

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

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|------------------------|---|---------------------|
| In the Case of:        | ) |                     |
|                        | ) |                     |
| Morton Markoff, D.O.,  | ) | DATE: June 19, 1998 |
|                        | ) |                     |
| Petitioner,            | ) |                     |
|                        | ) |                     |
| -v.-                   | ) | Docket No. C-98-026 |
|                        | ) | Decision No. CR538  |
| The Inspector General. | ) |                     |
|                        | ) |                     |

**DECISION**

I sustain the determination of the Inspector General (I.G.), United States Department of Health and Human Services, to exclude Petitioner, Morton Markoff, D.O., from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs (Medicare and Medicaid), until such time as he obtains a valid license to practice medicine or provide health care in the State of New Jersey. I base my decision on evidence which proves that Petitioner surrendered his medical license during the pendency in that State of a formal disciplinary proceeding related to his professional competence, professional performance, or financial integrity. I further base my decision on evidence which proves that Petitioner lost his license, and the right to apply for or renew it, for reasons bearing on his professional competence, professional performance, or financial integrity. Additionally, I find that when, as here, an exclusion imposed by the I.G. is concurrent with the remedy imposed by a State licensing authority, then no issue of reasonableness exists and such an exclusion is mandated by law.

**BACKGROUND**

By letter dated August 13, 1997, the I.G. notified Petitioner that he was being excluded from participating in Medicare and Medicaid. In that letter, the I.G. explained that Petitioner's exclusion was authorized under section 1128(b)(4) of the Social Security Act (Act), because Petitioner's license to practice

medicine or provide health care in the State of New Jersey was revoked, suspended, or otherwise lost, or was surrendered while a formal disciplinary proceeding was pending before the State licensing authority for reasons bearing on his professional competence, professional performance, or financial integrity. The I.G. also informed Petitioner that his exclusion would remain in effect as long as his license was revoked, suspended, or otherwise lost.

Petitioner requested a hearing and the case was assigned to me for decision. The parties agreed that the case could be decided based on written submissions, and that an in-person hearing was not necessary. On November 21, 1997, I issued an Order which set forth a schedule for the parties to submit briefs and proposed exhibits. In the Order, the I.G. was to file a brief and any proposed exhibits by January 12, 1998; Petitioner was to file his response brief and any proposed exhibits by March 18, 1998.

The I.G. submitted a brief (I.G. Br.) and six proposed exhibits (I.G. Exs. 1-6) on January 12, 1998. Petitioner did not object to these exhibits. I admit into evidence I.G. Exs. 1-6.

On March 5, 1998, prior to submitting his response brief, Petitioner, through counsel, submitted a Motion To Compel Production Of Information Pursuant To 42 C.F.R. § 1005.3(3) (Motion To Compel).<sup>1</sup> In its Motion To Compel, Petitioner sought documents from the I.G. relating to the date that the I.G. received information regarding Petitioner's surrender of his license to practice medicine in the State of New Jersey. Petitioner stated that the information he sought "was relevant to the issues of" the reasonableness of Petitioner's exclusion under section 1128 of the Act, the timeliness of the I.G.'s exclusion of Petitioner, and the I.G.'s notification to Petitioner of his exclusion.

On March 10, 1998, the I.G. responded timely<sup>2</sup> to Petitioner's Motion To Compel by filing a Motion In Opposition to Petitioner's Motion To Compel Production of Information and Motion For A Protective Order (Motion In Opposition). In its Motion In Opposition, the I.G. contested the production of the requested documents, arguing that the documents Petitioner sought were irrelevant and immaterial to the two issues I asked the parties

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<sup>1</sup> Petitioner cited to 42 C.F.R. § 1005.3(3) in his motion. The complete citation for this regulatory provision is 42 C.F.R. § 1005.3(a)(3).

<sup>2</sup> See 42 C.F.R. § 1005.13(c).

to address in my November 21, 1997 Order. Those issues were: 1) whether the I.G. had a basis upon which to exclude Petitioner; and, 2) whether the length of the exclusion imposed and directed by the I.G. against Petitioner was reasonable.

