Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Anthony Accaputo, Jr.,	)	DATE: January 12, 1993
	)	
Petitioner,	)	Docket No. C-92-001
	)	Decision No. CR249
- v. -	)	
	)	
The Inspector General.	)	
	)	

DECISION

On May 10, 1989, the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) issued a letter (Notice) stating that Petitioner was being excluded from participation in the Medicare and State health care programs[1] for a period of seven years. The I.G. alleged that Petitioner had been convicted of a criminal offense related to the delivery of an item or service under the Medicaid program. The I.G. contended that exclusions after such a conviction are required by section 1128(a)(1) of the Act, and that section 1128(c)(3)(B) of the Act provides that the minimum period of exclusion for such an offense is five years. In a letter dated August 21, 1991, which the I.G. received on September 26, 1991, Petitioner challenged his exclusion and requested a hearing.

I have considered the evidence of record, the parties' arguments, and the applicable law. I conclude that the seven year exclusion imposed by the I.G. is reasonable. Therefore, I sustain the exclusion imposed and directed against Petitioner.

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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.

BACKGROUND

The case was assigned originally to Administrative Law Judge (ALJ) Joseph K. Riotto. On October 3, 1992, Judge Riotto issued an Order to Show Cause in which he ordered the parties to submit briefs and supporting documentation on the issue of whether he should grant Petitioner's hearing request, in view of the length of time which had elapsed between the I.G.'s May 10, 1989 Notice and Petitioner's August 21, 1991 hearing request. The parties fully briefed this issue, and on January 28, 1992, Judge Riotto issued a Ruling finding that Petitioner had filed his request in a timely fashion. Judge Riotto found that Petitioner did not receive notice of the exclusion until some time in August 1991. He found also that Petitioner complied with the requirement to file a hearing request within 60 days from receipt of the Notice, and that Petitioner is therefore entitled to a hearing on the merits.

Pursuant to his January 28, 1992 Ruling, Judge Riotto scheduled a prehearing conference to take place by telephone on February 11, 1992. Prior to the conference, Petitioner moved to vacate his exclusion. During the February 11, 1992 conference, Petitioner argued that his exclusion should be vacated on the grounds that he did not have time to seek his remedies under the Act, since the I.G. did not notify him of the exclusion in a timely fashion. Judge Riotto issued an oral Ruling at the telephone conference, denying Petitioner's motion to vacate the exclusion. Prehearing Order and Schedule for Filing Motions for Summary Disposition dated February 14, 1992 at 2.

The I.G. subsequently filed a motion for summary disposition, accompanied by a supporting brief, and proposed exhibits. Petitioner filed a responsive brief accompanied by proposed exhibits. In his responsive brief, Petitioner requested an in-person hearing. The I.G. filed written objections to two of Petitioner's proposed exhibits.

Judge Riotto convened a telephone conference on May 27, 1992. During that conference, Judge Riotto issued an oral Ruling granting Petitioner's request for an in-person hearing, on the grounds that the case involved contested facts relating to Petitioner's trustworthiness. Order and Notice of Hearing dated June 15, 1992, at 2. In view of the fact that the case was proceeding to an in-person hearing, Judge Riotto deferred ruling on the I.G.'s objections to two of Petitioner's proposed exhibits.

On June 10, 1992, Petitioner filed a motion for discovery and request for documents from the I.G. The I.G. subsequently supplied some of the requested documents to Petitioner and filed a motion for a protective order in response to Petitioner's other requests for documents. Petitioner filed a motion to deny the I.G.'s motion for a protective order.

On July 1, 1992, the case was reassigned to me for hearing and decision. On July 20, 1992, I convened a prehearing conference. During that conference, the parties orally presented their respective positions regarding discovery. In addition, Petitioner argued that the equities in this case require that I backdate the commencement of the exclusion.

On July 23, 1992, I issued a Ruling in which I granted the I.G.'s motion for a protective order and denied Petitioner's request for discovery. Also, I ruled that my authority to hear and decide cases under section 1128 of the Act does not include the authority to change the commencement date of the exclusion. Samuel W. Chang, M.D., DAB 1198 (1990).

On August 24, 1992, I held a hearing in Boston, Massachusetts. Petitioner offered 12 exhibits into evidence. Although the I.G. had previously objected to two of these exhibits in a written memorandum, at the hearing the I.G.'s counsel stated that she did not object to any of the exhibits, and I admitted all 12 exhibits into evidence. Tr. 10-11.[2] The I.G. offered five exhibits. Petitioner did not object to any of the I.G.'s exhibits, and I admitted them into evidence. Tr. 11, 13-14.[3] Although Petitioner did not object to any of the

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[2] The transcript of the hearing will be referred to as Tr. (page).

[3] On page two of his January 28, 1992 Ruling Denying the I.G.'s Motion to Dismiss Request for Hearing, Judge Riotto admitted four exhibits offered by the I.G. which he referred to as I.G. Ex. 1, I.G. Ex. 2, I.G. 3, and I.G. Ex. 4. He also admitted one exhibit offered by Petitioner which he referred to as P. Ex. 1. The exhibits offered by the parties at the August 24, 1992 hearing were also numbered sequentially beginning with number 1. In order to avoid confusion, I will not change the numbers of the exhibits offered and admitted into evidence at the hearing, but I will refer to them as "hearing" exhibits. Citations to the hearing exhibits in

(continued...)

five exhibits offered by the I.G. at the hearing, he did object to the fact that the I.G. did not offer all of the exhibits on his list of proposed exhibits. Petitioner stated that the basis of his objection was that he wasn't notified that the I.G. would not offer all of the exhibits on his list. Tr. 12-13.[4]

A party is under no obligation to offer all of the exhibits proposed by that party, nor is there any obligation to notify the other party in advance that a particular exhibit will not be offered. Moreover, Petitioner has not shown that he has been prejudiced by this lack of notification. Indeed, the two proposed exhibits which the I.G. decided not to offer into evidence were copies of exhibits that had been offered by Petitioner and admitted into evidence as Petitioner Hearing Exhibit 9 and Petitioner Hearing Exhibit 10. Had the I.G. offered these exhibits into evidence, they would have been duplicative. Petitioner argued at the hearing that the I.G. should not be allowed to rely on exhibits offered by Petitioner. Tr. 13. I do not agree. There is no rule which prohibits a party from relying on evidence offered by the opposing party. Once an exhibit has been admitted into evidence, either party may rely on it.

