Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Howard Schreibstein, D.P.M.,	)	Date: February 26, 1998
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-97-117
	)	Decision No. CR517
The Inspector General.	)	
	)	

DECISION

I find to be unreasonable the ten-year exclusion that the Inspector General (I.G.) imposed against Howard Schreibstein, D.P.M. (Petitioner) from participating in Medicare and State health care programs, including Medicaid. I modify the exclusion to a term of five years.

I base my decision on the following considerations.

• The Social Security Act (Act) requires a de novo hearing and an independent decision by an administrative law judge in a case where an excluded individual or entity asserts an exclusion to be unreasonable. Implementing regulations are consistent with the Act's requirements.

• An issue in a case where an excluded individual or entity asserts that an exclusion is unreasonable is whether, based on the evidence adduced at the hearing, the exclusion is unreasonable. An administrative law judge is not obligated to defer to the I.G. in deciding whether an exclusion is reasonable or not. No presumption of validity attaches to the I.G.'s exclusion determination.

• In the recent decisions of Barry D. Garfinkel, M.D., DAB No. 1572 (1996), Frank A. DeLia, D.O., DAB No. 1620 (1997), and Gerald A. Snider, M.D., DAB No. 1637 (1997), appellate panels of the Departmental Appeals Board adopted a standard of adjudication which requires an exclusion to be sustained if it falls within a "reasonable range" of possible exclusions. In

doing so, the appellate panels appear to have rejected the requirement that a hearing be de novo. Additionally, they appear to have found that the administrative law judge must defer to the experience and acumen of the I.G. in deciding whether an exclusion is reasonable. In effect, they appear to have held that the I.G.'s exclusion determination is presumptively correct and that the purpose of the hearing is merely to review the I.G.'s determination to assure that the I.G. did not abuse her discretion in imposing an exclusion. This apparent standard is unlawful because it is contrary to the requirements of the Act. It is also contrary to, or not required by, applicable regulations.

• Additionally, the standard which the appellate panels apparently adopted is unworkable because it is not defined. The appellate panels have offered no explanation concerning how an exclusion is to be tested at an administrative hearing. The impression that appellate panels have created — perhaps unintentionally — is that administrative law judges should defer uncritically to the determinations that are made by the I.G.

• I must follow and apply the rules established by appellate panels. To the best of my ability, I have applied in this case the rule which appellate panels appear to have established in Garfinkel, DeLia, and Snider. However, I have a duty to identify circumstances where appellate panels may have misapplied or contravened the requirements of law and to request that they reconsider their rulings in light of what I identify.

• In this case I have elected to use alternative approaches to deciding whether the exclusion that the I.G. imposed is unreasonable. I do so because I believe that appellate panels may wish to reconsider the conclusions they reached in Garfinkel, DeLia, and Snider. Additionally, I do so because the apparent standard of adjudication that the panels expressed in Garfinkel, DeLia, and Snider is unclear.

• First, I decide that, based on the evidence which I received at a de novo hearing of this case, the ten-year exclusion that the I.G. imposed against Petitioner is unreasonable. I find that Petitioner's extensive cooperation with prosecuting officials shows that he will become trustworthy to provide care in less than ten years. The ten-year exclusion that the I.G. imposed does not fall within a reasonable range of exclusions in that it departs significantly from what I find to be reasonable, based on my independent review of the evidence which I received at the de novo hearing. I find a five-year exclusion to be reasonable based on my review of the evidence.

• Second, and alternatively, I conclude that any presumption of correctness that attaches to the I.G.'s determination is overcome by evidence which shows that the I.G. failed to consider the specific facts of Petitioner's case in determining to impose a ten-year exclusion. Moreover, the exclusion that the I.G. imposed in this case is irrational. There are no significant differences between the facts of this case and DeLia, in which the I.G. imposed, and the appellate panel sustained, a five-year exclusion. I find the exclusion in this case to be outside of a reasonable range of exclusions because it departs dramatically, and without explanation, from that which was imposed in DeLia. For that reason, I sustain a five-year exclusion.

I. Background

The facts and law which I recite in this section are not disputed by the parties.

Petitioner is a doctor of podiatric medicine. In 1996, the I.G. notified Petitioner that he was being excluded from participating in Medicare and State health care programs, including Medicaid, for a period of ten years. The I.G. advised Petitioner that Petitioner was being excluded pursuant to the provisions of section 1128(b)(1) of the Act.

The version of section 1128(b)(1) of the Act under which Petitioner was excluded authorized the Secretary of the United States Department of Health and Human Services (the Secretary), or her delegate, the I.G., to exclude any individual or entity who has been convicted:

> under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

This version of section 1128 did not state a minimum period of exclusion for individuals or entities who are excluded pursuant to the section. Congress revised and amended section 1128 of the Act in July 1996. The revised and amended Act, which became effective in January 1997, now mandates at sections 1128(a)(3) and 1128(c)(3)(B) the exclusion for at least five years of any individual or entity that has been convicted of a felony as previously

described under section 1128(b)(1). Neither the I.G. nor Petitioner argue that this case is covered by the revised and amended version of section 1128.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I held a hearing in Philadelphia, Pennsylvania, on August 21, 1997. As of the date of the hearing, Petitioner was represented by counsel. However, subsequently, Petitioner's counsel withdrew from the case. Petitioner has continued to appear pro se.

At the hearing, I received into evidence seven exhibits from the I.G. (I.G. Ex. 1 - 7). These exhibits include I.G. Ex. 4, which is a videotape of Petitioner's sentencing hearing in the criminal case in which Petitioner pled guilty. I received into evidence 11 exhibits from Petitioner (P. Ex. 1 - 11). The testimony which I received at the hearing included the testimony of Joseph V. Patti. Transcript (Tr.) at 43 - 73. Mr. Patti is a program analyst who is employed by the I.G. Tr. at 43. Additionally, I received the testimony of Petitioner. Tr. at 77 - 111. Finally, I received the testimony of Thomas W. Aloan. Tr. at 112 - 156. Mr. Aloan is a special agent of the Federal Bureau of Investigation (FBI). Tr. at 113.

At the close of the in-person hearing, I gave the parties a posthearing briefing schedule. Subsequently, I revised this schedule, without objection from the parties, in light of the withdrawal of Petitioner's counsel. The parties complied with the revised briefing schedule.

II. Issue

Petitioner does not assert that the I.G. lacks the authority to exclude him under the pre-July 1996 version of section 1128(b)(1) of the Act. The issue in this case is whether the ten-year exclusion which the I.G. imposed against Petitioner is unreasonable.

III. Findings of fact and conclusions of law

I make the following findings of fact and conclusions of law (Findings) to support my decision that the exclusion which the I.G. imposed is unreasonable and should be modified to a term of five years. I set forth each Finding as a separate heading. Beneath each Finding, I discuss that Finding in detail.

1. An administrative law judge is required to hold a de novo hearing on the issue of whether an exclusion imposed pursuant to section 1128

of the Act is unreasonable. The administrative law judge must make an independent decision, based solely on the evidence which is introduced at the de novo hearing.

> ***a. The Act requires that the Secretary conduct a de novo hearing. The Act requires the Secretary to make a decision that is entirely independent from, and which does not defer to, the determination on which a request for a hearing is based.***

Petitioner was excluded by the I.G. under the authority conferred by section 1128(b)(1) of the Act. An individual or entity that is excluded pursuant to any of the subsections of section 1128 of the Act is entitled to an administrative hearing in which, among other things, the excluded individual or entity may challenge the length of the exclusion. Act, section 1128(f).

Section 1128(f) confers the hearing rights that are described in Section 205(b) of the Act. Section 205(b) was enacted by Congress originally to establish hearing rights for claimants for Social Security benefits. In relevant part, section 205(b) states:

> The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this title . . . Upon request by any such individual . . . [or by any other described individuals] who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, [s]he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse [her] findings of fact and such decision.

Act, section 205(b)(1).

