Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Gideon M. Kioko, M.D.,	DATE: April 16, 1993
Petitioner,	Docket No. C-92-115
- v. -	Decision No. CR256
The Inspector General.	

DECISION

On May 12, 1992, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare and State health care programs.[1] The I.G. told Petitioner that he was being excluded under section 1128(b)(4)(B) of the Social Security Act (Act), based on Petitioner's surrender of his license to practice medicine in the State of Maryland. The I.G. told Petitioner that he would be excluded until the State of Maryland issued a license to him to practice medicine.

Petitioner requested a hearing and the case was assigned to Administrative Law Judge Joseph K. Riotto for a hearing and a decision. The I.G. moved for summary disposition and Petitioner opposed the motion. The I.G. argued that summary disposition in his favor was compelled by regulations which mandated the exclusion imposed against Petitioner, citing 42 C.F.R. § 1001.501(b) (1992). Petitioner asserted that the exclusion was not mandated by regulation, arguing that administrative law judges had held that the regulation relied on by the I.G. did not establish criteria by which

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally financed health care programs, including Medicaid. Unless the context indicates otherwise, I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

exclusions were to be adjudicated at hearings before administrative law judges.

On November 25, 1992, Judge Riotto issued a ruling which in part granted and in part denied the I.G.'s motion for summary disposition. Judge Riotto concluded that the I.G. had authority to exclude Petitioner pursuant to section 1128(b)(4) of the Act. He concluded, however, that there existed disputed issues of material fact which necessitated an administrative hearing as to the reasonableness of the exclusion. Judge Riotto concluded that regulations at 42 C.F.R. Part 1001, published and effective on January 29, 1992, which included 42 C.F.R. § 1001.501(b), did not establish criteria for review of exclusions by administrative law judges.

The case was then reassigned to me. I scheduled an evidentiary hearing to address those issues not decided by Judge Riotto's ruling. On January 29, 1993, the I.G. again moved for summary disposition. In this motion, the I.G. argued that the Secretary had, by regulation published on January 22, 1993, mandated that administrative law judges adjudicate the length of exclusions pursuant to the criteria contained in the January 29, 1992 regulations, including 42 C.F.R. § 1001.501(b). I provided Petitioner the opportunity to respond to the motion, and Petitioner opposed the motion. In his opposition, Petitioner contended that the regulations relied on by the I.G. were ultra vires section 1128 of the Act in that they denied him his right to a hearing as to the reasonableness of the exclusion.

I have carefully considered the parties' arguments and the applicable law and regulations. I conclude that there exists no issue of disputed material fact in this case. I find that the exclusion imposed and directed by the I.G. is mandated by 42 C.F.R. § 1001.501(b). Therefore, I enter summary disposition in this case in favor of the I.G. I sustain the exclusion which the I.G. imposed and directed against Petitioner.[2]

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[2] I hereby cancel the in-person hearing which I had scheduled, for the reasons set forth later in this Decision. Also, I deny as moot the I.G.'s motion to compel Petitioner to respond to the I.G.'s discovery request.

ISSUE

The issue in this case is whether the exclusion imposed and directed against Petitioner by the I.G. is mandated by 42 C.F.R. § 1001.501(b).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a physician. See I.G. Ex. 1, at 3, 6.[3]

2. On October 17, 1991, the Maryland Board of Physician Quality Assurance (Maryland Board) charged Petitioner with acts of misconduct, including: unprofessional conduct in the practice of medicine; practicing medicine with an unauthorized person or aiding an unauthorized person in the practice of medicine; and failing to meet appropriate standards for the delivery of quality medical and surgical care performed in an outpatient surgical facility, office, hospital, or any other location in Maryland. I.G. Ex. 2, at 1 - 2.

3. On December 3, 1991, Petitioner surrendered to the Maryland Board his license to practice medicine in the State of Maryland. I.G. Ex. 1, at 6 - 7.

