Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Cases of:	
John M. Thomas, Jr., M.D.,	DATE: August 18, 1993
and	
Texoma Orthopedic Associates, d/b/a Orthopedic and Sports Medicine Center of North Texas	Docket Nos. C-93-030 C-93-045
Petitioners,	Decision No. CR281
- v. -	
The Inspector General	

DECISION

On November 16, 1992, the Inspector General (I.G.) notified Petitioner John Mauldin Thomas, Jr., M.D. (Petitioner Thomas) that he was being excluded from participation in the Medicare program and certain State health care programs for ten years.[1] Simultaneously, the I.G. notified Petitioner Texoma Orthopedic Associates d/b/a Orthopedic and Sports Medicine Center of North Texas (Petitioner Texoma) that it also was being excluded for ten years. The I.G. advised Petitioner Thomas that he was being excluded pursuant to section 1128(a)(1) of the Social Security Act (Act), based on his conviction of a criminal offense related to the delivery of an item or service under Medicaid. The I.G. advised Petitioner

[1] "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-financed health care programs, including Medicaid. Unless the context indicates otherwise, I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

Texoma that it was being excluded pursuant to section 1128(b)(8) of the Act, because an excluded individual (Petitioner Thomas) had a direct or indirect ownership or controlling interest of five percent or more in Petitioner Texoma, or was an officer, director, agent, or managing employee of Petitioner Texoma.

The I.G. advised Petitioner Thomas further that, in cases of exclusions imposed pursuant to section 1128(a)(1) of the Act, section 1128(c)(3)(B) of the Act requires a minimum exclusion of five years. However, the I.G. determined to exclude Petitioner Thomas for ten years after taking into consideration circumstances which were unique to his case.[2]

Petitioners Thomas and Texoma requested hearings and their cases were assigned to me for hearings and decisions. I decided to consolidate the two requests and to hold a single hearing, in light of the relationship between Petitioners Thomas and Texoma. Neither Petitioner Thomas, Petitioner Texoma, nor the I.G. objected to my holding a consolidated hearing in these cases.[3]

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[2] These were identified as follows:

1. Financial damage to the Medicare and Medicaid programs resulting from Petitioner Thomas' criminal activity amounted to $25,461.00.

2. Petitioner Thomas was sentenced to a term of incarceration of eight years.

3. The court which accepted Petitioner Thomas' plea to program-related criminal offenses determined that he had a mental, emotional or physical condition, before or during his commission of his crimes, that reduced his criminal culpability.

[3] Petitioner Thomas filed a hearing request which appeared to be in response to the I.G.'s notice to Petitioner Texoma. I concluded from the language of the request that Petitioner Thomas intended that the request be for a hearing concerning his exclusion. However, the request also arguably pertained to the exclusion of Petitioner Texoma. At the April 14, 1993 hearing, counsel for Petitioners stipulated that Petitioner Texoma is owned by Petitioner Thomas. He stipulated further

(continued...)

On April 14, 1993, I held a hearing in Dallas, Texas. The parties submitted posthearing briefs and reply briefs. I have carefully considered the applicable law, the evidence and the parties' arguments. I conclude that the ten-year exclusions which the I.G. imposed and directed against Petitioners are excessive. I modify the exclusions to terms of five years.

ISSUE

The issue in this case is whether the exclusions imposed against Petitioners by the I.G. are excessive.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner Thomas is a physician who specializes in orthopedic surgery.

2. Petitioner Texoma is an entity in which Petitioner Thomas has a direct or indirect ownership or control interest of five percent or more, or of which Petitioner Thomas is an officer, director, agent or managing employee. I.G. Exhibit (Ex.) 7, pages 1 - 2; Tr. at 8.

3. On July 17, 1991, Petitioner Thomas was indicted for felonies under Texas law. The felonies consisted of 42 counts of Securing Execution of a Document by Deception, and eight counts of theft in excess of $750.00. I.G. Ex. 4; I.G. Ex. 7, page 5.

4. Petitioner Thomas was charged with falsifying medical insurance claims forms in order to fraudulently induce Blue Cross and Blue Shield of Texas to pay reimbursement to Petitioner Thomas for Medicare items or services, which Petitioner Thomas had not provided. I.G. Ex. 4.

5. On October 7, 1991, Petitioner Thomas pleaded guilty to 43 felony charges, including one count of theft in excess of $20,000.00, and 42 counts of Securing Execution of a Document by Deception. P. Ex. 1, pages 1 - 24, 71 - 139.

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[3](...continued)
that any exclusion found to be applicable to Petitioner Thomas would be applicable equally to Petitioner Texoma. Transcript (Tr.) at 8.

6. Petitioner Thomas was sentenced to incarceration of eight years, to pay a fine of $10,000.00, and to pay restitution in the amount of $25,103.58. P. Ex. 1, pages 39 - 58.

7. Petitioner Thomas was convicted of a criminal offense related to the delivery of an item or service under Medicare, within the meaning of section 1128(a)(1) of the Act. Findings 3 - 6; Social Security Act, section 1128(a)(1).

8. Petitioner Texoma is an entity owned or controlled by an individual (Petitioner Thomas) who has been convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act. Findings 2, 7; Social Security Act, sections 1128(a)(1), 1128(b)(8).

9. The Secretary of the Department of Health and Human Services (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. 21,662 (1983).

