# Department of Health and Human Services

# DEPARTMENTAL APPEALS BOARD

## Civil Remedies Division

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| In the Case of: | ) | |
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| Scott Gladstone, M.D., | ) | DATE: September 6, 1994 |
| | ) | |
| Petitioner, | ) | Docket No. C-93-071 |
| | ) | Decision No. CR331 |
| - v. - | ) | |
| | ) | |
| The Inspector General. | ) | |
| | ) | |

## DECISION

Background

By letter (Notice) dated March 23, 1993, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs for a period of 10 years.[1] The I.G. informed Petitioner that he was being excluded due to his conviction in the Las Vegas Justice Court, Clark County, Nevada, of a criminal offense related to the delivery of an item or service under the Medicaid program. The I.G. further advised Petitioner that an exclusion after such a conviction is mandated by section 1128(a)(1) of the Social Security Act (Act), and that section 1128(c)(3)(B) of the Act provides that the minimum period of exclusion for such an offense is five years. The I.G. stated further that the following circumstances were also taken into consideration in arriving at Petitioner's period of exclusion: (1) the statutory fines and penalties imposed by the court amounted to more than $500,000; (2) the

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[1] The State health care programs from which Petitioner was excluded are defined in section 1128(h) of the Social Security Act and include the Medicaid program under Title XIX of the Act. Unless the context indicates otherwise, I use the term "Medicaid" hereafter to refer to all State health care programs listed in section 1128(h).

commission of the crime evinced planning and premeditation; (3) Petitioner agreed to be excluded from the Medicaid program for 10 years. In a letter dated May 4, 1993, Petitioner challenged his exclusion and requested a hearing.

I conducted a prehearing conference by telephone on May 28, 1993. During that conference, I established a schedule for discovery and prehearing exchanges and scheduled an in-person hearing to begin on October 12, 1993. These events were memorialized in my Order and Notice of Hearing dated July 9, 1993. Subsequently, Petitioner changed attorneys and I held another prehearing conference on August 26, 1993, at which time Petitioner's new attorney entered his appearance. At the conference, I informed Petitioner's counsel of the status of the case and granted his request for a continuance of the document exchange dates. I rescheduled the hearing date to accommodate the schedule of Petitioner's counsel. Following this conference, I issued an Order Amending Hearing and Exchange Dates dated August 30, 1993. On September 3, 1993, in response to an August 30, 1993 letter sent to me by Petitioner's counsel, I issued an Order to Show Cause and Stay of Exchange Dates (Order to Show Cause). In the Order to Show Cause, I requested Petitioner's counsel to state whether his August 30, 1993 letter was intended as a withdrawal of Petitioner's request for hearing or whether it was intended, instead, as a request for a continuance. In a letter dated September 20, 1993, Petitioner's counsel responded to my Order to Show Cause. In my Order and Schedule for Submission of Briefs and Exhibits, dated October 4, 1993, I stated that I construed Petitioner's September 20, 1993 letter as a waiver of Petitioner's request for an in-person hearing and a request for a hearing on the record. Accordingly, I established a briefing schedule.
With her brief, the I.G. submitted nine proposed exhibits (three were declarations). I have given exhibit numbers to the declarations since the I.G. did not do so. I cite the I.G.'s exhibits as "I.G. Ex. (number) at (page)." The Declaration of Jeanette Supera is I.G. Ex. 7, the Supplemental Declaration of Jeanette Supera is I.G. Ex. 8, and the Declaration of Beth Salvador is I.G. Ex. 9. I admit I.G. Ex. 1 - 8 into evidence. I reject I.G. Ex. 9. With his response, Petitioner submitted one proposed exhibit, which I cite as P. Ex. 1. I reject P. Ex. 1.

I have rejected P. Ex. 1, a newspaper article dated November 13, 1993, on the basis of irrelevancy. FFCL

30.[2] Petitioner argued that he cooperated "with the investigation and indictment of his former accountant," and that this is a mitigating factor that I should take into consideration in deciding the length of his exclusion. P. Br. at 2. Petitioner appears to be arguing that his alleged cooperation should be regarded as mitigating pursuant to 42 C.F.R. § 1001.102(c)(3)(i). In support of this argument, Petitioner submitted the aforementioned newspaper article, which stated that a Las Vegas accountant had been indicted. Rejected P. Ex. 1. While the article does mention Petitioner's name, it merely relates that the indictment of the accountant involved the apparent theft of two checks from Petitioner. Id. The I.G. contends that "[t]his has no relevance to Petitioner's, or anyone else's, participation in the Medicare or Medicaid programs." I.G. R. Br. at 8 - 9; see I.G. Ex. 7. I concur.

Under the regulations, an excluded individual's cooperation with officials can be a mitigating factor if it "resulted in [o]thers being convicted or excluded from Medicare or any of the State health care programs." 42 C.F.R. § 1001.102(c)(3)(i). In Petitioner's case, there exists no proof that the indictment of the Las Vegas accountant resulted from Petitioner's cooperation with the authorities. I find that the accountant's indictment has no connection to Petitioner's Medicaid conviction or to Medicare or any State health care program and is wholly irrelevant to these proceedings. FFCL 28. Finally, the newspaper article states that the accountant was only indicted, not convicted. I conclude that the

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[2] The parties' submissions and my Findings of Fact and Conclusions of Law will be cited as follows:

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| I.G.'s Brief | I.G. Br. at (page) |
| I.G.'s Proposed Findings of Fact and Conclusions of Law | I.G. Prop. Finding (number) |
| Petitioner's Findings of Fact and Conclusions of Law | P. Br. at (page) |
| I.G.'s Reply Brief | I.G. R. Br. at (page) |
| My Findings of Fact and Conclusions of Law | FFCL (number) |

indictment of the accountant is not a mitigating factor under 42 C.F.R. § 1001.102(c)(3)(i), and has no bearing on my adjudication of Petitioner's case. FFCL 29. In view of the foregoing, I have thus rejected P. Ex. 1.

After the record in this case had closed on March 8, 1994, Petitioner himself untimely submitted additional materials directly to me, rather than submitting them through counsel. In a letter dated May 2, 1994, I informed counsel for Petitioner and counsel for the I.G. that I was treating Petitioner's submissions as a motion to reopen the record. I directed counsel for both parties that they had the opportunity to respond as to their respective positions on this matter. In response, counsel for the I.G. submitted a brief opposing Petitioner's motion to reopen the record and objecting to Petitioner's new evidence.