4. Petitioner surrendered his license to practice medicine in Maryland to avoid prosecution by the Maryland Board on charges that he had engaged in acts of misconduct. I.G. Ex. 1, at 4 - 5; Finding 3.

5. As a consequence of surrendering his license to practice medicine in Maryland, Petitioner is not permitted to practice medicine in Maryland until and unless his license is reinstated by the Maryland Board. I.G. Ex. 1, at 3, 5 - 6.

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[3] The I.G. submitted three exhibits in support of his original motion for summary disposition. Petitioner did not dispute the authenticity or the truth of the contents of these exhibits. Petitioner submitted one exhibit, consisting of his own affidavit, in opposition to the I.G.'s original motion for summary disposition. The I.G. did not dispute the authenticity or the truth of the contents of this exhibit. Judge Riotto did not specifically cite to either the I.G.'s exhibits or Petitioner's exhibit in his November 25, 1992 ruling. However, it is evident from the ruling that he relied on the exhibits. I am admitting into evidence the I.G.'s exhibits as I.G. Ex. 1, 2, and 3, and Petitioner's exhibit as P. Ex. 1.

6. The charges filed against Petitioner by the Maryland Board constituted a formal disciplinary proceeding by a State licensing authority concerning Petitioner's professional competence or performance. Finding 2; Social Security Act, section 1128(b)(4)(B).

7. Petitioner surrendered his license to practice medicine while a formal disciplinary proceeding was pending before the Maryland Board concerning Petitioner's professional competence or performance. Findings 2, 6; Social Security Act, section 1128(b)(4)(B).

8. 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. 21,662 (1983).

9. The I.G. had authority to impose and direct an exclusion against Petitioner pursuant to section 1128(b)(4)(B) of the Act. Findings 1 - 7; Social Security Act, section 1128(b)(4)(B).

10. The I.G. excluded Petitioner until he obtains a valid license to practice medicine from the State of Maryland.

11. 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 (1992).

12. 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)(4)(B) of the Act. 42 C.F.R. § 1001.501 (1992).

13. On January 22, 1993, the Secretary published a regulation which directs that the 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 are binding also on administrative law judges, appellate panels of the Departmental Appeals Board, and federal courts in reviewing the imposition of exclusions by the I.G. 58 Fed. Reg. 5617, 5618 (1993) (to be codified at 42 C.F.R. § 1001.1(b)).

14. My adjudication of the length of the exclusion in this case is governed by the criteria contained in 42 C.F.R. § 1001.501(b). Findings 11, 13.

15. Under the criteria contained in 42 C.F.R. § 1001.501(b), with the exception of circumstances enumerated in 42 C.F.R. § 1001.501(c), an exclusion will never be for a period of time less than the period during which an individual's or entity's license is revoked, suspended, or otherwise not in effect as a result of, or in connection with, a State licensing agency action. 42 C.F.R. § 1001.501(b)(1); see 42 C.F.R. § 1001.501(c).

16. Petitioner has neither proved nor contended that the exceptions contained in 42 C.F.R. § 1001.501(c) apply in this case.

17. The exclusion in this case is for the same period of time as the period of license revocation effectuated by the Maryland Board. Findings 5, 10.

18. Under the criteria contained in 42 C.F.R. § 1001.501(b), it is not relevant that Petitioner may be trustworthy to provide care to program beneficiaries or recipients at any time prior to his becoming licensed to practice medicine in Maryland. See P. Ex. 1.

19. There are no disputed issues of material fact in this case and summary disposition is appropriate. Findings 1 - 18.

20. The exclusion imposed and directed against Petitioner by the I.G. is mandated by regulation. Findings 1 - 19.

ANALYSIS

The undisputed material facts of this case are that Petitioner, a physician, had been licensed to practice medicine in the State of Maryland. On December 3, 1991, Petitioner agreed to surrender his license in order to avoid facing formal disciplinary proceedings which had been initiated against him. Those proceedings involved charges that implicated directly Petitioner's professional competence and performance. Findings 2 - 4, 7. Petitioner's license surrender is of indefinite duration. There is neither a minimum nor maximum period of revocation. Petitioner may not practice medicine in Maryland until his license is reinstated. Finding 5.

