DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	
Leonard N. Schwartz, R. Ph.,	DATE: August 4, 1989
Petitioner,	
- v. -	Docket No. C-62
The Inspector General.	DECISION CR 36

DECISION OF ADMINISTRATIVE LAW JUDGE

Petitioner timely requested a hearing, protesting the Inspector General's (the I.G.'s) determination to exclude him from participation in the Medicare program and to direct that he be excluded from participation in State health care programs, for eight years, pursuant to section 1128(b)(3) of the Social Security Act, 42 U.S.C. 1320a-7(b)(3).[1] I conducted a hearing in Philadelphia, Pennsylvania on March 28, 1989. Based on the evidence introduced at the hearing, and on applicable law, I conclude that the exclusions imposed on and directed against Petitioner in this case are reasonable.

BACKGROUND

On October 6, 1988, the I.G. sent notice to Petitioner, advising him that he was being excluded from Medicare and State health care programs for a period of eight years. Petitioner was advised that his exclusions were being imposed and directed pursuant to 42 U.S.C. 1320a-7(b)(3), and were due to his conviction in the United States District Court for the Eastern District of Pennsylvania

[1] "State health care program" is defined by section 1128(h) of the Social Security Act, 42 U.S.C. 1320a-7(h), to include any State Plan approved under Title XIX of the Act (such as Medicaid).

of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The I.G. told Petitioner that the eight-year exclusions determined in his case were based on the following circumstances: (1) Petitioner was convicted of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance; (2) the criminal acts resulting in the conviction were committed over a more than one-year period of time; (3) the violations had a significant adverse physical, mental or financial impact on individuals; and (4) the sentence resulting from the criminal conviction included incarceration.

On October 24, 1988, Petitioner timely requested a hearing as to the exclusions, arguing that his conviction was for a "record keeping" violation of 21 U.S.C. 843(a)(4)(A) and was not a conviction of a criminal offense relating to the manufacture, distribution, prescription, or dispensing of a controlled substance. He also denied that the record contained evidence that this violation had a significant adverse physical, mental or financial impact on individuals. Petitioner noted that he was in a court-approved work release program and engaged in activity to support his family. Petitioner asserted that for these reasons the exclusions imposed on and directed against him were unreasonable.

The case was assigned to me for hearing and decision. I conducted a prehearing conference on December 15, 1988, at which time a hearing was scheduled for February 27, 1989, in Philadelphia. Petitioner subsequently filed a request to stay the exclusions imposed on and directed against him. He also requested a postponement of the hearing in his case. I granted Petitioner's request for a postponement, and rescheduled the hearing for March 28, 1989. On March 1, 1989, I issued an Order denying Petitioner's request for a stay of the exclusions, ruling that I lacked authority to grant the requested relief.

APPLICABLE LAW AND REGULATIONS

A. Statutes.

1. Section 1128 of the Social Security Act, 42 U.S.C. 1320a-7(a)-(i).

2. Controlled Substances Act, 21 U.S.C. 801 et seq.

B. Regulations.

1. 21 C.F.R. Chapter II--Drug Enforcement Admin., Dept. of Justice.

2. 42 C.F.R. Part 1001--Program Integrity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Prior to late 1987, Petitioner was the owner, operator and sole pharmacist of Cadmus Pharmacy, 1941 Spring Garden Street, Philadelphia, Pennsylvania. Tr. at 110-111.[2]

2. On September 25, 1986, an agent of the Drug Enforcement Administration (the D.E.A.) performed an accountability investigation of the drug Preludin at Cadmus Pharmacy. Tr. at 86.

3. This investigation was prompted by complaints that pharmacies and doctors in Philadelphia were purchasing more Schedule II stimulants than in any state in the country. Tr. at 86.

