

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Norman A. Klegon, D.O.,)	DATE: September 9, 1991
Petitioner,)	
- v. -)	Docket No. C-237
The Inspector General.)	Decision No. CR152

DECISION

By letter dated March 19, 1990, the Inspector General (I.G.) informed Petitioner that he was excluded from participating in the Medicare and Medicaid programs for seven years.¹ The I.G. stated that Petitioner was excluded as a result of his conviction of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, and that exclusions after such a conviction are authorized by section 1128(b)(3) of the Social Security Act (Act).

By letter dated April 4, 1990, Petitioner requested a hearing before an Administrative Law Judge (ALJ), and the case was assigned to me. On March 28, 1991, I conducted an in-person evidentiary hearing in Ann Arbor, Michigan. I have considered the evidence of record, the parties' arguments, and the applicable laws and regulations. I conclude that the I.G.'s determination to exclude Petitioner from participation in Medicare and Medicaid programs for seven years is excessive, and that an exclusion for six years is reasonable under the circumstances of this case.

¹ The Medicaid program is one of three types of federally-financed State health care programs from which Petitioner is excluded. I use the term "Medicaid" to represent all three of these programs which are defined in section 1128(h) of the Social Security Act.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the Act is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1991 Supp.). Section 1128(a)(1) of the Act requires the exclusion from Medicare and Medicaid of those individuals or entities "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs. Section 1128(c)(3)(B) provides for a five-year minimum period of exclusion for those excluded under section 1128(a)(1) of the Act. Section 1128(b) of the Act provides for permissive exclusions after convictions relating to fraud, license revocations, failure to supply payment information, or, as in this case, conviction for a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance under section 1128(b)(3).

II. The Federal Regulations.

The governing federal regulations are codified in 42 C.F.R. Parts 498, 1001, and 1002 (1990). Part 498 governs the procedural aspects of this exclusion case; Parts 1001 and 1002 govern the substantive aspects.

PROCEDURAL BACKGROUND

On March 19, 1990, the I.G. issued a notice of determination (Notice) informing Petitioner that he was being excluded from participation in Medicare and Medicaid for a period of seven years. The I.G. stated in his Notice that this exclusion is based on Petitioner's conviction in the United States District Court for the Eastern District of Michigan of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. By letter dated April 4, 1990, Petitioner requested a hearing to contest the I.G.'s determination. This case was docketed and assigned to me for a hearing and decision.

Thereafter, the I.G. filed a motion for summary disposition on all issues, accompanied by a supporting brief and exhibits. Petitioner responded with a memorandum in opposition to the I.G.'s motion for summary disposition, accompanied by exhibits. The I.G. filed a reply brief.

In an October 24, 1990 telephone status call, Petitioner, through counsel, requested an in-person hearing. On March 28, 1991, I conducted an in-person hearing in Ann Arbor, Michigan. Thereafter, the parties submitted post-hearing briefs and reply briefs.

ADMISSIONS

Petitioner admits that he was convicted of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, within the meaning of section 1128(b)(3) of the Act and that the I.G. has the authority to exclude him from participation in the Medicare and Medicaid programs. P. Pre-Hearing Br. 12.²

² References to the record and to Departmental Appeals Board cases in this decision will be cited as follows:

I.G.'s Exhibit	I.G. Ex. (number/page)
Petitioner's Exhibit	P. Ex. (number/page)
Petitioner's Pre-Hearing Brief	P. Pre-Hearing Br. (page)
Transcript	Tr. (page)
I.G.'s Post-Hearing Brief	I.G. Post-Hearing Br. (page)
Petitioner's Post-Hearing Brief	P. Post-Hearing Br. (page)
I.G.'s Post-Hearing Reply Brief	I.G. Post-Hearing Rep. Br. (page)
Findings of Fact and Conclusions of Law	FFCL
Departmental Appeals Board ALJ decisions	DAB Civ. Rem. (docket no./date)
Departmental Appeals Board Appellate decisions	DAB App. (decision no./date)

ISSUE

The issue is whether the seven-year exclusion imposed and directed against Petitioner is reasonable and appropriate under the circumstances of this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW³

Having considered the entire record, the arguments and submissions of the parties, and being fully advised herein, I make the following Findings of Fact and Conclusions of Law:

1. Petitioner was licensed to practice osteopathic medicine in the State of Michigan from 1966 to 1984. Tr. 136-139, 153.
2. During the period from October 1982 to July 1984, the Michigan State Police Department conducted an undercover investigation of Petitioner's prescribing and treatment practices. I.G. Ex. 13.
3. Based on the results of this investigation, the Michigan Department of Licensing and Regulation summarily suspended Petitioner's osteopathic license on October 4, 1984, on the grounds that the continued licensure of Petitioner constituted an imminent threat to the public health, safety and welfare. I.G. Ex. 6.
4. At an administrative hearing before the Michigan Department of Licensing and Regulation, conducted on February 22, 1985, Petitioner admitted that he prescribed controlled substances to several undercover agents without a legitimate medical purpose, during the period from October 1982 through July 1984. I.G. Exs. 5, 7.
5. Petitioner admitted that on some occasions he received cash payments for the illegal prescriptions of controlled substances dispensed to undercover agents. Petitioner admitted that on other occasions the undercover agents agreed to submit to medically unnecessary procedures such as wearing heart monitors or undergoing EKG testing in exchange for the illegal prescriptions. I.G. Exs. 5, 7.

³ Some of my statements in the sections preceding these formal findings and conclusions are also findings of fact and conclusions of law. To the extent that they are not repeated here, they were not in controversy.

6. Petitioner admitted that he billed Blue Cross-Blue Shield, a private insurance carrier, for the medically unnecessary heart monitor and EKG procedures. I.G. Exs. 2, 5, 7.

7. Petitioner admitted that he also provided work excuses to undercover agents without diagnosing a medical condition. I.G. Exs. 5, 7.

8. Petitioner admitted that he provided illegal work excuses to undercover agents in exchange for the agents' agreement to submit to unnecessary medical procedures which Petitioner subsequently billed to Blue Cross-Blue Shield. I.G. Ex. 5, 7.

