Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of: D.J.P., M.D., Petitioner, - v - The Inspector General.	DATE: July 16, 1993 Docket No. C-93-050 Decision No. CR276

DECISION

I. PROCEDURAL OVERVIEW

On November 20, 1992, the Inspector General (I.G.) for the Department of Health and Human Services (DHHS) notified Petitioner that he was to be excluded from participation in various federally-funded health care programs, including the Medicare and Medicaid programs[1], until he regains his license to practice medicine in the State of Colorado. The asserted basis for the exclusion is section 1128(b)(4)(A) of the Social Security Act (Act). Section 1128(b)(4)(A) of the Act permits the Secretary of DHHS to exclude an individual

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 whose license to provide health care has been revoked or suspended by any State licensing authority ...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

Act, section 1128(b)(4)(A).

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[1] Section 1128(h) of the Social Security Act enumerates the various State health care programs that receive federal funds and are affected by the exclusion. "Medicaid" will be used in this decision as an abbreviation for all such programs.

On January 14, 1993, Petitioner requested a hearing on the propriety of his exclusion. He stated, as his basis, "[m]y license to practice medicine in Colorado was not revoked for reasons relating to my professional competence, professional performance, or financial integrity, but because of an illness I am recovering from."

During the prehearing conference of February 25, 1993, the parties agreed to submit the case for summary disposition. In accordance with my briefing order, the I.G. filed a motion for summary disposition with supporting brief (to be referred to herein as I.G. Br. at (page)) and four attached exhibits (to be referred to herein as I.G. Ex. (number) at (page)). Petitioner filed his brief in opposition (P. Br. at (page)), which was followed by the I.G.'s reply brief (I.G. R. Br. at (page)). Petitioner did not submit any exhibits.

The parties' submissions establish that they disagree on whether Petitioner's medical license was revoked for reasons bearing on his professional competence or performance. The dispute exists because the Colorado State Board of Medical Examiners (Medical Board) had revoked Petitioner's license under a part of the Colorado statutes that refers to the use of fraud, misrepresentation, or deception in applying for, securing, or renewing a license. I.G. Ex. 3 at 23, 24. The Medical Board specifically declined to revoke Petitioner's license under the statutory section that refers to a practitioner's inability to render medical services with reasonable safety and skill due to a mental or physical disability. Id. Even though Petitioner was found to have a mental disability that adversely affects his ability to practice medicine, the Medical Board concluded -- in considering the discipline warranted by Petitioner's mental disability alone -- that Petitioner could be allowed to practice medicine with safety to his patients, under certain restrictions. Id. at 29; I.G. Ex. 4.

For the reasons that follow, I affirm the exclusion imposed and directed against Petitioner by the I.G. I affirm the exclusion even though the Medical Board found that Petitioner received consistently good ratings throughout his medical career and that, had Petitioner not given false statements in his license application and license renewal form, he would have been allowed to retain his medical license.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact and Conclusions of Law by Agreement of the Parties[2]

1. Petitioner was licensed to practice medicine in the State of Colorado on March 16, 1990.

2. Petitioner specialized in internal medicine during his medical residency.

3. The Colorado State Board of Medical Examiners (Medical Board) is the State agency responsible for the licensure of and discipline of physicians in Colorado.

4. The Medical Board determined that Petitioner is suffering from a severe and chronic mental disability relating to a psychosexual disorder.

5. The Medical Board determined that Petitioner acted with reckless disregard for the truth when he answered "no" to question 20 on his initial application for licensure in Colorado that asked "Do you now have, or have you ever had, a physical or mental condition which might affect your ability to practice medicine?"

6. The Medical Board determined that "[b]ased on the record as a whole, [Petitioner's] false answer to question 20 on his application demonstrates that he is not qualified to practice medicine in Colorado at this time" and revoked Petitioner's license to practice medicine.

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[2] These findings of fact and conclusions of law (findings 1 - 12) in Part A are based on the I.G.'s proposed findings 1, 2, 3, 4, 6, 10, 12, 14, 15, 18, 19, and 21. I.G. Br. at 5 - 7. Petitioner did not agree with all of the I.G.'s proposed findings of fact and conclusions of law, but did agree with these specific findings of fact and conclusions of law. P. Br. at 4. Therefore, I have adopted these findings of fact and conclusions of law without substantive changes. I have, however, sequentially numbered them and conformed the style with the style I use in other parts of this Decision.

7. Upon review, on June 19, 1992, Hearing Panel B of the Medical Board rendered a "Final Board Order" affirming the initial decision to revoke Petitioner's license to practice medicine in the State of Colorado.

8. On November 20, 1992, the I.G. notified Petitioner that, effective December 10, 1992, he was being excluded from the Medicare and Medicaid programs pursuant to section 1128(b)(4) of the Act, 42 U.S.C. § 1320-7(b)(4).

9. The I.G.'s exclusion was predicated upon the Medical Board's revocation of Petitioner's license, which was for unprofessional conduct, namely for recklessly disregarding the truth when completing his licensure application.

10. The I.G. excluded Petitioner from the Medicare and Medicaid programs until he regains a valid license to practice medicine in Colorado.

11. The regulations require that the length of an exclusion imposed under section 1128(b)(4) will never be for a period of time less than the period during which an individual's license is revoked, unless paragraph (c) applies. 42 C.F.R. § 1001.501(b)(1) (1992). Paragraph (c) allows for a lesser period of exclusion when a second State licensing board, after being fully apprised of all the circumstances surrounding the revocation, suspension, or loss of the individual's license, decides to grant that individual a license or decides not to take any significant adverse action relating to a currently held license.