Congress expanded the reach of section 205(b) so that it now covers many types of cases which involve the United States Department of Health and Human Services (the Department). In fact, Congress made the Social Security

Administration an independent administrative agency so that section 205(b) now confers hearing rights in cases involving more than one Executive Branch agency. Individuals and entities to whom Congress has given hearing rights pursuant to section 205(b), other than claimants for Social Security benefits, include individuals and entities who are excluded by the I.G. pursuant to section 1128 of the Act. Act, section 1128(f). In addition, individuals and entities who are excluded pursuant to section 1156 of the Act are entitled to hearings under section 205(b). Act, section 1156(b)(4). The individuals and entities who are entitled to hearings under section 205(b) also include providers who are adversely affected by certain determinations made by the Health Care Financing Administration (HCFA). Act, sections 1866(b)(1), (2), 1866(h)(1). And, the individuals and entities who are entitled to hearings under section 205(b) include individuals and entities who are dissatisfied with Medicare enrollment and benefits payment determinations made by or on behalf of HCFA. Act, section 1869(b)(1).

Section 205(b) requires that a hearing conducted by the Secretary be a full evidentiary hearing and that the final decision of the Secretary be based exclusively on the evidence that is adduced at the hearing. Such a hearing constitutes a de novo review of evidence. A decision by the Secretary which is based on the record made at such a hearing is made independently from the determination of the agency whose action is challenged at the hearing. The Act does not contemplate that the Secretary will defer to the judgment of the agency whose case she is hearing. There is no suggestion in the Act that, in conducting a hearing pursuant to section 205(b), the Secretary conduct only an appellate review of the propriety of an agency's determination.

The fact that the Act imposes on *the Secretary* the responsibility for conducting a hearing is strong support for the conclusion that the Act intends that any hearing conducted pursuant to section 205(b) be an independent review of an agency's action which neither presumes that the agency acted properly nor defers to the agency whose determination is being challenged. The Secretary is vested with the authority to direct the actions of the agencies which comprise the Department. Congress neither stated nor implied that, in conducting a hearing, the Secretary should subordinate her authority to that of the agency whose action is being challenged in the hearing.

Under the Act, a hearing which involves a determination made by the I.G. or by HCFA must be conducted in the same de novo manner as is a hearing involving a determination made by the Social Security Administration. The Act does not permit the Secretary to give less than a full de novo review to a particular type of case. In each instance of a hearing right conferred under

section 205(b) of the Act, the affected individual or entity that is entitled to a hearing under the section is entitled specifically to a hearing by the Secretary to the same extent as is provided in section 205(b). Act, sections 1128(f), 1156(b)(4), 1866(h)(1), 1869(b)(1).

The scope of an administrative hearing conducted under the authority of section 205(b) of the Act has been adjudicated in the context of cases involving the Social Security Administration. As I conclude above, Congress required that individuals and entities other than Social Security benefits claimants who have hearings pursuant to section 205(b) be given exactly the same hearing rights as those which apply in Social Security cases. Therefore, the decisions which emanate from Social Security cases which define and apply section 205(b) apply equally to other types of cases, including those which involve exclusions imposed pursuant to section 1128 of the Act.

The requirements that are implicit in section 205(b) of a de novo hearing and an independent decision are so well-established in law as not to be controversial. The courts have interpreted section 205(b) uniformly and consistently to require a de novo hearing and an independent decision.

The United States Supreme Court has affirmed the general principle that, in a section 205(b) hearing involving the Social Security Administration, the administrative law judge who presides conducts a de novo hearing. Schweiker v. Chilicky, 487 U.S. 412 (1988). In Hayes v. Celebrezze, 311 F.2d 648 (5th Cir. 1963), the United States Court of Appeals for the Fifth Circuit specified what is meant by a de novo hearing and an independent decision. The court held explicitly that the duty of an adjudicator who conducts a hearing under the authority of section 205(b) is to make a decision, premised on the evidence adduced at the hearing, independent of the agency determination which is the basis for the hearing request. In that case, the court criticized the adjudicator for the Department for not having done so. It reversed the Department's final decision because it was not made independently. In the decision, the adjudicator is referred to as a Hearing Examiner. I take notice of the fact that, in later years, the title of Hearing Examiner was changed to that of Administrative Law Judge. The court stated that:

> [A] consideration of the Examiner's report leaves us with the definite impression that he did not really perform the function of drawing the critical inferences of facts and law. On the contrary, the structure of his report and the wording used leaves us with a strong feeling that

> he was primarily reviewing the prior adverse determinations of the State Agency. Important as is the routine administrative determination concerning the merits of claims, the scheme of the statute and the implementing regulations call for an initial determination of all of the relevant questions by the Hearing Examiner *entirely independent of the conclusions previously reached administratively.* Of course this material is customarily before the Examiner, and in the usual situation may undoubtedly be significant as he draws his own *conclusions. But in this function he is in no sense reviewing the prior decision of the administrative agencies or the sufficiency of the record to support their findings.*

311 F.2d at 653 (emphasis added).

The concept of a de novo hearing and an independent decision under section 205(b) was again affirmed in Boettcher v. Secretary of Health & Human Services, 759 F.2d 719 (9th Cir. 1985). In that case, the administrative law judge made a decision on a Social Security claim which was adverse to the claimant's interests and which exceeded in scope the State Agency determination which was the basis for the hearing request. The claimant asserted that the scope of the hearing before the administrative law judge was not de novo, but rather, must be limited to a review of the State Agency's determination. The Ninth Circuit Court of Appeals disagreed. It held, in effect, that a de novo hearing and an independent decision were mandated because a hearing would enable the presentation of more probative evidence than would the paper review conducted by the State Agency in a Social Security case:

> Under the statutory scheme, initial and reconsideration determinations are made by a state agency based only on paper reviews. The hearing requested by a claimant usually affords the first opportunity for an adjudicator to see the claimant in person and to engage in a searching factual inquiry. *The hearing should result in more accurate decision-making.*

759 F.2d at 722 - 723 (emphasis added). I note that, as with Social Security cases, the reviews conducted by the I.G. in cases involving exclusions imposed pursuant to section 1128 of the Act are also paper reviews. In a case involving section 1128, the first and only opportunity that an excluded individual has to present evidence in person is at the hearing before an administrative law judge.

Other decisions have made it clear that in a hearing conducted pursuant to section 205(b), the adjudicator has a duty to hold a de novo hearing and make independent findings of fact. E.g., Cox v. Secretary of Health, Education, & Welfare, 465 F.Supp. 1195, 1197 (E.D. Mich. 1979).

Until recently, appellate panels of the Departmental Appeals Board supported the principles that an administrative hearing conducted pursuant to section 205(b), in the context of a challenge to an I.G. determination made under section 1128 of the Act, was de novo, and that the administrative law judge's decision was independent from a determination made by the I.G. In Bernardo G. Bilang, M.D., DAB No. 1295 (1992) and Eric Kranz, M.D., DAB No. 1286 (1991), appellate panels stated that the administrative law judge's:

> *review authority is established by statute. An exclusion hearing is a de novo review.* . . . As the ALJ [in Kranz] noted, 'the purpose of the hearing is not to determine how accurately the I.G. applied the law to the facts before him, but whether, based on all relevant evidence, the exclusion comports with the legislative intent.' . . . As this Board has previously held, the ALJ may consider all evidence on the reasonableness of an exclusion including that which may not have been available to the I.G. when the decision to exclude was made. . . .

Bilang at 9; Kranz at 7 - 8 (citations omitted) (emphasis added).

> ***b. Regulations which govern a hearing conducted in a case involving an exclusion imposed pursuant to section 1128 of the Act delegate to an administrative law judge the responsibility to hold a de novo hearing and to make an independent decision.***

The Secretary has opted to delegate to administrative law judges the authority to hold hearings on her behalf pursuant to section 205(b) of the Act in cases which involve the I.G. 42 C.F.R. § 1005.2(a). Administrative law judges are vested with the full authority of the Secretary, as is defined by or as may be limited by the Secretary. In holding hearings, administrative law judges perform the function that the Secretary would discharge were she to hold the hearings herself.