Based on these undisputed facts, the I.G. determined to exclude Petitioner from participating in Medicare and Medicaid. The I.G. grounded his determination to exclude Petitioner on section 1128(b)(4)(B) of the Act, which provides that the Secretary (or his delegate, the I.G.)

may exclude a party who surrenders a license to provide health care to a State licensing authority while a formal disciplinary proceeding is pending before that authority concerning the party's professional competence, professional performance, or financial integrity.

There is no question in this case that the I.G. had authority to exclude Petitioner pursuant to section 1128(b)(4)(B) of the Act. Petitioner admitted that he surrendered his license to practice medicine in the State of Maryland while a formal disciplinary proceeding was pending against him. Petitioner's Opposition to I.G.'s Motion for Summary Disposition at 2 (September 14, 1992).

The I.G. determined to exclude Petitioner until the State of Maryland reinstates his license to practice medicine. That is, effectively, an indefinite exclusion. The State of Maryland may reinstate Petitioner's license at any time, or it may never reinstate his license. Thus, the exclusion which the I.G. imposed and directed against Petitioner is potentially a lifetime exclusion from participating in Medicare or Medicaid.

The I.G. contends that the indefinite exclusion which he imposed and directed against Petitioner is mandated by regulation. Therefore, according to the I.G., there exists no issue of fact for me to hear and I must issue summary disposition in his favor. Petitioner contends that he is entitled to a de novo hearing as to the reasonableness of the exclusion imposed and directed by the I.G. He contends further that the Act requires that exclusions be based on the trustworthiness of parties to provide care to program beneficiaries and recipients and that, therefore, he should be permitted to present evidence as to his trustworthiness. He asserts that any resolution of this case which denies him that right is contrary to congressional intent and unlawful.

Appellate panels of the Departmental Appeals Board (DAB) and administrative law judges delegated to hear cases under section 1128 of the Act have held consistently that section 1128 is a remedial statute. Exclusions imposed pursuant to section 1128 have been found reasonable only insofar as they are consistent with the Act's remedial purpose, which is to protect program beneficiaries and recipients from providers who are not trustworthy to provide care. Robert Matesic, R.Ph., d/b/a Northway Pharmacy, DAB 1327, at 7 - 8 (1992). Exclusions which do not comport with this remedial purpose may be punitive, and, therefore, unlawful. Civil remedy statutes cannot be applied constitutionally to produce punitive results in the absence of traditional constitutional guarantees

such as the right to counsel, the right to trial by jury, or the right against self-incrimination. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 - 69 (1963). Labeling an action taken pursuant to a civil remedies statute as "remedial" does not immunize that action from scrutiny as to its effect. An action taken pursuant to a civil remedies statute may be punitive in effect and, therefore, unlawful, if it does not comport with that statute's remedial purpose.

In Matesic, a DAB appellate panel discussed the kinds of evidence which must be considered by administrative law judges in hearings as to the reasonableness of exclusions. That evidence includes evidence which relates to:

> the nature of the offenses 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.

Matesic, DAB 1327, at 12.

Hearings before administrative law judges as to the reasonableness of exclusions have been held by DAB appellate panels to be de novo, and not appellate, hearings. Bernardo G. Bilang, M.D., DAB 1295 (1992); Eric Kranz, M.D., DAB 1286 (1991). Any party excluded pursuant to section 1128 of the Act is entitled to an administrative hearing as to the exclusion's reasonableness. Section 1128(f) of the Act provides that an excluded party's hearing rights shall be those conferred by section 205(b) of the Act. That section provides for de novo hearings. An excluded party may offer evidence at a hearing under sections 1128 and 205(b) which is relevant to the issue of reasonableness, even if that evidence was not considered by the I.G. in making his exclusion determination.