12. The regulations at 42 C.F.R. § 1001.501(b)(1) are binding upon the ALJs, the Departmental Appeals Board, and federal courts. 58 Fed. Reg. 5618 (1993) (to be codified at 42 C.F.R. § 1001.1(b)).

B. Other Findings of Fact And Conclusions of Law.

13. The Secretary of DHHS delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 53 Fed. Reg. 12993 (1988).

14. Petitioner cannot avail himself of the two exceptions found at 42 C.F.R. § 1001.501(c).

15. With regard to section 1001.501(c)(1), there is no evidence that Petitioner holds a medical license outside of Colorado.

16. With regard to section 1001.501(c)(2), Petitioner is not entitled to an ALJ hearing on the possibility of reinstatement into the programs if he should secure a license from another State.

17. In deciding whether to revoke Petitioner's medical license, the Medical Board determined, inter alia, that:

> a. Petitioner's psychosexual disorder (see finding 4, above) has affected him in his dealings with patients, including having caused him to be sexually aroused by his patients, impaired his ability to make differential diagnosis during October of 1990, and caused him to have sexual intimacies with a patient. I.G. Ex. 3 at 7, 13.
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> b. There exists a risk that Petitioner will act out sexually in the context of the physician-patient relationship. Id. at 13.
>
> c. Various incidents, including Petitioner's giving a false answer to question 20 on his application form for a medical license in Colorado, demonstrate that Petitioner engages in a pattern of trying to conceal his sexual disorder by telling half-truths or lies. Id. at 18 - 21.
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> d. Petitioner has suffered from denial, which is a fundamental symptom of his sexual addiction. Id. at 21.
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> e. With treatment, Petitioner is in the early stage of recovery, which is a lifetime process. Id. at 12.

f. Petitioner is at risk for relapse, which is a typical feature of any addictive illness. Id. at 12 - 13.

g. Petitioner's disorder renders him unable to perform medical services with safety to patients. Id. at 24.

18. In addition to having found that on his initial application form for a medical license in Colorado Petitioner had answered question 20 with reckless disregard for the truth (finding 5), the Medical Board found also that Petitioner had given a "knowingly false" answer to the same question on his license renewal application during the Spring of 1991. Id. at 19.

19. Question 20 on the initial application and renewal application forms bears on Petitioner's professional competence and performance in that it asks about his ability to practice medicine. Findings 5 and 18.

20. By falsely denying on his initial application form and his renewal application form that he had any mental condition that might affect his ability to practice medicine, Petitioner misrepresented his professional competence and performance. Findings 5, 18, 19.

21. The decision to revoke Petitioner's medical license due to his false answer to question 20 (finding 6) was made for reasons bearing on his professional competence and performance. Findings 17, 19, and 20.

22. The I.G. acted within the scope of the I.G.'s authority in directing and imposing the permissive exclusion under section 1128(b)(4)(A) of the Act, for the protection of the programs' beneficiaries and recipients. Findings 17, 19 - 21.

23. Both parties agree that the provisions of 42 C.F.R. § 1001.501(b)(1) are binding and, therefore, that the exclusion must be for the period during which Petitioner's license remains revoked in Colorado. Findings 10, 11, 14, 15, 16.

24. There exists no dispute concerning the reasonableness of Petitioner's period of exclusion. Finding 23.

25. The law and facts of record clearly establish that there is a proper basis for Petitioner's exclusion under section 1128(b)(4)(A) of the Act. Findings 1 - 24.

III. ANALYSIS

A. My Decision centers on why the Medical Board revoked Petitioner's license.

The sole issue of material fact before me is whether the I.G. had a basis for excluding Petitioner from participating in the Medicare and Medicaid programs under section 1128(b)(4)(A) of the Act. Petitioner and the I.G. agree that summary disposition is appropriate. P. Br. at 8, 10. Both parties acknowledge that the I.G.'s authority to exclude Petitioner can arise only from section 1128(b)(4)(A) of the Act. Assuming there exists a basis for the exclusion, the regulatory requirements of 42 C.F.R. § 1001.501(b)(1) control all adjudications on the issue of whether the period of exclusion is reasonable. I.G. Br. at 7, 18 - 19; P. Brief at 4 (referring to the I.G.'s proposed finding number 21).

The regulations require that, unless the enumerated exceptions apply, the length of an exclusion imposed pursuant to section 1001.501(b)(1) "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 agency action." 42 C.F.R. § 1001.501(b)(1). Here the State's revocation of Petitioner's license is to remain in effect indefinitely and the I.G. imposed a minimum coterminous exclusion pursuant to said regulation. The I.G. did not give any consideration to the existence of any of the aggravating factors listed in 42 C.F.R. § 1001.501(b)(2) for lengthening the exclusion. See the I.G.'s November 20, 1992 exclusion letter. Thus, none of the mitigating circumstances enumerated in the regulation applies because they may be considered "[o]nly if any of the aggravating factors listed ... justifies a longer exclusion." 42 C.F.R. § 1001.501(b)(3).

Even though the facts of this case do not necessitate my reaching the issue of what factors can mitigate the length of Petitioner's exclusion, I note that Petitioner

has proposed several findings of fact that are inconsistent with 42 C.F.R. § 1001.501(b)(3). The absence of alcohol or drug related problems (P. Br. at 9, proposed finding 6), the Medical Board's ability to limit a physician's practice (id., proposed finding 12), the absence of an obligation to tell Petitioner's medical school of his arrest (id., proposed finding 13), the absence of patient complaints during Petitioner's residency (id., proposed finding 14), and praise by Petitioner's supervisors (id., proposed finding 16) are not among the enumerated mitigating factors that can be considered under 42 C.F.R. § 1001.501(b)(3) for reducing Petitioner's exclusion period. I have therefore rejected the use of these assertions as formal findings even though they are not refuted. To the extent I discuss these or like facts, I do so for background purposes only.