10. The I.G. had authority to impose and direct an exclusion against Petitioner Thomas pursuant to section 1128(a)(1) of the Act. Findings 7, 9.

11. The I.G. had authority to impose and direct an exclusion against Petitioner Texoma pursuant to section 1128(b)(8) of the Act. Findings 8, 9.

12. Regulations published on January 29, 1992 establish criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to sections 1128(a) and (b) of the Act. 42 C.F.R. Part 1001 (1992).

13. The regulations published on January 29, 1992 include criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to sections 1128(a)(1) and 1128(b)(8) of the Act. 42 C.F.R. §§ 1001.101, 1001.102, 1001.1001.

14. On January 22, 1993, the Secretary published a regulation which directs that the criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to sections 1128(a) and (b) of the Act are binding also upon administrative law judges, appellate panels of the Departmental Appeals Board, and federal courts in reviewing the imposition of exclusions by the I.G. 42 C.F.R. § 1001.1(b); 58 Fed. Reg. 5617, 5618 (1993).

15. My adjudication of the length of the exclusions in this case is governed by the criteria contained in 42 C.F.R. §§ 1001.102 and 1001.1001. Finding 14.

16. An exclusion imposed pursuant to section 1128(a)(1) of the Act must be for a period of at least five years. Social Security Act, sections 1128(a)(1), 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

17. An exclusion imposed pursuant to section 1128(a)(1) of the Act may be for a period in excess of five years if there exist aggravating factors which are not offset by mitigating factors. 42 C.F.R. § 1001.102(b), (c).

18. Aggravating factors which may form a basis for imposing an exclusion in excess of five years against a party pursuant to section 1128(a)(1) of the Act may consist of any of the following:

> a. The acts resulting in a party's conviction, or similar acts, resulted in financial loss to Medicare and Medicaid of $1,500.00 or more.
>
> b. The acts that resulted in a party's conviction, or similar acts, were committed over a period of one year or more.
>
> c. The acts that resulted in a party's conviction, or similar acts, had a significant adverse physical, mental or financial impact on one or more program beneficiaries or other individuals.
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> d. The sentence which a court imposed on a party for the above mentioned conviction included a period of incarceration.
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> e. The convicted party has a prior criminal, civil or administrative sanction record.
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> f. The convicted party was overpaid a total of $1,500.00 or more by Medicare or Medicaid as a result of improper billings.

42 C.F.R. § 1001.102(b)(1) - (6) (paraphrase).

19. Mitigating factors which may offset the presence of aggravating factors may consist of only the following:

> a. A party has been convicted of three or fewer misdemeanor offenses, and the entire amount of financial loss to Medicare and

> Medicaid due to the acts which resulted in the party's conviction and similar acts, is less than $1,500.00.
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> b. The record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that, before or during the commission of the offense, the party had a mental, emotional, or physical condition that reduced that party's culpability.
>
> c. The party's cooperation with federal or State officials resulted in others being convicted of crimes, or in others being excluded from Medicare or Medicaid, or in others having imposed against them a civil money penalty or assessment.

42 C.F.R. § 1001.102(c)(1) - (3) (paraphrase).

20. An exclusion imposed against an entity pursuant to section 1128(b)(8) of the Act ordinarily must be for the same length of time as that imposed against the individual whose relationship with the entity is the basis for the exclusion. 42 C.F.R. § 1001.1001(b)(1).

21. Petitioner Thomas was convicted of felonies involving fraudulent Medicare claims of at least $17,000.00. I.G. Ex. 7a; Tr. at 71 - 73.

22. That the acts which resulted in Petitioner Thomas' conviction resulted in financial loss to Medicare of $1,500 or more is an aggravating factor that may justify excluding Petitioner Thomas for more than five years. Finding 21; 42 C.F.R. § 1001.102(b)(1).

23. Petitioner Thomas' sentence to a period of incarceration of eight years is an aggravating factor that may justify excluding Petitioner Thomas for more than five years. Finding 6; 42 C.F.R. § 1001.201(b)(4).

24. In February, 1991, Petitioner Thomas was convicted of a criminal offense for failure to keep an inventory of a controlled substance. Tr. at 96 - 97.

25. Petitioner Thomas' conviction in February 1991 of another criminal offense is a prior conviction which is an aggravating factor that may justify excluding Petitioner Thomas for more than five years. Finding 24; 42 C.F.R. § 1001.102(b)(5).

26. Petitioner Thomas offered to surrender his license to practice medicine in Texas during the pendency of an investigation by the Texas State Board of Medical Examiners into allegations that Petitioner Thomas illegally diverted controlled substances to third parties between July and November 1990 and failed to keep complete and accurate records of his purchases and distributions of controlled substances (including approximately 6885 dosage units of Dilaudid 4 mg., a Schedule II controlled substance) between January 1, 1990, and January 30, 1991. I.G. Ex. 11, pages 2 - 5.

27. On December 3, 1991, the Texas State Board of Medical Examiners revoked Petitioner Thomas' license to practice medicine in Texas. I.G. Ex. 11.

28. Petitioner Thomas' surrender of his license to practice medicine to the Texas Board of Medical Examiners during the pendency of an investigation concerning his possible illegal activity is a prior civil administrative sanction which is an aggravating factor that may justify excluding Petitioner Thomas for more than five years. Findings 26 - 27; 42 C.F.R. § 1001.102(b)(5).