The substantive and procedural regulations which govern hearings that are held by administrative law judges in cases involving section 1128 of the Act establish the criteria which administrative law judges are to use to adjudicate cases on behalf of the Secretary. 42 C.F.R. Parts 1001, 1005. They also contain some express limitations on the authority of administrative law judges. I shall discuss these criteria and limitations below. But, importantly, there is no statement in the regulations which instructs administrative law judges to provide individuals or entities with anything other than the de novo hearings and independent decisions required by section 205(b) of the Act.

(i). The substantive rules of evidence stated in regulations at 42 C.F.R. Part 1001 are consistent with the administrative law judge's obligations to conduct a de novo hearing and to issue a decision which is independent from the I.G.'s exclusion determination.

The substantive criteria which govern exclusions under section 1128 of the Act are established at 42 C.F.R. Part 1001. The regulations are made explicitly applicable at all levels of adjudication and review, without suggesting that they are to be applied differently at the hearing level than they are to be applied by the I.G. at the initial determination stage. 42 C.F.R. § 1001.1(b). They are consistent with the administrative law judge's duties to hold a de novo hearing and to issue an independent decision as to whether an exclusion is unreasonable.

The Part 1001 regulations are rules of evidence to be used in deciding the ultimate question of an excluded individual's or entity's trustworthiness. They contemplate that this question will be decided in each case based on the evidence which is unique to that case and which relates to the criteria for deciding trustworthiness.

The substantive criteria which govern exclusions imposed pursuant to the pre-1996 version of section 1128(b)(1) under which Petitioner was excluded are set forth at 42 C.F.R. § 1001.201. The regulation establishes the evidentiary criteria which are to be used to determine the length of an exclusion imposed pursuant to that section of the Act. It establishes that an exclusion imposed pursuant to section 1128(b)(1) will be for a period of three years, unless there exist certain factors identified as either aggravating or mitigating which would serve as a basis to lengthen or shorten the exclusion period. 42 C.F.R. § 1001.201(b)(1). Factors which may be considered as aggravating are identified at 42 C.F.R. § 1001.201(b)(2)(i) - (v). Factors which may be considered as mitigating are identified at 42 C.F.R. § 1001.201(b)(3)(i) - (iii).

The aggravating and mitigating factors identified in 42 C.F.R. § 1001.201(b)(2) and (3) are intended as rules of evidence to govern what is relevant to determining an excluded individual's or entity's trustworthiness to provide care. It is plain from the regulation that an adjudicator may consider only evidence that relates to an aggravating or mitigating factor in deciding whether the length of an exclusion is unreasonable.

The evidentiary criteria set forth in 42 C.F.R. § 1001.201 may be applied equally by the I.G. and by an administrative law judge. The regulation operates as rules of evidence at *each* level of review. Nothing in the regulation states or suggests that a hearing concerning the I.G.'s determination should be anything other than a de novo proceeding or that the administrative law judge's decision should not be made independently from the I.G.'s determination.

(ii). The regulations which establish the procedures for hearings involving exclusions made pursuant to section 1128 of the Act are consistent with an administrative law judge's duties to conduct a de novo hearing and to issue a decision which is independent from the I.G.'s exclusion determination.

The Part 1005 regulations establish hearing procedures for hearings in which the I.G. is a party, including all hearings involving exclusions imposed pursuant to section 1128 of the Act. There are provisions in the Part 1005 regulations which are consistent with the requirement of section 205(b) of the Act that the administrative law judge is obligated to hold a de novo hearing and to issue an independent decision as to the merits of the case. Indeed,

many of these provisions would be meaningless if the hearing were other than de novo, or if the administrative law judge's decision were not made independently of the I.G.'s determination.

First, the regulations establish that the hearing is to be an evidentiary hearing and that the administrative law judge's decision is to be based only on the record adduced at the hearing. 42 C.F.R. §§ 1005.15(a); 1005.20(a). Consistent with these requirements, the administrative law judge is authorized to allocate the parties' burdens of proof in cases brought under section 1128 of the Act. 42 C.F.R. § 1005.15(c). Traditionally, in such cases, administrative law judges have allocated the burden of proof to the I.G. The standard of proof in all cases involving the I.G., including exclusion cases brought under section 1128 of the Act, is preponderance of the evidence. 42 C.F.R. § 1005.15(d).

Second, the regulations provide for prehearing procedures which are needed only to prepare for evidentiary hearings. The Part 1005 regulations provide for limited prehearing discovery in all cases involving the I.G., including cases of exclusions imposed pursuant to section 1128 of the Act. 42 C.F.R. § 1005.7. The regulations provide for prehearing exchanges by the parties of the names of proposed witnesses and copies of proposed exhibits. 42 C.F.R. § 1005.8. And, the regulations empower the administrative law judge to issue subpoenas for the appearance of witnesses, an authority which would be useless if the hearing were other than a de novo hearing. 42 C.F.R. § 1005.9.

Finally, there are provisions in the regulations which expressly give the administrative law judge the authority to hear and decide new issues and to modify the I.G.'s exclusion determination. 42 C.F.R. §§ 1005.15(f)(1); 1005.20(b). These provisions do not state the circumstances when new issues are to be heard or the reasons for modifying an exclusion determination. On the other hand, neither do they state or suggest that they should be subject to some unwritten requirement that an administrative law judge subordinate his or her responsibility to make an independent decision to the authority of the I.G. to make an initial exclusion determination.

One would expect, given the statutory mandate for a de novo hearing and an independent decision, that, had the Secretary intended not to provide excluded individuals and entities with de novo hearings and independent decisions, she would have said so explicitly. In fact, the Part 1005 regulations contain no limitations on the administrative law judge's authority to hold a de novo hearing and to issue an independent decision. The regulations do limit the

administrative law judge's authority in other respects. However, these limitations are narrow and are stated explicitly in the regulations.

Although the Secretary has in some respects qualified the authority of the administrative law judge to hold hearings, none of the limitations she has announced in Part 1005 suggest that the administrative law judge should hold anything other than a de novo hearing, or should issue something other than an independent decision. The limitations on an administrative law judge's exercise of authority in Part 1005 are narrow. 42 C.F.R. § 1005.4(c). For example, an administrative law judge is prohibited from questioning the discretion of the I.G. to impose at least some exclusion in a case involving an exclusion imposed pursuant to section 1128(b) of the Act, where the I.G. proves that there is statutory authority to impose at least a minimal exclusion. 42 C.F.R. § 1005.4(c)(5). An administrative law judge may not limit the kinds of programs or services that might be affected by an exclusion. Id. An administrative law judge must sustain at least a minimal exclusion where the I.G. establishes authority to exclude an individual or entity. 42 C.F.R. § 1005.4(c)(6).

> ***2. An issue which an administrative law judge must hear and decide in a case where the length of an exclusion imposed pursuant to section 1128 of the Act is challenged is whether the exclusion is unreasonable. The requirement that the administrative law judge hear and decide this issue does not preclude the administrative law judge from conducting a de novo hearing or from making an independent decision as to whether an exclusion is unreasonable.***

The Secretary has directed that generally, in a case involving an exclusion imposed pursuant to section 1128 of the Act, an excluded individual or entity is entitled to a hearing before an administrative law judge and a decision only as to whether:

> (i) The basis for the imposition of the sanction exists, and

> (ii) The length of exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

The regulation makes it clear that, in making a decision as to the reasonable length of an exclusion, the administrative law judge must begin his or her analysis of the issue by examining the exclusion determination made by the I.G. The regulation establishes the I.G.'s exclusion determination as the jurisdictional predicate for any administrative hearing concerning the length of an exclusion. Implicitly, it says that the administrative law judge must uphold an exclusion if it is reasonable.

