Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	DATE: May 24, 1993
Michael D. Tempel,	)	
	)	
Petitioner,	)	Docket No. C-290
	)	Decision No. CR266
- v.-	)	
	)	
The Inspector General.	)	
	)	

DECISION

On August 7, 1990, 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 being excluded based on a determination by the Iowa State Board of Medical Examiners (Iowa licensing authority) to revoke Petitioner's license to practice medicine in the State of Iowa. The I.G. further advised Petitioner that his exclusion would remain in effect until he obtains a valid license to practice medicine in the State of Iowa. In a letter dated August 17, 1990, Petitioner challenged the exclusion and requested a hearing.

I have considered the evidence of record, the parties' arguments, and the applicable law. I conclude that the I.G. had authority to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act. I conclude also that regulations at 42 C.F.R. Part 1001, published and effective on January 29, 1992, do not apply retroactively

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[1] "State health care program" is defined by section 1128(h) of the Act 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.

to establish a standard for adjudicating the length of the exclusion in this case. In addition, 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 until any State licensing authority grants him a medical license without restriction after conducting a full review of all the legal and factual issues which were before the State of Iowa and after determining that Petitioner's mental disorder has resolved sufficiently to enable him to practice medicine competently.

In the alternative, if I were to conclude that the criteria of the Part 1001 regulations published on January 29, 1992 apply to establish a standard for adjudicating the length of the exclusion in this case, then I would find that 42 C.F.R. § 1001.501(b) mandates that the exclusion in this case must be coterminous with the indefinite license revocation imposed by the Iowa licensing authority and I would sustain the exclusion imposed and directed against Petitioner.

PROCEDURAL BACKGROUND

I convened a prehearing conference in this case on October 19, 1990. During that conference, the I.G. asserted that there are no disputed issues of material fact and that the case could be resolved by summary disposition. I established a schedule for the filing of briefs on the I.G.'s motion for summary disposition.

Before the I.G. could file the motion, Petitioner requested a stay of the proceedings in this case pending the outcome of a case before the United States District Court for the District of Alaska. Petitioner alleged that the outcome of this case would affect the status of his medical license in the State of Alaska and that this would, in turn, determine the status of his medical license in the State of Iowa. I granted Petitioner's request for a stay until January 22, 1991. When that time came and Petitioner did not renew his request, I ended the stay, although the court case apparently was still pending. On February 20, 1991, the I.G. filed a written motion for summary disposition and Petitioner filed a responsive brief on March 5, 1991.

At Petitioner's request, I subsequently stayed the proceedings in this case pending the outcome of a hearing by the Iowa licensing authority on the issue of the reinstatement of Petitioner's medical license in Iowa. By letter dated December 9, 1991, the I.G. informed me

that the Iowa licensing authority had issued a final decision denying Petitioner's application for reinstatement of his Iowa medical license. The I.G. subsequently filed his reply brief to Petitioner's March 5, 1991 response to his motion for summary disposition.

On January 29, 1992, prior to my issuance of a Ruling on the I.G.'s motion for summary disposition, the Secretary of the Department of Health and Human Services (the Secretary) promulgated new regulations containing procedural and substantive provisions affecting exclusion cases. I gave the parties an opportunity to submit written comments on the issue of what, if any, effect these regulations might have on the outcome of this case.

On April 23, 1992, I issued a Ruling in which I concluded that the I.G. has authority to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act, and I granted the I.G.'s motion for summary disposition on this issue. In addition, I held that the Part 1001 regulations published on January 29, 1992 do not apply retroactively to establish a standard for adjudicating the length of the exclusion in cases such as this where the I.G.'s exclusion determination was made prior to January 29, 1992. I concluded that the I.G. had not established as a matter of law that Petitioner should be excluded until he obtains a valid license to practice medicine in the State of Iowa. I found that there were genuine issues of material fact concerning the issue of Petitioner's trustworthiness and I stated that the case would proceed to hearing on the issue of the reasonableness of the length of the exclusion.

I initially scheduled the hearing to take place on June 25, 1992. That hearing date was continued until matters related to the parties' prehearing discovery motions and requests for subpoenas were resolved.[2] On December 10, 1992, I conducted an in-person hearing in San Diego, California. Testimony was received at this hearing from witnesses who appeared in person at the hearing, and from a witness who testified by telephone from Palmer, Alaska.

On January 22, 1993, during the period that the posthearing briefing schedule was in progress, the

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[2] My prehearing rulings on the parties' discovery motions and requests for subpoenas are chronicled in detail in the following documents: July 1, 1992 Ruling, October 15, 1992 Order and Notice of Hearing, and December 3, 1992 Summary of Prehearing Conferences and Notice of Location of Hearing.

Secretary published regulations described as a clarification of the exclusion regulations published January 29, 1992. I invited the parties to address the issue of the impact of these clarifying regulations on this case in their posthearing briefs. I also convened a posthearing conference in which I stated that in view of the fact that I may decide that the January 22, 1993 clarifying regulations require me to apply the Part 1001 regulations published on January 29, 1992 to this case, I would give the parties the opportunity to submit additional evidence based on any issue that would arise under these regulations. Both parties indicated that they did not wish to offer such evidence.

ISSUES

The issues are:

1. Whether the I.G. has the authority to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act.

2. Whether, given the circumstances of this case, it is reasonable to exclude Petitioner for a period of indefinite duration until he obtains a valid license to practice medicine in Iowa.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCLs)

1. Petitioner received a medical degree from the University of Iowa in 1978 and he completed a residency program in radiology at the University of Iowa in 1981. P. Ex. 10 at 13, 14.[3]

2. Petitioner was appointed to the position of graduate fellow in the Radiology Department of the University of Iowa Hospitals and Clinics for the period July 1, 1981 through June 30, 1982. P. Ex. 5.

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

Hearing Transcript	Tr. (page)
I.G. Exhibits	I.G. Ex. (number at page)
Petitioner Exhibits	P. Ex. (number at page)

3. Petitioner resigned from his graduate fellow position at the University of Iowa Hospitals and Clinic on August 11, 1981. P. Ex. 5.

4. After resigning from his graduate fellow position at the University of Iowa Hospitals and Clinic in 1981, Petitioner moved to Oregon. I.G. Ex. 12 at 19.

5. Petitioner applied for a medical license in Oregon. After conducting a hearing on Petitioner's application for a medical license in April 1982, the licensing authority in Oregon denied Petitioner a medical license. Tr. 163-164, 197-198.

6. In 1982, Petitioner moved to Alaska. He obtained a full license to practice medicine in Alaska, and he worked for various medical groups as a radiology consultant. I.G. Ex. 12 at 19; Tr. 197-198.

7. After moving to Alaska, Petitioner reported to Alaska State troopers alleged incidents involving assaults against him which he believed were politically motivated. These incidents allegedly occurred in Iowa in 1981 and over the course of several years after Petitioner moved to Alaska in 1982. Tr. 164-170.

8. On June 11, 1986, Paul E. Turner, Ph.D., a clinical psychologist, filed a Petition for Initiation of Involuntary Commitment in the Alaska Superior Court. Dr. Turner stated that Petitioner was demonstrating symptoms of paranoid schizophrenia, that he was delusional, and that he demonstrated loose associative functioning. Dr. Turner opined that Petitioner was a danger to others. I.G. Ex. 12 at 96-97.

9. Based on Dr. Turner's opinion, the Alaska Superior Court issued an ex parte order on June 11, 1986 finding that there was probable cause to believe that Petitioner is mentally ill and that he presents a likelihood of causing serious harm to himself or others. The Alaska Superior Court ordered the Alaska State troopers to take Petitioner into custody and deliver him to the Alaska Psychiatric Institute for evaluation. I.G. Ex. 12 at 95.

10. Petitioner was admitted to the Alaska Psychiatric Institute on June 11, 1986 with a provisional diagnosis of schizophrenia, paranoid type, chronic. I.G. Ex. 12 at 5, 17.

11. On June 12, 1986, Harold South, M.D., evaluated Petitioner at the Alaska Psychiatric Institute. This evaluation revealed extensive evidence that Petitioner

suffered from paranoid delusions and that he was mentally ill. I.G. Ex. 12 at 5, 90-91.

12. On June 12, 1986, Dr. South filed with the Alaska Superior Court a petition for a 30-day commitment. I.G. Ex. 12 at 90-91.

13. On June 13, 1986, the Alaska Superior Court conducted an in-person evidentiary hearing on Petitioner's mental condition. Petitioner was present at the hearing and he was represented by counsel. I.G. Ex. 8.

14. On June 20, 1986, the Alaska Superior Court issued a decision finding that Petitioner was mentally ill, that he was likely to cause harm to himself or others, and that he was gravely disabled. The Alaska Superior Court ordered that Petitioner be committed to the Alaska Psychiatric Institute for a period not to exceed 30 days. I.G. Ex. 8.