29. On January 31, 1992, the Texas Department of Human Services notified Petitioner Thomas that it was excluding him from participation in the Texas Medicaid program and other State health care programs, effective December 3, 1991. I.G. Ex. 12.

30. The Texas Department of Human Services' exclusion determination was predicated on Petitioner Thomas' surrender of his license to practice medicine in Texas to the Texas Board of Medical Examiners. I.G. Ex. 12, page 1.

31. The Texas Department of Human Services' exclusion of Petitioner Thomas is a prior civil administrative sanction which is an aggravating factor that may justify excluding Petitioner Thomas for more than five years. Findings 29 - 30; 42 C.F.R. § 1001.102(b)(5).

32. A conviction of a party or the imposition of a civil administrative sanction against a party is a "prior" conviction or civil administrative sanction under applicable regulations if it occurs prior to the date of the I.G.'s determination to exclude that party. 42 C.F.R. § 1001.102(b)(5); see Findings 26 - 31.

33. Petitioner Thomas was not denied due process by the I.G.'s failure to advise him in the notice of exclusion, dated November 16, 1992, of all of the aggravating

factors that are relevant to determining the length of Petitioner Thomas' exclusion.

34. The aggravating factors present in this case establish that Petitioner Thomas engaged in conduct which jeopardized the integrity of federally-financed health care programs and which could have jeopardized the well-being and safety of program beneficiaries and recipients. Findings 21 - 31.

35. In the absence of any offsetting mitigating factor, the aggravating factors present in this case would establish Petitioner Thomas as a threat to the integrity of federally-financed health care programs and to the well-being and safety of program beneficiaries and recipients. Finding 34.

36. In the absence of any offsetting mitigating factor, the aggravating factors present in this case would justify excluding Petitioner Thomas for more than five years. Findings 34 - 35; 42 C.F.R. § 1001.102(b)(1) - (6).

37. The record of the criminal proceedings in which Petitioner Thomas pled guilty to criminal offenses related to the delivery of items or services under Medicare demonstrates that the court determined that, during the commission of his offense, Petitioner Thomas had a mental condition that reduced his culpability. I.G. Ex. 1, page 2; I.G. Posthearing Brief at 1 - 2; P. Ex. 1, pages 32 - 34, 60 - 62; see P. Ex. 2; Tr. at 180.

38. Petitioner Thomas' mental condition during the commission of his offenses is a mitigating factor which may serve to offset the presence of aggravating factors. Finding 37; 42 C.F.R. § 1001.102(c)(2).

39. Petitioner Thomas has suffered since his childhood from a mental illness, consisting of a bipolar disorder, cyclic type. P. Ex. 1, page 60 - 61; Tr. at 102, 121, 136.

40. A bipolar affective disorder is a biological illness with behavioral ramifications. P. Ex. 1, page 61.

41. Individuals who suffer from bipolar affective disorders experience chemical imbalances in their brains which cause them to behave in ways which are, at least partially, beyond their ability to control. P. Ex. 1, page 61.

42. Petitioner Thomas' bipolar disorder has manifested both manic and depressed phases. P. Ex. 1, page 60; Tr. at 102, 124.

43. Petitioner Thomas' manic episodes have been characterized by excessive energy, grandiose behavior, and impaired judgment. P. Ex. 1, pages 60 - 61; Tr. at 103 - 104.

44. It was during a manic phase of Petitioner Thomas' illness which began in early 1990 that he engaged in the unlawful conduct which resulted in: his convictions in February and October, 1991; the loss of his license to practice medicine in Texas; and his exclusion by the Texas Department of Human Services. P. Ex. 1, pages 60 - 61; Tr. at 126 - 129.

45. The unlawful conduct in which Petitioner Thomas engaged beginning in early 1990 was a consequence of the impaired judgment he experienced during the manic phase of his bipolar disorder. P. Ex. 1, page 61; Tr. at 121 - 128; Finding 43.

46. Petitioner Thomas has received treatment for his bipolar disorder, consisting of therapy and medication. Tr. at 105 - 107, 126.

47. Petitioner Thomas has adhered faithfully to his treatment regime. Tr. at 105 - 107.

48. It is unlikely that Petitioner Thomas will again experience uncontrolled manic episodes like the one he experienced beginning in early 1990. Tr. at 105 - 111, 115, 129; see Tr. at 140.

49. There is little likelihood that Petitioner Thomas will, in the future, engage in unlawful conduct. Tr. at 110 - 116, 126, 139.

50. An exclusion of more than five years is not necessary to protect the integrity of federally-financed health care programs or the welfare and safety of program beneficiaries and recipients from future unlawful conduct by Petitioner Thomas. Findings 48 - 49.

51. In this case, the aggravating factors which would otherwise justify an exclusion of Petitioner Thomas for more than five years are offset by the mitigating factor of Petitioner's bipolar affective disorder. Findings 21 - 50; 42 C.F.R. § 1001.102(b), (c).

52. When the aggravating factors in these cases are weighed in conjunction with the mitigating factor, the ten year exclusion which the I.G. imposed against Petitioner Thomas is excessive. Finding 51.

53. A five year exclusion of Petitioner Thomas will meet the remedial purposes of the Act and is justified. Findings 21 - 52; Social Security Act, §§ 1128(a)(1), (c)(3)(B); 42 C.F.R. §§ 1001.101, 1001.102.