At the conclusion of the August 24, 1992 hearing, I gave the parties the opportunity to file simultaneous posthearing briefs, and to request the opportunity to file reply briefs. The parties filed posthearing briefs, but did not request leave to file reply briefs.

ADMISSIONS

Petitioner admits that: (1) he was "convicted" of a criminal offense within the meaning of section 1128(a)(1) of the Act; and (2) the offense was "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) of the Act. Tr. 6.

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[3] (...continued)
this decision will be as follows:

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

[4] Petitioner renewed this objection in his posthearing brief.

ISSUES

The remaining issues are:

1. Whether, under the circumstances of this case, the I.G. is precluded from exercising his authority to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

2. Whether the seven year exclusion imposed and directed against Petitioner is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[5]

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

1. Petitioner has provided health care as the owner and operator of several different nursing homes. Tr. 24; P. H. Ex. 11.

2. On August 28, 1986, a grand jury of the Commonwealth of Massachusetts returned Indictment No. 046498 charging Petitioner with seven counts of violating the Massachusetts Medicaid False Claims Act. P. H. Exs. 7, 8.

3. Indictment No. 046498 alleged that Petitioner knowingly and willfully made and caused to be made false statements on cost reports submitted to the Massachusetts Rate Setting Commission for use in determining the rates of payment for services under the Medicaid program. The indictment alleged also that the fraudulent cost reports involved five different nursing homes and that the criminal activity took place during the period spanning from January 1, 1981 through December 31, 1981. P. H. Ex. 8.

4. On August 28, 1986, a grand jury of the Commonwealth of Massachusetts returned Indictment No. 060529 charging Petitioner with four counts of making false entries in the books of four different nursing homes at various

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

times during the period from January 1981 to February 1983. P. H. Exs. 9, 10.

5. On September 17, 1986, Petitioner pled not guilty to all counts in both indictments. P. H. Exs. 7/1, 9/1.

6. Pursuant to plea negotiations, Petitioner entered into an agreement in which he agreed to change his plea to count one of Indictment No. 046498 from not guilty to guilty, in exchange for a predetermined sentence recommended to the Suffolk County Superior Court by the Massachusetts Attorney General's Medicaid Fraud Control Unit. Tr. 23, 24, 43, 50, 51, 61; P. H. Ex. 7/4.

7. On September 7, 1988, Petitioner pled guilty to count one of Indictment No. 046498. P. H. Ex. 7/4.

8. In pleading guilty to count one of Indictment No. 0460498, Petitioner admitted that he knowingly and willfully made and caused to be made false statements on a cost report of a nursing home for the period from January 1, 1981 through December 31, 1981. P. H. Ex. 8/2.

9. On September 7, 1988, the Suffolk County Superior Court entered a judgment of guilty, based on its acceptance of Petitioner's plea. P. H. Ex. 7/4.

10. The Suffolk County Superior Court sentenced Petitioner to the House of Correction for two years, sentence suspended, and to probation for three years. In addition, the Suffolk County Superior Court ordered Petitioner to pay a fine and surfine totalling $6,125 and to pay restitution to the Medicaid program in the amount of $35,205 over the three year probationary period. P. H. Ex.7/4-5.

11. On September 7, 1988, the Suffolk County Superior Court ordered that each of the remaining six counts of Indictment No. 046498 and each of the four counts of Indictment No. 060529 be placed on file, without a change of plea. P. H. Exs. 7/5, 9/4.

12. Petitioner was represented by counsel throughout the criminal proceedings. P. H. Exs. 7, 9.

13. Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(a)(1) and 1128(i) of the Act.

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

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

15. The Secretary of DHHS 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. On May 10, 1989, the I.G. issued a Notice stating that Petitioner was being excluded from participation in the Medicare and Medicaid programs for seven years, pursuant to section 1128(a)(1) of the Act.

17. Petitioner did not receive notice of the exclusion until some time in August 1991. January 28, 1992 Ruling Denying I.G.'s Motion to Dismiss Request for Hearing at 6.

18. Petitioner's hearing request, dated August 21, 1991, was timely filed. January 28, 1992 Ruling Denying I.G.'s Motion to Dismiss Request for Hearing at 1, 6.

19. The Massachusetts Attorney General's Medicaid Fraud Control Unit did not have the authority to make a decision on behalf of the Secretary of DHHS that would frustrate the strong federal interest in protecting the integrity of the federally-funded health care programs.

20. A defendant in a criminal proceeding does not have to be advised of all the possible consequences, such as temporarily being barred from government reimbursement for his professional services, which may flow from his plea of guilty.

21. Sections 1128(a)(1) and 1128(i) of the Act, read together, provide adequate notice of the consequences which could result from conviction of an offense related to the delivery of an item or service under the Medicaid program.

22. The determination of the I.G. to impose and direct a seven year exclusion in this case does not violate the prohibition against double jeopardy under the United States Constitution.

