Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Anthony W. Underhill,	DATE: September 24, 1992
Petitioner,	Docket No. C-92-048
- v. -	Decision No. CR231
The Inspector General.	

DECISION

This case is governed by section 1128 of the Social Security Act (Act). By letter dated December 20, 1991, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare and State health care programs[1] for a period of seven years. The I.G. advised Petitioner that his exclusion resulted from his conviction of a criminal offense related to "patient abuse." The I.G. advised Petitioner that the exclusion of health care providers convicted of such an offense is required by section 1128(a)(2) of the Act, and that section 1128(c)(3)(B) of the Act provides that the minimum period of exclusion for such an offense is five years.

Petitioner requested a hearing before an Administrative Law Judge (ALJ), and the case was assigned to me for hearing and decision. On April 28, 1992, I conducted a hearing in Tampa, Florida. Petitioner participated in the hearing by appearing in person, and the I.G. participated by telephone. Thereafter, I gave the parties the opportunity to file simultaneous posthearing

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[1] "State health care program" is defined by section 1128(h) of the Act, 42 U.S.C. § 1320a-7(h), to cover three types of federally-assisted programs, including State plans approved under Title XIX (Medicaid) of the Act. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

briefs, and to request the opportunity to file reply briefs. The I.G. filed a posthearing brief. Petitioner did not file a posthearing brief, and he did not request leave to respond to the I.G.'s brief.

I have considered the evidence of record, the parties' arguments, and the applicable law. I conclude that the seven year exclusion imposed by the I.G. is reasonable. Therefore, I sustain the exclusion imposed and directed against Petitioner.

ISSUES

The issues in this case are:

1. Whether the I.G. has the authority to exclude Petitioner pursuant to section 1128(a)(2) of the Act.

2. Whether the exclusion imposed and directed against Petitioner violates provisions of the United States Constitution.

3. 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 LAW[2]

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 (FFCLs):

1. Petitioner was employed as a nurse's aide in a facility known as the Clearwater Convalescent Center (Clearwater Center) beginning in June 1990. I.G. Ex. 8/12; Tr. 57.[3]

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[2] 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.

[3] Citations to the record in this Decision are as follows:

I.G.'s Exhibits	I.G. Ex. (number)/(page)
Petitioner's Exhibits	P. Ex. (number)/(page)
Hearing Transcript	Tr. (page)

2. On the morning of September 22, 1990, a nurse at the Clearwater Center, filed an Incident Report which stated that James Russell, a 75-year-old patient at the facility, sustained swelling and bruises to his face. I.G. Ex. 1; Tr. 60, 62.

3. Mr. Russell is "wheelchair bound" and he is dependent on others for providing assistance to him for all activities of daily living. Tr. 35.

4. On September 25, 1990, the Florida Department of Health and Rehabilitative Services (DHRS) initiated an investigation of the incident referred to in FFCL 2. I.G. Ex. 8/2.

5. In the course of the DHRS investigation, Mr. Russell alleged that a male staff member of Clearwater Center had punched him in the face and he identified Petitioner as his assailant. I.G. Ex. 8/2, Tr. 30.

6. Mr. Russell broke down and cried when he described to investigators the incident which formed the basis of Petitioner's conviction to investigators, and he kept a sock full of rocks under his pillow for protection after the incident occurred. Tr. 40 - 41; I.G. Ex. 8/6.

7. Based on its investigation, DHRS issued a finding of "confirmed" against Petitioner. This finding meant that DHRS determined that there were verified indicators that abuse took place and that the evidence pointed to Petitioner as the perpetrator of the abuse. I.G. Ex. 8/4; Tr. 32.

8. Clearwater Center terminated Petitioner's employment on October 26, 1990 as a result of the findings made by DHRS. I.G. Ex. 8/5.

9. Upon confirming that the incident of abuse occurred, DHRS referred the case to the Medicaid Fraud Control Unit (MFCU) for further investigation. I.G. Ex. 8/2.

10. MFCU concluded that the results of its investigation supported criminal charges against Petitioner, and on May 7, 1991, an Information was filed in Florida State Court charging Petitioner with Battery of an Elderly Person. I.G. Exs. 3, 8/16.

11. On July 29, 1991, Petitioner pled nolo contendere to the offense of Battery of an Elderly Person, and that day the court entered a judgment of guilty, based on its acceptance of Petitioner's plea. I.G. Exs. 4, 5.

12. The court sentenced Petitioner to one year of community control followed by two years probation, and court costs in the amount of $275. I.G. Exs. 4, 5.

13. Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(a)(2) and 1128(i) of the Act.

14. Petitioner was convicted of a criminal offense "relating to neglect or abuse of patients in connection with the delivery of a health care item or service" within the meaning of section 1128(a)(2) of the Act.

