. I.G. Ex. 533/110; I.G. Ex. 534/4; I.G. Ex. 541/3.

14. Respondent Shoals provided home oxygen equipment to patients residing in several states in the southern United States, including patients residing in the State of Alabama. Tr. at 1409, 1453.

15. Between 1983 and 1986, Respondent Shoals rented home oxygen equipment to between 500 and 800 patients at any one time. I.G. Ex. 534/69; Tr. at 1452 - 1453.

16. The home oxygen equipment which Respondent Shoals rented to patients included oxygen concentrators, portable oxygen equipment, ultrasonic nebulizers, and compressors. See R. Ex. 1/2; R. Ex. 3/3; R. Ex. 4/2; R. Ex. 6/4; R. Ex. 7/2.[5]

17. An oxygen concentrator is a device which extracts oxygen from room air, thereby providing oxygen to a patient without the presence of oxygen tanks or stored oxygen. Tr. at 394, 557 - 558.

18. Portable oxygen equipment includes tanks which contain oxygen and which can be transported by a patient from one location to another. Tr. at 554.

19. An ultrasonic nebulizer is a device which humidifies air breathed by a patient. Tr. at 556 - 557.

20. A compressor is a device which pressurizes medications for the purpose of aiding breathing by opening the patient's air passages. Tr. at 557.

21. Respondent Livingston was the President of Respondent Shoals. I.G. Ex. 1/2.

22. In December 1982, Respondent Livingston obtained a Medicare provider number for Respondent Shoals so that Respondent Shoals could present reimbursement claims for Medicare items or services. I.G. Ex. 2; see I.G. Ex. 534/4 - 5.

23. Respondent Livingston managed the affairs of Respondent Shoals and supervised Respondent Shoals' employees closely in the performance of their duties. I.G. Ex. 534/387, /394; Tr. at 1430, 1754, 1757, 1758 - 1759, 1760 - 1761.

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[5] Respondents' exhibits were marked in an inconsistent manner. Some of the page numbers in Respondents' exhibits are marked so that four zeros appear before the page number. Other page numbers are not marked in this way. For example, R. Ex. 6/4 is marked as Respondent Exhibit 6 with the page number 4. The pages in some of Respondents' exhibits, such as exhibit 3, are marked with the page numbers 00001, etc. Where applicable, in an effort to avoid confusion, I have cited to Respondents' exhibits using the page number without the zeros that precede that number.

24. The acts of Respondent Shoals were at the direction of, and under the close control of, Respondent Livingston. Findings 11, 22 - 23.

25. Respondent Shoals was the agent of Respondent Livingston. Findings 11, 22 - 24.

B. The conditions under which Medicare beneficiaries in Alabama qualified for Medicare reimbursement for home oxygen equipment rentals, and the manner in which providers in Alabama received reimbursement for Medicare claims for home oxygen equipment rentals

26. Blue Cross and Blue Shield of Alabama (BCBSA) is the agent of the United States Government which processes claims for Medicare reimbursement in the State of Alabama, and it served in that capacity from 1983 through 1986. Tr. at 412 - 413.

27. Prior to October 1, 1985, there existed no national standards of eligibility to qualify Medicare beneficiaries for reimbursement for home oxygen equipment. Tr. at 413 - 414.

28. Prior to October 1, 1985, BCBSA established standards of eligibility to qualify Medicare beneficiaries in Alabama for reimbursement for home oxygen equipment. I.G. Ex. 8; I.G. Ex. 12; I.G. Ex. 13; I.G. Ex. 17; I.G. Ex. 26; Tr. at 414.

29. Beginning October 1, 1985, the Medicare program established national standards of eligibility to qualify Medicare beneficiaries for reimbursement for home oxygen equipment. I.G. Ex. 21; I.G. Ex. 22; I.G. Ex. 25; I.G. Ex. 30; Tr. at 414.

30. Prior to October 1, 1985, BCBSA required as supporting evidence for an initial claim for Medicare reimbursement for home oxygen equipment: (1) a Durable Medical Equipment Certification (DME form), signed by a physician, which certified the need for the specific equipment ordered, and which contained specified additional information concerning the beneficiary's medical condition and the length of time for which the equipment was likely to be needed; and (2) documentation of the beneficiary's arterial blood gas, through an ABG, demonstrating a PO2 below 55mm Hg. I.G. Ex. 8/1 - 2; Tr. at 415.

31. Prior to October 1, 1985, BCBSA required that claims for home oxygen equipment be recertified every six months

with the submission of an updated DME form, signed by a physician. Tr. at 417 - 18.

32. Prior to June 1984, BCBSA did not require that recertification requests for home oxygen equipment be accompanied by ABG or other test results. Tr. at 417.

33. Beginning in June, 1984, BCBSA continued to require that a request for reimbursement for home oxygen equipment be recertified once every six months with an updated DME form, signed by a physician. It also required that, once every twelve months, a recertification request for reimbursement for home oxygen equipment be submitted with an ABG documenting that the beneficiary had a PO2 below 55mm Hg., along with an updated DME form, signed by a physician. Tr. at 417.

34. Beginning in early 1985, BCBSA required that, once every 12 months, a recertification request for reimbursement for home oxygen equipment be submitted with either an ABG documenting that the beneficiary had a PO2 of below 55mm Hg., or an ear oximetry test result documenting a blood oxygen saturation level of 90 percent or less, along with an updated DME form, signed by a physician. Tr. at 418 - 419, 423.

35. Beginning October 1, 1985, Medicare and BCBSA required that, for an initial claim for reimbursement for home oxygen, the claim be accompanied by a completed DME form signed by a physician, along with either an ABG test result documenting specified PO2 levels or an ear oximetry test documenting specified oxygen saturation levels. I.G. Ex. 21; I.G. Ex. 30; Tr. at 419 - 420.

36. The PO2 or oxygen saturation levels which would qualify a beneficiary for reimbursement under the October 1, 1985 Medicare reimbursement criteria varied, depending on the level of physical activity engaged in by the beneficiary while the test was being conducted. I.G. Ex. 21; I.G. Ex. 30; Tr. at 419 - 420.

37. Beginning October 1, 1985, Medicare and BCBSA did not require additional ABG studies or ear oximetry studies accompany recertification requests for reimbursement of home oxygen equipment, so long as the beneficiary's medical condition at the time of recertification remained unchanged. I.G. Ex. 21; I.G. Ex. 30; Tr. at 420.

38. Between 1983 and 1986, BCBSA sent to health care providers, including suppliers of home oxygen equipment, documents which announced BCBSA's and Medicare's criteria

for qualifying Medicare beneficiaries for Medicare reimbursement for home oxygen equipment. I.G. Ex. 8; I.G. Ex. 12; I.G. Ex. 13; I.G. Ex. 17; I.G. Ex. 21; I.G. Ex. 22; I.G. Ex. 25; I.G. Ex. 26; Tr. at 409, 412 - 413.

39. Respondents received BCBSA's publications of criteria for qualifying Medicare beneficiaries for Medicare reimbursement for home oxygen equipment, and knew about those criteria. I.G. Ex. 533/319; I.G. Ex. 534/11, 14, 54, 56; R. Ex. 13; R. Ex. 19 - 26; R. Ex. 28; R. Ex. 29; Finding 38.

40. Between September, 1980, and October, 1986, BCBSA reimbursed Medicare claims for home oxygen equipment under a procedure known as the "DME diary." Tr. at 430 - 431.

41. Under the DME diary procedure, a claim for home oxygen equipment, once initially qualified for reimbursement, would automatically be paid by BCBSA monthly, for six months. Tr. at 430 - 431.

42. Under the DME diary procedure, a provider claiming reimbursement for home oxygen equipment would only need to submit one claim which qualified for reimbursement in order to receive reimbursement from BCBSA for a six month period. Tr. at 430 - 431.

43. Under the DME diary procedure, each time a provider submitted a recertification to BCBSA which qualified a beneficiary for additional reimbursement for home oxygen equipment rental, BCBSA would reimburse the provider for six additional months' rental of the equipment. Tr. at 431.

44. Under the DME diary procedure, BCBSA would send a document to a provider once a month, known as a "turn-around document," which told the provider whether a claim was being paid by BCBSA, and whether a recertification was due in order for a beneficiary to continue to qualify for reimbursement rental of home oxygen equipment to that beneficiary. Tr. at 432 - 433.

45. Under the DME diary procedure, the provider of home oxygen equipment had the duty to notify BCBSA if a beneficiary stopped using home oxygen equipment in less than six months' time. I.G. Ex. 37; Tr. at 433 - 434.

46. Respondents were aware of the DME diary procedure and understood their duty to notify BCBSA in the event that a beneficiary stopped using home oxygen equipment in

less than six months' time. R. Ex. 1/26; R. Ex. 2/22; Finding 44.

47. BCBSA relied on the documents submitted by providers to determine whether Medicare beneficiaries qualified for reimbursement for home oxygen equipment rental. Findings 26 - 46.

48. Under the DME diary procedure, providers of home oxygen equipment in Alabama had a duty to determine each month whether beneficiaries were continuing to use home oxygen equipment, and to advise BCBSA if any beneficiaries were no longer using home oxygen equipment. Findings 40 - 47.

49. Providers who submit claims for Medicare reimbursement for home oxygen equipment have a duty to assure that the claims they submit accurately and honestly state the facts represented in the claims. Findings 26 - 48.

C. The relationship between Respondents and independent contractor respiratory therapists

50. Respondent Shoals rented home oxygen equipment to patients through respiratory therapists who had independent contractor relationships with Respondent Shoals. I.G. Ex. 534/7 - 8.

51. Respondent Livingston personally recruited independent contractor respiratory therapists on behalf of Respondent Shoals, and worked closely with the independent contractor respiratory therapists. I.G. Ex. 533/199, /208 - 209; I.G. Ex. 534/19, /28, /30; Tr. at 1446, 1469, 1761, 1766.

52. Respondent Shoals had independent contractor relationships with as many as 60 respiratory therapists at any given time. I.G. Ex. 534/6; Tr. at 1452.

53. Typically, an independent contractor respiratory therapist would service about 10 patients at a time on behalf of Respondent Shoals. I.G. Ex. 534/7.

54. Some of Respondent Shoals' independent contractors serviced more than, or less than, 10 patients at a time on behalf of Respondent Shoals. I.G. Ex. 534/7.

55. Respondent Shoals' purpose in doing business with independent contractors was to obtain access to patients who were candidates to rent home oxygen equipment. Respondent Shoals would rent home oxygen equipment to

patients through the independent contractors. I.G. Ex. 534/61; see Tr. at 1426 - 1429.

56. The independent contractor respiratory therapists through whom Respondent Shoals rented home oxygen equipment to patients were respiratory therapists who were employed by various hospitals. Tr. at 669 - 670, 785 - 786, 789, 1053, 1153.

57. The independent contractor respiratory therapists would obtain referrals for home oxygen equipment rental from physicians who were on the staffs of hospitals at which the respiratory therapists were employed. Tr. at 543 - 544, 669 - 670, 674 - 675.

58. Respondent Shoals agreed to pay independent contractor respiratory therapists a commission ranging from $25 to as much as $80 per month for each patient from whom the contractors could obtain an agreement to rent home oxygen equipment from Respondent Shoals, with the amount of the commission depending on the rental fee for the equipment rented. Tr. at 796, 798 - 799, 1259 - 1260.

59. Respondent Shoals agreed to pay independent contractor respiratory therapists for home oxygen equipment rental to Medicare beneficiaries on a commission basis, conditioned on the beneficiaries qualifying for reimbursement from Medicare for the rental of the equipment. I.G. Ex. 534/8, Tr. at 1253 - 1254.

60. If a patient who was a Medicare beneficiary did not qualify for reimbursement from Medicare for rental of home oxygen equipment, Respondent Shoals would not pay the contractor who obtained the referral of that patient. Finding 59; See I.G. Ex. 533/259 - 260.

61. Under the terms of Respondent Shoals' agreements with independent contractors, the independent contractors were required to obtain the documents necessary to qualify Medicare beneficiaries for Medicare reimbursement for rental of home oxygen equipment, including DME forms executed by physicians, ABGs which met qualifying criteria, and equipment rental agreements executed by beneficiaries or by persons on behalf of beneficiaries. I.G. Ex. 533/189, /210 - 211; Tr. at 1228, 1426 - 1429.

62. The independent contractors through whom Respondent Shoals rented home oxygen equipment to patients performed ABGs on those patients to qualify them for Medicare reimbursement for home oxygen equipment rentals. Tr. at 1256.

63. The independent contractors through whom Respondent Shoals rented home oxygen equipment to patients were Respondent Shoals' agents. Findings 50 - 62.

64. The means by which Respondent Shoals, at Respondent Livingston's direction, compensated independent contractor respiratory therapists (commissions for equipment rentals to patients who qualified for reimbursement) gave respiratory therapists an incentive to falsify documents, including DME forms, ABGs, and home oxygen equipment rental agreements, in order to qualify patients for initial and continuing reimbursement for rental of the most expensive home oxygen equipment, including oxygen concentrators and portable oxygen. Findings 50 - 63.

D. Medicare reimbursement claims by Respondent Shoals that were false or fraudulent or for items or services that were not provided as claimed

65. Respondent Shoals, at Respondent Livingston's direction, presented to BCBSA Medicare reimbursement claims for items or services that Respondent Shoals asserted it provided to Medicare beneficiary **Morris Broughton** from September 20, 1985 through June 20, 1986. I.G. Ex. 403 - 416; Findings 24 - 25; see I.G.'s April 19, 1991 notice letter to Respondents, Counts 1 - 16.

66. Respondent Livingston caused to be presented to BCBSA the reimbursement claims for the items or services which Respondent Shoals asserted to have provided to Morris Broughton from September 20, 1985 through June 20, 1986. Findings 23 - 25, 65.

67. The reimbursement claims for the items or services which Respondent Shoals asserted it provided to Morris Broughton from September 20, 1985 through June 20, 1986 include 16 claims for reimbursement for the rental of either an oxygen concentrator or portable oxygen. I.G. Ex. 403 - 416; see I.G. Ex. 9/18.

68. Morris Broughton did not suffer from a medical condition from September 20, 1985 through June 20, 1986, which would warrant the use by him of either an oxygen concentrator or portable oxygen. I.G. Ex. 395/2.

69. Morris Broughton's physician did not prescribe either an oxygen concentrator or portable oxygen for Morris Broughton from September 20, 1985 through June 20, 1986. I.G. Ex. 395/1 - 2.

70. Morris Broughton did not receive from Respondent Shoals either an oxygen concentrator or portable oxygen from September 20, 1985 through June 20, 1986. I.G. Ex. 396.

71. Respondent Shoals presented to BCBSA two DME forms for certification or recertification of home oxygen equipment that Respondent Shoals asserted it provided to Morris Broughton from September 20, 1985 through June 20, 1986. I.G. Ex. 401 - 402.

72. Although the two DME forms bear the purported signature of Morris Broughton's physician, that physician neither prepared nor signed the forms, nor authorized other individuals to prepare or sign the forms. I.G. Ex. 395/1 - 2; See I.G. Ex. 401 - 402.

73. Respondent Shoals presented to BCBSA an ABG result purportedly ordered by Morris Broughton's physician, and dated September 12, 1985, to support its reimbursement claims for an oxygen concentrator or portable oxygen and which it asserted it provided to Morris Broughton from September 20, 1985 through June 20, 1986. I.G. Ex. 400.

74. The ABG result is dated prior to the date that Morris Broughton's physician first saw Morris Broughton. I.G. Ex. 395/1.

75. Morris Broughton's physician did not order an ABG for Morris Broughton, to be performed on September 12, 1985. I.G. Ex. 395/1; Finding 74.