15. During his stay at the Alaska Psychiatric Institute, Petitioner expressed paranoid delusions and the belief that he was a political prisoner. I.G. Ex. 12 at 5-6.

16. On July 9, 1986, William A. Worrall, M.D., petitioned the Alaska court for an additional 90-day commitment. However, the petition for a 90-day commitment was dropped when Petitioner was voluntarily transferred on July 10, 1986 to Charter North Hospital, a private psychiatric hospital, for further treatment. I.G. Ex. 12 at 5-8, 81-82; Tr. 205.

17. Petitioner was discharged from the Alaska Psychiatric Institute with a diagnosis of chronic paranoid disorder. The discharge report revealed that Petitioner lacked insight into his condition and that the prognosis for Petitioner's condition was poor. The discharge report recommended that Petitioner be treated with medication for his condition. I.G. Ex. 12 at 6-8.

18. On August 16, 1986, Petitioner was discharged from Charter North Hospital. I.G. Ex. 9.

19. On October 27, 1986, the State licensing authority in Alaska automatically suspended Petitioner's license to practice medicine in Alaska based upon the Alaska Superior Court's finding that Petitioner suffered from a grave mental disability. I.G. Ex. 6 at 2.

20. On October 21, 1987, the State licensing authority in Hawaii revoked Petitioner's license to practice medicine in Hawaii based on the Alaska court's decision. I.G. Ex. 10 at 2; Tr. 196.

21. On October 1, 1987, the State licensing authority in Iowa initiated a license revocation proceeding after it became aware of Alaska's decision to suspend Petitioner's license. The Iowa licensing authority became aware of Alaska's decision in the course of its routine monitoring of disciplinary actions in other States. I.G. Exs. 2, 6.

22. On January 8, 1988, a three-member panel of the Iowa licensing authority issued a proposed decision to revoke Petitioner's medical license. Prior to reaching its proposed decision, the three-member panel conducted a hearing on December 16, 1987. Petitioner was not present at that hearing, but he was notified of it and he was given the opportunity to appear. I.G. Exs. 2, 6.

23. Petitioner appealed the proposed decision of the three-member panel of the Iowa licensing authority and on March 3, 1988, a hearing was held before the full membership of the Iowa licensing authority. Petitioner did not appear at that hearing in person, but he set forth his position in written arguments and supporting documents. I.G. Exs. 2, 6.

24. On March 14, 1988, the Iowa licensing authority issued a final decision affirming the proposed decision to revoke Petitioner's license. The Iowa licensing authority found that Petitioner was guilty of being adjudged mentally incompetent by a court of competent jurisdiction and that he was unable to practice medicine with reasonable skill and safety due to his mental condition. I.G. Exs. 2, 6, 7.

25. 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.

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

27. On August 7, 1990, 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, based on the decision of the licensing authority in Iowa to revoke Petitioner's medical license. The I.G. determined that Petitioner's exclusion will remain in effect until he obtains a valid license in Iowa.

28. Petitioner's medical license was revoked by a State licensing authority for reasons bearing on his professional competence and professional performance. FFCL 24.

29. The I.G. had authority to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act. FFCLs 24-28.

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

31. 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.

32. The Alaska Superior Court's 1986 finding that Petitioner is mentally ill is supported by credible medical opinion and is persuasive evidence that Petitioner is untrustworthy. FFCLs 8, 11, 15, 17.

33. The decisions of the licensing authorities in the States of Alaska, Hawaii, and Iowa to suspend or revoke Petitioner's medical licenses based on the findings of the Alaska Superior Court create the presumption that Petitioner is untrustworthy. FFCLs 19, 20, 24.

34. Petitioner sought to reinstate his medical license in Iowa. On November 21, 1991, the Iowa licensing authority denied Petitioner's application for reinstatement of his license on the grounds that Petitioner failed to establish that the basis for the revocation of his license no longer existed. The Iowa licensing authority reached this decision after conducting a hearing at which Petitioner appeared in person. I.G. Ex. 9.

35. The refusal by the Iowa licensing authority to reinstate Petitioner's medical license in 1991 is evidence that Petitioner is untrustworthy. FFCL 34.

36. Petitioner has applied for a medical license in California, and, on June 23, 1992, the State of California petitioned the California licensing authority to deny Petitioner's application on the grounds that his ability to practice medicine is impaired by mental illness. I.G. Ex. 10.

37. Petitioner is not licensed to practice medicine in any State, and this is evidence of his untrustworthiness. Tr. 196-199.

38. Petitioner underwent a psychological evaluation of his mental condition at the Veterans Administration Medical Center in San Diego, California in 1992. This evaluation was conducted by Ann Garland, M.S., a psychology intern, and Beth Kalal, Ph.D., a supervising clinical psychologist. P. Ex. 12; Tr. 32.

39. Dr. Kalal's and Ms. Garland's evaluation suggests that Petitioner suffers from a paranoid delusional disorder. The evaluation revealed also that Petitioner is not competent to practice medicine, that Petitioner does not understand that he has mental problems, and that Petitioner would benefit from treatment including anti-psychotic medication and psychotherapy. I.G. Ex. 12; Tr. 40, 43-44, 58, 64-66.

40. Petitioner continues to suffer from a mental disorder, and he is not competent to practice medicine safely. FFCLs 38-39.

41. Most individuals suffering from delusional disorders do not recover. Tr. 42.

42. The prognosis for recovery from delusional disorders is particularly doubtful in cases where the individual suffering from the disorder does not recognize the existence of the disorder and does not obtain treatment for it. Tr. 45, 158-159.

43. Petitioner denies that he has ever suffered from a mental disability and he has not sought or received treatment for his mental condition since he was discharged from Charter North Hospital in 1986. I.G. Ex. 12; Tr. 65, 206.

44. The prognosis for Petitioner's recovery from his condition is poor. FFCLs 41-43.

45. Petitioner's unsubstantiated denial that he has a mental disorder is not sufficient to rebut the overwhelming evidence showing that he suffers from a

mental disorder which renders him untrustworthy to provide medical care.

46. The record is devoid of any expert opinion by qualified professionals which support Petitioner's opinion that he does not suffer from a mental disorder.

47. Petitioner's unsubstantiated allegations that he is the victim of a conspiracy involving his political opponents and his wife to destroy his career and credibility is not sufficient to rebut the findings of the Alaska Superior Court and the State licensing authorities in Alaska, Hawaii, and Iowa.

48. Petitioner's unsubstantiated attacks on the motives of the health care providers who evaluated him are not sufficient to rebut the credible expert opinion evidence showing that he is a threat to Medicare and Medicaid patients.

49. The remedial purpose of section 1128 is satisfied by the following exclusion: Petitioner is excluded until any State licensing authority grants him a medical license without restriction after conducting a full review of all the legal and factual issues which were before the State of Iowa and after determining that Petitioner's mental disorder has resolved sufficiently to enable him to practice medicine competently.

50. In the alternative, were I to conclude that the regulations published on January 29, 1992 apply to establish a standard for adjudicating the length of the exclusion in this case, then I would find that the I.G.'s exclusion until Petitioner obtains a medical license in Iowa is mandated by 42 C.F.R. § 1001.501(b).

RATIONALE

Petitioner represented himself in this proceeding, and the record contains numerous submissions by Petitioner in which he sets forth his position. In many instances, Petitioner's contentions were repetitive and overlapping, and I have attempted to paraphrase and summarize Petitioner's position in this discussion. Even if not expressly mentioned, I have considered each and every one of the arguments made in the briefs and attachments and other documents submitted by Petitioner.

I. The I.G. has the authority to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act.

In my April 23, 1992 Ruling, I entered summary disposition in favor of the I.G. on the issue of the I.G.'s authority to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act. Notwithstanding my disposition of this issue, Petitioner continued to repeat his arguments pertaining to the legal basis for the exclusion after I issued the April 23, 1992 Ruling. I have considered Petitioner's arguments on this issue. I reaffirm my April 23, 1992 determination that the I.G. has the authority to exclude Petitioner under section 1128(b)(4)(A) for the reasons set forth in my Ruling, and I reiterate those reasons below.

A. Petitioner's license to provide health care was revoked by a State licensing authority for reasons bearing on his professional competence and professional performance, within the meaning of section 1128(b)(4)(A) of the Act.

The I.G. excluded Petitioner from participating in Medicare and directed that he be excluded from participating in Medicaid pursuant to section 1128(b)(4)(A) of the Act. That provision authorizes the Secretary, or the Secretary's delegate, the I.G., to impose and direct exclusions against any individual or entity:

> whose license to provide health care has been revoked or suspended by any State licensing authority . . . for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity.

The I.G.'s authority to impose and direct an exclusion under section 1128(b)(4)(A) is based upon fulfillment of the following statutory criteria: (1) revocation or suspension of a license to provide health care; (2) by a State licensing authority; (3) for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity. Petitioner does not dispute that these statutory criteria are met in this case. Based on my review of the record, I conclude that a State licensing authority revoked Petitioner's medical license for reasons bearing on Petitioner's professional competence and professional performance, and therefore the I.G. has the authority to exclude Petitioner pursuant to section 1128(b)(4)(A) of the Act.