15. The Secretary of the Department of Health and Human Services (the Secretary) 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).

16. On December 20, 1991, the I.G. notified Petitioner that he was being excluded from participation in the Medicare and Medicaid programs for seven years, pursuant to section 1128(a)(2) of the Act.

17. I do not have the authority to adjudicate the constitutional arguments raised by Petitioner in this case.

18. I do not have the authority to consider any issues relating to the I.G.'s interpretation of the scope and effect of the exclusion imposed against Petitioner in this case.

19. The I.G. had the authority to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of at least five years as required by the minimum mandatory exclusion provisions of sections 1128(a)(2) and 1128(c)(3)(B) of the Act.

20. While sections 1128(a)(2) and 1128(c)(3)(B) set a minimum mandatory period of exclusion of five years in cases of persons convicted of criminal offenses relating to patient abuse, the I.G. may direct and impose an exclusion of more than the minimum mandatory period in appropriate circumstances.

21. The Secretary did not intend that the regulations promulgated on January 29, 1992, concerning mandatory exclusions under section 1128(a)(2) of the Act, 42 C.F.R. § 1001.102, apply retroactively to appeals of I.G. exclusion determinations that were pending before ALJs at

the time the regulations were promulgated. Behrooz Bassim, M.D., DAB 1333 (1992).

22. The remedial purpose of section 1128 of the Act is to protect the integrity of federally-funded health care programs and the welfare of beneficiaries and recipients of such programs from individuals and entities who have been shown to be untrustworthy.

23. Throughout this proceeding, Petitioner has repeatedly and consistently denied that he committed the offense of which he was convicted. Letter Requesting Hearing; Tr. 9.

24. Petitioner's unsubstantiated denials of culpability are not credible, and are evidence of Petitioner's propensity to disregard the truth when it is in his interest to do so. FFCL 23.

25. The abuse of which Petitioner was convicted was physically and emotionally injurious to the victim of the abuse. FFCLs 2, 6.

26. Petitioner has demonstrated by his conduct that he is capable of harming disabled individuals entrusted to his care. FFCLs 1 - 7, 24.

27. Petitioner has a history of losing control of his temper, and he has hit people when provoked in the past. I.G. Ex. 7/2.

28. Petitioner's history of losing control of his temper is evidence that he has a propensity to engage in abusive conduct in the future. FFCL 27.

29. Petitioner's supervisors testified that his work performance as a nurse's aide at Clearwater Center was deficient because Petitioner frequently socialized while he was at work instead of attending to his patients' needs. Tr. 57, 58, 65.

30. Petitioner's work habits while he was employed as a nurse's aide at Clearwater Center are evidence that he has an uncaring attitude about the welfare of his patients. FFCL 29.

31. The acts underlying Petitioner's 1991 conviction are part of a larger pattern of misconduct and allegations of misconduct. I.G. Ex. 7.

32. Petitioner was convicted of burglary in 1982 in the State of Indiana and he served three years in prison for

this offense. He was then placed on parole for an additional two years. I.G. Ex. 7/3.

33. Petitioner's prior criminal record is additional evidence of his untrustworthiness. FFCL 32.

34. In approximately 1989, while he was employed at a facility known as Oak Manor Nursing Home, Petitioner stole another individual's wallet. This incident resulted in termination of Petitioner's employment from that facility, and is evidence of Petitioner's untrustworthiness. I.G. Ex. 7/1, 3.

35. In May 1990, while he was employed at a facility known as Wright's Nursing Home, Petitioner was accused of physically abusing patients of that facility. Although these charges were not substantiated, Petitioner was terminated from his employment at the facility due to these allegations of abuse. I.G. Ex. 7/2 - 3; Tr. 25 - 26.

36. Following his October 1990 termination from Clearwater Center for abusing Mr. Russell, Petitioner applied for and again obtained a position at the Oak Manor Nursing Home. I.G. Ex. 8/8.

37. Petitioner falsely stated that his social security number was 317-27-0256 on his application for the job at Oak Manor Nursing Home. Tr. 44 - 45.

38. 312-72-0756 is Petitioner's actual social security number. Petitioner correctly gave this as his social security number when he completed his tax withholding form at the time that he began employment at the Oak Manor Nursing Home in 1991. Tr. 44 - 45; I.G. Ex. 9/2 - 3.

39. The Oak Manor Nursing Home used the social security number on Petitioner's job application to check whether the Abuse Registry maintained by DHRS showed that Petitioner had a record of patient abuse. Tr. 44.

40. Since the social security number used to check Petitioner's record was not Petitioner's actual number, the Abuse Registry incorrectly showed that no complaints of abuse had been filed against Petitioner. Tr. 44 - 45.