9. On May 17, 1985, the Michigan Department of Licensing and Regulation issued a final order suspending Petitioner's license to practice osteopathic medicine for a minimum period of one year and assessing a \$2,000 fine. I.G. Ex. 7.

10. Petitioner's illegal activities were not limited to the agents involved in the undercover investigation. At the hearing before me, Petitioner admitted that his criminal activity involved approximately 15 to 20 individuals. Petitioner also estimated that during the period from January 1, 1982 to November 21, 1984, he billed Blue Cross-Blue Shield approximately \$5,482 for heart monitor and EKG procedures that were not medically justified. Tr. 175-179, see P. Ex. 2.

11. Federal Bureau of Investigation (F.B.I.) reports of interviews with former patients and other individuals associated with Petitioner at the time that he was practicing medicine reveal that Petitioner provided illegal prescriptions for controlled substances in exchange for sexual favors to at least three females. Tr. 37, 45, 60; I.G. Ex. 14.

12. On February 11, 1988, the grand jury for the United States District Court for the Eastern District of Michigan indicted Petitioner for 35 counts of mail fraud and controlled substance violations. I.G. Ex. 2.

13. Pursuant to a plea bargain agreement, Petitioner pled guilty to one count of mail fraud and one count of illegal distribution of a controlled substance. The United States District Court for the Eastern District of Michigan accepted Petitioner's guilty plea on January 18, 1989. I.G. Exs. 1, 3.

14. The court sentenced Petitioner to incarceration for a term of 30 months, fined him \$16,000, recommended psychological counseling, and ordered a special parole term of two years. I.G. Ex. 3.

15. Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act.

16. Petitioner was convicted of a criminal offense "relating to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance" within the meaning of section 1128(b)(3) of the Act.

17. The Secretary of the Department of Health and Human Services delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

18. On March 19, 1990, the I.G. excluded Petitioner from participating in the Medicare program and directed that he be excluded from participating in Medicaid.

19. The I.G. had the authority to exclude Petitioner pursuant to section 1128(b)(3) of the Act. FFCL 15-17.

20. The I.G. excluded Petitioner for a period of seven years.

21. Section 1128(b)(3) of the Act does not establish a minimum or maximum length for exclusions brought under that section.

22. The remedial purposes of section 1128 of the Act include protecting the integrity of federally funded health care programs from persons who have demonstrated by their conduct that they cannot be trusted to deal with program funds.

23. The remedial purposes of section 1128 of the Act also include protecting program beneficiaries and recipients from persons who have demonstrated by their conduct that they cannot be trusted to treat beneficiaries and recipients.

24. Petitioner admitted to committing a substantial number of offenses over a lengthy period of time involving significant amounts of money. FFCL 4-8, 10.

25. The serious nature of Petitioner's offenses is reflected in the Michigan Department of Licensing and Regulation's decision to summarily suspend Petitioner's

medical license as well as its subsequent final order to continue the suspension of Petitioner's license for a minimum period of one year. FFCL 3, 9.

26. The serious nature of Petitioner's offenses is reflected in the sentence of the United States District Court for the Eastern District of Michigan. FFCL 14.

27. Petitioner had a reputation for wrongdoing even before the death of his mother in February of 1982. Tr. 34, 102; I.G. Ex. 14/3, 7.

28. Petitioner was aware of the illegality of his actions and he repeatedly took affirmative steps to deceive authorities and conceal his wrongdoing. I.G. Ex. 13/3, 6, 23, 30; I.G. Ex. 14/31-32.

29. Petitioner was motivated to engage in the criminal activity for personal benefit, including desires for sexual gratification and for financial gain. Tr. 45, 60; I.G. Ex. 13/23; I.G. Ex. 14/12, 16, 28.

30. Dr. Rosenberg, Petitioner's treating psychiatrist, did not come into contact with Petitioner until approximately four years after the criminal activities occurred. Tr. 98-99.

31. Dr. Rosenberg's opinion that Petitioner's criminal offenses were caused by his grief over his mother's death is unpersuasive. Tr. 98-99, 101, 104-106, 114-116, 122, 133; I.G. Exs. 13, 14; FFCL 27-30.

32. Petitioner's willingness to file fraudulent claims with an insurance company and to issue illegal work excuses for his monetary benefit poses a threat to the fiscal integrity of the Medicare and Medicaid programs. FFCL 5-8, 10.

33. Petitioner's tendency to place his desires for sexual gratification and financial gain above the health and well-being of individuals under his care poses a threat to the health and safety of Medicare and Medicaid beneficiaries and recipients. I.G. Exs. 13, 14; FFCL 29.

34. Petitioner sought psychotherapy on his own initiative in 1984 after his license was suspended. This was the beginning of his rehabilitation. Tr. 156-157, 182.

35. Petitioner continued psychotherapy for a approximately a year and a half. He again sought psychotherapy on his own initiative with another

physician, Dr. Rosenberg, in 1990, after he was released from prison. Tr. 157-158; 162, 108.

36. Petitioner abused drugs at the time of his criminal activity in 1984. Tr. 114-116.

37. Petitioner has not tested positive for the use of addictive controlled substances since he came under Dr. Rosenberg's care. This is tangible evidence of his progress toward rehabilitation. Tr. 110.

38. Petitioner continues to need ongoing psychiatric supervision and periodic tests for drug use. Tr. 113-114, 120, 127.

39. Petitioner still does not accept complete responsibility for his actions. Tr. 165-169.

40. In 1988, Petitioner used his Missouri license to write prescriptions for himself for non-addictive medications, and he presented these prescriptions to a pharmacy located in Michigan. Tr. 61-64, 70-71.

41. Petitioner relied on the pharmacist to inform him if his prescribing conduct in 1988 was illegal. Tr. 180-181, 69.

42. Petitioner failed to recognize that he had a duty to independently determine whether his prescribing activities in 1988 were permissible. FFCL 41.

43. Petitioner's willingness to test the boundaries of the State of Michigan's prohibition against practicing medicine without determining with certainty the limits of permissible activity shows that he has made limited progress toward complete rehabilitation. FFCL 40-42.