4. As defined by law, a Schedule II controlled substance is a drug which meets the following criteria: (1) it has a high potential for abuse; (2) it has a currently accepted medical use in the United States or a currently accepted medical use with severe restrictions; and

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[2] The exhibits, transcript of the hearing, and the parties' briefs will be cited as follows:

Petitioner's Exhibit	P. Ex. (number)/(page)
I.G.'s Exhibit	I.G. Ex. (number)/(page)
Transcript	Tr. at (page)
I.G.'s Trial Memorandum	I.G.'s Trial Memorandum
Petitioner's Trial Memorandum	P.'s Trial Memorandum at (page)
I.G.'s Reply Brief	I.G.'s Reply Brief at (page)
Petitioner's Post-Hearing Memorandum	P.'s Post-Hearing Memorandum at (page)
I.G.'s Findings and Conclusions	I.G.'s Findings and Conclusions at (page)
Petitioner's Reply Brief	P.'s Reply Brief at (page)
I.G.'s Reply Brief	I.G.'s Reply Brief at (page)

(3) abuse of the drug may lead to severe psychological or physical dependence. 21 U.S.C. 812(b)(2).

5. Cadmus Pharmacy was identified in these complaints as one of the pharmacies that was purchasing excessive quantities of Schedule II stimulants. Tr. at 86.

6. Preludin is a Schedule II controlled substance. 21 C.F.R. 1308.12(d).

7. Preludin (phenmetrazine hydrochloride) is an amphetamine. I.G. Ex. 6/1-2.

8. Preludin is a highly abused controlled substance in certain areas of the country. I.G. Ex. 14-3.

9. Because of a high potential for abuse, no controlled substance in Schedule II may be dispensed without a written prescription from a physician (except in emergency situations). I.G. Ex. 14-3.

10. Each time a pharmacist dispenses a Schedule II controlled substance, a legitimate prescription must be received and retained by the pharmacist. I.G. Ex. 14-3.

11. At the time of the D.E.A. investigation, Cadmus Pharmacy was the eleventh highest purchaser of Preludin in the Philadelphia area. Tr. at 97.

12. Petitioner was unable to account to the D.E.A. agent for 34,356 Preludin tablets, or about 78 percent of the Preludin purchased by Petitioner during the period beginning May 1, 1985 and ending September 25, 1986. Tr. at 86-88.

13. On May 22, 1987, Petitioner agreed to waive indictment and to be charged by information with two felony counts of violating 21 U.S.C. 843(a)(4)(A).[3] I.G. Ex. 8.

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[3] This section provides that it:

> (S)hall be unlawful for any person knowingly or intentionally . . . to furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed under this subchapter . . . .

21 U.S.C. 843(a)(4)(A).

14. Petitioner was charged in federal court with knowingly and intentionally omitting material information from required records in dispensing controlled substances. I.G. Ex. 9/1-2.

15. Petitioner agreed to plead guilty to two counts of violating 21 U.S.C. 843(a)(4)(A). I.G. Ex. 10/1.

16. On December 8, 1987, Petitioner was convicted of two counts of violating 21 U.S.C. 843(a)(4)(A); was sentenced to 18 months' imprisonment, five years' probation, and was fined $20,000.00. P. Ex. 8.

17. The criminal offense of which Petitioner was convicted on December 8, 1987 is related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Findings 4, 6-10; 13-16; 42 U.S.C. 1320a-7(b)(3).

18. On October 6, 1988, the I.G. notified Petitioner that he was being excluded from participation in the Medicare program and any State health care program for a period of eight years as a result of his conviction of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. I.G. Ex. 3.

19. Petitioner was notified that he was being excluded pursuant to Section 1128(b)(3) of the Social Security Act, 42 U.S.C. 1320a-7(b)(3). I.G. Ex. 3.

20. Petitioner was further advised that the length of his exclusions was in part determined by the following circumstances: (1) the criminal acts resulting in Petitioner's conviction were committed over a period exceeding one year; (2) Petitioner's violations had a significant adverse physical, mental or financial impact on individuals; and (3) Petitioner's sentence resulting from his conviction included a period of incarceration. I.G. Ex. 3/2.

21. A remedial purpose of Section 1128 of the Social Security Act is to protect beneficiaries and program funds by mandating or permitting the Secretary to disqualify or to direct disqualification from participation in Medicare and State health care programs those individuals or entities who had demonstrated by their conduct that they could not be trusted to administer program funds. 42 U.S.C. 1320a-7(a)-(i).

22. The Secretary of Health and Human Services (the Secretary) delegated to the I.G. the duty to impose and

direct exclusions pursuant to Section 1128 of the Social Security Act. 48 Fed. Reg. 21662 (May 13, 1983).