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

24. While sections 1128(a)(1) and 1128(c)(3)(B) set a minimum mandatory period of exclusion of five years in cases of persons convicted of criminal offenses related to the delivery of a health care item or service under the Medicaid program, the I.G. may direct and impose an exclusion of more than the minimum mandatory period in appropriate circumstances.

25. Regulations published on January 29, 1992 do not apply retroactively to establish a standard for adjudicating the reasonableness of the exclusion in this case.

26. 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.

27. The offense of which Petitioner was convicted is serious.

28. The seriousness of Petitioner's criminal offense is reflected in the sentence imposed by the Suffolk County Superior Court. FFCL 10.

29. The Medicaid program suffered substantial financial loss as a result of Petitioner's criminal activity. FFCL 10.

30. Throughout this proceeding, Petitioner attempted to minimize his culpability by characterizing the false statements as unintentional errors. Tr. 69, 73-75, 87-88.

31. Petitioner's disavowal of criminal intent is not credible.

32. Petitioner engaged in calculated fraud of the Medicaid program motivated by the desire for personal gain. Petitioner's unlawful conduct manifests a high level of culpability. FFCL 8, 31.

33. Petitioner's testimony denying that he intentionally defrauded the Medicaid program is additional evidence of his untrustworthiness. FFCL 31.

34. Petitioner's attempt to minimize his culpability by characterizing his wrongdoing as negligence rather than intentional fraud shows that he still does not fully accept the wrongfulness of his criminal activity.

35. Petitioner's license to practice pharmacy was suspended because Petitioner did not comply with a requirement to report to authorities that a registered pharmacist was working for him. Tr. 79-81. This shows that Petitioner has engaged in a pattern of misconduct involving a failure to comply with reporting requirements to government authorities, and it is additional evidence of his untrustworthiness.

36. Petitioner was under treatment for an anxiety disorder at the time he committed the offense underlying his conviction. P. Ex. 2.

37. There is no evidence which leads me to conclude that Petitioner's anxiety disorder reduced his culpability.

38. There is no evidence that the Suffolk County Superior Court determined that Petitioner's anxiety disorder reduced his culpability.

39. The fact that Petitioner responded to stress by engaging in criminal activity is probative of his untrustworthiness rather than his trustworthiness.

40. Petitioner's expressions of remorse and Petitioner's probation officer's assurances that Petitioner is trustworthy are outweighed by the strong evidence showing that Petitioner is untrustworthy. P. Ex. 1; Tr. 85, 89.

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

42. The seven year exclusion imposed and directed by the I.G. is reasonable.

DISCUSSION

I. The I.G. was required to exclude Petitioner from participation in the Medicare program and to direct his exclusion from the Medicaid program for a minimum of five years pursuant to the mandatory exclusion provisions of the Act.

The Act mandates, at section 1128(a)(1), an exclusion of:

> Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under . . . [Medicare] or under . . . [Medicaid].

The Act further requires, at subsection 1128(c)(3)(B), that in the case of an exclusion imposed and directed pursuant to subsection 1128(a)(1), the minimum term of such exclusion shall be five years.

The I.G.'s authority to impose and direct an exclusion under section 1128(a)(1) is based on the fulfillment of the following statutory criteria: (1) an individual or entity must be "convicted" of a criminal offense within the meaning of the Act, and (2) the conviction must be "related to the delivery of an item or service" under the Medicare or Medicaid programs.

In this case, the record shows that on August 28, 1986, a grand jury of the Commonwealth of Massachusetts returned Indictment No. 046498 charging Petitioner with seven counts of violating the Massachusetts Medicaid False Claims Act. FFCL 2. On that same day, a grand jury of the Commonwealth of Massachusetts returned Indictment No. 060529, charging Petitioner with four counts of making false entries in the books of four nursing homes. FFCL 4. On September 17, 1986, Petitioner pled not guilty to all counts in both indictments. FFCL 5. Pursuant to plea negotiations, Petitioner entered into an agreement in which he agreed to change his plea to count one of Indictment No. 046498 from not guilty to guilty, in exchange for a predetermined sentence recommended to the Suffolk County Superior Court by the Massachusetts Attorney General's Medicaid Fraud Control Unit. FFCL 6. On September 7, 1988, Petitioner pled guilty to count one of Indictment No. 046498, and the Suffolk County Superior Court accepted that plea. FFCL 7, 9. In addition, the Suffolk County Superior Court ordered that each of the remaining six counts of Indictment No. 046498 and each of the four counts of Indictment No. 060529 be placed on file, without a change of plea. FFCL 11.

Based on these facts, Petitioner admits that he was "convicted" of a criminal offense within the meaning of section 1128(a)(1) of the Act. He admits also that the offense of which he was convicted was "related to the delivery of an item or service" under the Medicaid program. Tr. 6. In addition, he does not dispute that the mandatory exclusion provisions of the Act require the I.G. to exclude health care providers, who have been convicted of program-related offenses, for a minimum period of five years. Tr. 7. However, he does not concede that the mandatory exclusion provisions can be properly applied to this case. Petitioner contends that, under the circumstances of this case, the I.G. is precluded from exercising his authority to exclude him pursuant to section 1128(a)(1) of the Act. Tr. 7;

Petitioner's Posthearing Brief at 2-7. During the hearing, I issued an oral Ruling in which I held that the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) apply to this case. Tr. 67. Petitioner addressed this issue in his posthearing brief, and upon consideration of those arguments, I reaffirm my ruling, for the reasons discussed below.

A. The Massachusetts Attorney General's Medicaid Fraud Control Unit does not have the authority to act on behalf of the Secretary of DHHS in a way that would frustrate the strong federal interest in protecting the integrity of the federally-funded health care programs.

