Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Paul O. Ellis, R.Ph.,	DATE: August 31, 1993
Petitioner,	Docket No. C-93-037
- v. -	Decision No. CR283
The Inspector General.	

DECISION

The case before me involves an exclusion directed and imposed by the Inspector General (I.G.) for the United States Department of Health and Human Services (DHHS) pursuant to section 1128(a)(1) of the Social Security Act (Act). This section requires the Secretary of DHHS (Secretary) or his designee, the I.G., to exclude an individual or entity from the Medicare and Medicaid[1] programs for at least five years following that individual's or entity's conviction of a criminal offense related to the delivery of an item or service under the programs. Act, section 1128(c)(3)(B). As defined by section 1128(i) of the Act, a program-related conviction includes those situations where a plea of guilty or nolo contendere by an individual or entity has been accepted by a court of competent jurisdiction.

On October 29, 1992, the I.G. gave Paul O. Ellis, R.Ph., (Petitioner), written notice that he was being excluded under section 1128(a)(1) of the Act for a period of 10 years. The exclusion took effect 20 days after the date of the notice, as required by 42 C.F.R. § 1001.2002(b).

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[1] The Medicaid Program is among the State health care programs defined in section 1128(h) of the Act. Unless the context indicates otherwise, "Medicaid" will be used as an abbreviation herein to designate all State health care programs from which an individual or entity is subject to exclusion under section 1128(a)(1) of the Act.

In accordance with 42 C.F.R. § 1001.2007, Petitioner timely filed a request for hearing.

The hearing took place in Lincoln, Nebraska, on April 6, 1993.[2] In addition to presenting the testimony of witnesses, the parties submitted their written stipulations at hearing.[3] Items 3 and 5 of the stipulations have obviated the I.G.'s need to prove a statutory basis for the exclusion. J. Ex. 1 at 1, 2[4]; Tr. 7 - 8.

After the close of the evidence, the parties filed their briefs.[5] I have considered the parties' arguments in conjunction with the hearing testimony, the stipulations, and the documentary evidence[6] admitted at hearing concerning the remaining issue as to whether the length of the exclusion is reasonable. For the reasons that follow, I uphold the 10-year exclusion imposed by the I.G.

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[2] "Tr. (page)" is used herein to denote the hearing transcript.

[3] The document marked and entered as a joint exhibit (J. Ex. 1) contains a typographical error in Item 2. The underlined word in the following clause of Item 2 should be corrected to read "the I.G.'s":

> 2. Petitioner stipulates to the authenticity of Petitioner's proposed exhibits ....

[4] See Item 3, wherein Petitioner stipulated that he had pled guilty to one count of Medicaid fraud on June 25, 1992; and Item 5, wherein Petitioner stipulated that his guilty plea constituted a conviction covered by section 1128(a)(1) of the Act.

[5] The parties each filed posthearing and response briefs. I refer to the posthearing briefs as either "I.G." or Petitioner ("P.") "Br. (page)." I refer to the response briefs as "I.G." or "P. R. Br. (page)."

[6] I use the abbreviations "Ex. (number at page)," prefixed by I.G. or Petitioner ("P."), to designate the exhibits I cite in this decision.

ISSUE

The issue before me for decision is whether the 10-year exclusion imposed and directed by the I.G. against Petitioner is unreasonable based upon the facts of this case. 42 C.F.R. § 1001.2007(a)(1)(ii).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On February 1, 1966, the State of Nebraska issued Petitioner a license to practice pharmacy. I.G. Ex. 17 at 3.

2. Petitioner became a Medicaid provider on or about June 1, 1982. I.G. Ex. 16 at 2.

3. By delegation from the Secretary, the I.G. has the authority to determine, impose, and direct exclusions under section 1128 of the Act. 48 Fed. Reg. 21662 (1983).

4. On October 29, 1992, the I.G. notified Petitioner that he was being excluded from the Medicare and Medicaid Programs for a period of 10 years.

5. The crime for which Petitioner was convicted and sentenced on June 25, 1992, involved his submission of false Medicaid claims totalling $6203.75, covering the period from May 5, 1990 to December 24, 1990, while he was still barred from participating in the Medicaid program due to a previously imposed five-year exclusion. I.G. Ex. 4, 6, 7, 10, 12, 13; P. Ex. 14; J. Ex. 1 at 2 - 3; Tr. 43 - 55.

6. There is no dispute that the I.G. validly excluded Petitioner under section 1128(a)(1) of the Act. J. Ex. 1 at 2.

7. For individuals convicted of program-related offenses within the meaning of section 1128(a)(1), the Act mandates an exclusion period of not less than five years. Section 1128(c)(3)(B) of the Act.

8. Where, as here, the exclusion imposed pursuant to section 1128(a)(1) exceeds the minimum period mandated by statute, the factors specified in 42 C.F.R. § 1001.102 must be used to determine whether the length of the exclusion is reasonable. 58 Fed. Reg. 5617 (1993).

9. Only the "aggravating" factors specified in 42 C.F.R. § 1001.102(b) may be used to lengthen the exclusion

period from the minimum five years specified by statute. Finding 8.

10. Only where the exclusion at issue has been lengthened with the use of the aforementioned aggravating factors may the "mitigating" factors specified in 42 C.F.R. § 1001.102(c) be considered for decreasing the exclusion period to five or more years. Findings 8, 9.

11. In considering whether or how the length of an exclusion imposed under section 1128(a)(1) of the Act should be adjusted by using the aggravating and mitigating factors enumerated in 42 C.F.R. § 1001.102, it is necessary to weigh the evidence relevant to these enumerated factors in a manner that is consistent with the goals of the Act which is being implemented and interpreted by said regulation. See Act, section 1102.

12. Section 1128(a) of the Act includes among its goals:

> a. the protection of the Medicare and Medicaid programs from fraud and abuse, and
>
> b. the deterrence of conduct that is detrimental to the programs and those receiving benefits from the programs.

Leonard S. Dino, R.Ph., DAB CR260, at 16 - 17 (1993); DeWayne Franzen, DAB CR58 (1989), aff'd DAB 1165 (1990).

13. These are aggravating factors in this case:

> a. The acts that resulted in Petitioner's conviction, or similar acts, have caused financial loss to the Medicaid program of $1500 or more. 42 C.F.R. § 1001.102(b)(1); J. Ex. 1 at 1 - 2; I.G. Ex. 4, 13, 16.
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> b. The sentence imposed by the court included incarceration. 42 C.F.R. § 1001.102(b)(4); J. Ex. 1 at 1; I.G. Ex. 5.
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> c. Petitioner has a prior criminal, civil, or administrative sanction record. 42 C.F.R. § 1001.102(b)(5); J. Ex. 1 at 1 - 4; I.G. Ex. 3, 9 - 13, 16 - 22, 29.
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> d. Petitioner has been overpaid a total of $1500 or more by the Medicaid program as a result of improper billings. 42 C.F.R. § 1001.102(b)(6); J. Ex. 1 at 1; I.G. Ex. 6, 7, 12, 13, 16.

14. A 10-year exclusion is reasonable in order to:

a. protect the fiscal integrity of the programs from the serious damage Petitioner has done to the Medicaid program repeatedly over the past few years, despite Petitioner's having been sanctioned both criminally and administratively; and

b. deter Petitioner from harming the Medicaid program in the future by imposing a sanction against him which is different from and lengthier than those to which he was subjected in years past for his violations of State and federal law.

See Findings 11 - 12, 13 at b - d.

15. I am not required to increase an exclusion because of any one aggravating circumstance.

16. That the acts resulting in Petitioner's conviction, or similar acts, caused financial loss to Medicaid of $1500 or more -- an aggravating circumstance -- is not of significant independent weight to warrant increasing the 10-year exclusion already imposed. Finding 13(a)

17. Pursuant to 42 C.F.R. § 1001.102(c)(2), in determining whether Petitioner had a mental or emotional condition at the time he committed his offense, from May 5, 1990 to December 24, 1990, it is appropriate for me to consider whether:

a. Petitioner developed mental and emotional conditions in the years prior to the commission of his criminal offense;

b. The judge who sentenced Petitioner found that his culpability had been reduced by mental or emotional problems;

c. Petitioner has recovered from his mental or emotional problems so that he will not be committing the same offenses in the future.

See Findings 10 - 12; Tr. 25.

18. It is a mitigating factor that the sentencing judge (U.S. District Judge Warren K. Urbom) found that Petitioner was under considerable personal stress at the time of the offense. P. Ex. 14 at 56.