76. The ABG result which Respondent Shoals presented to BCBSA to support its reimbursement claims for Morris Broughton contains information concerning the PO2 levels in Morris Broughton's blood which is inconsistent with the clinical findings and diagnosis made by Morris Broughton's physician. I.G. Ex. 395/1 - 2, /24 - 26; I.G. Ex. 400.

77. The DME forms and the ABG result which Respondent Shoals presented to BCBSA to support its reimbursement claims for an oxygen concentrator or portable oxygen which it asserted it provided to Morris Broughton from September 20, 1985 through June 20, 1986 contain materially false information. Findings 71 - 76.

78. The 16 reimbursement claims for either an oxygen concentrator or portable oxygen which Respondent Shoals asserted it provided to Morris Broughton from September 20, 1985 through June 20, 1986 are false or fraudulent. Findings 67 - 77.

79. The 16 reimbursement claims for either an oxygen concentrator or portable oxygen which Respondent Shoals asserted it provided to Morris Broughton from September 20, 1985 through June 20, 1986 are for items or services which were not provided as claimed. Findings 67 - 78.

80. Respondent Shoals, at Respondent Livingston's direction, presented to BCBSA Medicare reimbursement claims for items or services that Respondent Shoals asserted it provided to Medicare beneficiary **Estelle Coleman** from February 20, 1985 through June 20, 1986. I.G. Ex. 373 - 389; Findings 23 - 25; see I.G.'s April 19, 1991 and July 8, 1991 notice letters to Respondents, Counts 17 - 30, 153 - 155.

81. Respondent Livingston caused to be presented to BCBSA the reimbursement claims for the items or services which Respondent Shoals asserted it provided to Estelle Coleman from February 20, 1985 through June 20, 1986. Findings 23 - 25, 79 - 80.

82. The reimbursement claims for the items or services which Respondent Shoals asserted it provided to Estelle Coleman from February 20, 1985 through June 20, 1986 include 17 claims for reimbursement for the rental of an oxygen concentrator. I.G. Ex. 373 - 389; see I.G. Ex. 9/18.

83. Estelle Coleman did not suffer from a medical condition from March 20, 1985 through June 20, 1986 which would warrant her using an oxygen concentrator. I.G. Ex. 354; I.G. Ex. 392.

84. Estelle Coleman's physician did not prescribe an oxygen concentrator for Estelle Coleman from March 20, 1985 through June 20, 1986. I.G. Ex. 354.

85. Estelle Coleman did not receive an oxygen concentrator from Respondent Shoals from March 20, 1985 through June 20, 1986. I.G. Ex. 355; I.G. Ex. 356.

86. Respondent Shoals presented to BCBSA six DME forms for certification or recertification of home oxygen equipment that Respondent Shoals asserted it provided to Estelle Coleman from March 20, 1985 through June 20, 1986. I.G. Ex. 363 - 367; I.G. Ex. 369 - 370.[6]

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[6] I.G. Ex. 363 and 369 are the same DME form. On I.G. Ex. 369 someone has placed the letter "F" next to the purported signature of Estelle Coleman's physician.

87. Estelle Coleman's physician signed two of the six DME forms. However, Estelle Coleman's physician did not complete these two forms, nor did he direct other individuals to complete these forms in a way which would indicate that Estelle Coleman suffered from respiratory illness, or that she needed home oxygen equipment. I.G. Ex. 354/2; See I.G. Ex. 365; I.G. Ex. 367.

88. Although the four remaining DME forms bear the purported signature of Estelle Coleman's physician, he did not complete or sign the four remaining forms, nor did he direct other individuals to complete or sign the forms. I.G. Ex. 354/1 - 2; See I.G. Ex. 363 - 364; I.G. Ex. 366; I.G. Ex. 369 - 370.

89. Respondent Shoals presented to BCBSA two ABG results purportedly ordered by Estelle Coleman's physician, to support its reimbursement claims for an oxygen concentrator which it asserted it provided to Estelle Coleman from March 20, 1985 through June 20, 1986. I.G. Ex. 361 - 362.

90. Estelle Coleman's physician never ordered ABGs to be performed on Estelle Coleman. I.G. Ex. 354.

91. The ABG results which Respondent Shoals presented to BCBSA to support its reimbursement claims for Estelle Coleman contain information concerning the PO2 levels in Estelle Coleman's blood which is inconsistent with the clinical findings and diagnosis made by Estelle Coleman's physician. I.G. Ex. 361 - 362; I.G. Ex. 392.

92. The DME forms and the ABG results which Respondent Shoals presented to BCBSA to support its reimbursement claims for an oxygen concentrator which it asserted it provided to Estelle Coleman from March 20, 1985 through June 20, 1986 contain materially false information. Findings 86 - 91.

93. The 17 reimbursement claims for an oxygen concentrator which Respondent Shoals asserted it provided to Estelle Coleman from March 20, 1985 through June 20, 1986 are false or fraudulent. Findings 80 - 92.

94. The 17 reimbursement claims for an oxygen concentrator which Respondent Shoals asserted it provided to Estelle Coleman from March 20, 1985 through June 20, 1986 are for items or services which were not provided as claimed. Findings 80 - 93.

95. Respondent Shoals, at Respondent Livingston's direction, presented to BCBSA Medicare reimbursement

claims for items or services that Respondent Shoals asserted it provided to Medicare beneficiary **Antonio Elizondo** from March 18, 1985 through December 18, 1985. I.G. Ex. 154 - 161; Findings 24 - 25; See I.G.'s April 19, 1991 and July 8, 1991 notice letters to Respondents, Counts 31 - 37, 156 - 158.

96. Respondent Livingston caused to be presented to BCBSA the reimbursement claims for the items or services which Respondent Shoals asserted it provided to Antonio Elizondo from March 18, 1985 through December 18, 1985. Findings 23 - 25, 95.

97. The reimbursement claims for the items or services which Respondent Shoals asserted it provided to Antonio Elizondo from March 18, 1985 through December 18, 1985 include 10 claims for reimbursement for the rental of an oxygen concentrator. I.G. Ex. 154 - 161; see I.G. Ex. 9/18.

98. The physician who treated Antonio Elizondo from March 18, 1985 through December 18, 1985 never prescribed an oxygen concentrator for Antonio Elizondo. Tr. at 577 - 578.

99. Antonio Elizondo never received an oxygen concentrator. I.G. Ex. 138.

100. Respondent Shoals presented to BCBSA five DME forms for certification or recertification of home oxygen equipment that Respondent Shoals asserted it provided to Antonio Elizondo from March 18, 1985 through December 18, 1985. I.G. Ex. 142 - 146.

101. Antonio Elizondo's physician signed one of the five DME forms. However, Antonio Elizondo's physician did not complete this form, nor did she direct other individuals to complete the form in a way which would indicate that Antonio Elizondo needed a respiratory support system (as is indicated on the form). I.G. Ex. 142; Tr. at 577 - 578.

102. Although the four remaining DME forms bear the purported signature of Antonio Elizondo's physician, she did not complete or sign the four remaining forms, nor did she direct other individuals to complete or sign the forms. Tr. at 579 - 582; see I.G. Ex. 143 - 146.

103. Respondent Shoals presented to BCBSA an ABG result, purportedly ordered by Antonio Elizondo's physician, to support its reimbursement claims for an oxygen concentrator which it asserted it provided to Antonio

Elizondo from March 18, 1985 through December 18, 1985. I.G. Ex. 141; Tr. at 585.

104. Antonio Elizondo's physician did not order the ABG which she purportedly ordered, and which Respondent Shoals presented to BCBSA to support its reimbursement claims for an oxygen concentrator which it asserted it supplied to Antonio Elizondo. Tr. at 584 - 586.

105. The ABG result which Respondent Shoals presented to BCBSA to support its reimbursement claims for Antonio Elizondo contains information concerning the PO2 levels in Antonio Elizondo's blood which is inconsistent with the clinical findings and diagnosis made by Antonio Elizondo's physician. I.G. Ex. 141; I.G. Ex. 171; Tr. at 586 - 587.

106. The DME forms and the ABG result which Respondent Shoals presented to BCBSA to support its reimbursement claims for an oxygen concentrator which it asserted it provided to Antonio Elizondo from March 18, 1985 through December 18, 1985 contain materially false information. Findings 100 - 105.

107. The 10 reimbursement claims for an oxygen concentrator which Respondent Shoals asserted it provided to Antonio Elizondo from March 18, 1985 through December 18, 1985 are false or fraudulent. Findings 95 - 106.

108. The 10 reimbursement claims for an oxygen concentrator which Respondent Shoals asserted it provided to Antonio Elizondo from March 18, 1985 through December 18, 1985 are for items or services which were not provided as claimed. Findings 95 - 107.

109. Respondent Shoals, at Respondent Livingston's direction, presented to BCBSA Medicare reimbursement claims for items or services that Respondent Shoals asserted it provided to Medicare beneficiary **Ruby Ellis** from May 19, 1985 through June 19, 1986. I.G. Ex. 181 - 206; Findings 24 - 25; See I.G.'s April 19, 1991 and July 8, 1991 notice letters to Respondents, Counts 38 - 65.

110. Respondent Livingston caused to be presented to BCBSA the reimbursement claims for the items or services which Respondent Shoals asserted it provided to Ruby Ellis from May 19, 1985 through June 19, 1986. Findings 23 - 25, 109.

111. The reimbursement claims for the items or services which Respondent Shoals asserted it provided to Ruby Ellis from May 19, 1985 through June 19, 1986 include 28

claims for reimbursement for the rental of either an oxygen concentrator or portable oxygen. I.G. Ex. 181 - 206; see I.G. Ex. 9/18.

112. The physician who treated Ruby Ellis during the period from May 19, 1985 through June 19, 1986, never prescribed an oxygen concentrator or portable oxygen for Ruby Ellis. Tr. at 577 - 578.

113. Ruby Ellis did not have or use an oxygen concentrator or portable oxygen at her home in 1985 or 1986. I.G. Ex. 172/1.

114. Respondent Shoals presented to BCBSA four DME forms for certification or recertification of home oxygen equipment that Respondent Shoals asserted it provided to Ruby Ellis from May 19, 1985 through June 19, 1986. I.G. Ex. 176 - 179.

115. Ruby Ellis' physician did not sign, nor did she give any other individual permission to sign, the four DME forms. Tr. at 590 - 594; see I.G. Ex. 176 - 179.

116. Respondent Shoals presented to BCBSA an ABG result for Ruby Ellis to support its reimbursement for claims for an oxygen concentrator or portable oxygen which it asserted it provided to Ruby Ellis from May 19, 1985 through June 19, 1986. I.G. Ex. 175.

117. The PO2 level reported in the ABG result for Ruby Ellis is inconsistent with the clinical findings made by her physician. I.G. Ex. 209/1 - 46; Tr. at 595.

118. The DME forms and the ABG result which Respondent Shoals presented to BCBSA to support its reimbursement claims for an oxygen concentrator or portable oxygen which it asserted it provided to Ruby Ellis from May 19, 1985 through June 19, 1986, contain materially false information. Findings 109 - 117.

119. The 28 reimbursement claims for an oxygen concentrator or portable oxygen which Respondent Shoals asserted it provided to Ruby Ellis from May 19, 1985 through June 19, 1986, are false or fraudulent. Findings 109 - 118.

120. The 28 reimbursement claims for an oxygen concentrator or portable oxygen which Respondent Shoals asserted it provided to Ruby Ellis from May 19, 1985 through June 19, 1986 are for items or services which were not provided as claimed. Findings 109 - 119.

121. Respondent Shoals, at Respondent Livingston's direction, presented to BCBSA Medicare reimbursement claims for items or services that Respondent Shoals asserted it provided to Medicare beneficiary **Jennie Mae King** from March 28, 1985 through August 28, 1985. I.G. Ex. 89 - 90; R. Ex. 10/1; Findings 24 - 25; See I.G.'s April 19, 1991 and July 8, 1991 notice letters to Respondents, Counts 66 - 67, 159 - 168.

122. Respondent Livingston caused to be presented to BCBSA the reimbursement claims for the items or services which Respondent Shoals asserted it provided to Jennie Mae King from March 28, 1985 through August 28, 1985. Findings 23 - 25, 121.

123. The reimbursement claims for the items or services which Respondent Shoals asserted it provided to Jennie Mae King from March 28, 1985 through August 28, 1985 include 12 claims for reimbursement for the rental of either an oxygen concentrator or portable oxygen. I.G. Ex. 89 - 90; R. Ex. 10; See I.G. Ex. 9/18.

124. The physician who treated Jennie Mae King during the period from March 28, 1985 through August 28, 1985 never prescribed an oxygen concentrator or portable oxygen for Jennie Mae King. I.G. Ex. 74/1.

125. Jennie Mae King never received an oxygen concentrator or portable oxygen from Respondent Shoals. I.G. Ex. 75; Tr. at 326 - 327, 329 - 330.

126. Respondent Shoals presented to BCBSA four DME forms for certification or recertification for claims for home oxygen equipment that Respondent Shoals asserted it provided to Jennie Mae King for the period of time from March 28, 1985 through August 28, 1985. I.G. Ex. 81 - 84; R. Ex. 10.

127. Jennie Mae King's physician signed one of the four DME forms. However, Jennie Mae King's physician did not complete this form, nor did he direct other individuals to complete the form in a way which would indicate that Jennie Mae King suffered from impaired breathing (as is indicated on the form). I.G. Ex. 74/1 - 2; see I.G. Ex. 81.

128. Although the three remaining DME forms bear the purported signature of Jennie Mae King's physician, he did not complete or sign the three remaining forms, nor did he direct other individuals to complete or sign the forms. I.G. Ex. 74/2 - 3; See I.G. Ex. 82 - 84.

129. Respondent Shoals presented to BCBSA an ABG result for Jennie Mae King to support its reimbursement claims for an oxygen concentrator or portable oxygen which it asserted it provided to Jennie Mae King from March 28, 1985 through August 28, 1985. I.G. Ex. 80; R. Ex. 10/16 - 17.

130. Jennie Mae King's physician did not order the ABG which Respondent Shoals presented to BCBSA to support its reimbursement claims for an oxygen concentrator or portable oxygen which it asserted it supplied to Jennie Mae King. I.G. Ex. 74/1; see I.G. Ex. 80.

131. The PO2 level reported in the ABG result for Jennie Mae King is inconsistent with the clinical findings made by her physician. I.G. Ex. 74; See I.G. Ex. 80.

132. The DME forms and the ABG result which Respondent Shoals presented to BCBSA to support its reimbursement claims for an oxygen concentrator or portable oxygen which it asserted it provided to Jennie Mae King from March 28, 1985 through August 28, 1985 contain materially false information. Findings 121 - 131.

133. The 12 reimbursement claims for an oxygen concentrator or portable oxygen which Respondent Shoals asserted it provided to Jennie Mae King from March 28, 1985 through August 28, 1985 are false or fraudulent. Findings 121 - 132.

134. The 12 reimbursement claims for an oxygen concentrator or portable oxygen which Respondent Shoals asserted it provided to Jennie Mae King from March 28, 1985 through August 28, 1985 are for items or services which were not provided as claimed. Findings 121 - 133.

135. Respondent Shoals, at Respondent Livingston's direction, presented to BCBSA Medicare reimbursement claims for items or services that Respondent Shoals asserted it provided to Medicare beneficiary **Prentiss Lambert** from April 28, 1985 through March 28, 1986. I.G. Ex. 59 - 64; 66 - 71; Findings 24 - 25; see I.G.'s April 19, 1991 and July 8, 1991 notice letters to Respondents, Counts 68 - 80; 170 - 171.

136. Respondent Livingston caused to be presented to BCBSA the reimbursement claims for the items or services which Respondent Shoals asserted it provided to Prentiss Lambert from April 28, 1985 through March 28, 1986. Findings 23 - 25, 135.