Petitioner objected to the I.G.'s proposed finding number 20 that "the exception found at 42 C.F.R. § 1001.501(c) (1992) is inapplicable to the case at bar." I.G. Br. at 7; P. Br. at 7. Petitioner argued that the exception "should be afforded to Petitioner at any time." P. Br. at 7. Petitioner further argued that he has the option of securing a license in another State, that he is not limited to regaining his Colorado license, and that, therefore, his exclusion should remain in effect only until he obtains a valid license to practice medicine in any State. Id. at 8. Even though Petitioner has not indicated to which of the two possible exceptions listed in subsection (c) he is directing his various arguments, all aspects of his propositions lack legal or factual support in the proceedings before me.

The first exception in subsection (c) refers to determining the length of the exclusion where, "prior to the notice of exclusion by the OIG," the licensing authority of a different State has granted an individual a license or refrained from taking any adverse action against an individual's license after having been fully apprised of circumstances that gave rise to the individual's license suspension or revocation in another State. 42 C.F.R. § 1001.501(c)(1) (emphasis added). This regulatory exception, by its unequivocal terms, is not available to Petitioner at any time as he argues. It was available to Petitioner only prior to his receipt of the I.G.'s November 20, 1992 letter notifying him of his exclusion. Petitioner has never alleged that he holds a license outside Colorado. In the record before me, there is evidence only concerning the actions taken by Colorado's licensing authority. Having agreed with the I.G. that I should decide this case by summary

disposition on the present record (P. Br. at 8), Petitioner has waived the submission of any evidence he might have had relating to any valid license he may hold elsewhere. This regulatory exception is not available to Petitioner now or later.

The second exception in subsection (c) relates to the I.G.'s discretionary authority to permit early reinstatement of an excluded individual where another State's licensing authority either grants the individual a license or refrains from taking adverse action against an individual's current license after being fully apprised of the circumstances that gave rise to a license suspension or revocation. 42 C.F.R. § 1001.501(c)(2). Here, not only has the delegation been made to the I.G., the regulation limits the Petitioner's rights under this subsection to having the I.G. "consider a request for early reinstatement" (emphasis added). Id. I have no authority to adjudicate the issue of whether Petitioner can or should receive early reinstatement at the I.G.'s discretion. See, 42 C.F.R. § 1001.2007. Moreover, Petitioner is not entitled to an advisory opinion concerning the possibility that he might be able to obtain a license from another State.

On the issue of the I.G.'s basis for excluding Petitioner under section 1128(b)(4)(A) of the Act, the parties agree that the principal question of fact is whether Petitioner's license was revoked for reasons bearing on his professional competence or performance.[3] P. Br. at 8.

The license revocation proceedings arose after Petitioner informed the Medical Board, by letter dated December 31, 1990, that he had pled guilty to a charge of indecent exposure and was receiving treatment for what he described as his sex addiction. I.G. Ex. 2 at 2; I.G. Ex. 3 at 1 - 2. On July 25, 1991, Inquiry Panel A of the Medical Board, upon reviewing Petitioner's file, summarily suspended Petitioner's license to practice medicine. Panel A's conclusion was that, due to Petitioner's mental disability, his continued practice of medicine constituted "an imminent threat to the public

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[3] Even though "financial integrity" is the third criteria included in section 1128(b)(4) of the Act, the I.G. has not used it as a basis for Petitioner's exclusion. See I.G.'s notice, pleadings, and briefs of record. Nor do the parties' submissions contain any evidence as to Petitioner's financial integrity or lack of it.

health, safety and welfare of the People of Colorado..." I.G. Ex. 2 at 4. Also, Panel A further directed the Office of Attorney General to request revocation of Petitioner's license at a hearing. Id.

An evidentiary hearing was held before State Administrative Law Judge Nancy Connick, during September and October 1991, on the issue of whether Petitioner's license to practice medicine should be revoked pursuant to Colo. Rev. Stat. § § 12-36-101 to 126 (1985, 1991). I.G. Ex. 3. The State Attorney General charged Petitioner with two separate counts of "unprofessional conduct" which, under Colorado law, subjects a licensee to discipline. Count I alleged that Petitioner had violated Colo. Rev. Stat. § 12-36-117(1)(o) (1985), which defines "unprofessional conduct" as "[s]uch physical or mental disability as to render the licensee unable to perform medical services with reasonable skill and with safety to the patients." I.G. Ex. 3 at 23, 24. Count II alleged that Petitioner had violated Colo. Rev. Stat. § 12-36-117(1)(a) (1985), which defines "unprofessional conduct" as "[r]esorting to fraud, misrepresentation or deception in applying for, securing, renewing, or seeking reinstatement of a license ...." Id. On the basis of the evidence before her, Judge Connick concluded that violations had been established under both counts; however, revocation of Petitioner's medical license was warranted only under Count II. Id. at 23 - 31.

Pursuant to exceptions filed by Petitioner, Judge Connick's Initial Decision, dated November 18, 1991, was reviewed by the Medical Board's Hearing Panel B. I.G. Ex. 4. In a Final Board Order, Panel B incorporated Judge Connick's hearing decision in full and affirmed and adopted her findings of fact and conclusions of law. Id. at 1. However, Panel B specifically rejected that part of Judge Connick's decision that serious consideration be given to any motion for reconsideration Petitioner might file after the passage of three or more years. Id. at 2. Panel B said it did not wish to create any expectation of reinstatement. Id.