19. Judge Urbom's statement constitutes the only finding made by a judge in any of Petitioner's criminal proceedings concerning the existence of a mental, emotional, or physical condition and its effect on Petitioner's culpability.

20. The only mental, emotional or physical condition of Petitioner's that fits within 42 C.F.R. § 1001.102(c)(2) is the "considerable personal stress" that was in existence during the time Petitioner committed his offense from May 5 to December 24, 1990. See generally Findings 5, 18.

21. Petitioner's evidence that he suffered from mental or emotional conditions that developed prior to 1990 is not consistent with other, more reliable evidence, and thus is not credible. See P. Ex. 2, 3, 4, 6, 7, 8, 13, 14 at 22 - 24, 56; I.G. Ex. 22 at 8 - 9; Tr. 24, 83 - 111, 122 - 23, 133 - 34, 145.

22. Petitioner has not shown by a preponderance of the evidence that he suffered from mental or emotional conditions that developed prior to 1990.

23. Even if Petitioner had met the burden of proof that he suffered from mental or emotional conditions that developed prior to 1990, Petitioner has not met the burden of persuasion that such evidence makes his 10-year exclusion extreme or excessive.

24. Even though Petitioner has established that his "considerable personal stress" during the time he committed his offense in 1990 merits consideration as a mitigating factor, (see Finding 18), the regulation does not mandate a reduction in the exclusion period. 42 C.F.R. § 1001.102(c).

25. Petitioner has failed to prove that he was given the lightest sentence possible solely because his culpability had been reduced by his "considerable personal stress." P. R. Br. 4.

26. The exclusion at issue was imposed pursuant to a civil statute that has different purposes than the criminal statute under which Judge Urbom imposed sentence. See Finding 12; P. Ex. 14.

27. Judge Urbom did not make any finding that the treatment Petitioner received was appropriate to or successful in eliminating those factors that caused Petitioner to break the law.

28. Judge Urbom's finding of considerable personal stress at the time of the offense does not justify a reduction in Petitioner's exclusion. Findings 25 - 27.

29. Petitioner's evidence in support of his asserted recovery depends largely on his proclamations of good intentions in situations where he has incentives to advance his own interests.

30. Even after having received treatment, Petitioner argued at his sentencing hearing that he had damaged the Medicaid program only to the extent of the 24 percent profit he made from the claims he submitted during his exclusion. P. Ex. 14 at 42 - 44.

31. Despite treatment, when testifying before me, Petitioner attempted to obscure the nature of his offenses in 1990, to blame others for his illegal actions, and to place his motives in a better light. Tr. 110 - 111.

32. Petitioner's violations of the June 25, 1992 judgment and confinement order during December 1992 and January 1993 indicate that he is not yet able or willing to conduct himself within the confines of his legal obligations. I.G. Ex. 1, 4, 31, 32.

33. Many of Petitioner's recent actions have been consistent with his previous pattern of deviating from the law and then confessing to his offenses while attempting to minimize their significance in order to lessen the potential penalty to him. See Finding 30.

34. The cumulative effect of the evidence points to the likelihood that Petitioner will commit similar program-related offenses in the future and that a period of exclusion of less than 10 years will not suffice as a deterrent. See generally Findings 12 - 14, 30 - 33.

35. A 10-year exclusion is reasonable. See Findings 1 - 34.

ANALYSIS

I. The I.G. has proven by a preponderance of the evidence that the 10-year exclusion is reasonable.

For purposes of this hearing, the I.G. had the burden of proving by a preponderance of the evidence that there existed a legal basis for the exclusion and that the 10-year exclusion period was reasonable. January 26, 1993

Order and Notice of Hearing, paragraph 5; see also 42 C.F.R. § 1001.2007(c). Petitioner had the burden of persuasion and the burden of proving by a preponderance of the evidence the affirmative arguments raised to contest the exclusion. Id. In my February 3, 1993 Order and Notice of Hearing, I determined that, in adjudicating this case, I am bound by the Secretary's implementing regulations that were initially published on January 29, 1992 and subsequently clarified on January 22, 1993. 57 Fed. Reg. 3298; 58 Fed. Reg. 5617. The parties have not argued that this interpretation is in error.

Given the stipulations of the parties, there is no dispute concerning the I.G.'s authority to impose the mandatory five-year exclusion under section 1128(a)(1) of the Act. Findings 5, 6. Even though the evidence and stipulations discussed herein establish that Petitioner was still under a five-year exclusion when the 10-year exclusion took effect, (I.G. Ex. 3 at 1, 12 at 3), I do not know if the I.G. intends to or has eliminated nine months and 12 days from the unexpired five-year exclusion. Under the regulations, I have authority to review only the reasonableness of the 10-year exclusion pursuant to Petitioner's request for hearing. 42 C.F.R. §§ 1001.2007, 1005.2. Therefore, the current status of the five-year exclusion is not an issue before me.

A. The I.G. based the 10-year exclusion primarily on Petitioner's criminal and administrative sanctions record.

The regulations authorize me to consider as an aggravating factor, justifying an exclusion of greater length than the minimum five-years mandated by statute, that the convicted individual has a prior criminal, civil, or administrative sanction record. 42 C.F.R. § 1001.102(b)(5).

According to the evidence and stipulations of record, prior to his 1992 conviction, Petitioner engaged in many activities that have resulted in criminal convictions, imprisonment, the suspension and revocation of his license to practice pharmacy, the suspension of his pharmacies' participation in the Medicaid program, exclusions from the Medicare and Medicaid programs, and other sanctions. I found the following facts persuasive and material to my determination that the 10-year exclusion is reasonable.

The earliest sanction imposed against Petitioner occurred in 1986, when he violated Nebraska law by distributing controlled substances without valid prescriptions. On

June 19, 1986, Petitioner pled guilty to the charges in State court. J. Ex. 1 at 4; I.G. Ex. 29, 30. The court ordered Petitioner to pay a fine. I.G. Ex. 29.

Also during June of 1986, the Nebraska Department of Health initiated administrative disciplinary proceedings against Petitioner for the foregoing offenses as well as for other offenses. I.G. Ex. 25. The Amended Petition charged, and Petitioner later stipulated, that he had been unable to account for certain doses of Class II, III and IV controlled substances and, at Petitioner's pharmacy and under Petitioner's directions, State undercover investigators were given refills of controlled substances on prescriptions that were marked either "no refill" or contained no indication that they were refillable. I.G. Ex. 22 at 4, 25 at 2. Petitioner stated later that he was missing about 6000 doses of controlled drugs. P. Ex. 7 at 1.

At his hearing before the Director of Health for the State of Nebraska, Petitioner sought to prove by way of mitigation that he had been under a great deal of stress and that he was a victim of his employees' conspiracy to devalue his pharmacy. I.G. Ex. 22 at 8. Petitioner presented evidence that he was under a great deal of stress because he was operating three stores located in different communities, he was working 12 to 15 hour work days, and he suffered from fatigue. Id.

On December 28, 1987, the Director of Health found that Petitioner had violated State law. I.G. Ex. 22. The Director rejected Petitioner's claims of stress as unpersuasive and as "self-imposed" by his decision to operate three stores, from which he was deriving financial consideration. Id. at 8. Also, the Director found "very weak" the evidence concerning Petitioner's conspiracy theory. Id. The Director then ordered the suspension of Petitioner's pharmacist's license for a period of 18 months -- with one year of probation thereafter, Petitioner's immediate payment of $5000 in civil monetary penalties to the State, and Petitioner's immediate payment of costs for the administrative proceedings. Id. at 9 - 11; J. Ex. 1 at 4. In addition, the Director gave Petitioner credit for the 18 month license suspension "as he has voluntarily withdrawn from practice upon submission of a sworn affidavit as to the same .... " I.G. Ex. 22 at 9.

Three months later, on March 3, 1988, the State Attorney General filed a Motion to Revoke Probation due to Petitioner's failure to comply with the Director of Health's order. I.G. Ex. 21. Despite repeated requests

by the State, Petitioner had refused to remit any part of the $5000 in civil penalties and the $502.75 in costs for the administrative proceedings. Id. After the State Attorney General moved to revoke his probation, Petitioner made partial payment of the fine and costs and agreed to make monthly installment payments of $500 until his obligations were satisfied. I.G. Ex. 20 at 3.