137. The reimbursement claims for the items or services which Respondent Shoals asserted it provided to Prentiss Lambert from April 28, 1985 through March 28, 1986 include 15 claims for reimbursement for the rental of either an oxygen concentrator or portable oxygen. I.G Ex. 59 - 64; 66 - 71; see I.G. Ex. 9.

138. The physician who treated Prentiss Lambert during the period from April 28, 1985 through March 28, 1986 never ordered home oxygen equipment for Prentiss Lambert. I.G. Ex. 31/1.

139. Prentiss Lambert never received home oxygen equipment from Respondent Shoals. I.G. Ex. 32; Tr. at 287 - 288.

140. Respondent Shoals presented to BCBSA three DME forms for certification or recertification of home oxygen equipment that Respondent Shoals asserted it provided to Prentiss Lambert from April 28, 1985 through March 28, 1986. I.G. Ex. 42 - 44.

141. Prentiss Lambert's physician did not sign, nor did he give any other individual permission to sign, the three DME forms. I.G. Ex. 31/1 - 3; see I.G. Ex. 42 - 44.

142. Respondent Shoals presented to BCBSA an ABG result for Prentiss Lambert to support its reimbursement claims for an oxygen concentrator or portable oxygen that it asserted it provided to Prentiss Lambert from April 28, 1985 through March 28, 1986. I.G. Ex. 39.

143. Prentiss Lambert's physician did not order the ABG which Respondent Shoals presented to BCBSA to support its reimbursement claims for an oxygen concentrator or portable oxygen which it asserted it provided to Prentiss Lambert from April 28, 1985 through March 28, 1986. I.G. Ex. 31/1; See I.G. Ex. 39.

144. The PO2 level reported in the ABG result for Prentiss Lambert is inconsistent with the clinical findings made by his physician. I.G. Ex. 31; See I.G. Ex. 80.

145. The DME forms and the ABG result which Respondent Shoals presented to BCBSA to support its reimbursement claims for an oxygen concentrator or portable oxygen which it asserted it provided to Prentiss Lambert from April 28, 1985 through March 28, 1986 contain materially false information. Findings 135 - 144.

146. The 15 reimbursement claims for an oxygen concentrator or portable oxygen which Respondent Shoals asserted it provided to Prentiss Lambert from April 28, 1985 through March 28, 1986 are false or fraudulent. Findings 135 - 145.

147. The 15 reimbursement claims for an oxygen concentrator or portable oxygen which Respondent Shoals asserted it provided to Prentiss Lambert from March 28, 1985 through August 28, 1986 are for items or services which were not provided as claimed. Findings 135 - 146.

148. Respondent Shoals, at Respondent Livingston's direction, presented to BCBSA Medicare reimbursement claims for items or services that Respondent Shoals asserted it provided to Medicare beneficiary **Amos Odom** from April 1, 1985 through February 1, 1986. I.G. Ex. 465 - 472; I.G. Ex. 477/23; R Ex. 7/1; Findings 24 - 25; See I.G.'s April 19, 1991 and July 8, 1991 notice letters to Respondents, Counts 81 - 83; 172 - 178.[7]

149. Respondent Livingston caused to be presented to BCBSA the reimbursement claims for the items or services which Respondent Shoals asserted it provided to Amos Odom from April 1, 1985 through February 1, 1986. Findings 23 - 25; 148.

150. The reimbursement claims for the items or services which Respondent Shoals asserted it provided to Amos Odom from April 1, 1985 through February 1, 1986, include 10 claims for reimbursement for the rental of an oxygen concentrator. I.G. Ex. 465 - 472; I.G. Ex. 477/23; see I.G. Ex. 9/18.

151. Respondent Shoals presented to BCBSA two DME forms for certification or recertification of home oxygen equipment that Respondent Shoals asserted it provided to Amos Odom from April 1, 1985 through February 1, 1986. I.G. Ex. 463 - 464.

152. The physician who was treating Amos Odom on the dates when the two DME forms referred to in Finding 151 were completed and executed admits signing the forms and

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[7] I.G. Ex. 477 is a copy of a BCBSA-generated document of BCBSA's records of claims and claims dispositions from Respondent Shoals, with respect to claims made for items or services allegedly provided to Amos Odom. Line 1 on page 23 of the exhibit documents claims from Respondent Shoals for the period beginning April 1, 1985 and ending June 1, 1985.

prescribing home oxygen equipment for Amos Odom. I.G. Ex. 453.

153. Respondent Shoals presented to BCBSA two blood oxygen saturation reports (ear oximetry test results) to support its claims for reimbursement for rental of home oxygen equipment to Amos Odom from April 1, 1985 through February 1, 1986. I.G. Ex. 459 - 460.

154. The I.G. did not prove that the information contained in the two blood oxygen saturation reports was false.

155. The I.G. did not prove that the 10 reimbursement claims which Respondent Shoals presented to BCBSA for items or services which it asserted it provided to Amos Odom from April 1, 1985 through February 1, 1986 were false, fraudulent, or for items or services which were not provided as claimed. See Findings 148 - 154.

156. Respondent Shoals, at Respondent Livingston's direction, presented to BCBSA Medicare reimbursement claims for items or services that Respondent Shoals asserted it provided to Medicare beneficiary **Barney Stevens** from March 1, 1985 through June 1, 1985. I.G. Ex. 287 - 292; Findings 24 - 25; see I.G.'s April 19, 1991 and July 8, 1991 notice letters to Respondents, Counts 84 - 87; 179 - 181.

157. Respondent Livingston caused to be presented to BCBSA the reimbursement claims for the items or services which Respondent Shoals asserted to have provided to Barney Stevens from March 1, 1985 through June 1, 1985. Findings 23 - 25, 156.

158. The reimbursement claims for the items or services which Respondent Shoals asserted it provided to Barney Stevens from March 1, 1985 through June 1, 1985 include seven claims for reimbursement for the rental of an oxygen concentrator or portable oxygen. I.G Ex. 287 - 292; see I.G. Ex. 9/18.

159. Barney Stevens had been supplied an oxygen concentrator but ceased using it in January 1984. I.G. Ex. 278/1; Tr. at 351.

160. Beginning in early 1984, Barney Stevens requested the independent contractor who had supplied the oxygen concentrator to him on behalf of Respondent Shoals to remove the equipment from his home. I.G. Ex. 278/1; Tr. at 351 - 352.

161. The oxygen concentrator was removed from Barney Stevens' home in March 1985. I.G. Ex. 278/1; Tr. at 352.

162. Respondent Shoals presented to BCBSA a DME form for certification or recertification of home oxygen equipment that Respondent Shoals asserted it provided to Barney Stevens from March 1, 1985 through June 1, 1985. I.G. Ex. 285.

163. Barney Stevens was not a patient of the physician who purportedly signed the DME form on the date that the form purportedly was signed. Tr. at 698 - 699; See I.G. Ex. 285.

164. The physician who purportedly signed the DME form did not sign, nor did he give any other individual permission to sign, the DME form. Tr. at 699; See I.G. Ex. 285.

165. On January 28, 1986, BCBSA wrote to Respondent Shoals, notifying it that BCBSA had been advised by Barney Stevens that he had discontinued using oxygen equipment which he had rented from Respondent Shoals. I.G. Ex. 272/1.

166. BCBSA requested repayment from Respondent Shoals for overpayments which it asserted had been made in error to Respondent Shoals. I.G. Ex. 272.

167. On February 17, 1986, Respondent Shoals sent to BCBSA a signed statement from Barney Stevens which recited that he had used the equipment rented from Respondent Shoals until May 1, 1985. The statement appears to have been notarized. I.G. Ex. 273; I.G. Ex. 280.

168. The statement which Respondent Shoals supplied to BCBSA was dictated to Barney Stevens by a representative of Respondent Shoals and was signed by Barney Stevens at the request of that representative. Tr. at 356 - 358.

169. The statement was not notarized in the presence of or at the request of Barney Stevens. Tr. at 358 - 359.

170. The DME form and the notarized statement which Respondent Shoals presented to BCBSA to support its reimbursement claims for an oxygen concentrator or portable oxygen which it asserted it provided to Barney Stevens from March 1, 1985 through June 1, 1985 contain materially false information. Findings 156 - 169.

171. The seven reimbursement claims for an oxygen concentrator or portable oxygen which Respondent Shoals asserted it provided to Barney Stevens from March 1, 1985 through June 1, 1985 are false or fraudulent. Findings 156 - 170.

172. The seven reimbursement claims for an oxygen concentrator or portable oxygen which Respondent Shoals asserted it provided to Barney Stevens from March 1, 1985 through June 1, 1985 are for items or services which were not provided as claimed. Findings 156 - 171.

173. Respondent Shoals, at Respondent Livingston's direction, presented to BCBSA Medicare reimbursement claims for items or services that Respondent Shoals asserted it provided to Medicare beneficiary **Lelar Williams** from January 18, 1985 through June 18, 1986. I.G. Ex. 232 - 264; Findings 24 - 25; see I.G.'s April 19, 1991 and July 8, 1991 notice letters to Respondents, Counts 88 - 122, 182.

174. Respondent Livingston caused to be presented to BCBSA the reimbursement claims for the items or services which Respondent Shoals asserted it provided to Lelar Williams from January 18, 1985 through June 18, 1986. Findings 23 - 25, 173.

175. The reimbursement claims for the items or services which Respondent Shoals asserted it provided to Lelar Williams from January 18, 1985 through June 18, 1986 include 36 claims for reimbursement for the rental of an oxygen concentrator or portable oxygen. I.G Ex. 232 - 264; see I.G. Ex. 9/18.

176. The physicians who treated Lelar Williams during the period from January 18, 1985 through June 18, 1986 never ordered home oxygen equipment for Lelar Williams. Tr. at 599 - 601; 704.

177. Lelar Williams never received home oxygen equipment from Respondent Shoals. I.G. Ex. 210/3; I.G. Ex. 211; I.G. Ex. 212.

178. Respondent Shoals presented to BCBSA three DME forms for certification or recertification of home oxygen equipment that Respondent Shoals asserted it provided to Lelar Williams from January 18, 1985 through June 18, 1986. I.G. Ex. 222 - 224.

179. The physician who purportedly signed the three DME forms did not sign, nor did she give other individuals

permission to sign, the three DME forms. Tr. at 599 - 603; See I.G. Ex. 222 - 224.

180. Two of the three DME forms represent that a physician other than the physician who purportedly signed the forms was Lelar Williams' treating physician. I.G. Ex. 222 - 223.

181. The three DME forms that Respondent Shoals presented to BSA to support its reimbursement claims for an oxygen concentrator or portable oxygen which it asserted it provided to Lelar Williams from January 18, 1985 through June 18, 1986 contain materially false information. Findings 173 - 180.

182. The 36 reimbursement claims for an oxygen concentrator or portable oxygen which Respondent Shoals asserted it provided to Lelar Williams from January 18, 1985 through June 18, 1986 are false or fraudulent. Findings 173 - 181.

183. The 36 reimbursement claims for an oxygen concentrator or portable oxygen which Respondent Shoals asserted it provided to Lelar Williams from January 18, 1985 through June 18, 1986 are for items or services which were not provided as claimed. Findings 173 - 182.

184. Respondent Shoals, at Respondent Livingston's direction, presented to BCBSA Medicare reimbursement claims for items or services which Respondent Shoals asserted it provided to Medicare beneficiary **Robert Williams** from January 13, 1985 through June 13, 1986. I.G. Ex. 109 - 128; Findings 23 - 25; see I.G.'s April 19, 1991 and July 8, 1991 notice letters to Respondents, Counts 123 - 152, 183 - 184.

185. Respondent Livingston caused to be presented to BCBSA the reimbursement claims for the items or services which Respondent Shoals asserted it provided to Robert Williams from January 13, 1985 through June 13, 1986. Findings 23 - 25, 184.

186. The reimbursement claims for the items or services which Respondent Shoals asserted it provided to Robert Williams from January 13, 1985 through June 13, 1986 include 32 claims for reimbursement for the rental of an oxygen concentrator or portable oxygen). I.G. Ex. 109 - 128; See I.G. Ex. 9/18.

187. Robert Williams did not rent either an oxygen concentrator or portable oxygen from Respondent Shoals

during the period from January 13, 1985 through June 13, 1986. I.G. Ex. 95/1 - 2; Tr. at 1015 - 1016.

188. Respondent Shoals presented to BCBSA four DME forms for certification or recertification of home oxygen equipment which Respondent Shoals asserted it provided to Robert Williams from January 13, 1985 through June 13, 1986. I.G. Ex. 102 - 105.

189. The physician who purportedly signed the four DME forms did not sign, nor did she give any other individual permission to sign, the four DME forms. Tr. at 556 - 562, 564; See I.G. Ex. 102 - 105.

190. Respondent Shoals presented to BCBSA an ABG result for Robert Williams to support its reimbursement claims for an oxygen concentrator or portable oxygen equipment which it asserted it provided to Robert Williams from January 13, 1985 through June 13, 1986. I.G. Ex. 100.

191. Robert Williams' physician did not order the ABG which Respondent Shoals presented to BCBSA to support its reimbursement claims for an oxygen concentrator or portable oxygen which it asserted it provided to Robert Williams from January 13, 1985 through June 13, 1986. Tr. at 571; see I.G. Ex. 100.

192. The PO2 level reported in the ABG result for Robert Williams is inconsistent with the clinical findings made by his physician. I.G. Ex. 137; Tr. at 572 - 573; see I.G. Ex. 100.

193. The DME forms and the ABG result which Respondent Shoals presented to BCBSA to support its reimbursement claims for an oxygen concentrator or portable oxygen which it asserted it provided to Robert Williams from January 13, 1985 through June 13, 1986 contain materially false information. Findings 184 - 192.

194. The 32 reimbursement claims for an oxygen concentrator or portable oxygen that Respondent Shoals asserted it provided to Robert Williams from March 13, 1985 through June 13, 1986 are false or fraudulent. Findings 184 - 193.

195. The 32 reimbursement claims for an oxygen concentrator or portable oxygen that Respondent Shoals asserted it provided to Robert Williams from March 13, 1985 through June 13, 1986 are for items or services that were not provided as claimed. Findings 184 - 194.

196. Respondent Shoals presented, and Respondent Livingston caused to be presented, 173 claims for Medicare reimbursement which were false, fraudulent, or for items or services which were not provided as claimed. Findings 65 - 67, 78 - 82, 93 - 97, 107 - 111, 119 - 123, 133 - 137, 146 - 147, 156 - 158, 171 - 175, 182 - 186, 194 - 195.

197. All of the 173 claims which Respondent Shoals presented, and Respondent Livingston caused to be presented which were false, fraudulent, or for items or services which were not provided as claimed, were presented by Respondent Shoals to BCBSA on or after April 19, 1985 (or in the case of those claims identified in the I.G.'s July 19, 1991 letter, on or after July 19, 1985). I.G. Ex. 72; I.G. Ex. 92; I.G. Ex. 136; I.G. Ex. 170; I.G. Ex. 208; I.G. Ex. 268; I.G. Ex. 295; I.G. Ex. 391; I.G. Ex. 419; see Tr. at 443 - 451.

