Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Gary E. Wolfe, D.O.,	)	DATE: September 22, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-95-015
	)	Decision No. CR395
The Inspector General.	)	
	)	

DECISION

I conclude that the 15-year exclusion the Inspector General (I.G.) of the United States Department of Health and Human Services (DHHS) imposed and directed against Gary E. Wolfe, D.O., Petitioner, from participating in Medicare and other federally financed health care programs is reasonable.

I. Procedural History

By letter dated October 19, 1994, the I.G. notified Petitioner that, as a result of his conviction of a criminal offense related to Medicare and other health care programs, he was being excluded for 15 years from participating as a provider in the Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs.[1]

The I.G. advised Petitioner that the exclusion of individuals convicted of offenses such as his is mandated by section 1128(a)(1) of the Social Security Act (Act).[2] The I.G. further advised Petitioner that for exclusions

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[1] Unless otherwise indicated, hereafter I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

[2] Those parts of the Act discussed herein are codified in 42 U.S.C. § 1320a-7.

imposed pursuant to section 1128(a) of the Act, a five-year minimum period of exclusion is required by section 1128(c)(3)(B), and that Petitioner's 15-year period of exclusion took into consideration six specific aggravating factors.

Petitioner filed a request for review of the I.G.'s action, and the case was assigned initially to Administrative Law Judge Steven T. Kessel. Judge Kessel determined without objection that the administrative law judge's decision would be based upon written submissions, there being no need for an in-person hearing.[3] The case was reassigned to me on April 14, 1995.

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[3] The I.G. filed a Motion for Disposition on the Documentary Record with a supporting brief (I.G. Br.), and a statement enumerating the material facts and conclusions of law the I.G. considered to be uncontested. The I.G.'s submissions were accompanied by I.G. Exhibits (I.G. Exs.) 1 through 18.

Petitioner filed Petitioner's Answer and Petitioner's Statement with Brief in support (P. Br.), accompanied by Petitioner's Exhibits (P. Exs.) 1 through 20.

The I.G. filed a Reply brief (I.G. R. Br.), accompanied by I.G. Exs. 19 and 20.

Petitioner filed a Response (P. R. Br.).

Petitioner did not object to any of the I.G.'s exhibits. Therefore, I admit I.G. Exs. 1 through 20 into evidence.

The I.G. objected to P. Exs. 1 through 9, 12, 14, and 15, asserting that Petitioner submitted them for the purpose of collaterally attacking his convictions. The I.G. objected also to P. Ex. 16 as incomplete. I.G. R. Br. at 7. In his Response, Petitioner explained that he was merely providing a full explanation of the circumstances surrounding his convictions and was not collaterally attacking them. Petitioner explained further that he provided P. Ex. 16 to emphasize the counts of which he was convicted, as distinguished from the counts that were dismissed. P. R. Br. at 6 - 7. I admit into evidence P. Exs. 10, 11, 13, and 17 - 20. I am not admitting P. Ex. 16 into evidence because it is included within I.G. Ex. 1 and is duplicative. Recognizing that Petitioner may not collaterally attack his conviction, to allow Petitioner to fully explain his convictions, I admit P. Exs. 1 through 9, 12, 14, and 15 into evidence over the I.G.'s objections.

Upon careful consideration of the record before me, I find that there exist no facts of decisional significance genuinely in dispute and that the only matters to be decided are the legal implications of the undisputed material facts.

II. Issue

The only issue is whether the 15-year exclusion which the I.G. imposed and directed against Petitioner is reasonable.

III. Findings of Fact and Conclusions of Law

1. At all relevant times, Petitioner was a physician practicing medicine in Pennsylvania. P. Br. at 5 - 6.

2. On May 24, 1993, Petitioner entered guilty pleas to eight felony offenses charged by Indictment, in Case No. CR 92-318 in the U.S. District Court for the Middle District of Pennsylvania, specifically pleading guilty to Counts 1, 2, 15, 16, 23, 25, 27, and 29 of the Indictment. I.G. Exs. 1 - 4.