Under the Act, the burden of proof is on the I.G. to establish that the length of any exclusion imposed against a party is reasonable. An excluded party has the statutory right to rebut evidence presented by the I.G. in a de novo hearing, or to introduce affirmative proof that is relevant to the issue of his or her trustworthiness to provide care.

The DAB's appellate panels have held specifically that exclusions imposed and directed pursuant to section 1128(b)(4) of the Act are not per se reasonable if they are coterminous with State license suspensions or revocations. Kranz, DAB 1286, at 11; Bilang, DAB 1295, at 8. In the case of an exclusion imposed and directed pursuant to section 1128(b)(4), the I.G. may establish by the preponderance of the evidence that an exclusion which is coterminous in duration with a State license suspension or revocation is reasonable. However, whether that is reasonable in any given case necessarily depends on evidence which relates to a party's trustworthiness to provide care, and the relationship between that party's trustworthiness and the term of a license revocation or suspension. Thus, under the Act, exclusions which are coterminous in duration with State license suspensions or revocations are not automatically, or even presumptively, reasonable. Under the Act, the criteria identified by the DAB's appellate panel in Matesic for evaluating the reasonableness of permissive exclusions apply to all permissive exclusions, including those imposed pursuant to section 1128(b)(4).[4]

The Bilang case involved facts and issues which are indistinguishable from those presented here. The petitioner in Bilang surrendered his license to practice medicine to a State licensing authority (Florida) in order to avoid a finding of misconduct by that licensing authority. As with this case, no final adjudication of misconduct was made against the petitioner by the licensing authority. The I.G. excluded the petitioner pursuant to section 1128(b)(4)(B) of the Act based on the petitioner's surrender of his license. The I.G. asserted that an indefinite exclusion coterminous with the license surrender was per se reasonable. Therefore, according to the I.G., it was erroneous for an administrative law judge to accept evidence from the petitioner concerning his trustworthiness to provide care.

The DAB's appellate panel disagreed with the I.G.'s argument that the exclusion was per se reasonable. It held that the petitioner was entitled to a hearing at which he would be permitted to show that, notwithstanding

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[4] The criteria identified in Matesic do not apply to exclusions imposed pursuant to sections 1128(a)(1) and (a)(2) of the Act for terms of five years. Congress mandated exclusions of at least five years for all exclusions imposed pursuant to sections 1128(a)(1) and (a)(2). Social Security Act, sections 1128(a)(1), (2), 1128(c)(3)(B).

his license surrender, he was trustworthy to provide care:

> In drafting section 1128(b)(4)(B) of the Act, Congress was concerned that individuals not evade an exclusion by the expedient of surrendering their license. Congress recognized the probability that providers who surrender their licenses to provide health care in the face of disciplinary proceedings ordinarily do so to avoid the stigma of an adverse finding. See S. Rep. No. 109, 100th Cong., 1st Sess. 2, reprinted in 1987 U.S. Code Cong. & Admin. News 682, 688. The scheme Congress established in section 1128 permits the Secretary to conserve program resources by relying where possible on other federal or state court or administrative findings. However, Congress did not require imposition of an exclusion on all providers who surrendered their licenses, nor mandate any particular period of exclusion in such circumstances. This grant of discretion to the Secretary is inconsistent with the I.G.'s apparent position that the surrender of a license creates a presumption of culpability which cannot be rebutted for any purpose.

Bilang, DAB 1295, at 8 (emphasis added).

On January 29, 1992, the Secretary published regulations which established criteria for the I.G. to apply in determining, imposing, and directing exclusions pursuant to section 1128 of the Act. The I.G. has argued since then that the exclusion determination criteria contained in these regulations apply also as criteria for adjudication of the length of exclusions at administrative hearings. Administrative law judges have held consistently that these regulations do not establish criteria for adjudication of the length of exclusions. Bertha K. Krickenbarger, R.Ph., DAB CR250 (1993); Tajammul H. Bhatti, M.D., DAB CR245 (1992); Narinder Saini, M.D., DAB CR217 (1992), aff'd, DAB 1371 (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); Charles J. Barranco, M.D., DAB CR187 (1992). The Willig decision held specifically that section 1001.501(b) of the regulations, governing the I.G.'s exclusion determinations under section 1128(b)(4) of the Act, which is at issue here also, did not apply in administrative hearings concerning such exclusions.

