

conclude that the I.G. had authority to exclude Petitioner under section 1128(b)(5) of the Act and that the three-year exclusion is reasonable. I sustain the exclusion.

ISSUES

The issues in this case are whether:

1. The I.G. had authority to exclude Petitioner under section 1128(b)(5) of the Act.
2. My decision as to the reasonableness of the exclusion imposed and directed against Petitioner by the I.G. is governed by regulations published on January 29, 1992.
3. The three-year exclusion which the I.G. imposed and directed against Petitioner is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a physician whose practice is in Memphis, Tennessee. I.G. Ex. 4/1; Tr. at 33 - 34.³
2. On August 29, 1990, Petitioner was charged in a criminal information filed in the United States District Court for the Western Division of Tennessee with the criminal offenses of knowingly and unlawfully:
 - a. distributing a Schedule III controlled substance, consisting of 44 ultragesic tablets;
 - b. receiving and possessing a firearm, a Cobray Mac II model SW 11A .30 caliber automatic machine gun; and

hearing. This exhibit is a document issued by the State of Tennessee Department of Health, Board of Medical Examiners, and is entitled "Supplemental Order." The exhibit is dated July 27, 1992. The I.G. does not object to the admission into evidence of this exhibit. Therefore, I have admitted it into evidence as P. Ex. 1.

³ I refer to the I.G.'s exhibits as "I.G. Ex. (exhibit number)/(page)." I refer to Petitioner's exhibit as "P. Ex. 1." I refer to the transcript of the hearing as "Tr. at (page)."

c. receiving and possessing a firearm, a Mac 10 automatic machine gun.
I.G. Ex. 8/1 - 2.

3. On February 20, 1991, Petitioner pleaded guilty to all three counts of the criminal information. I.G. Ex. 9/1.

4. Petitioner's entered his guilty plea pursuant to a plea agreement dated August 31, 1990. I.G. Ex. 10/1 - 2.

5. Petitioner was sentenced to six months' imprisonment on each of the counts of the information, to run concurrently, to three years of supervised release following his imprisonment, to a fine of \$13,000.00, and to a special assessment of \$150.00. I.G. Ex. 9/1 - 4; Tr. at 40.

6. The criminal charges against Petitioner were based on an investigation of an incident in which agents acting on behalf of the United States Drug Enforcement Administration (DEA) and the Bureau of Alcohol, Tobacco and Firearms (BATF) and Petitioner exchanged two fully automatic machine guns for ultragesic capsules. I.G. Ex. 11/1 - 6.

7. On September 19, 1990, the Tennessee Board of Medical Examiners issued an order summarily suspending Petitioner's license to practice medicine in Tennessee. I.G. Ex. 5/1 - 6.

8. The Tennessee Board of Medical Examiners' order of summary suspension was based on: the criminal information against Petitioner; his agreement to plead guilty to that information; allegations that on occasions other than that which was the basis for the criminal information Petitioner had exchanged controlled substances for weapons; and evidence that Petitioner had improperly prescribed Dilaudid to three different individuals on numerous occasions. I.G. Ex. 5/1 - 6.

9. On February 14, 1992, the Tennessee Board of Medical Examiners issued a final order concerning Petitioner's license to practice medicine. I.G. Ex. 7/1 - 4.

10. The Tennessee Board of Medical Examiners made its findings of fact based on a hearing conducted by an administrative law judge, at which Petitioner was present and represented by counsel, and at which the parties presented evidence. I.G. Ex. 7/1 - 4.

11. The Tennessee Board of Medical Examiners found that Petitioner had pleaded guilty to three crimes involving the unlawful distribution of a controlled substance and the unauthorized transfer, receiving, and possession of firearms. I.G. Ex. 7/1.

12. The Tennessee Board of Medical Examiners also found that Petitioner had overprescribed Dilaudid to a patient, and had written prescriptions for Dilaudid to a person who was not his patient. I.G. Ex. 7/1 - 2.

13. The Tennessee Board of Medical Examiners concluded that Petitioner had: engaged in unprofessional, dishonorable, or unethical conduct; dispensed, prescribed or otherwise distributed a controlled substance or other drug not in the course of professional practice; or not for a legitimate medical purpose; or not in good faith to relieve pain and suffering; or not to cure an ailment, physical infirmity, or disease; violated state and federal laws concerning dispensing controlled substances or other drugs; and had been convicted of state or federal crimes, or of a crime involving moral turpitude. I.G. Ex. 7/2.

14. The Tennessee Board of Medical Examiners ordered that Petitioner's license to practice medicine be suspended for at least six months. It also ordered Petitioner to take remedial measures, including establishing a relationship with the Tennessee Medical Association's Impaired Physician's Program. I.G. Ex. 7/3.