3. Two of the counts to which Petitioner entered his guilty pleas, Counts 1 and 15, charged Petitioner with knowingly submitting false Medicare claims to a department or agency of the United States (in violation of 18 U.S.C. § 287). These two counts **relate directly to the delivery of services under Medicare**. The other six counts to which Petitioner entered guilty pleas charged Petitioner with mail fraud offenses, and relate to claims submitted to Pennsylvania Blue Shield (in violation of 18 U.S.C. § 1341). I.G. Exs. 1 - 4.

4. The Secretary of DHHS (Secretary) has delegated to the I.G. the authority to exclude individuals from participation in Medicare and to direct their exclusion from participation in Medicaid. 53 Fed. Reg. 12,993 (1988).

5. The I.G. is **required** to exclude Petitioner from participation in Medicare and to direct his exclusion from participation in Medicaid. Act, sections 1128(a)(1), 1128(c)(3)(B).

6. The **minimum** period of exclusion pursuant to section 1128(a)(1) is **five years**. Act, section 1128(c)(3)(B).

7. Neither the I.G. nor an administrative law judge has the authority to reduce the five-year minimum exclusion period mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

8. The I.G. proved five aggravating factors which can support an exclusion longer than five years. 42 C.F.R. § 1001.102(b)(1), (2), (4), (5), (6).

9. The I.G. did not prove by a preponderance of the evidence that Petitioner's offense had a significant adverse physical, mental, or financial impact on program beneficiaries or other individuals. 42 C.F.R. § 1001.102(b)(3).

10. Petitioner did not prove that there exist any mitigating factors. 42 C.F.R. § 1001.102(c)(1) - (3).

11. The evidence relevant to the aggravating factors proves Petitioner to be untrustworthy to the extent that a 15-year exclusion is reasonably necessary to protect the integrity of federally financed health care programs and to protect program beneficiaries and recipients. I.G. Exs. 1 - 18.

12. The 15-year exclusion imposed and directed against Petitioner by the I.G. is reasonable. Findings 1 - 11.

IV. Discussion

A. An exclusion of at least five years is mandatory.

Section 1128(a)(1) of the Act **mandates** the exclusion of individuals who are convicted under federal or State law of a criminal offense related to the delivery of an item or service under Medicare or Medicaid.

Once it is shown that a program-related criminal conviction has occurred, exclusion for at least five years is mandatory under sections 1128(a)(1) and 1128(c)(3)(B). Petitioner admits that he was convicted of a criminal offense related to the delivery of an item or service under the Medicare program. Petitioner admits also that the I.G. was required to exclude him for at least five years. P. Br. at 27. Thus, the only issue is

whether the 15-year exclusion the I.G. imposed and directed against Petitioner is reasonable.

B. The 15-year exclusion imposed and directed against Petitioner is necessary to safeguard Medicare and Medicaid, and program beneficiaries and recipients, and, thus, comports with the remedial purposes of the Act.

1. The Governing Law

Section 1128 of the Act is a remedial statute. Congress intended that the Act, including section 1128(a)(1), be applied to protect the integrity of federally funded health care programs, and the welfare of program beneficiaries and recipients, from individuals and entities who have been shown to be untrustworthy. Exclusions imposed pursuant to section 1128 (including exclusions of more than five years imposed under section 1128(a)(1)) have been found reasonable only insofar as they are consistent with the Act's remedial purpose. Robert Matesic, R.Ph., d/b/a Northway Pharmacy, DAB 1327, at 7 - 8 (1992); Rosaly Saba Khalil, M.D., DAB CR353, at 9 (1995); Dr. Abdul Abassi, DAB CR390, at 3 (1995).

Prior to the promulgation of regulations governing exclusions imposed pursuant to section 1128, the criteria used to evaluate the trustworthiness of excluded parties, and the reasonableness of exclusions, were derived from the Act itself. These criteria encompassed any evidence relevant to an excluded party's trustworthiness to provide care. Matesic, DAB 1327, at 7 - 8; Abassi, DAB CR390, at 3.

