Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: December 9, 1992
George Iturralde, M.D., Petitioner,	Docket No. C-399
- v. -	Decision No. 1374
The Inspector General.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

George Iturralde, M.D., Petitioner, appealed the decision of Edward D. Steinman, Administrative Law Judge (ALJ), upholding Petitioner's exclusion from participation in Medicare and state health care programs.1/ George Iturralde, M.D., DAB CR218 (1992) (ALJ Decision). The Inspector General (I.G.) excluded Petitioner under section 1128(b)(5) of the Social Security Act (42 U.S.C. § 1320a-7(b)(5)) (the Act) based on the suspension of Petitioner from Medicaid by the Kansas Department of Social and Rehabilitative Services (Kansas Medicaid) for a period of three years. The exclusion by the I.G. was to run for a period coterminous with the suspension imposed by Kansas Medicaid. The ALJ found that the I.G. had the authority to exclude Petitioner and that the length of the exclusion was reasonable. For the reasons stated below, we affirm the holding of the ALJ, but with one modification to the Decision.

1/ "State health care program" is defined in section 1128(h) of the Act and includes the Medicaid program under title XIX of the Act. Unless the context indicates otherwise, we use the term "Medicaid" to refer to all programs listed in section 1128(h), which includes the program from which Petitioner was excluded by the Kansas Department of Social and Rehabilitative Services.

BACKGROUND

The ALJ Decision was based on the following findings of fact and conclusions of law (FFCLs):

1. At all times relevant to this case, Petitioner was a psychiatrist, providing psychiatric and other medical services to Medicaid patients.

2. Following notice to Petitioner and an administrative review, on January 30, 1990, Kansas Medicaid suspended Petitioner's participation to provide services in the Medicaid program.

3. Kansas Medicaid found that Petitioner had demonstrated a pattern of submitting billings for a higher level of service than was actually performed and of providing services of an inferior quality that might be harmful to a patient.

4. This Kansas Medicaid action followed an on-site review by the Surveillance & Utilization Review Section of Electronic Data Systems Corporation (EDSC) of Petitioner's practice which found three areas of concern relating to Petitioner's billing patterns and medical practice: 1) that Petitioner consistently billed the Medicaid/MediKan program at a higher level of service than his medical record documentation would support; 2) that the medical necessity and quality of psychiatric services provided appeared questionable; and 3) that physical examinations were documented as provided to recipients in an office not equipped for such services.

5. Petitioner reimbursed Kansas Medicaid for a reduced amount to satisfy the overpayment documented by EDSC.

6. Petitioner is eligible to apply for reinstatement to the Kansas Medicaid program as of February 19, 1993.

7. Kansas Medicaid suspended Petitioner as a participant in the Medicaid program for reasons bearing on his professional competence, professional performance, or financial integrity.

8. The Secretary of the Department of Health and Human Services (Secretary) delegated to the I.G. the authority to determine, impose and direct exclusions pursuant to section 1128 of the Act.

9. The I.G. had authority to impose and direct an exclusion against Petitioner.

10. On April 18, 1991, the I.G. imposed and directed the exclusion of Petitioner from participating in Medicare and Medicaid.

11. The exclusion imposed and directed against Petitioner by the I.G. is to last until Petitioner is reinstated by Kansas Medicaid.

12. 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)(1) and (2) and (b) of the Act.

13. The Secretary did not intend that the regulations contained in 42 C.F.R. Part 1001, and, in particular, 42 C.F.R. § 1001.601, govern my decision in this case.

14. The exclusion provisions of section 1128(b)(5) of the Act establish neither minimum nor maximum exclusion terms in those circumstances where the I.G. has discretion to impose and direct exclusions.

15. Section 1128(b)(5) of the Act does not require that the I.G. examine the fairness or propriety of the process which led Kansas Medicaid to exclude Petitioner.

16. Petitioner repeatedly billed Medicaid for a higher level of medical service than his medical record documentation supported, evidencing a lack of financial integrity, within the meaning of section 1128(b)(5)(B) of the Act.

17. The medical necessity and quality of psychiatric services provided by Petitioner were questionable, evidencing a lack of professional competence on Petitioner's part, within the meaning of section 1128(b)(5)(B).