In the past, I have applied this requirement in numerous cases. I have held that the regulation prohibits me from simply substituting my judgment for that of the I.G. where the I.G. has made a reasonable determination as to the length of an exclusion. The process that I have followed in every case to decide whether an exclusion is unreasonable is to hold a de novo hearing and to decide independently, based solely on the evidence that relates to aggravating and mitigating factors, how untrustworthy an excluded party is, and for how long that party should be excluded. Once I have decided the issue, I compare my conclusion with the I.G.'s determination. If my conclusion comports with the I.G.'s determination, or is very close to it, I sustain the exclusion. But, if I conclude that a substantially different exclusion from that which the I.G. determined to impose is merited by evidence which pertains to aggravating and mitigating factors, I find the I.G.'s determination to be unreasonable and I modify the exclusion.

The regulation, in effect, prohibits the administrative law judge from quibbling with the I.G. over the length of an exclusion if, after conducting a de novo hearing, the administrative law judge reaches the independent conclusion that the I.G.'s determination is reasonable. It acknowledges that any discretionary determination or decision concerning the length of a remedial exclusion embodies some subjective elements. The regulation means that, where there is an inconsequential difference of opinion between the I.G. and an administrative law judge over precisely what would be the best term of an exclusion, the administrative law judge should give the I.G. the benefit of the doubt.

What constitutes an "inconsequential difference" depends on the facts of a given case. As a general rule, however, the longer the exclusion that is

supported by objective evidence of untrustworthiness, the greater the leeway that I would give to the I.G. For example, either a 25-year exclusion or a 20-year exclusion of a highly untrustworthy individual may be tantamount to a permanent prohibition of that individual from providing care under federally-funded programs. In reality, few providers of care will be in a position to resume their former practices after either 20 or 25 years. In that circumstance, the difference between an I.G. determination that a 25-year exclusion is reasonable and an administrative law judge's conclusion that a 20-year exclusion is reasonable may be so slight as to be not significant. Thus, in that circumstance, I would be likely to sustain a 25-year exclusion even though I might have excluded the same individual or entity for 20 years, had I made the initial determination.

On the other hand, in the circumstance of a short exclusion, a difference of a year or two in the length of an exclusion may be highly significant. The reason is that a short exclusion must be based on evidence that an excluded individual or entity is likely to become trustworthy within a short period of time. In the case of an individual or entity who is likely to become trustworthy soon, the unwarranted addition of a year or two to an exclusion may be punitive.

But, although the regulation requires the administrative law judge to give the I.G. the benefit of the doubt in a close case, it does not state that the administrative law judge should hold anything less than a full, de novo hearing to receive evidence to weigh the reasonableness of the I.G.'s exclusion determination. Nor does the regulation state or even suggest that the administrative law judge lacks the authority to decide independently what is a reasonable exclusion.

All that 42 C.F.R. § 1001.2007(a)(1) requires is that the administrative law judge not substitute his or her independent conclusion for the I.G.'s determination if, in the final analysis, the differences between the I.G.'s determination and the administrative law judge's decision are inconsequential. The regulation does not require the administrative law judge to presume that the I.G. properly determined the length of an exclusion, and therefore, subordinate his or her independent decision-making authority to that of the I.G. The regulation neither states nor suggests that a hearing as to an exclusion determination is only a review of the I.G.'s determination to decide whether the I.G. acted reasonably.

The regulation does not define the term "unreasonable." However, the law is established as to what constitutes a reasonable exclusion. An exclusion is

reasonable if it satisfies the statutory purpose of protecting federally funded programs and beneficiaries and recipients of those programs from an untrustworthy individual or entity. Hanlester Network v. Shalala, 51 F.3d 1390 (9th Cir. 1995). The test of whether an exclusion is reasonable or not is whether the length of the exclusion is supported by evidence relating to the aggravating or mitigating factors defined by regulations.

What plainly is not at issue in a hearing involving the length of an exclusion is whether the *I.G.* acted reasonably or unreasonably in determining to exclude an individual or entity. The experience or expertise of I.G. employees is not one of the substantive criteria for determining the length of an exclusion established by the Part 1001 regulations. The opinion of the I.G. as to whether an exclusion is reasonable is not relevant to deciding the issue of reasonableness. An exclusion may be unreasonable if it is not supported by evidence which pertains to aggravating or mitigating factors, even if the determination to impose an exclusion was made by a highly experienced and qualified employee of the I.G. who opines that the exclusion is reasonable. And, an exclusion may be found to be reasonable if it is supported at the hearing by objective evidence which relates to aggravating or mitigating factors, even if the employee of the I.G. who determined to impose the exclusion is unable to articulate a cogent explanation for his or her determination.

> ***3. Appellate panels of the Departmental Appeals Board appear to have decided that the scope of review in a hearing involving the length of an exclusion imposed pursuant to section 1128 is less than de novo. Additionally, the panels appear to have decided that an administrative law judge may not make an independent decision on the issue of whether an exclusion is unreasonable.***

In Garfinkel, DeLia, and Snider, appellate panels of the Departmental Appeals Board held that the standard that an administrative law judge must employ in deciding whether an exclusion is unreasonable is whether the exclusion falls within a "reasonable range" of possible exclusions. The panels held that the I.G.'s exclusion determination must be sustained if the exclusion falls within a reasonable range.

On its face, the statement that an exclusion should be upheld if it falls within a "reasonable range" of exclusions does not depart from the standard that I have

employed historically, and which I discuss in the preceding section, to decide whether an exclusion is unreasonable. An I.G. exclusion determination that differs to an inconsequential degree from an independent decision by an administrative law judge as to what is reasonable may be said to fall within a "reasonable range" of exclusions. Saying that an exclusion must be upheld if it falls within a "reasonable range" of exclusions does not automatically preclude the administrative law judge from holding a de novo hearing and deciding independently whether an exclusion falls within a "reasonable range" of possible exclusions.

However, a close reading of the appellate panel decisions, and particularly of the panel's decision in Snider, suggests the possibility that the appellate panels intended to redefine the entire nature of the administrative hearing. As is articulated by the appellate panels, the "reasonable range" test does not appear simply to be a way of saying that the administrative law judge should affirm the I.G.'s determination where only slight differences exist as to what is reasonable between the I.G.'s determination and the administrative law judge's independent decision that is based on a de novo hearing. Appellate panels appear to have declared in Garfinkel, DeLia, and Snider that the administrative law judge should *not* conduct a de novo review of the I.G.'s determination and should *not* reach an independent decision as to what is reasonable. The "reasonable range" standard articulated by the appellate panels appears, on close analysis, to constitute something that is very close to an appellate review standard in which the I.G.'s determination is presumed to be correct.

This apparently new rule is stated most plainly by the appellate panel in the Snider decision. In Snider, the administrative law judge decided independently that an I.G. exclusion determination in a case involving an exclusion imposed pursuant to section 1128(a)(1) of the Act was unreasonable. The appellate panel reversed the administrative law judge's decision to modify the exclusion from a term of ten years to a term of eight years. In reversing the administrative law judge's decision, the appellate panel explicitly criticized the administrative law judge's methodology of reaching an independent decision:

> [T]he ALJ viewed himself as making a de novo decision, based on the evidence relating to the aggravating factors, as to whether the exclusion

period was reasonable. In DeLia and Garfinkel, however, the Board rejected a similar standard, stating:

> The preamble to . . . 42 C.F.R. Part 1001 indicates that the regulation contemplates broad discretion for the I.G. in setting the length of an exclusion in a particular case, in light of the I.G.'s 'vast experience in implementing exclusions under these authorities.' 57 Fed. Reg. 3298, at 3321. Consequently, '[s]o long as the amount of the time chosen by the [I.G.] is within a reasonable range, based on demonstrated criteria,' the ALJ, and hence the Board in reviewing the ALJ's action, is without authority to alter it. Id.