Regulations published originally in January 1992 (42 C.F.R. Part 1001) establish the criteria by which the length of exclusions imposed pursuant to section 1128 are now to be evaluated. These regulations provide that, in cases involving exclusions imposed pursuant to section 1128(a) of the Act, the reasonableness of the length of any exclusion imposed for a period of more than five years will be decided based on the presence of, and the weight assigned to, certain aggravating and mitigating factors which the regulations identify. 42 C.F.R. § 1001.102(b)(1) - (6), (c)(1) - (3); Abassi, DAB CR390, at 3 - 4.

Under the regulations, in any case in which the reasonableness of an exclusion is at issue, an administrative law judge is obligated to decide, using the factors contained in the regulations, whether an exclusion of a particular length is reasonably necessary

to protect the integrity of federally financed health care programs and the welfare of the programs' beneficiaries and recipients. Abassi, DAB CR390, at 4; Khalil, DAB CR353, at 10.

One consequence of the regulations is to limit the factors which an administrative law judge can consider as relevant to an excluded party's trustworthiness to provide care. For example, an administrative law judge may no longer consider evidence relating to a party's remorse for the party's crimes, nor may an administrative law judge consider evidence relating to a party's rehabilitation, as evidence of that party's trustworthiness. Evidence of remorse or rehabilitation does not fall within the mitigating factors contained in the regulations. Abassi, DAB CR390, at 4; See Matesic, DAB 1327, at 7 - 8.

An exclusion imposed pursuant to section 1128(a)(1) of the Act must not be punitive. Such exclusion must comport with the remedial purpose of the Act. Moreover, the presence of aggravating factors in a case is not itself a basis to exclude a party for a particular length of time. In a case involving an exclusion imposed pursuant to section 1128(a)(1), the presence of aggravating factors not offset by the presence of a mitigating factor does not automatically justify an exclusion of more than five years. The regulations contain no formula for assigning weight to aggravating and mitigating factors once the presence of any of these factors is established. It is the task of the administrative law judge (following the regulations and cognizant of the Act's remedial purpose) to explore in detail and assign appropriate weight to, the aggravating or mitigating factors present in a case. Abassi, DAB CR390, at 4.

2. Petitioner's Criminal Offenses

Based on his guilty pleas (Finding 2), Petitioner was convicted of program-related offenses with regard to two patients. Specifically, while Petitioner was a treating physician, he provided services to HB[4] on or about December 29, 1987, and to AE on or about October 25,

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[4] To protect the privacy of Petitioner's patients, I refer to them by their initials only.

1988, and billed Medicare for services which were not performed. I.G. Ex. 3 at 15.

- Patient HB

  Petitioner's treatment notes (P. Ex. 1) indicate that examination of HB's ears showed the presence of "dirt/wax." The notation "[i]rrigate both ears" has been scratched out, and the notation "FB (foreign body) removed R (right) ear" is included. Regarding lab work, the blood tests SGOT and SGPT were ordered and performed, to find out if there was an inflammation of the liver. P. Br. at 15 - 17; P. Ex. 1.

  Medicare was billed for removal of a foreign body from the ear and for performance of a hepatitis panel (procedure code 80059), which procedures were not performed. I.G. Ex. 3 at 15. Procedures less expensive to Medicare, i.e., ear irrigation and a hepatic panel (procedure code 80058), were performed, and Petitioner could have billed for those procedures. I.G. Ex. 3 at 9 - 15; P. Br. at 15 - 17; P. Ex. 1.

- Patient AE

  Petitioner's treatment notes (P. Ex. 2) indicate that examination of AE's abdomen revealed fullness in the right upper quadrant. To Petitioner this indicated possible inflammation of the liver, because AE's arthritis medication "has the potential to cause liver dysfunction." P. Br. at 17 - 18. The blood tests SGOT and SGPT were ordered and performed. P. Br. at 17 - 18; P. Ex. 2.