On May 25, 1994, I held a telephone conference call with Petitioner, his counsel, and the I.G.'s counsel. In a letter dated May 27, 1994, in which I summarized the events of the conference call, I stated that I had informed Petitioner that I had no authority to reduce his exclusion below the five-year minimum mandatory exclusion. I emphasized to Petitioner also that his request for a waiver of his exclusion to provide care to medically indigent individuals was outside the purview of my authority. I informed Petitioner that I would give him a final opportunity to challenge his exclusion through an in-person hearing or by an on-the-record submission of documentary evidence. On May 31, 1994, I held another telephone conference call with the same participants. Following this call, I issued an Order dated June 2, 1994 which reflected that Petitioner stated that 1) he did not want an in-person hearing; 2) he was withdrawing his previously submitted documents and 3) he wanted another opportunity to supplement the record with additional documentation. I gave Petitioner one last opportunity to offer evidence for my consideration and set a schedule to enable him to make this final submission.

Pursuant to my June 2, 1994 Order, counsel for Petitioner submitted additional documents as proposed exhibits for my consideration. The documents consisted of a polygraph examination report dated May 27, 1993, accompanied by a curriculum vitae of the examiner, and two letters written

to me by Petitioner, dated April 26, and April 27, 1994.[3] In a letter dated June 9, 1994, I directed that counsel for the I.G. had the opportunity to respond to Petitioner's submission. Counsel for the I.G. thereupon submitted a brief in opposition to Petitioner's June 3, 1994 submissions. By letter dated June 24, 1994, I directed that counsel for Petitioner had the opportunity to respond to the I.G.'s brief. By letter dated June 28, 1994, counsel for Petitioner indicated that he was declining to respond to the I.G.'s position and would await my decision. By letter dated July 8, 1994, I informed the parties that I was rejecting Petitioner's proposed exhibits and closing the record.

I find that Petitioner's proposed exhibits, P. Ex. 2-4, are irrelevant as they do not relate to the aggravating or mitigating factors set forth in the regulations which govern the length of Petitioner's exclusion. In his letters, Petitioner stated that he was pursuing employment with county mental health departments in California and was also considering a psychiatry fellowship at a university training facility. Petitioner expressed also his interest in providing care to the medically indigent and his bilingual ability, and asserted that psychiatrists were in need in northern California. Rejected P. Ex. 3, 4.

I find that Petitioner's letters do not address the merits of the length of his exclusion. Nothing in Petitioner's letters relates to the aggravating or mitigating factors set forth in 42 C.F.R. § 1001.102(b) and (c). At best he seeks a waiver of his exclusion -- an issue beyond the purview of my authority. Under 42 C.F.R. § 1001.1801(f), my jurisdiction does not extend to review of the disposition of a waiver request.[4] Petitioner's assertion that there is an insufficient number of bilingual psychiatrists to treat indigent patients in northern California, even if true, is irrelevant, since the lack of alternative sources of medical items or services is not a mitigating factor

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[3] Because Petitioner's counsel did not identify these proposed exhibits, I have identified them in the following manner: the polygraph examination report, with the accompanying curriculum vitae, is P. Ex. 2, the letter dated April 26, 1994, is P. Ex. 3, and the letter dated April 27, 1994, is P. Ex. 4.

[4] The record contains no evidence that the State of Nevada has requested a waiver of Petitioner's exclusion.

under the applicable regulations pertaining to program-related exclusions. 42 C.F.R. § 1001.102(c); FFCL 26. I have therefore rejected P. Ex. 3, 4. FFCL 27. Similarly, I.G. Ex. 9, which was offered to rebut Petitioner's claim of a lack of alternative sources, is also irrelevant, and thus, rejected. FFCL 27.

Similarly, I find the polygraph examination report, dated May 27, 1993, and the accompanying curriculum vitae, to be irrelevant as they address neither the aggravating nor mitigating factors. Petitioner has apparently offered these polygraph documents in an attempt to prove his innocence and good character. While general character evidence is not relevant in this case, I have allowed evidence of a petitioner's state of mind and rehabilitation to rebut the implications of untrustworthiness arising from a specified aggravating factor. Joseph Weintraub, M.D., DAB CR303 (1994) at 44. Such evidence must relate directly to an aggravating factor. Here, Petitioner offered polygraph evidence indicating that 1) he did not devise a plan or scheme to knowingly bill Medicaid fraudulently and 2) he never cashed any Medicaid checks for amounts beyond which he was entitled. Rejected P. Ex. 2. Such general denials, without further supporting evidence, do not directly relate to the aggravating factors pertaining to financial harm to the program. 42 C.F.R. § 1001.102(b)(1) and (6). The record reflects that I gave Petitioner repeated opportunities to provide specific information to rebut the aggravating factors either with documentary or testimonial evidence. Letter Closing the Record, dated March 16, 1994; Letter, dated May 27, 1994; Order, dated June 2, 1994; Letter, dated June 24, 1994. No such evidence was ever submitted.

To the extent that Petitioner is offering the polygraph documents to collaterally attack his conviction, such an effort is impermissible. Petitioner may have recourse in the State courts to rectify such matters, but not in this forum. Peter J. Edmonson, DAB 1330, at 4 - 5 (1992); Richard G. Philips, D.P.M., DAB CR133, aff'd, DAB 1279 (1991). Moreover, even assuming such documents are demonstrative of his general good character, such evidence, without a more detailed explanation of his conduct, lacks the requisite specificity to rebut the lack of trustworthiness arising from the aggravating factors alleged by the I.G. to justify the lengthy exclusion of Petitioner. In short, Petitioner has failed to make the threshold showing needed for me even to consider such evidence as rebuttal to the aggravating factors alleged by the I.G. Further, the polygraph evidence offered by Petitioner is not competent or

reliable evidence due to Petitioner's failure to provide an adequate foundation to establish the validity of the polygraph examination and to justify the receipt of such evidence. U.S. v. Piccinonna, 885 F.2d 1529 (11th Cir. 1989); U.S. v. One Parcel of Real Estate, 804 F. Supp. 319, 322 (S.D. Fla. 1992). For the foregoing reasons, I rejected P. Ex. 2. FFCL 31.