DAB No. 1637 at 5 - 6. The appellate panel held explicitly that it was error for the administrative law judge to have made his own decision as to the proper length of the exclusion instead of considering whether the ten-year exclusion that the I.G. imposed was within a reasonable range of possible exclusions. Id. at 10.

What appears to be the meaning of the appellate panel's decision in Snider is that the administrative law judge erred in holding a de novo hearing and in issuing an independent decision as to whether the exclusion at issue was unreasonable. The rule that the appellate panel seems to have enunciated is that the administrative law judge is required to review the I.G.'s determination only to decide whether the I.G. exercised her discretion reasonably. The appellate panel appears to have directed administrative law judges to defer to the I.G.'s "vast experience" in implementing exclusions. Under the appellate panel's standard, the administrative hearing becomes something in the nature of an appellate review in which the administrative law judge makes no independent decision as to whether an exclusion is reasonable.

If followed, the standard apparently enunciated in Garfinkel, DeLia, and Snider places administrative law judges, the Departmental Appeals Board, and ultimately, the Secretary, on a collision course with long-settled precedent

defining the scope and nature of administrative hearings under section 205(b) of the Act. The standard on which the appellate panels appear to have settled plainly contradicts the requirements of the Act that an administrative law judge hold a de novo hearing and issue an independent decision. Compare, for example, what the appellate panel said in Snider about the administrative law judge's authority, with what the United States Court of Appeals for the Fifth Circuit said about the administrative law judge's obligations in Hayes v. Celebrezze, 311 F.2d at 653. Moreover, the appellate panels' apparent standard renounces the appellate panels' rationales in both Kranz and Bilang.

I am troubled by the appellate panels' apparent rejection of a well-established statutory standard of review that has been affirmed on numerous occasions in federal courts. I am troubled, not only by the fact that the appellate panels appear to be directing administrative law judges to disregard well-established precedent, but also by the casual way in which they have issued this apparent requirement. The standard which the appellate panels appear to have adopted seems to transform the statute-required de novo hearing and independent administrative law judge decision into an appellate review, without any reference to the requirements of either the Act or the letter of the regulations. The appellate panels have made no effort to explain why the Part 1005 regulations explicitly contemplate a de novo hearing and an independent decision if, in fact, a de novo hearing and an independent decision is inappropriate in a case involving an exclusion determination made pursuant to section 1128 of the Act. It appears from the decisions in Garfinkel, DeLia, and Snider that the appellate panels devoted no consideration to the possibility that the review standard that they announced in those decisions might contravene the Act as it has been interpreted and applied by federal courts. Nor did the appellate panels in Garfinkel, DeLia, or Snider explain why they were renouncing a standard that had applied for years in administrative hearings and which they had affirmed in Kranz and Bilang.

The Parts 1001 and 1005 regulations, which govern hearings in cases involving section 1128 of the Act, were published by the Secretary in 1992, after the appellate panels had issued their decisions in Kranz and Bilang. It is a fair question to ask whether there is something in these regulations which requires that hearings no longer be de novo and that decisions no longer be made independently. However, as I have discussed above, there is nothing in these regulations which states or suggests any intent by the Secretary to impose on administrative law judges a standard of review which is contrary to the requirements of the Act or which departs from the standards of de novo hearings and independent decisions. Indeed, as I have discussed above, the regulations explicitly provide for a de novo hearing and a decision by an

administrative law judge that is made independently from the I.G.'s determination. In Garfinkel, DeLia, and Snider, the appellate panels identified no language in the regulations that would support the standard of review that they enunciated in those cases.

In all three decisions, the appellate panels based their entire rationale on a *response to a comment* in the preamble of the 1992 regulations. That response is stated at 57 Fed. Reg. at 3321. The response recites the I.G.'s "vast experience in implementing exclusions . . . ." Id. Additionally, it states that the intent of the regulations, and in particular, 42 C.F.R. § 1001.2007(a)(1)(ii), is that an exclusion be sustained "[s]o long as the amount of the time chosen by the [I.G.] is within a reasonable range, based on demonstrated criteria." Id.

I am not persuaded that this response furnishes any support for the appellate panels' apparent determination to deprive excluded individuals and entities of their statutory rights to de novo hearings and independent decisions by administrative law judges. The response may be read as consistent with the statutory guarantees of a de novo hearing and an independent decision. Although the response obviously provides strong support for the expertise of the I.G., it neither states nor suggests that a hearing as to whether an exclusion is reasonable should be less than a de novo review of the evidence. It does not state or suggest that an administrative law judge should not make independent findings as to whether an exclusion is unreasonable. Moreover, the response, as directive as it may or may not be, is not part of the regulation itself. It is only a response to a comment to the regulation. It does not carry the weight of the regulation, and should be used as an interpretative guide only to the extent that the regulation is ambiguous. There is nothing that is ambiguous about 42 C.F.R. § 1001.2007(a)(1)(ii). That regulation clearly states the issue at a hearing as to an exclusion to be whether the length of exclusion is unreasonable. It is not necessary to refer to responses to comments to the regulation to understand the regulation's meaning or to apply it.

Finally, I am concerned that appellate panels could rely on such weak support as a response to a comment to the regulations, in disregard of the Act, federal decisions which interpret and apply the Act, and the language of the implementing regulations, to establish an apparent standard which so plainly contradicts the requirements of law. The appellate panels appear to have put the Department on a course to disregard established precedent, based not on the directives of a regulation, but on what the I.G. said *about the regulation.*

I am convinced that it is the duty of administrative adjudicators to find ways in which regulations may be interpreted and applied consistent with the

requirements of the law. As adjudicators, we should not create conflicts between the requirements of law and Departmental application of law, where conflicts may be avoided. There is absolutely no need here to create conflict. The Parts 1001 and 1005 regulations are, on their face, not in conflict with the requirements of the Act for de novo hearings and independent decisions by administrative law judges. Even the response to a comment cited by the appellate panels may be read consistent with that requirement.

> ***4. The standard which the appellate panels appear to have announced in Garfinkel, DeLia, and Snider appears to direct administrative law judges to presume that the I.G.'s determination is correct, without establishing any basis for testing the validity of the presumption.***

Although appellate panels in Garfinkel, DeLia, and Snider concluded that an exclusion must be sustained if it falls within a "reasonable range" of exclusions, they offered no analysis to explain how an administrative law judge should determine whether an exclusion falls within a reasonable range. For example, in Snider, the appellate panel criticized extensively the methodology that the administrative law judge used to decide that an eight-year exclusion — rather than the ten-year exclusion determined by the I.G. — was reasonable. DAB No. 1637 at 6 - 10. But, the appellate panel offered nothing to explain why the ten-year exclusion that the I.G. determined, and which the appellate panel reinstated, was reasonable. The panel said only that:

> We further find that the ALJ improperly reduced the exclusion to eight years based on his erroneous findings that the first three aggravating factors should be given reduced weight and that the fourth aggravating factor should be given no additional weight. Moreover, in view of the four fully established aggravating factors proven in this case and the absence of any mitigating factors, we conclude that the exclusion imposed by the I.G. was within a reasonable range of possible exclusion periods.

Id. at 10 - 11.

To my knowledge, no evidence was offered by either the I.G. or the petitioners in Garfinkel, DeLia, and Snider as to what constituted a "reasonable range" of exclusions in each case. The appellate panels in those cases cited to no evidence in those cases as to what constituted a "reasonable range" of exclusions. It is unclear whether the appellate panels even heard arguments from the parties as to what might constitute a "reasonable range" of exclusions. No standards were announced by the appellate panels to be used to decide what constitutes a "reasonable range" of exclusions. In none of these cases did the appellate panels devote any consideration to what the administrative law judge must do should he or she find an exclusion to fall outside of a "reasonable range."