  Medicare was billed for performance of a hepatitis panel (procedure code 80059), which procedure was not performed. I.G. Ex. 3 at 15. A procedure less expensive to Medicare, i.e., a hepatic panel (procedure code 80058) was performed, and Petitioner could have billed for that procedure. I.G. Ex. 3 at 9 - 15; P. Br. at 17 - 18; P. Ex. 2.

Petitioner's convictions also encompassed non-program related offenses. Specifically, Petitioner was convicted of mail fraud for billing Pennsylvania Blue Shield for reimbursement through the U.S. mail for a procedure consisting of the removal of a foreign body from the ears

of HB and three other patients, when that procedure was not performed. I.G. Ex. 3 at 15 - 16. Also, Petitioner submitted medical records through the mail to cover up the fact that he had submitted claims to Pennsylvania Blue Shield for the removal of foreign bodies from the ears of these patients when he had not done so. I.G. Ex. 3 at 17.

During the proceeding in which the court accepted Petitioner's guilty plea, the government asserted certain facts which Petitioner did not contest. Specifically, the government asserted that, had Petitioner's case gone to trial, Petitioner's patients and the employees who irrigated those patients' ears would have testified that, in the case of HB (as well as in the cases of three other patients insured by Pennsylvania Blue Shield, not Medicare) where Petitioner billed for removal of a foreign body from an ear, no foreign body was removed. I.G. Ex. 3 at 13 - 14.

Further, the government asserted that Petitioner's billing employees would have testified that Petitioner directed his billing clerk to submit bills in such a way as to maximize Petitioner's reimbursement. I.G. Ex. 3 at 12. Specifically, the government asserted that Petitioner directed his billing clerk to bill for a hepatitis panel (procedure code 80059) whenever the employee saw "hep" or "SGOT" or "SGPT" on a patient's chart, instead of billing for the less expensive procedure codes they should have used (such as procedure code 80058, a hepatic panel). As a result, the government asserted that Petitioner was paid approximately three times more for each claim on a private insurer and a substantial amount more for each Medicare claim. I.G. Ex. 3 at 10 - 13. The government asserted that Petitioner directed his employee to do this in spite of the fact that Petitioner's office was not capable of doing a hepatitis panel. I.G. Ex. 3 at 12.

Finally, the government asserted that one of Petitioner's billing employees would have testified that she advised him that his billing for hepatitis panels when, in fact, he had performed SGOT and SGPT tests, was wrong. The government asserted Petitioner told the employee that was the way he did it and the way she would do it while she was working for him. I.G. Ex. 3 at 12 - 13.

As a result of Petitioner's conviction, he was sentenced to 15 months in prison and ordered to pay restitution of $34,593 to the DHHS and $55,056 to Pennsylvania Blue Shield. I.G. Ex. 4.

3. Presence of Aggravating Factors

The regulations at 42 C.F.R. § 1001.102 provide that, in appropriate cases, an exclusion imposed under section 1128(a)(1) may be for a period greater than five years when certain aggravating factors are present and these factors are not offset by certain enumerated mitigating factors. 42 C.F.R. § 1001.102(b)(1) - (6), (c)(1) - (3).

The regulations provide six factors only which may be considered aggravating and a basis for lengthening an exclusion beyond five years. 42 C.F.R. § 1001.102(b)(1) - (6). These aggravating factors are:

> 1. The acts resulting in the conviction, or similar acts, resulted in financial loss to Medicare or a State health care program of $1500 or more;
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> 2. The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more;
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> 3. The acts that resulted in the conviction, or similar acts, had a significant adverse physical, mental or financial impact on one or more program beneficiaries or other individuals;
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> 4. The sentence imposed by the court included incarceration;
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> 5. The convicted individual or entity has a prior criminal, civil, or administrative sanction record;
>
> 6. The individual or entity has at any time been overpaid a total of $1500 or more by Medicare or by a State health care program as a result of improper billing.