ANALYSIS

Petitioners do not dispute that Petitioner Thomas was convicted of a criminal offense related to the delivery of an item or service under Medicare within the meaning of section 1128(a)(1) of the Act. They do not dispute that the Act requires that Petitioner Thomas be excluded for a minimum of five years, based on his conviction of a program-related offense. Nor do they dispute that Petitioner Thomas owns and controls Petitioner Texoma within the meaning of section 1128(b)(8) of the Act, and that Petitioner Texoma must be excluded for the same period of time as is Petitioner Thomas.

What is at issue here is whether the 10 year exclusions which the I.G. imposed against Petitioners Thomas and Texoma are excessive. The I.G. contends that the exclusions are justified, citing applicable regulations. Petitioners contend, among other things, that the exclusions which the I.G. imposed against them are not justified by the regulations relied on by the I.G.

1. These cases are governed by regulations published on January 29, 1992 and January 22, 1993.

These cases are in some respects cases of first impression because they involve the first use of regulations adopted by the Secretary on January 29, 1992 as standards for adjudication of the legitimacy of the length of an exclusion of more than five years under section 1128(a)(1) of the Act, and of the length of an exclusion under section 1128(b)(8) of the Act. Therefore, I find it necessary to discuss the history of these regulations and the standards for adjudication which they contain.

a. The standard of adjudication prior to January 22, 1993

The standard for adjudication concerning the reasonableness of an exclusion in effect prior to the adoption of the January 22, 1993 regulations allowed parties to address fully the excluded party's trustworthiness to provide care. Evidence as to trustworthiness was admissible even if it pertained to events which were not related directly to the offense which was the basis for the exclusion, and even if not considered by the I.G.'s agents in making their exclusion determination.

Hearings before administrative law judges as to the reasonableness of exclusions are de novo, and not appellate, hearings. Bernardo G. Bilang, M.D., DAB 1295 (1992); Eric Kranz, M.D., DAB 1286 (1991). Under the Act, the burden of proof is on the I.G. to establish that the length of any exclusion imposed against a party is reasonable. An excluded party has the statutory right to rebut evidence presented by the I.G.

Appellate panels of the Departmental Appeals Board (Board) and administrative law judges delegated to hear cases under section 1128 of the Act have held consistently that section 1128 is a remedial statute. Exclusions imposed pursuant to section 1128 (including exclusions of more than five years imposed pursuant to section 1128(a)(1)) have been found reasonable only insofar as they are consistent with the Act's remedial purpose, which is to protect federally-financed health care programs and their beneficiaries and recipients from providers who are not trustworthy to provide care. Robert Matesic, R.Ph., d/b/a Northway Pharmacy, DAB 1327, at 7 - 8 (1992).

In Matesic, a Board appellate panel discussed the kinds of evidence which should be considered by administrative law judges in hearings as to the reasonableness of exclusions. The appellate panel concluded that any evidence which related to an excluded party's trustworthiness to provide care was relevant to the issue of reasonableness. Matesic, DAB 1327, at 12.

b. Publication of the 1992 regulations and their applicability to administrative law judges' adjudications of the length of exclusions

On January 29, 1992, the Secretary published regulations which, at 42 C.F.R. Part 1001, established criteria for the I.G. to apply in determining, imposing, and directing

exclusions pursuant to section 1128 of the Act. Administrative law judges held in several decisions issued after January 29, 1992 that these regulations do not establish criteria for adjudication of the length of exclusions. Bertha K. Krickenbarger, R.Ph., DAB CR250 (1993); Sukumar Roy, M.D., DAB CR205 (1992); Steven Herlich, DAB CR197 (1992); Stephen J. Willig, M.D., DAB CR192 (1992); Aloysius Murcko, D.M.D., DAB CR189 (1992); Charles J. Barranco, M.D., DAB CR187 (1992). The Herlich decision held explicitly that section 1001.102 of the regulations, governing the I.G.'s exclusion determinations for exclusions of more than five years under section 1128(a)(1) of the Act, which is at issue here also, did not apply in administrative hearings concerning such exclusions.

The decisions in these cases were based on two conclusions. First, the Part 1001 regulations were not intended by the Secretary to strip parties retroactively of rights vested prior to January 29, 1992. Therefore, the Part 1001 regulations did not apply to any cases arising from exclusion determinations made prior to that date. Behrooz Bassim, M.D., DAB 1333, at 5 - 9 (1992)[4]. Second, the Secretary did not intend part 1001 of the regulations to establish criteria for administrative hearings as to the length of exclusions.

The reasons for finding that the Secretary did not intend the Part 1001 regulations to establish criteria for adjudication of the length of exclusions are stated in detail in the decisions cited above. It is unnecessary to restate those reasons here, except to note that, among other things, the decisions concluded that the Part 1001 regulations, if applied as standards for adjudication, would serve to bar parties from presenting evidence which addresses fully the excluded party's trustworthiness to provide care.

On January 22, 1993, the Secretary published new regulations. These regulations state unequivocally that the exclusion determination criteria contained in 42 C.F.R. Part 1001 must be applied by administrative law judges in evaluating the length of exclusions imposed by the I.G. 58 Fed. Reg. 5617, 5618 (to be codified at 42 C.F.R. § 1001.1(b)).