41. Petitioner deliberately provided an incorrect social security number on his job application in order to conceal from a potential employer that he had a record of being accused of patient abuse. FFCLs 36 - 40.

42. Petitioner's falsification of his job application to conceal his unlawful conduct is additional evidence of his disregard for the truth and his untrustworthiness. FFCL 41.

43. On July 29, 1991, Petitioner pled nolo contendere to the criminal offense of Dealing in Stolen Property. I.G. Ex. 4.

44. The record is devoid of any meaningful evidence that Petitioner is rehabilitated.

45. A lengthy exclusion is needed in this case to satisfy the remedial purposes of the Act.

46. The seven year exclusion imposed and directed by the I.G. is reasonable.

DISCUSSION

I. The minimum five year mandatory exclusion provisions apply to this case.

The Act mandates an exclusion of:

> Any individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

Act, § 1128(a)(2). The Act further requires, at section 1128(c)(3)(B), that in the case of an exclusion imposed and directed pursuant to section 1128(a)(2), the minimum term of such exclusion shall be five years.

Thus, pursuant to sections 1128(a) and 1128(c)(3)(B), the I.G. is required to exclude a health care provider for at least five years if the following statutory criteria are met: 1) the provider was convicted of a criminal offense; 2) the offense of which the provider was convicted related to neglect or abuse; 3) the victim of the neglect or abuse was a patient; and 4) the act of neglect or abuse occurred in connection with the delivery of a health care item or service.

The first criterion that must be satisfied in order to establish that the I.G. had the authority to exclude Petitioner under section 1128(a)(2) is that Petitioner must have been convicted of a criminal offense. I find that the undisputed facts satisfy this criterion. Section 1128(i)(3) of the Act defines the term

"convicted" to include those circumstances in which a nolo contendere plea by a provider has been accepted by a federal, State, or local court. The undisputed facts establish that Petitioner entered a nolo contendere plea to the charge of Battery of an Elderly Person. FFCL 11. On July 29, 1991, a Florida State Court accepted this plea and entered a judgment of guilty on this charge. FFCL 11. In his letter requesting a hearing, Petitioner argued that he was not "convicted" of abuse because the court's judgment of guilt was based on his plea rather than on a trial on the merits. The fact that Petitioner was not convicted after a trial on the merits is not determinative of whether he was "convicted" of a criminal offense within the meaning of sections 1128(i) and 1128(a)(2) of the Act. The statutory definition of "convicted" in section 1128(i) includes, but is not limited to, situations in which a jury returns a guilty verdict after a trial. It is undisputed that Petitioner pled nolo contendere to the criminal offense of Battery of an Elderly Person and a State court accepted that plea. I therefore conclude that Petitioner was "convicted" of a criminal offense within the meaning of sections 1128(i) and 1128(a)(2) of the Act. Charles W. Wheeler and Joan K. Todd, DAB 1123 (1990).

The second criterion that must be satisfied in order to find that the I.G. had the authority to exclude Petitioner under section 1128(a)(2) is that the criminal offense must relate to neglect or abuse of another individual. A conviction need not be for an offense called patient neglect or abuse, it need only "relate to" neglect or abuse. Patricia Self, DAB CR198 (1992). Thus, the second criterion will be satisfied in cases where a party is convicted of an offense based on charges of neglectful or abusive conduct, even if the crime of which that party is convicted is not specifically labeled "neglect" or "abuse."

The Act does not define the term "abuse." In the absence of a definition, I will look to the common and ordinary meaning of the word "abuse." Abuse is defined in Webster's New International Dictionary, 1964 Edition, as "to use or treat so as to injure." This definition is in accord with the one given by Webster's Ninth New Collegiate Dictionary, 1983 Edition, "improper use or treatment." From these plain meaning definitions of the term abuse, it is apparent that Petitioner's offense falls squarely within the type of treatment that Congress had in mind. The offense of which Petitioner was convicted was Battery of an Elderly Person. The charging document to which Petitioner pled nolo contendere alleged that Petitioner unlawfully touched or hit another

individual 65 years of age or older against that individual's will. I.G. Ex. 3. Wrongfully striking or touching another individual constitutes mistreatment of that individual. I conclude that unlawfully touching or striking another person falls within the common definition of "abuse," and therefore Petitioner was convicted of an offense related to abuse, within the meaning of section 1128(a)(2) of the Act. Peter J. Edmonson, DAB CR163 (1991).