On June 17, 1988, the Director of Health denied Petitioner's motion that, in serving the 18 month license suspension period, Petitioner be given credit for the time he had voluntarily withdrawn from the practice of pharmacy. I.G. Ex. 19. On reviewing Petitioner's affidavit in support of such alleged withdrawal, the Director found that Petitioner had not in fact withdrawn from the practice of pharmacy during any previous period. Id. In fact, of the 609 days covered by the motion, Petitioner had practiced his profession 228 days and, on an average, he practiced 11 days a month. Id.

On August 30, 1988, Petitioner pled guilty in federal district court to one count, (Count I), of a 12 count indictment for Medicaid fraud. J. Ex. 1 at 2, I.G. Ex. 13, 14, 16. Count I charged Petitioner with having defrauded the Medicaid program by making false statements in order to inflate the price of a pharmaceutical product to increase the amount sought for reimbursement in 21 claims he submitted to the program from July 1984 to March 1986. I.G. Ex. 16. Petitioner later stipulated in another action that said crime would also constitute a felony under the criminal laws of the State of Nebraska. I.G. Ex. 17 at 3.

The judgment and sentence entered against Petitioner on his federal conviction included two years of imprisonment -- which sentence was suspended in favor of placing Petitioner on three years of probation. The special terms of Petitioner's probation included that he was to serve 10 days in jail, perform community service, be required to undergo counselling or treatment deemed appropriate by his supervising probation officer, pay a $10,000 fine, pay the costs of his prosecution, and make restitution to the State of Nebraska in an amount determined by the State. I.G. Ex. 13.

Also on August 30, 1988, following Petitioner's conviction in federal court, Petitioner entered into a settlement agreement with the I.G. That agreement states that, from January 1, 1983 to December 31, 1986, Petitioner had sought reimbursement under the Medicaid program for services not actually provided as claimed. I.G. Ex. 12. Petitioner agreed to pay DHHS the sum of

$14,944.39 in civil monetary penalties, which did not include restitution of the money he had been overpaid by the Medicaid program. Id.; J. Ex. 1 at 3. Petitioner agreed also to be excluded from the Medicare and Medicaid programs for a period of five years under section 1128(a)(1) of the Act. Id. The five-year exclusion took effect upon Petitioner's signing the agreement on August 30, 1988. I.G. Ex. 12 at 4 - 5.

Thereafter on November 14, 1988, the State of Nebraska notified Petitioner that he was being suspended also from participating in the Nebraska Medicaid program for a period of five years pursuant to State law. J. Ex. 1 at 3; I.G. Ex. 10.

By letter of November 30, 1988, the State of Nebraska suspended the participation of Petitioner's affiliate pharmacies in the Medicaid program for a period of three months (effective December 1, 1988), due to Petitioner's conviction of Medicaid fraud. J. Ex. 1 at 3; I.G. Ex. 9, 11.

On May 23, 1991, a Petition for Disciplinary Action against Petitioner was filed before the State Director of Health. I.G. Ex. 18. One count of the Petition alleged that between May 1, 1990 and December 31, 1990, while Petitioner was barred from participating in the Medicaid program, Petitioner violated Nebraska law by having submitted 312 claims to Medicaid after personally filling the prescriptions and then using other pharmacists' initials to hide the fact that he was seeking Medicaid reimbursement for his own services. Id. at 2 - 3. Another count of the Petition alleged additional violations of State law in that, during 1989 through 1991, Petitioner hired various named individuals who were not licensed pharmacists and allowed them to perform some of the tasks of licensed pharmacists. Id. at 3.

On September 10, 1991, Petitioner entered into a settlement agreement in the disciplinary proceedings before the Director of Health. I.G. Ex. 17 at 3 - 7. Petitioner agreed that the alleged violations of State law, which he neither admitted nor wished to contest, took place while he was under suspension from Nebraska's Medicaid program and while he was under probation by order of the federal court. Id. at 3 - 5. The State then revoked Petitioner's license to practice pharmacy. J. Ex. 1 at 2; I.G. Ex. 17.

On June 25, 1992, Petitioner pled guilty in federal district court to one count of Medicaid fraud under federal law. J. Ex. 1 - 2; I.G. Ex. 4. As in the State

disciplinary proceedings, Petitioner was charged with having used other pharmacists' initials to submit claims to the Medicaid program while he was excluded. I.G. Ex. 6, 7.[7] On accepting this plea, Judge Urbom sentenced Petitioner to 10 months of imprisonment (five months of incarceration and five months of home confinement) and supervised release thereafter for a period of three years. I.G. Ex. 4; P. Ex. 14 at 57 - 59. Judge Urbom ordered Petitioner also to make restitution to the State in the amount of $6203.75. I.G. Ex. 4 at 3; P. Ex. 14 at 59 - 60. However, having determined that Petitioner lacked the resources to pay a fine, the court imposed none. P. Ex. 14 at 60 - 61.

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[7] I.G. Ex. 7 is a summary report prepared by the Nebraska Department of Social Services showing that 314 Medicaid claims were submitted by Petitioner between May and December 1990 (during which time Petitioner was excluded from the programs), many of which claims used other pharmacists' initials. The Medicaid program paid Petitioner a total of $6203.75 on these claims. Tr. 43 - 44. One of the I.G.'s witnesses, the manager of the State's provider fraud investigation unit, described the details of the State's investigation in this matter. Tr. 38 - 60. The results of the investigation were turned over to the U.S. Attorney's Office for Petitioner's prosecution. Tr. 53 - 54.

Throughout this decision I refer to this offense as having involved 314 false Medicaid claims, even though I am aware that Petitioner was charged with only one count of having "made a false statement or representation of a material fact in an application for a benefit or payment" on or about October 9, 1990, (I.G. Ex. 6), and that Petitioner has pled guilty to the one count only, (I.G. Ex. 4). However, Judge Urbom found that Petitioner had committed the crime "not just once, but ... many times," (P. Ex. 14 at 56), and he ordered Petitioner to make restitution to the Medicaid program in the amount of $6203.75, (I.G. Ex. 4 at 3; P. Ex. 14 at 59 - 60). The amount of restitution corresponds to the total overpayment calculated for the 314 false claims submitted by Petitioner between May 5, 1990 and December 24, 1990. I.G. Ex. 7. The record does not contain evidence of any single claim that equalled the amount of Petitioner's restitution to the program. I have therefore concluded that the restitution for the one count to which Petitioner pled guilty included his submission of the 314 false claims identified in I.G. Ex. 7.

Also on June 25, 1992, Judge Urbom adjudicated the related probation revocation action that had been filed against Petitioner. Petitioner admitted to charges that, by committing the above-described Medicaid fraud offenses, he had violated the terms of the probation order imposed on August 30, 1988. P. Ex. 14 at 56; I.G. Ex. 5; J. Ex. 1 at 1. The court therefore revoked the terms and conditions of the earlier imposed probation and ordered Petitioner's imprisonment for five months, which was to run concurrently with the sentence imposed for his Medicaid fraud offense. I.G. Ex. 5. Judge Urbom warned Petitioner especially that, in most cases where an individual violates the terms of his probation, the judge believes he should simply reinstate the original sentence that was suspended -- which would have been two years of imprisonment in Petitioner's case. P. Ex. 14 at 57.

On October 29, 1992, the I.G. notified Petitioner that he was being excluded from participation in the Medicare and Medicaid programs for a period of 10 years under section 1128(a)(1) of the Act. The exclusion went into effect 20 days thereafter. On December 28, 1992, Petitioner requested a hearing to contest the 10-year exclusion. In seeking a reduction of the 10 years, Petitioner asked especially for the chance to "do it 'right' during my last few years left as a productive and capable professional."

Shortly thereafter, on December 29, 1992, January 6, 1993, January 8, 1993, January 10 to 12, 1993, January 15, 1993, January 18, 1993, January 20, 1993, and January 21, 1993, Petitioner violated the terms of his Home Confinement Agreement and certain conditions of the supervised release order imposed by Judge Urbom on June 25, 1992. I.G. Ex. 1, 31, 32. In his report to Judge Urbom requesting a hearing on these violations, Petitioner's probation officer stated that Petitioner had violated curfew on all of these dates. I.G. Ex. 1. In addition, on January 21, 1993, Petitioner had driven to another city without permission and spent the night at a motel. Id. When his probation officer conversed with him that night, Petitioner exhibited signs of being under the influence of a controlled substance. The next day Petitioner's probation officer collected a urine sample from him. Petitioner then indicated that he had ingested a controlled substance for which he did not have a valid prescription. Id. Therefore, according to his probation officer, Petitioner also had violated a special condition of his probation that barred him from purchasing, possessing, using, distributing, or administering any narcotic or other controlled substance except as

prescribed by a physician. Id.; I.G. Ex. 4 at 2, 32.