Moreover, the appellate panels in Garfinkel, DeLia, and Snider did not address the possibility that parties might offer new evidence at a hearing, either as to newly alleged mitigating circumstances, or as to the circumstances that were identified by the I.G. in her exclusion notice. As I read the Part 1005 regulations, such evidence is admissible, assuming that adequate notice is given by a party of the party's intent to offer it. In that situation, it is hard to see how an administrative law judge could limit his or her decision to something in the nature of an appellate review of the I.G.'s exercise of discretion.

The appellate panels seem to have created a strong presumption that an I.G. exclusion determination is correct, if there exist factors which might arguably support the determination, without stating any mechanism by which that presumption should be tested. Clearly, it appears to be the appellate panels' intent that the presumption may *not* be tested in a de novo hearing or by an independent administrative law judge decision. The absence of any mechanism by which the apparent presumption of correctness may be tested is a recipe for accepting an exclusion determination uncritically.

In fact, the I.G. has read the appellate panels' decisions in Garfinkel, DeLia, and Snider to mean just that. In this case, the I.G. argues that the administrative law judge's authority is now limited to deciding whether the aggravating and mitigating factors that were relied on by the I.G. as the basis for her exclusion determination exist. I.G.'s Reply Brief at 8. The I.G. argues that, if the I.G. correctly identified the relevant factors, then the administrative law judge must sustain the I.G.'s exclusion determination without any analysis of the weight of the evidence which relates to those factors.

I am not trying to suggest here that the appellate panels intended that administrative law judges simply rubber stamp the I.G.'s exclusion determinations. But, in the absence of a measurable standard for deciding what constitutes a "reasonable range" of exclusions, the end result may come very close to that. Undefined, the concept of "reasonable range" has the potential for becoming infinitely elastic.

I urge appellate panels to provide guidance in future cases as to what they mean when they say that an exclusion must be sustained if it falls within a "reasonable range" of exclusions. As I discuss above, the standard may be articulated consistent with the following:

- The requirement that an administrative law judge conduct a de novo hearing and issue an independent decision is in no way vitiated by the requirement that an exclusion be sustained if it falls within a reasonable range of exclusions. Ultimately, the administrative law judge must decide what is reasonable, given evidence which relates to the aggravating and mitigating factors identified by the regulations.

- Once an administrative law judge decides what constitutes a reasonable exclusion, he or she should decide whether the I.G.'s determination is unreasonable. If the exclusion determination of the I.G. is not significantly different from that which the administrative law judge decides independently is reasonable, it should be sustained as falling within a "reasonable range" of exclusions.

- The ultimate test for whether an exclusion is reasonable or unreasonable is whether it meets the statutory purpose of protecting federally funded health care programs and beneficiaries and recipients of those programs from an untrustworthy individual or entity. An exclusion is reasonable if, based on evidence relating to aggravating and mitigating factors, it is shown to relate reasonably to the statutory remedial purpose. However, the administrative law judge has the duty to decide independently whether an exclusion is reasonable, based on the factors stated in the regulations. No presumption of correctness attaches to the I.G.'s exclusion determination.

Of course, I am obligated to accept any directive that appellate panels give to me. I will endeavor to apply the "reasonable range" standard to each case as the appellate panels appear to have stated it in Garfinkel, DeLia, and Snider until appellate panels clarify their decisions. But, in the absence of guidance from the appellate panels as to what constitutes a "reasonable range" of exclusions, I am left to grope blindly as to how to apply the standard.

It seems to me that what I am now obligated to do is to test the I.G.'s determination against the apparent presumption of correctness that the appellate panels have created. That may mean that evidence concerning the methodology employed by the I.G. to determine an exclusion becomes relevant to deciding whether the apparent presumption is overcome.

In the past, I have consistently held that there is no relevance to the parties interrogating employees of the I.G. in hearings as to the way in which these employees calculated exclusion determinations in individual cases. As I explain above, I have resisted admitting evidence concerning the competence with which exclusions have been determined because it does not relate to any of the objective criteria for measuring the length of exclusions set forth in the Part 1001 regulations. However, evidence of the skill with which employees of the I.G. made an exclusion determination may be relevant if the appellate panels' apparent "reasonable range" standard remains intact. The skill and acumen of the I.G.'s employees in determining the length of individual exclusions may have to be tested if, in fact, a presumption of correctness attaches to their determinations.

Also in the past, I have ruled to be irrelevant evidence which relates to whether, under circumstances that are similar to the facts of the case at hand, other individuals or entities have been excluded for different periods of time than has been the individual or entity whose case is presently before me. That is because the criteria contained in the Part 1001 regulations do not suggest that the reasonableness of the length of exclusions ought to be measured on a comparative standard. But, the appellate panel decisions in Garfinkel, DeLia, and Snider may suggest otherwise. It seems to me that it would be relevant to deciding whether an exclusion falls within a "reasonable range" of exclusions that the exclusion is either similar to or markedly different from other exclusions that were imposed under similar circumstances.

In this case, I have attempted to apply the appellate panels' apparent "reasonable range" standard to the exclusion at issue (although, as an alternative approach, I decide independently that the exclusion is unreasonable). As part of the process of testing the presumption of correctness which appears to attach to the I.G.'s determination, I have considered evidence concerning the extent to which Mr. Patti, the I.G.'s analyst, actually considered the evidence which relates to aggravating and mitigating factors. Additionally, I have compared the exclusion imposed in this case with the exclusion that the appellate panel sustained in DeLia.

5. Evidence which relates to aggravating and mitigating factors establishes that the exclusion the I.G. imposed in this case is unreasonable. A five-year exclusion is reasonable.

Under this Finding, I analyze the evidence as I have done so traditionally. My decision under this Finding is based on the evidence which I received at the de novo hearing that I conducted. I make my decision independently. I attach no presumption of correctness to the I.G.'s determination.

I find, based on the evidence that I received at the hearing of this case, that the ten-year exclusion which the I.G. imposed is unreasonable. It is unreasonable because the exclusion does not account adequately for the strong evidence of mitigation offered by Petitioner. My decision under this Finding is consistent with a conclusion that the exclusion does not fall within a "reasonable range" of exclusions, in the sense that there is a significant difference between what I find independently to be reasonable based on my de novo review of relevant evidence, and what the I.G. determined to be reasonable.

The evidence establishes that Petitioner participated in a wide-ranging scheme to obtain money from insurance companies by filing bogus, sham and inflated personal injury claims against those companies. I.G. Ex. 1 at 4; Tr. at 79 - 80. Petitioner's role in the scheme included: drafting false, handwritten medical treatment records and progress reports, to be used in connection with the filing of bogus personal injury claims; authorizing his co-conspirators to use his letterhead to type fraudulent reports based on false handwritten medical records and progress reports; authorizing his co-conspirators to type and submit fraudulent medical bills for treatments that were not provided; receiving checks in payment for fraudulent insurance claims; and receiving payments from his co-conspirators. I.G. Ex. 1 at 10; Tr. at 79.

In the fall of 1991, agents of the FBI conducted a search of Petitioner's office, based on information that they had received concerning Petitioner's participation in the scheme. Tr. at 114. Shortly thereafter, Petitioner began cooperating with agents of the federal government. Id. On January 15, 1992, Petitioner pled guilty to one count of mail fraud, arising from his participation in the fraudulent scheme. I.G. Ex. 2 at 1; Tr. at 79. In his guilty plea, Petitioner admitted that he participated in the scheme between the years 1987 and 1991. Id.

On April 18, 1996, Petitioner was sentenced to a term of 15 months' imprisonment. I.G. Ex. 3 at 2.

The evidence establishes that Petitioner caused insurers to incur substantial losses as a result of his criminal conduct. The sentence that was imposed against Petitioner as a consequence of his plea of guilty to mail fraud included an order that he pay restitution in the amount of $165,000. I.G. Ex. 3 at 3. However, it is evident that the total damages caused by Petitioner exceeded that amount. Mr. Aloan, the FBI agent who was in charge of Petitioner's case, testified that Petitioner received $365,387 as payments, either from a co-conspirator, or from insurance companies. Tr. at 148.