To satisfy the third criterion, Petitioner's conviction must relate to abuse of a patient. It is not evident from the face of the court documents which comprise the conviction that the victim of the abuse was a "patient." This raises the issue of whether I may consider extrinsic evidence to decide whether the statutory criteria of section 1128(a)(2) has been satisfied. I find that extrinsic evidence relevant to the nature of the charges against a party, and the offense of which that party was convicted, is admissible to establish that section 1128(a)(2) applies in a particular case. Bruce Lindberg, D.C., DAB 1280 at 3 (1991). It is consistent with congressional intent to admit evidence which explains the circumstances of the offense of which a party is convicted. One of my tasks in hearing and deciding this case is to examine all relevant facts to determine if there is a relationship between Petitioner's criminal offenses and neglect or abuse of patients in connection with the delivery of a health care item or service. In this case, the evidence establishes that the victim of the battery to which Petitioner pled nolo contendere was, at the time of the offense, a resident patient at the Clearwater Center. FFCLs 2 - 3. Based on this evidence, I find that Petitioner was convicted of abusing a "patient" within the meaning of section 1128(a)(2).

The final criterion to be determined is whether the abuse of which Petitioner was convicted was abuse in connection with the delivery of a health care item or service. This broad terminology suggests that Congress intended that even a minimal nexus between the offense and the delivery of a health care item or service would satisfy the statutory test. The record shows that Petitioner was a nurse's aide providing nursing care for patients at Clearwater Center. FFCL 1. I find that the statutory test is met because the allegations of abuse related to Petitioner's performance of his duties at the Clearwater Center, and in particular, to his provision of services to the patient whom he was alleged to have assaulted. I.G. Ex. 8. Thus, Petitioner's abuse was "in connection with the delivery of a health care item or service."

Petitioner does not dispute that his conviction was related to abuse of a patient in connection with the delivery of a health care item or service. Tr. 9. Petitioner asserts, however, that the facts on which the criminal charges and his conviction are based are not true. Petitioner contends that he was falsely accused, and that the injuries sustained by the nursing home patient were in fact the product of some outside cause other than the battery charge to which he pled nolo contendere. Petitioner also contends that he was not adequately informed of the administrative repercussions of his nolo contendere plea, and that he would have gone to trial if he had known that his plea would have resulted in an exclusion. Petitioner stated that the reason he agreed to plead nolo contendere is that he had been in jail for 72 days and he entered a nolo plea so that he could be released from prison and get on with his life. Petitioner's Letter Requesting a Hearing; Tr. 9.

The I.G. contends that Petitioner cannot collaterally attack his guilty plea in this proceeding. According to the I.G., the appropriate forum for Petitioner to attack the validity of his conviction was the Florida State Court. I.G.'s Posthearing Brief at 11 - 12. I agree. Notwithstanding Petitioner's assertion of his innocence, it is well established that a hearing before an ALJ to challenge the basis for an exclusion may not be used to collaterally attack a State criminal conviction. Peter J. Edmonson, DAB 1330 (1992). The mandatory exclusion in this case arises from the fact of the conviction, not its actual validity. It is the fact of conviction which causes the exclusion. The law instructs the I.G. to act on the conviction and to impose and direct exclusions. Thus, the I.G. must exclude if there is a conviction and the I.G. cannot consider whether such conviction was defective or invalid. It is up to a Petitioner to attack any defects in the proper forum.

I find that all four statutory elements necessary to find that the I.G. has authority to impose and direct an exclusion pursuant to section 1128(a)(2) have been satisfied in this case. The I.G. is therefore required to exclude Petitioner for a minimum of five years under section 1128(c)(3)(B).

II. I do not have the authority to adjudicate the constitutional arguments raised by Petitioner.

Petitioner argued at the hearing that the Act is unconstitutional as applied to him. Petitioner argued that the minimum mandatory five year exclusion is

unconstitutional because it is a "blanket" sanction. Petitioner contends that imposition of a mandatory minimum exclusion is unfair. Tr. 10; Petitioner's Letter Requesting a Hearing.

Petitioner also stated that following receipt of the I.G.'s notification of his exclusion from Medicare and Medicaid, he was fired from a job at a nursing home. He stated that at the time he was fired, he was working as a carpet cleaner, and he was not working in the capacity of a nurse's aide. According to Petitioner, the job from which he was fired did not involve patient care, and he had no contact with patients other than passing them in the hall at work. Petitioner argued that it is unfair and unconstitutional to extend the exclusion to a job that does not involve patient care. Tr. 6 - 9.

While I do have authority to interpret and apply federal statutes and regulations, I am without authority to decide the validity of federal statutes and regulations in these types of cases brought pursuant to section 1128 of the Act. Betsy Chua, M.D., et al., DAB 1204 (1990). I do not have the authority to hear and decide issues concerning the constitutionality of the Act as it is being applied to Petitioner. Ronald Allen Cormier, DAB CR112 (1990). Moreover, with regard to Petitioner's argument that losing his job as a carpet cleaner is unfair, there is nothing in the law or regulations which either states or suggests that the Secretary has delegated to ALJs the authority to consider issues relating to the I.G.'s interpretation of the scope and effect of the exclusion imposed against health care providers. Walter J. Mikolinski, Jr., DAB 1156 (1990).

