# Department of Health and Human Services

# DEPARTMENTAL APPEALS BOARD

## Civil Remedies Division

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| In the Case of: | |
| Thieu Lenh Nghiem, M.D. | DATE: December 23, 1992 |
| Petitioner, | Docket No. C-372 |
| - v. - | Decision No. CR248 |
| The Inspector General. | |

## DECISION

On March 5, 1991, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare and State health care programs pursuant to section 1128(b)(4) of the Social Security Act (Act).[1] The I.G. advised Petitioner that he was basing his decision to exclude him on a determination by the Washington State Medical Disciplinary Board (Washington Board) to revoke Petitioner's license to practice medicine. The I.G. further advised Petitioner that he had determined to exclude Petitioner until Petitioner obtains a valid license to practice medicine in the State of Washington. By letter dated April 22, 1991, Petitioner requested a hearing, and the case was assigned to me for hearing and decision.

The I.G. subsequently filed a Motion To Dismiss, or, in the alternative, for Summary Judgment. The I.G. argued that Petitioner's request for a hearing should be dismissed because Petitioner's letter requesting a hearing failed to raise any cognizable issues. In addition, the I.G. contended that even if I determined

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

that Petitioner's request for a hearing was not fatally defective on its face, the matters raised by Petitioner could be resolved against Petitioner as a matter of law. Petitioner opposed this motion.

On July 30, 1991, I issued a Ruling in which I found that Petitioner's hearing request was not fatally defective, and I denied the I.G.'s Motion to Dismiss. In addition, I made a preliminary finding that the I.G. has the authority to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act. I concluded also that the I.G. had not demonstrated as a matter of law that Petitioner should be excluded until he obtains full restoration of his license to practice medicine in Washington. I found that there were genuine issues of material fact concerning the issue of Petitioner's alleged untrustworthiness.

At Petitioner's request, I stayed the proceedings in this case pending the outcome of various proceedings in the States of Washington and California related to Petitioner's medical licensure in those States. In a prehearing status conference on February 28, 1992, Petitioner admitted that the I.G. had the authority to exclude him. The parties stipulated that the only issue before me is whether the length of the exclusion imposed by the I.G. is reasonable. On July 14, 1992, I held a hearing in Seattle, Washington. The parties subsequently submitted posthearing briefs.

I have carefully considered the evidence, the applicable law, and the parties' arguments. I conclude that the remedial purpose of section 1128 of the Act will be served in this case by the following exclusion: Petitioner is excluded for not less than nine years. At any time thereafter that Washington gives him an unrestricted medical license, he may apply for reinstatement as a Medicare/Medicaid provider. Or, at any time after the nine years that another State gives, or has given him, an unrestricted medical license, and, prior to giving him an unrestricted medical license, that State examined all of the legal and factual issues considered by the Washington Board and determined that Petitioner has provided proof of his rehabilitation, then he may apply for reinstatement as a Medicare/Medicaid provider.

## ADMISSION

Petitioner admits that the I.G. has the authority to exclude him. March 5, 1992 Order and Notice of Hearing at 2; Petitioner's Posthearing Brief at 2.

## ISSUE

The sole remaining issue is whether the length of the exclusion imposed and directed against Petitioner is reasonable.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCLs)

1. Petitioner is a medical doctor. Tr. 35-36.[2]

2. Petitioner has advanced degrees in public health and he has an expertise in preventive medicine. P. Ex. 6/2.

3. Petitioner worked in the position of State epidemiologist for the State of Washington from 1973 to 1980. Tr. 39.

4. In 1980, Petitioner began practicing as a sole private medical practitioner in Olympia, Washington, and he continued to practice in this capacity until October 1989. Tr. 45.

5. On June 28, 1982, Petitioner obtained a medical license in California. P. Ex. 6.

6. On October 26, 1989, the Washington Board filed a Statement of Charges alleging that in 1988 Petitioner engaged in sexual misconduct with four of his patients, as follows:

> a. The Washington Board alleged that Petitioner had inappropriate sexual contact, including digital penetration of the vagina, and inappropriate questioning of a sexual nature with Patient One while evaluating her for high cholesterol. I.G. Ex. 2.
>
> b. The Washington Board alleged that Petitioner inappropriately examined the genital area and asked inappropriate sexual questions of Patient Two while evaluating her for high cholesterol. I.G. Ex. 2.

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[2] The transcript of the hearing and exhibits will be referred to as follows:

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| Hearing Tr. | Tr. (page) |
| I.G. Exhibits | I.G. Ex. (number/page) |
| Petitioner Exhibits | P. Ex. (number/page) |

c. The Washington Board alleged that Petitioner inappropriately examined Patient Three by having her sit partially clothed without a patient gown for a prolonged period of time. I.G. Ex. 2.

d. The Washington Board alleged that Petitioner inappropriately asked Patient Four explicit sexual questions on the telephone which were unrelated to her medical complaints. I.G. Ex. 2.

7. The Washington Board conducted an in-person evidentiary hearing. Patients One, Two, and Three testified as to the allegations against Petitioner. Petitioner, who was represented by legal counsel, testified at the hearing. Expert medical opinion evidence of Petitioner's mental condition was presented at the hearing. In addition, character witnesses testified on Petitioner's behalf, both live and by deposition. I.G. Ex. 3; P. Exs. 3, 4, 5.