E. Medicare reimbursement claims by Respondent Shoals that were either false or fraudulent or that were for items or services that were not provided as claimed other than the claims that comprise the I.G.'s case-in-chief

198. Respondent Shoals presented, and Respondent Livingston caused to be presented, Medicare reimbursement claims for Medicare beneficiaries **Estelle Coleman**, **Antonio Elizondo**, **Ruby Ellis**, **Jennie Mae King**, **Prentiss Lambert**, **Lelar Williams**, and **Robert Williams** in addition to the 173 claims for items that comprise the I.G.'s case-in-chief and for periods of time that predate the periods of time covered by those claims (or in the case of those claims identified in the I.G.'s July 19, 1991 letter, on or after July 19, 1985). I.G. Ex. 45 - 58; I.G. Ex. 85 - 88; I.G. Ex. 162 - 169; I.G. Ex. 225 - 231; I.G. Ex. 371 - 372; Findings 23 - 25.[8]

199. Respondent Shoals presented to BCBSA a DME form and an ABG report which contain false information in support of its additional claims for reimbursement for items or services that it asserted it provided to Estelle Coleman

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[8] The claims discussed in subpart E are claims that were presented for reimbursement by Respondent Shoals prior to April 19, 1985, and that are not part of the I.G.'s case-in-chief against Respondents. These claims are relevant to Respondents' culpability for the claims which are part of the I.G.'s case-in-chief. These claims are also relevant to my determinations regarding Petitioner's trustworthiness as a Medicare provider.

from August 20, 1984 through January 20, 1985. I.G. Ex. 354; I.G. Ex. 361; I.G. Ex. 363; Findings 80 - 94.

200. Respondent Shoals presented to BCBSA a DME form that contains false information in support of its additional claims for reimbursement for items or services that it asserted it provided to Antonio Elizondo from September 18, 1983 through January 18, 1985. I.G. Ex. 143; Tr. at 579; Findings 95 - 108.

201. Respondent Shoals presented to BCBSA a DME form that contains false information in support of its additional claims for reimbursement for items or services that it asserted it provided to Ruby Ellis on December 19, 1984. I.G. Ex. 176; Tr. at 594; Findings 109 - 120.

202. Respondent Shoals presented to BCBSA two DME forms and an ABG report which contain false information in support of its additional claims for reimbursement for items or services that it asserted it provided to Jennie Mae King for the period of time from February 28, 1984 through November 28, 1984. I.G. Ex. 74; I.G. Ex. 80 - 82; R. Ex. 10/5 /7; Findings 121 - 134.

203. Respondent Shoals presented to BCBSA two DME forms and an ABG report which contain false information in support of its additional claims for reimbursement for items or services that it asserted it provided to Prentiss Lambert from March 30, 1984 through March 28, 1985. I.G. Ex. 31; I.G. Ex. 38; I.G. Ex. 40 - 41; Findings 135 - 147.

204. Respondent Shoals presented to BCBSA four DME forms and an ABG report that contain false information in support of its additional claims for reimbursement for items or services that it asserted it provided to Lelar Williams from July 18, 1983 through January 18, 1984. I.G. Ex. 217 - 221; Tr. at 704 - 706, 710; Findings 173 - 183.

205. Respondent Shoals presented to BCBSA two DME forms and an ABG report that contain false information, in support of its additional claims for reimbursement for items or services which it asserted it provided to Robert Williams from May 13, 1984 through January 13, 1985. I.G. Ex. 99; I.G. Ex. 101 - 102; Tr. at 549, 559, 571; Findings 184 - 195.

206. The additional Medicare reimbursement claims that Respondents presented or caused to be presented for items or services that Respondent Shoals asserted it provided to Estelle Coleman, Antonio Elizondo, Ruby Ellis, Jennie

Mae King, Prentiss Lambert, Lelar Williams, and Robert Williams, are false, fraudulent, or for items or services that were not provided as claimed. Findings 198 - 205.

207. Respondent Shoals presented, and Respondent Livingston caused to be presented, Medicare reimbursement claims for Medicare beneficiary **Amos Odom** for the period of time from September 1, 1984 through March 1, 1985, in addition to claims for items or services which Respondent Shoals presented on or after April 19, 1985. I.G. Ex. 473 - 476; Findings 23 - 25.

208. Respondent Shoals presented to BCBSA two DME forms in support of its additional claims for reimbursement for items or services which it asserted it provided to Amos Odom for the period of time from September 1, 1984 through March 1, 1985. I.G. Ex. 461 - 462.

209. The physician whose name is stamped on the two DME forms did not sign or stamp these forms, nor did he authorize other individuals to sign or stamp these forms on his behalf. I.G. Ex. 452/1 - 3.

210. Respondent Shoals presented to BCBSA an ABG report dated August 16, 1984 in support of its additional claims for reimbursement for items or services which it asserted it provided to Amos Odom from September 1, 1984 through March 1, 1985. I.G. Ex. 458.

211. The independent contractor respiratory therapist who completed the August 16, 1984 ABG report on behalf of Respondent Shoals falsified the report. Tr. at 875 - 877.

212. Respondent Shoals presented two DME forms and an ABG report to BCBSA in which Respondent asserted it provided items or services to Amos Odom. These two DME forms and the ABG report contain false information. Findings 208 - 211.

213. The additional Medicare reimbursement claims that Respondents presented or caused to be presented for items or services that Respondent Shoals asserted it provided to Amos Odom are false, fraudulent, or for items or services that were not provided as claimed. Findings 207 - 212.

214. Respondent Shoals, at Respondent Livingston's direction, presented to BCBSA Medicare reimbursement claims for items or services that Respondent Shoals asserted it provided to Medicare beneficiary **Orville**

Harris from October 27, 1984 through March 27, 1985. I.G. Ex. 491 - 492; Findings 23 - 25.

215. Orville Harris was incarcerated from June 4, 1984 until October 2, 1987. I.G. Ex. 479.

216. Orville Harris did not receive home oxygen equipment from Respondent Shoals during the period when he was incarcerated. Finding 215.

217. The claims that Respondents presented or caused to be presented for Medicare items or services that Respondent Shoals asserted it provided to Orville Harris are false, fraudulent, or for items or services that were not provided as claimed. Findings 214 - 216.

218. Respondent Shoals, at Respondent Livingston's direction, presented to BCBSA Medicare reimbursement claims for items or services that Respondent Shoals asserted it provided to Medicare beneficiary **Nash Henderson** from June 30, 1983 through February 28, 1985. I.G. Ex. 310 - 325; Findings 23 - 25.

219. Nash Henderson never received home oxygen equipment from Respondent Shoals. I.G. Ex. 297; Tr. at 519, 539.

220. The physician who treated Nash Henderson from June 30, 1983 through February 28, 1985 never prescribed home oxygen equipment for Nash Henderson. Tr. at 685, 689 - 690, 692.

221. Respondent Shoals presented to BCBSA DME forms to support its reimbursement claims for home oxygen equipment which it asserted to have supplied to Nash Henderson from June 30, 1983 through February 28, 1985 that were forged and that contained false information. I.G. Ex. 303 - 306; Tr. at 686, 689 - 693.

222. The claims which Respondents presented or caused to be presented for Medicare items or services which Respondent Shoals asserted it provided to Nash Henderson are false, fraudulent, or for items or services that were not provided as claimed. Findings 23 - 25, 218 - 221.

223. Respondent Shoals, at Respondent Livingston's direction, presented to BCBSA Medicare reimbursement claims for items or services which Respondent Shoals asserted it provided to Medicare beneficiary **Elmore Mobley** from August 6, 1984 through December 6, 1984. I.G. Ex. 444 - 448; Findings 23 - 25.

224. The physicians who treated Elmore Mobley from August 6, 1984 through December 6, 1984 did not prescribe or authorize the rental of home oxygen equipment for Elmore Mobley. I.G. Ex. 437 - 438.

225. Respondent Shoals presented to BCBSA two DME forms to support its claims for reimbursement for home oxygen equipment it asserted it supplied to Elmore Mobley. I.G. Ex. 441 - 442.

226. The physicians who are purported to have signed or stamped the two DME forms neither signed, stamped, nor authorized other individuals to sign the two DME forms. I.G. Ex. 437 - 438.

227. The claims which Respondents presented or caused to be presented for Medicare items or services which Respondent Shoals asserted it provided to Elmore Mobley are false, fraudulent, or for items or services which were not provided as claimed. Findings 223 - 226.

228. Respondent Shoals, at Respondent Livingston's direction, presented to BCBSA a Medicare reimbursement claim for items or services that Respondent Shoals asserted it provided to Medicare beneficiary **Rosa Rigsby** in July 1984. I.G. Ex. 434; Findings 23 - 25.

229. Respondent Shoals presented to BCBSA three ABG reports in support of its claim for reimbursement for items or services which it asserted it provided to Rosa Rigsby. I.G. Ex. 423 - 424; I.G. Ex. 431.

230. The ABG reports contain information which was falsified by the independent contractor who performed the ABGs. Tr. at 843 - 845, 851.

231. The claim which Respondents presented or caused to be presented for Medicare items or services which Respondent Shoals asserted it provided to Rosa Rigsby is false, fraudulent, or for items or services which were not provided as claimed. Findings 228 - 231.

232. Respondent Shoals, at Respondent Livingston's direction, presented to BCBSA Medicare reimbursement claims for items or services that Respondent Shoals asserted it provided to Medicare beneficiary **Ed Thomas** from July 28, 1983 through December 28, 1984. I.G. Ex. 339 - 352; Findings 23 - 25.

233. Ed Thomas never received home oxygen equipment from Respondent Shoals. I.G. Ex. 329; I.G. Ex. 332.

234. The physician who treated Ed Thomas never prescribed home oxygen equipment for Ed Thomas. Tr. at 700 - 703.

235. Respondent Shoals presented to BCBSA three DME forms to support its claims for reimbursement for home oxygen equipment it asserted it supplied to Ed Thomas. I.G. Ex. 334 - 335; I.G. Ex. 337.

236. The physician who purportedly signed the three DME forms did not sign the DME forms, nor did he authorize other individuals to sign the DME forms. Tr. at 701 - 703.

237. The claims which Respondents presented or caused to be presented for Medicare items or services which Respondent Shoals asserted it provided to Ed Thomas are false, fraudulent, or for items or services which were not provided as claimed. Findings 232 - 236.

F. Respondents' responsibility for presenting or causing to be presented claims for Medicare reimbursement which were false, fraudulent, or for items or services which were not provided as claimed

238. Respiratory therapists who acted as agents for Respondent Shoals falsified ABG results which Respondent Shoals submitted to BCBSA to support claims for home oxygen equipment rentals. I.G. Ex. 534A/14; Tr. at 813, 823, 826 - 827, 830, 840, 1059 - 1060, 1080; Findings 73 - 76, 89 - 91, 103 - 105, 116 - 118, 129 - 131, 142 - 144, 190 - 192.

239. Examples of the fraudulent conduct engaged in by respiratory therapists are performing ABGs with venous blood instead of arterial blood and recording fictitious ABG results. Tr. at 813, 1059.

240. Respiratory therapists who acted as agents for Respondent Shoals forged or falsified DME forms which Respondent Shoals submitted to BCBSA to support claims for home oxygen equipment rentals. I.G. Ex. 534A/9 - 11; Tr. at 858 - 860, 870; Findings 23 - 25, 71 - 72, 86 - 88, 100 - 102, 114 - 115, 126 - 128, 140 - 141, 162 - 164, 178 - 180, 188 - 189.

241. The false and fraudulent acts committed by respiratory therapists in presenting documentation to support Respondent Shoals' claims for reimbursement for 173 Medicare items or services which were false, fraudulent, or not provided as claimed were committed by

them within the scope of their agency relationship with Respondent Shoals. Findings 63, 196.

242. Respondent Shoals' presentation of 173 claims for reimbursement for Medicare items or services which were false, fraudulent, or for items or services which were not provided as claimed was within the scope of its agency relationship with Respondent Livingston. Findings 25, 196.

243. The I.G. did not prove that respiratory therapists who acted as agents for Respondent Shoals falsified ABG results and forged or falsified DME forms at the direction or request of Respondent Shoals or Respondent Livingston. See Findings 238 - 240; Tr. at 785 - 1012, 1049 - 1146, 1148 - 1223, 1497 - 1729; I.G. Ex. 534A/4 - 144, /163 - 250.

244. The I.G. did not prove that Respondents Shoals and Livingston knew that respiratory therapists falsified ABG results and forged and falsified DME forms. See Findings 238 - 240.

245. Respondents Shoals and Livingston knew that independent contractor respiratory therapists had the opportunity to falsify documents related to claims for reimbursement for home oxygen equipment. I.G. Ex. 534/60 - 61; Findings 1, 41 - 45, 59 - 65.

246. Respondents Shoals and Livingston knew that an independent contractor respiratory therapist had sent Respondent Shoals DME forms which had purportedly been signed by a physician, but which had not been completed by the physician who had purportedly signed the forms. I.G. Ex. 534/62.

247. Respondents Shoals and Livingston knew that Respondent Shoals had received DME forms which were purportedly signed by a physician, but which designated a treating physician who was not the patient's treating physician. Finding 180.

248. Respondents Shoals and Livingston knew that, on at least one occasion, an independent contractor respiratory therapist had provided them with a DME form on which the physician's signature had been forged. Tr. at 1262 - 1263; Findings 23 - 25.

249. Respondents Shoals and Livingston knew that an employee of Respondent Shoals had informed them that an independent contractor may have forged a physician's signature on a DME form. Tr. at 1440; Findings 24 - 25.

250. Respondents Shoals and Livingston knew that an independent contractor respiratory therapist obstructed their efforts to determine the extent to which patients had actually been supplied with home oxygen equipment for which Respondent Shoals had presented Medicare reimbursement claims. Tr. at 1340 - 1341, 1441 - 1442; Findings 24 - 25.

251. Respondents Shoals and Livingston knew that Respondent Shoals had been provided with conflicting statements from a Medicare beneficiary concerning whether that beneficiary continued to use home oxygen equipment rented to him by Respondent Shoals. Findings 165 - 167.

252. Respondents Shoals and Livingston did not make meaningful efforts to assure that the reimbursement claims for Medicare items or services that Respondent Shoals presented were accurate and honest. Findings 45 - 49; Findings 245 - 251; see Tr. at 1429 - 1430, 1437 - 1439, 1464 - 1465.

253. Respondents Shoals and Livingston had reason to know that the 173 claims for Medicare reimbursement that they presented or caused to be presented that were false, fraudulent or for items or services that were not provided as claimed were in fact false, fraudulent, or for items or services which were not provided as claimed. Findings 45 - 49, 196, 245 - 252; Social Security Act, sections 1128A(a)(1)(A), (B).

254. Respondents Shoals and Livingston should have known that the 173 claims for Medicare reimbursement that they presented or caused to be presented that were false, fraudulent or for items or services that were not provided as claimed were in fact false, fraudulent, or for items or services that were not provided as claimed. Findings 196, 245 - 253; Social Security Act, sections 1128A(a)(1)(A), (B).

255. Respondent Shoals is liable under sections 1128A(a)(1)(A) and (B) of the Act for the false and fraudulent acts of its independent contractor agents. Finding 241; Social Security Act, sections 1128A(a)(1)(A), (B), 1128A(l).

256. Respondent Livingston is liable under sections 1128A(a)(1)(A) and (B) of the Act for the unlawful acts of his agent, Respondent Shoals. Finding 242; Social Security Act, sections 1128A(a)(1)(A), (B), 1128A(l).

G. The need to impose remedies against Respondents

257. The substantive portions of regulations published on January 29, 1992, governing the imposition of penalties, assessments, and exclusions under section 1128A of the Act, are not applicable to this case. 42 C.F.R. Parts 1001 - 1005, 57 Fed. Reg. 3298 et seq. (January 29, 1992).

258. The decision to impose assessments, penalties and exclusions in this case is governed by regulations that became effective on September 26, 1983. 42 C.F.R. §§ 1003.100 through 1003.133.