III. A seven year exclusion is appropriate and reasonable in this case.

In this case, the I.G. excluded Petitioner for a period of seven years. The exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act require that a health care provider that has been convicted of a criminal offense related to abuse of a patient in connection with the delivery of a health care item or service be excluded for a minimum period of five years. The remaining issue in this case is whether a seven year exclusion is reasonable.

On January 29, 1992, the Secretary published regulations which, among other things, establish criteria to be employed by the I.G. to determine the length of exclusions to be imposed pursuant to sections 1128(a) and

(b) of the Act. 42 C.F.R. Part 1001; 57 Fed. Reg. 3298, 3330 - 43. These regulations include a section which establishes criteria to be employed by the I.G. to determine the length of exclusions to be imposed pursuant to section 1128(a)(2). 42 C.F.R. § 1001.102; 57 Fed. Reg. 3331.

The parties disagree as to the reasonableness of the length of the exclusion imposed and directed by the I.G. The I.G. contends that the seven year exclusion is reasonable, particularly when evaluated pursuant to regulations published by the Secretary on January 29, 1992. I.G.'s Posthearing Brief at 7 - 10. Petitioner did not address the issue of the applicability of the new regulations to this case. He does, however, assert that the exclusion which the I.G. imposed and directed in this case is excessive. Petitioner urges me to modify the exclusion to the five year minimum period required by law. Tr. 11. In considering the issue of the reasonableness of the length of the exclusion, the threshold question is whether the regulations promulgated on January 29, 1992 apply to this case.

A. Regulations published on January 29, 1992, do not establish criteria which govern my decision on the reasonableness of the length of the exclusion in this case.

The I.G. asserts that, as the new regulations were effective when they were published on January 29, 1992, they apply to any exercise of ALJ authority on or after that date. I.G.'s Posthearing Brief at 12. In particular, the I.G. relies on the regulation found at 57 Fed. Reg. 3331 (to be codified at 42 C.F.R. § 1001.102), which establishes criteria for imposing exclusions in excess of five years pursuant to section 1128(a)(2) of the Act. It is the I.G.'s position that the new regulations require me to uphold the seven year exclusion imposed on Petitioner in this case.

The I.G.'s position is without merit in light of the decision in Behrooz Bassim, M.D., DAB 1333 (1992). In that case, an appellate panel of the DAB held that, as interpreted by the I.G., the new regulations effected a substantive change in the right of a petitioner to a de novo hearing to challenge his exclusion pursuant to section 1128(b)(4) of the Act. For that reason, the panel held that retroactive application of the new regulations would deprive petitioner of due process. I conclude that application of the new regulations to the present case, notwithstanding the fact that it arises under section 1128(a)(2) rather than under section

1128(b)(4), would similarly materially alter Petitioner's substantive rights. Therefore, I conclude that the new regulations do not apply to this case.[4]

B. The remedial purpose of the Act is satisfied in this case by a seven year exclusion.

1. The Reasonableness of the Exclusion

In deciding whether an exclusion under section 1128(b)(3) is reasonable, I must analyze the evidence of record in light of the exclusion law's remedial purpose. Bernard Lerner, M.D., DAB CR60 at 8 (1989). 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 beneficiaries and recipients. See S. Rep. No. 109, 100th Cong., 1st Sess. 1, reprinted in 1987 U.S.C.C.A.N. 682.

When considering the remedial purpose of section 1128, the term to keep in mind is "protection," the prevention of harm. Through exclusion, health care providers 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 program beneficiaries or recipients. Thus, untrustworthy providers are removed from positions which provide a potential avenue for causing future harm to the program or to its beneficiaries or recipients.

By not mandating that exclusions from participation in the programs be permanent, however, Congress has allowed the I.G. the opportunity to give health care providers a

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[4] In light of the Bassim decision, I do not need to consider the merits of the I.G.'s position as to the meaning of the new regulations as applied at the hearing level. I note, however, that in Steven Herlich, DAB CR197 (1992), the ALJ reasoned that the regulation cited by the I.G. establishes criteria to be used by the I.G. in making exclusion determinations, but does not establish criteria binding on an ALJ in conducting a de novo review of the reasonableness of an exclusion. Id. at 8 - 16. See also Charles J. Barranco, M.D., DAB CR187 (1992).

"second chance." The period of exclusion can be viewed as an opportunity for an excluded individual or entity to demonstrate that he or she can and should again be trusted to participate in the Medicare and Medicaid programs as a provider. Lakshmi N. Murty Achalla, M.D., DAB 1231 (1991).