There was no further appeal of the Medical Board's decision to revoke Petitioner's license.

In addressing the present issue of whether Petitioner's license was revoked by the Medical Board for reasons bearing on his professional competence or performance, I have analyzed the relevant parts of Judge Connick's decision as affirmed, adopted, and incorporated in the Medical Board's Final Board Order. In my Decision, I

refer to the findings and conclusions as Judge Connick's for convenience.

It is well settled that, in contesting their exclusions, parties may not collaterally attack the findings made against them in other forums by other adjudicators of competent jurisdiction. Petitioner herein, while urging me to decide this case on the basis of an evidentiary record consisting solely of the administrative decisions issued in his license revocation proceedings and parts of the Colorado Revised Statutes (see, e.g., P. Br. at 10 (proposed finding 19)), also urges me to draw conclusions about his honesty and his fitness to practice medicine that are not in total accord with Judge Connick's findings (see, e.g., P. Br. at 8 - 10 (proposed findings 4, 5, 9, 15)). Moreover, Petitioner reasserted parts of his defense that had failed in the license revocation proceedings.[4] In deciding whether the I.G. had a proper

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[4] For example, in his proposed findings 9 and 15, Petitioner contends, "[a]ll of Petitioner's treating professionals agree that he could safely practice medicine, provided that certain conditions were imposed[,]" and "[i]n the ALJ's Initial Recommendation and Initial Decision, she specifically found that Petitioner could continue to practice medicine with safety to his patients under some restrictions." P. Br. at 9; see also id., proposed finding 11. Such arguments had been placed before Judge Connick, who found them "without merit." I.G. Ex. 3 at 23. Judge Connick reasoned as follows:

> If practice restrictions and other monitoring and treatment requirements must be imposed as the result of [Petitioner's] mental disability in order to insure the safety of his patients, [Petitioner] indeed has a mental disability which renders him unable to practice medicine with safety to his patients.

Id.

Also, in his proposed finding 7, Petitioner contends, "[p]rior to January 1991, Petitioner had not been diagnosed or treated for a mental condition." P. Br. at 9. This argument was rejected by Judge Connick thusly:

> [Petitioner] argues that, at the time he completed the 1989 application, he had not been specifically diagnosed as suffering from a DSM

(continued...)

basis for excluding Petitioner under section 1128(b)(4)(A) of the Act, I am not altering Judge Connick's findings or conclusions on the issues before her. Instead, I am rejecting Petitioner's proposed findings and arguments that are at variance with Judge Connick's decision.

B. The progression of Petitioner's disorder has caused him to deny its impact on his ability to safely practice medicine.

Judge Connick found that Petitioner suffers from a mental disorder that has intensified over time and has persisted despite treatment. I.G. Ex. 3 at 24. Judge Connick adopted the diagnosis of various mental health experts that Petitioner clearly suffers from a psychosexual disorder, including the paraphilia of exhibitionism and other paraphilia not otherwise specified,[5] which is characterized by significant addictive features. In addition, Petitioner has suffered from depression at times, as well as from a personality disorder that

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[4](...continued)
III-R psychosexual disorder and thus could at best infer the existence of a mental disability based on the treatment prescribed for his sexually inappropriate behavior. The lack of a specific psychosexual disorder diagnosis as of November, 1989, is at best a matter of form and is not particularly useful in determining whether [Petitioner] acted with reckless disregard for the truth.

I.G. Ex. 3 at 28.

[5] In her finding 58, Judge Connick defined "paraphilia" and "exhibitionism" as:

> Paraphilia is a sexual deviation, including a variety of thoughts and fantasies of a repetitive nature which cause an individual subjective distress or cause him to act in a manner causing problems to others. The term "paraphilia" recognizes a broad range of normal activities, but in [Petitioner's] case, his behavior has caused problems to himself and others. Exhibitionism is a particular type of paraphilia.

I.G. Ex. 3 at 9.

includes narcissistic, passive/dependent, and obsessive/compulsive traits.[6] His disorder is chronic, severe, and compulsive because it has lasted more than six months and he "exhibits a preoccupation with sexual behavior which becomes so strong that it overrides the adverse consequences of such behavior." Id. at 11, 16, 33.

In addition, Petitioner has suffered from denial as a part of his addictive disorder, and he has engaged in a pattern of trying to conceal his sexual disorder by telling half-truths or lies to authorities. Id. at 21. Petitioner's actions in this regard "constitute[s] unprofessional conduct by resorting to fraud, misrepresentation, or deception in applying for and in securing his license ...." Id. at 29.

The record shows the impact Petitioner's disorder has had on his dealings with patients and on his willingness to tell the truth about the consequences of his disorder.

When Petitioner was very young, he began to manifest symptoms of what would later be diagnosed as his sexual disorder. Id. at 2. His early symptoms included exhibitionism, compulsive masturbation, and attempts to participate in voyeurism. Id. The symptoms persisted through his adolescence and college years. Id.

After Petitioner enrolled in Northwestern University's School of Medicine in September of 1984, the rate of his exhibitionism increased. Id. The victims of his exhibitionism were all unknown to him and tended to be small groups of teenage girls -- although Petitioner has exhibited himself to older women as well. Id. at 2 - 3. Petitioner admitted to having been sexually aroused by female patients while in medical school. Id. at 13.

From 1985 to 1988, Petitioner obtained professional counselling for his sexual disorder. Id. at 3. For two of those years, 1986 to 1988, Petitioner also attended Sex Addicts Anonymous (SAA) meetings on the recommendation of his counsellor. Id.