I note that Petitioner appears to have sought the requested information to support his claim that the I.G. unfairly delayed instituting exclusion proceedings against him. Pursuant to 42 C.F.R. § 1005.7(a), "[a] party may make a request to another party for production of documents for inspection and copying which are relevant and material to the issues before the ALJ (emphasis added)." Because the I.G. has discretion as to when to impose an exclusion, and I have no authority to review the timeliness of the I.G. decision to impose an exclusion, I find that Petitioner's request for document production is not legally relevant to these proceedings. See Chander Kachoria, DAB No. 1380 (1993). See also, Laurence Wynn, M.D., DAB CR344 (1994); Samuel W. Chang, M.D., DAB No. 1198 (1990) (administrative law judge (ALJ) has no authority to review the timing of the I.G.'s determination to impose an exclusion or to alter the effective date of an exclusion). Therefore, I deny Petitioner's Motion To Compel.

On March 23, 1998, Petitioner submitted his response brief (P. Br.) and seven exhibits (P. Exs. 1-7). The I.G. did not object to Petitioner's exhibits. I admit into evidence P. Exs. 1-7. On April 2, 1998, the I.G. submitted a Motion For Leave To File Reply and a Reply To Petitioner's Brief of Dr. Morton Markoff. On April 14, 1998, Petitioner stated his opposition, maintaining that the I.G. had not stated grounds as to why the I.G. should be permitted to submit an additional brief.

The briefing schedule I set forth in my November 21, 1997 Order did not provide for an I.G. reply to Petitioner's response brief. Petitioner, however, raised one argument in its response brief that the I.G. had not addressed. Specifically, Petitioner contended that Petitioner's exclusion from Medicare and Medicaid, as well as the timing of the I.G.'s determination to exclude him, "detrimentally affected" his property rights in his employment, which rights are guaranteed under the due process clause of the Fifth Amendment of the United States Constitution. See P. Br. at 9. I grant the I.G.'s Motion for Leave to File Reply for the purpose of addressing this argument.

I base my decision in this case on the exhibits, the applicable law, and the argument of the parties.

**PETITIONER'S CONTENTIONS**

Petitioner does not dispute that he surrendered or lost his medical license within the scope of section 1128(b)(4) of the Act. He does maintain, however, that such surrender or loss did not relate to his professional competence, professional performance, or financial integrity. Specifically, Petitioner maintains that, as the exclusion proceeding is not under section 1128(a) of the Act, the criminal proceeding is irrelevant under section 1128(b)(4) of the Act. He denies that the Administrative Complaint filed against him by the Attorney General of the State of New Jersey (New Jersey Attorney General)<sup>3</sup> contained allegations concerning his professional competence, professional performance or financial integrity<sup>4</sup> and that conviction of a crime involving moral turpitude under New Jersey law<sup>5</sup> does not, per se, signify professional incompetence or performance or lack of financial integrity.<sup>6</sup> In this regard, Petitioner notes that he presently is licensed to practice medicine in the Commonwealth of Pennsylvania after full disclosure of his federal conviction. Petitioner also has submitted letters of support from his medical peers and his patients which attest to his professional competence and performance and his integrity.<sup>7</sup>

Petitioner also contends that the timing of his exclusion was unfair, unreasonable, and violates due process. In this regard, he asserts that the I.G. was not timely in instituting proceedings against him, as his license surrender occurred in 1993, but the I.G. did not commence exclusion proceedings until 1997. He further asserts that such delay violates his due process rights, as exclusion from participation in Medicare and Medicaid affects his ability to provide services to his patients and detrimentally affects his property rights in his employment.

Petitioner also asserts that the length of his exclusion is unreasonable. In support of this contention, Petitioner argues that the length of his exclusion should be determined in accordance with prior provisions of the Act in effect at the time of the loss of his medical license, that is, the provisions of

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<sup>3</sup> I.G. Ex. 3.

<sup>4</sup> P. Br. at 5; see I.G. Ex. 3.

<sup>5</sup> See N.J.S.A. § 45:1-21(f).

<sup>6</sup> P.Br. at 5-6.

<sup>7</sup> P. Ex. 7.

the Act as in effect in 1993. Petitioner also maintains that, given the fact that he is licensed to practice medicine in the Commonwealth of Pennsylvania, the I.G.'s determination to exclude him based upon the surrender of his medical license in the State of New Jersey is unreasonable. Petitioner further contends that the I.G. determination is, in effect, to impose an indefinite exclusion, as Petitioner surrendered his medical license in the State of New Jersey with prejudice, and is unlikely to obtain reinstatement of that license, as indicated by subsequent proceedings. See P. Br. at 11-13; P. Ex. 1; I.G. Exs. 2 and 5.