15. On July 14, 1992, the Tennessee Board of Medical Examiners issued a supplemental order reinstating Petitioner's license to practice medicine. P. Ex. 1.

16. The Tennessee Board of Medical Examiners placed Petitioner on two years' probation and directed him to maintain a contract with the Tennessee Medical Foundation's Impaired Physicians Program for two years. P. Ex. 1.

17. On October 17, 1990, the Tennessee Bureau of Medicaid terminated Petitioner's status as a Medicaid provider, based on the September 19, 1990 order of the Tennessee Board of Medical Examiners suspending summarily Petitioner's license to practice medicine. I.G. Ex. 4.

18. The Tennessee Bureau of Medicaid advised Petitioner that he could request reactivation of his status as a Medicaid provider at the end of the term of his license suspension. I.G. Ex. 4/1.

19. The Tennessee Bureau of Medicaid terminated Petitioner's status as a Medicaid provider for reasons bearing on Petitioner's professional competence or performance. Findings 8, 17; Social Security Act, § 1128(b)(5).
20. The Secretary of the United States 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).
21. The I.G. had authority to impose and direct an exclusion against Petitioner pursuant to section 1128(b)(5) of the Act. Findings 19, 20.
22. Regulations published on January 29, 1992 establish criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to sections 1128(a) and (b) of the Act. 42 C.F.R. Part 1001; 57 Fed. Reg. 3298, 3330 - 3341 (January 29, 1992).
23. The regulations published on January 29, 1992 include criteria to be employed by the I.G. in determining to impose and direct exclusions pursuant to section 1128(b)(5) of the Act. 42 C.F.R. § 1001.601; 57 Fed. Reg. 3333.
24. The Secretary did not intend that regulations contained in 42 C.F.R. Part 1001 and, in particular, 42 C.F.R. § 1001.601, govern my decision in this case.
25. The remedial purpose of an exclusion under section 1128 of the Act is to protect federally-funded health care programs and beneficiaries and recipients of those programs from individuals and entities who have established by their conduct that they are untrustworthy to provide care.
26. In exchanging a controlled substance for machine guns, and in prescribing drugs under circumstances where there did not exist a medical necessity for that prescription, Petitioner engaged in conduct which potentially endangered the health and safety of other persons. Findings 2, 3, 6, 8, 11 - 13.
27. Petitioner has demonstrated by his conduct that he is not trustworthy to provide care. Finding 26.
28. Petitioner has not proven that he is now trustworthy to provide care.

29. The three-year exclusion imposed and directed against Petitioner by the I.G. is reasonable.

ANALYSIS

Many of the salient facts of this case are not disputed. Petitioner is a physician. In July, 1990, agents acting on behalf of the DEA and the BATF engaged in a "sting" operation wherein they exchanged two machine guns with Petitioner for a quantity of ultragesic, a Schedule III controlled substance. The agents acted on information supplied to them by an individual who alleged that Petitioner had previously exchanged controlled substances for weapons. I.G. Ex. 11/1 - 6. Petitioner was arrested and was charged with three federal crimes arising from his exchange of drugs for machine guns. He pleaded guilty to the charges, was sentenced to six months' imprisonment to be followed by three years' supervised release, and to a fine.

The Tennessee Board of Medical Examiners summarily suspended Petitioner's license to practice medicine in Tennessee, based on Petitioner's agreement to plead guilty to criminal charges. It then conducted a hearing into Petitioner's conduct. Based on the evidence adduced at that hearing, the Tennessee Board of Medical Examiners found that Petitioner had engaged in unlawful, unprofessional, and unethical conduct. It found Petitioner unlawfully exchanged drugs for machine guns. It found also that Petitioner had prescribed drugs to an individual where there was no medical necessity for the drugs. It found additionally that, on another occasion, Petitioner prescribed drugs for an individual who did not have a patient relationship with Petitioner.

The Tennessee Board of Medical Examiners concluded that a suspension of Petitioner's license to practice medicine for a minimum of six months was reasonable. In July 1992, it agreed to restore Petitioner's license to him. However, Petitioner was placed on probation for two years, and the restoration of his license was conditioned on his agreement to maintain a contract with the Tennessee Medical Foundation's Impaired Physicians Program.

On October 17, 1990, the Tennessee Bureau of Medicaid terminated Petitioner's status as a Medicaid provider in Tennessee. It grounded its decision on the September 19, 1990 summary suspension of Petitioner's license to practice medicine. It advised Petitioner that he would be eligible to apply for reinstatement as a Medicaid

provider when his license to practice medicine in Tennessee was restored to him.