The undisputed material facts establish that on June 20, 1986, the Superior Court for the State of Alaska issued an order involuntarily committing Petitioner to the

Alaska Psychiatric Institute. This order was based on a finding that Petitioner was mentally ill, and that, as a result of his mental illness, he was "gravely disabled." I.G. Ex. 8. On October 27, 1986, the State licensing authority in Alaska automatically suspended Petitioner's medical license based upon the Alaska court's finding. FFCL 19.

The licensing authority in the State of Iowa subsequently became aware of the Alaska licensing authority's decision to suspend Petitioner's medical license. A Complaint and Statement of Charges filed before the Iowa licensing authority on October 1, 1987 alleged that the Alaska Superior Court's finding that Petitioner was mentally ill was grounds for automatic suspension of his medical license in the State of Iowa. Specifically, the complaint alleged that Petitioner was guilty of being "adjudged mentally incompetent by a court of competent jurisdiction" and that Petitioner was guilty of being unable "to practice medicine . . . with reasonable skill and safety by reason of a mental or physical impairment." I.G. Ex. 7. On March 14, 1988, the Iowa licensing authority found that there was substantial evidence to support these allegations and revoked his license. I.G. Ex. 6.

These uncontested facts establish that the State licensing authority in Iowa revoked Petitioner's license to practice in Iowa. In addition, the reasons expressed by the Iowa licensing authority for revoking Petitioner's medical license bear on Petitioner's professional competence and performance. The Iowa licensing authority revoked Petitioner's medical license based on its finding that Petitioner was unfit to practice medicine by virtue of his mental illness. Although the terms "professional competence" and "professional performance" are not defined in section 1128(b)(4)(A), the plain meaning of these terms encompasses the ability to practice a licensed service with reasonable skill and safety. The Iowa licensing authority found that Petitioner was unable to practice medicine with reasonable skill and safety. Thus, the basis for the Iowa licensing authority's revocation decision falls squarely within the meaning of section 1128(b)(4)(A).

B. <u>Arguments pertaining to the correctness or fairness of the Iowa licensing authority's revocation decision are not relevant to the issue of the I.G.'s authority to exclude Petitioner.</u>

Petitioner's central argument is that the Iowa licensing authority's decision to revoke his medical license is

defective because: (1) it was based on false allegations and (2) he was treated unfairly in the Iowa license revocation hearing as well as in the proceedings in Alaska which led to the Iowa decision to revoke his medical license. According to Petitioner, the I.G.'s determination to exclude him from participation in the Medicare and Medicaid program, is not justified because it is based on a defective decision by the Iowa licensing authority to revoke his medical license.

Throughout this proceeding, Petitioner has consistently maintained that the findings of the Iowa licensing authority that he is unfit to practice medicine are unfounded and unproven. Petitioner has repeatedly insisted that the actions taken by the government authorities in the States of Alaska and Iowa are politically motivated and that he was denied due process in the Iowa license revocation proceeding and in the proceedings in Alaska which led to Iowa's decision to revoke his medical license.

Petitioner asserts that his difficulties with State licensing authorities emanated from a contractual dispute he had with the United States Navy more than twelve years ago. Petitioner states that he had agreed to serve on active naval duty following graduation from medical school and that he had been prevented from doing so by the United States Navy. Petitioner states that he retained the services of a law firm to arbitrate his complaint that he had been wrongfully excluded from active naval service and that he scheduled a meeting with his lawyer to take place on February 20, 1981. According to Petitioner, he was assaulted on February 20, 1981 as part of an effort by his political opponents to obstruct the scheduled meeting with his lawyer. Petitioner states that he was assaulted again on July 23, 1981. Petitioner contends that these assaults took the form of the wrongful use of drugs, terrorism, and included an intentionally applied overdose of radioactive material on July 23, 1981 which resulted in a "near death" experience. Petitioner's Posthearing Brief at 2-4.

Petitioner contends also that between 1982 and 1986 he was the victim of additional politically motivated assaults while he was living and practicing medicine in Alaska. Tr. 164-170. Petitioner asserts that attempts made by him to report these assaults resulted in retaliation by the State of Alaska which culminated in his involuntary commitment to the Alaska Psychiatric Institute in June of 1986. Petitioner's Posthearing Brief at 4-6.

Petitioner asserts that a political factor which might have a bearing on this case is that he is a genetic descendant of the John and Edmund Pendleton family of colonial Virginia and therefore is a relative of former Presidents James Madison, Zachary Taylor, and George Washington. According to Petitioner, this is an additional possible cause for political jealousy and for a political assassination. Petitioner's Posthearing Brief at 25-26. Petitioner states that he has always believed himself to be completely normal and he maintains that the Iowa licensing authority's finding that he suffers from an incapacitating mental illness is false. Petitioner's Posthearing Brief at 6, 48.

It is well settled that a provider's arguments concerning the correctness or fairness of a State licensing board's revocation proceeding are irrelevant to the issue of whether the I.G. has the authority to impose and direct an exclusion based on the State licensing board's order revoking the provider's license. Bernardo G. Bilang, M.D., DAB 1295 at 8 (1992). The I.G.'s authority to impose and direct exclusions pursuant to section 1128(b)(4)(A) emanates from actions taken by State licensing boards, not the underlying facts on which State boards' decisions may be based. The I.G.'s authority to exclude health care providers under section 1128(b)(4)(A) is triggered by a State licensing board's revocation or suspension of a provider's license to provide health care, and a hearing on the I.G.'s authority to exclude may not be used to raise collateral challenges of State board decisions on the grounds that they are defective. Leonard R. Friedman, M.D., DAB 1281 (1991).

In this case, the evidence establishes that the Iowa licensing authority revoked Petitioner's medical license for reasons bearing on his professional competence and professional performance. I recognize that Petitioner argues vehemently that the Iowa licensing authority's revocation decision was based on allegations that are patently false and that he has been treated unfairly not only in the Iowa proceeding but in the proceedings in the State of Alaska which led to the Iowa licensing authority's decision. However the legal basis for the I.G.'s authority to exclude Petitioner is derived from the fact of the Iowa licensing authority's decision to revoke Petitioner's license for reasons bearing on his professional competence and professional performance. Section 1128(b)(4)(A) does not require the I.G. to go behind the State licensing proceeding to determine whether the revocation decision is valid. I conclude that Petitioner's license to practice medicine in Iowa was revoked for reasons bearing on his professional

competence and professional performance by the Iowa licensing authority within the meaning of section 1128(b)(4)(A), and therefore the I.G. had the authority to exclude him.

II. The remedial purpose of section 1128 of the Act is served by the following exclusion: Petitioner is excluded until any State licensing authority grants him a medical license without restriction after conducting a full review of all the legal and factual issues which were before the State of Iowa and after determining that Petitioner's mental disorder has resolved sufficiently to enable him to practice medicine competently.

A. Trustworthiness is the applicable standard for evaluating the reasonableness of the exclusion in this case.

On January 29, 1992, the Secretary published regulations (42 C.F.R. Parts 1001-1007) pertaining to the authority under the Medicare and Medicaid Patient and Program Protection Act (MMPPPA), Public Law 100-93, to exclude individuals and entities from reimbursement for services rendered in connection with the Medicare and Medicaid programs.[4] These new regulations also included amendments to the civil money penalty authority of the Secretary under the MMPPPA. For purposes of this proceeding, the specific regulatory provisions relating to permissive exclusions under section 1128(b)(4) of the Act (42 C.F.R. § 1001.501) and appeals of such exclusions (42 C.F.R. Part 1005) must be considered in terms of their applicability to this case.

Prior to the January 29, 1992 regulations, when determining whether the length of an exclusion imposed and directed against a party by the I.G. was reasonable, administrative law judges usually evaluated an excluded party's "trustworthiness" in order to gauge the risk that party might pose in terms of the harm Congress sought to prevent. Appellate panels of the Departmental Appeals Board (DAB) have approved the use of the term "trustworthiness" as a shorthand term for those cumulative factors which govern the assessment of whether a period of exclusion imposed by the I.G. is reasonable. See, Hanlester Network, et al., DAB 1347, at 45-46 (1992); Behrooz Bassim, M.D., DAB 1333 (1992).