#### APPLICABLE LAW

Pursuant to section 1128(b)(4) of the Act, the I.G. may exclude:

"[a]ny individual or entity - (A) whose license to provide health care has been revoked or suspended by any State licensing authority, or who otherwise lost such a license or the right to apply for or renew such a license, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity, or (B) who surrendered such a license while a formal disciplinary proceeding was pending before such an authority and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity.

Pursuant to section 1128(c)(3)(E) of the Act, as amended by section 212 of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104-191, § 212 (August 21, 1996) (to be codified at 42 U.S.C. § 1320a-7(c)(3)(E)), the length of an exclusion under section 1128(b)(4) of the Act "shall not be less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered, or the individual or entity is excluded or suspended from a Federal or State health care program." The HIPAA provisions affecting the length of exclusions became effective on January 1, 1997.

Prior to 1996, the Act provided no criteria for establishing the length of exclusions for individuals or entities excluded pursuant to section 1128(b)(4). Under the 1996 amendments, no issue of reasonableness exists as to the length of an exclusion, where the I.G. imposes an exclusion that is concurrent with the loss, suspension, or revocation of a State license. Therefore, by law, the minimum period for an exclusion is concurrent with the loss, suspension, or revocation of a State license, as in Petitioner's case.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Petitioner held a license to practice medicine from the State of New Jersey until March 19, 1993. I.G. Ex. 2; P. Ex. 1.
2. In July 1989, an indictment was filed, in the United States District Court for the District of New Jersey, charging Petitioner with knowingly and willfully entering into an agreement with others for the purpose of defrauding various insurance companies. I.G. Ex. 3.
3. The indictment charged that Petitioner, from 1977 until 1985, altered medical records, or caused such records to be altered by his agents at his direction, to reflect patient visits which did not occur. I.G. Ex. 3.
4. The indictment also charged that Petitioner, or his agents at his direction, fabricated medical records to exaggerate patient injuries, to reflect phantom services close in date to the alleged patient injury, and to overstate service charges and permanency of injury. I.G. Ex. 3.
5. As a result of the indictment, ensuing jury trial and entry of a guilty verdict, Petitioner was convicted of 24 separate acts of mail fraud, one act of racketeering, and one act of racketeering conspiracy. I.G. Ex. 3.
6. Petitioner received an eight-year prison sentence and was ordered to pay restitution in an amount in excess of \$340,000. I.G. Ex. 5.
7. On August 20, 1991, the New Jersey Attorney General initiated an administrative disciplinary proceeding against Petitioner by filing an Administrative Complaint, demanding that the New Jersey State Board of Medical Examiners (Board of Medical Examiners) suspend or revoke Petitioner's license to practice medicine based upon his criminal conviction. I.G. Ex. 3.
8. The Complaint alleged that Petitioner's conviction constituted a conviction of a crime involving moral turpitude and related adversely to the practice of medicine in violation of N.J.S.A. § 45:1-21(f). I.G. Ex. 3.
9. The Complaint also alleged that Petitioner's conviction was conclusive evidence that he engaged in acts which constitute professional misconduct in violation of N.J.S.A. § 45:1-21(e). I.G. Ex. 3.

10. Petitioner was notified that the Board of Medical Examiners had scheduled a hearing concerning the Complaint. I.G. Ex. 4.

11. In that proceeding, Petitioner filed an answer to the Complaint admitting his conviction. I.G. Ex. 2.

12. On March 19, 1993, Petitioner, in settlement of the Complaint filed by the New Jersey Attorney General, entered into a Consent Order with the Board of Medical Examiners, whereby he agreed to voluntarily surrender his license to practice medicine in the State of New Jersey, with prejudice to seeking any future reinstatement. I.G. Ex. 2; P. Ex. 1.

13. On March 13, 1996, Petitioner sought permission from the Board of Medical Examiners to apply for reinstatement of his State of New Jersey medical license. I.G. Ex. 5.

14. On May 29, 1996, the Board of Medical Examiners denied Petitioner's request for permission to apply for reinstatement of his State of New Jersey medical license. I.G. Ex. 5.

15. On August 13, 1997, the I.G. notified Petitioner of his exclusion from participation in Medicare and Medicaid. I.G. Ex. 6; P. Ex. 5.

16. Under section 1128(b)(4)(A) of the Act, the I.G. is authorized to exclude an individual whose license to provide health care has been revoked or suspended by any State licensing authority, or who otherwise lost such a license or the right to apply for or renew such a license, for reasons bearing on the individual's professional competence, professional performance, or financial integrity.

17. Under section 1128(b)(4)(B) of the Act, the I.G. is authorized to exclude an individual who surrenders his or her license to provide health care during the pendency of formal disciplinary proceedings before a State licensing authority which concern the individual's professional competence, professional performance, or financial integrity.