1. The I.G. had authority to exclude Petitioner under section 1128(b)(5) of the Act.

The I.G. based his determination to impose and direct an exclusion against Petitioner on the authority conferred by section 1128(b)(5) of the Act. That section provides that the Secretary (or his delegate, the I.G.) may impose and direct an exclusion against a party where the party has been suspended or excluded from participation, or otherwise sanctioned from either:

(A) any Federal program, including programs of the Department of Defense or the Veterans' Administration, involving the provision of health care, or

(B) a State health care program

for reasons bearing on . . . [that party's] professional competence, professional performance, or financial integrity.

Here, the evidence establishes that Petitioner was suspended or excluded by the Tennessee Medicaid program, which is a "State health care program" within the meaning of section 1128(b)(5)(B) of the Act. The evidence also establishes that Petitioner was suspended or excluded for reasons pertaining to his professional competence or performance. In its decision terminating Petitioner's status as a Medicaid provider, the Tennessee Bureau of Medicaid specifically referenced the September 19, 1990 summary suspension of Petitioner's license to practice medicine. That summary suspension was based on Petitioner's guilty plea to crimes which involved exchanging drugs for machine guns, and allegations that Petitioner had improperly dispensed drugs. These admissions of misconduct and allegations relate to Petitioner's performance as a physician and to his competence to practice medicine. Thus, the I.G. had authority to exclude Petitioner under section 1128(b)(5) of the Act, because the termination of Petitioner's Medicaid provider status by the Tennessee Bureau of Medicaid was made under circumstances which meet that section's criteria.

In his letter requesting a hearing in this case, Petitioner challenged the authority of the I.G. to exclude him by asserting that the Tennessee Bureau of

Medicaid had not provided him with proper notice of its determination to terminate Petitioner's provider status. This assertion suggests a contention that Petitioner was denied due process by the Tennessee Bureau of Medicaid and that, consequently, the I.G. could not base his determination to exclude Petitioner on that agency's action.

The Act provides, without exception, that the I.G. has authority to exclude a party where that party has been excluded or suspended by a Medicaid program for the reasons enumerated in section 1128(b)(5). The triggering act which gives the I.G. the authority to exclude is the State authority's sanction action. The Act neither states nor suggests that the I.G.'s authority to impose or direct exclusions depends on findings that, in imposing a sanction against the party, the Medicaid program complied with due process or its own internal procedures. Furthermore, the Act clearly intended that under section 1128(b)(5) the I.G. was to rely on State actions, and did not allow petitioners to collaterally attack State actions by examining the fairness or propriety of the process which led to the State actions. This is in accord with Departmental Appeals Board decisions involving other subsections of 1128(a) and (b) regarding such collateral attacks. Olufemi Okunoren, M.D., DAB 1319 at 7 (1992).

2. Regulations published by the Secretary on January 29, 1992 are not applicable to this case.

The I.G. contends that my decision as to the reasonableness of the exclusion imposed against Petitioner is governed by regulations published by the Secretary on January 29, 1992. 57 Fed. Reg. 3298, 3340 (to be codified at 42 C.F.R. Part 1001). The I.G. asserts that these new regulations, which contain a section establishing criteria for the I.G. to employ in determining to impose and direct exclusions pursuant to section 1128(b)(5) of the Act, also apply at the level of administrative hearings to establish mandatory criteria for adjudicating the reasonableness of exclusions imposed pursuant to section 1128(b)(5). 57 Fed. Reg. at 3340 (to be codified at 42 C.F.R. § 1001.601). The I.G. asserts that the regulations in effect require that I sustain the exclusion which he imposed and directed against Petitioner without considering any evidence offered by Petitioner as to the exclusion's reasonableness. If I were to agree with the I.G.'s argument, I would have no choice but to conclude that, despite statutory language to the contrary, Petitioner is not entitled to an

administrative hearing as to the reasonableness of the exclusion.

I, along with other administrative law judges, have held on numerous occasions that these regulations do not establish criteria for administrative law judges' review of exclusions imposed and directed by the I.G. Narindar Saini, M.D., DAB CR217 (1992); Sukumar Roy, M.D., DAB CR205 (1992); Steven Herlich, DAB CR197 (1992); Stephen J. Willig, M.D., DAB CR192 (1992); Aloysius Murcko, D.M.D., DAB CR189 (1992) (Murcko); Charles J. Barranco, M.D., DAB CR187 (1992). In Murcko, I held specifically that 42 C.F.R. § 1001.601 was not intended by the Secretary to establish criteria for review of exclusions imposed pursuant to section 1128(b)(5) of the Act. The I.G. has not raised any arguments in this case which would cause me to change my conclusion that the new regulations do not establish binding standards for administrative law judges' de novo decisions as to the reasonableness of exclusions.