44. Petitioner has repeatedly engaged in activities which test the limits of his exclusion sanction, and his failure to independently ascertain whether these activities are legal shows that he has made limited progress toward complete rehabilitation. Tr. 164, 186-188, 193-194.

45. In light of the progress Petitioner has made in correcting the behavior that led to his conviction, a seven year exclusion is extreme and excessive.

46. Petitioner's progress toward rehabilitation is genuine, but it is limited. Under the circumstances of this case, the remedial considerations of section 1128 of the Act will be served by a six year exclusion.

DISCUSSION

I. Petitioner Was "Convicted" Of A Criminal Offense "Relating To The Unlawful Manufacture, Distribution, Prescription Or Dispensing Of A Controlled Substance" Within The Meaning Of Section 1128(b)(3) Of The Act.

Section 1128(b)(3) of the Act authorizes the I.G. to exclude from participation in the Medicare and Medicaid programs individuals or entities who have been "convicted, under Federal or State law, of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance".

The first criterion that must be satisfied in order to establish that the I.G. had the authority to exclude Petitioner under section 1128(b)(3) of the Act is that Petitioner must be convicted of a criminal offense. The undisputed facts establish that: (1) Petitioner pled guilty to one count of illegal distribution of controlled substances and to one count of mail fraud and aiding and abetting in the United States District Court for the Eastern District of Michigan, and (2) the court accepted Petitioner's guilty plea. I.G. Exs. 1, 3. Section 1128(i)(3) defines the term "convicted" of a criminal offense to include those circumstances in which a plea of guilty by an individual or entity has been accepted by a federal, state, or local court. I, therefore, conclude that Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(b)(3) and 1128(i)(3) of the Act.

The second criterion that must be satisfied in order to find that the I.G. has the authority to exclude Petitioner under section 1128(b)(3) is that the criminal offense must relate to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The undisputed facts establish that Petitioner was convicted of one count of distribution of controlled substances by prescription in violation of 21 U.S.C. 841(a)(1). The criminal offense of distribution of a controlled substance by prescription in violation of a federal statute on its face constitutes the unlawful distribution and prescription of a controlled substance within the meaning of section 1128(b)(3) of the Act. The undisputed facts therefore satisfy the requirement that the criminal offense relates to the unlawful distribution or prescription of a controlled substance.

Petitioner admitted in his pre-hearing brief that he was "convicted" of a criminal offense "related to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance". P. Pre-Hearing Br. 12. The record supports these admissions. Thus, I conclude that the I.G. had the authority to impose and direct an exclusion against Petitioner from participation in the Medicare and Medicaid programs.

II. A Six Year Exclusion Is Appropriate And Reasonable In This Case.

A. The remedial purpose of section 1128 of the Act is to protect federally-funded health care programs and their beneficiaries and recipients from untrustworthy providers.

Since Petitioner has admitted, and I have concluded, that he was convicted of a criminal offense for which the I.G. may impose an exclusion pursuant to section 1128(b)(3) of the Act, the only contested issue in this case is whether the seven year exclusion imposed on Petitioner by the I.G. is reasonable and appropriate under the circumstances of this case. Resolution of this issue depends on analysis of the evidence of record in light of the exclusion law's remedial purpose. Lakshmi N. Murty Achalla, M.D., DAB App. 1231 (1991).

Section 1128 is a civil statute and Congress intended it to be remedial in application. The remedial purpose of the exclusion law is to enable the Secretary to protect federally-funded health care programs from misconduct. Such misconduct includes fraud or theft against federally-funded health care programs. It also includes neglectful or abusive conduct against program recipients and beneficiaries. See, S. Rep. No. 109, 100th Cong., 1st Sess. 1, reprinted in 1987 U.S. Code Cong. and Admin. News 682.

The key term to keep in mind is "protection", the prevention of harm. See, Webster's II New Riverside University Dictionary 946 (1984). As a means of protecting the Medicare and Medicaid programs and their beneficiaries and recipients, Congress chose to mandate, and in other instances to permit, the exclusion of untrustworthy providers. Through exclusion, individuals who have caused harm, or demonstrated that they may cause harm, to the federally funded health care programs or their beneficiaries or recipients are no longer permitted to receive reimbursement for items or services which they provide to Medicare beneficiaries or Medicaid recipients. Thus, untrustworthy providers are removed from a position

which provides a potential avenue for causing harm to the program or to its beneficiaries or recipients. See Vladimir Coric, DAB Civ. Rem. C-244 (1991).

Congress has not mandated that exclusions from participation in the federally-funded health care programs be permanent. Instead, section 1128(g) provides that an excluded provider may apply for reinstatement into the program at the end of the exclusion period. The Secretary may then terminate the exclusion if there is no basis for a continuation of the exclusion and there are reasonable assurances that the types of actions which formed the basis for the original exclusion have not recurred and will not recur.

By not mandating that exclusions from participation in federally-funded health care programs be permanent, Congress has allowed the I.G. the opportunity to give individuals a "second chance". The placement of a limit on the period of exclusion allows an excluded individual or entity the opportunity to demonstrate that he or she can and should be trusted to participate in the federally-funded health care programs as a provider of items and services to beneficiaries and recipients. See Thomas J. DePietro, R. Ph., DAB Civ. Rem. C-282 at 8 (1991).

The ultimate issue to be determined at a hearing pertaining to an exclusion imposed pursuant to section 1128 of the Act is whether the exclusion is reasonable. 42 C.F.R. 1001.128(a)(3). In adopting this regulation, the Secretary stated that:

The word 'reasonable' conveys the meaning that . . . [the I.G.] is required at the hearing only to show that the length of the [exclusion] determined . . . was not extreme or excessive.

48 Fed. Reg. 3744 (January 27, 1983). An exclusion determination will be held to be reasonable where, given the evidence of the case, it is consistent with the legislative purpose of protecting federally-funded health care programs and their beneficiaries and recipients and it is not extreme or excessive as a length of time necessary to establish that the excluded provider no longer poses a risk to covered programs and their beneficiaries and recipients. See Basem F. Kandah, R. Ph., DAB Civ. Rem. C-155 at 5 (1990).