I have considered the evidence of record, the parties' arguments,[5] and the applicable law and regulations. I find that, pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act, the I.G. has the authority to exclude Petitioner and that the 10-year exclusion is reasonable. Therefore, I sustain the 10-year exclusion imposed and directed against Petitioner.

## ISSUES

The issues in this case are:

1. Whether Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act.

2. Whether the 10-year exclusion imposed and directed against Petitioner by the I.G. is reasonable.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Findings of Fact and Conclusions of Law by Agreement of the Parties[6]

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[5] The I.G. incorrectly characterized her first submission as a "Memorandum in Support of a Motion for Summary Disposition." Although I am disposing of the issues in this case without holding an in-person hearing, this is not a summary disposition. Because Petitioner waived his right to an in-person hearing, I am deciding all disputed factual and legal issues based on the documentary evidence of record.

[6] In this section, I have adopted I.G. Prop. Findings 1-6, 8-10, 12-25, 28, and 30. Petitioner did not contest these specific findings of fact and conclusions of law. P. Br. at 2-3. Therefore, I have adopted these findings of fact and conclusions of law, with only minor editorial changes. Where necessary for purposes of clarity, I have added additional wording in brackets. I have independently reviewed the record and

(continued...)

1. On March 16, 1992, Petitioner entered into a Memorandum of Plea Negotiations [also referred to in this section as "plea agreement" and "plea negotiation"] with the Medicaid Fraud Control Unit of the State of Nevada Office of the Attorney General, whereby Petitioner agreed to plead guilty to Count I of the Criminal Complaint appended to the Memorandum. I.G. Ex. 1.

2. At the time of his execution of the Memorandum of Plea Negotiations with the State of Nevada, Petitioner was a psychiatrist practicing in Las Vegas, Nevada.

3. Count I of the Criminal Complaint to which Petitioner agreed to plead guilty charged him with willfully, unlawfully, knowingly and designedly, with the intent to cheat and defraud, obtaining money from the Nevada Medicaid program by means of false pretenses, by falsely claiming that he rendered professional services to certain patients, when, in fact, he did not render such services. I.G. Ex. 1.

4. Petitioner, through the execution of his plea agreement with the State of Nevada, specifically stipulated that the State of Nevada could prove beyond a reasonable doubt that he did knowingly and designedly obtain money from Nevada Medicaid by making false statements on claims for professional services, which he knew were false, and that he acted with the intent to defraud the Medicaid program. I.G. Ex. 1.

5. Petitioner further stipulated that, if he were to breach the terms of the plea negotiation, he understood and agreed that the Criminal Complaint attached as Exhibit B to the Memorandum of Plea Negotiations with the State of Nevada may be filed against him. I.G. Ex. 1.

6. The Criminal Complaint attached as Exhibit B to the Memorandum of Plea Negotiations, which Petitioner consented could be filed against him if he breached his plea agreement, charged Petitioner with eight felony counts and one misdemeanor count of obtaining money by

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[6] (...continued)
determined that the findings have a basis in the record. Accordingly, I have supplied the citations to the record that support the findings. Although Petitioner did not contest I.G. Prop. Finding 26, I did not include this finding among these uncontested findings because I assume that Petitioner agreed to this finding in error, since adopting this finding would have rendered Petitioner's appeal moot.

false pretenses from the Nevada Medicaid program by falsely claiming that he rendered professional services to patients, when in fact, he did not. I.G. Ex. 1.

7. Petitioner agreed through his executed plea agreement that (1) he would pay to the State of Nevada $300,000 in restitution, to be assessed on the following basis: $35,624.36 for restitution; $38,192.06 for costs of investigation and enforcement; and, $226,183.58 for statutory penalties; (2) all of these payments would be made by negotiable instruments made payable to the "State of Nevada" and delivered to the Medicaid Fraud Control Unit of the Office of the Nevada Attorney General; (3) he would perform 500 hours of community service; (4) he would voluntarily agree to be excluded from the Nevada Medicaid program in any and all capacities for a period of ten years, with permission afforded to petition for reinstatement if, after the lapse of five years, Nevada Medicaid considers his services to [have] be[en] exemplary. I.G. Ex. 1.

8. The Justice Court of Las Vegas Township, Clark County, Nevada, accepted Petitioner's plea of guilty to the charge of obtaining money from the Nevada Medicaid program by means of false pretenses, by claiming that he had rendered professional services to patients when, in fact, he had not rendered such services. I.G. Ex. 2.

9. On March 31, 1992, the Justice Court of Las Vegas Township sentenced Petitioner to perform 500 hours of community service, and to pay restitution of $300,000 to the State of Nevada in the following manner: $35,624.36 for restitution; $38,192.06 for the cost of investigation and enforcement; and $226,183.58 for statutory penalties. I.G. Ex. 2.[7]

10. By letter dated April 7, 1992, the Nevada Medicaid Office of the Nevada Department of Human Resources notified Petitioner that, based upon his agreement to be excluded as a Medicaid provider for a period of ten years, Nevada Medicaid was terminating his provider agreement effective April 1, 1992, and that he would not

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[7] In her proposed findings, the I.G. mistakenly states the date of Petitioner's sentencing as March 21, 1992. I.G. Prop. Finding 10.

be reimbursed by the Medicaid program for services provided on or after that date.[8] I.G. Ex. 3.

11. The Secretary [of the Department of Health and Human Services] 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).

12. By letter dated March 23, 1993, the I.G. excluded Petitioner pursuant to section 1128(a)(1) of the Act for a period of 10 years. I.G. Ex. 4.

13. Petitioner stipulated during a prehearing conference on May 28, 1993 that he did not contest the fact of his conviction, or that his conviction was related to his delivery of services under the Nevada Medicaid program, thereby subjecting him to the mandatory minimum exclusion of five years under section 1128(a)(1) and section 1128(c)(3)(B) of the Act.[9] Order and Notice of Hearing, dated July 9, 1993.

14. The I.G. has authority to impose and direct an exclusion pursuant to section 1128(a)(1) of the Act based upon Petitioner's conviction of an offense related to his delivery of services under the Medicaid program.