18. Petitioner performed physical examinations in an office not equipped for that purpose, evidencing a lack of professional performance on Petitioner's part, within the meaning of section 1128(b)(5)(B) of the Act.

19. A remedial objective of section 1128(b)(5) of the Act is to protect the integrity of federally funded health care programs, and their recipients and

beneficiaries, from individuals who demonstrate by their conduct that they cannot be trusted to deal with program funds or to provide items or services to recipients or beneficiaries.

20. The patient records introduced by Petitioner do not support Petitioner's trustworthiness to provide services to the Medicare and Medicaid programs.

21. Excluding Petitioner until Kansas Medicaid reinstates him is neither extreme or excessive.

ALJ Decision at 2-5 (citations omitted). Petitioner objected to FFCLs 2-9, 11, 15-18, and 20-21. Petitioner did not object to FFCLs 1, 10, 12-14, and 19, and we affirm and adopt these FFCLs without further discussion.

ANALYSIS

We have a limited role as the forum for administrative review of an ALJ's decision in an exclusion case. The standard of review on disputed issues of fact is whether the ALJ Decision is supported by substantial evidence on the record. The standard of review on disputed issues of law is whether the ALJ Decision is erroneous. See 42 C.F.R. § 1005.21(h); Joyce Faye Hughey, DAB 1221 at 11 (1991); Lakshmi N. Murty Achalla, DAB 1231 at 7 (1991). Applying these standards, we conclude here that the ALJ's conclusions that the I.G. had the authority to exclude Petitioner and that the length of the exclusion was reasonable were not erroneous.

For purposes of discussion, we have divided the FFCLs to which Petitioner objected into three groups: (1) those related to Kansas Medicaid's proceedings (FFCLs 2, 3, 4, 5, and 15); (2) those related to the authority of the I.G. to exclude Petitioner (FFCLs 7, 8, 9, 16, 17, and 18); and (3) those related to the reasonableness of the length of Petitioner's exclusion (FFCLs 6, 11, 20, and 21).

I. Petitioner May Not Collaterally Attack Kansas Medicaid's Proceedings on Appeal.

Petitioner excepted to several of the ALJ's findings on the ground that they relied on Kansas Medicaid's proceedings, which Petitioner alleged to be unfair and in violation of his due process rights. See Petitioner's Brief (P. Br.) at 1-2. The ALJ found that, following notice and administrative review, Kansas Medicaid suspended Petitioner's participation in the Medicaid

program (FFCL 2). The ALJ noted that Kansas Medicaid had found that Petitioner had demonstrated a pattern of submitting billings for a higher level of service than was actually performed and of providing inferior and possibly harmful services to patients (FFCL 3). The ALJ further noted that Kansas Medicaid's action followed an investigation by EDSC, which found that Petitioner had consistently overbilled, had provided unnecessary and questionable care, and had performed physical examinations in an office which was not equipped for such purposes (FFCL 4).

Petitioner alleged specifically that he was denied due process because Kansas Medicaid never held an administrative hearing on EDSC's findings and the I.G. based his exclusion on Kansas Medicaid's action without making separate factual determinations on Kansas Medicaid's findings.2/ Petitioner objected to the ALJ's finding that section 1128(b)(5) of the Act does not require the I.G. to examine the fairness of the state process (FFCL 15). However, Petitioner did not deny that the assertions contained in FFCLs 2, 3, and 4 were true to the extent they reflected Kansas Medicaid's actions. In other words, Petitioner did not deny that Kansas Medicaid suspended Petitioner's participation in Medicaid; that the grounds for the suspension by Kansas Medicaid involved charges of overbilling and providing questionable services; and that the suspension followed an investigation by EDSC which found overbilling, questionable care, and inadequate facilities. Petitioner simply denied that the state process was fair and that the findings were accurate. Petitioner claimed that his due process rights were further violated because the ALJ denied his request to subpoena witnesses for the hearing

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2/ Apparently, a hearing on the merits of the EDSC findings, on which the state suspension was based, was never held by Kansas Medicaid because Petitioner did not timely appeal the suspension. P. Br. at 2.

and to reopen the case following the hearing.3/ P. Br. at 2.