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[6] In finding 59 and footnote 10, Judge Connick explained that "personality disorders are maladaptive patterns of personality functioning which may cause problems for others[,]" and, "[a] passive dependent personality reflects that a person is passive about solving his own problems and has dependent relationships with others with attendant adverse consequences." I.G. Ex. 3 at 9, 33.

On March 10, 1988, during his last year of medical school and while still attending SAA meetings, Petitioner exited naked from his car in a residential neighborhood of Cook County, Illinois, and exposed himself to three teenage girls. Id.

During April 1988, shortly after his arrest, Petitioner completed a form that was used by the Air Force in financing his medical education. Id. at 19. In this form, and also in other forms he had previously completed for the Air Force, Petitioner had answered "no" to the question "[h]ave you ever been treated for a mental condition?" Id. at 19 - 20. Due to the nature of Petitioner's counselling sessions and SAA meetings at that time, Judge Connick found the record insufficient to establish that Petitioner's answers on these forms were false. Id.

On April 11, 1988, Petitioner pled guilty to the charge of public indecency for having exposed himself to the three teenage girls. Id. at 3 - 4. Under the sentence that was imposed, Petitioner was to receive psychological and psychiatric counselling until the court discharged him from its supervision on April 10, 1990. Id. During his residency at the University of Colorado Health Science Center, Petitioner received treatment at RSA, Inc.,[7] from late August 1988 to mid-January 1990. Id. at 4 - 6.

During May 1989, while under continuing court ordered supervision and treatment, Petitioner completed another financial aid form for the Air Force. This time, in answer to the question of whether he had been treated for a mental condition, Petitioner answered "[n]o meds given, only counsel. 'General Anxiety' -- seen by private non-M.D. psychologist/ordained minister, Denver CO 10/88-4/89." Id. at 20. Later, at his license revocation proceedings, Petitioner tried to assert that he did not believe he was being treated for a mental condition and viewed his exhibitionism as akin to a traffic violation. Id. Judge Connick found his answer of May 1989 to be inaccurate. Id.

During November 1989, while still being treated at RSA pursuant to court order, Petitioner applied for a Colorado medical license. In an application form dated

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[7] According to Judge Connick, RSA was formerly known as "Redirecting Sexual Aggressions" and deals exclusively with people engaged in sexually inappropriate and abusive behaviors. Id. at 4.

November 14, 1989, Petitioner answered "no" to the question (number 20) "[d]o you now have, or have you ever had, a physical or mental disability which might affect your ability to practice medicine ?" Id. at 19. The Medical Board issued him a license on March 16, 1991, in reliance upon his answers on this application. Id. at 1, 19. It later found that Petitioner had given his answer on the application form in reckless disregard of the truth. Id. at 28.

In RSA Petitioner was being taught, inter alia, the behavior modification techniques that would reduce his inappropriate arousal. Id. at 4. However, even during this court supervised treatment course, Petitioner continued to exhibit symptoms of his disorder while appearing to progress in treatment. Id. at 3, 6.

After completing the RSA program in late January, 1990, Petitioner's sexual compulsions escalated to the point where he again exposed himself several times during the ensuing months. Id.

In April 1990, during his last year of residency and about the time he was being released from his legal obligations under the court's order, Petitioner exhibited symptoms of his sexual disorder by having a sexual encounter with a patient who performed oral sex on him. Id. at 7. Ethical standards prohibit a physician from having a sexual relationship with a current or former patient. Id. Petitioner's behavior towards this patient (e.g., accepting a card with her phone number, interpreting the giving of her card as a sexual overture, initiating a visit to her several weeks after examining her as a patient, and having the sexual encounter with her) was "symptomatic of his sexual disorder." Id.

In June 1990, in filing another renewal form for financial aid from the Air Force, Petitioner answered the question of whether he had ever been treated for a mental condition by stating: "General Anxiety (Isolated incident resulting from a patient's death) spring 1989." Id. at 20. Petitioner's answer was inaccurate and affirmatively misleading. Id. He had actually completed a treatment course of many months at RSA and was continuing other regular treatment under a mental health professional. Id.

In August 1990, Petitioner exposed himself to two eight year old girls in a residential area of Arapaho County, Colorado. Id. at 7. One of the victims suffered an adjustment disorder and anxiety as a result. Id at 7 - 8.

On August 28, 1990, Petitioner was arrested and charged with indecent exposure for having shown himself to the eight year old girls. Id. at 7. After having been informed that he had the right to remain silent, Petitioner lied and denied the behavior to the police. Id. at 20. He subsequently sought to justify his lying with the explanation that he made his false statement in an effort to see an attorney and have due process. Id.

Around Labor Day of 1990, Petitioner drove to California intending to kill himself. Id. at 8.[8] He returned to Denver after having had "anonymous" sex and resolved to obtain help for his disorder. Id.

By October 3, 1990, Petitioner's preoccupation with sexual behavior was interfering with his professional concentration to the point where it was causing him to have problems in making differential diagnoses. Id. at 13.

On October 4, 1990, Petitioner purchased a gun and alerted his wife that he wished to commit suicide. Id. at 8. He was hospitalized for depression until October 16, 1990. Id. He was then transferred to another facility, where during the period October 16, 1990 to November 20, 1990, he received five weeks of intensive, inpatient treatment for his psychosexual disorder. Id.

In November 1990, after the hospital released him to resume work without restrictions, Petitioner began monthly sessions with a psychiatrist. Id. On November 21, 1990, Petitioner began receiving outpatient treatment with a pastoral counsellor and also began attending SAA meetings as well. Id. at 8 - 9.