23. The exclusion provisions of Section 1128 of the Social Security Act establish neither minimum nor maximum exclusion terms in those circumstances where the I.G. has discretion to impose and direct exclusions. 42 U.S.C. 1320a-7(b)(1)-(14).

24. The Secretary has discretion to exclude Petitioner from participating in the Medicare program and to direct that he be excluded from participating in State health care programs, as a result of Petitioner's conviction of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Finding 17; 42 U.S.C. 1320a-7(b)(3).

25. The offenses of which Petitioner were convicted are serious criminal offenses, resulting in his incarceration. Finding 16.

26. Petitioner perpetrated the conduct which resulted in his conviction over a 17-month period, a lengthy period of time. Finding 12.

27. The conduct engaged in by Petitioner endangered the health and safety of the individuals who obtained Preludin from Cadmus Pharmacy. Findings 4-12.

28. Petitioner succumbed to personal and psychological pressures to engage in conduct which he knew was illegal. Tr. at 112, 117, 119.

29. The I.G.'s determination that, given Petitioner's conduct, he cannot be trusted as a Medicare or Medicaid provider for eight years, is reasonable. Findings 25-28; see 42 C.F.R. 1001.125(b)(1)-(7).

30. The I.G.'s determination that relatively lengthy exclusions are justified in this case in order to deter other providers from engaging in unlawful conduct, is reasonable. Findings 25-28; see 42 C.F.R. 1001.125(b)(1)-(7).

31. Petitioner has not established that the personal and psychological pressures to which he was subject make the I.G.'s determinations concerning the appropriate length of exclusions to impose on Petitioner unreasonable. See Tr. at 112, 117, 119.

32. Petitioner has not proven a community need for his services as a pharmacist which establishes that the

I.G.'s determinations concerning the appropriate length of exclusions to impose on Petitioner are unreasonable. See Tr. at 115-116.

33. Even if Petitioner had proven a community need for his services as a pharmacist, that would not establish that the I.G.'s determinations concerning the appropriate length of exclusions to impose on Petitioner are unreasonable.

34. Evidence offered by Petitioner showing that he is a person of good moral character does not establish that the I.G.'s determinations concerning the appropriate length of exclusions to impose on Petitioner are unreasonable. See P. Ex. 1-4.

35. Evidence offered by Petitioner showing that he had no prior criminal record, and that he cooperated with authorities prosecuting his criminal case, does not establish that the I.G.'s determinations concerning the appropriate length of exclusions to impose on Petitioner are unreasonable. See P. Ex. 7, 8; I.G. Ex. 7-10; 14.

36. Petitioner has not established that the reduction of his prison sentence to a work-release program makes the exclusions imposed on him unreasonable. See Tr. at 45-46.

37. Petitioner has not established that his age makes the exclusions imposed on him unreasonable. See Tr. at 46.

38. Petitioner has not established that, in light of mitigating factors, the I.G.'s determinations concerning the appropriate length of exclusions to impose on Petitioner are unreasonable. Findings 31-37.

39. The I.G.'s determination to impose an eight-year exclusion against Petitioner from participating in the Medicare program, and to direct that Petitioner be excluded from participating in State health care programs, for eight years, is reasonable. Findings 30-31; 42 U.S.C. 1320a-7(b)(1)-(14); see 42 C.F.R. 1001.125(b)(1)-(7); 42 C.F.R. 1001.128.

ANALYSIS

1. Petitioner was convicted of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, within the meaning of 42 U.S.C. 1320a-7(b)(3).

A determinative issue in this case is whether Petitioner's conviction, for knowingly and intentionally omitting material information from records required by law on the dispensing of controlled substances, pursuant to 21 U.S.C. 843(a)(4)(A), is a conviction of an offense related to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance, as defined by 42 U.S.C. 1320a-7(b)(3).

The I.G. argues that Petitioner's offense is within the purview of section 7(b)(3). He premises his argument on two contentions. First, the I.G. asserts that Congress intended the section to permit exclusions of individuals or entities convicted of any criminal offense related to a controlled substance. I.G.'s Trial Memorandum at 4-5. Second, the I.G. contends that Petitioner was convicted of criminal record-keeping violations concerning a "closed distribution system" established by Congress for controlled substances. Record keeping is an integral part of this closed system, and thus Petitioner's conviction is for an offense related to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance.