Many of the exclusions under section 1128 of the Act are derivative in nature, in that the I.G. derives his authority to exclude a petitioner from actions taken by another administrative or a judicial body.4/ Petitioner was excluded under section 1128(b)(5)(B), which provides:

> (b) The Secretary may exclude the following individuals and entities from participation in [Medicare] and may direct that the following individuals and entities be excluded from participation in [Medicaid]:
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> * * *
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> (5) EXCLUSION OR SUSPENSION UNDER FEDERAL OR STATE HEALTH CARE PROGRAM. -- Any individual or

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3/ Petitioner also objected to the ALJ's finding that Petitioner reimbursed Kansas Medicaid for a reduced amount to satisfy the charges of overbilling (FFCL 5). Petitioner took exception to this statement "because it is irrelevant and proves nothing [but] that petitioner compromised a disputed claim with the State of Kansas. There were no findings of fact or conclusions of law in that litigation relating to any issues herein." P. Br. at 3.

Petitioner did not appear to dispute the factual accuracy of the statement (i.e., that he did reimburse Kansas Medicaid for a portion of the overbilled amount); rather, he appears only to be challenging certain of the possible conclusions which one might draw from the statement. See ALJ Decision at 3, 6. Therefore, we affirm and adopt FFCL 5.

4/ For example, section 1128(a) requires the I.G. to exclude any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid, or to the neglect or abuse of patients in connection with the delivery of a health care item or service. Section 1128(b)(3) allows the I.G. to exclude any individual or entity that has been convicted of an offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Section 1128(b)(4) allows the I.G. to exclude any individual or entity that has had its license to provide health care revoked for certain reasons (or has surrendered such license during disciplinary proceedings).

> entity which has been suspended or excluded from participation, or otherwise sanctioned, under --
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> * * *
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> (B) a State health care program,
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> for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity.

As the ALJ correctly noted, this exclusion authority derives from a state's action in excluding or suspending an individual from participation in a state health care program for reasons bearing on the individual's professional competence, professional performance, or financial integrity. ALJ Decision at 6. Under section 1128(b)(5), it is the fact of the suspension or exclusion by a state for those specified reasons which gives the I.G. the authority to further exclude a practitioner, and a practitioner may not collaterally attack the state proceeding on appeal of the I.G.'s exclusion before an ALJ. Olufemi Okonuren, DAB 1319 (1992). We have held that the fairness of a state's process in taking action against a petitioner is irrelevant in a derivative exclusion proceeding before the Board, and evidence relating to such fairness is properly excluded from evidence. Bernardo G. Bilang, M.D., DAB 1295 (1992). We have also held that an ALJ is not required to determine the "guilt or innocence" of a party as to the conduct on which the state action is based before affirming a petitioner's exclusion by the I.G. Behrooz Bassim, M.D., DAB 1333 at 9-10 (1992). Our conclusion is consistent with the legislative history and purpose of section 1128(b)(5) and other cited sections. There would be no point in relying on these actions if they would be reopened and relitigated during the exclusion proceedings.

In a case with facts similar to those in this case, the Board previously examined the issue of collateral attacks on state proceedings where no hearing was held by a state on the merits of the charges. In Okonuren, the petitioner was suspended from Medicaid participation for allegedly performing and billing for unnecessary laboratory tests and was then excluded by the I.G. under section 1128(b)(5). The petitioner appealed, asserting that the Mississippi Medicaid program had not suspended him for reasons bearing on his professional performance, professional competence, or financial integrity because his untimely appeal before the state had been rejected and there were never specific findings on the merits of the charges. Okonuren at 6. After stating the principles that a petitioner may not collaterally attack the state proceedings before the ALJ and that the

fairness of the state process is irrelevant, we stated that:

> precluding collateral attacks on the actions of state licensing authorities did not infringe on constitutional rights, as state proceedings are subject to the due process and equal protection clauses of the Fourteenth Amendment [citation omitted]. The Petitioner here did not allege that he was unable to attack his suspension from Mississippi Medicaid on due process grounds at the State level. Where practitioners can directly attack state proceedings at the state level, constitutional rights are adequately and more appropriately protected by direct appeal from state decisions. Allowing collateral attacks would unnecessarily encumber the exclusion process by granting practitioners a remedy that duplicates a pre-existing remedy.

Okonuren at 7.