On March 11, 1993, following a hearing, Judge Urbom entered an order finding that Petitioner had violated a provision of the June 25, 1992 judgment and commitment order. I.G. Ex. 31. Various letters and affidavits were offered by Petitioner to explain his curfew violations. P. Ex. 19 - 22. However, Judge Urbom increased the period of Petitioner's home confinement from five months to six months. I.G. Ex. 31.

Thus, both prior to and following the exclusion at issue, Petitioner violated federal and State laws and court orders in a series of offenses which indicate that he will pose a threat to federally financed health care programs for a considerable period of time.

B. The I.G. relied also upon two other aggravating factors to support Petitioner's 10-year exclusion.

The evidence and stipulations noted above support the I.G.'s contention that at least one of the aggravating factors enumerated in 42 C.F.R. § 1001.102 is present in this case. Citing 42 C.F.R. § 1001.102(b)(5), the I.G. established that Petitioner's criminal and administrative sanctions record is an aggravating factor. See subsection I.A, supra.

In addition, citing 42 C.F.R. § 1001.102(b)(4), the I.G. considered as a second aggravating factor that the sentence imposed on Petitioner for his most recent program-related conviction included incarceration. I.G. Br. 12. Also, citing 42 C.F.R. § 1001.102(b)(6), the I.G. considered as a third aggravating factor that Petitioner fraudulently obtained thousands of dollars in Medicaid overpayments during the past years. The I.G. especially noted that, as a result of his June 25, 1992 plea of guilty to Medicaid fraud, Petitioner paid restitution based on his having submitted 314 false claims and receiving $6203.75 in overpayments from the Medicaid program. I.G. Br. 12 (citing I.G. Ex. 4 and Tr. 43 - 47). The I.G. did not offer proof of the amount of Medicaid overpayments to Petitioner on either the 21 false Medicaid claims submitted by him during the period July 1983 - March 1986 or the unspecified number of allegedly false Medicaid claims submitted by him during the period January 1983 through December 1986. However, that Petitioner was ordered to make restitution to Medicaid in the amount of $6203.75, (I.G. Ex. 4 at 3; P. Ex. 14 at 59 - 60), more than amply satisfies the regulatory criterion that it is an aggravating factor if

a petitioner is overpaid $1500 or more as a result of improper billings.

C. The I.G. has established that Petitioner's exclusion is reasonable.

Based on these three aggravating factors, a 10-year exclusion is reasonable. Petitioner has done extensive damage to the fiscal integrity of the Medicaid program on repeated occasions. The I.G. has proved that Petitioner has consistently pursued illegal activities designed to unjustly enrich himself. I.G. Br. 14. Over the years, Petitioner has been especially diligent and innovative in his pursuit of unjust enrichment at the expense of the Medicaid program. He began defrauding the program within months of his having become an eligible provider in June 1982. He has been sanctioned repeatedly for his submission of numerous false claims to the Medicaid program from January 1983 to December 1986 (I.G. Ex. 12), from the period between July 1983 through March 1986 (J. Ex. 1 at 2; I.G. Ex. 13, 14, 16), and, most recently, from May until December, 1990 (I.G. Ex. 7; J. Ex. 1 at 1). Also, Petitioner has been sanctioned repeatedly for the various violations of State law he committed in his work as a pharmacist.

Petitioner testified before me that, in 1990, he was more afraid of potential bankruptcy than the consequences of his illegal actions. Tr. 110. Petitioner was not deterred from again breaking the law in 1990 by his 1986 conviction in the Nebraska State court of three counts of distributing controlled substances without valid prescriptions; nor by the administrative decision of December 28, 1987 to suspend his license to practice pharmacy for 18 months and to place him on probation for one year thereafter; nor by the December 28, 1987 order that he pay a civil penalty of $5000 for having illegally refilled prescriptions for controlled substances and being unable to account for 6000 doses of controlled substances; nor by the State's efforts to revoke his probation due to his failure to pay the civil penalty on time; nor by his federal conviction of August 30, 1988 for submitting falsely inflated Medicaid claims; nor by the court's giving him a two-year term of incarceration, which was suspended and replaced by probation for three years, and ordering him to make restitution to the State and to pay an additional $10,000 in fine; nor by his five-year exclusion from the Medicare and Medicaid programs and his payment of $14,944.39 in civil monetary penalties under his August 30, 1988 agreement with the I.G.; nor by the State's decision in November 1988 to exclude him from Medicaid pursuant to State law; nor by

the State's decision in November 1988 to suspend for three months the participation of his pharmacies in Medicaid.

Notwithstanding these sanctions, and despite the fact that he was still under probation by order of the federal court and still barred from participating in Medicaid, Petitioner again broke State and federal laws and violated the terms of his probation by submitting false claims to the Medicaid program during 1990. In 1991, he broke additional State laws by hiring unlicensed individuals to perform the tasks of a pharmacist.

Because Petitioner sought to prove that he is now able to conform to the requirements of law, the I.G. introduced more current evidence concerning Petitioner's sanction record. Tr. 7 - 17.[8] Specifically, the I.G. introduced evidence to prove that Petitioner had violated the terms of Judge Urbom's June 25, 1992 judgment and commitment order by skipping curfew, travelling to another city without permission, and using controlled substances without a valid prescription. Petitioner committed these violations in December 1992 and January 1993, in spite of having served months in prison (and having the experience of being set on fire in prison (P. Ex. 13 at 6)), having surrendered his license to practice pharmacy, and having been warned by the judge at his June 25, 1992 sentencing hearing that the judge usually reinstates the original sentence of imprisonment when people violate the terms of their probation. Not only was Petitioner not deterred by the judge's warning about a lengthier term of imprisonment, he began to violate the court's order only one day after he filed his request for a hearing on the reasonableness of the 10-year exclusion period at issue, in which he asserted that he wanted the opportunity to "do it right" at this point of his life.

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[8] I have overruled Petitioner's objection that the evidence concerning his curfew violations does not establish his commission of "crimes." Tr. 17. The regulations permit me to review civil and administrative as well as criminal records. 42 C.F.R. § 1001.102(b)(5). Moreover, regardless of how the offenses at issue are characterized, the curfew violations committed by Petitioner were directly related to his criminal sanctions. A curfew was imposed as part of the original sentence on Petitioner's criminal conviction, and Petitioner's curfew violations resulted in the court's increasing the sanction imposed pursuant to that conviction. I.G. Ex. 31.

The evidence concerning the three aggravating factors cited by the I.G. is sufficient to support the reasonableness of the 10-year exclusion period. Even though the evidence establishes also an aggravating factor under 42 C.F.R. § 1001.102(b)(1),[9] I have not used it to increase the exclusion already imposed. The evidence relied upon by the I.G. overlaps the evidence that establishes the additional aggravating factor, and, as discussed below, the statute does not mandate an adjustment in the exclusion period solely on the basis of any single aggravating or mitigating factor. Rather, what controls the exclusion period is the relative weight of the material evidence in the context of the total record. Here, the totality of the evidence establishes that a 10-year exclusion for Petitioner is reasonable.

II. Petitioner has failed to prove by a preponderance of the evidence that his 10-year exclusion is unreasonable.

Petitioner seeks a reduction of his 10-year exclusion based on the fact that Judge Urbom, before whom Petitioner appeared in June 1992 for sentencing on his Medicaid fraud conviction, stated as follows at the sentencing hearing:

> In Mr. Ellis's case I have taken into account some good features of his. He, I think, has clearly accepted responsibility for what he has done. He's admitted that when he was on probation he committed a crime, he knew it was a crime but he did it anyway. And not just once, but he did it many times. He has

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[9] Petitioner's submission of the false claims between May 1990 and December 1990 has resulted in the Medicaid program's losing more than $6000 in overpayments. I.G. Exs. 4, 7; Tr. 43 - 47. As discussed previously, Petitioner's prior convictions also caused losses to the Medicaid program. Where, as here, the acts that resulted in the conviction at issue (or similar acts) result in financial loss to the Medicaid program of $1500 or more, this can be considered as an additional aggravating factor under 42 C.F.R. § 1001.102(b)(1). Even though the I.G. did not consider this fourth aggravating factor in setting the exclusion period (see I.G. Br. 12 - 13), I have the authority to review the totality of the evidence de novo. See section 205(b) of the Act as incorporated by section 1128(f) of the Act; 42 C.F.R. § 1005.20.