42 C.F.R. § 1001.102(b)(1) - (6).

In this case, the I.G. has proved the presence of five of the six aggravating factors asserted in her Notice. I agree with Petitioner that no significant adverse physical or mental impact on a program beneficiary or other individual has been proved. P. Br. at 33 - 34. There may have been a significant adverse <u>financial</u> impact on Medicare beneficiaries, by virtue of their 20 percent co-pay portion of Petitioner's inflated billings. However, absent specific proof regarding financial impact, I conclude that the third aggravating factor has not been proved. 42 C.F.R. § 1001.102(b)(3).

Regarding the first aggravating factor, the I.G. has proved that Petitioner's criminal offenses caused a loss of more than $1500 to Medicare. Specifically, Petitioner's guilty plea was accompanied by his admission that he knowingly and wilfully caused false bills to be submitted, with the result that he received $34,593 in Medicare reimbursement to which he was not entitled. I.G. Exs. 3, 4 at 4; P. Br. at 33 - 34.

Regarding the second aggravating factor, the I.G. proved and the Petitioner admits (P. Br. at 33) that Petitioner's criminal conduct lasted for over a year's duration. The actual length of time is in dispute. Petitioner pled guilty to eight counts of the Indictment, but the remaining 21 counts were dismissed. Thus, the indictment language "[f]rom on or about August 1986 to on or about 1990. . . ." (I.G. Ex. 1 at 4) must be examined more closely. The amount of restitution that Petitioner agreed to pay (I.G. Ex. 3 at 6) suggests that Petitioner's criminal conduct extended beyond the eight counts to which he pled guilty, but no specific dates are established except by the eight counts to which he pled guilty. Thus, the admissions accompanying Petitioner's guilty plea establish criminal conduct by Petitioner which extended from December 1987 through April 1990 (I.G. Ex. 3 at 15 - 17), a period of more than two years.

Regarding the fourth aggravating factor, the I.G. has proved that Petitioner was sentenced to a 15-month term of incarceration. I.G. Ex. 4 at 2. Petitioner admits that he spent 13 months in prison. P. Br. at 10, 34.

Regarding the fifth aggravating factor, the I.G. has proved that Petitioner has both a prior criminal and administrative sanction record. I.G. Exs. 5 - 18. Petitioner pled guilty to felony drug distribution charges in November 1990 (distribution of cocaine). I.G. Exs. 6, 7. Following his plea, Petitioner was sentenced to two years probation, fined $17,320, ordered to perform 200 hours of community service, and ordered to participate in any drug abuse treatment program his probation officer deemed necessary. I.G. Ex. 7.

Based on this drug distribution conviction, on March 17, 1992, the I.G. imposed and directed a four-year exclusion against Petitioner under the authority of section 1128(b)(3) of the Act. I.G. Ex. 8.

Also based on Petitioner's guilty plea to the drug distribution charge, the Pennsylvania State Board of Osteopathic Medicine (State Board) suspended Petitioner's medical license in December 1990. I.G. Ex. 15.

On May 12, 1993, the State Board suspended Petitioner's medical license indefinitely. The State Board restricted Petitioner further by not permitting him to seek termination of his suspension for five years. I.G. Ex. 18. On July 2, 1993, the State Board ordered Petitioner to show cause why the State Board should not impose further sanctions against Petitioner, based on the criminal offenses underlying Petitioner's 15-year exclusion here. I.G. Ex. 18.

Regarding the sixth aggravating factor, the I.G. has proved that Petitioner was overpaid more than $1500. I.G. Exs. 3, 4 at 4; P. Br. at 33 - 34.

In her reply brief, the I.G. requested that I consider Petitioner's recent Medicaid fraud convictions as an aggravating factor in this case. I.G. Exs. 19, 20. The I.G. suggested also that I consider increasing Petitioner's exclusion based on these additional program-related convictions. I.G. R. Br. at 1. These Medicaid fraud convictions would impact somewhat the first, second, and sixth aggravating factors. They would not impact the fourth aggravating factor and, because they do not constitute a **prior** criminal record, they would not impact the fifth aggravating factor. I have decided **not** to consider Petitioner's recent Medicaid fraud convictions here. These convictions constitute an independent basis upon which the I.G. may exclude Petitioner.