We find the facts of this case to be substantively indistinguishable from Okonuren. Thus, we find that the I.G. did not violate due process in acting to exclude Petitioner based on Kansas Medicaid's suspension. Accordingly, the ALJ did not err in concluding that section 1128(b)(5) does not require the I.G. to examine the fairness of the state process in determining whether to exclude an individual, and we affirm and adopt FFCL 15. Moreover, since Petitioner may not collaterally attack the state proceedings before the ALJ, we find it was not error for the ALJ to refuse to reopen the record, once the period for filing post-hearing briefs had expired, in order to take additional evidence on the alleged unfairness of Kansas Medicaid's process.5/

To whatever extent Petitioner may have been arguing that the FFCLs reflecting Kansas Medicaid's actions are objectionable because they do not accurately reflect the

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5/ Likewise, the ALJ properly declined to subpoena the three witnesses requested by Petitioner since he did not make his subpoena request on time and did not explain what purpose the testimony of these witnesses would serve. See Letter from Maxine Winerman, Staff Attorney, Departmental Appeals Board, to the parties, dated February 12, 1992. To the extent that Petitioner intended to use the testimony of the witnesses to collaterally attack the state proceedings, the testimony would have been irrelevant.

state proceedings, we find that there is substantial evidence in the record to support the ALJ's finding that Kansas Medicaid's reasons for suspending Petitioner's participation in Medicaid involved charges of a pattern of overbilling and providing inferior services. See I.G. Exs. 9 and 12. There is also substantial evidence in the record that this finding was based on an on-site review by EDSC, which found a pattern of overbilling, providing questionable quality services, and performing medical examinations in an inadequately-equipped office. See I.G. Exs. 14, 15, 16, and 17. For these reasons, we affirm and adopt FFCLs 3 and 4. Finally, because there is no dispute that, following notice on January 30, 1990, Kansas Medicaid suspended Petitioner's participation in the program, we affirm and adopt FFCL 2.

II. The ALJ Had Authority to Exclude Petitioner Under Section 1128(b)(5).

Petitioner objected to the ALJ's conclusion that Kansas Medicaid had suspended Petitioner for reasons bearing on his professional competence, professional performance, or financial integrity within the meaning of section 1128(b)(5)(B) of the Act (FFCL 7). Specifically, the ALJ found that Petitioner's repeated overbilling of Medicaid evidenced a lack of financial integrity (FFCL 16); that the questionable necessity and quality of services performed evidenced a lack of professional competence (FFCL 17); and that the performing of physical examinations in an inadequately-equipped office evidenced questionable professional performance (FFCL 18).

Petitioner also excepted to the ALJ's findings that the Secretary delegated to the I.G. the authority to determine, impose and direct exclusions (FFCL 8) and that the I.G. had authority to impose and direct an exclusion against Petitioner (FFCL 9). P. Br. at 3. Petitioner did not directly dispute the fact of the Secretary's delegation to the I.G. or that the reasons given by Kansas Medicaid for Petitioner's suspension, if true, bore on Petitioner's professional competence, professional performance, or financial integrity. Rather, Petitioner argued that the I.G.'s imposing and directing of exclusions must be pursuant to constitutional due process principles. Id. In support of his argument, Petitioner referred again to his arguments regarding the fairness of the state process and the fact that the ALJ conducted no hearing on the merits

of Kansas Medicaid's allegations (see discussion in section I, supra).6/

Under section 1128(b)(5)(B), the I.G. need only prove that two elements have been met: (1) that a petitioner was excluded or suspended from state health care programs, and (2) that the exclusion or suspension was for reasons bearing on the petitioner's professional competence, professional performance, or financial integrity.

Petitioner did not argue that he was not suspended or excluded from state health care programs, and there is substantial evidence in the record to indicate that he was. See I.G. Exs. 9, 12. Furthermore, the letter notifying Petitioner of his suspension from Medicaid stated that Kansas Medicaid found that Petitioner "demonstrated a pattern of submitting billings for a higher level of service than was actually performed and of providing services of an inferior quality that may be harmful to the patient." I.G. Ex. 9. The ALJ found that these actions, as well as Petitioner's performing physical examinations in an inadequately-equipped office, bore on professional competence, professional performance, or financial integrity. ALJ Decision at 6-7. Petitioner did not argue that these actions are somehow unrelated to professional competence, professional performance, or financial integrity, and we agree with the ALJ that they are very much related. As we have previously stated --

> The state authority is not required to use the words "professional competence, professional performance or financial integrity" in effecting the suspension in order for the I.G. to have authority to exclude an individual under section 1128(b)(5)(B) of the Act. The statute requires only that the state suspension be for reasons bearing on professional competence, performance, or financial integrity. Thus, the appropriate inquiry is what were the reasons for the state action in suspending Petitioner, and whether those reasons bear on his

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6/ Petitioner did not offer any additional reasons why the exclusion imposed by the I.G. allegedly violated constitutional due process principles, other than those discussed in the previous section. Since the issue of the fairness of the state proceedings has already been discussed, we address here only the authority of the I.G. to exclude.