18. Petitioner possessed a license to provide health care within the scope of section 1128(b)(4) of the Act.

19. The Consent Order issued by the Board of Medical Examiners on March 19, 1993, to which terms Petitioner agreed to be bound, resulted in the loss of his medical license and the loss of the right to apply for or renew his medical license within the scope of section 1128(b)(4)(A).

20. Petitioner surrendered his medical license during the pendency of a formal disciplinary proceeding before a State licensing authority, within the scope of section 1128(b)(4)(B) of the Act.

21. The loss or surrender of Petitioner's license to practice medicine in the State of New Jersey, as a result of the March 19, 1993 Consent Order, bore on Petitioner's professional competence, professional performance, or financial integrity within the scope of section 1128(b)(4) of the Act.

22. The I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4) of the Act.

23. Where an exclusion is imposed pursuant to section 1128(b)(4) of the Act, the period of exclusion shall not be less than the period during which the individual's license to provide health care is revoked, suspended, or surrendered. Section 1128(c)(3)(E) of the Act.

24. When an exclusion is imposed pursuant to section 1128(b)(4) of the Act, and the period of exclusion is coterminous with the loss, revocation, suspension, or surrender of a State license, then no issue of reasonableness concerning the length of the exclusion exists.

25. The exclusion the I.G. imposed against Petitioner is for the minimum period mandated by section 1128(c)(3)(E) of the Act.

#### DISCUSSION

Based upon my review of the record, I find that Petitioner lost his license, within the scope of section 1128(b)(4)(A) of the Act, when he voluntarily surrendered his license to the Board of Medical Examiners. An appellate panel of the Departmental Appeals Board (DAB) has found that the "otherwise lost" language in section 1128(b)(4)(A) of the Act is broadly defined by Congress to affect any loss of a license. William I. Cooper, DAB No. 1534 (1995). In Cooper, the petitioner signed a Consent Order surrendering his medical license prior to formal disciplinary hearings. The appellate panel affirmed the ALJ's decision that the I.G. had properly excluded the petitioner. The appellate panel concluded that the I.G. properly had based its exclusion determination on section 1128(b)(4) generally, as well as citing specifically to section 1128(b)(4)(A). The appellate panel stated:



Petitioner could also have been excluded under the provision of section 1128(b)(4)(A). The broad "otherwise lost" language Congress included in section 1128(b)(4)(A) indicates that Congress intended that section to encompass any loss that occurs by a means other than revocation or suspension by a licensing authority.

Cooper, at 6, fn. 1.

In Petitioner's case, the New Jersey Attorney General filed an Administrative Complaint, seeking the suspension or revocation of Petitioner's medical license as a result of his criminal conviction arising out of his participation in an insurance fraud scheme. When Petitioner was confronted with these allegations, he agreed to sign a Consent Order whereby he voluntarily surrendered, with prejudice, his license to practice medicine. Like Dr. Cooper, Petitioner surrendered his license prior to formal disciplinary hearings, and once he signed the Consent Order, his license was "otherwise lost" within the scope of section 1128(b)(4)(A) of the Act.

I also find that Petitioner surrendered his medical license within the scope of section 1128(b)(4)(B) of the Act, due to a disciplinary proceeding initiated by the New Jersey Attorney General, who sought the suspension or revocation of his license to practice medicine. In other cases, the I.G. has been found to have authority to exclude an individual from participation in Medicare and Medicaid if that individual surrendered his license to provide health care pending a formal disciplinary proceeding. Dillard P. Enright, DAB CR138 (1991); John W. Foderick, M.D., DAB CR43 (1989). In Enright, the petitioner surrendered his nursing license to a Nursing Board before formal findings were made as to the allegations in a complaint filed against him. In that decision, an ALJ found that the petitioner's license surrender at an informal meeting was a surrender while a formal disciplinary proceeding was pending. In the present case, had Petitioner not voluntarily surrendered his license to practice medicine in the State of New Jersey, he would have faced an administrative hearing seeking the revocation or suspension of his medical license.

I also note that, with regard to the scope of section 1128(b)(4) of the Act, the I.G.'s authority to indefinitely exclude providers who surrendered their licenses pursuant to settlement agreements has been upheld. Richard L. Pflipsen, D.C., DAB CR132 (1991). An ALJ also has found surrender of licenses to informal committees to constitute surrender of a license while a formal disciplinary proceeding was pending. Chester A. Bennett, M.D., DAB CR64 (1990).