15. The I.G. has authority to impose and direct an exclusion for at least five years, pursuant to section 1128(c)(3)(B) of the Act.

16. 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).

17. 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

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[8] In her proposed findings, the I.G. incorrectly referred to the State agency as the Nevada Department of Health Services. I.G. Prop. Finding 12.

[9] The I.G.'s proposed findings contained two errors, which I have corrected here. The I.G. incorrectly stated the date of the prehearing conference to be July 9, 1993, instead of May 28, 1993. The I.G. also referred to section 1128(c)(3)(B) as 1138(c)(3)(B). I.G. Prop. Finding 15.

section 1128(a)(1) of the Act. 42 C.F.R. §§ 1001.101 and 1001.102.

18. 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. 5617-18 [(1993)].

19. The Administrative Law Judge's adjudication of the length of exclusion in this case is governed by the criteria set out in section 1128(a)(1) of the Act, section 1128(c)(3)(B) of the Act, and 42 C.F.R. § 1001.102. FFCL 14-18.

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

21. An exclusion imposed pursuant to section 1128(a)(1) of the Act may be in excess of the five-year mandatory minimum period if any of the six aggravating factors set out in 42 C.F.R. § 1001.102(b) are found to be present. See FFCL 37.

22. If any of the six factors in [42 C.F.R.] § 1001.102(b) are found to be present, thereby justifying an exclusion longer than five years, the three factors (and only those three factors) specified in [42 C.F.R.] § 1001.102(c) may be considered mitigating, and a basis for reducing the duration of exclusion that is in excess of five years. See FFCL 38.

23. The I.G. has the burden of proving that aggravating factors specified in the regulations are present in this case. 42 C.F.R. § 1005.15(c).

24. The I.G. has proved that the acts that resulted in Petitioner's conviction, or similar acts, had a significant adverse physical, mental, or financial impact on one or more program beneficiaries. 42 C.F.R. § 1001.102(b)(3).

25. Petitioner has the burden of proving that mitigating factors exist which justify reducing his exclusion. 42 C.F.R. § 1001.102(c)(1)-(3); 42 C.F.R. § 1005.15(c).

Other Findings of Fact and Conclusions of Law

26. A lack of alternative sources of medical items or services is not a mitigating factor under the applicable regulations pertaining to program-related exclusions. 42 C.F.R. § 1001.102(c).

27. P. Ex. 3 and 4, which were offered to establish the existence of a lack of alternative sources, are irrelevant, and thus, rejected. Similarly, I.G. Ex. 9, which was offered to rebut Petitioner's claim of a lack of alternative sources, is also irrelevant, and thus, rejected.

28. The indictment of the Las Vegas accountant, related in the newspaper article offered by Petitioner, has no connection to Petitioner's Medicaid conviction or to Medicare or any State health care program. Rejected P. Ex. 1; see I.G. Ex. 7.

29. The indictment of the Las Vegas accountant, related in the newspaper article offered by Petitioner, is not a mitigating factor under 42 C.F.R. § 1001.102(c)(3)(i), and has no bearing on my adjudication of Petitioner's case. Rejected P. Ex. 1.

30. P. Ex. 1 is irrelevant, and thus rejected.

31. P. Ex. 2 is irrelevant. The polygraph evidence offered by Petitioner is not competent or reliable evidence due to Petitioner's failure to provide an adequate foundation to establish the validity of the polygraph examination and to justify the receipt of such evidence. P. Ex. 2 is thus rejected.

32. At all times relevant to this case, Petitioner was a physician specializing in psychiatry practicing in Las Vegas, Nevada. I.G. Br. at 1, 15; P. Br. at 2.

33. The conduct underlying the eight felony counts and one misdemeanor count with which Petitioner was charged in the Criminal Complaint attached as Exhibit B to the Memorandum of Plea Negotiations occurred between November 2, 1990 and May 17, 1991.

34. The Nevada Medicaid program is a State health care program as defined by section 1128(h) of the Act.

35. Petitioner's guilty plea, and the actions taken by the court indicating acceptance of his plea, constitute a "conviction" of a criminal offense, within the meaning of section 1128(i)(3) of the Act. FFCL 1, 8, 9, 13.

36. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program, within the meaning of section 1128(a)(1) of the Act. FFCL 1, 3, 4, 8, 9, 13, 35.

37. 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 or Medicaid of $1500 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.

d. The sentence which a court imposed on a party for the above-mentioned conviction included a period of incarceration.

e. The convicted party has a prior criminal, civil, or administrative sanction record.

f. The convicted party was overpaid a total of $1500 or more by Medicare or Medicaid as a result of improper billings.

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

38. 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 $1500.

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).

39. The fact that Petitioner agreed to repay $35,624.36 as restitution to the State of Nevada is evidence that the acts which resulted in his conviction resulted in financial loss to Medicaid of $1500 or more, which is an aggravating factor that justifies excluding Petitioner for more than five years. 42 C.F.R. § 1001.102(b)(1); FFCL 7, 9.

40. In a letter to the Nevada Medicaid program dated November 18, 1992, the Quality Review Committee (QRC) of the Nevada Peer Review organization (PRO) stated that it had reviewed the cases of five Medicaid patients in which Petitioner was the attending physician. I.G. Ex. 5.

41. The five Medicaid patients who were the subjects of the QRC review had all been admitted to the adolescent or adult psychiatric units of Lake Mead Hospital with the diagnosis of major depression associated with suicidal ideation. I.G. Ex. 5.

42. The QRC identified serious quality of care problems in Petitioner's care and treatment of these five patients. The QRC concluded that the quality of care with respect to these five patients "was compromised and presented significant risk to the patients." I.G. Ex. 5.

43. The QRC of the Nevada PRO made the following specific findings, which were common to all of the five Medicaid patients, and which were stated in its November 18, 1992 letter to Nevada Medicaid:

a. there was no substantiation for the diagnoses of major depression;

b. there was an inadequate and delayed diagnostic workup with an inadequate differential diagnosis;

c. the cases lacked direction, discharge criteria, and clear goals;

d. detoxification was done without physician monitoring;

e. telephone orders were documented, but there

were only minimal psychiatric assessments noted in the progress notes;

f. medications were prescribed without a thorough evaluation of the patient being done, and without appropriate psychiatric rationale documented for its use; and monitoring while on medication was inadequate.

g. there was repeated mention of stressful and disruptive life circumstances, but these went unaddressed and unchanged at discharge.