259. The Act provides for the imposition against a party who unlawfully presents or causes to be presented a claim for an item or service which is false, fraudulent, or not provided as claimed, of a penalty of up to $2,000.00 for each such item or service, an assessment of up to twice the amount claimed for each such item or service which is false, fraudulent, or falsely claimed, and an exclusion from participating in Medicare or Medicaid. Social Security Act, section 1128A(a).

260. The Act and regulations direct the Secretary, or his or her delegate, in determining the amount or scope of any penalty, assessment, or exclusion imposed, to take into account both aggravating and mitigating factors. Social Security Act, section 1128A(d); 42 C.F.R. § 1003.106.[9]

261. Factors which may be considered as aggravating or mitigating include: the nature of the claims and the circumstances under which they were presented; the degree of culpability, history of prior offenses, and financial condition of the person presenting the claims; and such other matters as justice may require. Social Security Act, section 1128A(d); 42 C.F.R. § 1003.106.

262. In proceedings brought pursuant to the Act, the I.G. has the burden of proving the existence of any aggravating factors and the respondent has the burden of proving the existence of any mitigating factors.

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[9] Inasmuch as I hold that the substantive regulations which are applicable to this case are those in effect prior to January 29, 1992, my citations to regulations which establish aggravating and mitigating factors governing penalties, assessments, and exclusions are to the pre-January 29, 1992 regulations.

263. The 173 claims which Respondents presented or caused to be presented which were false, fraudulent, or for items or services which were not provided as claimed involved items or services which Respondent Shoals asserted it provided from January 1985 through June 1986. Findings 65, 80, 95, 109, 121, 135, 156, 173, 184.

264. The 173 claims that Respondents presented or caused to be presented that were false, fraudulent, or for items or services that were not provided as claimed constituted a large number of unlawful claims for items or services which Respondent Shoals asserted it provided over an extended period of time. This is an aggravating factor to be considered in deciding the remedies to be imposed in this case. Findings 262 - 263; 42 C.F.R. § 1003.106(b)(1).

265. The 173 claims that Respondents presented or caused to be presented that were false, fraudulent, or for items or services that were not provided as claimed, sought reimbursement from Medicare in the aggregate amount of $44,838.80. I.G. Ex. 59 - 64; I.G. Ex. 66 - 71; I.G. Ex. 89 - 90; I.G. Ex. 109 - 128: I.G. Ex. 154 - 161; I.G. Ex. 181 - 206; I.G. Ex. 232 - 264; I.G. Ex. 287 - 292; I.G. Ex. 373 - 389; I.G. Ex. 403 - 416; R. Ex. 10.[10]

266. Respondent Shoals received payments totalling $25,440.64 from BCBSA for the 173 claims that Respondents presented or caused to be presented that were false, fraudulent, or for items or services that were not provided as claimed. I.G. Ex. 71/10, 15 - 20; I.G. Ex. 93; I.G. Ex. 136/15, 18 - 25; I.G. Ex. 170/6 - 8; I.G. Ex. 208/18, /22 - 23, /25 - 33, /35 - 36; I.G. Ex. 295/12 - 14; I.G. Ex. 268/10, /13 - 19; I.G. Ex. 391/9 - 10, /15 - 18; I.G. Ex. 419/12 - 14, /17 - 19.

267. Respondents' claiming and receiving substantial reimbursement for 173 Medicare claims that were false,

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[10] The amounts claimed by and reimbursed to Respondents do not include the amounts claimed by and reimbursed to Amos Odom (Counts 81 - 83 and 172 - 178 in the I.G.'s April 19, 1991 and July 8, 1991 notice letters to Respondents). As I find above, the I.G. did not prove that the claims for items or services provided to Amos Odom were false, fraudulent, or for items or services which were not provided as claimed. However, I do find infra that Respondents did present or cause to be presented some false claims involving Amos Odom. These claims relate to the issue of aggravating circumstances and not to my findings of liability.

fraudulent, or for items or services that were not provided as claimed is an aggravating factor to be considered in deciding the remedies to be imposed in this case. Findings 265 - 266; 42 C.F.R. § 1003.106(b)(1).

268. Respondents presented or caused to be presented 173 claims for Medicare reimbursement that were false, fraudulent, or for items or services that were not provided as claimed, despite being aware of facts that put them on notice that these claims might be false, fraudulent, or for items or services that were not provided as claimed. Findings 238 - 251.

269. Respondents engaged in a pattern of presenting or causing to be presented claims for Medicare items or services that were false, fraudulent, or for items or services that were not provided as claimed, beginning in June, 1983, and extending through June 1986. Findings 65 - 237.

270. Respondents' pattern of presenting or causing to be presented claims for Medicare items or services that were false, fraudulent, or for items or services that were not provided as claimed began within six months of the incorporation of Respondent Shoals. Findings 11, 65 - 237.

271. Respondents' pattern of presenting or causing to be presented claims for Medicare items or services that were false, fraudulent, or for items or services that were not provided as claimed demonstrates that Respondents were indifferent to their duty to assure that they comply with Medicare and BCBSA reimbursement requirements. Findings 268 - 270.

272. Respondents' indifference to their duty to comply with Medicare reimbursement requirements establishes a high level of culpability for the 173 claims for items or services that were false, fraudulent, or for items or services that were not provided as claimed. This is an aggravating factor to be considered in deciding the remedies to be imposed in this case. 42 C.F.R. § 1003.106(b)(2).

273. Respondents' pattern of presenting or causing to be presented claims for Medicare items or services that were false, fraudulent, or for items or services that were not provided as claimed damaged the financial integrity and reputation of the Medicare program.

274. Respondents' unlawful conduct with respect to the 173 Medicare reimbursement claims that were false,

fraudulent, or for items or services that were not provided as claimed resulted in substantial costs to the United States Department of Health and Human Services (Department) that include the following: the amount paid to Respondent Shoals to reimburse it for claims that were false, fraudulent, or for items or services that were not provided as claimed; the costs of investigating Respondents' unlawful conduct; and the damage to the integrity and reputation of the Medicare program. I.G. Ex. 540; Findings 266, 273.

275. Respondent Livingston knew no later than May 6, 1988 that independent contractor respiratory therapists had sworn that they had falsified documents on behalf of Respondents Livingston and Shoals. I.G. Ex. 534.

276. Respondent Livingston knew no later than May 6, 1988, that he had access to documents which would corroborate the admissions by independent contractor respiratory therapists that they had falsified documents on behalf of Respondents Livingston and Shoals and which established that claims for items or services by Respondent Shoals were false, fraudulent, or for items or services which were not provided as claimed. See I.G. Ex. 534; Findings 65 - 237.

277. Respondent Livingston offered to make "voluntary" restitution for claims or services that the I.G. proved were false or fraudulent, or for items or services that were not provided as claimed. Tr. 1412 - 1414, 1419 - 1420.

278. Respondent's offer to make "voluntary" restitution for claims that the I.G. proved were false or fraudulent, or for items or services that were not provided as claimed is not a mitigating factor because since no later than 1988, he could have established on his own which claims were false or fraudulent, or for items or services that were not provided as claimed, and could have made restitution for those claims or items or services. Findings 275 - 277.

279. Respondent Livingston's expressions of remorse for his conduct are not credible in light of his continued business relationship with a former independent contractor of Respondent Shoals whom Respondent Livingston knows engaged in fraudulent and dishonest conduct. I.G. Ex. 533/121 - 129; I.G. Ex. 536 - 537; Tr. at 1262 - 1264, 1299.

280. In this case, there are many aggravating factors and no mitigating factors. Findings 267 - 279.

281. The maximum assessments which I may impose against Respondents are $89,677.60. Findings 259, 265.

282. The maximum penalties which I may impose against Respondents are $346,000.00. Findings 196, 197, 259.

283. Based on the preponderance of aggravating factors, and on the costs sustained by the Department as a consequence of Respondents' unlawful conduct, I impose on Respondents, jointly and severally, assessments of $85,000.00, and penalties of $300,000.00.

284. Respondents are not trustworthy to provide care to beneficiaries and recipients of federally-funded health care programs.

285. Based on Respondents' lack of trustworthiness to provide care, as evidenced by their culpability and by the preponderance of aggravating factors, I exclude them from participation in Medicare and Medicaid for five years.

286. The assessments, penalties, and exclusions that I impose against Respondents are not prohibited by the constitutional ban against double jeopardy.

287. The assessments and penalties that I impose against Respondents are reasonably related to the costs sustained by the Department as a result of Respondents' unlawful conduct, including the costs of investigating that conduct.

ANALYSIS

The I.G. presented overwhelming evidence of pervasive fraud by respiratory therapists in Alabama who worked as contractors for Respondent Shoals. These respiratory therapists systematically falsified documents to support Medicare reimbursement claims by Respondent Shoals for rental of home oxygen equipment to Medicare beneficiaries. The I.G. sought to establish that Respondents orchestrated and directed this fraud. I do not find that the weight of the evidence proves that Respondents conspired with respiratory therapists to defraud Medicare. However, Respondents not only tolerated the fraud perpetrated by their contractors, they profited from it. Respondents' indifference to the blatant and large scale dishonesty of others is virtually indistinguishable from fraud.

Respondents established an enterprise which created incentives for respiratory therapists to commit fraud. Respondents ignored information which would put any reasonable party on notice that fraud was being perpetrated. They made no meaningful efforts to curb the fraud and dishonesty from which they profited. They disregarded their duty to assure Medicare that the claims they were presenting were accurate and honest.

The I.G. proved that Respondents presented or caused to be presented 173 claims for Medicare reimbursement which were false, fraudulent, or for items or services which were not provided as claimed. The I.G. proved that Respondents had reason to know that the claims were for items or services which were not provided as claimed. The I.G. also proved that Respondents should have known that the claims were false, fraudulent, or for items or services which were not provided as claimed. Therefore, the I.G. established that Respondents are liable under section 1128A of the Act for the 173 claims.[11]

There are aggravating factors which justify the remedy which I impose in this case. Respondents demonstrate a high level of culpability for their misconduct. Respondents' misconduct was costly to the Department and to the health care programs which it administers. Respondents induced the Medicare program to make substantial payments for false and fraudulent claims, or for items or services which were not provided as claimed. The Department had to undertake an expensive investigation to rectify the misconduct. Far more costly, however, was the damage Respondents caused to the Department's reputation and to that of the Medicare program as well. Respondents participated in and fostered an environment in which fraud became a common and acceptable manner of doing business with Medicare. In light of these aggravating factors, and in order to compensate the Department for the costs which it sustained as a result of Respondents' misconduct, I impose substantial assessments and penalties against Respondents. I also conclude that Respondents have established by their conduct that they are manifestly untrustworthy providers of care, and I exclude them for a five-year period.

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[11] The I.G. also proved that Respondent Shoals was liable under section 1128A(1) of the Act for the unlawful acts of its respiratory therapist agents, and that Respondent Livingston was liable under this same section for the unlawful acts of Respondent Shoals.

1. Respondents fostered an environment which encouraged fraud.

Prior to 1983, Respondent Livingston worked as a respiratory therapist, providing care to patients who suffered from breathing disorders. In January 1983, he incorporated Respondent Shoals. Respondent Shoals had its principal place of business in Florence, Alabama. Respondent Shoals did business throughout the southern United States, and did substantial business in Alabama, providing durable medical equipment to patients. A large percentage of its business consisted of the rental of home oxygen equipment to individuals whose rental of such equipment would be reimbursed by Medicare, provided they met eligibility criteria.

Respondent Livingston closely managed and controlled Respondent Shoals. Its acts and policies were the consequence of his management decisions. Respondent Livingston recruited respiratory therapists, who also were employed by hospitals, to work for Respondent Shoals as independent contractors. These contractors were paid commissions by Respondent Shoals for rental of home oxygen equipment to individuals who qualified for Medicare reimbursement for the equipment rental. Respondent Shoals' payment to the contractors was conditioned on Medicare agreeing to compensate Respondent Shoals for the rental of the equipment. To obtain a commission, a contractor had to rent home oxygen equipment to an individual who qualified for Medicare reimbursement for that rental. The size of the commission that Shoals paid to a contractor depended on the amount of reimbursement that Medicare paid for rented equipment. Respondent Shoals paid higher commissions for the rental of expensive equipment than for rental of less expensive equipment.

Respondent Shoals required its contractors to obtain the documents necessary to qualify Medicare beneficiaries for reimbursement for rental of home oxygen equipment. These documents included DME forms, which were, in effect, physicians' prescriptions for home oxygen equipment. These documents also included ABG results, which provided required clinical evidence as to whether patients needed home oxygen equipment.

The relationship which Respondents created with respiratory therapists provided these agents with both the inducement and the opportunity to commit fraud. The respiratory therapists received no payment from Respondent Shoals unless they were able to qualify patients for Medicare reimbursement for home oxygen

equipment rentals. That created an incentive for these therapists to falsify the documents which were presented to BCBSA, the Alabama Medicare carrier, to qualify beneficiaries for reimbursement. Respondents did little or nothing to police the activities of these therapists. Those therapists who were disposed to falsify documents in order to qualify beneficiaries for Medicare reimbursement thus were able to do so without meaningful review of their actions by Respondents.

Respiratory therapists began falsifying claims information almost from the inception of Respondent Shoals' operations. From 1983 through 1986, respiratory therapists falsified documentation for hundreds of claims. Documents which were falsified included DME forms and ABG results. Therapists falsified ABG results in a variety of ways. In some instances they simply filled out fictitious forms. In other cases they used venous blood (which contains less oxygen than arterial blood) in ABGs. The effect of the substitution of venous blood for arterial blood was to produce test results which appeared to establish that patients' blood oxygen levels were low enough to qualify the patients for Medicare reimbursement for home oxygen equipment rentals.[12] Therapists submitted DME forms on which the prescribing physicians' signatures were forged or which were altered to make it appear as if the physicians signing the forms had prescribed expensive home oxygen equipment (such as oxygen concentrators) to beneficiaries. Therapists submitted documentation for home oxygen equipment claims where the patients' treating physicians had not prescribed home oxygen equipment and where there was no medical need for the equipment. Therapists submitted documentation for home oxygen equipment claims where no such equipment had been provided to patients.

Respondent Shoals presented to BCBSA documents which had been falsified by respiratory therapists to support its claims for reimbursement of home oxygen equipment rentals to Medicare beneficiaries. The documents that the therapists falsified induced BCBSA to reimburse

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[12] ABG means arterial blood gas study, and not venous blood gas study. The use of venous blood in an arterial blood gas study gives a lower PO2 reading than does the use of arterial blood because venous blood contains less oxygen than arterial blood. It is not appropriate or accurate to substitute venous blood for arterial blood in an arterial blood gas study. Findings 6 - 8.

Respondent Shoals for home oxygen equipment rentals. Respondents profited from the respiratory therapists' fraud. Respondent Shoals paid to the respiratory therapists, in the form of commissions, a percentage of this ill-gotten reimbursement. The commissions which Respondent Shoals paid to respiratory therapists induced the therapists to commit additional fraud.

2. Respondents presented or caused to be presented to BCBSA 173 claims for Medicare reimbursement that were false, fraudulent, or for items or services that were not provided as claimed.

The I.G. alleged that Respondents presented or caused to be presented to BCBSA 183 claims for Medicare reimbursement which were false, fraudulent, or for items or services which were not provided as claimed. I conclude that the I.G. proved its allegations with respect to 173 of these 183 claims.

There is no dispute that Respondent Shoals presented the claims at issue to BCBSA for Medicare reimbursement or that Respondent Livingston, acting as the chief executive of Respondent Shoals, caused the claims to be presented. Nor is there any dispute that the claims at issue were presented within the six-year statute of limitations.

Respondents have conceded that there was massive fraud committed by the respiratory therapists. Respondents' Brief at 3. They do not contest evidence which the I.G. offered which proves that these therapists falsified DME forms and ABG reports, and which proves that beneficiaries never received oxygen equipment which Respondent Shoals claimed to have rented to them. Id.