In order to be adjudged reasonable under section 1128, an exclusion must satisfy the remedial objective of protecting federally-funded health care programs and

their beneficiaries and recipients from untrustworthy providers of items or services. An exclusion which satisfies this purpose may also have the ancillary benefit of deterring wrongdoing. However, an exclusion fashioned solely to achieve the objective of deterrence is punitive if it does not reasonably serve the Act's remedial objective. See Elias Goldstein, DAB Civ. Rem. C-104 (1989).

B. The fact finder must evaluate the totality of the circumstances of each case in light of the remedial purpose of the exclusion law in order to determine the appropriate length of an exclusion.

Guidance in determining the appropriate length of an exclusion is found in regulations contained in 42 C.F.R. 1001.125(b). These regulations were adopted by the Secretary prior to the enactment of the 1987 Amendments to the Act. The regulations specifically apply only to exclusions for "program-related" offenses. To the extent that they have not been repealed, however, they embody the Secretary's intent that they continue to apply, at least as broad guidelines, to the cases in which discretionary exclusions are imposed.⁴ The regulations require the I.G. to consider factors related to the seriousness and program impact of the offense, and to balance those factors against any factors that demonstrate trustworthiness. Leonard N. Schwartz, R. Ph., DAB Civ. Rem. C-62 (1989).

Since the exclusion remedy is not intended to be a punishment for wrongdoing, the regulations should not be applied as sentencing guidelines to the facts of a case to determine the degree of a provider's culpability with a view to determining the punishment he "deserves". Instead, the regulations provide guidance as to the factors that should be considered in order to make inferences about a provider's trustworthiness and the

⁴ There are proposed regulations which, if adopted by the Secretary, would supersede the regulations which presently govern exclusions. See Fed. Reg. 12205 (April 2, 1990). The I.G. urged that I use these proposed regulations as guidelines to evaluate the reasonableness of the exclusion imposed and directed against Petitioner. However, these proposed regulations have not been finally adopted, and it would not be appropriate for me to assume that they will be adopted in their proposed form. Moreover, it is not clear that, assuming these proposed regulations are adopted, they would apply retroactively to exclusions imposed prior to the date of their adoption.

length of time a provider should be excluded to provide the Secretary adequate opportunity to determine that a provider no longer poses a risk to the covered programs and to their beneficiaries and recipients.

A determination of the length of time necessary to establish that a provider is no longer a threat to the covered programs and to their beneficiaries and recipients necessitates an evaluation of the myriad facts of each case, including the nature of the offense committed by the provider, the circumstances surrounding the offense, whether and when the provider sought help to correct the behavior which led to the offense, how far the provider has come towards rehabilitation, and any other factors relating to the provider's character and trustworthiness. See Thomas J. DePietro, R. Ph., DAB Civ. Rem. C-282 (1991), See Joyce Faye Hughey, DAB App. 1221 (1991).

There is no precise formula which can be applied to calculate when a provider should be trusted and allowed to reapply for participation in the federally-funded health care programs. The totality of the circumstances of each case must be evaluated in order to reach a determination regarding the appropriate length of an exclusion. Id.

C. The nature and gravity of Petitioner's offenses are serious.

The parties presented a rich and thorough record in this case. The record shows that Petitioner engaged in a pattern of serious criminal activity over a period of several years. On October 20, 1982, the Michigan State Police Department began an undercover investigation of the prescribing and treatment practices of Petitioner. This investigation, involving five undercover agents, was initiated because a patient of Petitioner informed the Michigan State Police that it was possible to obtain prescriptions for controlled substances from Petitioner without any medical reason or physical examination. I.G. Ex. 13; see I.G. Ex. 5.

Based on the results of this investigation, the Michigan Attorney General filed a five count administrative complaint before the Michigan Department of Licensing and Regulation on October 2, 1984. I.G. Ex. 5. The serious nature of Petitioner's activities is reflected in the fact that two days later the Michigan Department of Licensing and Regulation summarily suspended Petitioner's osteopathic license on the grounds that the continued licensure of Petitioner "constitutes an imminent threat

to the public health, safety and welfare requiring emergency action". I.G. Ex. 6. There was an administrative hearing in this case on February 22, 1985, and at this hearing Petitioner stipulated that the factual and legal allegations of the complaint were true with some minor modifications.⁵

The administrative complaint alleged, and Petitioner admitted that, during the period from October 1982 through July 1984, Petitioner prescribed controlled substances to several undercover agents without a legitimate medical purpose. Petitioner admitted that on some occasions he received consideration in the form of cash payments for the prescriptions of controlled substances. On other occasions, Petitioner admitted that he issued prescriptions for controlled substances in exchange for the undercover agents' agreement to wear a heart monitor for 24 hours and to submit to EKG procedures. Petitioner subsequently billed Blue Cross-Blue Shield, a private insurance company, for the heart monitor and the EKG procedures. Petitioner admitted that he did not conduct a physical examination, obtain a medical history, or diagnose a condition which indicated that the heart monitor or EKG procedures were appropriate for any of the individuals.

By Petitioner's own admission, the provision of the heart monitor and EKG services in exchange for controlled substances was an unlawful transaction between Petitioner and the undercover agents to provide controlled substances without a legitimate medical need. In addition, Petitioner admitted that he billed the heart monitor and EKG procedures to Blue Cross-Blue Shield for the purpose of unlawfully obtaining third party reimbursement for services that were not medically necessary.

Petitioner admitted that during this period of time he also provided work excuses to several of the undercover agents without diagnosing a medical condition. Petitioner admitted that he provided these illegal work excuses in exchange for the undercover agents' agreement to wear a 24-hour heart monitor and to submit to EKG procedures. Petitioner then defrauded Blue Cross-Blue Shield by billing for these medically unnecessary services.

⁵ These minor modifications are listed on page 5 of the opinion issued by the Michigan Department of Licensing and Regulation. I.G. Ex. 7.

Subsequent to the hearing on the allegations contained in the administrative complaint, the Michigan Department of Licensing and Regulation issued a final order, dated May 17, 1985, suspending Petitioner's license to practice osteopathic medicine for a minimum period of one year and assessing a \$2,000 fine. I.G. Ex. 7. This action confirmed that upon hearing all the evidence at a full hearing, the Michigan Department of Licensing and Regulation viewed Petitioner's illegal activities to be of sufficient gravity to merit continued suspension of his license.