I.G. Ex. 5.

44. Investigator Jeanette Supera of the Medicaid Fraud Control Unit of the Nevada Attorney General's Office found that the five Medicaid patients who were the subjects of the QRC review were also Medicaid recipients for whom Petitioner had submitted claims and received reimbursement for services he had not provided. Four of the five patients were included in the false claim counts set forth in the Criminal Complaint attached as Exhibit B to the Memorandum of Plea Negotiations. I.G. Ex. 8.

45. Petitioner's neglect of patients, his failure to provide the psychiatric services for which he billed and received Medicaid payments, and his inadequate patient assessments and monitoring had "a significant adverse physical, mental, or financial impact on one or more program beneficiaries or other individuals," and thus is an aggravating factor that justifies excluding Petitioner for more than five years. 42 C.F.R. § 1001.102(b)(3). FFCL 40 - 44.

46. The record contains copies of three Medicaid reimbursement checks paid to Petitioner, the sum of which is $24,842.34. I.G. Ex. 6; see I.G. Ex. 8.

47. For the same reasons upon which I determined that the aggravating factor at 42 C.F.R. § 1001.102(b)(1) exists in this case, I conclude also that the acts which led to Petitioner's conviction resulted in overpayments by Medicaid of $1500 or more, and thus, is an aggravating factor that justifies excluding Petitioner for more than five years. 42 C.F.R. § 1001.102(b)(6); FFCL 7, 9, 39.

48. Petitioner has not directly responded to any of the aggravating factors set forth by the I.G. P. Br. at 1 - 3.

49. Petitioner has not proved the presence of any mitigating factors which may be used as a basis for offsetting aggravating factors. 42 C.F.R. § 1001.102(c)(1) - (3).

50. The remedial purpose of section 1128 of the Act is to protect federally-funded health care programs and their beneficiaries and recipients from providers who have demonstrated by their conduct that they cannot be trusted to handle program funds or to treat beneficiaries and recipients.

51. The aggravating factors specified at 42 C.F.R. §§ 1001.102(b)(1), 1001.102(b)(3), and 1001.102(b)(6) are present in Petitioner's case, and warrant imposition of a period of exclusion of 10 years. FFCL 24, 39, 45, 47.

52. The multiple and significant aggravating factors present in this case, with no offsetting mitigating factors present, justify excluding Petitioner for 10 years. 42 C.F.R. § 1001.102(b); FFCL 49, 51.

53. Petitioner has failed to show that he is no longer a threat to the Medicare and State health care programs.

54. A lengthy exclusion is needed in this case to satisfy the remedial purposes of the Act and to protect the Medicare and Medicaid programs and its beneficiaries and recipients from future misconduct by Petitioner.

55. I conclude that the 10-year exclusion imposed and directed against Petitioner by the I.G. is not extreme or excessive.

56. The 10-year exclusion imposed and directed against Petitioner by the I.G. is reasonable. FFCL 1 - 55.

## PETITIONER'S ARGUMENT

Petitioner does not dispute that he was "convicted" of a criminal offense related to his delivery of services under the Nevada Medicaid program and that the I.G. has authority to exclude him for at least the mandatory minimum period of five years, under sections 1128(a)(1) and 1128(c)(3)(B) of the Act. FFCL 13. Petitioner contends, however, that his 10-year exclusion is unreasonable and unwarranted. Petitioner argues that he pled guilty to a single misdemeanor count, is "one of only a few psychiatrists who can truly address indigent patients' needs," and cooperated with the investigation

of his former accountant. P. Br. at 2. The I.G. contends that a 10-year exclusion is justified because of the presence of significant aggravating factors. The I.G. asserts that no mitigating factors are present in this case.

## RATIONALE

I. Petitioner was "convicted" within the meaning of section 1128(i) of the Act and is subject to a minimum mandatory exclusion of five years pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

Section 1128(i)(3) of the Act provides:

> For purposes of subsections (a) and (b) (of section 1128 of the Act), an individual or entity is considered to have been "convicted" of a criminal offense . . . when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court.

Petitioner does not dispute that he was convicted of a criminal offense related to his delivery of services under the Nevada Medicaid program and is thus subject to at least the five-year minimum mandatory exclusion under sections 1128(a)(1) and 1128(c)(3)(B) of the Act. FFCL 1 - 9 , 12 - 14, 33 - 36.[10]

II. The aggravating factors present in this case are a basis for lengthening the period of exclusion beyond the minimum period of five years.

The I.G. excluded Petitioner from participating in the Medicare and Medicaid programs for 10 years. Petitioner argues that "[t]he reasonable length of exclusion should

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[10] Although Petitioner did not admit to the I.G.'s Prop. Finding 11 which pertained to the existence of a program related offense, Petitioner has admitted to all of the I.G.'s proposed findings relating to his conviction for fraudulently obtaining money from the Nevada Medicaid program. P. Findings at 3. Moreover, Petitioner did not dispute that he was subject to a five-year exclusion. Id. at 2, 3. Therefore, a reasonable reading of Petitioner's position is that he acknowledges that the I.G. has authority to exclude him for at least five years under sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

be five years." P. Br. at 2, 3. The issue in this case is whether the I.G. is justified in excluding Petitioner for 10 years.

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). FFCL 16. These regulations include criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to section 1128(a)(1) of the Act. 42 C.F.R. §§ 1001.101 and 1001.102; FFCL 17.

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 - 18 (1993); FFCL 18. This regulation was made applicable to cases which were pending on January 22, 1993, the clarification's publication date. It is undisputed that the present case was pending after January 22, 1993.[11] I must now apply to this case the criteria for determining the length of exclusions set forth in sections 1128(a)(1) and 1128(c)(3)(B) of the Act and 42 C.F.R. § 1001.102. FFCL 19.

The standard for adjudication contained in 42 C.F.R. § 1001.102 provides that, in appropriate cases, an exclusion imposed pursuant to section 1128(a)(1) of the Act may be in excess of the five-year mandatory minimum period if any of the six aggravating factors set out in 42 C.F.R. § 1001.102(b) are found to be present. FFCL 21, 37.