4. Absence of Mitigating Factors

The regulations provide that, if aggravating factors are present and justify an exclusion of more than five years, then mitigating factors may be considered as a basis for reducing the exclusion to a period of not less than five years. 42 C.F.R. § 1001.102(c). The regulations provide that only the following three factors may be considered as mitigating:

> 1. The individual or entity was convicted of 3 or fewer misdemeanor offenses, and the entire amount of financial loss to Medicare and State health care programs due to the acts that resulted in the conviction, and similar acts, is less than $1500;
>
> 2. The record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional, or physical condition before or during the commission of the offense that

reduced the individual's culpability; or

3. The individual's or entity's cooperation with federal or State officials resulted in -

(i) Others being convicted or excluded from Medicare or any of the State health care programs, or

(ii) The imposition against anyone of a civil monetary penalty or assessment under part 1003 of this chapter.

42 C.F.R. § 1001.102(c)(1) - (3).

It is Petitioner's burden to prove that mitigating factors exist. Abassi, DAB CR390, at 7. Petitioner has not introduced evidence to prove any of the mitigating factors allowed by the regulations.

With regard to the first mitigating factor, Petitioner's conviction was for a felony and the amount of loss to Medicare was well in excess of $1500. I.G. Exs. 1 - 4. Regarding the second mitigating factor, while Petitioner asserts that his drug dependency affected all his actions during the time in which he committed his criminal offenses, the record of the criminal proceedings upon which his 15-year exclusion is based (his program-related crimes), including his sentencing documents, demonstrates that the court did not determine that his mental, emotional, or physical condition before or during the time that he committed his offenses reduced his culpability. I.G. Exs. 1 - 4.

Finally, while Petitioner asserted that he cooperated with government officials in drug investigations, there is no evidence that Petitioner's cooperation with government officials resulted in the conviction, exclusion, or imposition of a civil money penalty against anyone with regard to the criminal proceedings upon which his 15-year exclusion is based (his program-related crimes).

5. Reasonableness of the Exclusion

Petitioner's arguments are eloquent and demonstrate an understanding of the law. Nevertheless, upon careful consideration of the evidence as a whole, I am convinced that Petitioner's 15-year exclusion is reasonable. The five aggravating factors proved by the I.G. convince me that Petitioner is a manifestly untrustworthy individual and that the 15 year period of exclusion imposed against

Petitioner is necessary to protect Medicare and Medicaid and the programs' beneficiaries and recipients. Below, I discuss these factors in terms of the weight I have assigned to each factor and the reasonableness of Petitioner's exclusion.

a. Weight of Aggravating Factors

i. Petitioner's prior conviction and administrative sanction record

Petitioner argues that the criminal offenses which led to his felony drug distribution conviction occurred during the same time period as the criminal offenses which led to his program-related convictions. In an attempt to mitigate the severity of his offenses, Petitioner distinguishes between the repeat offenses of an individual who has been held accountable and thereafter commits additional crimes, and his own convictions.

It is true that Petitioner's criminal convictions all stem from criminal offenses committed prior to his first sentencing. Petitioner's felony drug dealing occurred "from on or about December 1985 to on or about January 1990" (I.G. Ex. 5). He was sentenced in March 1991 (I.G. Ex. 7), and he was notified of his exclusion in March 1992 (I.G. Ex. 8). So far as we know, the only offenses Petitioner has committed since his first sentencing involve his continuing drug use in 1992.[5] Petitioner's program-related crimes occurred in December 1987 (Count I, I.G. Ex. 1) and October 1988 (Count XV, I.G. Ex. 1), prior to his first sentencing.[6]

I agree with Petitioner that his prior record is not as egregious as if he had committed his program-related crimes after having once been brought to justice. Nevertheless, Petitioner's prior record is, in my opinion, the most weighty aggravating factor in his case. 42 C.F.R. § 1001.102(b)(5).