Petitioner's illegal activities were not limited to the five undercover agents involved in the investigation which led to the filing of the administrative complaint. Upon reviewing the results of the undercover investigation performed by the Michigan State Police Department, the F.B.I. pursued an investigation of Petitioner's prescribing and billing practices. Rick Germroth, a special agent with the F.B.I., testified at the hearing before me that he interviewed approximately 20 individuals who had been associated with Petitioner during his practice of osteopathic medicine, including former patients, employees, and pharmacists. Mr. Germroth stated that at least half of these individuals had received illegal prescriptions for controlled substances or illegal work excuses from Petitioner. Mr. Germroth's testimony, as well as the written reports of some of his interviews, reveals that Petitioner received various forms of compensation for providing illegal prescriptions and illegal work excuses. In some instances, individuals paid for the prescriptions and work excuses with cash. In instances where the individuals were insured by Blue Cross-Blue Shield, they paid for the prescriptions and work excuses by wearing the 24-hour heart monitor. In addition, several females agreed to exchange sexual favors for the prescriptions and work excuses. Tr. 14, 19, 21, 23, 37; see I.G. Ex. 14.

When asked at the March 28, 1991 hearing about the scope of his illegal activities, Petitioner estimated that his criminal activity involved approximately 15 to 20 individuals. The record shows that during the period between January 1, 1982 and November 21, 1984, Petitioner billed Blue Cross-Blue Shield a total of \$109,639.76 for heart monitor and EKG procedures. Petitioner estimated that approximately five percent of these billings, amounting to approximately \$5,428, were for procedures that were not medically justified. Even assuming that Petitioner's account of his illegal activities is understated, Petitioner has admitted to committing a substantial number of offenses involving significant

amounts of money over a lengthy period of time. Tr. 175-179, see P. Ex. 2.

On February 11, 1988, based on information supplied by the F.B.I., the grand jury for the United States District Court for the Eastern District of Michigan indicted Petitioner for 35 counts of mail fraud and controlled substance violations. Tr. 50-51; I.G. Ex. 2. Pursuant to a plea bargain agreement, Petitioner pled guilty to one count of mail fraud and one count of illegal distribution of a controlled substance. I.G. Ex. 1. The United States District Court for the Eastern District of Michigan convicted Petitioner for these offenses, and the serious nature of Petitioner's criminal activity is reflected in the sentence imposed by the court. The court sentenced Petitioner to 30 months of imprisonment and fined him \$16,000. In addition, the court recommended psychological counseling for Petitioner and ordered him to serve a special parole term of two years. I.G. Ex. 3.

D. Petitioner's argument that his criminal activities were caused by a grief reaction to his mother's death is unpersuasive.

Petitioner concedes that the acts which formed the basis for his license revocation and subsequent were "illegal" and "wrong". Tr. 153. However, he contends that a seven year exclusion is unreasonably lengthy because his criminal misconduct was the result of a severe grief reaction he suffered over the untimely death of his mother and that he has since taken the necessary steps to rehabilitate himself. P. Post-Hearing Br. 10.

Petitioner testified that he lived in his parents' home until he was 39 years old, and that he had an especially close relationship with his mother. Tr. 143-144. Petitioner stated that in 1982 his mother died suddenly of a heart attack and that she might have lived if her doctors had performed a simple test which would have shown the need for immediate surgery. Tr. 145-149. Petitioner testified that his mother's sudden death under these circumstances "shook" him "to the foundation" and undermined his belief in religion. Tr. 150-151. According to Petitioner, he became very despondent after his mother's death and he "saw things completely dark". Tr. 151. Petitioner stated that his depression at this time impaired his ability to know right from wrong, and that he began to treat his patients in a "robotic" way. Tr. 151, 166. Petitioner stated that at the time he engaged in the criminal activity from 1982 to 1984, he did not really know what he was doing and that he

dispensed controlled substances and billed Blue Cross-Blue Shield for medical procedures that were not indicated because of his depression. Tr. 166, 174-175.

Petitioner's testimony regarding the effect his mother's death had on him was supported by the expert testimony of Dr. Harvey J. Rosenberg, a psychiatrist with extensive experience in treating patients who have abused alcohol and drugs. Tr. 90, 91, 93. Petitioner's attorney referred Petitioner to Dr. Rosenberg at the time he was criminally indicted, for an evaluation of the circumstances surrounding his criminal activity. Dr. Rosenberg saw Petitioner approximately 10 times during the period from July 1988 to September 1988 for the purpose of evaluating him. Tr. 98-99. Dr. Rosenberg did not see Petitioner again until after Petitioner completed his prison sentence in 1990.⁶ At that time, Petitioner on his own initiative contacted Dr. Rosenberg and requested that he treat him on an ongoing basis. Tr. 107-108.

Dr. Rosenberg testified that, in his opinion, Petitioner suffered a major depressive disorder as a result of his mother's death. Tr. 101. Dr. Rosenberg stated that Petitioner's depression was compounded by "the fact that she died in a malpractice situation", and that Petitioner felt guilty that he, as a physician, was unable to prevent his mother's death. Tr. 106. Dr. Rosenberg expressed the view that Petitioner's depression caused him to abuse drugs and the depression, combined with the drug abuse, caused him to engage in his illegal activities. According to Dr. Rosenberg, Petitioner was disabled from practicing medicine competently during the period following his mother's death. He was unable to function and think clearly. His impaired mental condition robbed him of his ability to distinguish right from wrong. Dr. Rosenberg, like Petitioner, used the word "robotic" to describe Petitioner's behavior during the period from 1982 to 1984. He stated that Petitioner automatically gave patients whatever they asked for and that Petitioner was not thinking clearly when he filed improper claims with Blue Cross-Blue Shield. Tr. 104-106, 114-116, 122, 133. Dr. Rosenberg further expressed the opinion that it is unlikely that Petitioner will repeat his criminal activities in the future. He reasoned that Petitioner's "anti-social" behavior was precipitated by the unique circumstance of his mother's

⁶ Although Petitioner was sentenced to 30 months of imprisonment, he was required to serve only 13 months of this prison term. Tr.159

death and that since Petitioner is not as close to anyone else as he was to his mother, he will probably never suffer the same depressive disorder again. Tr. 113, 128-129.