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

The January 29, 1992 regulations affect procedural and substantive changes with respect to the imposition of exclusions. For example, under the criteria contained in 42 C.F.R. § 1001.501(b), with the exception of circumstances enumerated in 42 C.F.R. § 1001.501(c), an exclusion will never be for a period of time less than the period during which an individual's or entity's license is revoked, suspended, or otherwise not in effect as a result of, or in connection with, a State licensing action. In addition, the new regulations provide that exclusions imposed pursuant to section 1128(b)(4) are subject to being lengthened based on the specific "aggravating" factors enumerated in 42 C.F.R. § 1001.501(b)(2). Only if one or more of the aggravating factors listed in section 1001.501(b)(2) justifies a longer exclusion can the specific mitigating factors listed in 42 C.F.R. § 1001.501(b)(3) be considered. It is undisputed that the new regulations alter the substantive rights of Petitioner, because they limit the mitigating factors that can be considered in Petitioner's favor and would bar Petitioner from presenting evidence which is relevant to his trustworthiness to provide care.[5]

Administrative law judges have held consistently that the January 29, 1992 regulations were not intended by the Secretary to strip parties retroactively of rights vested prior to January 29, 1992 and, therefore, the regulations do not apply to any cases arising from exclusion determinations made prior to that date. Bruce G. Livingston, D.O., DAB CR202 (1992) (Livingston); Charles J. Barranco, M.D., DAB CR187 (1992) (Barranco); Syed Hussaini, DAB CR193 (1992); Steven Herlich, DAB CR197 (1992); Stephen J. Willig, DAB CR192 (1992); Sukumar Roy, M.D., DAB CR205 (1992); Aloysius Murcko, D.M.D., DAB CR189 (1992); Narinder Saini, M.D., DAB CR217 (1992) (Saini); Tajammul H. Bhatti, M.D., DAB CR245 (1992); Anthony Accaputo, Jr., DAB CR249 (1993). In addition, an appellate panel of the DAB addressed the applicability of the new regulations to an exclusion the I.G. had imposed under section 1128(b)(4) of the Act prior to January 29, 1992. The panel held that the January 29, 1992 regulations do not apply retroactively in cases involving exclusion determinations made prior to the regulations'

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[5] Moreover, 42 C.F.R. § 1001.501 limits my consideration of aggravating factors to those specifically mentioned therein, and so could, under the appropriate scenario, impair the I.G.'s ability to demonstrate that a petitioner is deserving of a lengthy exclusion.

publication date. Behrooz Bassim, M.D., DAB 1333, at 5-9 (1992).

The appellate panel in Bassim noted the distinction between the effective date of a new regulation and the permissible effect of a regulation. Bassim at 6. It held that the January 29, 1992 regulations were inconsistent with prior DAB decisions on the scope of review and the length of an exclusion, and that the January 29, 1992 regulations represented substantive changes in the law. Bassim at 6-7. The panel determined that the Secretary did not intend to alter the substantive rights of petitioners with the January 29, 1992 regulations. Bassim at 8-9.

The panel cited several rationales to support its determination that the new regulations were not to be applied retroactively to cases where a petitioner had been excluded prior to January 29, 1992. The panel noted that the concept of retroactivity is not favored in law, and that an agency's authority to promulgate rules having a retroactive effect must be expressly granted by Congress. Bassim at 6. Moreover, the panel also noted that even with such a statutory grant of authority, an agency's rules will not be applied retroactively unless its language clearly requires this result. Bassim at 6.

Congress did not authorize the Secretary to promulgate rules having a retroactive effect, and there was no statement by the Secretary that the new regulations were intended to apply retroactively to achieve substantive changes. In the panel's view, if the Secretary had intended to effect substantive changes in pending cases, this intent would have been expressly stated given the resultant administrative complications in the appeals process as well as the potential prejudice to petitioners. Bassim at 7. The panel held that parts of the new regulations which affect substantive changes may be applied only to cases in which the I.G.'s Notice of Intent to Exclude, Notice of Exclusion, or Notice of Proposal to Exclude is dated on or after January 29, 1992. Bassim at 9.

I conclude that it was not the Secretary's intent to retroactively apply the new regulations to unlawfully strip parties, including Petitioner, of previously vested rights. Therefore, the new Part 1001 regulations were not intended to apply to cases pending as of the date of their publication. I have previously addressed this issue in depth in my decisions in Barranco at 16-27 and Livingston at 8-10. Administrative Law Judge Steven T. Kessel has addressed this issue in depth in his decision

in Saini at 11-19. For purposes of this case, I incorporate the rationale in Barranco, Livingston and Saini that Petitioner's de novo hearing rights would be substantially adversely affected and it would be manifestly unjust to apply the January 29, 1992 regulations.

On January 22, 1993, the Secretary published a clarification of the January 29, 1992 regulations (hereafter referred to as clarification) that purported to make the regulations of Part 1001:

> applicable and binding on the Office of Inspector General (OIG) in imposing and proposing exclusions, as well as to Administrative Law Judges (ALJs), the Departmental Appeals Board (DAB), and federal courts in reviewing the imposition of exclusions by the OIG (and, where applicable, in imposing exclusions proposed by the OIG).

42 C.F.R. § 1001.1; 58 Fed. Reg. 5618 (1993).

This clarification was to be applied to "all pending and future cases under this authority." 58 Fed. Reg. 5618 (1993). The Secretary waived the proposed notice and public comment period specified by the Administrative Procedure Act pursuant to the exception for "interpretive rules, general statements of policy or rules of agency organization, procedure or practice" at 5 U.S.C. 553(b)(A). Id. Moreover, the Secretary stated that this clarification "does not promulgate any substantive changes to the scope of the January 29, 1992 final rule, but rather seeks only to clarify the text of that rulemaking to better achieve our original intent". Id.

At the time of the promulgation of this clarifying regulation on January 22, 1993, the Secretary must be assumed to have been aware of the DAB appellate panel's decision in Bassim, which was issued on May 28, 1992. More importantly, the DAB is delegated authority to make final interpretations of law on behalf of the Secretary upon review of administrative law judge decisions. Gideon M. Kioko, M.D., DAB CR256 (1993). Thus, the DAB appellate panel was in effect speaking for the Secretary when it concluded that the January 29, 1992 regulations were not to apply retroactively to cases pending prior to promulgation of the new regulations. It gave its rationale as follows:

> In our view, if the Secretary had intended to effect substantive changes in pending cases, this intent would have been expressly stated since this effect

> would create administrative complications in the appeals process, as well as potential prejudice for petitioners.

Bassim at 7.

The appellate panel in Bassim went on to say:

> In sum, absent specific instructions in the Act or the preamble to the 1992 Regulations directing that they apply to pending cases, we conclude that the Secretary did not intend to alter a petitioner's substantive rights in such fundamental ways as suggested by the I.G. We also conclude that portions of the 1992 Regulations which change substantive law may permissibly be applied only to cases in which the I.G.'s Notice of Intent to Exclude, Notice of Exclusion, or Notice of Proposal to Exclude is dated on or after January 29, 1992.

Bassim at 8-9.

In this clarification, the Secretary did not expressly state his intent or provide specific instructions directing that the new regulations apply retroactively to cases pending prior to January 29, 1992. Rather, the Secretary emphasized that such regulation did not make "any substantive changes" to the "scope" of the new regulations. 58 Fed. Reg. 5618. No other conclusion can be reached but that in promulgating the January 22, 1993 clarification, the Secretary did not modify the appellate panel decision in Bassim, which held that the January 29, 1992 regulations do not apply to cases pending prior to January 29, 1992. This case was pending as of that date.

The January 22, 1993 clarification was published during the period that the posthearing briefing schedule was in progress in this case. I specifically invited the parties to address the applicability and impact of the new regulations on this case in their posthearing briefs. I deemed this especially necessary since the parties had prepared for this hearing under the assumption that the case would be heard and decided under the trustworthiness standard. It was not until several weeks after the December 10, 1992 hearing that the January 22, 1993 clarification was published. Also, I convened a posthearing conference in which I specifically asked the parties whether they wished to submit additional evidence in light of the clarification. Both parties declined to offer additional evidence.

In his posthearing brief, the I.G. contends that I am bound to apply the clarification in my determination because it specifically states in the clarification that it applies to all pending cases. The I.G. contends that this is a pending case within the plain meaning of the word and accordingly takes the position that the clarification is controlling in my determination in this case. I.G. Posthearing Brief at 5-6.

Since the January 29, 1992 regulations lacked retroactive effect, for the reasons stated in Bassim, they could not have acquired such effect with subsequent textual clarifications that do not purport to modify the scope of the January 29, 1992 regulations and which have been published without satisfying the procedures necessary under the Administrative Procedure Act for effecting substantive changes. Accordingly, neither the January 29, 1992 regulations nor the subsequent January 22, 1993 clarification is controlling upon my determination of the length of the exclusion in this case, where the notice of exclusion was issued on August 7, 1990, well in advance of the publication of the new regulations on January 29, 1992 or the clarification on January 22, 1993. Instead, Petitioner's trustworthiness is the applicable standard for evaluating the reasonableness of the length of the exclusion in this case.

B. The evidence of record establishes that Petitioner is suffering from a mental disorder which renders him untrustworthy to provide medical care.