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[5] During probation, Petitioner's urine specimens were positive for cocaine (I.G. Exs. 9 - 13).

[6] As indicated, I do not evaluate the impact of Petitioner's recent Medicaid fraud convictions (I.G. Ex. 20) on his period of exclusion. I note, however, that the criminal offenses of which he was convicted took place "on or about February 26, 1988 through August 31, 1990" (I.G. Ex. 19), again, prior to his first sentencing.

I do not agree with Petitioner's characterization of his felony drug dealing and his program-related crimes as "a single set of facts." P. Br. at 2. Even though these crimes occurred during roughly the same time period, they reflect entirely different criminal activity and give rise to additional reasons for concern regarding Petitioner's trustworthiness to participate in the programs.

Furthermore, in suspending Petitioner's license to practice for at least five years, beginning May 1993 (I.G. Ex. 17 at 15), the State Board included in its Conclusions of Law the following:

> 2. Respondent is unable to practice osteopathic medicine and surgery with reasonable skill and safety to patient by reason of drunkenness and excessive use of drugs in violation of Section 15(a)(5) of the Act. (Findings of Fact Nos. 6-28).

I.G. Ex. 17 at 10.

Petitioner admits "active addiction" to both alcohol and cocaine (P. Br. at 4) during the period of his criminal activity (from the late 1980s into 1990). Furthermore, his drug dealing conviction for **distribution** of cocaine goes beyond addiction. Petitioner's drug dealing conviction demonstrates clearly his disregard for the law, his disregard for the health and safety of others, as well as of himself, and his poor judgment.

Petitioner's cocaine distribution conviction and the attendant circumstances, including Petitioner's positive urine specimens for cocaine after sentencing (I.G. Exs. 9 - 13), and including the State Board's conclusion that Petitioner is unable to practice medicine and surgery with reasonable skill and safety to his patients, is entitled to great weight. Thus, Petitioner's prior conviction and sanction record demonstrates that a very lengthy exclusion is necessary for the I.G. to be able to determine whether Petitioner is again trustworthy to provide program services.

ii. Financial loss to Medicare

The next most weighty aggravating factor in Petitioner's case is the $34,593 financial loss to the Medicare program (42 C.F.R. § 1001.102(b)(1)), which is admitted by Petitioner. I categorize this together with the aggravating factor of overpayment to Petitioner in the same amount (42 C.F.R. § 1001.102(b)(6)). The large

financial loss to Medicare, and the illegal gain to Petitioner, again demonstrate the seriousness of Petitioner's offenses and support a very lengthy period of exclusion.

Petitioner pled guilty to defrauding Medicare by billing for services that he did not perform. Petitioner's admission of guilt in open court in the presence of his attorney (I.G. Ex. 3) is more persuasive than his detailed explanation of his reasons for choosing the code for removal of a foreign body from the ear and the code for performance of a hepatitis panel (P. Br. at 20 - 22) in place of using codes for less expensive services he may have performed. Petitioner's explanation that he decided to plead guilty because his prior conviction prevented him from being regarded as credible, and because he could not afford to defend himself, is not persuasive.

Petitioner distinguishes his wrongdoing from that of providers who submit fraudulent claims without providing any treatment, explaining: "[w]hat I did do, was engage in aggressive billing practices. . . ." P. Br. at 6. While Petitioner may wish to characterize his criminal conduct as "aggressive billing practices," he nevertheless committed fraud or theft. As stated by an appellate panel of the Departmental Appeals Board in the case of Timothy L. Stern, M.D., DAB 1396, at 17 (1993):

> [p]resenting an "inflated" claim can be potentially just as damaging to the Medicare program as presenting a claim where no reimbursable service was provided at all. Both instances equally involve program deception and both instances place program funds at risk.

iii. Other aggravating factors

The remaining aggravating factors, i.e., Petitioner's crimes being committed over longer than a one-year period (42 C.F.R. § 1001.102(b)(2)), and Petitioner's sentence including incarceration (42 C.F.R. § 1001.102(b)(4)), are additional indicators of the extent of Petitioner's

untrustworthiness and support a lengthy period of exclusion.

b. Consistency with other exclusions

In determining the reasonableness of a period of exclusion, I consider the period of exclusion imposed by the I.G. in other cases and whether that period of exclusion was upheld by administrative law judges and appellate panels of the DAB. However, each case must be decided on the totality of its own circumstances, and there are so many variables in each case that comparison is difficult.