The hearing is, by reason of section 205(b)(1) of the Act, de novo. Evidence which is relevant to the reasonableness of an exclusion is admissible, whether or not that evidence was available to the I.G. at the time the I.G. made his exclusion determination. Evidence which relates to a provider's trustworthiness or the remedial objectives of the exclusion law is admissible at an exclusion hearing, even if that evidence is of conduct other than that which establishes statutory authority to exclude a provider. Willeta J. Duffield, DAB CR225 (1992).

An exclusion determination will be held to be reasonable where, given the evidence in the case, it is shown to fairly comport with legislative intent. "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." (Emphasis added.) 48 Fed. Reg. 3744 (Jan. 27, 1983).

The determination of when a health care provider should be trusted and allowed to reapply to the I.G. for reinstatement as a provider in the Medicare and Medicaid programs is a difficult issue. It involves consideration of multiple factual circumstances. An appellate panel of the DAB, in adopting criteria previously outlined by ALJ's in section 1128 cases, has provided a listing of some of these factors, which include:

> 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 toward rehabilitation, and any other factors relating to the provider's character and trustworthiness.

Robert Matesic, R.Ph., d/b/a Northway Pharmacy, DAB 1327 at 12 (1992). It is evident that in evaluating these factors I must attempt to balance the seriousness and impact of the offense with existing factors which may demonstrate trustworthiness. The totality of the circumstances of each case must be evaluated in order to

reach a determination regarding the appropriate length of an exclusion.

In weighing these factors, I conclude that a lengthy exclusion is needed in this case to satisfy the remedial purposes of the Act, and the seven year exclusion imposed and directed by the I.G. is reasonable. In reaching this determination, I recognize that Petitioner has already suffered financial losses as a result of the related criminal proceedings and that a seven year exclusion may have a severe financial impact on Petitioner. See Petitioner's Letter Requesting a Hearing. However, the remedial considerations of the Act must take precedence over the financial consequences that an exclusion may have on Petitioner. Willeta J. Duffield, DAB CR225 (1992).

2. Factors Determining Trustworthiness

Throughout this proceeding, Petitioner has consistently asserted that he was not responsible for inflicting the injuries sustained by Mr. Russell, and that he was not guilty of the offense to which he pled nolo contendere. FFCL 23. The I.G. argues that this argument amounts to nothing more than a collateral attack upon Petitioner's conviction, and that this administrative exclusion proceeding may not be used to collaterally attack Petitioner's state criminal conviction. I.G.'s Posthearing Brief at 11 - 12.

As discussed above, it is a settled principle that a health care provider may not challenge the I.G.'s authority to exclude him by denying that he is guilty of the offense of which he was convicted. The I.G.'s authority to exclude a health care provider under section 1128(a)(2) arises by virtue of that provider's conviction of a criminal offense as described in the Act. A provider's actual guilt or innocence is irrelevant in determining whether the I.G. has authority under section 1128(a)(2) to exclude that provider.

On the other hand, the issue of whether the length of an exclusion is reasonable is separate and distinct from the issue of whether the I.G. has authority to impose and direct an exclusion. A provider may offer evidence at an exclusion hearing concerning his culpability for the offense of which he was convicted. That evidence relates to trustworthiness and is therefore relevant to determining the appropriate length of an exclusion. Bernardo G. Bilang, M.D., DAB 1295 at 6 - 9 (1992).

In this case, the investigator's report on which the criminal charges were based shows that Mr. Russell, a patient at Clearwater Center, had sustained injuries to his face and that he identified Petitioner as being the individual who caused these injuries. FFCLs 2, 5. Petitioner was charged with the criminal offense of Battery of an Elderly Person. FFCL 10. Petitioner chose not to contest these charges. Instead, he pled nolo contendere to this offense. The court entered a judgment of guilty, based on its acceptance of that plea. FFCL 11. I conclude that Petitioner's nolo contendere plea in the face of Mr. Russell's allegations of patient abuse, gives rise to an inference that Mr. Russell's allegations are true. Although Petitioner may present evidence on his culpability for the purpose of determining whether the exclusion period should be reduced, the burden is on Petitioner to present sufficient evidence to overcome the inference that he was guilty of the offense to which he pled nolo contendere. Placing the burden on Petitioner to show his lack of culpability is consistent with the general principle that a provider has the burden of proving factors which would tend to reduce the exclusion period. See Bilang at 10.

Petitioner's principal challenge to the Florida State Court's judgment of guilt merely consisted of unsubstantiated assertions that he was innocent of the alleged abuse. Petitioner has not offered any evidence to rebut the inference that he was guilty of the abuse of which he was convicted. Unsupported assertions that Petitioner is innocent are not sufficient to shift the burden to the I.G. to prove Petitioner's guilt.