Furthermore, to apply these regulations to this case (assuming that they did establish binding criteria for administrative law judges' review of exclusions) would constitute a retroactive application of the regulations not intended by the Secretary. The I.G. made his exclusion determination in this case on December 20, 1991. That predates the publication date of the new regulations. An appellate panel of the Departmental Appeals Board has held that the new regulations do not apply to determinations made prior to January 29, 1992. Behrooz Bassim, M.D., DAB 1333 at 5 - 9 (1992) (Bassim).

The I.G. attempts to distinguish this case from Bassim by arguing that in Bassim the administrative hearing occurred prior to the new regulations' publication date, whereas in this case, the administrative hearing occurred after the new regulations' publication date. While that is certainly true, it is not a meaningful distinction. The point of Bassim is that the new regulations (to the extent that they establish binding criteria for administrative review of exclusions) strip parties of rights which inured to them under the Act. Those statutory rights, which include the right to a de novo hearing as to an exclusion's reasonableness, vest at the moment that the I.G. issues his exclusion determination. The fact that the hearing may occur prior to or after the regulations' publication date is irrelevant in deciding whether the regulations would strip a party of previously vested rights, because those rights spring from the exclusion determination.

3. The three-year exclusion which the I.G. imposed and directed against Petitioner is reasonable.

The remedial purpose of any exclusion imposed pursuant to the Act is to protect the integrity of federally funded health care programs and the welfare of beneficiaries and recipients of those programs from parties who have demonstrated that they are not trustworthy providers of care. In testing an exclusion against the Act's remedial purpose, I accept evidence from both the I.G. and from the excluded party which relates to the issue of whether the excluded party is trustworthy to provide care.

The three-year exclusion which the I.G. imposed and directed against Petitioner is reasonable. There is ample evidence that Petitioner engaged in conduct which shows him to be an untrustworthy provider. Petitioner has not introduced evidence in response which vitiates the inferences raised by that evidence.

Petitioner engaged in conduct which demonstrated, at a minimum, that he was indifferent to the welfare of individuals whose care had been entrusted to him, and to that of the public in general. Considering Petitioner's position of trust as a physician, his conduct was frighteningly reckless. He exchanged controlled substances -- consisting of painkillers containing codeine-like medication -- for machine guns, without any regard for the possible consequences of introducing these drugs into general commerce. See Tr. at 45 - 46. He prescribed another painkiller, Dilaudid (a Schedule II controlled substance) to an individual who did not have a medical need for the drug. On another occasion, he wrote a prescription for Dilaudid to an individual who was not his patient.

Petitioner has not satisfied me that he poses no threat to engage in similar or other reckless conduct in the future. He asserts that he has complied with the terms of his criminal sentence. While that may be true, it does not reassure me that Petitioner is now free of the propensity to engage in wrongful conduct at some future date. Petitioner also asserts that he has never defrauded a health care program, including Medicare or Medicaid. However, Petitioner's honesty in dealing with health care insurers is not the issue here.

What troubles me most about this case is that, in his testimony, Petitioner offered no assurances that he understood that his conduct in the past jeopardized the welfare and safety of other individuals. To the contrary, he attempted to minimize his past wrongdoing by

suggesting, at one point, that his actions in prescribing Dilaudid to an individual who was not his patient comprised mere clerical error by his office staff. Tr. at 49 - 50. Petitioner's attempt to deflect responsibility for his actions convinces me that Petitioner does not really accept the potential for harm that might have resulted from his misconduct. Therefore, I am not convinced that Petitioner might not in the future engage in similar misconduct if he saw it to be in his self-interest.

I have considered the fact that the State of Tennessee has restored to Petitioner his license to practice medicine, albeit on a probationary basis. This action does not convince me that the exclusion is unreasonable. I am charged under the Act with making an independent decision as to whether an exclusion is reasonable. The fact that another agency decides to terminate or modify a sanction against a party, while not irrelevant, does not relieve me of my duty to make that independent decision. My decision here is based on the evidence of Petitioner's misconduct and by Petitioner's failure to convince me that he poses no threat to repeat his acts at some future date. Furthermore, I note that the State of Tennessee did not restore Petitioner's license without restrictions. Petitioner's continued probation is strong evidence that the State of Tennessee continues to harbor concerns about Petitioner's conduct in the future. The remedy which it has opted for to address those concerns - - probation -- is one mechanism which, evidently, is satisfactory to State authorities. However, the I.G. is entitled here to impose a different remedy -- exclusion - - given the legitimate concerns which exist about Petitioner's trustworthiness to provide care.

CONCLUSION

For the foregoing reasons, I conclude that the three-year exclusion imposed and directed against Petitioner by the I.G. is reasonable. I therefore uphold the I.G.'s determination to impose and direct a three-year exclusion against Petitioner.

/s/

Steven T. Kessel
Administrative Law Judge