8. At the request of the Washington Board, Leslie H. Rawlings, Ph.D., conducted a psychological evaluation of Petitioner in the fall of 1989. P. Ex. 4/164.

9. In the course of Dr. Rawlings' evaluation, Petitioner described the events surrounding the charges of sexual misconduct. Petitioner's account of these events contained several contradictions. This suggests that Petitioner was less than forthright in describing these events to Dr. Rawlings and it undermines Petitioner's credibility. These inconsistent statements are also evidence of Petitioner's untrustworhthiness. P. Ex. 4/165-167, 171-172.

10. Results of psychological tests performed by Dr. Rawlings suggest that Petitioner is an individual who tends to be self-centered and who experiences considerable underlying resentment toward obligations and responsibilities. Dr. Rawlings' evaluation revealed that Petitioner suffers from a personality disorder characterized by obsessive compulsive and narcissistic features. P. Ex. 4/171-172.

11. At Petitioner's attorney's request, S. Harvard Kaufman, M.D., a psychiatrist, conducted an evaluation of Petitioner in the fall of 1989. Dr. Kaufman's evaluation revealed that Petitioner suffers from a hypomanic reaction, probably with a bipolar disease and from serious narcissistic and dependent personality disorders. P. Ex. 4/82-85, 87, 94, 103.

12. Petitioner had needed treatment for the diagnosed conditions for a long period of time prior to Dr. Kaufman's 1989 evaluation. P. Ex. 4/88.

13. On February 28, 1990, the Washington Board issued its decision and made findings of fact which were substantially identical to the allegations in the Statement of Charges relating to Patients One, Two, and Three. The Washington Board dismissed the charges relating to Patient Four on the grounds that no evidence in support of these charges was presented. The Washington Board concluded that Petitioner's conduct with respect to Patients One, Two, and Three constituted unprofessional conduct. I.G. Ex. 3.

14. Based on its findings of fact and conclusions of law, the Washington Board revoked Petitioner's license to practice medicine in Washington. The Washington Board determined that: 1) no license to practice medicine may be issued to Petitioner unless he provides proof of his rehabilitation; and 2) it will not consider an application for the restoration of Petitioner's license until after a ten year period has elapsed from the date of its February 28, 1990 decision. I.G. Ex. 3.

15. The Secretary delegated to the I.G. the authority to determine, impose, and direct exclusions, pursuant to section 1128 of the Act. 48 Fed. Reg. 21661 (May 13, 1983).

16. Section 1128(b)(4)(A) of the Act authorizes exclusions from the Medicare and Medicaid programs of any individual whose license to provide health care has been revoked by a State licensing authority for reasons bearing on the individual's professional competence, professional performance, or financial integrity.

17. On March 5, 1991, pursuant to section 1128(b)(4)(A) of the Act, the I.G. excluded Petitioner from participating in the Medicare program and directed that he be excluded from participating in Medicaid until he obtains a valid license in Washington.

18. Petitioner's medical license was revoked by a State licensing authority for reasons bearing on his professional competence or performance. FFCLs 6, 13, 14.

19. The I.G. had authority to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act. FFCLs 15, 16, 18.

20. Section 1128(b)(4)(A) of the Act does not establish a minimum or a maximum term of exclusion.

21. Regulations published on January 29, 1992 do not apply retroactively to establish a standard for adjudicating the reasonableness of the exclusion in this case. Behrooz Bassim, M.D., DAB 1333 (1992).

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

23. The findings of the Washington Board create the presumption that Petitioner is untrustworthy.

24. On March 28, 1990, Petitioner filed an appeal in the Washington Superior Court in and for Thurston County challenging the Washington Board's license revocation. The Washington Superior Court fully reviewed the record before the Washington Board, and, on December 6, 1991, it issued a decision affirming the Washington Board's license revocation decision. P. Exs. 1, 2.

25. The fact that the Washington Superior Court upheld the Washington Board's decision is persuasive evidence of Petitioner's untrustworthiness and the seriousness of his offenses. FFCL 24.

26. On January 15, 1992, a California administrative law judge issued a proposed decision revoking Petitioner's license to practice medicine in California. This decision was based on the findings of the Washington Board. P. Ex. 6.

27. Prior to reaching the decision to revoke Petitioner's medical license in California, the administrative law judge held an evidentiary hearing at which Petitioner appeared and represented himself. The administrative law judge found that Petitioner offered no evidence to establish that he had been rehabilitated. P. Ex. 6.

28. On March 5, 1992, the Medical Board of California (California Board) adopted the administrative law judge's January 15, 1992 proposed decision. P. Ex. 6.

29. The January 15, 1992 proposed decision to revoke Petitioner's California medical license, and the California Board's adoption of this decision on March 5, 1992, are persuasive evidence of Petitioner's

untrustworthiness and the seriousness of his offenses. FFCLs 26-28.

30. Petitioner asked the patients who brought the charges which resulted in his license revocation questions about the distribution of their pubic hair. Tr. 71-72.

31. Petitioner's rationale for asking questions about his patients' pubic hair distribution is that the distribution of pubic hair provides information about an individual's endocrine function. Tr. 72-74.

32. Petitioner's unsubstantiated rationale for asking about pubic hair patterns is not sufficient to overcome the findings of the Washington Board that Petitioner asked his patients questions of a sexual nature that were not medically justified. Tr. 72-74.