> acknowledged that he was in need of treatment and he sought that treatment for about seven months, and that's all to his favor. He has obviously, from the information that I have in this file, much family support, he has community support, all of which is to his favor. I acknowledge, too, that during the times when this crime was committed he was under considerable personal stress, and that's to his favor in the sense of creating a sentence to fit.

P. Ex. 14 at 56.

Petitioner argued that Judge Urbom's finding of "considerable personal stress" serves as a mitigating factor within the meaning of 42 C.F.R. § 1001.102(c)(2). See, e.g., P. R. Br; Tr. 23 - 29. This provision of the regulations permits reducing the exclusion period upon consideration of an on-record determination by the court in the relevant criminal proceedings 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).[10] In contesting the 10-year exclusion imposed by the I.G., Petitioner relied on three interrelated allegations:

> 1. Petitioner's mental and emotional condition developed prior to the offenses that occurred in 1990;
>
> 2. The sentencing judge came to the conclusion that a mental or emotional condition specifically reduced Petitioner's culpability;
>
> 3. Petitioner has recovered so that he will not be committing the same offenses in the future.

Tr. 25.

> A. Examination of Petitioner's contention that a mental or emotional condition reduced his

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[10] Because section 1128(a)(1) of the Act mandates an exclusion of not less than five years, the regulation applies only to those cases where aggravating factors have been used to increase the exclusion to more than five years. Furthermore, the regulation specifies that the exclusion may not be reduced to less than five years.

> culpability properly extends to consideration of his recovery and the likelihood that he may commit offenses in the future.

Before proceeding to the evidence on mitigation, I will address the parties' apparent agreement that I should consider under 42 C.F.R. § 1001.102(c)(2) the extent of Petitioner's recovery and whether Petitioner is likely to commit similar offenses in the future.[11]

Prior to the promulgation of the January 29, 1992 regulations, administrative law judges (ALJs) at the Departmental Appeals Board (DAB) evaluated an excluded individual's "trustworthiness" in determining the reasonableness of an exclusion period. See, e.g., Behrooz Bassim M.D., DAB 1333, at 13 (1992), and general discussion of "trustworthiness" at Leonard S. Dino, DAB CR260, at 17 - 18 (1993). "Trustworthiness" assessments have been made with reference to evidence of an individual's rehabilitation (or lack thereof) and the likelihood that an individual might commit the same or similar offenses in the future. See, e.g., Hanlester Network et al., DAB 1347, at 46 - 47 (1992) (citations omitted).

Neither party disagrees that, in determining the reasonableness of the exclusion period at issue, I must limit my consideration to the factors enumerated in 42 C.F.R. § 1001.102. I.G. Br. 10 - 11; P. Br. 3 - 4. In allowing me to consider mitigating factors only where aggravating factors are present, the regulation contemplates that I will evaluate the reasonableness of an exclusion period by assigning relative weight to the material evidence on the facts of each case. 42 C.F.R. § 1001.102. However, no part of 42 C.F.R. § 1001.102 expressly authorizes an ALJ to consider a petitioner's recovery from the mental or emotional condition described in subpart (c)(2) of the regulation; nor does it expressly authorize an ALJ to analyze the related issue of whether a petitioner is likely to commit the same or similar offenses in the future. Nevertheless, these matters are logical corollaries to the question of whether the emotional, physical, or mental condition that has reduced the petitioner's criminal culpability should

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[11] As counsel for Petitioner stated during opening argument, "Number three[,] we must prove that Paul Ellis has recovered from that strain that he was suffering and from that depression that he was suffering so that you can be confident that the same wrongs will not be committed again in the future." Tr. 25.

be used by an ALJ to decrease the length of an exclusion determined, imposed, and directed against a petitioner by the I.G. -- and, if so, by how much.

The regulations promulgated by the Secretary cannot do more than interpret and implement the Act itself. Section 1102 of the Act authorizes the Secretary to publish only those rules and regulations "not inconsistent with this Act, as may be necessary to the efficient administration of the functions with which [she] is charged under this Act." The relevant section of the law specifies no time period beyond the minimum five-year exclusion that the Secretary must impose whenever a provider has been convicted of a program-related crime. Section 1128(a)(1) of the Act. Therefore, the remedial purposes of the statute provide guidance where, as here, the regulation at issue simply states that the specified evidence "may" be considered in determining the length of the exclusion. 42 C.F.R. § 1001.102(b) and (c).

The major purposes of section 1128 of the Act include 1) protecting the Medicare and Medicaid programs from fraud and abuse, and, 2) deterring individuals from engaging in conduct that is detrimental to the programs and to those receiving benefits from the programs. Finding 12. Thus, in applying 42 C.F.R. § 1001.102(b) and (c), I must consider the extent to which an exclusion of more than five years will advance the remedial purposes of the Act. I agree with the parties' legal interpretation that the proper application of 42 C.F.R. § 1001.102(c)(2) in this case necessitates my analyzing the evidence concerning Petitioner's recovery from his mental or emotional condition, as well as my reaching a conclusion concerning the likelihood of his committing similar offenses against the programs in the future.

B. Petitioner's evidence regarding his mental or emotional condition prior to May 5, 1990 does not support a reduction of Petitioner's 10-year exclusion.

As discussed below, I am obliged to accept, for purposes of 42 C.F.R. § 1001.102(c)(2), Judge Urbom's finding that Petitioner was under "considerable personal stress" when he committed the offenses at issue in 1990. I do not accept, however, Petitioner's urging that I find him depressed, under a great deal of stress, or otherwise mentally impaired in prior years when he broke the law in other ways. Judge Urbom's finding did not extend to any period prior to the commission of the program-related offenses from May 5, 1990 to December 24, 1990, or to

anything more than Petitioner's "considerable personal stress" during that period. P. Ex. 14 at 56. In none of Petitioner's other criminal proceedings has any judge made a finding of Petitioner's diminished culpability for any period prior to May 5, 1990.

Judge Urbom did not adopt Petitioner's descriptions of his longstanding pre-existing mental condition, which were reported by the mental health experts from whom Petitioner sought treatment at his defense attorney's recommendation. P. Ex. 13; P. Ex. 14 at 22 - 24, 56; and, e.g., P. Ex. 2, 3, 7, 8. The judge did not adopt any of the medical diagnoses provided to him. Nor did the judge adopt Petitioner's testimony concerning his feelings of severe depression, "bashed" self-esteem, and having lived for years with a lot of pain, apprehension, worry, and protracted fear. P. Ex. 14 at 22 - 24, 56. Since Judge Urbom limited his findings to Petitioner's "considerable personal stress" occurring "during the times when this crime was committed" (id. at 56), there is no basis under 42 C.F.R. § 1001.102(c)(2) for me to consider as a mitigating factor Petitioner's allegations of stress or other mental conditions previous to his commission of the Medicaid fraud crimes from May 5, 1990 to December 24, 1990. See I.G. Ex. 7.

The I.G. did not object to the admission of the evidence concerning Petitioner's condition prior to May 5, 1990. Thus, it is in the record, and I have analyzed it for a better understanding of the parties' positions under 42 C.F.R. § 1001.102. However, even considering Petitioner's evidence of his alleged mental condition prior to May 5, 1990 as solely an attempt to explain the background of the aggravating and mitigating factors in this case, I do not find Petitioner's evidence persuasive. His allegations are, essentially, that he has had many especially serious personal and business problems during and since 1984. Tr. 86 - 111. He testified before me that his degree of stress had "sky rocketed" in 1984 due to various setbacks in his business enterprises and the deterioration of his relationship with his wife. Tr. 122 - 23.

As earlier noted, Petitioner had used the "stress" argument without success in 1986 and 1987, when he was being sanctioned for having filled "no refill" prescriptions and having been unable to account for several thousand doses of controlled substances. See I.G. Ex. 22; see generally I.G. Ex. 25, 29, 30. The Director of Health had found the claims of great stress unpersuasive and "self-imposed" by Petitioner's business and financial decisions. I.G. Ex. 22 at 8. The Director

further found that Petitioner's stress "neither justifies nor excuses his actions." Id. at 9.