Petitioner asserts that his conviction does not fall within the ambit of section 7(b)(3). He bases his argument on the language of the statute. He notes that the law requires that a conviction must be for an offense related to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance. He asserts that his conviction was for unlawful record keeping. According to Petitioner, there is nothing in either the statute pursuant to which he was convicted, or in the documentation of his conviction which suggests that his offense related to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance. Petitioner's Post-Hearing Memorandum at 11-12.

I conclude that the offense of which Petitioner was convicted is an offense related to the unlawful distribution or dispensing of a controlled substance. Contrary to Petitioner's assertion, the presence of the word "unlawful" in 42 U.S.C. 1320a-7(b)(3) does not suggest that a conviction for willful failure to maintain

records in connection with the sale of a controlled substance is beyond the reach of the exclusion law. Unlawful failure to maintain records in connection with a sale of a controlled substance is an inseparable element of an unlawful sale of a controlled substance. Petitioner was not convicted of a mere record-keeping violation, but of unlawful transactions in controlled substances. He is therefore subject to the exclusion law.

Congress considered maintenance of records of transactions in controlled substances to be an integral part of a system designed to assure that such substances were manufactured, prescribed, and distributed only under strict controls. Willful failure by a party involved in sales of controlled substances to comply with this system is a felony. 21 U.S.C. 843(a)(1)-(5).

The law describes closely related felonies of equal gravity. These include knowingly and intentionally: (1) distributing a controlled substance without an order form as defined by law; (2) using, in the course of the manufacture or distribution of a controlled substance, a registration number which is fictitious, revoked, suspended, or issued to another person; (3) acquiring or obtaining a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge; (4) furnishing false or fraudulent material information in, or omitting any material information from, any application, report, record, or other document required to be made, kept or filed concerning transactions in controlled substances; or (5) making, distributing, or possessing a device designed to facilitate the counterfeiting of controlled substances. 21 U.S.C. 843(a)(1)-(5). The identical penalty attaches to each of these offenses. 21 U.S.C. 843(c).

It is apparent from this law that Congress did not view the requirement to maintain records of transactions in controlled substances as separable from its objective to strictly regulate transactions in controlled substances. Sale of a controlled substance without maintenance of required records can just as easily be characterized as an unlawful sale under 21 U.S.C. 843(a)(4)(A), as it can be characterized an unlawful failure to maintain records. Thus, a conviction under 21 U.S.C. 843(a)(4)(A) may properly be characterized as a conviction related to unlawful distribution or dispensing of a controlled substance pursuant to 42 U.S.C. 1320a-7(b)(3).

Petitioner asserts that it is possible to violate section 843 without actually dispensing controlled substances in

an unlawful manner. For example, according to Petitioner, a person could sell controlled substances in accordance with statutory requirements, generate records required by law, and then destroy those records six months later. P.'s Reply Brief at 4-5. According to Petitioner, the sale would be lawful but the record-keeping would be unlawful. He asserts that a conviction for unlawful record-keeping in that event could not possibly relate to unlawful distribution or dispensing of controlled substances.

The facts of Petitioner's hypothetical situation do not conform to the facts of this case, so strictly speaking, it is irrelevant.[4] Nevertheless, I disagree with Petitioner's analysis. It is true that in this hypothetical situation the seller of controlled substances would not be guilty of violating 21 U.S.C. 843(a)(1) (sale without required forms). But he would nevertheless be guilty of an unlawful sale of a controlled substance--whether he failed to generate required records to begin with, or generated required records and unlawfully destroyed them at a later date.

The I.G. asserts that legislative history supports the argument that Congress intended section 7(b)(3) to apply to individuals or entities convicted of any offense related to manufacture, distribution, prescription or dispensing of a controlled substance. It is unnecessary for me to decide this question, as Petitioner's conviction was for an offense which related to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance.

2. The eight-year exclusions from participation in Medicare and State health care programs imposed and directed by the I.G. are reasonable.

The I.G. excluded Petitioner from participating in the Medicare program, and directed that he be excluded from participating in State health care programs, for eight years. Having concluded that the I.G. had discretion to impose and direct exclusions on Petitioner pursuant to 42 U.S.C. 1320a-7(b)(3), I must now decide whether the length of the exclusions imposed and directed by the I.G. is reasonable.