Petitioner asserts that in comparison to other exclusions, his is unreasonable. Petitioner argues that the term of his exclusion should be consistent with the exclusions "imposed on other practitioners who have been involved in like violations." P. R. Br. at 8; see also P. Br. at 35 - 36.

For example, Petitioner distinguishes his case from that of the petitioner in Khalil, DAB CR353. P. Br. at 35. Dr. Khalil's program-related convictions involved:

> fraudulent claims [which] resulted in a financial loss of almost $2 million. Khalil, DAB CR353 at 11 - 12.
>
> [Dr. Khalil] was almost never present at the clinics and, but for one or two instances, never personally examined or treated Medicaid recipients. Khalil, DAB CR353 at 15.
>
> [Dr. Khalil] knew that the physician assistants were seeing patients on her behalf without supervision, and that they were generating reimbursement claims for services which she had not provided and which were not medically necessary. Khalil, DAB CR353, at 16.

While I agree with Petitioner that his program-related crimes are less egregious than those of Dr. Khalil, Petitioner's cocaine distribution conviction and the attendant circumstances nevertheless add a dimension to Petitioner's case that is not present in Dr. Khalil's case. Based on the totality of the aggravating factors

in Petitioner's case, I am persuaded that a 15-year exclusion is warranted and reasonable.[7]

Recently, an administrative law judge modified a 15-year exclusion from Medicare and Medicaid down to eight years. Two aggravating factors and no mitigating factors were proved:

> First, the I.G. proved that [Abassi] engaged in crimes resulting in financial loss to the New York Medicaid program in excess of $1500.00. 42 C.F.R. § 1001.102(b)(1). . . .[Abassi] committed fraud against the New York Medicaid program in the amount of $75,000 . . .
>
> Second, [Abassi] was sentenced to incarceration. 42 C.F.R. § 1002.102(b)(4). . . . [Abassi] was sentenced to a term of one year in prison . . .

Abassi, DAB CR390, at 6.

In Abassi, the judge noted that the record was practically silent as to the nature of Petitioner's involvement in the crimes for which he was convicted. However, the aggravating factors present in Petitioner's case add a dimension not present in Dr. Abassi's case, including, but not limited to, Petitioner's cocaine distribution conviction and the circumstances attendant to that conviction.

Petitioner has demonstrated by his conduct that he cannot be trusted to handle program funds or to treat patients. Even if Petitioner does not consider himself as culpable as some others who have been excluded for 15 years, this does not mean that the 15-year exclusion imposed against him is unreasonable. The aggravating factors proved in Petitioner's case suggest that Petitioner is a manifestly untrustworthy individual and that a very lengthy period of exclusion is necessary to protect the integrity of federally financed health care programs and the welfare

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[7] A 15-year exclusion also was upheld recently in the case of Shahid M. Siddiqui, M.D., DAB CR377 (1995). Dr. Siddiqui was excluded from Medicare and Medicaid for 15 years, based on the presence in his case of four aggravating factors and no mitigating factors. The aggravating factors were those specified at 42 C.F.R. §§ 1001.102(b)(1), 1001.102(b)(2), 1001.102(b)(4), and 1001.102(b)(5).

of the programs' beneficiaries and recipients. See Abassi, DAB CR390, at 9.

V. Conclusion

The I.G.'s determination to exclude Petitioner for 15 years from participation in Medicare, and to direct that he be excluded from participation in Medicaid, comports with the remedial purposes of the Act and, thus, is reasonable.

/s/

Jill S. Clifton
Administrative Law Judge