33. Petitioner denies asking the patients who brought the charges which resulted in his license revocation inappropriate questions about their sexual habits and their orgasmic responses. Tr. 71-72, 77.

34. Petitioner denies performing inappropriate physical examinations of his patients. Tr. 90.

35. Petitioner's unsupported denials of culpability are not credible, and they are additional evidence of his lack of trustworthiness.

36. Petitioner exploited the trust his patients felt towards him in order to satisfy his own sexual desires. Sexual misconduct of this nature poses a serious threat to the welfare of patients. P. Ex. 4/16-21, 128.

37. The serious nature of the sexual misconduct which formed the basis of the Washington Board's revocation decision is reflected in the fact that the Washington Board determined that Petitioner should not be allowed to practice medicine in Washington for at least 10 years. FFCL 14.

38. Instead of accepting responsibility for his conduct, Petitioner has exhibited a consistent pattern of making unsupported allegations of wrongdoing against the complaining witnesses, the medical experts, and the members of the Washington Board who made the revocation decision. Tr. 57, 60, 62-66, 81, 87-89, 91, 93-94.

39. Petitioner has not sought psychotherapy for his mental disorders. Tr. 68-69.

40. Petitioner has demonstrated a disturbing tendency to excuse and rationalize his misconduct. FFCLs 30-32.

41. The record is devoid of any credible evidence that Petitioner is rehabilitated.

42. Character evidence presented to the Washington Board by Petitioner's patients and friends attests to Petitioner's skills as a physician and his honesty in personal relationships. P. Exs. 3, 4/138 - 162.

43. The character evidence of record does not derogate from the strong evidence in this case showing that Petitioner cannot be trusted to participate in Medicare and Medicaid programs. FFCL 42.

44. Where the danger of harm to patients is great, a lengthy exclusion is justified to protect beneficiaries and recipients from even a slight possibility that they will be exposed to such danger. Norman C. Barber, D.D.S., DAB CR123 (1991). An even longer exclusion is justified where, as in this case, there is evidence that the excluded provider is likely to engage in the misconduct in the future.

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

46. The remedial purpose of section 1128 is satisfied by the following exclusion: Petitioner is excluded for not less than nine years. At any time thereafter that Washington gives him an unrestricted medical license, he may apply for reinstatement as a Medicare/Medicaid provider. Or, at any time after the nine years that another State gives, or has given him, an unrestricted medical license, and, prior to giving him an unrestricted medical license, that State examined all of the legal and factual issues considered by the Washington Board and determined that Petitioner has provided proof of his rehabilitation, then he may apply for reinstatement as a Medicare/Medicaid provider.

## RATIONALE

On February 28, 1990, the Washington Board revoked Petitioner's license to practice medicine in Washington based on findings that Petitioner had engaged in sexual misconduct with three of his patients. The I.G., pursuant to section 1128(b)(4)(A) of the Act, then excluded Petitioner from participation in the Medicare and Medicaid programs until Petitioner regains his license to practice medicine in Washington.

Petitioner does not dispute that the I.G. had authority to impose and direct an exclusion against him pursuant to section 1128(b)(4)(A) of the Act. He disagrees as to the reasonableness of the length of the exclusion imposed and directed by the I.G.

I. Regulations published on January 29, 1992, do not apply retroactively to I.G. determinations made prior to the regulations' publication date.

A threshold issue in this case is whether regulations published by the Secretary on January 29, 1992 establish criteria by which I must adjudicate the reasonableness of the exclusion which the I.G. imposed and directed against Petitioner. 57 Fed. Reg. 3298, 3330-41 (to be codified at 42 C.F.R. Part 1001.)

During the February 28, 1992 prehearing conference, counsel for the I.G. asserted that the new regulations require that I sustain the exclusion imposed by the I.G. without considering evidence offered by Petitioner as to the exclusion's reasonableness. Counsel for the I.G. stated that there would be no need for a hearing if I decided that the regulations published on January 29, 1992 applied to this case. During that conference, I informed the parties that I was not inclined to rule that the new regulations apply here, and I stated that the case would proceed to hearing. March 5, 1992 Order and Notice of Hearing at 2-3.

In his posthearing brief, Petitioner argued that the new regulations do not apply to this case because they were not in effect at the time these proceedings commenced. Petitioner's Posthearing Brief at 3.

An appellate panel of the DAB addressed this issue in the decision Behrooz Bassim, M.D., DAB 1333 (1992). In that case, the appellate panel held that, as interpreted by the I.G., the new regulations effected a substantive change in the right of a petitioner to a de novo hearing to challenge an exclusion pursuant to section 1128(b)(4) of the Act. For that reason, the panel held that retroactive application of the new regulations would deprive petitioner of due process. The exclusion determination in this case was made on March 5, 1991. Therefore, under Bassim, the Part 1001 regulations, published on January 29, 1992, do not apply retroactively

to establish a standard for adjudicating the reasonableness of the exclusion in this case.[3]

II. The Reasonableness of the Exclusion

A. The remedial purpose of section 1128 of the Act is to protect federally-funded health care programs and their beneficiaries and recipients.

In deciding whether an exclusion under section 1128(b)(4) is reasonable, I must analyze the evidence of record in light of the exclusion law's remedial purpose. Lakshmi N. Murty Achalla, M.D., DAB 1231 (1991).