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[4] Indeed, in this case Petitioner admitted at the hearing that he unlawfully distributed controlled substances without either receiving the required forms or maintaining required records. Tr. at 111-112.

In order to decide whether the I.G.'s exclusion determination is reasonable in a particular case, I must measure that determination against both the remedial purpose of the exclusion statute and the regulations. An exclusion will be held to be reasonable where it is shown to fairly comport with legislative intent and the Secretary's policy as expressed in the regulations. "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 on the basis of these criteria was not extreme or excessive." (Emphasis added). 48 Fed. Reg. 3744 (Jan. 27, 1983).

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 statutory purpose and the Secretary's policies. 42 U.S.C. 405(b). Therefore, in a hearing on an exclusion, evidence which is relevant to the reasonableness of the exclusion will be admitted and considered, even if that evidence was not available to the I.G at the time the exclusions were imposed and directed.

The I.G. excluded Petitioner from participating in the Medicare program and directed that he be excluded from participating in State health care programs pursuant to a section of the exclusion law which gives the Secretary discretion to impose exclusions upon individuals and entities convicted of offenses related to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance. 42 U.S.C. 1320a-7(b)(3). The law does not specifically prescribe minimum or maximum exclusions in such circumstances. However, legislative intent is evident from the language of the statute.

Congress intended the exclusion law to be remedial in application. By its terms, the law was intended to protect beneficiaries and program funds by directing or permitting the Secretary (and his delegate, the I.G.) to disqualify from participation in Medicare and State health care programs those individuals and entities who had demonstrated by their conduct that they could not be trusted to administer program funds or deal on the government's behalf with beneficiaries of federally-funded health care programs. The law was intended to protect trust funds from the misconduct of larcenous individuals and entities. It also embodied Congress' conclusion that the Secretary had a duty to protect program beneficiaries from individuals or entities whose conduct demonstrated that they posed a threat to beneficiaries' well-being.

This policy was evident in the original enactment in 1977. Successive revisions of the law have continued to express this legislative purpose in progressively stronger language.[5]

The Secretary has applied this remedial policy in regulations. Regulations adopted by the Secretary prior to enactment of the 1987 revisions to the exclusion law, and applicable to exclusions for program-related offenses, require the I.G. in determining exclusions to consider factors related to the seriousness and program impact of the offense and to balance those factors against any mitigating factors that may exist. 42 C.F.R. 1001.125(b)(1)-(7). The regulations are entirely consistent with Congressional intent to exclude manifestly untrustworthy parties from participation in Medicare and State health care programs.

It is true, as Petitioner asserts, that these regulations were adopted by the Secretary to implement the law as it existed prior to adoption of the 1987 revisions. The regulations specifically apply only to exclusions for "program-related" offenses (convictions for criminal offenses related to the Medicare and State health care programs). However, they do express the Secretary's policy for evaluating cases where discretionary exclusions may be appropriate. To the extent that these regulations have not been repealed or modified, they embody the Secretary's intent that they continue to apply, at least as broad guidelines, to those cases in which discretionary exclusions are imposed. Moreover, Congressional intent has remained consistent with each revision of the exclusion law--except that Congress has mandated more stringent exclusions in some cases and has

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[5] The exclusion law in effect prior to August, 1987, 42 U.S.C. 1320a-7(a), required the Secretary to suspend from participation in the Medicare and State health care programs any physician or other individual who had been convicted of a criminal offense related to that person's participation in the delivery of medical care or services under Medicare, Medicaid, or block grants to states. The law did not specify minimum exclusion terms. The 1987 amendments extended the reach of the law to entities, added new categories of mandatory exclusions, specified a minimum five-year exclusion for cases in which mandatory exclusions were imposed, and enumerated circumstances in which the Secretary had discretion to impose exclusions. 42 U.S.C. 1320a-7(a)(1)-(2); (b)(1)-(14).

expanded the Secretary's discretionary authority to impose exclusions. It is therefore consistent with legislative purpose to continue to use these regulations as broad guidelines to determine the length of exclusions in cases where the Secretary has discretion to exclude individuals and entities.