The six factors mentioned at 42 C.F.R. § 1001.102(b)(1) -(6) are the only ones classified by the regulations as aggravating factors.[12] The I.G. has the burden of

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[11] The I.G.'s Notice to Petitioner, informing him of his 10-year exclusion, is dated March 23, 1993. I.G. Ex. 4.

[12] In the Notice sent to Petitioner informing him of his exclusion, the I.G. stated that the following circumstances were taken into consideration in arriving at Petitioner's period of exclusion: (1) the statutory

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proving that aggravating factors exist which justify increasing an exclusion imposed pursuant to section 1128(a)(1) beyond the minimum mandatory five-year period. FFCL 23. In this case, the I.G. contends that the aggravating factors identified at 42 C.F.R. §§ 1001.102(b)(1), 1001.102(b)(3), and 1001.102(b)(6) are present.

A. The evidence establishes that the aggravating factor identified at 42 C.F.R. § 1001.102(b)(1) is present.

Petitioner contended that he pled guilty to a single misdemeanor count, and that the large amount of restitution which he was required to pay "should not be used against him now." P. Br. at 2. The regulations place no such prohibition on the scope of my inquiry. On the contrary, the language of 42 C.F.R. § 1001.102(b)(1) specifically states that "[t]he entire amount of financial loss to [Medicare and State health care] programs will be considered, including any amounts resulting from similar acts not adjudicated, regardless of whether full or partial restitution has been made to the programs." Thus, in assessing the financial damage caused by Petitioner to the Nevada Medicaid program, I am permitted to look beyond the single misdemeanor count to which Petitioner pled guilty and consider, additionally, the counts contained in the Criminal Complaint attached as Exhibit B to the Memorandum of Plea Negotiations (Plea Memorandum) executed by Petitioner with the State of Nevada.

The misdemeanor count to which Petitioner pled charged him with unlawfully obtaining money from the Nevada

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[12] (...continued)
fines and penalties imposed by the court amounted to more than $500,000; (2) the commission of the crime evinced planning and premeditation; and (3) Petitioner agreed to be excluded from the Medicaid program for 10 years. I have accepted evidence concerning the aggravating factors found at 42 C.F.R. § 1001.102(b), even though they were not mentioned in the Notice because the I.G. provided Petitioner adequate notice that at least some of the aggravating factors set forth in the regulations were applicable at the May 28, 1993 telephone prehearing conference. Order and Notice of Hearing, dated July 9, 1993. Moreover, in her motion for summary disposition, the I.G. argued that several aggravating factors were applicable to this case. Petitioner was given ample opportunity to rebut the evidence and arguments made by the I.G.

Medicaid program in an amount less than $250. However, the Criminal Complaint attached as Exhibit B to the Plea Memorandum charged Petitioner with eight felony counts and one misdemeanor count of obtaining money by false pretenses from the Nevada Medicaid program. Each felony count in the Criminal Complaint attached as Exhibit B to the Plea Memorandum charged Petitioner with unlawfully obtaining money from Nevada Medicaid "in an amount in excess of $250." I.G. Ex. 1. The amount of financial loss evidenced by these unadjudicated felony counts, which all allege Medicaid fraud, indicate that the financial damage to the Nevada Medicaid program resulting from Petitioner's criminal activities was at least $1500 and, in all probability, substantially more.

Moreover, the I.G. offered additional evidence of financial damage to the Medicaid program. I.G. Ex. 6 consists of copies of three Medicaid reimbursement checks paid to Petitioner and also, corresponding recipient account information for each check which shows the names of the four patients who were the subjects of the Nevada PRO's review and who were included in the Criminal Complaint attached as Exhibit B to the Plea Memorandum. See I.G. Ex. 8. The checks are in the amounts of $9,356.40, $8,756.12, and $6,729.82 (a total of $24,842.34), and form the basis of counts 4, 7, and 8, respectively, in the Criminal Complaint attached as Exhibit B to the Plea Memorandum. FFCL 46. The language contained in counts 4, 7, and 8 stated that Petitioner had "willfully, unlawfully, knowingly and designedly, with the intent to cheat and defraud, obtain[ed] money from the Nevada Medicaid program, . . . by falsely claiming that he rendered professional services to . . . patients . . . when in fact, he did not." I.G. Ex. 1. Petitioner's receipt of these Medicaid monies as payment for professional services which he allegedly did not render constitutes further evidence that the Nevada Medicaid program suffered substantial financial damage at the hands of Petitioner.

In addition, the uncontroverted evidence of record shows that, in executing the Plea Memorandum with the State of Nevada, Petitioner agreed to pay the sum of $300,000 to the State of Nevada as restitution, to be assessed on the following basis: $35,624.36 as restitution; $38,192.06 for costs of investigation and enforcement; and $226,183.58 as statutory penalties. FFCL 7. As part of the executed Plea Memorandum, Petitioner agreed that all of the aforementioned payments would be made by negotiable instruments made payable to the "State of Nevada" and delivered to the Medicaid Fraud Control Unit of the Office of the Nevada Attorney General. FFCL 7.

The Justice Court of Las Vegas Township (Las Vegas court) accepted Petitioner's plea of guilty, and, on March 31, 1992, sentenced him to pay restitution of $300,000 to the State of Nevada according to the above terms. FFCL 8, 9. The fact that the Las Vegas court sentenced Petitioner to pay $35,624.36 specifically as restitution to the State of Nevada establishes further that the acts which resulted in his conviction, or similar acts, cost the Medicaid program an enormous amount of money, far in excess of $1500.

Based on the aforementioned evidence, the aggravating factor identified at 42 C.F.R. § 1001.102(b)(1) is thus present in Petitioner's case.

B. The evidence establishes that the aggravating factor identified at 42 C.F.R. § 1001.102(b)(3) is present.

The misdemeanor count to which Petitioner pled charged him with falsely claiming to have "rendered professional services to certain patients, when in fact, [he] [had] not." I.G. Ex. 1. I find that Petitioner's failure to render the services for which he sought, and received, payment from the Nevada Medicaid program did cause "a significant adverse physical, mental, or financial impact on one or more program beneficiaries" which is the aggravating factor identified at 42 C.F.R. § 1001.102(b)(3). FFCL 24.