In support of his position, Petitioner argues that he should not be excluded from participation in the Medicare and Medicaid programs because at the time he entered into his plea agreement, the Massachusetts Attorney General's Medicaid Fraud Control Unit (Medicaid Fraud Control Unit) did not recommend to the Suffolk County Superior Court that an exclusion should be part of his sentence. Petitioner contends that the Medicaid Fraud Control Unit receives funds from DHHS and is subject to federal laws and regulations. Based on this, Petitioner argues that the Medicaid Fraud Control Unit is an agent of DHHS and that it has the authority to act on behalf of DHHS in negotiating plea agreements in criminal proceedings prosecuted by the Commonwealth of Massachusetts.

Petitioner contends that he changed his plea from not guilty to guilty in exchange for a predetermined sentence that was recommended to the Suffolk County Superior Court by the Medicaid Fraud Control Unit. The Medicaid Fraud Control Unit did not recommend that exclusion from Medicare and Medicaid be part of Petitioner's sentence. Petitioner reasons that at the time he entered into his plea bargain with an Assistant Attorney General from the Medicaid Fraud Control Unit, he was in effect entering into an agreement with an agent of DHHS. According to Petitioner, DHHS is now precluded from excluding him from the Medicare and Medicaid programs because its agent, the Medicaid Fraud Control Unit, did not recommend that an exclusion should be part of his sentence at the time that the plea agreement was reached. Petitioner's Posthearing Brief at 2-7; Tr. 42-50, 62-66.

Petitioner's argument is premised on his assertion that at the time he entered into his plea bargain with an Assistant Attorney General from the Medicaid Fraud Control Unit, the Assistant Attorney General acted as an agent for DHHS in reaching a plea agreement. Even if I were to accept Petitioner's assertions that the Medicaid

Fraud Control Unit receives some federal funding and is subject to some federal regulation for the sake of argument, I do not accept that this leads to the conclusion that the Medicaid Fraud Control Unit acts as an agent of DHHS in prosecuting criminal offenses, as Petitioner contends.

Section 1128 of the Act is a federal statute which Congress enacted to provide civil remedies independent from punishments which might be applied to a party under State criminal law. There is nothing in section 1128 which suggests that Congress intended that the authority to impose and direct exclusions be subject to limitations imposed by State prosecutors. Petitioner's program-related conviction triggered a mandatory exclusion under a federal law which was designed to protect a federal interest in protecting federally-funded health care programs from health care providers who cannot be trusted to handle program funds. I conclude that the State prosecutor did not have the authority to make a decision on behalf of the Secretary of DHHS that would frustrate the strong federal interest in protecting the integrity of federally-funded health care programs.

B. The I.G. is not barred from excluding Petitioner in this case because Petitioner did not know that his criminal conviction would result in an exclusion.

Petitioner argues also that he should not be subject to an exclusion under section 1128(a)(1) because the State prosecutor did not inform him that he would be excluded from the Medicare and Medicaid programs as a result of his conviction at the time he agreed to change his plea from not guilty to guilty. Petitioner asserts that he was prejudiced because he did not have full knowledge of the consequences of entering a guilty plea. Petitioner states that had he known that he would have been excluded as a result of his conviction, he might not have agreed to plead guilty to violating the Medicaid False Claims Act. Petitioner's Posthearing Brief at 3, 6; Tr. 23-24, 46, 50-52.

This argument is essentially the same as an argument made by a petitioner in the case of Douglas Schram, R.Ph., DAB CR215 (1992), aff'd DAB 1372 (1992). In that case, the petitioner argued that his due process rights were violated because he was deprived of the notice necessary to understand the possible consequences of his guilty plea. The petitioner asserted that had he known of the consequences of his plea, he would have pled differently. The ALJ rejected this argument. In rejecting this argument, the ALJ cited U.S. v. Suter, 755 F.2d 523, 525

(7th Cir. 1985) for the proposition that a defendant in a criminal proceeding does not have to be advised of all the possible consequences, such as temporarily being barred from government reimbursement for his professional services, which may flow from his plea of guilty. DAB CR215, at 6. An appellate panel of the DAB reviewed the ALJ's decision, and found that the "ALJ correctly held that, as a defendant, Petitioner did not have to be advised of all the possible consequences of his plea". DAB 1372, at 11. The appellate panel also went on to say:

> More importantly, Petitioner was on notice that his guilty plea could lead to a mandatory exclusion. Sections 1128(a)(1) and 1128(i), read together, provide adequate notice of the consequences which could result from conviction of a program-related offense. If Petitioner's complaint is with the actions of the [State] prosecutor . . . the proper forum for this complaint is . . . [the] State court.

DAB 1372, at 12. The DAB has held in other cases that arguments about the process leading to a Petitioner's criminal conviction are completely irrelevant to an exclusion proceeding. Charles W. Wheeler, DAB 1123 (1990); David S. Muransky, D.C., DAB 1227 (1991). In view of the foregoing, Petitioner's argument that the I.G. is precluded from imposing an exclusion in this case because Petitioner did not know that his conviction would result in an exclusion is without merit.

C. The exclusion in this case does not violate the constitutional prohibition against double jeopardy.

In addition, Petitioner argues that application of the mandatory exclusion provisions to this case violates the Double Jeopardy Clause of the United States Constitution because he has already been punished in the criminal case, and the effect of the exclusion is so extreme as to constitute a second punishment. Petitioner's Posthearing Brief at 7; Tr. 44.