I have considered Petitioner's trustworthiness de novo in accordance with the remedial purpose of the statute and the criteria approved by the DAB. The principal purpose served by an exclusion is to keep out untrustworthy providers until such time as they can be trusted to deal with program funds and to properly serve program beneficiaries and recipients. H.R. Rep. No. 393, 95th Cong. 1st Sess., pt. 2, reprinted in 1977 U.S.C.C.A.N. 3072. The evidence in this case persuades me that Petitioner is suffering from a mental disorder which affects his trustworthiness to provide care. Although Petitioner is not culpable for his mental disorder, it nevertheless renders him less than fully trustworthy to provide care.

The record shows that Petitioner received his medical degree from the University of Iowa in 1978 and that he completed a residency program in radiology at the University of Iowa in 1981. FFCL 1. Petitioner was appointed to the position of graduate fellow in the Radiology Department of the University of Iowa Hospitals

and Clinics for the period July 1, 1981 through June 30, 1982. FFCL 2. Petitioner did not stay in this position for this entire period of time, but instead resigned from it on August 11, 1981. FFCL 3. According to Petitioner, he was forced to resign from this position due to a radiation injury to his right hand and forearm which occurred on July 23, 1981. Petitioner alleges that this radiation injury was an assault against him perpetrated by his political opponents. P. Ex. 5 at 2-5; Petitioner's Posthearing Brief at 2-4.

Petitioner subsequently moved to Oregon, where he attended Bible school. I.G. Ex. 12 at 19. Petitioner applied for a medical license in Oregon. The record does not contain any documents pertaining to this license application. However, Petitioner stated that he informed Oregon licensing authorities that he was the victim of politically motivated assaults at a hearing on his license application which was conducted in April of 1982 and that the Oregon licensing authority subsequently denied his application for licensure. Tr. 163-164, 197-198.

In 1982 Petitioner moved to Alaska. He obtained a full license to practice medicine in Alaska, and he worked for various medical groups as a radiology consultant. FFCL 6. On June 11, 1986, Paul E. Turner, Ph.D., a clinical psychologist, filed in the Alaska Superior Court a Petition for Initiation of Involuntary Commitment. Dr. Turner stated that Petitioner was demonstrating symptoms of paranoid schizophrenia, that he was delusional, and that he demonstrated loose associative functioning. Dr. Turner expressed the opinion also that Petitioner was a danger to others. FFCL 8.

Based on Dr. Turner's opinion, the Alaska Superior Court issued an ex parte order on June 11, 1986 finding that there was probable cause to believe that Petitioner was mentally ill and that he presented a likelihood of causing serious harm to himself or others. The Alaska Superior Court ordered Alaska State troopers to take Petitioner into custody and deliver him to the Alaska Psychiatric Institute for evaluation. FFCL 9. Pursuant to this order, Petitioner was admitted to the Alaska Psychiatric Institute that same day with a provisional diagnosis of schizophrenia, paranoid type, chronic. FFCL 10.

On June 12, 1986, Harold South, M.D., evaluated Petitioner. P. Ex. 12 at 5. Based on his evaluation, Dr. South filed a Petition for 30-day Commitment that same day in which he stated that Petitioner provided

extensive evidence that he suffers from paranoid delusions. Dr. South expressed the view that Petitioner was mentally ill. FFCLs 11, 12.

On June 13, 1986, the Alaska Superior Court held a hearing to inquire into Petitioner's mental condition. Petitioner was present at the hearing and he was represented by counsel. FFCL 13. Pursuant to that hearing, the Alaska Superior Court found that Petitioner was mentally ill, that he was likely to cause harm to himself or others, and that he was gravely disabled. The court ordered that Petitioner be committed to the Alaska Psychiatric Institute for a period not to exceed 30 days. FFCL 14.

Petitioner remained at the Alaska Psychiatric Institute until July 10, 1986. According to the Alaska Psychiatric Institute's discharge summary report, during his stay at this facility Petitioner expressed paranoid delusions and the belief that he was a political prisoner. FFCL 15. The discharge summary report reveals that Petitioner's treatment team was concerned about the serious degree of Petitioner's delusions, the potential that Petitioner's paranoid perception of the world would cause him to act out violently, and the lack of insight Petitioner displayed about his mental illness. I.G. Ex. 12 at 6. Based on these concerns, William A. Worrall, M.D., petitioned for a 90-day commitment on July 9, 1986. However, at Petitioner's request, he was allowed to transfer voluntarily to Charter North Hospital, a private psychiatric hospital, for further treatment on July 10, 1986, and the petition for a 90 day commitment was dropped. FFCL 16.

At the time of his discharge from the Alaska Psychiatric Institute, Dr. Worrall opined that Petitioner's condition did not support the diagnosis of schizophrenia, and he changed the diagnosis of Petitioner's condition to chronic paranoid disorder. I.G. Ex. 12 at 6. He opined that the prognosis was "poor, in view of the patient's diagnosis and his lack of insight". I.G. Ex. 12 at 7. Petitioner was not on any medication at the time of his discharge, but Dr. Worrall recommended that various medications be tried before giving up on the possibility that medication might help reduce Petitioner's paranoia. I.G. Ex. 12 at 8.

Petitioner was treated at Charter North Hospital until August 16, 1986 when he was discharged. FFCL 18. Petitioner testified that he has not sought or received any further psychiatric treatment since his release from Charter North Hospital in 1986. FFCL 43.

On October 27, 1986, the State licensing authority in Alaska automatically suspended Petitioner's license to practice medicine in Alaska based upon the Alaska Superior Court's finding that Petitioner suffered from a grave mental disability. FFCL 19. In addition to being licensed to practice medicine in Alaska, Petitioner was also licensed to practice medicine in Hawaii and Iowa. Tr. 196. On October 21, 1987, the State licensing authority in Hawaii revoked Petitioner's license to practice medicine in Hawaii based on the Alaska Superior Court's findings. FFCL 20. In addition, on March 14, 1988, the State licensing authority in Iowa issued a decision revoking Petitioner's license to practice medicine in Iowa on the same grounds. The Iowa licensing authority found that Petitioner was unable to practice medicine with reasonable skill and safety due to his mental illness. FFCL 24.

Petitioner subsequently sought to reinstate his medical license in Iowa. On November 21, 1991, the Iowa licensing authority denied Petitioner's application for reinstatement of his medical license. The Iowa licensing authority concluded that Petitioner had failed to establish that the basis for the revocation of his license no longer existed. FFCL 34. Noting that Petitioner had not had any psychiatric evaluations or treatment since August 1986, the licensing authority stated that the only evidence which Petitioner produced concerning his mental condition was his own personal opinion. The licensing authority found that this was insufficient to establish that it would be in the public interest for Petitioner's license to be reinstated. I.G. Ex. 9.[6]

Petitioner subsequently obtained an evaluation of his mental condition from the Veterans Administration Medical Center in San Diego, California. In a report dated October 19, 1992, Ann Garland, M.S., a psychology intern, and Beth Kalal, Ph.D., a supervising clinical psychologist, described in detail the results of their evaluation. I.G. Ex. 12; Tr. 32. In addition, Ms. Garland and Dr. Kalal presented extensive testimony at the December 10, 1992 hearing regarding the results of their evaluation of Petitioner's mental condition.

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[6] The record shows that Petitioner has applied for medical licensure in the State of California. On June 23, 1992, the State of California petitioned the California licensing authority to deny Petitioner's application on the grounds that his ability to practice medicine is impaired by mental illness. FFCL 36.

Dr. Kalal testified that her evaluation of Petitioner did not reveal any evidence that the Petitioner suffered from schizophrenia, but that it strongly suggested that Petitioner suffered from a paranoid delusional disorder and that the delusions were of a persecutory type. Tr. 40, 43-44. Dr. Kalal stated also that Petitioner's delusional disorder is a psychosis and that a psychosis exists when a person's perception of reality is not congruent with that reality. Tr. 54.

In addition, Dr. Kalal stated that her diagnosis was a "rule out" diagnosis. She explained that a "rule out" diagnosis means that the evaluator strongly suspects that the diagnosis is applicable, but that there is not enough confirming information to justify a firm diagnosis. Tr. 48. Dr. Kalal stated also that the sources of information that she used in making her assessment of Petitioner's mental condition were the personal report of Petitioner, his responses to the testing instruments, and observations of him making those responses. Tr. 37. Dr. Kalal explained that she made a "rule out" diagnosis rather than a firm diagnosis in this case because she did not have information from sources other than Petitioner to confirm the diagnosis. She suggested that had she been fully aware of Petitioner's medical history and the findings of the Alaska Superior Court, she would have made a firm diagnosis of a delusional disorder instead of a "rule out" diagnosis. Tr. 74.

Dr. Kalal described the results of the psychological tests performed on Petitioner in detail. She stated that, based on her interpretation of the test results, she did not believe that Petitioner was competent to practice medicine. Tr. 58, 64. In addition, she opined that Petitioner would benefit from a course of treatment involving anti-psychotic medication and psychotherapy. Tr. 66.