> professional competence, professional performance, or financial integrity.

Okonuren at 8. Therefore, the relationship is established where there is a common sense connection between a state's findings and either professional competence, performance, or financial integrity. Here we believe that common sense connection is obvious.

Since we find that Petitioner was suspended from state health care programs for reasons bearing on his professional competence, professional performance, or financial integrity, we find that the I.G. had authority to exclude Petitioner. It makes no difference that Kansas Medicaid did not make specific findings in an adjudicatory proceeding regarding the investigatory findings of EDSC, since Petitioner did not timely appeal the matter before Kansas Medicaid. We also find that the Secretary has, in fact, delegated to the I.G. the authority to determine, impose and direct exclusions and that the Petitioner has not raised a valid challenge to that authority. See 48 Fed. Reg. 21662 (May 13, 1983).7/ For these reasons, we affirm and adopt FFCLs 7, 8, 9, 16, 17 and 18.

III. The ALJ Did Not Err in Concluding that the Length of Petitioner's Exclusion Is Reasonable.

Once the I.G. has determined that he has the authority to exclude a petitioner, he must determine a reasonable length for the exclusion. Petitioner excepted to the ALJ's findings that the two patients' records introduced by Petitioner did not support Petitioner's trustworthiness (and therefore did not require a shorter exclusionary period) (FFCL 20) and that excluding Petitioner until Kansas Medicaid reinstated him was neither extreme nor excessive (FFCL 21).8/ Petitioner further argued

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7/ Petitioner's constitutional due process objection to FFCLs 8 and 9 appears to be directed to the I.G.'s authority to exclude Petitioner under the facts of this case rather than a more general challenge to the Secretary's authority to delegate the exclusionary authority to the I.G. P. Br. at 3.

8/ Petitioner also objected to the findings that the exclusion imposed and directed by the I.G. is to last until Petitioner is reinstated by Kansas Medicaid (FFCL 11) and that Petitioner is eligible to apply for

(continued...)

that he was confused because the ALJ "first took the position that no evidence would be admissible relating to the underlying allegations and state agency actions, and then at the time of the hearing revealed that a hearing on the question of reasonableness was de novo." P. Br. at 4. Petitioner also objected to the finding of the ALJ that Petitioner had made no attempts to rehabilitate himself through continuing medical education classes or through psychiatric or medical help. ALJ Decision at 12. Petitioner asserted that he has taken continuing medical education classes and has availed himself of psychiatric and medical assistance. P. Br. at 4.

An exclusion is reasonable under section 1128(b)(5) if it is neither extreme nor excessive. See 48 Fed. Reg. 3744 (Jan. 27, 1983); Eric Kranz, M.D., DAB 1286 at 7, 8. In determining whether the length of an exclusion is extreme or excessive, the ALJ considered the petitioner's trustworthiness; that is, whether and when the petitioner may be trusted again to participate in the programs. This concept has been used to determine the exclusion period reasonably needed to accomplish the purposes of section 1128 of the Act, which purposes include protecting beneficiaries and the programs. See Behrooz Bassim, M.D., DAB 1333 at 13 (1992).

8/ (...continued)
reinstatement as of February 19, 1993 (FFCL 6). Petitioner objected on the ground that the coterminous exclusion by the I.G. placed him in a "Catch-22" position because Kansas Medicaid had suspended him until the I.G. reinstated him, while the I.G. had excluded him until Kansas Medicaid reinstated him. P. Br. at 3.