In view of the foregoing, I find that the weight of the evidence establishes that Petitioner was guilty of the abuse of which he was convicted. Petitioner, of his own free will and with the advice of counsel, chose to plead nolo contendere to charges of patient abuse in 1991. Petitioner voluntarily gave up the right to have the facts underlying his offenses examined in court because at the time he perceived it to be the most advantageous alternative to him. See Petitioner's Letter Requesting a Hearing, I.G. Ex. 4. Now, insulated from the repercussions of the criminal justice system, Petitioner attempts to achieve the best of both worlds by denying that he was guilty of the abuse. This attempt to deny culpability is self-serving and not credible.

I find also that Petitioner's denial of culpability is additional evidence of his lack of trustworthiness. Petitioner may have thought that claiming that he was innocent of the charges of abuse would minimize his

culpability in my eyes. However, this testimony has the opposite effect. I do not consider this testimony as evidence of Petitioner's trustworthiness. To the contrary, I find that it betrays that Petitioner is an individual who is willing to say whatever he believes will impress a fact-finder, regardless of its truthfulness.

The evidence in this case overwhelmingly establishes that Petitioner abused a gravely disabled individual who was entrusted to his care. Mr. Russell, the victim of the abuse of which Petitioner was convicted, was 75 years old and unable to walk. FFCLs 2 - 3. He was dependent on Petitioner and other members of the staff at the Clearwater Center to assist him in all activities of daily living and to provide him with the minimum necessities to sustain him. FFCL 3. The evidence shows that Petitioner punched Mr. Russell in the face. FFCL 5. This assault resulted in bruises and swelling to Mr. Russell's face. FFCL 2. The evidence also shows that during interviews in which he described the abuse, Mr. Russell broke down and cried. In addition, after the incident, Mr. Russell kept a sock full of rocks under his pillow for protection. FFCL 6.

Petitioner's abuse was physically and emotionally injurious to Mr. Russell. There is no evidence in the record which would mitigate or even explain Petitioner's conduct. Petitioner has demonstrated that he is capable of harming aged and helpless individuals under his care, and I infer from Petitioner's abusive conduct that he cannot be trusted to care for Medicare and Medicaid beneficiaries and recipients.

Petitioner admitted to investigators that he has a history of losing his temper, and that he has hit others in the past when provoked. FFCL 27. Given his history of problems with controlling his temper, Petitioner is likely to lose control over it in the future. Were Petitioner to be provoked while caring for a patient in the future, he would be at risk for repeating his abusive conduct.

I am concerned also by the testimony of Petitioner's supervisors concerning his work performance during the period he was employed as a nurse's aide at the Clearwater Center. Petitioner's coworkers testified at the April 28, 1992 hearing that Petitioner frequently socialized at work instead of performing his duties to attend to his patients' needs. FFCL 29. This evidence suggests that Petitioner lacks concern for the welfare of incapacitated individuals under his care, and is

additional evidence that he cannot be trusted to provide health care to Medicare and Medicaid beneficiaries and recipients.

I find that there is sufficient evidence to justify a lengthy exclusion based on the abusive conduct underlying Petitioner's conviction and his refusal to admit to it. The record, however, contains additional evidence which is damaging to Petitioner. There is substantial evidence which shows that Petitioner's 1991 conviction was a part of a larger pattern of dishonesty and entanglements with the law.

3. Additional Evidence of Untrustworthiness

Petitioner was convicted of burglary in 1982 and he served three years in prison for that offense, followed by two years of probation. FFCL 32. While the criminal offense of burglary is different from the criminal offense of battery, it nevertheless is probative of Petitioner's untrustworthiness.

In approximately 1989, Petitioner was terminated from his employment at a facility known as the Oak Manor Nursing Home. This termination from employment resulted when Petitioner was caught stealing another individual's wallet. FFCL 34.[5] Petitioner underwent counseling after this incident, and he learned that he had taken the wallet to get attention from his girlfriend. I.G. Ex. 7/3. While it is laudable that Petitioner sought help after this incident, I find that it is another episode in a pattern of misconduct which shows that Petitioner is untrustworthy.

Petitioner was terminated from employment at another facility in 1990. In May 1990, while he was employed at a facility known as Wright's Nursing Home, Petitioner was accused of physically abusing several patients of that facility. These charges were not substantiated, but the allegations were taken seriously enough by managers of the facility to cause them to fire Petitioner. FFCL 35.

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[5] Petitioner told an investigator that he stole a wallet from a patient at the Oak Manor Nursing Home. I.G. Ex. 7/1,3. However, at the April 28, 1992 hearing, Petitioner stated that the victim of this offense was not a patient at the facility, but instead was a visitor. Tr. 47. Regardless of whether the victim of the offense was a patient or a visitor, I find that this incident is additional evidence of Petitioner's untrustworthiness.