According to Dr. Kalal, studies show that only a small percentage of people with delusional disorders recover completely. Tr. 42. Dr. Kalal stated that the prognosis for recovery is poor for an individual suffering from a delusional disorder who denies the existence of the condition and does not obtain treatment for it as a result. Tr. 45. Dr. Kalal testified that, based on her assessment of Petitioner, there is no evidence that Petitioner understands that he has mental problems. Tr. 65.

The evidence in this case establishes that Petitioner is suffering from a mental illness which impairs his ability to practice highly complex skills which involve

interpersonal relationships. Tr. 64. Although Petitioner is not responsible for his mental condition, the evidence shows that his mental disorder nonetheless affects his trustworthiness to provide care. Based on my evaluation of the evidence, I conclude that Petitioner poses a risk to program beneficiaries and recipients as a result of his mental illness.

In assessing Petitioner's trustworthiness to participate in the Medicare and Medicaid programs, I rely on the Alaska Superior Court's 1986 findings that Petitioner was mentally ill and that, as a result of this mental illness, he was disabled. The record contains credible medical evidence which supports the Alaska Superior Court's findings. Dr. South examined Petitioner the day before the hearing. He found that Petitioner suffered from paranoid delusions and concluded that he was mentally ill. At the time Petitioner was transferred from the Alaska Psychiatric Institute to Charter North Hospital on July 10, 1986, Dr. Worrall diagnosed a chronic paranoid disorder and recommended further treatment.

Petitioner's lack of trustworthiness is evidenced also by the fact that he is not licensed to practice medicine in any State at present. FFCL 37. Based on the Alaska Superior Court's finding that Petitioner was disabled as a result of his mental illness, the licensing authorities in the States of Alaska, Hawaii, and Iowa either suspended or revoked Petitioner's licenses to practice medicine in those States. These licensing authorities uniformly concluded that, for reasons bearing on his professional competence and performance, Petitioner was not sufficiently trustworthy to be allowed to continue to practice medicine. The findings of these licensing authorities create the presumption that Petitioner is untrustworthy. An individual who loses a medical license for reasons bearing on professional competence or performance is presumed to be untrustworthy and is potentially harmful to program beneficiaries and recipients. That presumption is the basis for Petitioner's exclusion which is designed to protect program beneficiaries and recipients. Narinder Saini, M.D., DAB 1371 at 6 (1992).

As recently as November 1991, following review of Petitioner's case, the licensing authority in Iowa refused to reinstate Petitioner's medical license on the grounds that Petitioner failed to establish that the basis for the revocation of his license no longer existed. In addition, Petitioner's attempts to obtain

licensure in States other than Alaska, Hawaii, and Iowa have thus far been unsuccessful. Tr. 196-199.

The record is devoid of persuasive evidence showing that Petitioner has recovered from his disabling mental illness. To the contrary, the record contains convincing affirmative evidence showing that Petitioner continues to suffer from the delusional paranoid disorder which was diagnosed in 1986.

At the time Petitioner was admitted to the Alaska Psychiatric Institute on June 11, 1986, his condition was provisionally diagnosed as chronic schizophrenia, paranoid type. However, this diagnosis was subsequently changed at the time of his transfer to Charter North Hospital on July 10, 1986. Based on observations of Petitioner over the course of a month, Dr. Worrall determined that Petitioner's delusional symptoms did not support the diagnosis of schizophrenia, but instead supported a diagnosis of chronic paranoid disorder.

Petitioner's psychiatric evaluation at the Veterans Administration Medical Center in 1992 resulted in strikingly similar diagnostic impressions. Dr. Kalal, the clinical psychologist who supervised the 1992 evaluation, stated that her assessment of Petitioner did not support a diagnosis of schizophrenia, but instead suggested that Petitioner suffered from a paranoid delusional disorder. Dr. Kalal reached her conclusions without the benefit of being aware of Petitioner's medical history at the Alaska Psychiatric Institute. The fact that Dr. Kalal independently had a diagnostic impression of Petitioner's condition in 1992 similar to that formed by Dr. Worrall in 1986 is strong evidence that the diagnosis is correct and that Petitioner continues to suffer from the diagnosed condition.

None of the medical evidence shows that Petitioner can be trusted to practice medicine safely. To the contrary, Dr. Kalal stated specifically and unequivocally that Petitioner is not competent to practice medicine.

The expert evidence shows also that Petitioner's disorder is unlikely to resolve in the near future. Dr. Kalal testified that studies show most individuals suffering from delusional disorders do not recover. Both Dr. South and Dr. Kalal testified that the prognosis for recovery is particularly doubtful in cases where the individual suffering from the disorder does not recognize the existence of the disorder and does not obtain treatment for it. FFCL 42. Throughout this proceeding, Petitioner has vigorously and consistently denied that he has ever

suffered from a mental disability. Petitioner's lack of insight regarding his mental disorder was specifically noted by Dr. Worrall and Dr. Kalal. Petitioner has not received any psychiatric treatment since 1986 when he was discharged from Charter North Hospital, and he has not expressed any intention to seek treatment in the future. In view of Petitioner's denial of his mental disorder and his refusal to obtain treatment for it, I find that the medical evidence establishes that the prognosis for Petitioner's recovery from his condition is poor.

C. Petitioner has not provided any credible evidence to rebut the evidence showing that he is untrustworthy.

Petitioner has not provided any credible evidence to rebut the overwhelming evidence that he suffers from a mental disorder which renders him less than fully trustworthy to provide medical care. Petitioner's principal challenge to the exclusion has consisted principally of unsubstantiated denials that he has a mental disorder and unsubstantiated allegations that the 1986 commitment hearing, the decision by the State of Alaska to suspend his medical license, and the decision by the State of Iowa to revoke his medical license were politically motivated acts of malice which were designed to intentionally destroy his career and credibility without due process of law. Petitioner's Posthearing Brief at 12. Such unsupported assertions are not sufficient to overcome the evidence showing that Petitioner is suffering from a mental disorder which affects his ability to provide trustworthy care.

Petitioner testified that after he moved to Alaska in 1982, his conscience began to bother him because he did not believe that he had fully discharged his obligation under his Naval oath of office to report incidents which might represent a threat to his country, such as an attack on a Naval officer. In an attempt to clear the record, Petitioner stated that he reported to Alaska State troopers two politically motivated assaults against him which occurred in Iowa in 1981. These incidents included efforts by his political opponents to prevent him from meeting with his lawyer on February 20, 1981 and the radiation injury which occurred on July 23, 1981. Petitioner testified that he was the victim of further assaults after he moved to Alaska. These assaults allegedly occurred in the form of shotgun blasts, vandalism, radiation exposure, and an incident involving possible poisoning from drinking a can of root beer. Petitioner stated that he documented these assaults in the form of affidavits and reported them to Alaska State troopers. Tr. 164-170. Petitioner contends that his

involuntary commitment to the Alaska Psychiatric Institute in 1986 was an effort by his political opponents to cover up the assaults which he reported to the Alaska State troopers. Tr. 8-9.

Petitioner contends that he was denied his basic legal rights at the time of his involuntary commitment to the Alaska Psychiatric Institute. Petitioner asserts that he was the victim of police brutality when Alaska State troopers took custody of him against his will prior to his commitment hearing, that he was denied the opportunity to call a friend or obtain an attorney when he was taken into custody, that he was denied his right to a 72-hour evaluation period prior to his commitment, that he was provided with inadequate representation at the commitment hearing, and that he was drugged with medication to which he claimed he had previously had an allergic reaction. Petitioner argues that the undue haste of the commitment proceedings and the denial of his basic due process rights suggest malice on the part of government authorities and are evidence that his involuntary commitment was motivated by a desire by government authorities to destroy his testimony regarding the politically motivated assaults against him. Petitioner's Posthearing Brief at 28-31; Tr. 8-10.

Petitioner points out also that the commitment hearing occurred only a few days after his wife initiated divorce proceedings, and he speculates that she might have been involved in a conspiracy to deprive him of his property which was valued at approximately $150,000. Petitioner's Posthearing Brief at 6, 26, 31.

I am not persuaded by Petitioner's argument. The record is devoid of credible evidence to support Petitioner's claim that his involuntary commitment stemmed from a political conspiracy to damage his career or that Petitioner's former wife was involved in a conspiracy to deprive him of his property. The record shows that the Alaska Superior Court made its findings that Petitioner was mentally incompetent after conducting an evidentiary hearing. Petitioner was present at the hearing and he was represented by legal counsel. However, even assuming that there is some merit to Petitioner's argument and that there were in fact some violations of Petitioner's legal rights in the manner in which he was taken into custody by Alaska State troopers or in the way the commitment hearing was conducted, the fact remains that the Alaska Superior Court's findings are supported by credible expert medical opinion evidence. Petitioner has not brought forward any medical evidence to rebut the

Alaska Superior Court's findings. Absent such evidence, I rely on the Alaska Superior Court's findings.