The Supreme Court has held that, under some circumstances, the imposition of civil penalties could constitute double jeopardy where:

> . . . [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

United States v. Halper, 490 U.S. 435 (1989). In this case, the primary purpose of this exclusion is not to punish the Petitioner, but to protect the Medicare and Medicaid programs from future misconduct by a provider who has shown himself to be untrustworthy. Federal district courts have specifically found that exclusions under section 1128 are remedial in nature, rather than punitive, and do not violate the double jeopardy provisions of the constitution. Manocchio v. Sullivan, 768 F. Supp. 814 (S.D. Fla. 1991); Greene v. Sullivan, 731 F. Supp. 838 (E.D. Tenn. 1990).

Petitioner has not established that his seven year exclusion is the type of government action contemplated by the Halper doctrine where the civil penalty is so extreme that it bears no rational relation to the government's remedial goals. As I discuss more fully below, the evidence in this case establishes that a seven year exclusion is proportionate to the harm done by Petitioner to the Medicaid program and the need to preclude repetition of his behavior. In view of the remedial nature of the exclusion, I find no merit to Petitioner's double jeopardy argument. See John N. Crawford, M.D., DAB 1324, at 6-8 (1992) (where an appellate panel of the DAB found that a six year exclusion imposed pursuant to section 1128(a)(1) of the Act did not violate the constitutional prohibition against double jeopardy.)

D. The I.G. properly classified Petitioner's exclusion as falling under the mandatory exclusion authority.

Petitioner contends also that the I.G. should have treated his criminal conviction as the basis for a permissive exclusion action. Petitioner's Motion for Oral Arguments and Summary Disposition at 5. I do not agree. Where, as here, an individual has been convicted of a program-related criminal offense, the law directs the I.G. to impose an exclusion of not less than five years. Even where the same conviction could give rise to mandatory as well as permissive exclusions, it is well settled that the I.G. must impose the mandatory exclusion when the conviction falls within the meaning of section 1128(a)(1). Schram, DAB 1372, at 12-13, citing Travers v. Sullivan, 791 F. Supp. 1471 (E.D. Wash. 1992).

In this case, there is no dispute that Petitioner was convicted of a criminal offense which is related to the delivery of an item or service under the Medicaid program. I conclude that the I.G. properly classified Petitioner's conviction as falling under the mandatory exclusion authority. Under these circumstances, the I.G.

had no choice but to apply sections 1128(a)(1) and 1128(c)(3)(B) of the Act and to exclude Petitioner from participation in the Medicare and Medicaid programs for at least five years.

II. A seven year exclusion is appropriate and reasonable in this case.

The I.G. excluded Petitioner for a period of seven years. The exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act require that a health care provider that has been convicted of a program-related offense be excluded for a minimum period of five years. The remaining issue in this case is whether a seven year exclusion is reasonable. The parties disagree as to the reasonableness of the length of the seven year exclusion imposed and directed by the I.G.

A. Regulations published on January 29, 1992 do not establish criteria which govern my decision on the reasonableness of the length of the exclusion.

On January 29, 1992, the Secretary of DHHS published regulations which, among other things, establish criteria to be employed by the I.G. to determine the length of exclusions imposed pursuant to sections 1128(a) and (b) of the Act. 42 C.F.R. Part 1001; 57 Fed. Reg. 3298, 3330-43. These regulations include a section which establishes criteria to be employed by the I.G. to determine the length of exclusions to be imposed pursuant to section 1128(a)(1). 42 C.F.R. § 1001.102; 57 Fed. Reg. 3331.

In considering the reasonableness of the length of the seven year exclusion, a threshold issue is whether the regulations published by the Secretary of DHHS 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.

The I.G. asserts that, as the new regulations were effective when they were published on January 29, 1992, they apply to any exercise of ALJ authority on or after that date. It is the I.G.'s position that the new regulations require me to uphold the seven year exclusion imposed on Petitioner in this case. I.G. Motion for Summary Disposition at 7-10. Petitioner did not address the issue of whether the regulations can be applied retroactively to I.G. determinations made prior to the regulations' date. He did, however, cite the new regulations to support his position that the I.G. should have treated his conviction as the basis for a permissive

exclusion action. Petitioner's Motion for Oral Arguments and Summary Disposition at 5.

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. Notwithstanding the fact that it arises under section 1128(a)(1) rather than under section 1128(b)(4) of the Act, I conclude that application of the new regulations to the present case would similarly materially alter Petitioner's substantive rights. The exclusion determination in this case was made on May 10, 1989. 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.[6]

B. 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(a)(2) 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 it to be remedial in application. The remedial purpose of the exclusion law is to enable the Secretary of DHHS to protect federally-funded health care programs from misconduct. Such misconduct includes fraud or theft against federally-funded health care programs. See S. Rep. No. 109, 100th Cong., 1st Sess. 1, reprinted in 1987 U.S.C.C.A.N. 682.

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[6] In light of the Bassim decision, I do not need to decide the issue of whether the regulations establish criteria which govern ALJs' review of exclusion cases. I note, however, that in Steven Herlich, DAB CR197 (1992), the ALJ reasoned that the regulation cited by the I.G. establishes criteria to be used by the I.G. in making exclusion determinations, but does not establish criteria binding on an ALJ in conducting a de novo review of the reasonableness of the exclusion. See also Charles J. Barranco, M.D., DAB CR187 (1992).

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 and recipients. Thus, untrustworthy providers are removed from positions which provide a potential avenue for causing future harm to the programs or to their 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 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.

In weighing these factors, I conclude that a lengthy exclusion is needed in this case to satisfy the remedial purposes of the Act, and the seven year exclusion imposed and directed by the I.G. is reasonable. In reaching this determination, I recognize that Petitioner has already suffered financial losses as a result of the related criminal proceeding and that a seven year exclusion may have a severe financial impact on Petitioner. Tr. 24-25, 27. However, the remedial considerations of the Act must take precedence over the financial consequences that an exclusion may have on Petitioner. Willeta J. Duffield, DAB CR225 (1992).