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[4] Both Petitioners Thomas and Texoma filed a request for hearing after January 29, 1992. Therefore, neither case involves an issue of retroactive application of regulations.

The regulations were made applicable to cases which were pending on January 22, 1993, the regulations' publication date. 58 Fed. Reg. at 5618. The present cases are "pending cases" inasmuch as at both the exclusion determinations and the hearing requests were made after January 29, 1992 and prior to January 22, 1993.

c. The applicable standard of adjudication

I must now apply to Petitioner Thomas' case the criteria contained in 42 C.F.R. §§ 1001.101 and 1001.102. I must now apply to Petitioner Texoma's case the criteria contained in 42 C.F.R. § 1001.1001. The standard for adjudication contained in 42 C.F.R. § 1001.101 mandates that, in cases of exclusions imposed pursuant to section 1128(a)(1), the minimum exclusion imposed must be for no less than five years. This incorporates into the regulations the minimum exclusion period mandated by section 1128(c)(3)(B) of the Act for exclusions imposed pursuant to section 1128(a)(1). The standard for adjudication contained in 42 C.F.R. § 1001.102 provides that, in appropriate cases, exclusions imposed pursuant to section 1128(a)(1) may be for more than five years. Such exclusions may be appropriate where there exist aggravating factors (identified by 42 C.F.R. § 1001.102(b)) that are not offset by mitigating factors (identified by 42 C.F.R. § 1001.102(c)). The regulation specifically states those factors which may be classified as aggravating and those factors which may be classified as mitigating. Under the regulatory scheme, evidence which relates to factors which are not among those specified as aggravating and mitigating is not relevant to adjudicating the length of an exclusion and cannot be considered.[5]

The standard for adjudication contained in 42 C.F.R. § 1001.1001(b)(1) for exclusion of entities pursuant to section 1128(b)(8) of the Act directs that an entity excluded pursuant to that section generally must be excluded for the same length of time as is the individual who owns or controls that entity. This section therefore mandates that Petitioner Texoma be excluded for whatever length of time Petitioner Thomas is excluded.

The regulation governing exclusions imposed pursuant to section 1128(a)(1) contains no formula for assigning weight to aggravating and mitigating factors once such

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[5] I describe the permissible aggravating factors in Finding 18. I describe the permissible mitigating factors in Finding 19.

factors are established by the parties. I expressed concern at the hearing that 42 C.F.R. § 1001.102 might leave me without standards by which to adjudicate the length of exclusions in cases of exclusions imposed pursuant to section 1128(a)(1) of the Act for periods of more than five years.[6] Upon further reflection, however, I find that this regulation and the Act, when read together, provide ascertainable standards for adjudicating the length of exclusions. See Patchogue Nursing Center v. Bowen, 797 F.2d 1137 (2d Cir. 1986).

While the regulation limits the factors which I may consider in evaluating the reasonableness of an exclusion for more than five years imposed pursuant to section 1128(a)(1), it requires that I explore in detail, and assign appropriate weight to, those factors which are aggravating or mitigating. Ultimately, I must still decide, using the regulatory factors, whether an exclusion in a particular case is reasonably necessary to protect the integrity of federally-financed health care programs and the welfare of the programs' beneficiaries and recipients.

The I.G. argues that the regulation requires me to defer to the I.G.'s judgment in deciding whether an exclusion is reasonable. Petitioners argue that, because the regulation contains no formula by which to measure the length of an exclusion, and because the regulation states that aggravating and mitigating factors "may" be used to increase or decrease the length of an exclusion, essentially I have unbridled discretion to decide what is reasonable. Both sides overstate the degree of discretion which the regulation gives to adjudicators to modify exclusions.

My authority in hearing and deciding cases pursuant to section 1128 of the Act remains de novo authority. I am not charged with an appellate review of the I.G.'s actions, nor am I directed to conduct an inquiry as to whether the I.G.'s agent has discharged his or her duty

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[6] Petitioners contend that 42 C.F.R. § 1001.102 provides no guidance as to what length exclusions ought to be, assuming that aggravating factors are present in a given case which are not offset by mitigating factors. They contend that no exclusion of more than five years can be sustained, because there exists no mechanism in the regulation to measure an exclusion's reasonableness. I conclude that, for the reasons stated in this Analysis, the regulations do provide principles by which the length of an exclusion can be adjudicated.

competently in a particular case. Thus, the regulation does not suggest that I should defer to the I.G.'s discretion in any case where the length of an exclusion is at issue. On the other hand, the regulation requires me to evaluate exclusions de novo, using the same criteria employed by the I.G.'s agents, to decide whether exclusions are reasonable. The regulation does not suggest that I have unbridled discretion to modify an exclusion. I must sustain an exclusion if, based on an independent review, I conclude it comports with the regulation's criteria and the Act. I must modify an exclusion if, based on an independent review, I conclude that it does not comport with the criteria contained in the regulations and with the Act.

There are two broad principles which govern application of the regulation.[7] First, the regulation must be applied as written. Second, the regulation must be applied consistent with the Act's remedial purpose as expressed by the Board's appellate panels in Matesic and in other decisions, to the extent that can be done without contravening the regulation's explicit directions.