I have analyzed each of the 183 claims at issue. The evidence shows that 173 of the 183 claims were based on false documentation. These 173 claims were false, fraudulent, or for items or services which were not provided as claimed. The unifying characteristic of these claims is that the home oxygen equipment purportedly rented by Respondent Shoals had not been prescribed by the beneficiaries' physicians, nor was it medically justified. In many cases, it was not even supplied to the beneficiaries. Findings 65 - 197. All of these claims were supported with falsified documents, including forged or altered DME forms and false ABG reports.

I conclude that the I.G. failed to prove that 10 of the 183 claims were false, fraudulent, or for items or services that were not provided as claimed. These are

claims for home oxygen equipment rented to Medicare beneficiary Amos Odom from April 1, 1985, through February 1, 1986. Findings 148 - 155. Close examination of the circumstances of these claims establishes that they were technically not false. The physician who treated Odom during the period at issue signed an affidavit in which he admits executing DME forms prescribing home oxygen equipment for Odom. He now admits that Odom did not have a medical need for the equipment, but nevertheless, the physician certified at the time that he executed the forms that there was a medical need for the equipment which he prescribed to Odom. Thus, the documents upon which Respondent Shoals based the 10 claims are not "false" in the sense that they were falsified by Respondents or their agents. Furthermore, the I.G. did not prove that the ABG reports which Respondent Shoals presented to BCBSA to justify the 10 claims were false.[13]

3. The 173 claims that were false, fraudulent, or for items or services that were not provided as claimed were part of a pattern of claims which were false, fraudulent, or for items or services that were not provided as claimed.

The I.G. proved that Respondents presented or caused to be presented many claims, in addition to the claims on which it based its case for liability, which were false, fraudulent, or for items or services which were not provided as claimed. These consist of claims which Respondents presented or caused to be presented to BCBSA on dates which fall outside of the six-year statute of limitations. The evidence presented by the I.G. establishes that, as with the 173 claims which comprise the I.G.'s case-in-chief, these claims were supported with falsified and forged documents. They establish a pattern of false claims which transcends the claims on which the I.G. bases its assertions of liability. Findings 198 - 237.

Respondents cannot be held liable for these additional claims under the Act, because they fall outside the statute of limitations. However, as I shall discuss, infra, they are indirect evidence of Respondents'

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[13] However, Respondents did present other claims for oxygen equipment allegedly rented to Odom which were false, fraudulent, or for items or services which were not provided as claimed. These consist of claims which Respondent Shoals presented prior to April 1985. Findings 207 - 214.

culpability and untrustworthiness for the 173 claims for which liability may be established.

4. The I.G. proved that Respondents are liable for the 173 claims which they presented or caused to be presented which were false, fraudulent, or for items or services which were not provided as claimed.

Respondents presented or caused to be presented 173 claims for Medicare reimbursement which were false, fraudulent, or for items or services which were not provided as claimed. Respondents are liable under the Act to the extent that they, or their agents acting on their behalf, are culpable for these claims within the meaning of the Act. Respondents are culpable, and liable for these claims, if they knew, had reason to know, or should have known that the claims were false, fraudulent, or for items or services which were not provided as claimed. Respondents are also liable to the extent that it is established that their agents, acting on Respondents' behalf, presented claims or caused claims to be presented in violation of the Act.

Section 1128A(a)(1)(A) of the Act makes it unlawful for a party to present or cause to be presented claims for items or services which that party knows or should know were not provided as claimed.[14] Section 1128A(a)(1)(B) makes it unlawful for a party to present or cause to be presented claims for items or services where that party knows or should know the claim is false or fraudulent.[15]

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[14] Prior to December 22, 1987, this section's standard of liability for a party who filed a false claim was couched in terms of whether the party knew or had reason to know that the item or service was not provided as claimed. On December 22, 1987, Congress retroactively substituted the "should know" standard for the "reason to know" standard. No court has decided the validity of Congress' retroactive application of the "should know" standard to claims for items or services presented prior to December 22, 1987. In light of this unresolved issue, I use the "knows" and "should know" standard of the 1987 revision, as well as the pre-revision "has reason to know" standard, to decide Respondents' liability under section 1128A(a)(1)(A).

[15] This section was added effective December 22, 1987, and is inapplicable to administrative actions commenced prior to that date. The administrative action in this case commenced after December 22, 1987. Unlike section 1128A(a)(1)(A), there is no previous version of

Section 1128A(1) of the Act provides that a principal is liable under sections 1128A(a)(1)(A) and (B) for the actions of that principal's agent which are within the scope of the agency relationship.[16] The I.G. need not prove, as a prerequisite to establishing liability, that all of these standards are met. If any of these standards are satisfied with respect to the claims at issue, then Respondents are liable under the Act.

a. The I.G. did not prove that Respondents knew that the 173 claims were false, fraudulent, or for items or services that were not provided as claimed.

A person "knows" that an item or service is not provided as claimed within the meaning of the Act when he or she knows that the information that he or she is placing or causing to be placed on a claim is untrue. Anesthesiologists Affiliated, et al. and James E. Sykes, D.O. et al., DAB CR65 (1990) (Anesthesiologists Affiliated); Thuong Vo, M.D. and Nga Thieu Du, DAB CR38 (1989) (Vo). The "knows" standard is satisfied where a party deliberately presents or causes to be presented a false claim, or instructs another individual to present or cause to be presented a false claim.

The I.G. contends that the "knows" standard also is met where a party recklessly disregards the truth of the fact assertions on which a claim is based, citing Administrative Law Judge Stratton's decision in George A. Kern, M.D., DAB CR12 (1987) (Kern). Although Judge Stratton did hold in Kern that "knows" means reckless disregard for the truth of one's statements, that is a broader interpretation of the word "knows" than is indicated by the plain meaning of the word. I do not agree with this broad interpretation of the meaning of "knows." The more reasonable interpretation of the word "knows" is that it refers to something within a person's

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this section which uses the "reason to know" standard to measure liability requisite to establish a violation. Therefore, under section 1128(a)(1)(B), a party is liable if he or she "knows" or "should know" that an item or service was not provided as claimed.

[16] Section 1128A(1) was added to the Act in 1987, and Congress provided that this section would apply to acts occurring before, on, or after the date of enactment. Pub. L. 100-203, § 4118(e)(3), 101 Stat. 1330-155 (1987). The validity of Congress' direction that this language be applied retroactively has not yet been decided by a court.

actual knowledge, and not to something which a person ought to know but which that person ignores. Anesthesiologists Affiliated at 54. I have held previously that reckless disregard for the truth of one's statements falls within the ambit of the "should know" standard of liability, and not the "knows" standard. Anesthesiologists Affiliated at 56.

There is no question that, in this case, Respondents' agents, the respiratory therapists, knew that the claims information that they were causing to be presented to BCBSA was false. However, that evidence is not sufficient to prove that Respondents knew that the claims contained false information.[17] In order to prove that Respondents knew that the 173 claims were false, fraudulent, or for items or services which were not provided as claimed, the I.G. must show that Respondents either knew that the claims were false or that they directed other individuals to present claims which they knew would be false. The I.G. argues this standard is satisfied here, because Respondents conspired with respiratory therapists to present false Medicare claims. He asserts that Respondent Livingston directed respiratory therapists who served as Respondent Shoals' agents to falsify DME forms and ABG results in order to qualify patients for Medicare reimbursement.

The I.G.'s evidence for this contention consists of the testimony of respiratory therapists who served as independent contractors for Respondent Shoals, along with the testimony of an individual who was employed in Respondent Shoals' Florence, Alabama, office. The I.G. called as witnesses three respiratory therapists (Judith A. Madison, Steven C. Plummer, and William F. White). In lieu of live testimony, the I.G. introduced the sworn testimony, given in a prior proceeding, of a fourth respiratory therapist (Timothy D. Hayes). He also called as a witness the former employee of Respondent Shoals (David A. Blaylock) and also introduced the sworn testimony which this witness gave at a prior proceeding.

These witnesses, individually and collectively, accuse Respondents of orchestrating a conspiracy to defraud Medicare. Plummer and Madison each testified that they participated in conversations at which Respondent Livingston, or his office manager, Duane Traglia, asked or instructed them to falsify documents -- especially ABG

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[17] As I discuss infra, Respondents are liable under section 1128A(1) of the Act for their agents' unlawful conduct.

reports -- in order to qualify patients for Medicare reimbursement for home oxygen equipment rentals. See Tr. at 785 - 1012, 1049 - 1146. Hayes testified in a prior criminal trial of Respondent Livingston (at which Respondent Livingston was acquitted of criminal fraud against Medicare) that Respondent Livingston instructed him to falsify documents in order to qualify patients for Medicare reimbursement for home oxygen equipment rental. See I.G. Ex. 534/4 - 100. Blaylock testified before me, and in the prior criminal trial, that Respondent Livingston instructed him to alter or falsify documents that were sent to BCBSA in order to justify Medicare reimbursement claims. see I.G. Ex. 534/101 - 144, /163 - 250; Tr. at 1497 - 1729.[18]

I do not find credible these witnesses' assertions that they were instructed by, or conspired with, Respondent Livingston to defraud the Medicare program. The I.G. did not prove from this testimony that Respondents committed fraud. I stress here that I do not make an affirmative finding that Respondents did not commit fraud. Had I concluded that any of the witnesses called by the I.G. on the issue of Respondent's knowing presentation of false claims was credible, then I would have agreed with the I.G. that Respondents committed fraud. All that I find is that the evidence which the I.G. offered did not establish that Respondent Livingston, or his agent, Respondent Shoals, encouraged and directed fraud against Medicare.

My conclusion that these witnesses' testimony is not reliable evidence that Respondents committed fraud is grounded on my decision that I cannot confidently accept as truthful these witnesses' testimony concerning Respondents' involvement in their fraud. Each of the witnesses who accused Respondent Livingston of having orchestrated fraud had motivation to defraud Medicare without having been asked to do so by Respondent Livingston.[19] Each of these witnesses had motivation to

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[18] White testified that he had been at a meeting at which Respondent Livingston and Traglia discussed ways to falsify ABG reports, but characterized these remarks as humorous and as not intended to be taken seriously. White's testimony was totally discredited, for reasons which I shall discuss infra. See Tr. at 1148 - 1223.

[19] Blaylock was not paid on a commission basis and did not have the motivation to commit fraud which was shared by the respiratory therapists. On the other hand, and as I shall discuss, Blaylock is plainly hostile to

lie concerning Respondents' participation in his or her own fraud. Some of these witnesses admitted to having lied previously to authorities concerning aspects of their own fraudulent conduct. Several of the witnesses (Madison, Hayes, and Blaylock) significantly changed their recitation of events on occasion to suit the forum in which they were being to asked to recount the facts. One of the witnesses (Hayes) subsequently recanted his testimony in which he accused Respondent Livingston of having orchestrated fraud. One of the witnesses (White) attempted to extract money from Respondent Livingston in return for favorable testimony.

The relationship between Respondent Shoals and its independent contractor respiratory therapists provided ample motivation and opportunity for these therapists to defraud Medicare. Each of the therapists could have engaged in fraud without any urging by Respondent Livingston. The nature of their relationship with Respondent Shoals provided all the inducement they needed. Respondents' participation or encouragement was not a necessary element of the respiratory therapists' fraud. It was in these therapists' pecuniary interest to generate false documents to support reimbursement claims for home oxygen equipment, inasmuch as Respondent Shoals compensated them for only those patients who qualified for Medicare reimbursement. Therefore, I am not logically obligated to conclude from the fact that the respiratory therapists engaged in fraud that Respondents necessarily abetted the respiratory therapists' fraud, nor must I necessarily find persuasive the therapists' testimony that Respondents participated in their fraud.

Madison, Plummer, and Hayes had been charged with, and pleaded guilty to, criminal offenses arising from their conduct as respiratory therapists. Each of these witnesses knew that the sentences which they received for their crimes might be affected by the testimony they gave in Respondent Livingston's criminal trial. Therefore, they had a reason to accuse him of complicity in their own fraud.[20] These witnesses' motivation to give testimony which might not be truthful is a reason to

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Respondent Livingston and that hostility damages his credibility.

[20] I am not suggesting that authorities induced these witnesses to give false testimony in return for lenient treatment. However, it is evident that these witnesses perceived that the authorities wanted them to implicate Respondent Livingston in their own fraud.

suspect the veracity of their statements concerning Respondent Livingston's complicity in their fraud. It is not necessarily a sufficient basis to disqualify their testimony. I am certain that there have been many instances where co-conspirators have testified truthfully concerning a party's complicity in a scheme where they have also benefitted from their testimony. But the fact that these witnesses had something to gain from implicating Respondent Livingston is a reason to scrutinize their testimony carefully.

What is more disturbing about these witnesses is that two of them, Madison and Hayes, changed their stories to accommodate the circumstances in which they found themselves to be situated. When an investigator initially confronted Madison with evidence that she had engaged in fraud, she denied any wrongful conduct. She changed her story only when it became apparent to her that she could pay a heavy price for her misconduct. She changed her story again on subsequent occasions. In cross-examination before me, she admitted to having lied previously under oath. Hayes recanted the testimony he gave in Respondent Livingston's criminal trial, subsequently averring in a sworn deposition that Respondent Livingston had not directed him to engage in illegal conduct.

Plummer's testimony was at least unchanging. However, I find the central element of his testimony to be less than credible. He asserted that Respondent Livingston counseled him to falsify ABG reports at their first meeting, in the parking lot of the hospital at which Plummer was then employed. This assertion is doubtful at best. Based on my assessment of the parties involved, it is highly unlikely that Respondent Livingston would direct or counsel a person to commit fraud who, at the time, was a total stranger to him.

White, the third respiratory therapist who testified before me, totally discredited himself. Under cross-examination by Respondents' counsel, White admitted that he had offered to make his testimony favorable to Respondent Livingston if he paid White money which White contended that Respondent Livingston owed to him. Given this admission, I cannot accept as truthful anything that this witness offered on the question of Respondents' complicity to commit fraud against Medicare.[21]

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[21] In fact, White's testimony at the hearing which I conducted was marginally favorable to Respondents in that he asserted that Respondent Livingston and Traglia

Furthermore, I was not impressed by the demeanor and presentation of Madison, Plummer, or White. Each of them was evasive and less than forthcoming in answers to most questions.

The I.G. argues that similarities in these witnesses' accounts of what Livingston allegedly told them reinforces the weight of their individual stories and their overall credibility. He observes that the individual respiratory therapists were not well acquainted with each other prior to their testifying against Respondent Livingston at his criminal trial. He notes that each of the respiratory therapists identified separate meetings or conversations in which Respondent Livingston allegedly counseled him or her to falsify documents. According to the I.G., there is nothing to suggest that these respiratory therapists agreed to concoct a similar story about Respondent Livingston's involvement in their fraud. He argues that it would be highly unlikely for each of the respiratory therapists independently to invent testimony with such obviously similar features. Therefore, the credibility of each respiratory therapist's account of conversations with Respondent Livingston should be bolstered by the similarities in the respiratory therapists' testimony.