In a letter to the Nevada Medicaid program dated November 18, 1992, the QRC of the Nevada PRO stated that it had identified serious quality of care problems in its review of the cases of five Medicaid patients in which Petitioner was the attending physician. FFCL 40, 42. The five Medicaid patients who were the subjects of the QRC review had all been admitted to the adolescent or adult psychiatric units of Lake Mead Hospital with the diagnosis of major depression associated with suicidal ideation. FFCL 41.

The QRC concluded that the quality of care with respect to these five patients "was compromised and presented significant risk to the patients." FFCL 42. The QRC of the Nevada PRO made the following specific findings, which were common to all of the five Medicaid patients, and which were stated in its November 18, 1992 letter:

a. there was no substantiation for the diagnoses of major depression;

b. there was an inadequate and delayed diagnostic workup with an inadequate differential diagnosis;

c. the cases lacked direction, discharge criteria, and clear goals;

d. detoxification was done without physician monitoring;

e. telephone orders were documented, but there were only minimal psychiatric assessments noted in the progress notes;

f. medications were prescribed without a thorough evaluation of the patient being done, and without appropriate psychiatric rationale documented for its use; and monitoring while on medication was inadequate.

g. there was repeated mention of stressful and disruptive life circumstances, but these went unaddressed and unchanged at discharge.

FFCL 43.

Moreover, Investigator Jeanette Supera of the Medicaid Fraud Control Unit of the Nevada Attorney General's Office, found that the five Medicaid patients who were the subjects of the QRC review were also Medicaid recipients for whom Petitioner had submitted claims and received reimbursement for services he had not provided. Ms. Supera stated that four of these five Medicaid patients were included in the false claim counts set forth in the Criminal Complaint attached as Exhibit B to the Plea Memorandum. FFCL 44.

Under 42 C.F.R. § 1001.102(b)(3), I am not limited to considering the acts that resulted in Petitioner's conviction (i.e., the misdemeanor count), but can consider "similar acts" as well. I note that each of the eight felony counts in the Criminal Complaint attached as Exhibit B to the Plea Memorandum charged Petitioner with unlawfully obtaining money from the Nevada Medicaid program "by falsely claiming that he rendered professional services" to patients, when in fact, he had not.[13] I.G. Ex. 1.

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[13] Each count listed in the Criminal Complaint attached as Exhibit B to the Plea Memorandum referred to a corresponding exhibit attached to the complaint. (E.g., Count 1 of the complaint referred to an "Exhibit 1 attached hereto;" Count 2 referred to an "Exhibit 2 attached hereto;" and so on). These exhibits contained

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Based on the aforementioned evidence, I find that Petitioner has engaged in a pattern of harmful conduct toward Medicaid recipients. The I.G. contended that the individuals who were dependent on Petitioner for psychiatric care were deprived of services to which they were entitled, and which may have been critical to their well-being. I.G. Br. at 11; I.G. Rep. at 4 - 5. I concur. Petitioner neglected patients, failed to provide the psychiatric services for which he billed and received Medicaid payments, and gave inadequate patient assessments and monitoring. Among its findings, the QRC of the Nevada PRO stated that detoxification was done without physician monitoring, and medications were prescribed without a thorough evaluation of the patient, and without appropriate psychiatric rationale documented for its use. Additionally, the QRC found that Petitioner's monitoring of patients while they were on medication was inadequate. By his irresponsible and inappropriate conduct, Petitioner subjected his patients to significant risks and jeopardized their physical and mental health. As a result, Petitioner's conduct had "a significant adverse physical, mental, or financial impact on one or more program beneficiaries or other individuals". Thus, the aggravating factor enunciated at 42 C.F.R. § 1001.102(b)(3) is met in this case. FFCL 45.

C. The evidence establishes that the aggravating factor identified at 42 C.F.R. § 1001.102(b)(6) is present.

Under 42 C.F.R. § 1001.102(b)(6), if "an individual or entity has at any time been overpaid a total of $1500 or more by Medicare or State health care programs as a result of improper billings," the period of exclusion may be lengthened. Because the aggravating factors set forth at 42 C.F.R. §§ 1001.102(b)(1) and (b)(6) are essentially the same, any analysis of whether these factors exist in any given case would most likely be based on the identical factual predicate. As I discussed earlier, I found that the aggravating factor enunciated at 42 C.F.R. § 1001.102(b)(1) was present, based on the amount of financial loss to the Medicaid program evidenced by the unadjudicated felony counts, the copies of the Medicaid reimbursement checks paid to Petitioner, and the amount

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[13] (...continued)
the names of patients, the purported dates of service, and the amount Medicaid paid, as well as other information. The I.G. did not submit these specific exhibits; thus, they are not part of this record.

of restitution Petitioner was ordered to pay the State of Nevada ($35,624.36). Supra, at 19 - 21. I find that this factual predicate also proves the existence of the aggravating factor set forth at 42 C.F.R. § 1001.102(b)(6). FFCL 47. Accordingly, I conclude that the total amount of overpayments received by Petitioner from Medicaid as a result of Petitioner's improper billings was in excess of $1500. Thus, I find that the aggravating factor identified at 42 C.F.R. § 1001.102(b)(6) is met in this case. FFCL 47.

III. There are no mitigating factors present in this case.

Petitioner has not offered any credible evidence to rebut the I.G.'s arguments. In fact, other than stating that "the large amount of restitution paid [by Petitioner] should not be used against him now" (P. Br. at 2), Petitioner has not directly responded to any of the aggravating factors set forth in the documents submitted by the I.G. FFCL 48.

The only evidence Petitioner offered as an attempt to show mitigation in this case was P. Ex. 1-4. As previously discussed in the Background, supra p. 2-6, I determined that P. Ex. 1-4 are irrelevant and thus, I rejected P. Ex. 1-4.

Petitioner's argument that he did not commit any fraud on the Medicaid program despite his guilty plea is similarly without merit here. Order and Notice of Hearing, dated July 9, 1993. In his brief, Petitioner admitted to the I.G.'s proposed findings relating to his conviction for fraudulently obtaining money from the Nevada Medicaid program. P. Br. at 3. The Nevada Medicaid program is a State health care program within the meaning of section 1128(h) of the Act. FFCL 34. Thus, Petitioner's criminal acts were directed against the Medicaid program, and any attempt to argue the contrary is specious.