As a general matter, regulations should be applied to produce a result which is consistent with that required by the underlying statute. Furthermore, the Secretary has made it plain that the regulations in 42 C.F.R. Part 1001 are to be applied consistent with the Act's remedial purpose:

> The primary purpose of an exclusionary sanction is remedial, not punitive. When the . . . [I.G.] imposes an exclusion under section 1128 of the Act, it is simply carrying out Congress' intent to protect the Medicare and Medicaid programs from individuals or entities who have

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[7] The narrow issue in these cases is the application of 42 C.F.R. § 1001.102 in cases involving exclusions of more than five years imposed pursuant to section 1128(a)(1) of the Act. However, this regulation's identification of factors which may be considered in evaluating the length of an exclusion is part of a regulatory scheme in 42 C.F.R. Part 1001 which identifies aggravating and mitigating factors that relate to all types of exclusions that may be imposed under section 1128. My holding concerning the application of 42 C.F.R. § 1001.102 may be applicable broadly to the other regulations in 42 C.F.R. Part 1001.

> already been tried and convicted of a criminal offense . . . .

57 Fed. Reg. at 3300.

The plain meaning of 42 C.F.R. § 1001.102 is that the only factors which may be considered as relevant to adjudicating the length of exclusions imposed pursuant to section 1128(a)(1) are those which are identified in the regulation as being aggravating or mitigating. Therefore, I may not accept evidence as to factors which, in the past, may have been found by the Board's appellate panels and administrative law judges to be relevant to a party's trustworthiness to provide care, but which are not identified by the regulation as aggravating or mitigating. For example, two of the factors which the Board's appellate panel identified in Matesic as being relevant to determining whether the length of any exclusion is necessary to accomplish the Act's remedial purpose were a party's remorse for past misconduct, and the extent to which that party has been rehabilitated. DAB 1327, at 12. The regulation does not identify either of these as mitigating factors; consequently I may not now consider them (or receive evidence relevant to them) in adjudicating the length of exclusions.

I issued a ruling in this case that I would receive evidence relevant to the factors in Matesic, and I permitted the parties to offer such evidence at the hearing. For example, Petitioners' counsel asked several witnesses the general question whether they considered Petitioner Thomas as being "trustworthy" to provide care, based on their knowledge of his character, and without regard to any specified aggravating or mitigating factors. I permitted Petitioners' counsel to ask witnesses whether they knew if Petitioner Thomas had expressed remorse for his unlawful conduct. I made my ruling at a time when I was uncertain as to the implications and application of the regulations. I now reject that evidence as irrelevant. Therefore, I did not rely on it in reaching my decision in this case. The specific aggravating and mitigating factors on which I received evidence, and the conclusions I reached concerning those aggravating and mitigating factors, are identified and described in Findings 21 - 49.

Thus, the regulation's limitation of the evidence which is admissible as to the length of exclusions prohibits administrative law judges from admitting evidence relating to the full range of factors which the Board's appellate panels previously have identified as being relevant to the issue of trustworthiness. The

"trustworthiness" analysis which I must now perform is truncated and may not fully answer the question of whether a party in a given case is trustworthy to provide care.

On the other hand, the regulation is intended to comport with the Act's remedial purpose. Therefore, in each case, I must continue to weigh those factors which the regulation now directs me to consider with an eye towards determining at what point the excluded party may be trusted to provide care. The fact that my analysis in a given case may not be as complete as the appellate panel held would be appropriate in Matesic is a consequence of the regulation's proscriptions, but I must nevertheless analyze that evidence which remains relevant under these regulations in accord with the Act's remedial purpose.

The presence of an aggravating or mitigating factor in a case may permit inferences about a party's trustworthiness. But far more may be revealed by evidence which explains and develops an aggravating or mitigating factor. The regulation does not proscribe admission of such evidence, and its admission is consistent with the requirement that exclusions be remedial. It is consistent also with the requirement for de novo hearings.

The comments to 42 C.F.R. Part 1001 support my conclusion that the parties should be permitted to develop evidence which explains and develops aggravating and mitigating factors. For example, the comments pertaining to a party's mental state as of the time that party committed an offense note that:

> this factor will not be considered as mitigating if there is an ongoing problem that has not been resolved, such that the program(s) and their beneficiaries continue to be at risk.

57 Fed. Reg. at 3315. This comment requires the adjudicator to accept evidence about a party's mental state beyond evidence which shows only that the sentencing judge found that the party's culpability was diminished by his mental condition.[8] Rather, a full

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[8] Arguably, this comment might be interpreted as suggesting that no evidence should be accepted as to a party's mental impairment unless the impairment resolves completely prior to the date of the hearing. Consistent with the Act and the regulations, I conclude that the

(continued...)

explication of evidence concerning a party's mental condition is required (assuming that the evidence proves that the party's mental condition meets the regulation's definition of a mitigating factor) in order to decide how that party's mental condition impinges on his or her trustworthiness to provide care.[9]

The record of these cases provides examples of how this analysis works in practice. For example, the I.G. proved that Petitioner Thomas was sentenced to a period of incarceration as a result of his pleading guilty to program-related crimes. Petitioner Thomas' sentence is admissible evidence as to his trustworthiness because it conforms to one of the aggravating factors identified by the regulations. 42 C.F.R. § 1001.201(b)(4). However although inferences can be drawn about Petitioner Thomas' trustworthiness by the fact that he was sentenced to incarceration, even more can be inferred by considering the length of his sentence. What is most relevant about Petitioner Thomas' incarceration is that he was sentenced to a term of imprisonment of eight years. The length of the sentence underscores the seriousness of the crimes to which Petitioner Thomas pled guilty and leads to the inference that, at least as of the time of his conviction, Petitioner Thomas was a highly untrustworthy individual.