Although this argument is appealing, I am not sufficiently persuaded by it to find credible the testimony of these respiratory therapists. The similarities in these witnesses' testimony is not sufficient to overcome my conclusion that, individually, these were not credible witnesses. Furthermore, I do not find it unlikely that these witnesses could individually have contrived stories which coincidentally had similar features, in order to deflect opprobrium from themselves. It is not unreasonable to conclude that respiratory therapists, including these witnesses, knew how to commit fraud before they ever became involved with Respondents. Fraud against Medicare by respiratory therapists did not begin with these therapists' relationship with Respondent Shoals. Madison admitted that she had perpetrated fraud

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were joking when they allegedly suggested that ABG reports could be falsified in order to qualify patients for Medicare reimbursement for home oxygen equipment. However, given White's offer to shade his testimony in return for money, I do not find from White's testimony that the asserted conversation took place, much less do I find that Respondent Livingston made the alleged suggestion in jest. The I.G. offered no evidence to corroborate White's account of the alleged suggestion.

against Medicare prior to her involvement with Respondents. None of these witnesses necessarily needed to be instructed by Respondent Livingston how to commit fraud. Nor is it unreasonable to conclude that each of these therapists may have individually decided that his or her route to safety or a reduced penalty lay in linking his or her own fraud to Respondent Livingston.

The additional witness called by the I.G., Blaylock, did not directly implicate Respondent Livingston in a scheme to defraud Medicare. Much of his testimony focused on Respondent Shoals' business practices (such as its failure to meaningfully track the distribution to independent contractors of home oxygen equipment in its inventory). He testified also that Respondent Livingston was indifferent to evidence that employees of Respondent Shoals were engaging in improprieties concerning the qualification of patients to receive Medicare reimbursement for the rental of home oxygen equipment. His testimony concerning Respondent Livingston's involvement in fraud mainly related to an episode in which Respondent Livingston allegedly directed Blaylock to alter a document to be submitted to BCBSA in order to qualify a patient for Medicare reimbursement for home oxygen equipment rental. Much of Blaylock's testimony was directed at showing that Respondent Livingston had attempted to intimidate him into not testifying against Respondent Livingston in his criminal trial. Blaylock testified that the alleged intimidation included threatening telephone messages and written threats, theft of his automobile, and two beatings.

Blaylock was not a credible witness. He admitted to having had animus towards Respondent Livingston (Respondent Livingston had fired him from his employment with Respondent Shoals). His animus was also reflected in his demeanor, which was at times hostile and at other times evasive. His testimony as to the alleged intimidation was not corroborated. He was unable to produce the threatening note that allegedly he had received. He could produce no evidence which linked Respondents directly to the alleged intimidation. And, like several of the respiratory therapists, Blaylock changed his story to suit the circumstances in which he found himself. Tr. at 1678 - 1679.

Moreover, his testimony was in some respects, fanciful. For example, he testified that on one occasion he had been home alone when persons unknown to him forced their way into his home, beat him, and threatened him with additional violence if he continued to cooperate with the authorities who were prosecuting Respondent Livingston.

He asserted that, on this occasion, the persons who broke into his home were somehow able to find and to remove a telephone voice recording device from a darkened room. However, Blaylock acknowledged that, prior to the alleged break-in, beating, and theft, the existence of the recording device was unknown to any individual other than himself. I find this depiction of events to be far-fetched, because it assumes that the persons who allegedly invaded Blaylock's home would somehow discover the previously unknown recording device in the dark, recognize its significance to them, and remove it.

Blaylock also testified that, on another occasion, he returned to his home after several days' absence. On this occasion, according to Blaylock, persons unknown to him were waiting for him inside his home. He asserted that these individuals surprised him and beat him upon his entry to his home. Yet, Blaylock was unable to explain how these individuals knew that he would be returning to his home on the day in question, after a long absence. For these reasons, I do not believe this depiction of events or Blaylock's account of the other alleged entry into his home.

There is evidence that Respondents knew of at least one instance in which a respiratory therapist had presented falsified documents concerning home oxygen equipment which had ostensibly been supplied to a Medicare beneficiary. Tr. at 1262 - 1263, 1299. I do not find this evidence sufficient to prove the I.G.'s contention that Respondents knew that all 173 false claims were false. On the other hand, this evidence is relevant to my conclusion that Respondents had reason to know or should have known that the 173 claims were false.

b. Respondents had reason to know that the 173 claims were for items or services that were not provided as claimed.

The "reason to know" standard contained in the Act prior to December 22, 1987 created a duty on the part of a provider to prevent the presentation of false claims where: (1) the provider had sufficient information to place him or her, as a reasonable medical provider, on notice that the claims presented were for services not provided as claimed, or (2) there were pre-existing duties which would require a provider to verify the truth, the accuracy, and the completeness of the claims. Anesthesiologists Affiliated at 54; Vo at 19; Kern at 5 - 7.

The record in this case is replete with evidence that placed Respondents on notice that the 173 claims could be for items or services which were not provided as claimed. I do not find that Respondents had facts which specifically placed them on notice that each of the 173 claims was false. But they had sufficient evidence to know that there was a likelihood that any one of these claims was false. Respondents presented or caused these claims to be presented notwithstanding their knowledge that these claims might not be honest or accurate, and notwithstanding their resulting duty to prevent the presentation of false claims. Respondents thus had reason to know that the claims were for items or services which were not provided as claimed, and that establishes requisite culpability under the Act for the 173 claims.

Respondents knew that the opportunity and incentive existed for respiratory therapists to provide false documentation to justify claims for Medicare reimbursement. Respondents knew that, by virtue of their relationship with respiratory therapists, respiratory therapists were required to generate claims documents. They knew that the compensation arrangement they established with respiratory therapists rewarded the therapists only for those claims that were paid by Medicare, and rewarded those therapists more for expensive equipment rentals than for inexpensive equipment rentals. Also, Respondents knew that the respiratory therapists could generate ABG reports without any check or balance to assure that these ABG reports were honest or accurate. Finding 245. They therefore knew that, not only did respiratory therapists have incentive to commit fraud, but that the documents which respiratory therapists generated had at least the potential for being false.

Thus, Respondents knew that there existed a real possibility that the claims that they were presenting or causing to be presented could be for items or services which were not provided as claimed. That knowledge was sufficient to meet the "reason to know" standard under the Act for all of the 173 claims. However, Respondents had additional information which strongly pointed to the possibility that any of the claims they were presenting or causing to be presented could be for items or services which were not provided as claimed. Respondents had direct evidence that fraud was being perpetrated by respiratory therapists in specific instances. Such evidence consisted of documents which were generated by respiratory therapists and sent to Respondents as support for home oxygen equipment claims that were patently false or, at the very least, were suspicious.

Respondents were put on notice that fraud might be being committed by Respondent Shoals' receipt from a respiratory therapist of blank DME forms which were purportedly executed by a physician. In and of itself, the receipt of those documents would have been sufficient to put Respondents on notice of possible dishonesty by the therapist, because Respondents knew that DME forms were in effect, physicians' prescriptions for home oxygen equipment. At the least, blank DME forms suggested a total abdication of responsibility by the physician who purportedly signed them. They suggested also the possibility of more sinister acts, including the falsification of claims documents.

Respondents were put on notice of possible fraud also by Respondent Shoals' receipt from a respiratory therapist of DME forms which bore the name of one physician as the treating physician, but which bore the purported signature of another physician. See, e.g., I.G. Ex. 222 - 223. That discrepancy suggests to any reasonable reviewer that the information contained in the forms might be false. It also suggests the possibility that the signatures on the forms were forged. Respondents received even stronger evidence that physicians' signatures were being forged. This stronger evidence consisted of several DME forms sent to them by a therapist, which bore the same physician's name as the purported signing physician, but which were signed with obviously different handwriting styles. See I.G. Ex. 101 - 105.

Also, Respondents were aware that, on at least one occasion, a respiratory therapist had sent Respondent Shoals a DME form on which the physician's signature had been forged. Respondents were warned on another occasion by one of Respondent Shoals' employees that a physician's signature on a DME form may have been forged. They knew that, on at least one occasion, they had been provided with conflicting statements from a patient concerning whether that individual had actually received home oxygen equipment. They knew that the DME forms which they were receiving from respiratory therapists contained fact discrepancies which suggested that the forms may not have been prepared honestly.

The evidence of likely fraud which Respondents received from their respiratory therapists included documentation pertaining to numerous claims in addition to the 173 claims which comprise the I.G.'s case for liability under the Act. Indeed, the evidence in this case establishes that Respondents began receiving falsified or forged documents from respiratory therapists in 1983, almost at

the inception of Respondent Shoals' commencement of business. Respondents therefore were in a position to know, long before they began receiving the documents relevant to the 173 claims, that documents provided to them by respiratory therapists were suspect and needed to be scrutinized carefully. Findings 198 -237.

Finally, Respondents knew that, when they attempted to ascertain the status of one respiratory therapist's (Hayes) patient accounts, that respiratory therapist obstructed their efforts. Once they were made aware that Hayes was obstructing their efforts, Respondents made no further effort to investigate. Instead, they allowed the respiratory therapist who was allegedly perpetrating the fraud to control the investigation. Respondents therefore had ample reason to suspect that the therapist had engaged in dishonest conduct with respect to a large number of claims.

c. Respondents should have known that the 173 claims were false, fraudulent, or for items or services that were not provided as claimed.

The "should know" standard of liability subsumes reckless disregard for the consequence of a person's acts. It subsumes those situations where a party has reason to know that items or services were not provided as claimed. "Should know" also subsumes negligence in preparing and submitting claims, or in directing the preparing and submitting of claims. Mayers v. U.S. Dept. of Health and Human Services, 806 F.2d 995 (11th Cir. 1986), cert. denied, 484 U.S. 822 (1987) (Mayers); Anesthesiologists Affiliated at 56; Vo at 20.

Respondents were indifferent to the truth or falseness of the claims they presented or caused to be presented. They made no meaningful or systematic efforts to assure BCBSA that the claims which they were presenting or causing to be presented were honest. Their indifference was at least negligence which meets the "should know" liability test under the Act.

If Respondents were not willfully dishonest, they were at the least indifferent to the honesty of individuals who they knew had the incentive and the wherewithal to commit fraud. Respondents knew that their method of compensating respiratory therapists gave these individuals an incentive to commit fraud. They knew that the therapists were in a position to generate false documents. Given this knowledge, Respondents' blind reliance on the documents which the therapists submitted,

to their considerable profit, was more than merely negligent, it was reckless.

Respondent Livingston testified that he spoke frequently with respiratory therapists and physicians' offices to monitor the services that Respondent Shoals was providing. Notwithstanding this testimony, I do not find that Respondents made meaningful efforts to assure that the claims that they were presenting or causing to be presented were accurate or honest. As I find above, Respondents ignored evidence which put them on notice that, at the least, incorrect or untruthful documents were being provided by respiratory therapists. Respondents failed to put into effect any meaningful mechanism to detect fraud, in spite of their receiving documents which strongly suggested that fraud was being committed. Had Respondent Livingston made any meaningful effort to check the veracity of the documents which respiratory therapists were submitting to him, he would immediately have detected massive and blatant fraud.

As have found above, Respondents received DME forms purportedly signed by one physician, where the signatures were executed by an individual or individuals with different handwriting styles. The evident and obvious handwriting differences in the signatures should have put any reasonable reviewer of the DME forms on notice that something was amiss. However, there is no evidence that Respondent Livingston or any of Respondent Shoals' employees made any effort to determine why one physician was purportedly signing documents with different handwriting. There is no evidence that Respondents checked documents which were purportedly being signed by physicians against exemplars of these physicians' signatures, in order to assure that documents were not being forged. Nor is their any evidence that Respondents called physicians to inquire as to why their signatures appeared to be varying from document to document.

There is no evidence in this case that Respondents made systematic (or even sporadic) efforts to contact physicians or their office staffs to check the accuracy or honesty of forms which were being submitted by respiratory therapists. Given the blatant and heavy-handed nature of the forgeries that were being committed by respiratory therapists, it is apparent that even a cursory inquiry by Respondents of physicians or their offices would have disclosed massive fraud.

Furthermore, there is no evidence which would establish that Respondents made any meaningful effort to control their inventory to assure that patients were actually

being rented the equipment which respiratory therapists purported to have rented to them. Respondents received statements from some patients disputing that home oxygen equipment had been rented to them. Had Respondents maintained a meaningful systematic control over their equipment inventory, at the least they could have ascertained whether equipment had actually been rented to a particular patient. But the testimony of Blaylock (which I find to be credible on this limited issue) establishes that Respondents did not maintain a meaningful record of their rented equipment. Tr. at 1519 - 1521.

d. Respondents are liable for the acts of their agents.

The respiratory therapists were the agents of Respondent Shoals. Respondent Shoals was the agent of Respondent Livingston. Under section 1128A(l) of the Act, a principal is liable for the acts of his or her agent, where that agent operates within the scope of his or her agency. This section was enacted by Congress in 1988. Pub. L. 100-360, § 411(k)(10)(B)(ii)(III), 102 Stat. 794-95 (1988). Respondents presented or caused to be presented the 173 claims at issue here prior to the enactment of this section. However, in enacting the section, Congress added to it language which Congress intended to apply retroactively. See Pub. L. 100-203, § 4118(e)(3), 101 Stat. 1330-155 (1987). I interpret these enactments as a specific directive from Congress to apply section 1128A(l) retroactively to claims presented prior to the section's date of enactment.[22]

There is no question here that, in providing Respondent Shoals with falsified and forged documents to support Medicare reimbursement claims, the respiratory therapists were acting within the scope of their agency relationship with Respondent Shoals. These therapists' duties included providing Respondent Shoals with whatever documents were necessary to qualify patients for Medicare reimbursement for the rental of home oxygen equipment.

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[22] Although I am applying section 1128A(l) retroactively, as is directed by Congress, I am not premising my findings that Respondents are liable solely on the liability of their agents. I would find Respondents liable under the Act even if section 1128A(l) were not applicable here, because Respondents had reason to know and should have known that the 173 claims were false, fraudulent, or for items or services that were not provided as claimed.

Nor is there any question that these therapists engaged in fraud with respect to the documentation for the 173 claims. Under section 1128A(l), these therapists' fraud must be imputed to Respondent Shoals, and Respondent Shoals is therefore liable for the acts of its agents.

Nor is there any question that, in presenting the claims at issue, Respondent Shoals acted as Respondent Livingston's agent. Findings 21 - 25. Because Respondent Shoals is liable for the 173 claims, and because it acted within the scope of its agency relationship with Respondent Livingston in presenting the claims, Respondent Livingston is personally liable under section 1128A(l) of the Act.

5. There is a remedial need for assessments, penalties, and exclusions.

Section 1128A of the Act is a remedial statute. Its purpose is not to punish wrongdoing, but to provide the Secretary with a remedy for misconduct. Having concluded that Respondents are liable for presenting 173 Medicare reimbursement claims that were false, fraudulent, or for items or services that were not provided as claimed, I must decide what remedies are reasonable.

The Act and regulations provide parameters for determining the remedies to be imposed in a particular case. Section 1128A(a) of the Act provides for assessments of up to twice the amount of any item or service which is presented in violation of the Act and for civil monetary penalties of up to $2,000.00 for each such item or service. This section also provides for the exclusion of any party who is found to have presented or caused to be presented claims in violation of the Act.

The Act provides that, in determining the amount of any penalties or assessments, and the length of any exclusion to be imposed, the following factors are to be considered:

> (1) the nature of claims and the circumstances under which they were presented,
>
> (2) the degree of culpability, history of prior offenses, and financial condition of the person presenting the claims, and
>
> (3) such other matters as justice may require.

Social Security Act, section 1128A(d).

Regulations in effect prior to January 29, 1992, restated these statutory criteria. 42 C.F.R. §§ 1003.106(a), 1003.107. They provided that the I.G. bore the burden of proving factors which were "aggravating" (such as a high level of culpability) and which merited greater remedies. 42 C.F.R. § 1003.114(a). They provided that respondents bore the burden of proving factors which were "mitigating" (such as a low level of culpability) and which merited reduced remedies. 42 C.F.R. § 1003.114(c). These regulations also provided that the criteria for determining penalties, assessments, and exclusions were to be employed as guidelines. However, they instructed administrative law judges to set penalties, assessments, and exclusions close to the maximum permitted by the Act in situations where there are substantial aggravating factors. 42 C.F.R. § 1003.106(c)(2).