I conclude that the I.G. established that the eight-year exclusions imposed and directed against Petitioner are reasonable when considered in light of Congressional intent and the Secretary's policy determinations, and the evidence of this case. The exclusions were grounded on evidence establishing that Petitioner committed very serious crimes involving misconduct which posed a potential for considerable harm to individuals. Petitioner demonstrated by his misconduct that he could not be trusted to deal with program beneficiaries. The I.G. was justified in concluding that program beneficiaries needed protection from potentially harmful conduct by Petitioner for the substantial time period encompassed by the exclusions.

The record establishes that Petitioner was convicted of criminal offenses involving a large number of unlawful transactions of a controlled substance. Findings 12-16, 26; see 42 C.F.R. 1001.125(b)(1). By his own admission, Petitioner succumbed to personal and psychological pressures to unlawfully dispense controlled substances. Finding 28. Petitioner participated in numerous unlawful transactions in a drug which Congress has determined has a high potential for abuse. Abuse of this drug may cause the abuser to experience severe psychological or physical dependence. Findings 4, 8. It is reasonable to infer from this that Petitioner's conduct endangered the health and safety of individuals to whom he unlawfully dispensed controlled substances. Finding 27; see 42 C.F.R. 1001.125(b)(2). The seriousness of this offense is in some respect reflected by the fact that Petitioner was sentenced to incarceration. Finding 16; see 42 C.F.R. 1001.125(b)(5).

Petitioner asserts that the eight-year exclusions imposed on him are unreasonable in that they fail to take into account circumstances which he alleges to be mitigating. See 42 C.F.R. 1001.125(b)(4). According to Petitioner, these mitigating circumstances include: (1) the fact that Petitioner had no criminal record prior to the convictions at issue in this case; (2) that Petitioner's sentence was reduced from incarceration in prison to commitment to a work release program; (3) Petitioner's age; (4) Petitioner's service to his community; (5) that Petitioner was under stress when he committed the

offenses for which he was convicted; and (6) Petitioner's willingness to cooperate with prosecuting authorities. P.'s Post-Hearing Memorandum at 17-18.

Regulations do not define what circumstances may be considered as mitigating. See 42 C.F.R. 1001.125(b)(4). However, given Congressional intent to exclude untrustworthy individuals from participation in Medicare and State health care programs, it is reasonable to conclude that mitigating circumstances should constitute those circumstances which demonstrate an individual or entity to be trustworthy.

None of the circumstances asserted to be mitigating by Petitioner derogate from the conclusion that in light of the offenses he committed, he is an individual who should not be trusted to administer Medicare or State health care funds. The circumstances cited by Petitioner essentially address elements of his case which show that he is a relatively sympathetic individual. While these factors certainly should have some bearing on the extent to which Petitioner is punished for his crimes, they have little to do with the question of whether Petitioner can now or in the near future be trusted to dispense controlled substances to program beneficiaries.

The fact that Petitioner did not have a prior criminal record is essentially neutral, neither adding to nor detracting from the seriousness of his unlawful transactions in controlled substances. The reduction of his sentence of incarceration is not explained in the record. However, it is reasonable to infer that this action was based on Petitioner's personal circumstances, and not on a determination that he had proven himself to be a trustworthy individual. Similarly, Petitioner's age has nothing to do with the question of whether he can be trusted to deal with beneficiaries. The fact that he succumbed to stress and unlawfully sold controlled substances is an aggravating, and not a mitigating factor. Petitioner's service to his community merely demonstrates that he manifests personal virtues other than trustworthiness. Finally, his offer to cooperate with prosecuting authorities, while laudable, says nothing about the extent to which he should be trusted in the future to dispense controlled substances to beneficiaries.

Petitioner also goes to considerable lengths to attack the thought processes by which the I.G.'s agents determined that eight-year exclusions were appropriate in this case. See P.'s Post-Hearing Memorandum at 15-17. However, the thought processes of the I.G.'s agents are

not really at issue in this case. The question before me is whether the determination arrived at by the I.G. is reasonable in light of the evidence and applicable law.

CONCLUSION

Based on the evidence in this case and the law, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare program, and to direct that Petitioner be excluded from participation in State health care programs, for eight years, is reasonable. Therefore, I am entering a decision in favor of the I.G. in this case.

/s/

Steven T. Kessel
Administrative Law Judge