Section 1128 is a civil statute and Congress intended is to be remedial in application. The remedial purpose of the exclusion law is to enable the Secretary to protect federally-funded health care programs from misconduct. Such misconduct includes fraud or theft against federally-funded health care programs. It includes also neglectful or abusive conduct against program beneficiaries and recipients. See S. Rep. No. 109, 100th Cong., 1st Sess. 1, reprinted in 1987 U.S.C.C.A.N. 682.

When considering the remedial purpose of section 1128, the key term to keep in mind is "protection," the prevention of harm. Through exclusion, individuals who have caused harm, or who have demonstrated that they may cause harm, to the federally-funded health care programs or their beneficiaries or recipients, are no longer permitted to receive reimbursement for items or services which they provide to program beneficiaries or recipients. Thus, untrustworthy providers are removed from positions which provide a potential avenue for causing future harm to the program or to its beneficiaries or recipients.

The determination of when an individual should be trusted and allowed to reapply to the I.G. for reinstatement as a provider in the Medicare and Medicaid programs is a

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[3] In light of the Bassim decision, I do not need to decide the issue of whether the regulations establish criteria which govern administrative law judges' review of exclusion cases. I note, however, that in Charles J. Barranco, M.D., DAB CR187 (1992), I reasoned that the regulations cited by the I.G. establish criteria to be used by the I.G. in making exclusion determinations, but do not establish criteria binding on an administrative law judge in conducting a de novo review of the reasonableness of an exclusion.

difficult issue. It involves consideration of multiple factual circumstances. An appellate panel provided a listing of some of these factors, which include:

> the nature of the offenses committed by the provider, the circumstances surrounding the offense, whether and when the provider sought help to correct the behavior which led to the offense, how far the provider has come toward rehabilitation, and any other factors relating to the provider's character and trustworthiness.

Robert M. Matesic, R.Ph., d/b/a Northway Pharmacy, DAB 1327, at 12 (1992).

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

B. The revocation decisions of the State licensing authorities in Washington and California are persuasive evidence of Petitioner's untrustworthiness.

In this case, the State licensing authority in Washington revoked Petitioner's license to practice medicine in that State based on findings that Petitioner engaged in sexual misconduct with three of his patients. The Washington Board found that Petitioner had asked these patients questions of a sexual nature which were unrelated to their medical complaints. In addition, the Washington Board found that Petitioner had inappropriate sexual contact, including digital penetration of the vagina, with one of the patients and that he inappropriately examined the other two patients. FFCLs 6, 13. The Washington Board determined that it would not consider an application to reinstate Petitioner's medical license for at least ten years and that it would reinstate Petitioner's license after that period only if Petitioner provided proof of rehabilitation. FFCL 14.

Prior to reaching its decision, the Washington Board conducted an evidentiary hearing. Petitioner was represented by legal counsel at that hearing. The three women who brought the complaints upon which the Board based its revocation decision testified. In addition, Petitioner testified and character witnesses testified on Petitioner's behalf. Also, expert medical opinion evidence concerning Petitioner's mental condition was presented. FFCL 7.

In assessing Petitioner's trustworthiness to participate in the Medicare and Medicaid programs, I place great reliance on the Washington Board's decision to revoke Petitioner's medical license. The Washington Board had the opportunity to observe and judge the credibility of all the witnesses. It concluded that, for reasons related to his professional competence or performance, Petitioner is not sufficiently trustworthy to be allowed to engage in the practice of medicine for at least ten years. The decision of the Washington Board is convincing evidence that Petitioner is untrustworthy. See Behrooz Bassim, M.D., DAB 1333, at 10-11 (1992).

My reliance on the Washington Board's revocation decision is further justified by the fact that it has withstood the rigors of judicial review. The Washington Superior Court fully reviewed the record before the Washington Board and affirmed the Washington Board's decision to revoke Petitioner's medical license for a minimum period of ten years. FFCL 24, 25.

As recently as March 1992, the licensing authority in California revoked Petitioner's medical license in that State for an indefinite period based on the findings of the Washington Board. Prior to the issuance of this decision, Petitioner was provided an evidentiary hearing conducted by an administrative law judge. Petitioner was present at this hearing. The administrative law judge issued a proposed decision finding that Petitioner had not offered any evidence to show that he had been rehabilitated. The California Board adopted the findings of the administrative law judge and revoked Petitioner's license. The findings and conclusions of the California licensing authority are additional persuasive evidence of Petitioner's untrustworthiness. FFCL 26-29.

The findings of the Washington Board create the presumption that Petitioner is untrustworthy. Narinder Saini, M.D., DAB 1371, at 6 (1992). In this proceeding, Petitioner has not provided any credible evidence to rebut the findings of the Washington Board. Petitioner's challenge to these findings has consisted principally of unsubstantiated denials of sexual misconduct and unsubstantiated attacks on the motives and integrity of the complaining witnesses, the medical experts, and the members of the Washington Board who made the revocation decision. Such unsupported assertions are not sufficient to shift the burden to the I.G. to prove the accuracy of the Washington Board's findings. Bernardo G. Bilang, M.D., DAB 1295, at 10-11 (1992).

Petitioner admits that he questioned his patients about the distribution of their pubic hair. However, he denies that this line of questioning to his patients constitutes sexual misconduct. According to Petitioner, these questions were medically justified because the distribution of pubic hair provides information about an individual's endocrine function. Petitioner justified obtaining information of this nature from individuals who complained of high cholesterol on the grounds that a "good physician doesn't isolate the symptom from the rest of the patient." Tr. 74.