Based upon my review of the record, I also conclude that Petitioner's loss or surrender of his medical license occurred for reasons bearing on his professional competence, professional performance, or financial integrity. The record reflects that Petitioner was convicted of racketeering and mail fraud as a result of his participation in a scheme to defraud insurance companies. The record reflects, and Petitioner does not dispute, that he or his agents at his direction: 1) altered medical records to reflect patient visits that did not occur; 2) fabricated medical records to include excessive allegations of the nature and extent of the patients' injuries and the necessity of the treatments employed; 3) back-dated medical records to reflect phantom services in closer proximity to the date of the injury rather than the actual date of service; and, 4) fabricated billing statements to overstate charges and the permanency of injury for the purpose of exceeding the no-fault monetary threshold. I find that such conduct bears on the professional competence and performance of Petitioner within the scope of section 1128(b)(4). In support of my conclusion, I note that in the Complaint the New Jersey Attorney General filed against Petitioner, he specifically alleged that Petitioner's conduct constituted a crime involving moral turpitude and related adversely to the practice of medicine, in violation of N.J.S.A. § 45:1-21(f). The New Jersey Attorney General further alleged in the Complaint that Petitioner's conviction was conclusive evidence that he engaged in acts which constitute professional misconduct in violation of N.J.S.A. § 45:1-21(e). I further find that such conduct bears on Petitioner's financial integrity within the scope of section 1128(b)(4) of the Act.

I disagree with Petitioner's contention that exclusion is unfair in his case. Specifically, Petitioner contends that "it is unfair and contrary to the purposes of the Act to exclude him indefinitely based upon the fact that he surrendered his license to practice medicine in the State of New Jersey."<sup>8</sup> According to Petitioner, to require that his exclusion remain in effect until he obtains a medical license in the State of New Jersey is unfair, as that State is unlikely to grant him such license. Meanwhile, Petitioner has obtained a medical license in the Commonwealth of Pennsylvania, after he allegedly disclosed to such authorities the fact of his federal criminal conviction. Petitioner contends that a coterminous exclusion under these circumstances is unreasonable, as Petitioner has obtained a license to practice medicine in another State. Petitioner cannot realistically claim that he had the expectation, upon full

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<sup>8</sup> P. Br. at 13.

disclosure of his federal criminal conviction, that another State would, in fact, grant him a medical license.

Petitioner's argument also is contrary to the statute. The I.G. has the authority to exclude Petitioner in this case. The Act, as amended at section 1128(c)(3)(E), requires that in cases of exclusion of an individual under section 1128(b)(4) of the Act, the period of exclusion be not less than the period during which the individual's license to provide health care is revoked, suspended, or surrendered. The plain language of the amendment at section 1128(c)(3)(E) indicates that the minimum length of the exclusion must be coterminous with the term of revocation, suspension, or surrender of the State license. As Petitioner surrendered or otherwise lost his license to practice medicine in the State of New Jersey, such surrender or loss of license clearly falls within the provisions of section 1128(b)(4) of the Act. Section 1128(c)(3)(E) of the Act requires that the period of the exclusion will not be less than the period during which his license to practice medicine in the State of New Jersey is surrendered or lost. Petitioner is required to obtain from the State of New Jersey licensing authority the same type of license that he surrendered or lost before he can be considered for reinstatement as a participant in Medicare and Medicaid.

Although Petitioner contends that the length of his exclusion is not reasonable, it has been held that under section 1128(c)(3)(E) of the Act, "no issue of reasonableness exists" where the exclusion imposed by the I.G. is coterminous with the revocation, suspension, surrender, or loss of a State license. Maurice Labbe, DAB CR488, at 3 (1997). As in Labbe, the exclusion period in this case is controlled by section 1128(c)(3)(E) of the Act. That section requires that Petitioner be excluded for a period no less than the period during which his license is revoked, suspended, surrendered, or lost. The coterminous exclusion imposed by the I.G. in this case is the minimum period required by law.

Petitioner also contends that it is impermissible to apply the statutory provisions of section 1128(c)(3)(E) of the Act, which were enacted in 1996, to his case, as he originally surrendered or lost his license in 1993. In this regard, I note that it is unlikely that the State of New Jersey will reinstate his medical license. The Board of Medical Examiners denied his petition for reinstatement on May 29, 1996, because its 1993 Consent Order provided that Petitioner was to surrender his medical license with prejudice. Because such denial is ongoing, I find no merit in Petitioner's retroactivity argument.