I am not persuaded by Petitioner's explanation for his criminal activities or by Dr. Rosenberg's corroborating opinion regarding the cause of Petitioner's misconduct. I note that Dr. Rosenberg's first contact with Petitioner was not until July of 1988, several years after the criminal activity in question occurred. While I was impressed by Dr. Rosenberg and his testimony concerning Petitioner's rehabilitation, Dr. Rosenberg did not have the opportunity to evaluate Petitioner near the time that Petitioner was engaging in the criminal misconduct. Thus, I conclude that Dr. Rosenberg's opinion regarding Petitioner's state of mind at the time of the criminal misconduct is speculative and unconvincing. In addition, Dr. Rosenberg's opinion testimony on this issue is controverted by information contained in the reports of the Michigan State Police Department's undercover investigation and the F.B.I. reports of interviews with witnesses. I accord greater weight to the undercover investigative reports than I do to Dr. Rosenberg's opinion because they were contemporaneous accounts of the criminal activities in question. I also rely on the F.B.I. witness reports because they are accounts of statements made by people who associated with Petitioner at the time of the criminal activity.

Dr. Rosenberg characterizes Petitioner as basically a moral individual who was temporarily impaired emotionally by the death of his mother. According to Dr. Rosenberg, Petitioner's impairment caused him to be easily manipulated by individuals who wanted illegal controlled substances and it deprived him of his ability to distinguish right from wrong. I accept that Petitioner experienced depression as a result of his mother's death. I also accept that Petitioner abused drugs during the period of his criminal activity, as Dr. Rosenberg contends. I do not, however, accept that the death of Petitioner's mother impaired him so severely that he lacked the capacity to appreciate the wrongfulness of his actions or that it caused him to be manipulated and led astray by others.

On the contrary, the picture that emerges from the investigative reports contained in the record is that Petitioner was an individual who engaged in wrongdoing even before the death of his mother and that he was motivated to engage in this wrongdoing for reasons related to his desires for financial gain and sexual

gratification. This evidence also establishes that Petitioner was aggressive and enterprising in pursuing his criminal activities, that he was aware that his actions were wrong, and that he continually developed schemes to avoid detection.

For example, John D. Patton, Jr., a former patient of Petitioner's, told F.B.I. Agent Germroth that he began seeing Petitioner in 1978 for the sole purpose of receiving work release excuses. Mr. Patton estimated that he received "100 plus" work excuses and that none of them were for legitimate medical reasons. I.G. Ex. 14/3. Similarly, Toran Stewart, Jr., another former patient, told Agent Germroth that a friend recommended Petitioner to him in the early 1970s because Petitioner was an easy source of work release excuses. Mr. Stewart stated that he repeatedly received work excuses without first receiving a medical examination. I.G. Ex. 14/7. In addition, Agent Germroth testified that Verna Blacklock was introduced to Petitioner by her sister in 1977 for the purpose of obtaining controlled substances from him, but that she was not complaining of the symptoms of any illness when she first started seeing Petitioner. Tr. 34. This evidence shows that, even prior to the death of his mother, Petitioner had the reputation for being a physician who dispensed work excuses and controlled substances without adequate medical justification. In addition, Mercedes Polske, a former receptionist of Petitioner's, who worked for him from August 1980 to September 1982, told Agent Germroth that while Petitioner experienced some depression after his mother's death, she did not observe any change in Petitioner's care for his patients. I.G. Ex. 14/38. Petitioner's mother died in February of 1982. Tr. 102. The fact that Petitioner's receptionist did not observe any noticeable change in Petitioner's care for his patients during the seven month period after his mother's death undermines Petitioner's testimony that he was dramatically impaired by his mother's death.

Although Dr. Rosenberg attempts to advance the view that Petitioner engaged in wrongdoing because of a depressive disorder, the investigative reports provide ample evidence that he engaged in criminal misconduct in order to obtain sexual gratification or to benefit himself financially. According to statements made by Verna Blacklock, Petitioner provided her with daily injections of the drugs vistol and nubane from mid-1981, prior to Petitioner's mother's death, to 1984, in exchange for sexual favors. I.G. Ex. 14/12. Based on Agent Germroth's testimony, at least two other women told him

that they granted Petitioner sexual favors in exchange for controlled substances. Tr. 45, 60.

Verna Blacklock also worked for Petitioner as a receptionist on a fill-in basis from 1981 to 1984. She told Agent Germroth that patients without health care insurance were not ever asked to wear heart monitors. This suggests that Petitioner prescribed this procedure only when he knew that he would be able to obtain financial reimbursement for it. In addition, Verna Blacklock stated that Petitioner often bragged about how much money he was making by having patients with insurance coverage wear heart monitors. I.G. Ex. 14/15-16. Patricia Smith, another former patient who worked as a receptionist, also told Agent Germroth that Petitioner had bragged to her about how much money he was making from Blue Cross-Blue Shield. I.G. Ex. 14/28. In addition, one of the agents involved in the undercover investigation reported that when Petitioner asked him to submit to the heart monitor test, he stated that he appreciated the fact that the officer was willing to help him out and that "these recession times were also tough on doctors". I.G. Ex. 13/23. Petitioner's fraudulent claims against Blue Cross-Blue Shield were not the result of unclear thinking, as Dr. Rosenberg suggests. Instead, this evidence shows that Petitioner was clearly aware that his criminal activity was profitable and that he engaged in this activity to advance his financial interests.