C. The offense which formed the basis of Petitioner's criminal conviction is serious.

The evidence of record shows that on August 28, 1986, a grand jury of the Commonwealth of Massachusetts returned an indictment charging Petitioner with seven counts of knowingly and willfully making and causing to make false statements on cost reports submitted to the Massachusetts Rate Setting Commission for use in determining the rates of payment for services under the Medicaid program. The indictment alleged that the fraudulent cost reports involved five different nursing homes and that the criminal activity took place during the period spanning from January 1, 1981 through December 31, 1981. FFCL 2, 3. Also, Petitioner was charged on that same day in a separate indictment with four counts of making false entries in the books of four nursing homes at various times during the period from January 1981 to February 1983. FFCL 4. Pursuant to a plea agreement, Petitioner pled guilty to one count of knowingly and willfully making and causing to make false statements on the cost report of a nursing home for the period from January 1, 1981 through December 31, 1981. FFCL 6, 7, 8.[7]

Citing the I.G.'s May 10, 1989 Notice, Petitioner stated that the I.G.'s determination to exclude him for seven years was based on the fact that he was charged with seven counts of making false statements on cost reports of five nursing homes and four counts of making false entries in the books of four nursing homes. Petitioner points out that while it was true that he was charged with these offenses, he pled guilty to and was convicted of only one count of making false statements on the cost report of one nursing home. He contends that the I.G. improperly based his determination to exclude him for seven years on allegations to which he did not plead guilty and which did not form the basis of his conviction. Petitioner's Posthearing Brief at 7-8.

Petitioner argues that the I.G.'s exclusion determination is improper for the additional reason that he was not afforded the opportunity to submit information on

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[7] It is unclear whether the count to which Petitioner pled guilty alleged that Petitioner filed more than one cost report containing false statements for the period January 1, 1981 through December 31, 1981. For the purpose of this decision, I will assume that Petitioner pled guilty to filing only one cost report containing false statements covering the period from January 1, 1981 through December 31, 1981.

mitigating circumstances prior to the time that the I.G. reached his exclusion determination. The I.G. sent a preliminary exclusion notice letter to Petitioner on January 18, 1989 which invited Petitioner to provide information on mitigating circumstances. Since this letter was sent to an incorrect address, Petitioner did not receive it. January 28, 1992 Ruling Denying I.G.'s Motion to Dismiss Request for Hearing at 4. Petitioner now argues that the I.G. improperly excluded him for seven years without giving him the opportunity to provide information on mitigating circumstances prior to the time that he was excluded. Petitioner's Motion for Oral Arguments and Summary Disposition at 1-2; Tr. 22.

I disagree with Petitioner's arguments. Under section 205(b) of the Act, Petitioner is entitled to a de novo hearing. I am required to make an independent evaluation of the question of whether the exclusion, as measured against the evidence adduced by both parties and the Act's remedial purpose, is reasonable. The purpose of this hearing is not to decide whether the I.G. correctly determined to impose the exclusion. Therefore, the thought processes of the I.G. or members of the I.G.'s staff in reaching the determination to exclude Petitioner for a particular length of time are not relevant to my decision. I must independently judge the exclusion on its merits, not in terms of whether the I.G. properly considered the evidence or properly followed its own internal procedures in imposing an exclusion. See Arthur V. Brown, DAB CR252, at 14 (1992).

In evaluating the evidence, I find that the offense of which Petitioner was convicted, the one count violation of the Massachusetts Medicaid False Claims Act, is serious. In pleading guilty to this offense, Petitioner admitted that he knowingly and willfully made false statements on a cost report of a nursing home for the period January 1, 1981 through December 31, 1981. FFCL 8. In committing this offense, Petitioner attacked the nerve center of the Medicaid program.

The Medicaid program is vulnerable to unscrupulous providers. Since the Medicaid program is responsible for processing numerous claims, it is impossible for it to audit every claim as it is filed. It depends on the honesty and good faith of the providers of services who submit claims to uphold the integrity of the program. Petitioner's unlawful conduct directly relates to program fiscal integrity and, therefore, is the type of misconduct Congress sought to prevent when it enacted section 1128 of the Act.

The seriousness of Petitioner's criminal offense is reflected in the sentence imposed by the Suffolk County Superior Court pursuant to a plea agreement between Petitioner and the prosecutor. The Suffolk County Superior Court sentenced Petitioner to the House of Correction for two years, sentence suspended, and to probation for three years. In addition, the Suffolk County Superior Court ordered Petitioner to pay a fine and surfine totalling $6,125 and to pay restitution to the Medicaid program in the amount of $35,205 over the three year probationary period. FFCL 10.

In his April 23, 1992 response to the I.G.'s statement of facts and conclusions of law, Petitioner denied that there was a total of $35,000 damage to the Medicaid program resulting from the false statements referred to in the count to which he pled guilty. However, he testified at the hearing that he did not know the amount of the monetary damage to the Medicaid program resulting from his criminal activity, but that he "was willing to accept" the amount of restitution ordered by the court. Tr. 89. I conclude that the fact that the Suffolk County Superior Court ordered Petitioner to pay restitution in the amount of $35,205 to compensate the Medicaid program for its monetary loss gives rise to an inference that the financial damage to the program resulting from Petitioner's criminal activities was at least that amount. Petitioner has not presented any evidence to overcome this inference.