More importantly, Petitioner has presented no evidence that his case was pending before the I.G. at the time the amendments became effective, as the exclusion order was not issued until August 1997. Therefore, none of the concerns that arise when the law is changed after a proceeding is instituted and before a decision is issued appear to exist in this case. See Landgraf v. USI Film Products, 511 U.S. 244 (1994). In the absence of such considerations, a tribunal should apply the law in effect at the time it renders its decision. Landgraf, 511 U.S. at 273 (quoting Bradley v. School Bd. of Richmond, 416 U.S. 696, 711 (1974)).

Petitioner also asserts that it is unfair that his exclusion did not commence from the date that he surrendered or lost his license. I find no merit in this claim. That exclusions are remedial in nature and not punitive is well-established. Manocchio v. Kusserow, 961 F.2d 1539, 1541-42 (11th Cir. 1992). The I.G. has discretion to determine when to impose an exclusion. Laurence Wynn, M.D., DAB CR344 (1994). Neither the statute nor the regulations set any specific deadline for the I.G. to act. Chander Kachoria, R.Ph., DAB CR220 (1992), aff'd DAB No. 1380 (1993). An exclusion must take effect 20 days from the date of the I.G.'s notice of exclusion. Section 1128(c)(1) of the Act; 42 C.F.R. § 1001.2002. This means that Petitioner's exclusion must take effect 20 days from the date of the August 13, 1997 exclusion letter and not 20 days from the date he surrendered his license. Although Petitioner maintains that his exclusion should be retroactive, an ALJ is without authority to change the effective date of an exclusion against an individual by the I.G. Shanti Jain, M.D., DAB No. 1398 (1993); Stanley Karpo, D.P.M., DAB CR356 (1995); Kachoria, DAB CR220 (1992), aff'd DAB No. 1380 (1993); Wynn, DAB CR344 (1994); Samuel W. Chang, M.D., DAB No. 1198 (1990); Christino Enriquez, M.D., DAB CR119 (1991). Similarly, the I.G. has no authority to make exclusions retroactive and neither the ALJ nor the I.G. can move the effective date of the exclusion back to the date when Petitioner surrendered his license. See Karpo, at 12.

In Chander Kachoria, R.Ph., DAB CR220 (1992), aff'd DAB No. 1380 (1993), there was a three-year delay between the date of the I.G. initial investigation and the date when the petitioner received the exclusion notice from the I.G. The petitioner argued that his rights were violated by the length of time between the conviction and the exclusion letter. An appellate panel of the DAB ruled, however, that neither the statute nor the regulations set any specific deadline for the I.G. to act once an individual was convicted. Kachoria, DAB No. 1380, at 10. Accordingly, I find that the time which elapsed between Petitioner's surrender of his medical license and his receipt of the I.G.'s notice of exclusion does not violate his due process rights.

Petitioner also argues that a delay in imposing an exclusion is a violation of his Fifth Amendment property right to participate in Medicare and Medicaid, and that such exclusion detrimentally affects his employment. As support for his argument that he has a Fifth Amendment property interest in participation in Medicare and Medicaid, Petitioner cites Federal Deposit Insurance Corporation v. Mallen, 486 U.S. 230 (1988). Mallen, however, dealt with delay of a post-suspension hearing for a banker.

Although an ALJ lacks the authority to decide constitutional issues, I note that there is case law which holds that an individual does not have a property right in participating in Medicare and Medicaid, and that an exclusion is therefore not an unconstitutional taking of property. Kahn v. The Inspector General of the U.S. Department of Health and Human Services, 848 F. Supp. 432 (S.D.N.Y. 1994). Even assuming, for the sake of argument, that Petitioner has a Fifth Amendment property right to participate in Medicare and Medicaid, this property right would only come into question after an exclusion was imposed. As the United States Court of Appeals held in Ram v. Heckler, 792 F.2d 444 (4th Cir. 1986), an excluded party has a right to a prompt post-exclusion hearing. Through the hearing schedule set for this case, Petitioner has obtained the requisite due process.

#### CONCLUSION

I conclude that the I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4) of the Act. I conclude also that the period of exclusion imposed by the I.G. is the minimum period mandated by section 1128(c)(3)(E) of the Act. Accordingly, I sustain the I.G.'s determination to exclude Petitioner from participation in Medicare and Medicaid until such time as he obtains a valid license to practice medicine or provide health care in the State of New Jersey.

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**Joseph K. Riotto**  
**Administrative Law Judge**