Petitioner stated that "[a]ny textbook of endocrinology worth its name" would support his claim that pubic hair distribution provides information about endocrine function. Tr. 73. However, he did not provide copies of any medical literature to substantiate this claim. In addition, during the hearing before the Washington Board, Petitioner offered the same explanation about the relationship between endocrine function and hair patterns to justify his questions. P. Ex. 5/89-90. The fact that the Washington Board concluded that Petitioner asked inappropriate questions suggests that the Washington Board was not persuaded by this explanation. In view of this, I conclude that Petitioner's unsubstantiated rationale for asking about pubic hair patterns is not sufficient to overcome the findings of the Washington Board that Petitioner asked his patients questions of a sexual nature that were not medically justified.

Petitioner denied also that he asked his patients inappropriately intrusive questions about their sexual habits and their orgasmic responses. FFCL 33. He denied also performing inappropriate physical examinations of his patients. FFCL 34. In fact, Petitioner categorically denied performing vaginal examinations of any of his patients since 1986, two years before the alleged inappropriate examinations took place. Tr. 90.

Again, Petitioner did not rebut the evidence of sexual misconduct relied on by the Washington Board. Mere unsubstantiated denials of misconduct are not sufficient to rebut the findings of the Washington Board. In addition, it is noteworthy that Petitioner made contradictory statements about the events surrounding the charges of sexual misconduct in the course of a psychological evaluation performed at the request of the Washington Board. FFCL 8-9. The fact that Petitioner's account of these events contains inconsistences suggests that he was less than forthright in describing these events to the evaluating psychologist and it undermines Petitioner's credibility. These

inconsistent statements are also evidence of Petitioner's untrustworthiness.

I find that Petitioner's unsupported denials of culpability are not credible and they are additional evidence of his lack of trustworthiness.

C. The charges of sexual misconduct which formed the basis of the revocation decisions are serious.

When I evaluate the evidence in this case regarding Petitioner's trustworthiness, I find that the charges of sexual misconduct which formed the basis of the Washington Board's revocation decision are serious.

The Washington Board found that Petitioner engaged in serious acts of inappropriate and improper sexual contact with three patients. The Washington Board based this on the testimony of three female patients of Petitioner. According to this testimony, Petitioner asked these patients personal questions about their sexual habits and desires. One patient testified that Petitioner asked her whether she had double climaxes and whether she had erotic dreams. P. Ex. 4/21. Another patient testified that Petitioner asked her whether she ever had group sex and how many men could she handle at one time. P. Ex. 4/128. One of the patients stated that Petitioner performed a physical examination of her genitals on the pretext that he needed to see her pubic hair pattern. P. Ex. 4/16. This patient stated that after he conducted the examination, he watched her get dressed, and told her that she was a desirable woman. This patient stated that during the same appointment, Petitioner gave her a big hug "to feel the energy", and told her that he could control his sexual energy for six hours. P. Ex. 4/18-19. When the appointment was over, this patient stated that Petitioner walked her to her car and said that he would like to put a flower in her hair. P. Ex. 4/19-20.

The evidence in this case shows that Petitioner exploited the trust his patients felt towards him in order to gratify his own sexual desires. A physician owes a high duty of care to his patients. A physician who takes advantage of his patients for his own sexual gratification breaches this duty of care and violates the trust between physician and patient.[4] Actions of this

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[4] In this regard, I point out that one of the complaining witnesses testified at the hearing before the Washington Board that because she trusted him she was

(continued...)

type pose a serious threat to the welfare of patients. See Leonard R. Friedman, M.D., DAB 1281, at 10-11 (1991). The seriousness of this type of misconduct is reflected in the fact that the Washington Board determined that Petitioner should not be allowed to practice medicine in Washington for at least 10 years.

D. The medical evidence of record establishes that Petitioner suffers from mental disorders.

The record contains medical opinion evidence showing that Petitioner has significant psychological disorders. Dr. S. Harvard Kaufman, a psychiatrist who examined Petitioner at the request of Petitioner's own attorney in connection with the proceeding before the Washington Board, found that Petitioner suffers from a hypomanic reaction, probably with a bipolar disease and from serious narcissistic and dependent personality disorders. FFCL 11. Dr. Kaufman concluded also that Petitioner had needed treatment for the diagnosed conditions for a long period of time prior to his evaluation, which was performed in 1989. FFCL 12.

Petitioner was examined also by Leslie H. Rawlings, a psychologist, at the request of the Washington Board. Dr. Rawlings reported that results of psychological tests performed by him suggest that Petitioner is an individual who tends to be self-centered and who experiences considerable underlying resentment toward obligations and responsibilities. Dr. Rawlings concluded that Petitioner suffers from a personality disorder characterized by obsessive compulsive and narcissistic features. FFCL 10. Dr. Rawlings noted that Petitioner denied engaging in inappropriate behavior and he opined that "[w]ithout assuming responsibility for his behavior there is no basis upon which to pursue a psychotherapeutic intervention." P. Ex. 4/173. This conclusion implies that Petitioner needs psychotherapy, but it shows that such therapy will not be effective unless Petitioner assumes responsibility for his conduct. As I discuss below, the evidence fails to establish that Petitioner has confronted his problems and that he has taken any steps towards rehabilitation.