Dr. Rosenberg's portrayal of Petitioner as an individual who was psychologically impaired to the degree that he did not know right from wrong and was easy prey for the manipulations of others is not substantiated by the record. Instead, the record is replete with examples where Petitioner consciously took steps to avoid having his illegal activities detected by authorities. This shows that he was very aware of the illegality of his actions and that he actively tried to conceal his wrongdoing. For example, Petitioner reportedly told Sherry Hyatt, a former patient and sexual partner, that he would not prescribe a certain kind of drug to her because he "might get in trouble with the law". I.G. Ex. 14/31. In addition, Sherry Hyatt stated that Petitioner often used names other than her name on prescriptions in order to conceal the volume of prescriptions he was writing for her. I.G. Ex. 14/32. Petitioner repeatedly told undercover agents that he was unable to prescribe certain types of drugs in the amount they requested because authorities were monitoring these drugs. I.G. Ex. 13/3, 6. During one visit with an undercover agent, Petitioner explained that he might have to stop

prescribing amphetamines after a 90 day period. He showed Petitioner a letter from the Attorney General which stated that it was illegal for a doctor to prescribe amphetamines for more than a 90 day period. Petitioner then told the undercover agent not to worry, because at the end of the 90 days he would "switch to Preludin, which is a synthetic but just as good". He also stated that "there was always ways to work around these things". I.G. Ex. 13/23. When another undercover agent asked Petitioner if he could obtain controlled substances and work excuses in exchange for wearing a heart monitor, Petitioner told him that they would have to be "very discreet". I.G. Ex. 13/30.

The record provides ample evidence that Petitioner was in control of his actions. Rather than passively being manipulated by others, he was aggressive and enterprising in pursuing his criminal activities. Bojica Bojicic, a former patient of Petitioner's, told Agent Germroth that Petitioner asked him to inform others at the plant at which he worked that he would provide narcotics or work excuses in exchange for patient insurance billing privileges. Petitioner gave Mr. Bojicic his business cards and asked him to distribute them to his coworkers. Mr. Bojicic estimated that he referred over 50 people to Petitioner. I.G. Ex. 14/19. This evidence suggests that Petitioner took the initiative to expand the scope of his criminal activities and that he pursued these activities on a larger scale than he admitted to me at the hearing.

The nature of Petitioner's criminal activity was complex and calculated, and the record shows that Petitioner engaged in it for his personal benefit. There is no evidence which suggests that Petitioner committed fraud against the Medicare and Medicaid programs. However, it can be inferred from the fact that Petitioner filed fraudulent claims with a private insurance company that he is untrustworthy and that he poses a threat to the fiscal integrity of the Medicare and Medicaid programs. In addition, Petitioner's willingness to abuse his position as a physician to improperly issue work excuses for his personal financial gain convinces me that he is untrustworthy and that he poses a threat to the integrity of the Medicare and Medicaid programs.

Even more troubling is Petitioner's use of his medical license to prescribe potentially dangerous controlled substances without medical necessity. This leads me to conclude that he poses a threat to the health and safety of Medicare and Medicaid beneficiaries and recipients. Petitioner repeatedly demonstrated by his actions that he was indifferent to the health and well-being of

individuals under his care. Sherry Hyatt reported to Agent Germroth that Petitioner prescribed a variety of controlled substances to her even though he knew that she was a heroin addict. He also prescribed diet pills even though she was extremely thin. She reported that on one occasion, she went into convulsions after Petitioner gave her an injection of an unknown substance. Ms. Hyatt paid for access to the drugs by providing sexual favors to Petitioner. I.G. Ex. 14/31-32. This evidence demonstrates that Petitioner actively encouraged Ms. Hyatt's dependency on narcotics in order to have an assured source of sexual gratification. Thus, he placed a higher value on his own desire for sexual pleasure than he did on the health of an individual under his care. This pattern of behavior was repeated with several other women. Verna Blacklock reported that she experienced "traumatic withdrawal symptoms" after Petitioner's medical license was suspended in 1984 and she no longer had a source of narcotics. I.G. Ex. 14/15. Agent Germroth also testified that he uncovered evidence that Petitioner prescribed drugs to Ms. Blacklock in combinations which can be physically harmful. Tr. 35-37.

By any measure, Petitioner's criminal activities were serious in nature and I find that the remedial considerations of the Act justify a lengthy exclusion in this case. There are, however, circumstances in this case which mitigate against an exclusion as long as seven years.

E. There is evidence that Petitioner has made some progress in his rehabilitation.

Were it not for evidence of Petitioner's rehabilitation, a seven year exclusion would easily be justified in this case. While Petitioner did not stop his criminal activity until his license was revoked, there is evidence that he first began steps toward rehabilitation at this point. Petitioner testified that his license revocation was a traumatic event for him and that it caused him to be aware of the need for psychological counseling. The record shows that Petitioner on his own initiative sought psychotherapy at this time. In addition, Petitioner was licensed to practice medicine in two other states, but he testified that he did not attempt to establish a practice in those locations because he wanted to "resolve the issues" that got him into trouble and to get himself "straightened out". Tr. 156-157, 182.

Petitioner stopped his psychotherapy after approximately a year and a half because he thought that he had progressed as far as he could with that doctor. Tr. 157-

158. Petitioner on his own initiative sought psychological treatment in 1990 from Dr. Rosenberg after he was released from prison. Tr. 162, 108. Dr. Rosenberg testified that Petitioner's psychological health had improved substantially between the time that he evaluated him in 1988 and the time he started treating him in 1990. He was of the opinion that the experience of going to prison had a positive effect on Petitioner. Dr. Rosenberg also testified that Petitioner has continued to show improvement under his care. Tr. 124-125. Dr. Rosenberg reported that he has periodically administered unannounced urine drug screen tests on Petitioner and there has not been any evidence of use of scheduled controlled substances based on these tests. Tr. 110. This is significant because it is tangible evidence that Petitioner has made progress in his rehabilitation since 1984 when he was abusing drugs.

F. While Petitioner's progress toward rehabilitation is genuine, it is limited.

Although Petitioner has progressed in his rehabilitation, I find that the circumstances of this case do not support a conclusion that an exclusion of less than six years is reasonable.

While Dr. Rosenberg expressed the opinion that Petitioner is trustworthy now, he qualified this by recommending that Petitioner continues to need "some ongoing psychiatric supervision", and that he should continue to be tested for drug use periodically. Tr. 113-114, 120. Dr. Rosenberg recommended that this should continue "over a couple of year period of time". Tr. 127. Petitioner's criminal misconduct was not only unlawful, but it endangered the health and welfare of others. In view of the serious damage to the health of others which can result from the unlawful distribution of controlled substances, I find that a margin of safety is necessary to protect Medicare and Medicaid beneficiaries and recipients from the possibility that Petitioner might again engage in this conduct.