Also on November 21, 1990, Petitioner reported his sexual disorder to the director of his internal medicine residency program. Id. at 9. From the lateness of this report, from Petitioner's failure to voluntarily disclose his arrest in Chicago to the Northwestern University School of Medicine, and from the inaccurate or misleading answer Petitioner had provided to the Air Force, Judge

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[8] Judge Connick referred to Labor Day, 1991. I.G. Ex. 3 at 8 (finding 47). However, the chronology of her discussion indicates that the year should be 1990.

Connick inferred that Petitioner may have been actively concealing his sexual disorder. Id. at 20.[9]

Upon being told of Petitioner's sexual disorder, the director of Petitioner's residency program referred him to the Colorado Physician Health Program (CPHP). Id. at 9. CPHP is an independent organization that evaluates, refers for treatment, and monitors Colorado physicians with health problems. Id.

Dr. Michael Gendel, a CPHP staff psychiatrist, evaluated Petitioner in November and December of 1990. During these evaluations Petitioner initially denied having exhibited symptoms of his disorder in the workplace. Id. at 9, 21. It was not until Dr. Gendel probed the subject further that Petitioner admitted the sexual encounter with his patient[10] and said he had become cognizant of its inappropriateness. Id. at 21.

Dr. Gendel found in his preliminary assessment as well as in his completed analysis that Petitioner could resume his residency in internal medicine with reasonable skill and safety -- especially since he had agreed to a complex treatment schedule and monitoring. Id. at 9 - 10. Petitioner was then permitted to resume his residency in December 1990. However, because Petitioner had revealed his prior sexual relationship with a patient, Dr. Gendel told Petitioner that either he (Dr. Gendel) or Petitioner must report Petitioner's sexual disorder to the Medical Board. Id. at 10.

On December 13, 1990, Petitioner pled guilty to the indecent exposure charge involving his behavior before the two eight year old girls. Id. at 7.

On December 31, 1990, Petitioner notified the Medical Board of his sexual disorder and treatment. Id. at 1.

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[9] In light of Judge Connick's finding of concealment, I reject Petitioner's proposed finding 4, in which he claims that he "did not conceal his sexual disorder [and] [i]n fact, ... reported to Dr. Martin Hutt, M.D., Program Director for the residency program ..., his sexual disorder." P. Br. at 8.

[10] In light of Judge Connick's finding number 111 (I.G. Ex. 3 at 21), I reject Petitioner's proposed finding 5, alleging that "Petitioner did not conceal his involvement with [the patient]." P. Br. at 9.

On January 10, 1991, Petitioner signed a Participation Agreement with CPHP. Id. at 10. The agreement required Petitioner to attend three SAA or similar meetings a week, to participate in weekly psychotherapy sessions, to continue psychotherapy in order to address work-related stress issues, and to refrain from exposing himself, having "anonymous" sex, or having sex with present or former patients. Id.

As a result of his August 1990 arrest for indecent exposure, on February 28, 1991, the Arapaho County court sentenced Petitioner to 60 days of incarceration -- which he served during April and May of 1991. The sentencing order entered by the court on February 28, 1991 also barred Petitioner from treating anyone under the age of 18 and required Petitioner to verify, in writing to the Probation Office, that he had made his supervisors aware of the court imposed restriction. Id. at 7.

Petitioner, who was present at the hearing, heard the sentence, and later received a copy of it, never notified his supervisors that he was prohibited from treating anyone under the age of 18. Id. As a result, none of his supervisors was aware of the court-imposed limitation. Id. Petitioner tried to use the excuse of emotional stress to justify his silence. Id. He later conceded at the hearing before Judge Connick that he had no good reason for having violated the court's order. Id.

During the Spring of 1991, when Petitioner applied for renewal of his Colorado medical license, he again answered "no" to the question "[d]o you now have or have you ever had, a physical or mental disability which might affect your ability to practice medicine?" Id. at 19. Judge Connick found this answer "knowingly false" in light of Petitioner's prior criminal offenses, his having already received intensive treatment from several professionals, his having been twice informed (and having professed to understand) that his sexual encounter with a patient was inappropriate and symptomatic of his disorder, his having entered into a participation agreement with the CPHP in the prior months, and his having alerted the Medical Board to his sex addiction and arrests. Id.

Until approximately July 1991, when Petitioner left Colorado to begin orientation for his Air Force service, he continued to attend meetings and treatment sessions pursuant to his Participation Agreement with CPHP. Id. at 10 - 11. However, between November 1990 and July 1991, Petitioner had several affairs symptomatic of his

sexual disorder. This was contrary to one counsellor's instructions to remain celibate for self-improvement. Id. One of Petitioner's affairs was with a woman he met during an SAA meeting. Petitioner had the affair, even though he had been told that sexual relationships between group members were strictly forbidden. Id.

In September 1991, Petitioner lied when he was being evaluated in connection with his Colorado license revocation proceedings. Richard Irons, M.D., headed a team of professionals who evaluated Petitioner prior to the hearing before Judge Connick in order to determine whether, or under what conditions, Petitioner could practice medicine with reasonable skill and safety. Id. at 15. Even though Petitioner had previously told other medical professionals that he knew his sexual relationship with a patient had been inappropriate and violated professional boundaries, he initially told Dr. Irons that he had never had a sexual contact with a patient. Id. at 21.[11] He later indicated that he did not see what this sexual relationship with the patient had to do with the practice of medicine. Id.