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[8](...continued)
comment should be read to mean that a mental impairment should never be considered to be mitigating unless it can be expected to resolve completely within whatever exclusion period is decided to be reasonable.

[9] The requirement that the threshold conditions identified by the regulation be met first is critical. The regulation provides that a party's mental condition can be considered as a mitigating factor only if:

> The record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional or physical condition before or during the commission of the offense that reduced the individual's culpability; . . .

42 C.F.R. § 1001.102(c)(2). I may not consider as "mitigating," evidence concerning a party's mental state and culpability unless this threshold condition is first proved by an excluded party.

2. The exclusions which the I.G. imposed against Petitioners Thomas and Texoma are excessive.

No remedial purpose would be served by excluding Petitioner Thomas for ten years. While it is obvious that he engaged in egregiously unlawful and reckless conduct, his culpability for that conduct was diminished by a mental illness that affected his judgment and self-control.

Section 1128(a)(1) of the Act and 42 C.F.R. § 1001.101 mandate a minimum five-year exclusion period. Petitioner Thomas proved that his unlawful activities were the direct result of his bipolar affective disorder. Petitioner Thomas proved that the therapy and medication he is receiving for his illness should bring that illness within control well within the minimum five-year exclusion period. He will then be trustworthy to provide care to program beneficiaries and recipients. Given this proof, an exclusion of Petitioner Thomas for more than five years would be punitive and excessive. The exclusion against Petitioner Texoma also must be reduced to five years.

The I.G. introduced evidence which proved that Petitioner Thomas' case manifested several elements which 42 C.F.R. § 1001.102 identifies as aggravating factors. Petitioner Thomas pleaded guilty to program-related crimes involving fraudulent claims in excess of $17,000.00. Finding 21; 42 C.F.R. § 1001.102(b)(1). He was sentenced for these crimes to a period of eight years' incarceration. Findings 6, 23; 42 C.F.R. § 1001.102(b)(4). The I.G. proved, additionally, that Petitioner Thomas has a prior record of criminal convictions and administrative sanctions. In February 1991, he was convicted of a criminal offense for failure to keep an inventory of a controlled substance. Finding 24; 42 C.F.R. § 1001.102(b)(5). In December 1991, Petitioner Thomas surrendered his license to practice medicine in Texas in the face of an investigation into the circumstances surrounding his February 1991 conviction. Findings 26 - 28; 42 C.F.R. § 1001.102(b)(5). In January 1992, Petitioner Thomas was excluded from participation by the Texas Medicaid program, based on his surrender of his license to practice medicine in Texas. Finding 29; 42 C.F.R. § 1001.102(b)(5).

The I.G. offered evidence which shows that Petitioner Thomas admitted to fraud against insurers other than Medicare in an amount exceeding $7000.00. I admitted that evidence. However, that evidence does not appear to fall within any of the factors identified in the

regulation as aggravating, and therefore, I may not consider it as evidence of Petitioner Thomas' lack of trustworthiness to provide care. Accordingly, I give no weight to that evidence. The regulation permits evidence which proves that acts which are "similar" to those resulting in conviction of a program-related offense resulted in financial loss to "Medicare and State health care programs of $1500 or more." 42 C.F.R. § 1001.102(b)(1). Although the I.G. proved that Petitioner Thomas engaged in acts which are "similar" to those for which he was convicted, the I.G. did not prove that these acts resulted in financial loss to Medicare or to State health care programs. However, even had the I.G. proved that Petitioner Thomas has committed offenses similar to those to which he pled guilty, within the meaning of 42 C.F.R. § 1001.102(b)(1), I would have concluded that such aggravating evidence was offset by mitigating evidence.

Petitioner Thomas' conviction for an offense involving a controlled substance, his license surrender, and his Medicaid exclusion were not identified by the I.G. as aggravating circumstances in the exclusion notice sent to Petitioner Thomas. I permitted the evidence to be offered, because the hearing before me is de novo and because adequate notice of these circumstances was provided by the I.G. to Petitioners in the exchange of proposed exhibits made more than two weeks prior to the hearing. Petitioners also objected to my receiving evidence concerning Petitioner Thomas' license revocation and the exclusion by the Texas Medicaid program on the ground that these events occurred after the date of Petitioner Thomas' conviction for a program-related offense. Therefore, according to Petitioners, these were not prior convictions or administrative sanctions within the meaning of 42 C.F.R. § 1001.101(b)(5). I do not conclude that the term "prior" as used in this section relates to events occurring prior to the conviction on which the exclusion is based. It is apparent from the context of this language that "prior" means events occurring prior to the date of the exclusion. Finding 32.

The aggravating circumstances, singly and together, establish Petitioner Thomas to have been a highly untrustworthy individual. Indeed, during the period when these offenses occurred (early 1990), he can be characterized as a person who was totally without control of his impulses and who was motivated to engage in conduct that caused great harm to federally-financed health care programs. Furthermore, he can be characterized as a person who had a propensity to engage in conduct which could have jeopardized the safety and

welfare of program beneficiaries and recipients. I would have had no difficulty in sustaining a ten year exclusion against Petitioner Thomas in the absence of any mitigating evidence.