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[4](...continued)
slow to realize that Petitioner's sexual questions and his examination of her genitals was inappropriate. This is evidence that Petitioner took advantage of the trust inherent in the physician/patient relationship in order to gain sexual access to his patient. P. Ex. 4/17-18. See Bruce Lindberg, D.C., DAB CR233 (1992).

E. The record is devoid of credible evidence that Petitioner is rehabilitated.

What most disturbs me about this case is Petitioner's stubborn refusal to admit or accept responsibility for any wrongdoing, even when confronted with overwhelming evidence to the contrary. Petitioner has not demonstrated to me the slightest ability or inclination to recognize past mistakes and to take action to rehabilitate himself. I have no assurance that Petitioner would not in the future repeat this conduct if he were afforded an opportunity to do so.

Instead of accepting responsibility for his conduct, Petitioner has exhibited a consistent pattern of making unsupported allegations of wrongdoing against others. FFCL 38. Petitioner responded to the allegations of the three complaining witnesses by questioning their integrity and motives. Tr. 57, 60, 81, 91. However, the record is devoid of evidence showing that Petitioner is justified in raising such questions.

Petitioner also raised the possibility of bias against him by members of the Washington Board. Petitioner made the unsubstantiated allegation that his medical license was revoked as a result of a vendetta by members of the Washington Board, based on his job performance as an epidemiologist during the period from 1973 to 1980. Petitioner advanced a rather bizarre and incoherent theory that the Washington Board viewed him as a liability because of his success in controlling measles. Petitioner also made the unsubstantiated assertion that the Washington Board saw him as a threat to the power and financial health of the established medical community because of his unconventional medical practices. Tr. 87-89, 93-94. These unsupported allegations of misconduct against individuals involved in the Washington Board's decision to revoke Petitioner's medical license is additional evidence of Petitioner's lack of trustworthiness.

Petitioner testified at the July 14, 1992 hearing that he has not sought psychotherapy treatment for the conditions diagnosed by Dr. Kaufman. FFCL 39. Instead of accepting Dr. Kaufman's recommendation that he needs psychiatric treatment, Petitioner explained his lack of treatment with an unpersuasive attack on the ethics and professionalism of Dr. Kaufman. Tr. 62-66.

Petitioner has consistently refused to confront and correct the behavior which led to the revocation of his medical license. Rather than admitting to his own

misconduct, Petitioner has repeatedly attempted to shift the blame for the loss of his medical license to other individuals involved in the Washington license proceeding by making unjust accusations of misconduct against them.

Not only has Petitioner refused to admit to wrongdoing, but he has demonstrated a disturbing tendency to excuse and rationalize his misconduct. This is evident in his explanation for asking his patients about their pubic hair patterns. This testimony shows that Petitioner not only refused to recognize the inappropriate nature of his questions, but he was able also to convince himself that asking these questions was helpful to his patients. Tr. 72-74.

Petitioner testified before me that it was his belief that the Washington Board revoked his medical license because it wanted to penalize him for his unconventional medical practices. Tr. 93-94. He testified at the California license revocation proceeding that he considers himself to be a "medical deviate" because he believes in holistic medicine, and he is not interested in financial success. He indicated that he wished to practice in California because he believes that Californians are open to unorthodox medical practices. P. Ex. 6/2. The picture that emerges from the record is that Petitioner sees himself as an enlightened physician who engages in unorthodox medical practices which are superior to conventional treatment protocols. Petitioner has demonstrated a dangerous tendency to engage in inappropriate medical practices and then self-righteously promote these practices as being proper. Petitioner's propensity to be an advocate for his own medical philosophy even when it collides with the dictates of acceptable medical practices is a serious threat to program beneficiaries and recipients because it shows that he is likely to engage in inappropriate conduct in the future.

In light of the absence of any evidence of rehabilitation, I conclude that Petitioner is untrustworthy and that he poses a threat to the welfare of program beneficiaries and recipients.

In reaching this conclusion, I have considered the character evidence Petitioner offered at the proceeding before the Washington Board. This evidence, provided by Petitioner's patients and friends, attests to Petitioner's skills as a physician and his honesty in his personal relationships. FFCL 42. This testimony shows that Petitioner has had patients who have been satisfied with his medical skills and that Petitioner has displayed

honesty in his social relationships. However, it offers little in the way of probative evidence regarding the trustworthiness of Petitioner with respect to the sexual misconduct which formed the basis of the Washington Board's revocation decision. Accordingly, I find that the character evidence of record does not derogate from the strong evidence in this case showing that Petitioner cannot be trusted to participate in the Medicare and Medicaid programs.

F. A minimum exclusion of nine years is consistent with the remedial purpose of the Act.

By the terms of its revocation decision, the Washington Board will not even consider an application for restoration of Petitioner's medical license for a period of ten years from the date of its February 28, 1990 decision. The I.G. issued its exclusion decision on March 5, 1991, approximately a year after the Washington Board issued its revocation decision. Under these facts, the Washington Board will be willing to consider an application to restore Petitioner's medical license approximately nine years after the I.G. excluded Petitioner.

The term of the exclusion imposed and directed by the I.G. against Petitioner is coterminous with Petitioner's license revocation in Washington. Petitioner will be eligible to apply to the I.G. for reinstatement as a provider of Medicare and Medicaid upon reinstatement of his Washington license to practice medicine. Since the Washington Board refuses to consider an application to restore Petitioner's license prior to February 28, 2000, the effect of the I.G.'s March 5, 1991 exclusion decision is to bar Petitioner from participating in the Medicare and Medicaid programs for a minimum period of approximately nine years.