In reactivating this same argument with augmented factual contentions in contesting his 10-year exclusion here, Petitioner alleges that his stress was present in 1986, during his disciplinary proceedings before the Director of Health, but it was not as obvious at that time as it became later. Tr. 24. However, except for the deaths in his family and his son's attempted suicide (Tr. 102 - 103) -- both of which events I consider to have been covered by Judge Urbom's finding of Petitioner's "considerable personal stress" in 1990 -- Petitioner's alleged problems in past years have been caused largely by his desire to acquire more money. The gravity of his past offenses as a pharmacist and as a Medicaid provider are not lessened by his contentions that he was in need of money to expand his business empire, to please his father, or to make his wife happier. Tr. 122 - 23, 133 - 34.

The evidence concerning Petitioner's sanctions record indicates that since at least 1983, shortly after Petitioner became a Medicaid provider (Finding 2), Petitioner has consistently wanted or needed more money than he could earn by legitimate means. This need or desire has caused him to commit crimes; once caught, he has justifiable reasons to feel a great deal of stress, apprehension, or sadness. There is no expert opinion establishing that any offense committed by Petitioner prior to May 5, 1990 was due to any mental or emotional defect.

Petitioner's accounts of his emotional difficulties over the years are of dubious reliability, given their timing and his apparent motive for making such reports. He made the reports many years after the fact and only when he had the opportunity to show mitigation in court in order to lessen his potential punishment. Petitioner admitted at hearing that, after his conviction for Medicaid fraud in 1988, he never followed his probation officer's repeated advice to seek treatment. Tr. 84 - 85. Petitioner rejected this advice, even though he knew that he was legally obligated to follow it as a condition of his probation. I.G. Ex. 13. Petitioner knew also, however, that following his probation officer's advice would not reduce the sentence already imposed for his 1988 offense. It was not until shortly before the sentencing hearing on his second Medicaid fraud conviction that, on the advice of his defense attorney, Petitioner sought treatment. Tr. 83 - 84. One psychologist acknowledged that he was doing the

evaluation on the referral of Petitioner's attorney, and the "purpose of this assessment is to screen for psychological problems, if any, which may be relevant to Mr. Ellis' current situation before the court." P. Ex. 4 at 2. Another evaluation report of the same period noted that Petitioner's presence at the treatment center was prompted by, inter alia, "his possible federal charges ...." P. Ex. 2 at 1.

Petitioner's brother, Dr. Kenneth Ellis, testified that, on more than one occasion prior to 1990, Petitioner had stated that he would like to take his own life. Tr. 145. However, there was no evidence from Dr. Ellis or anyone else that Petitioner made these assertions as a result of a medically diagnosable condition. In addition, there is evidence indicating that Petitioner was not in serious danger of taking his own life. Petitioner had explained to one of his treating doctors that, while he has thought about "when will it all end," he has gone on to think also about his children and his new relationship with a girlfriend. P. Ex. 4 at 4, 5. There has been no report of any actual suicide attempt by Petitioner.

Petitioner contended, with some support in the record, that some of the health care professionals who evaluated him in 1991 thought him depressed and exhibiting an "extreme amount of anxiety, anger, frustration and depression at the same time." P. Br. 7 (citing P. Ex. 3 at 4 and P. Ex. 6 at 4)). Even so, there has been no credible or rational explanation of how the depression, anxiety, anger, or frustration exhibited in 1991 could have caused him to actively and repeatedly breach laws and default on his legal obligations during prior years. Even those who remarked on Petitioner's symptoms in 1991 did not render any opinion on when the symptoms began, and one report noted that, even during evaluation in 1991, Petitioner's reasoning and judgment were within normal limits. P. Ex. 3 at 2.

The symptoms of anger, frustration, and depression appear to be the natural consequences of Petitioner's chosen course over time, not its causes. For example, one mental health professional made this observation:

> [Petitioner was] clearly showing evidence of emotional strain as a result of the long period of stress since his first conviction.

P. Ex. 4 at 5. Another consulting psychiatrist, who evaluated Petitioner in 1991 for treatment of complaints of depressed feelings and sexual dysfunction, made the following finding:

> He has sadness, depression and discomfort, anger and frustration at the financial upheaval that he has gone through . . . .

P. Ex. 6 at 3. As for the cause of Petitioner's financial upheaval, another psychologist noted this information provided by Petitioner:

> The patient describes his finances as in doubt since he may be fined by the feds. He has paid $19,000 to attorneys in the last 10 days.
>
> The patient has lost several businesses, both pharmacies and dry cleaning businesses and all he seems to have left is some real estate that he owns. All of these losses are as a result of his lawyer bills and fines from the government.

P. Ex. 2 at 2.

In considering Petitioner's argument that his severe emotional problems began before or during 1984, I was not persuaded by his contention that he had maintained a "clear record" and a good professional reputation for 20 years. Tr. 24. Petitioner stated that, during his disciplinary proceedings in 1986, "the director [of health] stipulated that for a period of 20 years Mr. Ellis had a clear record as a pharmacist and a reputation of maintaining ethical standards as a pharmacist." Id. This contention is not altogether true. The parties to that proceeding made the stipulation quoted by Petitioner (I.G. Ex. 22 at 5), and the Director of Health concluded "based on the evidence presented regarding [Petitioner's] character and previous record, that revocation [of his license] would not be appropriate in this instance." Id. at 9. The evidence already discussed establishes that, after having obtained stipulations concerning his clean record and good reputation until 1986, Petitioner was convicted of and sanctioned for the offenses he committed prior to 1986. Petitioner's record was not, in fact, clean for the years prior to 1986. Additionally, even in 1986 there was no credible evidence that Petitioner had been suffering from any serious medical problem. The Director of Health found no mitigation of the violations established by the evidence in 1986. Id. at 8. Even with the stipulations noted by Petitioner, the evidence to date is inadequate for inferring that, but for the onset of a serious emotional problem during approximately 1984, Petitioner would have been working as an honest and law abiding pharmacist.

In sum, Petitioner has not established the legal relevance or factual validity of his affirmative argument that his 10 year exclusion should be reduced because of a mental or emotional condition which existed prior to his committing his most recent Medicaid fraud offenses in 1990.

C. The evidence submitted by Petitioner concerning his reduced culpability in committing the offense upon which this exclusion is based and his alleged rehabilitation does not support a reduction in his 10-year exclusion.

Petitioner has proven that the sentencing judge determined on the record that a mental or emotional condition in existence during the time he committed his crimes in 1990 reduced his culpability for those crimes. Ex. 14 at 56; Tr. 25. Petitioner correctly posited that, pursuant to regulation, Judge Urbom's finding of "considerable personal stress" is relevant to these proceedings. See, e.g., P. R. Br. 1, 3.

The I.G.'s exclusion notice of October 29, 1992 does not mention consideration of any mitigating factor. However, after Petitioner submitted the transcript of the sentencing proceedings as evidence in this case (see P. Ex. 14), the I.G. agreed that the court did take account of Petitioner's personal stress and its existence during the time he committed the offense at issue. I.G. Br. 16; I.G. R. Br. 1. The I.G. agreed also that the foregoing finding of stress may be considered mitigating under the above referenced regulation. Id. The I.G. argued, however, that the evidence presented in this case does not warrant reducing the 10-year exclusion. I.G. Br. 16 - 20. The I.G. has sought to refute Petitioner's assertion that he has recovered through treatment so that he will not be committing the same offenses in the future. Id.; I.G. R. Br. 2.

Under the regulations, establishing the existence of a mental or emotional condition does not entitle Petitioner to an automatic reduction of the exclusion period at issue. The regulation uses the word "may" to indicate the permissive, discretionary use of this mitigating factor as a basis for reducing the exclusion period. 42 C.F.R. § 1001.102(c)(2). Just as I have not increased the 10-year exclusion period upon finding evidence of an additional aggravating factor pursuant to my de novo reviewing authority, I need not reduce the exclusion solely because there is evidence of a mitigating factor. Thus, to further substantiate that his exclusion should be reduced, Petitioner has sought to persuade me that he

has recovered from his mental condition and is therefore unlikely to commit the same offense in the future.

For several reasons, I have not accorded Judge Urbom's finding of "considerable personal stress," or the related evidence on which Petitioner relies, the controlling weight urged by Petitioner.