While originally Petitioner was suspended by Kansas Medicaid for three years, Kansas Medicaid revised the suspension period to be coterminous with the I.G.'s exclusion. See I.G. Exs. 5, 9. This was subsequently brought to the attention of the ALJ and Kansas Medicaid when Petitioner expressed concern that he could never be reinstated in either Medicare or Medicaid. See Stay of Proceedings, October 28, 1991; Letter from Health Care Administrative Sanctions, Office of Investigations, to Kansas Medicaid, October 30, 1991. However, we agree with the I.G. that this matter was resolved by a letter, dated November 1, 1991, from Kansas Medicaid again revising the state suspension and advising Petitioner that he would be able to apply for reinstatement to Medicaid as of February 19, 1993 (resulting in a three-year suspension). I.G. Br. at 2-3; I.G. Ex. 13. Therefore, we affirm and adopt FFCLs 6 and 11.

Directly relevant to Petitioner's trustworthiness is whether Petitioner was culpable for the offenses found by the EDSC investigation. We have previously held that a petitioner may offer evidence concerning his culpability for the offenses alleged by a state to the extent that his culpability bears on his trustworthiness. Bernardo G. Bilang, M.D., DAB 1295 at 9 (1992). This is clearly distinguishable from a collateral attack on a state proceeding where a petitioner seeks to overturn a state's suspension or to fully relitigate, in a new forum, the conduct which led to the suspension. See Bassim at 11. As we have previously explained, the Board has --

> specifically rejected the I.G.'s arguments that no challenge to state findings was permitted and affirmed the ALJ's decision to examine the evidence regarding the petitioner's conduct relevant to judging the petitioner's trustworthiness. We have affirmed ALJ decisions using this "trustworthiness" finding as a key element in analyzing the reasonableness of the length of an exclusion. This does not mean, as suggested by Petitioner, that we will review the state proceeding to overturn the exclusion itself.

Bassim at 12.

For this reason, the ALJ did not err in considering evidence of Petitioner's culpability at the hearing to the extent such evidence was offered. While Petitioner, who appeared at the hearing pro se, may have been confused about the legal standards to be applied and therefore what evidence was admissible, Petitioner was given great latitude in presenting evidence on his culpability. For example, the ALJ allowed Petitioner to introduce two patients' records on the issue of whether Petitioner's medical records were inadequate, over the I.G.'s objection that the records were not timely filed with the ALJ. Transcript of February 19, 1992 Hearing before the ALJ (Tr.) at 41. When the Petitioner testified at some length about the investigation conducted by Kansas Medicaid, the ALJ overruled the I.G.'s objection that Petitioner was collaterally attacking the state proceedings; the ALJ stated that Petitioner's testimony went to his level of culpability for the findings made by Kansas Medicaid, and the ALJ allowed Petitioner to continue this line of testimony. Tr. at 52. The ALJ also allowed Petitioner to introduce and refer to a chronology of Kansas Medicaid's actions which Petitioner had drafted and to testify that the chronology represented his position on Kansas Medicaid's actions. Tr. at 47. Furthermore, the ALJ asked

Petitioner specifically to respond to the three findings made by EDSC (i.e., overbilling, inadequate quality of services, and inadequate facilities for medical examinations). Petitioner responded by discussing at some length how he was referred patients by Kansas Medicaid and how he offered to repay the program if Kansas Medicaid found that he had overbilled. Tr. at 48-54.

Because we find that the ALJ gave Petitioner wide latitude in introducing evidence of his culpability and that the ALJ even sought Petitioner's testimony on Kansas Medicaid's findings, we find that Petitioner was not prejudiced by whatever lack of understanding he had regarding the introduction of evidence on culpability. Accordingly, we find that the ALJ did not err in this matter.9/

On the other hand, we do find error in the ALJ's statement that Petitioner had made no effort to rehabilitate himself through continuing medical education courses or by availing himself of psychiatric or other medical help. ALJ Decision at 12. We find no evidence in the record supporting this assertion, which Petitioner stated is simply untrue. P. Br. at 4. It would not have been error for the ALJ to have stated that Petitioner had introduced no evidence on the issue of his rehabilitation through continuing medical education or psychiatric or medical help. However, this was not the ALJ's statement. Therefore we strike from the ALJ Decision the last sentence in the first full paragraph of page 12, which reads "Petitioner has made absolutely no attempt to rehabilitate himself, either by taking continuing medical education courses, by asserting that he is working to change his practice methods, or by availing himself of psychiatric or other medical help."