The decisions in the above cases were based on two conclusions. First, the January 29, 1992 regulations were not intended by the Secretary to strip parties retroactively of rights vested prior to January 29, 1992. Therefore, the regulations did not apply to any cases arising from exclusion determinations made prior to that date. Behrooz Bassim, M.D., DAB 1333, at 5 - 9 (1992).[5] Second, the Secretary did not intend Part 1001 of the regulations to establish criteria for administrative hearings as to the length of exclusions.[6]

The present case does not involve an issue of retroactive application of regulations, because the exclusion determination is dated May 12, 1992, after publication of the January 29, 1992 regulations. Therefore, the only question concerning the regulations' application is whether the Secretary intended these regulations to apply as criteria for adjudication of the length of exclusions.

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[5] Central to the DAB appellate panel's holding that the regulations did not apply retroactively was a finding that the I.G.'s interpretation of the January 29, 1992 regulations represented a departure from policy previously enunciated by the DAB. The appellate panel considered and rejected the I.G.'s argument that, in requiring most exclusions based on State license revocations and suspensions to be coterminous with such revocations and suspensions, 42 C.F.R. § 1001.501(c) merely restated the DAB's interpetation of section 1128(b)(4) on the Secretary's behalf:

> [T]here is no merit to the I.G.'s argument that his interpetation of the 1992 Regulations comports with prior Board decisions, with respect to prohibiting review of matters considered during the state licensing proceeding and requiring a coterminous exclusion.

DAB 1333, at 8 (footnote omitted).

[6] The I.G. filed a notice of appeal with the DAB in Willig, but then withdrew it. Krickenbarger was the first of the administrative law judge decisions to examine an exclusion determination made after January 29, 1992. Thus, Krickenbarger was the first decision to present the issue of the applicability of the Part 1001 regulations independent of the issue of retroactive application of the regulations that had been addressed by the appellate panel in Bassim.

The administrative law judge decisions which addressed the issue of applicability found that the new regulations, if applied as criteria for review of exclusions, would place the Secretary in opposition to the requirements of the Act. If applied at the level of the administrative hearing, the regulations would conflict squarely with the remedial criteria of the Act. 42 C.F.R. § 1001.501(b), for example, mandates that exclusions imposed pursuant to section 1128(b)(4) be coterminous with the State license revocations or suspensions on which the exclusions are based. This is in direct conflict with the Act, as interpreted by the DAB's appellate panels in Kranz, Bilang, and Matesic. Furthermore, the new regulations would strip parties of their rights to de novo hearings guaranteed to them by section 205(b) of the Act, because these regulations, if applicable as criteria for administrative adjudications of the reasonableness of exclusions, would bar parties from presenting evidence which is relevant to their trustworthiness to provide care. Indeed, as applied to this case, the new regulations require the conclusion that an exclusion coterminous with a State license revocation is per se reasonable without an evidentiary hearing. This is precisely the result which the DAB's appellate panel in Bilang found to be beyond that which Congress authorized the Secretary to impose.[7]

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[7] The I.G. argues that the new regulations are similar to those found lawful by the United States Supreme Court in Heckler v. Campbell, 461 U.S. 458 (1983). The Campbell decision involved regulations adopted by the Social Security Administration to facilitate the processing of disability cases under the Act. The regulations simplified the processing of disability cases by resolving certain medical-vocational issues that were common to many cases. The Supreme Court held that the regulations were not ultra vires the Act. In holding that the regulations were not ultra vires, the Supreme Court found that they determined issues that did not require case-by-case consideration, in a manner which was consistent with that which Congress had intended. 461 U.S. at 467. Furthermore, the Supreme Court noted that: "The regulations here . . . state that an administrative law judge will not apply the rules contained in the guidelines when they fail to describe a claimant's particular limitations." 461 U.S. at 468 n.11. Thus, these regulations were held not to be ultra vires because: (1) they promoted outcomes which were consistent with congressional intent, and (2) they permitted claimants to argue that the regulations did not

(continued...)