IV. A 10-year exclusion is reasonable.

The multiple aggravating factors present in Petitioner's case lead to the conclusion that Petitioner has been and remains an unfit health care provider and a highly untrustworthy individual. Petitioner has offered nothing to rebut the aggravating factors. He has not proved the existence of even one mitigating factor under the regulations. FFCL 49.

The fact that Petitioner was ordered to pay $35,624.36 as restitution to the State of Nevada alone warrants an

exclusion of beyond five years. This amount is indicative of the substantial program-related harm caused by Petitioner. Although the I.G. did not submit any information as to the basis of this restitution amount, an inference can be made that the $24,842.34 total of the three Medicaid reimbursement checks paid to Petitioner (discussed supra) accounts for a portion of the $35,624.36 restitution amount.

In addition to causing financial damage to the Medicaid program, Petitioner, in pleading guilty, admitted that he had falsely claimed to have provided professional services to patients, when in fact, he had not provided such services. Thus, with respect to certain patients, Petitioner jeopardized their health and completely breached his duty of care to them. Supra, at 21 - 23. The five Medicaid patients for whom Petitioner was the attending physician and who were the subjects of the Nevada PRO's review were dependent on Petitioner for appropriate psychiatric care and treatment. (Four of these five Medicaid patients were included in the false claim counts set forth in the Criminal Complaint attached as Exhibit B to the Plea Memorandum). Petitioner neglected his patients, failed to provide the psychiatric services for which he billed and received Medicaid payments, and gave inadequate patient assessments and monitoring. By failing to provide these patients with adequate and responsible psychiatric care, Petitioner displayed a callous disregard for their mental health and well-being. By neglecting his patients, who were Medicaid recipients, Petitioner subjected them to risks of both physical and psychological harm. See FFCL 43.

Petitioner has expressed no remorse for the consequences of his egregious lack of care to his patients. He has simply characterized this case as one involving improper billing. Order and Notice of Hearing, dated July 9, 1993; P. Br. at 3. While fraudulent billing is an issue in this case, another, more serious, issue which is also before me is the lack of proper care and treatment provided by Petitioner to his patients. At no time has Petitioner acknowledged the serious quality of care problems identified by the QRC of the Nevada PRO. Petitioner, instead, has merely asserted that he should only be subject to an exclusion of five years and that he wishes to work with indigent patients. P. Br. at 2 - 3; Letter, dated May 27, 1994. Petitioner apparently fails to appreciate or comprehend the serious risks to which he subjected his patients.

Petitioner has demonstrated that he is an individual who is capable of engaging in false and fraudulent actions.

He has failed to show that he is no longer a threat to the Medicare and State health care programs. FFCL 53. Petitioner has attempted to minimize the overall impact of the financial harm he caused the Medicaid program by focusing on the single misdemeanor count to which he pled guilty. However, the serious nature of his criminal conviction is evidenced by the severe terms of the Las Vegas court's sentence. The Las Vegas court ordered Petitioner to pay $226,183.58 in statutory penalties, over six times the amount of restitution. Furthermore, Petitioner agreed to be excluded from Nevada Medicaid for 10 years.

As I stated earlier (supra at 6), during the course of this case, I gave Petitioner several opportunities to respond to the aggravating factors alleged by the I.G. and to further explain his conduct. Letter Closing the Record, dated March 16, 1994; Letter, dated May 27, 1994; Order, dated June 2, 1994; Letter, dated June 24, 1994. However, Petitioner submitted no evidence to rebut the aggravating factors.

In view of the foregoing, I conclude that, absent any mitigating evidence, the minimum five-year exclusion is not sufficient to protect the federally-financed health care programs in this case. In other cases, I have concluded that criminal conduct similar to that of Petitioner in this case warranted an exclusion of 10 years. See Arthur V. Brown, M.D., DAB CR226 (1992); Domingos R. Freitas, DAB CR272 (1993). In Freitas, Petitioner violated his duties as a pharmacist by dispensing prescription medications without authorization. In doing so, he subjected his customers to serious risks and jeopardized their health and safety. Id. The present case is analogous to Freitas, for Petitioner here has violated his duties as a psychiatrist and jeopardized the mental and physical health of his patients.

I find that the presence in this case of the aggravating factors specified at 42 C.F.R. §§ 1001.102(b)(1), 1001.102(b)(3), and 1001.102(b)(6) warrant imposition of a 10-year exclusion of Petitioner from Medicare and State health care programs. FFCL 51. The amount of financial damage to the Medicaid program, combined with the physical and mental harm to Medicaid recipients caused by Petitioner, warrant a 10-year exclusion.

The Medicare and Medicaid programs are vulnerable to unscrupulous providers. The remedial purpose of section 1128 of the Act is to protect the integrity of federally-funded health care programs and their beneficiaries and

recipients from providers who have demonstrated by their conduct that they cannot be trusted to handle program funds or to treat beneficiaries and recipients. FFCL 50. Petitioner's unlawful conduct is the type of misconduct Congress sought to prevent when it enacted section 1128 of the Act. There is nothing in the record to suggest that Petitioner has recognized the nature of the harm he caused the Medicaid program and its recipients. He has demonstrated a lack of understanding of the significance of the unlawfulness of his conduct. I find that a lengthy exclusion is needed in this case to satisfy the remedial purposes of the Act and to protect the Medicare and Medicaid programs and its beneficiaries and recipients from future misconduct by Petitioner. FFCL 54.

By any standard, the criminal conduct for which Petitioner was convicted is serious. The multiple and significant aggravating factors present in this case, with no offsetting mitigating factors present, justify excluding Petitioner for 10 years. FFCL 52. I conclude that the 10-year exclusion imposed and directed against Petitioner by the I.G. is not extreme or excessive, and therefore, must stand. FFCL 55.

## CONCLUSION

Based on the law and the evidence, I conclude that the 10-year exclusion imposed and directed against Petitioner by the I.G. is reasonable and must stand. FFCL 56.

/s/

Edward D. Steinman
Administrative Law Judge