Petitioner attempts to rebut the Alaska Superior Court's findings by submitting documents which he alleges prove the fact that he was a victim of politically motivated assault, battery, and intimidation by gunfire. Petitioner's Posthearing Brief at 11; P. Ex. 10. Even if I were to accept that the documents submitted by Petitioner show that he was the victim of assaults and vandalism to his property in Alaska, there is no evidence showing that this was part of a political conspiracy or that it was done in retaliation for the fact that Petitioner attempted to report incidents related to other assaults. Moreover, Dr. South reviewed these documents and testified at the December 10, 1992 hearing that had he been able to review these documents at the time he evaluated Petitioner in 1986, they would not have changed his opinion that Petitioner was suffering from a mental illness. Tr. 126.[7]

Petitioner contends that the State of Iowa's decision to revoke his medical license is defective because he was denied due process by the Iowa licensing authority. According to Petitioner, the State of Iowa arranged his license revocation hearing while Petitioner was a resident of Alaska and at a time that it was impossible for Petitioner to attend the hearing because of legal and economic restraints. Again, Petitioner alleges that this denial of due process is evidence that the State of Iowa is part of a political conspiracy to damage him. Petitioner argues that the denial of his right to attend the hearing which formed the basis of the revocation of

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[7] Petitioner argues also that he is disadvantaged in this proceeding because the affidavits he wrote documenting the assaults against him prior to his commitment hearing are not part of the evidence of record before me. While a subpoena was issued for these affidavits in this proceeding, the State of Alaska was unable to locate them. Petitioner suggests that these documents were intentionally lost or destroyed by authorities in Alaska in an effort to harm him. Petitioner's Posthearing Brief at 22, 31, 45, 61-62. There is no evidence that the State of Alaska intentionally refused to make these documents available in this proceeding in an effort to hurt the presentation of Petitioner's case. Moreover, the Alaska Superior Court was privy to these documents in 1986 and that tribunal nonetheless found clear and convincing evidence that Petitioner was mentally disabled.

Petitioner's medical license in Iowa violates his constitutional rights to equal protection and due process. October 4, 1990 Response and Notice of Prehearing Conference at 1-2.

Petitioner's argument is without merit. I do not find any evidence showing that the State of Iowa was involved in a political conspiracy to harm Petitioner. Indeed, the record shows that the Iowa licensing authority afforded Petitioner ample procedural safeguards in conducting its proceedings.

The Iowa licensing authority initiated the license revocation proceedings after it became aware of the State of Alaska's decision to suspend Petitioner's license. It became aware of Alaska's decision in the course of its routine monitoring of disciplinary actions in other States. FFCL 21. On December 16, 1987, a hearing was held before a three-member panel of the Iowa licensing authority which resulted in a proposed decision to revoke Petitioner's medical license. While Petitioner was not present at that hearing, he was notified of it and he was given the opportunity to appear. FFCL 22.

The Iowa licensing authority afforded Petitioner appeal rights, which he exercised. On March 3, 1988, a hearing was held before the full membership of the Iowa licensing authority. This hearing resulted in a final decision revoking Petitioner's license. While Petitioner did not appear at that hearing in person, he set forth his position in written arguments and supporting documents which were considered by the licensing authority. FFCLs 23-24. Moreover, Petitioner did appear in person at a 1991 hearing on his application to reinstate his medical license. FFCL 34. Thus, Petitioner was able to fully present his case before the Iowa licensing authority at that time.

Petitioner attacks the motives of the health care professionals who authored written evaluations about his mental condition at the time of his involuntary commitment in 1986, and he contends that political malice motivated them to make detrimental statements about his mental health. Petitioner's Posthearing Brief at 24. In addition, he contends that the report of his condition by Dr. Kalal and Ms. Garland was an attempt to cover up the errors of the other health care professionals who offered the opinion that he was mentally ill. He contends that Dr. Kalal's assessment is unreliable because she spent only 45 minutes with him, they were uncomfortable with each other, and she did not consider factors such as fatigue, insomnia, and his recent exposure to propane gas

in making her findings. He argues also that since Ms. Garland was working under the direction of Dr. Kalal, she was limited in her ability to make an independent judgment of Petitioner's condition. Petitioner pointed out that the report submitted by Dr. Kalal and Ms. Garland contains errors in his name, age, and birthdate, and he argues that this suggests that Dr. Kalal and Ms. Garland are incompetent. Petitioner asserts also that it is possible that Dr. Kalal may have been motivated by financial incentives to offer an opinion unfavorable to him. Petitioner's Posthearing Brief at 32-35.

There is no evidence to substantiate Petitioner's assertions that the mental health professionals who evaluated him were motivated by political malice or financial incentives to express the opinion that Petitioner has a mental disorder. There is no evidence that Dr. Kalal attempted to cover up the errors of other mental health professionals as Petitioner suggests, particularly since Dr. Kalal and Ms. Garland testified that they were not even aware of the evaluations of other professionals at the time that they examined Petitioner. Tr. 74, 98. In fact, Dr. Kalal expressed the view that Petitioner's accusations that she was involved in a conspiracy against him gave her cause for concern because it was an example of psychotic reasoning and a manifestation of his mental disorder. Tr. 65.

I have reviewed the expert evidence and I find it to be credible. In particular, I find the report of Dr. Kalal and Ms. Garland to be thorough and supported by convincing rationale. While Dr. Kalal met with Petitioner for 45 minutes, Ms. Garland met with him from one to two hours on five different occasions and she administered an exhaustive battery of tests. Tr. 92; P. Ex. 12. Dr. Kalal was actively involved in determining what tests to administer and in the interpretation of the test results. Tr. 36, 108. Ms. Garland testified that she was aware that Petitioner mentioned that he was a bit tired at times during the evaluation. However, she stated that she gave him opportunities to take breaks, which he declined. Tr. 100. Ms. Garland stated that, based on her observations, she did not believe Petitioner's level of fatigue to be clinically significant. Tr. 94-95. While it is regrettable that Dr. Kalal's and Ms. Garland's report misspelled Petitioner's name and erroneously reported his age and birthdate, these errors are not serious enough to undermine the credibility of the report in its entirety.

Petitioner submitted exhibit evidence showing that he graduated from medical school with a "near honors" in

psychiatry. P. Ex. 6. He argues that his opinion that he is not suffering from a mental disorder should be given weight in light of his medical training. Petitioner's Posthearing Brief at 73; Tr. 67.

It is undisputed that Petitioner is a highly intelligent individual.[8] It is also undisputed that Petitioner has earned a medical degree and that he performed well in his course work in the field of psychiatry in medical school. I recognize Petitioner's intelligence and his professional achievements. However, I give his opinion regarding his mental health status little weight because Petitioner's personal involvement prevents him from forming a professionally objective, unbiased opinion about his condition. While Petitioner has repeatedly expressed the opinion that he does not have a mental disorder, the record is devoid of any expert opinions by qualified professionals which support Petitioner's opinion. Petitioner's opinion of his own condition alone, without additional support, is not sufficient to outweigh the credible expert evidence in this case showing that Petitioner suffers from a mental disorder.

Petitioner argues that he is trustworthy because he is a "Christian humanitarian". He states that he has sworn to serve humanity as a medical doctor, that he is a former Bible student, and that he has never threatened or injured anyone in a meaningful way. Petitioner's Posthearing Brief at 23, 24, 82.

Throughout this proceeding, Petitioner has been polite and cooperative. In addition, there is no evidence of record showing that Petitioner has physically harmed another individual. However, section 1128(b)(4)(A) of the Act does not require a finding of actual harm to a patient as a precondition to an exclusion. Leonard R. Friedman, M.D., DAB 1281 at 9-10 (1991). Rather, the essential element is revocation of a provider's license for reasons bearing on professional competence or performance. An individual or entity losing a license for reasons bearing on professional competence or performance is presumed to be potentially harmful to program beneficiaries and recipients. In addition, the medical evidence in this case shows that Petitioner has a mental disorder which might affect his judgment in a way which would prevent him from providing competent,

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[8] Dr. Kalal reported that the results of a standardized test of intelligence reveal that Petitioner is functioning in the superior range of intellectual ability. P. Ex. 12 at 6.

adequate, or appropriate care to patients. Exclusions under section 1128(b)(4) of the Act are intended to protect beneficiaries and recipients from the threat of such substandard care.

D. The remedial purpose of the Act requires me to modify the exclusion in this case.

In this case, the I.G. effectively imposed an indefinite exclusion against Petitioner by excluding him until he obtains a license to practice medicine in Iowa. The Iowa licensing authority did not specify a date when Petitioner would be entitled to have his license reinstated. It is conceivable that the Iowa licensing authority might never determine to reinstate Petitioner's medical license. Moreover, Petitioner no longer resides in Iowa and, at this point in time, neither Petitioner or the State of Iowa have any interest in pursuing possible reinstatement of his license, except for the requirements of the I.G.'s exclusion.