However, in this case, there is offsetting mitigating evidence. In the notice letter and in the posthearing brief, the I.G. concedes that the record in the proceedings of Petitioner Thomas' guilty plea to program-related offense demonstrates that the court determined that, during the commission of his offense, Petitioner Thomas had a mental illness that diminished his culpability. Finding 37; 42 C.F.R. § 1001.102(c)(2).

Petitioners offered the unrebutted testimony of three psychiatrists, who testified that Petitioner Thomas has suffered from a bipolar disorder since his childhood, manifesting both manic and depressed phases. During his manic phases, Petitioner Thomas has suffered extreme loss of self-control and judgment. Finding 43. Petitioner Thomas' manic phases are typified by grandiose behavior. Id. The unrebutted evidence offered by Petitioners proved that all of the conduct which I have identified as aggravating in this case transpired during a period in 1990 when Petitioner Thomas was in a manic state. Finding 44. His unlawful conduct was the consequence of his mental illness. Finding 45.

Petitioners proved that, since 1991, Petitioner Thomas has been undergoing treatment for his disorder, consisting of both medication and therapy. The prognosis for his condition is good. The experts who have examined and treated Petitioner Thomas opined that he is unlikely to exhibit extreme behavior in the future, or to engage in unlawful conduct. All of the experts concurred that, at some point in the near future, Petitioner Thomas would be trustworthy to provide care. Findings 48, 49.

The I.G. offered no evidence at the hearing of these cases to rebut the testimony of psychiatrists whom Petitioner called as witnesses. The I.G. has now offered an excerpt from a treatise on psychiatric disorders (DSM III-Revised), as an attachment to the I.G.'s reply brief, which the I.G. asserts rebuts that testimony.[10] Petitioners object to my receiving that treatise excerpt. Petitioners contend that the proffer is untimely, and that they would be prejudiced if I were to accept the treatise excerpt as evidence in these cases.

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[10] For purposes of maintaining the record, I have identified this document as I.G. Ex. 13.

The I.G. argues that, inasmuch as the excerpt is from a learned treatise, I can take notice of it without admitting it into evidence. The I.G.'s argument begs the question of whether I should be considering the excerpt in deciding these cases. The issue, as far as I am concerned, is not whether the treatise excerpt is evidence admissible under various rules of evidence or evidence of which I might take judicial notice. The issue is whether Petitioners would be prejudiced if I accepted the treatise excerpt now, several months after the hearing.

By offering the excerpt now, the I.G. would foreclose Petitioners the opportunity to attack its relevance and probative value. It would be prejudicial to Petitioners for me to now accept and consider the treatise excerpt offered by the I.G. For that reason, I decline to consider it. The I.G. knew well in advance of the hearing that Petitioners intended to call psychiatrists to testify on Petitioner Thomas' behalf. The I.G. also knew that the subject of these psychiatrists' testimony was to be Petitioner Thomas' mental state at the time he committed his crimes and the prognosis of his condition. The I.G. therefore had ample opportunity to propose rebuttal evidence, including the DSM III-Revised excerpt which the I.G. now offers, and to offer that evidence at the April 14 hearing.

The mitigating factor present in these cases offsets the aggravating factors established by the I.G. The unrefuted expert testimony presented by Petitioners has demonstrated that all of the misconduct engaged in by Petitioner Thomas emanated from Petitioner's bipolar affective disorder. I find Petitioner's bipolar affective disorder to be a mental illness that diminished the culpability of Petitioner for his unlawful activities. Findings 37 - 39, 51. Indeed, all of the aggravating factors cited by the I.G. emanated from Petitioner's bipolar affective disorder, a disorder which I find to be a mitigating factor. Id. I conclude from the expert psychiatric testimony offered by Petitioners that it is highly likely that Petitioner Thomas' bipolar affective disorder, the condition that caused him to act unlawfully, will be brought under control within the five year exclusion period. Given that, there is no need for an exclusion longer than the five year minimum prescribed by law.

The exclusion against Petitioner Texoma must be reduced correspondingly to an exclusion of five years. The exclusion of that entity derives from the exclusion of Petitioner Thomas and must be for the same length of time

as that which has been imposed against Petitioner Thomas. 42 C.F.R. § 1001.1001(b).[11]

CONCLUSION

I conclude that the ten year exclusions which the I.G. imposed against Petitioners Thomas and Texoma are excessive. The exclusions against both Petitioners are modified to terms of five years.

/s/

Steven T. Kessel
Administrative Law Judge

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[11] Petitioners made a number of legal arguments concerning the interpretation of 42 C.F.R. § 1001.102: whether the regulation was ultra vires the Act or the Administrative Procedure Act, the constitutionality of the regulation, and whether the exclusion violated Petitioners' due process rights. My conclusions concerning the interpretation of 42 C.F.R. § 1001.102 are subsumed in my analysis of how the regulation should be applied, at part 1 of this Analysis. I do not address Petitioner's other legal and constitutional arguments. It is not necessary for me to do so here. Furthermore, I do not have the authority to declare a regulation to be ultra vires the Act, or to find it to be unconstitutional. 42 C.F.R. § 1005.4(c)(1).