The evidence in this case provides strong justification for an exclusion of at least nine years.[5] In view of the

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[5] Petitioner is approximately 70 years old. Tr. 35-36. I recognize that in view of Petitioner's age, he has only a limited number of years left to practice medicine. I did not, however, consider Petitioner's age in determining the reasonableness of the length of the exclusion in this case. Age is not a factor which bears directly on the issues of Petitioner's trustworthiness and whether the program's interests can be sufficiently protected by a shorter exclusion. See Francis Shaenboen,

(continued...)

serious nature of the offenses of sexual misconduct which formed the basis of the Washington revocation decision and the absence of assurances that Petitioner will not engage in this misconduct in the future, I find that a minimum exclusion of nine years is not extreme or excessive as a length of time necessary to establish that Petitioner is no longer a danger to Medicare and Medicaid beneficiaries and recipients.

It is instructive that under section 1128(a)(2) of the Act, Congress has made a legislative determination that an exclusion be imposed for a minimum of five years in cases where a provider has been convicted of a criminal offense relating to abuse of patients in connection with the delivery of a health care item or service. While the Petitioner in this case has not been convicted of a criminal offense, his misconduct was similar to the type of behavior Congress intended to cover in enacting section 1128(a)(2). This analysis provides a framework that can be used to determine the appropriate length of exclusion needed in this case. In my judgment, sexual abuse of patients where the patients' trust in their physicians is exploited to enable such physicians to satisfy sexual desires is a compelling justification to support a lengthy exclusion. Under circumstances such as this, where the danger of harm to patients is great, a lengthy exclusion is justified to protect beneficiaries and recipients from even a slight possibility that they will be exposed to such danger. Norman C. Barber, D.D.S., DAB CR123 (1991). An even longer exclusion is justified where, as in this case, there is evidence that the excluded provider is likely to engage in the misconduct in the future.

Although Petitioner may be eligible to apply for reinstatement of his license to practice medicine in Washington on February 28, 2000, his eligibility for reinstatement of his medical license is conditioned also on his proving that he has been rehabilitated. There is no guarantee that Petitioner will meet this requirement. The Washington Board may refuse to reinstate Petitioner's medical license for an indefinite period in the event that it deems this to be necessary to protect the citizens of Washington.

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[5](...continued)
R.Ph., DAB 1249, at fn. 8 (1991). The remedial considerations of the Act must take precedence over any adverse impact a lengthy exclusion would have on Petitioner's ability to practice medicine in the future.

In past cases under section 1128(b)(4), the I.G. has sought and been upheld by appellate panels of the DAB in obtaining exclusions of an indefinite duration based on relicensure in the State where the original license was revoked, suspended, or surrendered. See, Leonard R. Friedman, M.D., DAB 1281 (1991) and John W. Foderick, M.D., DAB 1125 (1990). As the appellate panel concluded in Friedman, such a remedy is reasonable since that State, in exercising its decision on relicensure, would act in a careful and prudent manner in the best interest of its citizens. Friedman, DAB 1281, at 7. In such circumstances, it is appropriate for the I.G., in discharging his responsibilities to the Medicare and Medicaid programs, to defer to such State in determining that a health care provider has demonstrated sufficient trustworthiness to justify seeking application for admission into the program.

In his posthearing brief, Petitioner does not contend that the I.G.'s exclusion is unreasonable because it is indefinite. In addition, he does not argue that the I.G.'s exclusion is excessive because there is convincing evidence of his trustworthiness in this case. Instead, he takes issue with the I.G.'s exclusion because it ignores the possibility that his medical license might be reinstated in California before his license is reinstated in Washington.

Petitioner states that, under California law, he is precluded from filing an application for reinstatement of his California medical license for three years and that the California Board must be satisfied that he is rehabilitated before such an application for reinstatement can be granted. Petitioner asserts also that since California revoked his medical license based on the Washington Board's revocation decision, the California Board is fully aware of the concerns of the Washington Board. Petitioner contends that, under these circumstances, it is appropriate for the I.G. to defer to the California Board in determining that he has demonstrated sufficient trustworthiness to seek reinstatement into the Medicare and Medicaid programs. Petitioner contends that the length of the exclusion in this case should be until he obtains his license to practice medicine in either Washington or California, whichever happens first. Petitioner's Posthearing Brief at 3-4.

The effect of the exclusion imposed by the I.G. is to exclude Petitioner for a minimum period of approximately nine years. Assuming that Petitioner's characterization of California law is correct, it is possible Petitioner

could be relicensed in California as early as three years from the California Board's 1992 revocation decision. Were I to modify the exclusion period in the manner proposed by Petitioner, it is possible that Petitioner's exclusion from the Medicare and Medicaid programs could end several years before the nine year minimum exclusion contemplated by the I.G.'s exclusion.

The I.G. argues that adopting Petitioner's proposal to make the exclusion coterminous with the reinstatement of Petitioner's medical license in California (if California restores his license before Washington) would frustrate one of Congress' primary goals in enacting section 1128(b)(4). According to the I.G., the legislative history of section 1128(b)(4) demonstrates that one of the main problems Congress sought to address was the phenomenon of a doctor losing his license in one State and then using a license in another State to continue or reestablish participation in federally-funded health care programs. S. Rep. No. 109, 100th Cong., 1st Sess. 1, reprinted in 1987 U.S.C.C.A.N. 684. I.G. Posthearing Brief at 14.