The demand for Medicaid's scarce resources is great. Payments by Medicaid for any claim which is not properly reimbursable under Medicaid regulations results in financial damage to the program. In this case, Petitioner illegally diverted a substantial amount of program funds and this resulted in a serious financial loss to the Medicaid program. Certainly, the fact that Petitioner was convicted of a criminal offense involving approximately $35,000 of Medicaid funds, raises serious questions about his ability to be trusted to handle Medicare and Medicaid funds.

D. Petitioner's refusal to admit that he intentionally defrauded the Medicaid program is additional evidence of his untrustworthiness.

Petitioner argues that he is trustworthy because he has accepted full responsibility for his actions and he has shown remorse for his misconduct. Petitioner's Posthearing Brief at 8. I do not agree that the record supports these assertions.

In his testimony at the hearing, Petitioner consistently attempted to minimize his culpability by characterizing the false statements as unintentional errors which were the product of time pressures he was under to file the cost report by the required deadline. Petitioner testified that an outside accounting firm prepared the cost report and that individuals in the accounting firm actually made the false statements. Tr. 69, 73. Petitioner acknowledged that it was his responsibility to review the cost report for accuracy before it was submitted to the Rate Setting Commission, but he claimed that he did not do so because he was under a filing deadline. Tr. 74. Thus, although Petitioner admits that he was negligent in his failure to check the cost report before it was submitted, he consistently refused to admit that he intentionally defrauded the Medicaid program. Tr. 75, 87-88.

I find that Petitioner's attempt to minimize his culpability by characterizing his misconduct as merely failure to supervise the shoddy work of other individuals is unpersuasive. In 1988, Petitioner, of his own free will and with the advice of counsel, chose to plead guilty to a charge that he "knowingly and wilfully" violated the Massachusetts Medicaid False Claims Act. This amounts to an admission that he intentionally engaged in criminal activity. Petitioner was not forced to enter into a plea agreement with the Commonwealth of Massachusetts. He voluntarily gave up the right to have the facts underlying the allegations contained in the indictments examined in court when he thought that it was in his interest to do so. Now, insulated from the repercussions of the criminal justice system, Petitioner attempts to achieve the best of both worlds by denying that he had criminal intent at the time he engaged in the criminal activity. This attempt to excuse his criminal conduct is highly suspect.

In addition, Petitioner's disavowal of criminal intent is belied by other statements made by Petitioner at the hearing. When he was asked at the hearing who received the overpayment resulting from the false statements on the cost report, Petitioner admitted that he received the overpayment. He testified that he received that overpayment as part of his salary and admitted that his salary should not have been included in the cost report. Tr. 89-90. Additionally, Petitioner testified that he was going through a difficult divorce at the time the false statements were made, stating that, ". . . what I did was I tried to make it so that my ex-wife couldn't get as much money as she wanted from me". Tr. 70. These statements suggest that Petitioner's divorce dispute

created a motive to improperly include his salary in the cost report. Petitioner's assertions that the false statements were merely a mistake is not credible, particularly when viewed in context with these other statements made by Petitioner.

I find that the weight of the evidence establishes that Petitioner engaged in calculated fraud of the Medicaid program motivated by the desire for personal monetary gain. His unlawful conduct establishes a propensity to engage in harmful conduct when it suits his ends, manifesting a high level of culpability.[8] Petitioner asserts that he was not the owner or an officer of the particular nursing home named in the count to which he pled guilty, and that his ex-partner, Walter Mikolinski, actually signed the cost report. Petitioner's Hearing Request dated August 21, 1991; Tr. 34, 73. Under the circumstances of this case, the fact that Petitioner did not actually sign the cost report containing the false statements and the fact that he was not an owner or a corporate officer of the nursing home named in the count to which he pled guilty does not reduce Petitioner's level of culpability. It was Petitioner's responsibility to ensure that the cost report contained accurate information. Tr. 74. He deliberately submitted a cost report containing false information in order to defraud the Medicaid program.

I find also that Petitioner's testimony denying that he intentionally defrauded the Medicaid program is additional evidence of his untrustworthiness. Petitioner may have thought that claiming that the false statements were unintentional mistakes would minimize his culpability in my eyes. However, this testimony has the opposite effect. I find troubling Petitioner's testimony disavowing criminal intent because it demonstrates a

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[8] Even if I were to accept that the false statements resulted from a mistake made by an accounting firm which Petitioner did not review, I would still find that Petitioner manifested a high level of culpability. Petitioner admitted at the hearing that he was aware in 1983 that the accounting firm which prepared the cost report was making mistakes. Tr. 74. Although Petitioner stated that he might have corrected the misstatements, he did not produce any evidence to substantiate this claim. Tr. 75. Assuming for the sake of argument that Petitioner did not intend to make any false statements, his failure to provide evidence showing that he corrected the mistakes upon learning about them reveals a propensity for dishonesty.

willingness to dissemble and misrepresent facts under oath. This testimony shows that Petitioner is willing to say whatever he believes will impress a fact-finder, regardless of its truthfulness. Petitioner's present mischaracterization of the facts underlying his 1988 conviction is evidence that Petitioner continues to be untrustworthy, and that he therefore still poses a threat to the Medicare and Medicaid programs.

In addition, while Petitioner gives lip service to acknowledging responsibility for his misconduct, the nature and tenor of his testimony reveals that he has not done so. Petitioner is still attempting to minimize his past wrongdoing by claiming that it was the result of negligence rather than intentional fraud.

Petitioner has offered me no meaningful assurance that he will not engage in wrongdoing in the future. I recognize that Petitioner has expressed remorse and that he testified that he is sorry for his wrongdoing. Tr. 85, 89. However, in view of the fact that Petitioner still does not admit that he intended to defraud the program, these expressions of remorse, proclaimed at a time when it plainly suited his self-interest, ring hollow.