In past cases under section 1128(b)(4) of the Act, 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 a State where the 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 this case, Petitioner does not currently reside in the State of Iowa and he does not have a medical practice there. Petitioner's May 13, 1992 motion to subpoena witnesses at 1-2. Petitioner asserts that he has signed up for the National Resident Matching Program with the intent of obtaining additional residency training in diagnostic radiology. He states that obtaining a license in the State of Iowa does not currently pertain to his continuing medical education or medical practice plans, and he asks that he be "protected" from being required to obtain a license in Iowa as a condition for reinstatement into the Medicare and Medicaid programs. Petitioner's Posthearing Brief at 79-80.

I conclude that the I.G. has failed to show a meaningful remedial basis for an indefinite exclusion until Petitioner regains a valid license to practice medicine in Iowa. At present, the State of Iowa has little interest in Petitioner. Petitioner does not live there,

and the citizens of Iowa are not presently his patients. Petitioner states that he would like the freedom to live and practice in a State other than Iowa for reasons that are unrelated to his trustworthiness. In light of this, it is unreasonable to require that Petitioner obtain a medical license in Iowa as a condition for terminating his exclusion period. Walter J. Mikolinski, Jr., DAB 1156 (1990). In order for an exclusion so conditioned to be reasonable, the evidence would have to demonstrate that there is little or no possibility that Petitioner would become trustworthy unless and until he changed his mind and chose to return to Iowa. The I.G. has presented no such evidence.

On the other hand, an exclusion plainly is warranted by the evidence. A court of competent jurisdiction has found Petitioner to be mentally disabled. This has resulted in either the suspension or revocation of Petitioner's license in three States, and Petitioner is not currently licensed in any State. The medical evidence shows that Petitioner continues to suffer from a mental disability which disqualifies him from practicing medicine and that this condition is not likely to resolve in the near future. In view of the indefinite duration of Petitioner's disabling medical condition, I find that an indefinite exclusion is reasonable. However, I modify the I.G.'s exclusion to excluding Petitioner until any State licensing authority grants Petitioner a medical license without restriction after conducting a full review of all the legal and factual issues which were before the State of Iowa and after determining that Petitioner's mental disorder has resolved sufficiently to enable him to practice medicine competently.

The legislative history shows that, in enacting section 1128(b)(4)(A) of the Act, Congress sought to protect Medicare and Medicaid patients from 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 4. I recognize that modifying the exclusion in this case to make it coterminous with Petitioner obtaining a medical license from any State raises concerns about forum shopping expressed in the Act's legislative history.

I have addressed those concerns by fashioning an exclusion which incorporates the requirement that the State which grants Petitioner a license must conduct a full review of all the issues which were before the State of Iowa and make an affirmative determination that

Petitioner's mental disorder has resolved sufficiently to enable Petitioner to be a competent medical practitioner.[9] This requirement assures that Petitioner will not be entrusted to treat program beneficiaries and recipients until he has established to the satisfaction of a State licensing authority that he no longer suffers from a mental disorder which interferes with his ability to be a competent medical practitioner. Thus, the conditions of the modified exclusion address the same remedial considerations embodied in the Act.[10]

In addition, at the expiration of the exclusion period, Petitioner may apply for, but is not guaranteed, reinstatement into the Medicare and Medicaid programs pursuant to Subpart F of Part 1001 of the 1992 regulations. At that time, the I.G. will have the opportunity to independently determine whether Petitioner's mental disorder has resolved sufficiently to allow him to be a trustworthy provider. The length of the exclusion dictates only when a provider is allowed to apply for reinstatement into the program. The I.G. is not required to reinstate a provider at the end of the exclusion period. In this case, the fact that the I.G. is not required to defer to a State licensing authority's determination that Petitioner is trustworthy in making its reinstatement determination is an additional protection for the Medicare and Medicaid programs and

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[9] Any such State action would have to include the review of the findings of the Alaska Superior Court and current evidence of Petitioner's mental status. It is anticipated that any finding that he has recovered from his illness first would be predicated on a determination that he recognized the significance of his mental condition and sought treatment that led to his recovery.

[10] The Secretary, at 42 C.F.R. § 1001.501(c)(2) of the 1992 regulations pertaining to license revocation or suspension, provides for the consideration of early reinstatement in circumstances similar to those set forth in my modification of Petitioner's exclusion. Although I am not bound to apply the criteria of the Part 1001 regulations as standards for adjudicating the length of the exclusion in this case, it is instructive that, in enacting these regulations, the Secretary recognized the harshness of a narrow indefinite exclusion of the type originally directed and imposed against Petitioner and adopted an approach similar to the one I have taken in modifying the exclusion.

further dissipates congressional concerns about forum shopping.

III. In the alternative, were I to conclude that the regulations published on January 29, 1992 establish a standard for adjudicating the length of the exclusion in this case, then I would find that the I.G.'s exclusion until Petitioner obtains a medical license in Iowa is mandated by 42 C.F.R. § 1001.501(b).

The I.G. argues that the new regulations are binding on me as of the effective date, January 29, 1992, and that they require me to affirm the coterminous exclusion imposed on Petitioner. I.G. Posthearing Brief at 4-7, 10-12.

I do not find that the new regulations apply to this or other cases in which the I.G. had imposed an exclusion prior to January 29, 1992. However, in order to expedite a final resolution of all potential issues in this case, I will apply the criteria specified in 42 C.F.R. § 1001.501 to the facts of this case. Were I to conclude that I am required to apply this criteria as standards for adjudicating the length of the exclusion, I would affirm the I.G.'s exclusion.

The Part 1001 regulations require, at 42 C.F.R. § 1001.501(b), that the minimum length of exclusions imposed and directed by the I.G. pursuant to section 1128(b)(4) of the Act be coterminous with the State license suspensions or revocations on which those exclusions are based. Exceptions to this requirement are provided for at 42 C.F.R. § 1001.501(c). Under subsection (1) of 42 C.F.R. § 1001.501(c), an exclusion imposed pursuant to section 1128(b)(4) of the Act may be for a period of time less than that prescribed by 42 C.F.R. § 1001.501(b) if, prior to the I.G.'s notice of the exclusion, other licensing authorities, having been apprised of the licensing action upon which the exclusion is based, grant the provider a license or decide to take no adverse action against a provider's existing license. In addition, subsection (2) of 42 C.F.R. § 1001.501(c) provides that the I.G. will consider a request for early reinstatement if an excluded provider fully and accurately discloses the circumstances surrounding the license revocation to another State and that State either grants the provider a new license or takes no adverse action against an existing license.

In this case, Petitioner has neither contended nor proved that he qualifies for the exceptions contained in 42 C.F.R. § 1001.501(c). To the contrary, the evidence

establishes that Petitioner is not currently licensed in any State. FFCL 37. Therefore, the regulation mandates that the exclusion in this case at a minimum be coterminous with the indefinite license revocation imposed by the Iowa licensing authority.

Section 1001.501(b)(2) of the regulations sets forth factors which may be considered as a basis for lengthening the minimum period of exclusion. In this case, the I.G. is not seeking a longer period of exclusion than the minimum period of exclusion.

In view of the foregoing, I find that were I to apply the regulatory criteria specified in 42 C.F.R. § 1001.501(b) to this case, I would be required to uphold the I.G.'s exclusion.

CONCLUSION

I conclude that the I.G. had authority to impose and direct an exclusion against Petitioner pursuant to section 1128(b)(4)(A) of the Act. I conclude also that regulations at 42 C.F.R. Part 1001, published on January 29, 1992, do not apply to this case to establish a standard for adjudicating the length of the exclusion. In addition, I conclude that the remedial purpose of the Act is satisfied by the following exclusion: Petitioner is excluded until <u>any</u> State licensing authority grants him a medical license without restriction after conducting a full review of all the legal and factual issues which were before the State of Iowa and after determining that Petitioner's mental disorder has resolved sufficiently to enable him to practice medicine competently.[11]

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[11] Throughout this proceeding, Petitioner has shown strong motivation to continue his medical profession. There is no doubt that he possesses an exceedingly high intellect. Unfortunately, to date he has failed to recognize the existence, extent and significance of his mental illness. Furthermore, this record is replete with Petitioner's continued paranoid ideation. However, other than his mental illness, the record is devoid of any evidence that would suggest that Petitioner could not carry out his responsibilities as a physician in a competent and professional manner. Therefore, I strongly urge Petitioner to come to grips with his illness and seek out treatment in an attempt to regain his competency to practice medicine. I have crafted the exclusion to provide him with flexibility in pursuing his medical licensure in any State where he is

In the alternative, were I required to apply the regulatory criteria specified in 42 C.F.R. § 1001.501(b) to this case, I would uphold the I.G.'s exclusion.

/s/

Edward D. Steinman
Administrative Law Judge

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able to establish, after consideration of his mental illness and license revocation, that he has regained an ability to practice medicine. There are adequate provisions in the terms for ending the exclusion and in the reinstatement process to ensure that the Medicare and Medicaid programs will be protected should Petitioner remain a threat from his mental illness.