I am also troubled by Petitioner's testimony before me which shows that he still has tendencies to rationalize his misconduct. I recognize that Petitioner stated that he knows that his misconduct was "wrong" and "illegal" and he has also expressed remorse for it. Tr. 153, 174. I am, however, disturbed that Petitioner persists in characterizing his criminal activities as misjudgments and the result of the manipulative behavior of others. Tr. 165-169. This is evidence that Petitioner still does not accept full responsibility for his actions.

The I.G. has also brought forward evidence showing that as recently as 1988, Petitioner presented approximately 40 prescriptions for medications for himself to a pharmacy in the State of Michigan without possessing a Michigan license. Instead, Petitioner used his Missouri license to write prescriptions for himself, to be filled by a pharmacy located in Michigan. I.G. Ex. 14/33-37; Tr. 61-64, 70-71. The I.G. also cites relevant portions of the Michigan Public Health Code to show that this conduct is illegal under Michigan state law. I.G. Post-Hearing Br. 22-25.

Petitioner admits that he used his Missouri license to write prescriptions for himself and that he had these prescriptions filled in Michigan in 1988. Tr. 61-64. He points out that these medications were not for scheduled controlled substances. Instead, they were non-addictive prescription medications that Petitioner used to treat himself for various ailments. P. Post-Hearing Br. 12; see Tr. 70-71. Petitioner also suggests, through the testimony of Dr. Rosenberg, that it is permissible for a physician licensed in one state to write prescriptions using that license in another state. Dr. Rosenberg testified that on occasion he has used his medical license in one state to prescribe medications for patients located in another state. Tr. 97-98.

While I recognize that each state may have enacted provisions which allow persons licensed in one state to engage in the limited practice of medicine in another state for certain purposes, Petitioner has not cited any specific provisions of the Michigan Health Code or other statutory law of Michigan to show that his prescribing activity in 1988 is permissible under Michigan state law. Instead, Petitioner attempts to excuse his conduct by pointing out that he did not deceive the pharmacist when he presented the prescriptions in question. Petitioner testified that he informed the pharmacist that he resided in Michigan and that he was licensed in Missouri. The record also shows that the prescription clearly indicated that it was written using a Missouri license number. Petitioner stated that he was not aware that this prescribing conduct was illegal and that he relied on the pharmacist to tell him if it was not permissible to write a prescription for himself in Michigan using a Missouri license. Tr. 180-181, 69.

I agree that Petitioner's conduct would have been more serious if he had actively deceived the pharmacist regarding his licensure status. However, even under the circumstances as Petitioner describes them, I infer that this conduct demonstrates a lack of trustworthiness.

Petitioner's explanation that he relied on the pharmacist to inform him of the legality of writing prescriptions shows that he did not recognize that he had a duty to independently ascertain the legal ramifications of his license suspension in Michigan. Petitioner's license to practice medicine in Michigan was suspended in 1984. As recently as 1988, Petitioner engaged in activities which tested the boundaries of Michigan's prohibition against practicing medicine. Petitioner knew that his prescribing conduct was questionable, but he did not take any affirmative steps to independently determine whether his activities were permissible. This shows a reckless disregard for the law, which I find to be troubling.

To Petitioner's credit, he has participated in a fellowship program with the Chicago College of Osteopathic Medicine and he has worked in a rural medicine environment in the State of Nevada subsequent to his release from prison. Petitioner testified that in both of these settings he assisted in providing medical services to patients under the supervision of licensed physicians. However, Petitioner also stated that the patients who received these services may have been beneficiaries or recipients of Medicare or Medicaid. Tr. 163-164, 186-188, 193-194. The I.G. points out that it is possible that Petitioner may have violated his exclusion sanction in the course of assisting in the provision of services to patients in these settings. While the I.G. does not prove that Petitioner violated his exclusion sanction, he argues that "regardless of whether the petitioner actually violated his exclusion, the fact that he engaged in the questionable activity without making inquiry into whether it was permissible is evidence that petitioner is not trustworthy". I.G. Post-Hearing Rep. Br. 4.

Petitioner's conduct would be far more serious if the I.G. had demonstrated that he violated the exclusion sanction or that he misled his supervising physicians about the fact that he has been excluded. However, even absent a showing that Petitioner violated the exclusion sanction or that he deceived others about his exclusion, I am still troubled that he has again shown a propensity to engage in activities which test the limits of restrictions placed on him without ascertaining whether it is permissible to engage in such activities. Again, this shows a careless disregard for the law.

Having considered all the evidence, I find that an exclusion of seven years is unreasonable. As early as 1984, Petitioner recognized that he needed to be rehabilitated, and he sought psychotherapy on his own

initiative. Petitioner again sought psychotherapy on his own initiative in 1990. Petitioner's treating psychiatrist has testified that he has made substantial progress in being rehabilitated and that he has not abused drugs since he has been under his care. Petitioner has also made extensive efforts to update his medical education. While taking continuing education courses does not directly show that Petitioner is trustworthy, it is an encouraging indication that Petitioner is sincere about taking positive steps to better himself.

However, I do not find that Petitioner's rehabilitation is so complete that he can be entrusted with caring for Medicare and Medicaid patients in the near future. In view of the serious nature of Petitioner's criminal activity and the potential dangers to Petitioner's future patients should Petitioner resume his criminal activities, I find that a lengthy exclusion is justified. Furthermore, Petitioner still shows destructive tendencies to rationalize his behavior. In addition, he has demonstrated a disturbing tendency in the recent past to engage in questionable activities without recognizing his duty to determine the legal limits of his actions. Under the circumstances of this case, I find that an exclusion of six years is reasonable to achieve the remedial purposes of the Act.

CONCLUSION

Based on the evidence in this case and the law, I conclude that the seven year exclusion imposed against Petitioner is excessive and unreasonable, and I modify it to six years.

/s/

Charles E. Stratton
Administrative Law Judge