The administrative law judge decisions concluded that the Secretary did not intend to publish regulations which might conflict with the requirements of the Act. They found support for this conclusion on several grounds. First, the decisions found that the Part 1001 regulations neither stated nor suggested that they applied at the level of the administrative hearing. The decisions held that the plain meaning of the Part 1001 regulations was to establish criteria for the I.G. to use in making exclusion determinations. Thus, the Part 1001 regulations, did not, on their face, apply to administrative hearings. Krickenbarger, DAB CR250, at 15 - 16.

Second, the administrative law judge decisions found that there was nothing in the Part 1001 regulations or the commentary to those regulations which either stated or suggested that the Secretary intended the regulations to overrule the DAB's interpretations of the Act. Even as administrative law judges are delegated authority to hear and decide cases on the Secretary's behalf, and to interpret law and regulations for the Secretary, the DAB is delegated authority to make final interpretations of law on behalf of the Secretary. The decisions concluded that, had the Secretary intended to supersede the DAB's appellate decisions by his enactment of regulations, he would have said so. Id. at 16.

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[7] (...continued)
resolve the issues as uniquely applied in their particular cases. By contrast, the Part 1001 regulations would direct outcomes based on criteria which are inconsistent with congressional intent, as found by the DAB's appellate panels in Kranz, Bilang, and Matesic, and would prohibit petitioners from offering evidence to show that the regulations did not resolve the issues as uniquely applied in their particular cases.

More recently, the United States Supreme Court has held that regulations promulgated pursuant to the Social Security Act are ultra vires where they impose standards for relief which are stricter than those embodied in the Act, or where they deny claimants for benefits the opportunity to show that the regulations should not direct an outcome given the unique circumstances which pertain in particular cases. Sullivan v. Zebley, 493 U.S. 521 (1990). Zebley involved the lawfulness of regulations which directed the outcomes of applications for disability for children eligible for benefits under the Supplemental Security Income program.

Third, the decisions concluded that the Part 1001 regulations would conflict with other regulations adopted by the Secretary on January 29, 1992, if they were held to establish criteria for adjudication of the reasonableness of exclusions. The Part 1001 regulations are part of a broader enactment which includes regulations which explicitly establish the authority of administrative law judges to conduct hearings pursuant to section 1128 of the Act (and pursuant to other sections, as well). These are contained in Part 1005 of the new regulations. The Part 1005 regulations also make explicit certain rights which inure to parties in hearings held pursuant to the Act. The Part 1005 regulations contain many sections which become meaningless when the Part 1001 regulations are applied as a standard for reviewing the reasonableness of exclusion determinations. These include sections which establish and define the authority of administrative law judges and sections which define the parties' rights to present evidence in administrative hearings. Id. at 16 - 17.

Finally, the administrative law judge decisions concluded that the Part 1001 regulations could be read as codifying I.G. policy, without construing them as being applicable at all levels of review. Id. at 18. In so holding, the administrative law judges noted that there had never been a particular nexus between the criteria employed by the I.G. to make exclusion determinations and criteria employed by administrative law judges or the DAB's appellate panels to evaluate the reasonableness of such determinations.