First, contrary to Petitioner's arguments, (see, e.g., P. R. Br. at 4), Judge Urbom did not set the criminal penalty at the lightest level solely because of Petitioner's reduced culpability. The record in the criminal proceeding gives no indication of the degree of culpability that was reduced by Petitioner's having been under personal stress. In setting Petitioner's sentence at the lowest level permitted by the federal sentencing guidelines, Judge Urbom mentioned several factors in Petitioner's favor, among which were his "considerable personal stress" and the support expressed by his family and community. P. Ex. 14 at 56. Judge Urbom's statement regarding Petitioner's "considerable personal stress" does not persuade me that, pursuant to regulation, I must reduce the length of Petitioner's exclusion.

Second, contrary to Petitioner's arguments, the I.G. has neither set the exclusion at the maximum level possible nor acted in a manner diametrically opposed to Judge Urbom's assessment. P. R. Br. at 4. A 10-year exclusion is not the maximum sanction permitted by section 1128(a)(1) of the Act. Section 1128(a)(1) of the Act specifies no maximum length for an exclusion. Section 1128 of the Act is, moreover, a civil statute, with purposes different from the criminal laws under which Petitioner was sentenced by Judge Urbom. The purpose of section 1128 is to protect the programs and their beneficiaries and recipients. I therefore reject Petitioner's argument that "[i]t is inconsistent for one government body to conclude that a minimum sentence is appropriate and another government body to conclude that a stiff penalty is appropriate." P. R. Br. at 4.

Third, at the time he sentenced Petitioner in 1992, Judge Urbom had mentioned Petitioner's seven months of treatment without finding that the treatment had rehabilitated him or that it was successful in any other respect. Judge Urbom stated only that Petitioner "has acknowledged that he was in need of treatment and he sought that treatment for about seven months . . . ." P. Ex. 14 at 56. As I found in subsection II.B supra., Petitioner has failed to establish that the offenses he committed in the years prior to 1990 were due to any mental or emotional condition. I find instead that

Petitioner went into treatment in an attempt to decrease the sanctions he might be given as a result of the federal charges against him, and to obtain help with his feelings of depression caused by his legal and financial problems, and with his sexual dysfunctions. See, e.g., P. Ex. 13 at 37, 39; P. Ex. 15 at 2. Those treating Petitioner allowed him to help shape his own treatment course; they worked on problem areas identified by Petitioner, and they accepted as true certain background information provided by Petitioner (which I find to be false).[12] See, e.g., P. Ex. 15 at 3, 4, 38, 44. Petitioner also was discharged early -- after 28 days -- from his inpatient treatment facility solely because his insurance company refused to pay for the treatment. See, P. Ex. 13 at 60, 15 at 22. Therefore, on the issue of whether Petitioner's exclusion should be reduced, evidence that Petitioner has received treatment, together with Judge Urbom's finding of "considerable personal stress" limited to 1990, do not lead to a conclusion that Petitioner's treatment has made him unlikely to commit future offenses against the Medicaid program.

Finally, the totality of Petitioner's evidence concerning his alleged rehabilitation is not sufficiently consistent or persuasive to establish that a 10-year exclusion is excessive. Compared with the I.G.'s evidence on the

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[12] For example, Petitioner gave the following false information to his treating facility:

> Last January federal agents came into another pharmacy that he had and indicted him on Medicaid fraud again for about $300 worth of discrepancies based on him selling prescriptions to Medicaid patients even though he had another doctor signing off and officially taking responsibility for those interactions.

P. Ex. 15 at 3.

> The patient has served the sentence [for his 1988 Medicaid fraud conviction] successfully and then came to know that he was being charged again for probation violation at this point .... [a]s he was getting the signatures from one [of] the pharmacists and dispensing drugs.

Id. at 38.

aggravating factors, Petitioner's evidence on mitigation is considerably less substantial, less consistent, and less objective. Petitioner relied in very large part on his own statements in situations where he had clear incentives to advance his own interests. Thus, Petitioner did not establish by a preponderance of the evidence that he is not likely to commit similar offenses in the future or that a lesser period of exclusion will suffice as a deterrent.

Petitioner's evidence has established that the "considerable personal stress" that had weighed on Petitioner when he committed his latest Medicaid fraud offenses has lessened. Petitioner has been feeling better due to a combination of factors, including treatment, the alleviation of certain financial difficulties, the resolution of certain family problems, the transient nature of certain tragic events, and the decreasing magnitude of his legal problems. See generally the testimony by Petitioner and his witnesses at hearing (Tr. 71 - 149) and P. Ex. 7. Also, unlike earlier times when Petitioner's sanctions have included the payment of substantial fines, Judge Urbom imposed no fine for the 1990 crimes in light of Petitioner's financial situation. P. Ex. 14 at 60 - 61. Witnesses have indicated that Petitioner has benefitted from treatment and changed for the better. See, e.g., P. Ex. 13 at 47 - 62, 18; Tr. 136 - 40, 146 - 47.

I have noted the progress made by Petitioner and hope that he will continue to improve. However, the extent of Petitioner's progress does not render the 10-year exclusion unreasonable or unnecessary. Absent a lengthy exclusion, there is no adequate assurance that Petitioner will refrain from committing offenses against the programs. Petitioner is not yet able to abide by rules and laws, and he continues to exhibit a number of his past traits.

I note, for example, that, despite the testimony and evidence concerning Petitioner's newly acquired insights, improved honesty, and willingness to accept responsibility for his actions (e.g., P. Ex. 13 at 58 - 61), Petitioner -- sitting in court awaiting sentencing after having undergone seven months of treatment -- allowed his lawyer to argue on his behalf that he had committed a victimless crime in 1990 and that his submission of the false claims in 1990 did not really cause the Medicaid program to lose the $6203.75 paid to him (rather, the loss to the program was allegedly limited to the 24 percent profit he made on the prescriptions he filled while under exclusion from the

program). P. Ex. 14 at 42 - 44, 47. I agree with Judge Urbom that Petitioner's position was "not well taken" because, in the judge's words,

> The amount of $6,203.75 represents a claim made by Mr. Ellis and paid by the state for matters to which he was not entitled. He wasn't entitled to reimbursement for everything except profit. He was not entitled to reimbursement for anything where he was making claim under the Medicaid [f]or prescriptions that he had filled unlawfully.

Id. at 47 - 48.

The arguments presented at Petitioner's request or with his agreement on June 25, 1992 do not show that he had recovered sufficiently by that time to recognize that submitting fraudulent Medicaid claims creates victims: recipients whose health care is impaired by the loss of program integrity and the taxpayers who fund the Medicaid program. By arguing that he should be allowed to keep all but 24 percent of the overpayment, he was still exhibiting a desire to reap substantial monetary benefits from his illegal actions. This and other facts discussed herein tend to show that, even though Petitioner has proclaimed his willingness to take responsibility for his actions, he still has a skewed outlook on what is right and wrong. Moreover, Petitioner has shown that the responsibility he is willing to take is in a manner favorable to himself.

Petitioner's subsequent violation of Judge Urbom's judgment and commitment order is strong evidence that he cannot yet restrain himself from doing what is legally prohibited. As already noted, Petitioner requested his hearing on December 28, 1992 so that he could demonstrate that he could "do it right" during his remaining professional life. However, on the following day, December 29, 1992, Petitioner began to violate his curfew and, after eight more days of curfew violations, he was found in another city under the influence of a controlled substance for which he had no prescription. Petitioner then sought to prove to Judge Urbom and to me that his infractions were insignificant and, in some instances, prompted by others' requests to him. See, e.g., P. Ex. 19, 20; Tr. 118 - 119. Petitioner argued also that these "relatively minor infractions" can be attributed to the fact that Petitioner was only in the early weeks of his confinement program. P. R. Br. 5.

I found Petitioner's violations of Judge Urbom's order very significant in light of Petitioner's assertions that he is able to abide by laws and regulations. I did not attribute much significance to Petitioner's contention that he had committed the infractions during the early part of his confinement program. I note that Petitioner has a history of having defrauded the Medicaid program when he was new to it as well as when he became more experienced with it. Moreover, only 11 days before he began violating them, he had read and signed a copy of the rules and procedures he was to follow pursuant to his confinement program. I.G. Ex. 32 at 5 - 8.

For purposes of deciding whether the length of Petitioner's exclusion from the programs is reasonable, I do not find it necessary to decide matters such as why he violated the court's judgment and commitment order. Whatever caused him to violate curfew and use a controlled substance, Petitioner behaved in much the same way as he had done before. He did what was legally prohibited to him; he then attempted to justify or minimize the significance of his actions by, inter alia, blaming external events or other people, and he confessed fault only when doing so was likely to lessen his penalty.