I find that the sum of $365,387 is better evidence of the amount of damages caused by Petitioner than the restitution that Petitioner was ordered to pay. It shows that Petitioner caused substantially greater harm by his criminal conduct than is measured by the restitution amount. However, I do not find that the amount cited by Mr. Aloan is a precise measure of the damages caused by Petitioner's criminal conduct. The amount includes substantial payments made to Petitioner by a co-conspirator. Only some of the $365,387 amount was paid by insurers to Petitioner. Additionally, the amount cited by Mr. Aloan does not measure the amount of payments that insurers may have made to Petitioner's co-conspirator for bogus personal injury claims that were generated in part based on Petitioner's false medical records.

Thus, there is no evidence of record in this case which precisely states the losses that were incurred as a result of Petitioner's criminal conduct. From the evidence, I can conclude only that the damages caused by Petitioner exceeded the restitution that Petitioner was ordered to pay and may have been in the neighborhood of $365,387.

The cooperation that Petitioner gave to prosecuting officials after he was apprehended was substantial. The United States Attorney for the Eastern District of Pennsylvania characterizes the extent of Petitioner's cooperation as "outstanding." P. Ex. 2. Petitioner testified as a government witness, both before grand juries and in criminal trials. Tr. at 84 - 85. Petitioner provided valuable information to the United States government concerning the criminal activities of other individuals. Tr. at 118, 120. Petitioner's cooperation was useful in obtaining convictions or guilty pleas of numerous other individuals. Tr. at 121, 124 - 134.

Petitioner began cooperating in December, 1991, before he entered his guilty plea. Tr. at 81; see I.G. Ex. 2. Petitioner continued to cooperate for a period of nearly five years. His cooperation continued until September 1996, after he had been sentenced for his crime. Tr. at 81; see I.G. Ex. 3. Petitioner's cooperation included wearing a body wire on many occasions to elicit

incriminating information from co-conspirators. Tr. at 81 - 82. Petitioner also made telephone calls that were taped by the FBI. Id. at 82. Petitioner met with federal officials on many occasions for debriefing sessions. Id. at 82 - 83.

a. The I.G. proved the presence of three aggravating factors.

The I.G. proved the presence of three aggravating factors. These are as follows.

First, Petitioner engaged in criminal activity which caused insurers to sustain financial losses in excess of $1,500. 42 C.F.R. § 1001.201(b)(2)(i). There is no precise record of the amount of damages that Petitioner caused insurers to suffer, either as a direct consequence of Petitioner's false claims for services or as an indirect consequence of unjustified damages payments resulting in part from Petitioner's false claims and medical records. However, it is evident that these damages exceed the $165,000 in restitution that Petitioner was ordered to pay as part of his sentence. FBI agent Aloan testified credibly that Petitioner received $365,387 as payments for his false reports, either from insurers or from a co-conspirator. I find this sum to be a better representation of the quantum of damages caused by Petitioner than is the restitution amount that Petitioner was ordered to pay.

Second, Petitioner engaged in criminal activity for a period of more than one year. 42 C.F.R. § 1001.201(b)(2)(ii). The duration of Petitioner's criminal activity extends over a period of about four years, beginning at some point in 1987 and ending in the fall of 1991, when Petitioner was apprehended by the FBI.

Third, Petitioner was incarcerated for his crimes. 42 C.F.R. § 1001.201(b)(2)(iv). Petitioner received a sentence of 15 months' imprisonment as a consequence of his guilty plea.

b. Petitioner proved the presence of a mitigating factor.

Petitioner proved the presence of a mitigating factor. He gave extensive and highly valuable cooperation to prosecuting authorities which resulted in the guilty pleas or convictions of many other individuals. 42 C.F.R. § 1001.201(b)(3)(iii)(A). I have described Petitioner's cooperation with prosecuting authorities, above.

The I.G. has characterized Petitioner's cooperation as being only sporadic. It is true that Petitioner did not devote every waking hour between December 1991 and September 1996 to cooperating with prosecuting authorities. But, the record of this case establishes an extensive degree of cooperation by Petitioner. More important, it shows that Petitioner gave prosecuting authorities what they asked for and what they needed.

The I.G. attempts to minimize the significance of Petitioner's cooperation by asserting that it was in his self-interest to cooperate. That, undoubtedly, is true. But, self-interest always is a factor where a criminal cooperates with prosecuting authorities. That does not detract from the fact that the regulations specifically identify cooperation to be a mitigating factor. Nor does it detract from my conclusion that individuals who cooperate extensively may be more trustworthy than those who cooperate only slightly.

Petitioner alleged the presence of an additional mitigating factor. At the hearing, Petitioner's counsel asserted that alternative sources of health care, consisting of podiatric care, would not be available to poor persons and inner-city residents by virtue of Petitioner's exclusion. Tr. at 20 - 21; see 42 C.F.R. § 1001.201(b)(3)(iv).

I do not find that Petitioner established the presence of this alleged second mitigating factor. He offered no credible affirmative evidence to prove that alternative sources of health care were not, in fact, available. In addition, Petitioner did not address this issue in his posthearing briefs.

c. The ten-year exclusion which the I.G. imposed against Petitioner is unreasonable, based on the evidence which relates to aggravating and mitigating factors. In this case, a five-year exclusion is reasonable.

I have weighed the evidence which relates to the aggravating and mitigating factors that were established by the parties. I conclude, based on an independent review of that evidence, that the ten-year exclusion is unreasonable. I find a five-year exclusion to be reasonable.

The evidence which the I.G. offered relating to aggravating factors is, when weighed in isolation, evidence that Petitioner is a highly untrustworthy individual. Petitioner participated in an organized criminal conspiracy for

approximately four years. His involvement in that conspiracy contributed, directly or indirectly, to hundreds of thousands of dollars of losses by insurers. The United States District Court judge who sentenced Petitioner for his crime found it necessary to incarcerate him.

However, that evidence is strongly mitigated by evidence showing the extent of cooperation that Petitioner gave to prosecuting authorities after his apprehension by the FBI. The evidence of cooperation establishes Petitioner to have behaved in a highly trustworthy manner for almost five years after he was apprehended.

I would have no difficulty sustaining a very lengthy exclusion of Petitioner if the only evidence that I had which related to his trustworthiness to provide care was evidence that relates to aggravating factors. But, that evidence cannot be considered in isolation. I find that the exclusion imposed by the I.G. fails to take into consideration the extent and nature of Petitioner's cooperation and the trustworthiness that is established by Petitioner's cooperation. The evidence of mitigation shows that, for almost five years, Petitioner cooperated extensively with prosecuting authorities. They have described his cooperation as being "outstanding." P. Ex. 3. Petitioner's cooperation was a basis for guilty pleas by or convictions of numerous other individuals.

When all of the evidence is considered, it establishes that a ten-year exclusion of Petitioner is excessive. A ten-year exclusion fails to credit Petitioner's extensive efforts at rehabilitation, as is evidenced by the cooperation he gave to prosecuting authorities.

A five-year exclusion is reasonable. A five-year exclusion provides federally funded health care programs and beneficiaries and recipients of those programs with adequate protection from Petitioner's propensity to engage in unlawful conduct. Under a five-year exclusion, Petitioner will not become eligible to apply for reinstatement until the year 2001. I find nothing in the record of this case to show that Petitioner is so untrustworthy that he needs to be excluded beyond that point in time.

The evidence establishes a very significant difference between the exclusion that I find independently to be reasonable, based on the evidence which I received at a de novo hearing, and what the I.G. determined to be reasonable. For that reason, I conclude that the I.G.'s exclusion determination is not within a "reasonable range" of exclusions and is unreasonable. And, on that basis, I modify the exclusion to the five year term which I find to be reasonable.

6. The weight of the evidence overcomes any presumption that the ten-year exclusion falls within a reasonable range of exclusions.