Sexual addiction has three levels of increasing severity: 1) victimless behavior such as excessive masturbation, use of pornography, frequenting topless bars, and calling sexually oriented recorded messages; 2) behavior involving legal problems such as exhibitionism, voyeurism, excessive obscene telephone conversations, prostitution, and taking indecent liberties; and 3) more extreme behavior such as child molestation, incest, or rape. Id. at 11 - 12. Judge Connick was of the view that Petitioner had never exhibited behavior beyond level 2, and he has maintained his behavior at level 1 since November 1990, for reasons that are due, at least in part, to his legal problems. Id. at 12. Events such as an arrest and the proceedings to revoke a medical license can reduce the sex drive of an individual suffering from a chronic, psychosexual, addictive disorder. Id.

At the time of his license revocation hearing, Petitioner had successfully completed primary treatment and was in the early stage of a life-long recovery process. Id. According to the experts, the early stage of recovery can last several years; in addition, it takes typically five to ten years before recovery from sex addiction becomes

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[11] On the basis of Judge Connick's findings, I again reject Petitioner's proposed finding 5, which alleges that he did not conceal his sexual involvement with the patient. See P. Br. at 9.

self-sustaining. Id. Petitioner remains at risk of a relapse, since relapse is a significant problem during the early stage of recovery and a feature of any addictive illness. Id. at 12 - 13. There exists a risk to his acting out sexually in the physician-patient relationship. Id. at 13.

C. Petitioner's license was revoked for reasons bearing on his professional competence or performance.

The I.G. asks that I find:

> Revoking petitioner's license for recklessly disregarding the truth when completing his licensure application is a revocation of petitioner's license for reasons bearing on his professional performance.

I.G. Br. at 6 (proposed finding 16). The I.G. relies on Eric Kranz, M.D., DAB CR148 (1991), aff'd DAB 1286 (1991). The I.G. notes that the license revocation at issue in the Kranz case was also partially caused by false statements on a license application form. I.G. Br. at 17. The I.G. quotes language from the appellate panel's decision and suggests that Kranz is controlling.

Petitioner, like the I.G., looks at the false answer as an abstraction and asks that I find:

> Revoking Petitioner's license for recklessly disregarding the truth when completing his licensure application is not a revocation of petitioner's license for reasons bearing on his professional performance.

P. Br. at 10 (proposed finding 18).[12] Petitioner repeatedly argues that his license was revoked "for medical reasons" and because he "suffered from an illness, and not that he lacked professional competence." P. Br. at 3, 12. I find, however, that both the I.G.'s proposed finding quoted above and the Petitioner's propositions are overly broad and not fully appropriate to the facts of this case.

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[12] The remainder of this proposed finding, alleging that the Medical Board, in adopting Judge Connick's decision, found Petitioner able to practice medicine with safety to his patients, is factually insupportable for the reasons previously discussed.

Petitioner's medical license was not revoked merely because his application contained a false statement. Neither the Kranz decision nor any other legal precedent directs a conclusion that any statement on a license application form that is false or given with reckless disregard for the truth and causes an individual's license to be revoked or suspended constitutes authority for the I.G. to direct and impose an exclusion against an individual based upon the individual's professional competence or performance. In Kranz, the basis of the I.G.'s exclusion under section 1128(b)(4)(A) of the Act was that West Virginia had revoked the physician's license because he had perpetrated a criminal act upon a hospital employee in a hospital setting and had falsely denied in his licensure application to West Virginia that another state (Ohio) had rejected his application to practice medicine. Ohio denied Dr. Kranz a medical license because he had offered to sell questions and answers to medical examinations, because he had falsely claimed in his Ohio application that he was licensed to practice in Canada, and because he had failed to disclose that Pennsylvania and Oklahoma had denied him licenses as well. It is the totality of these very case-specific facts that led the administrative law judge and the appellate panel to conclude that the license revocation in Kranz was for reasons bearing on the doctor's professional competence and performance.

I reject the I.G.'s broad proposition that "'professional competence' and 'professional performance' clearly include the requirement that health care providers honestly respond to questions in their licensing application." I.G. R. Br. at 3. There is no per se rule that whenever a license revocation action involves a false answer on an application form, the resultant revocation is due to a reason bearing on professional competence or performance. Some false or incorrect answers on application forms may have no bearing on professional competence or performance. There is no evidence that a state licensing authority is prohibited from establishing rules that would authorize sanctions for false answers of any type on an application form -- even answers having nothing to do with professional competence or performance.

However, on the facts of this case, Petitioner's license was revoked for reasons bearing on his professional competence or performance because he had twice given a false answer to a question concerning his ability to

practice medicine.[13] The import of his false answers, and the facts he sought to conceal, form the basis of his exclusion under section 1128(b)(4)(A) of the Act.

Question 20 asked, "Do you now have, or have you ever had, a physical or mental disability which might affect your ability to practice medicine?" Judge Connick found that Petitioner's "response to question no. 20 inferred [sic] facts about the relationship between [his] mental disability and his medical practice." I.G. Ex. 3 at 26. By answering "no," Petitioner had made himself appear more professionally competent than he was -- that is, he gave the impression that he could practice medicine with safety to his patients even though "[t]he possibility of his mental condition's affecting his medical practice was a feature of his disability which existed at the time he completed the license application." Id. at 26 - 27. After the true extent of his psychosexual disorder came to light in the license revocation hearing, there was not one medical expert or Medical Board adjudicator who found Petitioner capable of practicing medicine without significant restrictions. I.G. Ex. 2, 3, 4.