I note Petitioner's recent explanation of why, in 1990, he submitted Medicaid claims during his exclusion. Petitioner testified before me that he had "relaxed" on the terms of his exclusion in 1990 because he "rationalized or felt" that his actions were justified as long as he had a backup pharmacist's initials to use or he made an effort to find other pharmacists to do the work. Tr. 111, 124 - 125. Petitioner used this same type of rationalization to justify his curfew violations after his treatment. Petitioner pointed out that he had called and left messages for his probation officer around the time of each incident, (Tr. 119), even though the explicit terms of his commitment order prohibited him from following his own timetable without the explicit approval of his probation officer 24 hours in advance. I.G. Ex. 32. The "Home Confinement Scheduling Procedures" instructed Petitioner, in these unambiguous words, to refrain from doing what he did:

> All schedule changes must be done 24 hours in advance! .... DO NOT call and say you are leaving and going to take some free time, or whatever. You must schedule everything in advance as I am supposed to know where you are and what you are doing at any given time. If

> you do not have preapproved permission to be somewhere, YOU MUST BE AT HOME!

Id. at 1. In the home confinement participation agreement Petitioner had signed shortly before he committed his violations, Petitioner acknowledged as follows:

> I must obtain my officer's advance permission for any special activities (such as doctor's appointments) that are not included in my written schedule.

Id. at 5. None of the reasons for Petitioner's curfew infractions (going to church, changing his free time, working late, or meeting his attorney in another city) constituted an emergency that would have allowed him to deviate from the foregoing procedures. See id. at 2 and 5; P. Ex. 19, 20.

Petitioner's efforts to minimize his violations of Judge Urbom's judgment and commitment order also reminded me of Petitioner's explanation for his inability to account for several thousand doses of controlled substances during 1986. Petitioner sought to mitigate that offense by testifying before the State Director of Health that employees were conspiring to devalue his pharmacy as part of a scheme to facilitate purchase by others. I.G. Ex. 22 at 8.

In testifying before me, Petitioner gave additional indications that he was continuing his old pattern of obfuscating his offenses and blaming others while professing to take responsibility for his own actions. He testified that his crime in 1990 was in filling Medicaid prescriptions during his exclusion from the program, and, if he were able to relive that period of his life, he would want to obtain greater clarification from Medicaid officials in order to follow their instructions as to what he could and could not do during his exclusion, (Tr. 105, 110 -111).[13] Both assertions,

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[13] Q: If you were placed in the same circumstances again today, what, if anything, would you do differently?

A: I would, I would hope to, with my mind being occupied in so many different directions and with all the extenuating circumstances. I wish I would have made better contact with someone like Kris Logsdon and called her on a regular basis or had her notes and reviewed them

(continued...)

and their implications, are not in total accord with his earlier admissions.

When testifying on direct examination at his sentencing hearing on June 25, 1992, Petitioner asserted that his crime was filling Medicaid prescriptions during his five-year exclusion. P. Ex. 14 at 22. However, on cross-examination by the U.S. Attorney, Petitioner indicated his awareness that his offense was committed when he billed the Medicaid program for his services while he was excluded. I.G. Ex. 14 at 26 - 27. The U.S. Attorney asked him if he recalled a conversation with two Medicaid officials where he was told very clearly that, if he filled any Medicaid prescriptions, he could not bill for them. Id. Petitioner answered "That's correct." Id.

These and other facts show that Petitioner knew, prior to testifying before me, that his offense was not in filling prescriptions for Medicaid recipients. His license to practice pharmacy had been returned to him prior to 1990, and he was not prohibited from working as a pharmacist under his own name. J. Ex. 1 at 4; Tr. 105. He also knew prior to the hearing before me that he was prohibited from claiming Medicare or Medicaid reimbursement for any service he provided to program beneficiaries and recipients during his exclusion. Tr. 105. If he lacked such clear knowledge when he committed his offenses against the Medicaid program, he would not have tried to hide his involvement in the submission of numerous false claims over the six month period in 1990. He falsified those claims by deliberately using other pharmacists' initials and by altering the transactions recorded on the computer in his store. See Tr. 44 - 45; I.G. Ex. 7.

The record concerning Petitioner's prior sanctions also contains evidence of similar manipulations used by Petitioner to advance his own interests. For example, Petitioner had sought to shorten his license suspension period by claiming in an affidavit that he had "voluntarily withdrawn" from the profession when, in fact, he had been practicing pharmacy every month. I.G. Ex. 19. Also, until a probation revocation action was filed against him, Petitioner refused to pay any part of the more than $5000 in fines and costs assessed against him as a term of his probation. I.G. Ex. 20, 21.

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[13] (...continued)
regularly and followed her instructions.

Tr. 110 - 111.

In an effort to put his Medicaid fraud offenses of 1990 in a better light, Petitioner gave considerable testimony concerning his search for relief pharmacists, his desire to serve his Medicaid patrons, and his fear of bankruptcy. See Tr. 106 - 11, 130 - 32. The causes of his illegal activities were not, as Petitioner attempted to portray them, the absence of available pharmacists who were willing to work in his store between certain hours, or the need to serve Medicaid recipients who came to his store during the final store hour and only after having run out of their prescription medications. Id. Petitioner was working in his own store as a relief pharmacist and was legally authorized to fill the prescriptions; having filled the prescriptions brought in by the Medicaid recipients, he was not in any danger of losing the business of their friends or relatives. See, e.g., Tr. 110, 124, 131. The percentage of prescriptions filled at Petitioner's store for Medicaid recipients accounted for only 15 to 18 percent of the store's total. Tr. 130. This low percentage included the Medicaid work Petitioner's store transacted with nursing homes (id.), which should not have encountered the types of emergencies and staffing problems described by Petitioner.

Petitioner did not need to bill the Medicaid program during his exclusion to maintain his customers' loyalty or to serve the needs of his Medicaid customers. He could have accomplished these business goals legitimately by filling Medicaid prescriptions without charge to his customers or to Medicaid. His lack of candor on these critical facts at this time is not consistent with his affirmative arguments concerning recovery.

For these and related reasons, I accorded little weight to Petitioner's expressions of contrition. Neither do I find credible his explanation on cross-examination that, rather than implying that the Medicaid officials had not clearly explained the exclusion to him, what he had really meant was he wished he had tried harder to follow the rules and regulations in 1990. Tr. 125. His counsel's questions on direct examination produced many of Petitioner's concessions concerning his past offenses. I was not persuaded that, absent the leading questions that reminded Petitioner of his offenses, the true extent of his knowledge, and the need to take responsibility for his actions, Petitioner would have voluntarily acknowledged them.

Petitioner's admissions of wrongdoing following his treatment have not persuaded me that he is unlikely to commit offenses against the programs. For several years

prior to treatment, Petitioner had been admitting wrongdoing as well. What he has not yet learned to do well is to follow the precise terms of those orders and rules that he is legally obligated to follow in order to avoid committing offenses in the first instance. The fiscal integrity of the programs cannot be advanced by the participation of a provider who is apt to deviate from the applicable laws and regulations for reasons he thinks proper.

Petitioner did not prove that an exclusion of less than 10 years would suffice for safeguarding the integrity of the Medicare and Medicaid programs and would deter him from again defrauding the programs. Petitioner has a long history of illegally acting on his need for money. The programs remain at risk because he is either unable or unwilling to abide by the laws as written. Moreover, the current absence of serious financial problems in his life may be temporary. There is no adequate assurance that Petitioner will not revert to his old ways when he believes he has a need to do so.

CONCLUSION

In accordance with the facts and law applicable to this case and for the reasons stated above, Petitioner's 10-year exclusion is reasonable. I sincerely hope, for the sake of Petitioner and the programs, that Petitioner will learn to conform his conduct to the requirements of law.

To avoid any misunderstanding about the significance of this decision, I wish the parties to be aware that I have made no determination on the current status of the five year exclusion that was imposed against Petitioner on August 30, 1988. I.G. Ex. 10, 12. Because my jurisdiction of this case is limited to determining the reasonableness of the 10-year exclusion for which a hearing has been requested, my decision should not be read as having excused Petitioner from serving his five-year exclusion in full. I reviewed evidence on the five-year exclusion solely as part of the sanctions record made relevant by 42 C.F.R. § 1001.102(b)(5). Only the I.G., as the Secretary's delegate under the Act and as a

signatory to the instrument that imposed the five year exclusion, is authorized to review the matter of the unexpired exclusion and take appropriate action.

/s/

Mimi Hwang Leahy
Administrative Law Judge