Under this Finding, I have done my best to apply the standard of review which I believe appellate panels may want me to apply based on what they said in Garfinkel, DeLia, and Snider. I have presumed the I.G.'s determination to be reasonable, based on the presence of the three aggravating factors and one mitigating factor which I discuss in the previous Finding. I have then examined additional evidence which addresses whether the I.G. properly exercised her authority to exclude Petitioner. I conclude that the additional evidence which I discuss under this Finding overcomes any presumption of reasonableness that attaches to the I.G.'s exclusion determination. It establishes, moreover, that the exclusion is not within a "reasonable range" of exclusions.

There is no reason why, in this case, deference need be given to the I.G.'s exclusion determination. The testimony given by Mr. Patti, the I.G. analyst who made the exclusion recommendation in Petitioner's case, makes it clear that the I.G.'s determination did not involve the close scrutiny of evidence relating to aggravating and mitigating factors that is contemplated by the regulations. The presumption that the exclusion is reasonable is overcome here by evidence showing that the I.G. failed to perform a careful analysis of the record before excluding Petitioner.

As is made evident by Mr. Patti's testimony, the I.G. did not carefully weigh the evidence which relates to aggravating or mitigating factors in determining to impose a ten-year exclusion against Petitioner. The I.G. did not perform the close review of evidence which pertains to aggravation and mitigation that is mandatory under 42 C.F.R. § 1001.201(b). Moreover, the exclusion is not in line with that which the I.G. has imposed in similar circumstances. That is evident from a comparison of the evidence in this case with the facts of DeLia.

Mr. Patti testified that he was the I.G. analyst who was responsible for making a recommendation as to the length of the exclusion to be imposed against Petitioner. Tr. at 46. Mr. Patti asserted that he weighed the presence of aggravating factors and a mitigating factor in order to make a recommendation in this case. He testified that, had the exclusion determination been based only on the presence of aggravating factors, he would have recommended that Petitioner be excluded for a term of 15 years. Id. Mr. Patti testified that he recommended reducing the exclusion to ten years based on the substantial cooperation that Petitioner gave to prosecuting authorities. Id.

In fact, what emerges from Mr. Patti's testimony is a depiction of an exclusion determination that was made with very little regard to the facts of Petitioner's case. There was no careful analysis by the I.G. of the facts of Petitioner's case under the factors stated in 42 C.F.R. § 1001.201(b). Instead, the I.G. made a determination based on the *presence* of aggravating and mitigating factors, without carefully scrutinizing and weighing the evidence which is relevant to those factors. Any presumption that the exclusion determination emanated from the I.G.'s "vast experience" in determining exclusions of the type imposed here is overcome by evidence which shows that the I.G. paid no close attention to the facts.

Mr. Patti offered no explanation as to why a 15-year exclusion would be merited in this case by the presence of aggravating factors. I do not find Mr. Patti's testimony concerning his weighing of evidence pertaining to aggravating factors to be credible in light of obvious errors of fact in his testimony concerning what the evidence reveals. His testimony suggests that the I.G. performed only a cursory review of the facts of Petitioner's case.

It is apparent from Mr. Patti's testimony that he was uncertain as to precisely what the facts were which established the aggravating factors. For example, in his testimony, Mr. Patti asserted that Petitioner's involvement in a criminal conspiracy "according to the indictment" ran from 1989 until some point in 1992. Tr. at 45. In fact, the indictment of Petitioner recites that the conspiracy began in 1987, not 1989, and ran into about March of 1992. I.G. Ex. 1 at 4. And, Petitioner specifically pled guilty to engaging in crimes that began in 1987 and ended in 1991. I.G. Ex. 2 at 6. Additionally, Mr. Patti recited that Petitioner had been sentenced to pay $165,000 as restitution as evidence supporting the dollar amount of Petitioner's crimes. Tr. at 44. In fact, as I discuss above, the evidence suggests that Petitioner caused more damage than is indicated by the restitution amount.

Mr. Patti appeared to be almost wholly ignorant of the degree of cooperation that Petitioner gave to prosecuting authorities. Mr. Patti was unaware that Petitioner began his cooperation in 1991. Id. at 51. Mr. Patti admitted that he did not interview agents of the FBI to ascertain the extent of Petitioner's cooperation. Id. at 52. Mr. Patti did not know the number of times that Petitioner wore a wire to record surreptitiously the conversations of others who were involved in the conspiracy. Id. at 53. Mr. Patti was unaware of the instances in which Petitioner tape recorded telephone conversations. Id. at 54. He was unaware of the number of cases in which Petitioner assisted the United States in the prosecution of other individuals. Id. at 53.

Moreover, Mr. Patti made it plain that he considered the extent of Petitioner's cooperation to be irrelevant to determining the length of the exclusion. Tr. at 55. He testified that:

> I did not feel that [the nature or extent of Petitioner's cooperation] was relevant . . . What he actually did was not relevant other than he offered substantial assistance to the Government. And that was the bottom line.

Id. Thus, Mr. Patti gave Petitioner credit for the presence of a mitigating factor, but failed to do any meaningful analysis of the evidence pertaining to that factor to ascertain what the evidence said about Petitioner's trustworthiness to provide care.

The evidence in this case plainly establishes that the exclusion that the I.G. imposed against Petitioner is outside of the reasonable range of exclusions that the I.G. has imposed in similar circumstances. The exclusion that the I.G. imposed in this case departs sharply and inexplicably from that which the I.G. imposed in another, very similar case. In DeLia, the I.G. imposed, and the appellate panel sustained, a five-year exclusion of the petitioner. The petitioner in DeLia was involved in the same type of conspiracy as the one engaged in by Petitioner. The identical three aggravating factors and one mitigating factor that are established here were present in DeLia. DAB No. 1620 at 4. Furthermore, the evidence which relates to aggravating and mitigating factors in DeLia and in this case is very close. A comparison of the two cases shows the following:

- In DeLia, the appellate panel found that the losses attributable to the petitioner were about $400,000. DAB No. 1620 at 9. Here, I have found that the best evidence of the losses attributable to Petitioner is in the area of $365,387, based on the credible testimony of FBI agent Aloan.

- In DeLia, the appellate panel concluded that the petitioner's involvement in a criminal conspiracy was for about four years. DAB No. 1620 at 10. In this case I have found that Petitioner was involved in a criminal conspiracy for about four years.

- The petitioner in DeLia was incarcerated for a term of ten months. Here, Petitioner was incarcerated for a term of 15 months.

• The petitioner in DeLia gave extraordinary cooperation to prosecuting authorities, as did Petitioner in this case.

The exclusion in this case appears arbitrary when it is compared with the five-year exclusion that the I.G. imposed, and the appellate panel sustained, in DeLia. The I.G. has offered no explanation for the lengthier exclusion that was imposed in this case. Moreover, given the testimony of Mr. Patti, there appears to be no possible credible explanation for the disparity between the two exclusions.

A ten-year exclusion is a much harsher exclusion than is a five-year exclusion. A five-year exclusion, which precludes Petitioner from participating in federally funded health care programs until at least the year 2001, will certainly severely affect Petitioner's ability to resume his profession. But, a ten-year exclusion, which precludes Petitioner from participating in federally funded health care programs until at least the year 2006, will very likely permanently preclude Petitioner from resuming his profession. Under no circumstances is a ten-year exclusion reasonably close in length to a five-year exclusion. An exclusion of ten years is, absent reasonable justification, a draconian penalty.

The evidence which shows that the I.G. did not closely analyze the facts of this case in determining to impose a ten-year exclusion against Petitioner, coupled with evidence which establishes that the I.G. excluded another petitioner under indistinguishable circumstances for only five years, is basis for me to conclude that the exclusion in this case is not within a "reasonable range" of exclusions as the appellate panels have apparently used the term in Garfinkel, DeLia, and Snider. I modify the exclusion to a term of five years.

/s/

Steven T. Kessel
Administrative Law Judge