We do not find that this error requires us to reverse or remand the ALJ Decision, however. We find that the ALJ's

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9/ Furthermore, whatever misunderstanding Petitioner may have had at the time of the hearing regarding the admissibility of evidence on the issue of culpability could have been compensated for by filing a post-hearing brief further explaining his position. Petitioner never filed such a brief, despite the fact that the ALJ told Petitioner at the hearing that he should file a post-hearing brief before the record closed and address whether the I.G. had the authority to exclude Petitioner and whether a coterminous exclusion was extreme or excessive. Tr. at 65.

inclusion of the stricken statement was at most harmless error. Since the burden was on Petitioner to introduce evidence showing rehabilitation if he wished for the ALJ to consider it as a mitigating factor, he was not prejudiced by the ALJ's failure to inquire as to his continuing medical education courses and psychiatric or medical assistance. Furthermore, it is not clear that this element was material in determining that the length of the exclusion imposed by the I.G. was reasonable, particularly where there was no reference to the matter of rehabilitation in the FFCLs.

While the reasonableness of the length of an exclusion is based on a petitioner's conduct, the legislative history of section 1128(b)(5), which was cited by the I.G., further supports the ALJ's decision that the length of the exclusion in this matter was reasonable. The Senate report on the enacting legislation states that --

> The purpose of the provision is to correct the anomaly in current law whereby individuals or entities found unfit to participate in one Federal health care program, may continue to participate in Medicare or the other State programs.

S. Rep. No. 109, 100th Cong. 1st Sess. 8, reprinted in 1987 U.S.C.C.A.N. 682, 698. We agree with the I.G. that a coterminous exclusion is consistent with the purpose of section 1128(b)(5), as expressed in the legislative history, because it makes the suspension or exclusion imposed by a state consistent with the exclusion imposed by the I.G. Appeal Brief of the Inspector General (I.G. Br.) at 4. Moreover, we have previously held that a coterminous exclusion is not per se unreasonable in a derivative exclusion case. See Bassim at 13 (coterminous exclusion is reasonable where the petitioner's license to practice medicine was revoked by a state for conduct evidencing moral unfitness and for physical abuse of patients). Therefore, we find that the coterminous exclusion was neither extreme nor excessive, and we affirm and adopt FFCL 21.

While Petitioner argued that, based on the two patients' records he introduced, a shorter exclusion was warranted, we find that the ALJ did not err in concluding that these patient records do not support Petitioner's trustworthiness and do not require a reduction in the length of the exclusion. ALJ Decision at 5, 11. Petitioner objected specifically to the ALJ's statement that Petitioner's records did not reflect that his services were effective in relieving his patients' underlying problems. ALJ Decision at 11. Petitioner

stated that the ALJ's assertion did not consider "that for 100 years or so the medical profession has been looking for a cure to the chemical imbalances which cause many mental illnesses and so far they are still looking." P. Br. at 4.

While it is true that cures for certain mental illnesses are not as easily defined as cures for many physical disorders, Petitioner's records simply failed to demonstrate why or how his services for ten years (patient D.F.) and five years (patient P.D.), respectively, were necessary and how these patients or the Medicaid program were benefitting from his services. The ALJ found, and Petitioner did not dispute, that "Petitioner's records in general lacked treatment plans, goals, direction, assessment, prognosis, and psychiatric terminology." ALJ Decision at 11. Petitioner certainly may not bill the Medicaid program indefinitely for seeing patients on a regular basis when there is nothing to indicate that Petitioner has in mind specific treatment goals for the patients or has seen any improvement in their condition. See, e.g., section 1156(a)(1) of the Act (it is the duty of health care practitioners receiving reimbursement under Medicaid or Medicare to assure that services provided are provided economically and only to the extent medically necessary); section 1861(v)(1) of the Act (the reasonable costs of services for which a provider can bill Medicare are the actual costs incurred minus unnecessary or inefficient costs). For these reasons, we affirm and adopt FFCL 20.

CONCLUSION

We find that the ALJ did not err in concluding that the I.G. had authority to exclude Petitioner and that the length of Petitioner's exclusion was reasonable. We affirm and adopt each of the FFCLs, but modify the ALJ

Decision by striking the last sentence of the first full paragraph on page 12.

Judith A. Ballard

Cecilia Sparks Ford

M. Terry Johnson
Presiding Board Member