The record does not contain sufficient evidence to prove that Petitioner actually perpetrated the alleged abuse at Wright's Nursing Home, and I do not find that these allegations are true. However, just because I am not persuaded that these allegations are true does not mean that I must find that they are untrue. I am not required to, nor do I find, that Petitioner did not abuse these patients. While it is not possible for me to draw conclusive inferences as to Petitioner's trustworthiness from these allegations, I am nevertheless troubled by the fact that Petitioner was implicated in these additional incidents of patient abuse.

Following his October 1990 termination from Clearwater Center for abusing Mr. Russell, Petitioner applied for and again obtained a position at the Oak Manor Nursing Home. FFCL 36. The uncontroverted evidence shows also that Petitioner misstated his social security number on his application for employment at Oak Manor Nursing Home. Documents contained in the record show that while Petitioner's actual social security number is 312-72-0756, he falsely stated that his social security number is 317-27-0256 on an application for a job at Oak Manor Nursing Home completed by him. Petitioner clearly knew his social security number, as evidenced by the fact that he gave his actual social security number on his W-4 form completed at the time that he was hired for the job at Oak Manor Nursing Home in 1991. FFCLs 37 -38.

The record shows that before hiring him, the Oak Manor Nursing Home used the social security number on his job application to check whether the DHRS Abuse Registry had information showing that complaints of abuse had been filed against Petitioner. FFCL 39. Since the social security number provided by Petitioner on his job application was false, the DHRS Abuse Registry incorrectly showed that no complaints of abuse had been filed against Petitioner. FFCL 40. I infer from these undisputed facts that Petitioner knew that his employment application would be checked against the DHRS Abuse Registry, and therefore he deliberately falsified his employment application to conceal that he had a record of being accused of patient abuse. This misconduct is another example of his disregard for the truth when it serves his purposes.[6]

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[6] The I.G. argued that additional evidence of Petitioner's pattern of illegal conduct is demonstrated by the fact that Petitioner recently has been jailed for a credit card violation. In making this argument, the I.G. relied on a June 12, 1992 letter to the parties from

Also troubling is the fact that, at the time Petitioner pled nolo contendere to the charge of Battery of an Elderly Person on July 29, 1991, he also pled nolo contendere to a charge of Dealing in Stolen Property. FFCL 43. Neither the charging document from which this plea emanated nor the court's disposition of this plea is contained in the record. Absent more complete information concerning the circumstances underlying this nolo contendere plea, I am unable to make meaningful inferences as to Petitioner's trustworthiness from it alone. However, this plea is disturbing evidence that Petitioner ran afoul of the law in 1991 for a different offense unrelated to the battery offense.

I conclude that the seven year exclusion imposed and directed by the I.G. in this case is reasonable. In reaching this conclusion, I am cognizant of Petitioner's claim that during the 72 day period he was incarcerated in 1991, he received counseling and "rediscovered the Bible." See Petitioner's Letter Requesting a Hearing. While I support any positive steps Petitioner takes to rehabilitate himself, his assertions that he is rehabilitated are not sufficient to overcome the strong evidence showing that he cannot be trusted to provide health care to Medicare and Medicaid beneficiaries and recipients. The evidence of record in this case shows that Petitioner has repeatedly engaged in misconduct or has been named in allegations of misconduct over a lengthy period of time, that he has repeatedly been fired from jobs in nursing home facilities, and that he has repeatedly misstated the truth when it is convenient for him to do so. He has a criminal record dating as far back as 1982, and as recently as the April 28, 1992 hearing he refused to admit his guilt in the unlawful conduct underlying his exclusion. The portrait of Petitioner that emerges from the record is that of an individual who is manifestly untrustworthy. Petitioner has offered me no meaningful assurance that he will not engage in wrongdoing in the future. In light of the facts of this case, a seven year exclusion is not extreme or excessive.

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my office. That letter stated that Petitioner's wife told a staff attorney in my office that Petitioner "was unable to come to the telephone because he was in jail for a credit card violation." The I.G. did not submit independent evidence to support Petitioner's wife's statement that Petitioner was in jail. Absent independent evidence to corroborate Petitioner's wife's statement, I did not rely on it to reach my decision in this case.

CONCLUSION

Based on the evidence in this case and the law, I conclude that the I.G. had the authority to exclude Petitioner pursuant to section 1128(a)(2) of the Act, and that a minimum period of exclusion of five years is mandated by federal law. In addition, I conclude that the I.G.'s determination to exclude Petitioner for seven years is reasonable. I therefore sustain the exclusion.

/s/

Charles E. Stratton
Administrative Law Judge