Administrative Law Judge Riotto's November 25, 1992 ruling in this case, which in part denied the I.G.'s motion for summary disposition, was on all fours with these decisions. An in-person hearing was scheduled pursuant to Judge Riotto's ruling and also pursuant to the decisions which held that the Part 1001 regulations did not establish criteria for administrative adjudications of exclusions. The decision to schedule an in-person hearing was made also in light of Petitioner's representation that, at such a hearing, he would present evidence concerning his trustworthiness which addressed the factors identified as controlling that issue in Matesic. See, e.g., P. Ex. 1. Had I held an in-person hearing, I would have received evidence, either from the I.G. or from Petitioner, that would have related to the issue of Petitioner's trustworthiness. It is possible that, based on that evidence, I would have modified the exclusion to a term of years. See Kranz, Bilang. It is also possible that I might have sustained the exclusion imposed and directed by the I.G.

However, on January 22, 1993, the Secretary published a new regulation.[8] This regulation states that:

> The regulations in . . . [Part 1001] are applicable and binding on the Office of Inspector General (OIG) in imposing and proposing exclusions, as well as to Administrative Law Judges (ALJs), the Departmental Appeals Board (DAB), and federal courts in reviewing the imposition of exclusions by the OIG . . . .

58 Fed. Reg. 5618 (to be codified at 42 C.F.R. § 1001.1(b)). Interpretive comments to this new regulation emphasize that the exclusion determination criteria contained in Part 1001 must be applied by administrative law judges in evaluating the length of exclusions imposed and directed by the I.G.

The regulations were made applicable to cases which were pending on January 22, 1993, the regulations' publication date. 58 Fed. Reg. 5618. The present case is a "pending case" inasmuch as the exclusion determination was made on May 12, 1992, after the January 29, 1992 effectuation date of the Part 1001 regulations.[9]

Thus, I am now required to apply the criteria of the Part 1001 regulations as standards for adjudicating the length of exclusions imposed and directed by the I.G. The previous decisions concerning the applicability of these regulations, including Judge Riotto's ruling in this case, have been overruled by the January 22, 1993 regulation.

Petitioner argues that I cannot lawfully apply the Part 1001 regulations here, because to do so would deprive him of due process rights guaranteed to him under the Act. This is, effectively, an argument that the regulations are ultra vires. I am without authority to rule that the regulations are ultra vires. 42 C.F.R. § 1005.4(c)(1).

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[8] The new regulation was approved by then-Secretary Louis W. Sullivan on December 18, 1992. 58 Fed. Reg. 5618.

[9] Thus, it is not necessary for me to conclude as a matter of law, nor do I conclude, that the Part 1001 regulations apply to cases in which exclusion determinations were made prior to January 29, 1992.

The Part 1001 regulations require, at 42 C.F.R. § 1001.501(b), that exclusions imposed and directed by the I.G. pursuant to section 1128(b)(4) of the Act, be coterminous with the State license suspensions or revocations on which those exclusions are based. Petitioner does not argue here that he would qualify for the exceptions to this requirement contained in 42 C.F.R. § 1001.501(c). Therefore, the regulation mandates that the exclusion in this case be coterminous with the indefinite license revocation imposed by the Maryland Board. Evidence as to Petitioner's trustworthiness to provide care is now irrelevant, because the regulation does not permit consideration of such evidence here. Therefore, there is no basis in this case for an in-person evidentiary hearing. I enter summary disposition in favor of the I.G. sustaining the indefinite exclusion imposed and directed against Petitioner.[10]

CONCLUSION

I conclude that the I.G. had authority to impose and direct an exclusion against Petitioner pursuant to section 1128(b)(4)(B) of the Act. I conclude that the indefinite exclusion imposed and directed against Petitioner by the I.G. is in accord with 42 C.F.R. § 1001.501(b). Therefore, I enter summary disposition in favor of the I.G. sustaining the exclusion.

/s/

Steven T. Kessel
Administrative Law Judge

[10] One consequence of my decision is that Petitioner will be excluded indefinitely without a hearing either before a State agency or within this Department as to his trustworthiness to provide care. Petitioner gave up his opportunity to have a hearing before the Maryland Board on the State charges against him when he surrendered his license to that agency. The new regulations preclude Petitioner from having a hearing before me concerning his trustworthiness to provide care.