Judge Connick found the false answer provided by Petitioner to be part of the denial that is symptomatic of Petitioner's addictive psychosexual disorder. Id. at 21. As already discussed, Petitioner's false answers on the license application and license renewal application are intertwined with the progression of his disorder and its impact on his practice of medicine. See also, id. at 28. In addition, Judge Connick had especially remarked on the falsity of Petitioner's answer to question 20 in light of his unprofessional sexual relationship with a patient, his arousal by female patients, and his difficulties in making differential diagnosis by October, 1990. Those problems were of a professional nature and resulted from Petitioner's mental disorder.

The Medical Board did not modify Judge Connick's reasoning that:

> Based on the record as a whole, [Petitioner's] false answer to question no. 20 on his application demonstrates that he is not

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[13] Petitioner had given a false answer on his initial license application form dated November 14, 1989, as well as on his renewal application form during the Spring of 1991. I.G. Ex. 3 at 19. The latter answer was "knowingly false"; and the former answer was made "with reckless disregard for the truth." Id. at 19, 28.

> qualified to practice medicine in Colorado at this time. In addition, revocation is the only discipline which would allow the Board the initial opportunity missed to judge [Petitioner's] conduct.

I.G. Ex. 3 at 31. This language indicates that the revocation action was not merely intended to punish Petitioner for a false answer on his application form. Rather, the revocation was intended to restore the Medical Board's opportunity to decide in the first instance whether, based on a true answer to question 20, Petitioner is qualified to practice medicine in the State. From this statement, the I.G. may properly infer that "[m]aintaining the integrity of the licensing process is integral to insuring that only qualified practitioners are allowed to practice medicine." I.G. R. Br. at 3. However, given the record before her and her findings, Judge Connick was not using the phrase "not qualified to practice medicine" to say that an individual is unfit to practice medicine unless he has been truthful in all matters on his application form.

For all these interrelated reasons, Petitioner's license was revoked "for reasons bearing on [his] professional competence [or] professional performance" within the meaning of section 1128(b)(4)(A) of the Act.

I am aware that the Medical Board, in adopting Judge Connick's decision, found nothing lacking in Petitioner's technical skills. I.G. Ex. 3 at 22. He was, by all accounts, a superior medical resident. Id. Petitioner relies on the good quality of care he has delivered in the past to define his professional competence and performance. P. Br. at 7. He especially notes that the Medical Board was not critical of the professional care that he has administered. Id. I am aware also that Petitioner may be able to practice medicine with safety to his patients under certain restrictive circumstances. See, e.g., I.G. Ex. 3 at 16 - 18, 29 - 31.[14] However,

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[14] The experts disagreed concerning what safeguards -- beyond continued treatment -- were necessary in order for Petitioner to practice medicine. Id. Expert recommendations included having a female chaperone with Petitioner during certain types of examinations and when he treats certain types of patients, barring Petitioner from treating children and women of child-bearing age for a period of two years, barring Petitioner from treating all female patients, and (continued...)

these and like factors do not alter my finding that Petitioner was properly excluded under section 1128(b)(4)(A) of the Act.

Section 1128(b)(4)(A) of the Act does not permit the use of a "but for" test when examining the reasons for a license revocation. That is, the federal statute does not require that Petitioner's license be revoked as a direct consequence of, or solely because of, his professional competence or performance. The revocation decision need only have been for reasons "bearing on" the enumerated factors. Here, there is adequate and incontrovertible evidence that satisfies the "bearing on" standard of section 1128(b)(4)(A).

With respect to Petitioner's observations that he had provided good medical services to his patients, I note that section 1128(b)(4)(A) does not limit exclusions to those individuals whose licenses have been revoked on specific findings of professional incompetence or on past delivery of poor health care services. The terms "professional competence" and "professional performance" connote what has occurred in the past as well as what may occur in the future. As already noted, despite some very superior professional accomplishments, Petitioner has experienced problems in the physician-patient context, and the experts were in agreement that his continued practice of medicine poses risks to patients. The Act is satisfied when, as here, the reason an individual's license was revoked has to do with professional competence or performance.

Additionally, I am unable to give weight to Judge Connick's opinion that, in the absence of the false answers to Question 20, Petitioner should be allowed to practice medicine under certain restrictions and probationary conditions. I.G. Ex. 3 at 29 - 31. Section 1128(b) of the Act provides the Secretary with only two choices: either to exclude or not to exclude health care

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[14](...continued)
restricting Petitioner to a single practice location where his history is disclosed to persons on a need-to-know basis. Id. at 13 - 16. Because Judge Connick was convinced that Petitioner's disorder may manifest itself in the physician-patient relationship in the future, she found that he should avoid high risk situations in his practice by, most preferably, treating only male patients. Id. at 17.

providers. The Secretary, in delegating to the I.G. this discretionary authority, announced that the I.G. will always consider on a case-by-case basis whether an individual presents a risk to the programs or their beneficiaries. 57 Fed. Reg. 3305 (1992).

Here, the Medical Board has already concluded that the "overwhelming evidence in the record ... supports the conclusion that [Petitioner] suffers from a mental disability which renders him unable to perform medical services with safety to the patient." I.G. Ex. 3 at 24. The Medical Board, which had the authority to set limitations or impose conditions on Petitioner's medical practice, did not do so because it chose to revoke his license instead. The I.G., by contrast, is not authorized to limit medical practices, to require female chaperones for physicians, or to impose any conditions for health care providers' continued participation in the programs. The I.G. may only exclude (or not exclude) health care providers. In challenging the I.G.'s decision to exclude him from further participation in the programs, Petitioner has not shown that the I.G. deviated from the Act or the regulations.

IV. CONCLUSION

For the foregoing reasons, the I.G. is entitled to summary judgment in the I.G.'s favor.

/s/

Mimi Hwang Leahy
Administrative Law Judge