The regulations published on January 29, 1992 are similar to the preexisting regulations in most respects. One difference between the language of new regulations and their predecessors is that the regulations now provide that the standards for determining penalties, assessments, and exclusions are "binding, except to the extent that their application would result in imposition of an amount that would exceed limits imposed by the United States Constitution." 57 Fed. Reg. 3348, to be codified as 42 C.F.R. § 1003.106(d)(1).

a. This case is governed by regulations in effect prior to January 29, 1992.

The I.G. made his determinations to impose assessments, penalties, and exclusions against Respondents in April and July, 1991. The determinations were made prior to the January 29, 1992 publication date of the new regulations. The I.G. contends, notwithstanding, that the January 29, 1992 regulations are the regulations which govern my decision in this case as to assessments, penalties, and exclusions. I conclude that, to the extent that these regulations differ substantively from their predecessors, it would be an unlawful retroactive application of these regulations to apply them to this case. Therefore, I adjudicate this case pursuant to the regulations which were in effect prior to January 29, 1992.

It is not immediately clear from the new regulations the extent to which they change substantively the criteria to be employed in deciding the amount of assessments and penalties, or the length of exclusions, to be imposed in particular cases. As I note above, there is a language change in the new regulations which makes the criteria to

be used in deciding the amount of assessments and penalties, and the length of exclusions, binding on the finder of fact. On the other hand, the criteria contained in the preexisting regulations were more than merely advisory. They were plainly intended to establish criteria for deciding remedies in most cases. Furthermore, the new regulations contain the caveat that they are not "binding" where their application would be unconstitutional.

However, to the extent that the new regulations do substantively change the criteria for deciding remedies under section 1128A of the Act, they are not retroactively applicable to cases initiated prior to the regulations' date of publication. There is no language in the regulations which would suggest that the Secretary intended that they be applied retroactively. Furthermore, an appellate panel of the Departmental Appeals Board has concluded that Part 1001 of the new regulations, which governs the I.G.'s exclusion determinations under section 1128 of the Act, does not apply retroactively to exclusion determinations made prior to the regulations' publication date. Behrooz Bassim, M.D., DAB 1333 at 5 - 9 (1992) (Bassim). Although the Part 1001 regulations apply to a different section of the Act than to section 1128A, which is at issue here, the same reasoning that the appellate panel used to decide Bassim is applicable in this case, and leads to the conclusion that the regulations may not be retroactively applied. Therefore, I find this case to be governed by the appellate panel's holding in Bassim and I conclude that the governing regulations are those which were in effect prior to January 29, 1992.

b. Assessments of $85,000.00 and a penalties of $300,000.00 are reasonable.

I conclude that assessments of $85,000.00 and penalties of $300,000.00, to be imposed against Respondents, jointly and severally, are reasonable in this case. I base my conclusion on the preponderance of aggravating factors and on the absence of mitigating factors. However, I also conclude that the aggregate penalties and assessments that I impose against Respondents are reasonably related to the costs sustained by the Department by virtue of Respondents' misconduct.

There are several serious aggravating factors present here. This is a case involving a substantial number of false or fraudulent claims presented over a lengthy period of time. The 173 claims at issue in this case were presented over a 17-month period beginning in

January, 1985, and ending in June, 1986. The amount falsely claimed by Respondents in the 173 claims is substantial, totalling $44,838.80. The amount which was reimbursed by Medicare for the 173 claims is also substantial, totalling $25,440.64. All of this evidence concerning the nature of Respondents' false and fraudulent claims is relevant to establishing the seriousness of Respondents' misconduct.

More important to my conclusion that substantial assessments and penalties are merited here is evidence which shows that Respondents demonstrate a high level of culpability for their misconduct. Although the evidence may not establish that Respondents orchestrated and encouraged fraud, neither does it show them to be passive bystanders to the fraud of others. To the contrary, Respondents created a climate in which fraud became an ordinary and accepted manner for doing business with Medicare. They were utterly indifferent to the systematic fraud committed by their independent contractors. I am convinced from the record of this case that Respondents were not innocently unaware of what was being perpetrated on their behalf. The documents which Respondents received from respiratory therapists were, in some instances, so obviously false that Respondents would have had to blind themselves to the likelihood of fraud in order to maintain ignorance of that fraud.[23]

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[23] The I.G. offered evidence that Respondents falsified or misrepresented the results of pulse oximetry tests which they presented to BCBSA in order to requalify patients who had been qualified previously for Medicare reimbursement for home oxygen equipment. Many of the allegations of falsification of those tests consist of the averments of Madison and Blaylock, witnesses whose testimony I have found to be unreliable. Therefore, I do not find that Respondents deliberately falsified pulse oximetry test results. On the other hand, the evidence is uncontested that these tests were administered by Traglia, an individual who had no training as a respiratory therapist. There is no evidence whatsoever in this case to suggest that Traglia, whose duties for Respondent Shoals consisted largely of bookkeeping, had any qualification to administer pulse oximetry tests. Respondents' use of Traglia for this purpose may not have been illegal, but, at the least, it suggests an indifference to a basic premise of the Medicare program, which is that the program is intended to provide reimbursement for items or services provided by qualified health care providers. This contempt for the program reinforces my conclusion that Respondents were

Respondent Livingston asserted in his testimony before me that he was appalled to learn of the fraud that had been perpetrated on his behalf. He contended that he had not known of the level of fraudulent conduct until listening to the testimony and reviewing the exhibits which I admitted into evidence at the hearing which I conducted in this case. He asserted that he was willing to make restitution for any fraud that was established. In a sense, he contended that he had been victimized by his contractors' fraud, even as the Medicare program had been victimized. I find these assertions to be less than credible. As I have concluded, the evidence is overwhelming that, for over a three-year period, Respondents were presented with evidence of massive fraud by their contractors and did nothing to stop that fraud.

Moreover, once Respondents were put on direct notice by investigating authorities that fraud had been perpetrated, they did little or nothing of substance to uncover or disclose the fraud from which they had benefitted. Respondent Livingston knew as early as 1987 that he and Respondent Shoals were under investigation for possible Medicare fraud. Respondent Livingston was a defendant in a 1988 criminal prosecution in which he and his manager, Traglia, were charged with fraud against Medicare. Throughout this period, Respondents had in their possession or had access to the same documents now offered against them by the I.G. Had they cared to ascertain whether fraud had been perpetrated in their names, they could have done so easily by reviewing the documents.

At the hearing before me, Respondent Livingston testified that he attempted to investigate the possibility that respiratory therapist Hayes had engaged in fraud, but that he was frustrated by Hayes' obstructionist tactics. I am not persuaded that Respondents made any meaningful effort to investigate or deter Hayes' fraud. They did not systematically review their records to determine whether Hayes had submitted falsified or forged documents. They did not systematically contact the patients Hayes had allegedly serviced in order to determine what equipment, if any, Hayes had provided to these patients. They did not contact any of the physicians who allegedly ordered equipment through Hayes to determine whether the DME forms Hayes had submitted, and that purportedly were executed by these physicians, were honest and accurate.

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indifferent to the fraud that was being perpetrated on their behalf.

The maximum assessments that I may impose in this case are $89,677.60 (which is double the $44,838.80 claimed by Respondents in the 173 claims). The maximum penalties that I may impose in this case are $346,000.00 (which is $2,000.00 x 173 claims that are false, fraudulent or for items or services which are not provided as claimed). I conclude that assessments should be imposed against Respondents, jointly and severally, of $85,000.00. I conclude that penalties should be imposed against Respondents, jointly and severally, of $300,000.00. My conclusion as to assessments and penalties reflects my decision that there is strong aggravating evidence in this case, consisting of evidence both of the magnitude of Respondents' misconduct and their culpability. It also reflects my decision that there are no significant mitigating factors here.[24] My reason for not imposing the maximum assessments and penalties is that the I.G. did not prove that Respondents knowingly presented or caused to be presented claims in violation of the Act.

My decision as to penalties and assessments also reflects my conclusion that the penalties and assessments reasonably relate to the costs sustained by the Department and the Medicare program by virtue of Respondents' misconduct. Those costs comprise three elements. First, Medicare was induced by Respondents to pay them over $25,000.00 for the 173 claims. These payments were made as a consequence of Respondents' false representations, and Respondents were entitled to none of these payments.

Second, the Department incurred substantial costs in investigating Respondents' wrongful conduct. Finding 274; I.G. Ex. 540. The investigation required expenditure of many hours of employees' time and thousands of dollars in salaries, benefits, and ancillary disbursements.

I have not considered, as an element of the Department's costs in this case, the time and efforts of I.G.'s counsel and employees in prosecuting the case. Also, the I.G. contended that I should consider as an element of the Department's cost in this case the time and expenses of I.G.'s counsel and employees in preparing for and

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[24] Respondents did not offer evidence that the assessments and penalties proposed by the I.G. would affect their ability to continue to function as health care providers. Under the regulations, Respondents have the burden of proof on this issue, if they choose to raise it. 42 C.F.R. § 1003.114(c)(3).

representing the I.G. at the hearing. The January 29, 1992 regulations provide that such costs are to be considered as part of the Department's costs in a case brought under section 1128A of the Act. 57 Fed. Reg. 3348 to be codified at 42 C.F.R. § 1003.106(d)(2). Inasmuch as the new regulations represent a substantive change from what I have previously ruled admissible evidence as to costs, I conclude that to apply them here would be a retroactive application not intended by the Secretary. See Part 5a of this Analysis.

In previous hearings, I have expressed skepticism that such costs were intended by Congress to be taxable to respondents under section 1128A of the Act. My skepticism is grounded on the fact that the Act provides respondents with the right to an administrative hearing without stating or suggesting that they are to be taxed with the costs of the hearing, should the outcome of the hearing be unfavorable to them. Furthermore, I am concerned that taxing respondents with the I.G.'s prosecution costs would have a chilling effect on their exercise of their statutory right to a hearing. Finally, I am troubled by the prospect of having to consider as evidence the averments of I.G.'s counsel concerning their efforts on the I.G.'s behalf. If I accept such evidence, I must logically provide respondents with the opportunity to rebut it, and that may include the right to call employees of the I.G., or even the I.G.'s counsel, as witnesses.

Third, Respondents' misconduct imposed an inchoate cost on the Department and the Medicare program consisting of damage to Medicare's reputation as a federally-funded health care program. The damage to the program's reputation, while not calculable in dollars, was extensive. Mayers; Edward J. Petrus, Jr., M.D., and The Eye Center of Austin, DAB 1264 at 37 (1991) (Petrus). By recklessly presenting Medicare reimbursement claims that were false, fraudulent, or for items or services which were not provided as claimed, Respondents frustrated Congress' intent that the Medicare program, with its limited funds, effectively care for the legitimate medical needs of beneficiaries. Respondents also fostered a climate in which health care providers were encouraged to treat the program, and its safeguards against fraud and abuse, with contempt.

c. Five-year exclusions are reasonable.

As with the assessments and penalties, the purpose of an exclusion under section 1128A is remedial. An exclusion is not intended to punish a provider for wrongdoing.

Rather, its purpose is to protect the integrity of federally-funded health care programs and these programs' beneficiaries and recipients from individuals and entities who have established by their conduct that they are not trustworthy to provide care.

The evidence in this case establishes Respondents to be highly untrustworthy providers of care. Based on this evidence, I impose a five year exclusion on each Respondent. There is nothing in the record which assures me that these Respondents can be trusted in the future to abstain from engaging in conduct which may be harmful to the programs and their beneficiaries and recipients.[25] To a great extent, I ground my conclusions that Respondents are untrustworthy and that five-year exclusions are a reasonable remedy on the evidence of Respondents' indifference to their respiratory therapists' fraud. As I conclude above, Respondents ignored overwhelming evidence of fraud. The result of Respondents' failure to take notice and act upon the overwhelming evidence of fraud was that Respondents profited from that fraud. That strongly supports a conclusion that these Respondents are not to be trusted with program funds or with the welfare of beneficiaries and recipients of those funds.

However, there is additional evidence of Respondents' lack of trustworthiness. Respondent Livingston admitted to a continuing personal and business relationship with Hayes despite professing to be appalled by the fraud perpetrated by respiratory therapists, especially that of Hayes, and despite offering evidence as to Hayes' poor reputation for honesty. Respondent Livingston's continued relationship with this individual suggests either that he is less daunted by Hayes' dishonesty and poor reputation than he professes to be, or that he is a manifestly poor judge of the character of his business associates. In either event, his continued relationship with Hayes evidences a less than scrupulous concern by Respondent Livingston for the integrity of his business operations and is strong evidence of lack of trustworthiness.

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[25] Respondent Shoals was Respondent Livingston's creation and his agent and, therefore, to the extent that Respondent Livingston is untrustworthy, so is Respondent Shoals.

6. The remedies imposed in this case do not violate Respondent Livingston's right not to be placed in double jeopardy.

Respondent Livingston argues that the imposition of remedies against him violates his rights not to be placed in double jeopardy. Respondent Livingston premises his argument on his acquittal in 1988 of criminal charges of Medicare fraud and the Supreme Court's decision in United States v. Halper, 490 U.S. 435 (1989) (Halper). I conclude that the double jeopardy clause is not invoked here. Unlike the facts of Halper, the remedies which I am imposing in this case are not punitive.

The defendant in Halper was convicted in federal court of filing 65 false Medicare claims resulting in an overpayment of $585.00. He was sentenced to two years' imprisonment and fined $5,000.00. Subsequently, the United States Government brought a civil action against the defendant under the False Claims Act, a statute which provides for civil remedies of twice the dollar amount of that which is established as falsely claimed, plus penalties of $2,000.00 for each false claim. The government's suit was premised on defendant's conviction for all 65 claims. The district court entered summary judgment in favor of the government on the issue of liability. However, it held that the remedy sought by the government -- penalties totalling $130,000.00 -- would violate the defendant's right against being placed in double jeopardy. The court based its conclusion on its determination that there was a "tremendous disparity" between the civil penalty requested and the actual damages sustained by the government. It concluded that the disparity was so great as to render the penalty punitive.

The Supreme Court sustained the district court's conclusion that imposition of a $130,000.00 penalty would be punitive in the context of the particular facts of the case. It held that a civil sanction constitutes punishment in those circumstances where the civil sanction serves only the traditional aims of punishment: retribution and deterrence. It stated that a civil penalty could operate as an unconstitutional second punishment in:

> the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused. The rule is one of reason: Where a defendant has previously sustained a

> criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes second punishment.

490 U.S. at 435.

The Supreme Court held that its decision was inapplicable to defendants who had not previously been convicted on the same offense for which civil penalties are sought:

> Nothing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive. In such a case, the Double Jeopardy Clause simply is not implicated.

490 U.S. at 450.

In order for Halper to be relevant here, the remedies I impose against Respondent Livingston must be punitive within the meaning of the Supreme Court's decision in Halper. That is to say, they must bear no reasonable relationship to the costs sustained by the Department by virtue of Respondent Livingston's misconduct, or bear no reasonable relationship to the remedial purpose of an exclusion. The assessments, penalties, and exclusion which I impose here against Respondent Livingston do not constitute a punishment under Halper. These remedies are reasonably related to either the costs sustained by the Department as a result of Respondent Livingston's misconduct or to the remedial purpose for exclusions under the Act.

CONCLUSION

For the reasons set forth in this Decision, I impose assessments of $85,000.00, and penalties of $300,000.00 against Respondents, jointly and severally. I also exclude Respondents from participating in Medicare and Medicaid for five years.

/s/

Steven T. Kessel
Administrative Law Judge