E. The suspension of Petitioner's license to practice pharmacy is additional evidence of his untrustworthiness.

I find that there is sufficient evidence to justify a lengthy exclusion based on Petitioner's criminal activity and his refusal to admit that he intended to defraud the Medicaid program. However, the record contains additional evidence which is damaging to Petitioner. Petitioner testified that he had been a registered pharmacist in the past, but that his license to practice pharmacy was suspended in 1982. Petitioner stated that the reason for the suspension was that he did not comply with a requirement to report to authorities that a registered pharmacist was working for him. According to Petitioner, his license to practice pharmacy has not been reinstated since it was suspended in 1982. Tr. 79-81. The misconduct which led to the suspension of Petitioner's pharmacy license is troubling because it shows that Petitioner has engaged in a pattern of misconduct involving a failure to comply with reporting requirements to government authorities.

F. Petitioner's treatment for an anxiety disorder does not reduce his culpability.

Petitioner states that he was under stress in his personal life at the time he engaged in the criminal

activity underlying his conviction and that he was under the care of a psychiatrist at that time. He claims that the trial judge took this into consideration when he accepted the sentence recommended by the prosecutor. Petitioner asserts also that he has worked through his emotional problems and that he has changed his ways. Tr. 72; Petitioner's Motion for Oral Arguments and Summary Disposition at 5-6.

In support of these assertions, Petitioner submitted a document dated February 27, 1984 written by S.D. Zigelbaum, M.D. This document indicates that Petitioner was treated for an anxiety disorder by Dr. Zigelbaum during the period from 1978 to 1982. According to Dr. Zigelbaum, Petitioner's anxiety disorder was precipitated by family problems, legal problems, and the closing of his pharmacy business. Dr. Zigelbaum stated also that termination of therapy "was a mutually agreed upon experience and represented the successful 'working through' of [Petitioner's] emotional distress". P. H. Ex. 2.

While I accept that Petitioner was under treatment for an anxiety disorder at the time he engaged in the criminal activity, there is no evidence which leads me to conclude that Petitioner's anxiety disorder reduced his culpability. There is no evidence that this condition caused Petitioner to engage in fraud. Nor is there evidence that, as a result his anxiety disorder, Petitioner was unable to comprehend the nature of his acts. On the contrary, Dr. Zigelbaum stated that Petitioner "at no time, displayed a significant or disabling emotional illness". P. H. Ex. 2. In addition, although Petitioner claims that the judge presiding over his criminal proceeding in the Suffolk County Superior Court considered his anxiety disorder in determining his sentence, he did not submit any evidence substantiating that the judge determined that Petitioner had a mental or emotional condition before or during the commission of his offense that reduced his culpability. I accept that Petitioner may have been under stress at the time that he defrauded the Medicaid program. However, I find that the fact that he responded to this stress by engaging in criminal activity is probative of his untrustworthiness rather than his trustworthiness.

G. <u>The favorable statements made by Petitioner's probation officer do not derogate from my conclusion that a seven year exclusion is reasonable in this case</u>.

I conclude that the seven year exclusion imposed and directed by the I.G. in this case is reasonable. In

reaching this conclusion, I am cognizant that the record contains a letter from Petitioner's probation officer, dated February 24, 1992, stating that Petitioner has conformed to all terms and conditions of probation, that he has been cooperative, and that he understands his prior mistakes. P. H. Ex. 1.[9] By saying that I do not find him to be a trustworthy provider of care, I am not belittling any efforts Petitioner has made to comply with the terms of his sentence. Although I do not doubt the good faith of Petitioner's probation officer, his assurances as to trustworthiness are outweighed by the strong evidence showing that Petitioner has further to go before he can be considered completely trustworthy. The evidence in this case establishes that Petitioner was convicted of Medicaid fraud for making false statements on a cost report required by the Medicaid program. These misstatements were deliberately made by Petitioner in a calculated effort to obtain money to which he was not entitled. Petitioner continues to attempt to misrepresent the facts underlying his conviction and he continues to attempt to minimize his culpability. In addition, Petitioner has shown a pattern of running afoul of the law, as demonstrated by the suspension of his pharmacy license for failure to meet reporting requirements. I am unwilling to gamble that my assessment of Petitioner is incorrect based on Petitioner's representations that he is a changed person or on his probation officer's assertions that Petitioner understands his prior mistakes. I conclude that as a safeguard and protection against future fraud, a seven year exclusion is reasonable.

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[9] Although Petitioner's probation officer stated that Petitioner has complied with his terms of probation, the record shows that Petitioner's three year probation sentence has been extended for a year. This was done because Petitioner has failed to comply with the court's order to pay the restitution during the three year probationary period. Petitioner testified that as of the August 24, 1992 hearing, he had paid only $2,000 of the $35,205 he owes in restitution. Petitioner explained that the reason for his not paying more is that the exclusion has had a devastating effect on his ability to earn a livelihood. Tr. 33. In view of the fact that Petitioner's probation officer has attested to Petitioner's cooperation during the probationary period, and in the absence of evidence showing that Petitioner has the financial ability to pay more restitution than he has, I refrain from drawing a negative inference as to Petitioner's trustworthiness, based on the fact that he has paid only $2,000 as of the August 24, 1992 hearing.

CONCLUSION

Based on the evidence in this case and the law, I conclude that the I.G. had the authority to exclude Petitioner pursuant to section 1128(a)(1) of the Act, and that a minimum period of exclusion of five years is mandated by federal law. In addition, I conclude that the I.G.'s determination to exclude Petitioner for seven years is reasonable. I therefore sustain the exclusion.

/s/

Charles E. Stratton
Administrative Law Judge