The evidence in this case shows that Petitioner is an individual who is manifestly untrustworthy. His license to practice medicine has been revoked in Washington and California based on findings that he engaged in sexual misconduct with three different patients. The decision of the State licensing authority in Washington has been upheld on appeal. Petitioner's misconduct is serious and I infer from the nature of these offenses that Petitioner poses a threat to the welfare of his patients. Petitioner persists in refusing to admit that he engaged in sexual misconduct, but instead has responded to the Washington Board's findings with unsubstantiated denials, false accusations against others, and a propensity to justify and legitimize inappropriate medical treatment practices. Petitioner's unsubstantiated assertions are not credible, and this is evidence of his untrustworthiness. The evidence shows also that Petitioner suffers from mental disorders, and that he has not sought treatment for these disorders. Under these circumstances, I am unwilling to leave to the determination of another State, including Washington, the question of when the exclusion should end, at least until a minimum nine year period has expired, during which time Petitioner can demonstrate he is trustworthy to resume his participation as a provider.

Upon the expiration of the nine years which I have found to be the minimum length of time necessary to establish his trustworthiness, an indefinite exclusion until

Petitioner's Washington license is fully restored is reasonable.[6] Alternatively, if Petitioner is able to practice in another State before his license in Washington is fully restored, then Petitioner's exclusion will last until the minimum nine year period expires, provided that the new State licensing authority has granted Petitioner a license without restriction after conducting a full review of all the legal and factual issues which were before the State of Washington and has determined that Petitioner is rehabilitated.[7]

In view of the length of the nine year minimum exclusion which I have determined is necessary in this case, it would not be fair to Petitioner to condition the termination of his exclusion on the reinstatement of his license in Washington. During the course of the nine years, Petitioner may choose to relocate to another State for reasons that are unrelated to his trustworthiness. In that event, it would be unreasonable to require that Petitioner obtain a medical license in Washington as a condition for terminating the exclusion period. Walter J. Mikolinski, Jr., DAB 1156 (1990). In addition, an exclusion of at least nine years would dissipate the I.G.'s concerns about forum shopping.

In Jerry D. Harrison, D.D.S., DAB CR203 (1992), aff'd DAB 1365 (1992), I fashioned a similar exclusion, with the difference that I excluded the health care provider in Harrison for a minimum period of five years rather than nine years. Harrison, like this case, was brought under section 1128(b)(4) and involved a provider who lost his

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[6] Petitioner's attorney represented that the Washington Superior Court's decision upholding the Washington Board's revocation decision is currently on appeal. Tr. 19. In the event that the Washington Board's revocation decision is reversed or vacated, he would be reinstated retroactive to the date of the exclusion. 42 C.F.R. § 1001.3005(a) (57 Fed. Reg. at 3343).

[7] At the expiration of the exclusion period, Petitioner may apply for, but is not guaranteed, reinstatement pursuant to Subpart F of Part 1001 of the 1992 Regulations. In the event that Petitioner applies for reinstatement into the Medicare and Medicaid programs, the I.G., in determining whether Petitioner has successfully undergone rehabilitation, should consider whether Petitioner has recognized his wrongdoing, has engaged in no further sexual misconduct, and has undergone appropriate treatment for mental disorders.

license based on sexual misconduct and who suffered from diagnosed mental disorders requiring treatment. However, Harrison is distinguishable from this case because the excluded provider provided affirmative evidence of trustworthiness that is not present in this case. In Harrison, the provider, unlike Petitioner, admitted that he had engaged in sexual misconduct, recognized that it was wrong, and was under active treatment for his mental disorders. The State of California in Harrison, upon full review of the facts, allowed Petitioner to practice in California, based on certain restrictions, including the successful completion of a period of probation lasting five years. Based on the fact that Petitioner was unable to apply for an unrestricted license for at least five years, I excluded him for at least that period.

The evidence in this case shows that Petitioner poses a more serious threat to the safety of program beneficiaries and recipients than the excluded provider in Harrison, justifying an exclusion that is substantially longer than the five year minimum period that I determined was reasonable in Harrison. In this case, the State licensing authority prohibited Petitioner from applying for reinstatement of his license for a period of nine years from the date of the exclusion. Petitioner refuses to acknowledge any wrongdoing, even when confronted with overwhelming evidence to the contrary, and the record is devoid or any evidence that Petitioner has taken even the first step towards rehabilitation. I have no assurance that Petitioner will not repeat this misconduct if afforded the opportunity to do so.

## CONCLUSION

Based on the material facts and the law, I conclude that the remedial purpose of section 1128 is satisfied by the following exclusion: Petitioner is excluded for not less than nine years. At any time thereafter that Washington gives him an unrestricted medical license, he may apply for reinstatement as a Medicare/Medicaid provider. Or, at any time after the nine years that another State gives, or has given him, an unrestricted medical license, and, prior to giving him an unrestricted medical license, that State examined all of the legal and factual issues

considered by the Washington Board and determined that Petitioner has provided proof of his rehabilitation, then he may apply for reinstatement as a Medicare/Medicaid provider.

/s/

Edward D. Steinman
Administrative Law Judge