



Maine Department of Health and Human Services
 Commissioner's Office
 11 State House Station
 221 State Street
 Augusta, Maine 04333-0011

PAUL R. LEPAGE
 GOVERNOR

BETHANY L. HAMM
 ACTING COMMISSIONER

IN THE
 OF:

MATTER

Stephen Doane, M.D.)
 C/o Christopher C. Taintor, Esq.)
 Norman Hanson & DeTroy, LLC) **FINAL DECISION**
 P.O. Box 4600)
 Portland, ME 04112)

This is the Department of Health and Human Services' Final Decision.

The Recommended Decision of Hearing Officer Strickland, mailed January 22, 2018 and the responses and exceptions filed on behalf of the Department have been reviewed.

I hereby adopt the findings of fact but I do NOT accept the Recommendation of the Hearing Officer. Instead, for the reasons set forth below, I find that the Department was correct when it terminated Stephen Doane, M.D., from participation in the MaineCare program.

Pursuant to the MaineCare Benefits Manual, Chapter I, section 1.19-2(A), the Department has independent authority to exclude a provider from participation in the MaineCare program based on its consideration of factors set forth in section 1.19-3(A)(1). This authority arises out of the Department's administration of the MaineCare program which provides reimbursement for medical services provided to vulnerable low-income, disabled, and high-risk populations. The Department properly exercised its authority to exclude Dr. Doane from participation in the MaineCare population by basing the exclusion on the undisputed serious and multiple incidents of professional incompetence by Dr. Doane over an extended period of time as set forth in Exhibits D-3 and D-4.

DATED: 10/10/18 SIGNED: Bethany Hamm
 BETHANY HAMM, ACTING COMMISSIONER
 DEPARTMENT OF HEALTH & HUMAN SERVICES

YOU HAVE THE RIGHT TO JUDICIAL REVIEW UNDER THE MAINE RULES
 OF CIVIL PROCEDURE, RULE 80C. TO TAKE ADVANTAGE OF THIS RIGHT, A

PETITION FOR REVIEW MUST BE FILED WITH THE APPROPRIATE SUPERIOR COURT WITHIN 30 DAYS OF THE RECEIPT OF THIS DECISION.

WITH SOME EXCEPTIONS, THE PARTY FILING AN APPEAL (80B OR 80C) OF A DECISION SHALL BE REQUIRED TO PAY THE COSTS TO THE DIVISION OF ADMINISTRATIVE HEARINGS FOR PROVIDING THE COURT WITH A CERTIFIED HEARING RECORD. THIS INCLUDES COSTS RELATED TO THE PROVISION OF A TRANSCRIPT OF THE HEARING RECORDING.

cc: Christopher C. Taintor, Esq., Norman Hanson & DeTroy, LLC, P.O. Box 4600,
Portland, ME 04112
Thomas Bradley, AAG, Office of the Attorney General, Augusta
Herb Downs, Audit



Department of Health
and Human Services

Maine People Living
Safe, Healthy and Productive Lives

Paul R. LePage, Governor

Ricker Hamilton, Commissioner

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Ricker Hamilton, Commissioner
Department of Health and Human Services
11 SHS, 221 State Street
Augusta, ME 04333

DATE OF MAILING: JAN 22 2018

RE: Stephen Doane, M.D. – exclusion from participation in medical assistance programs

ADMINISTRATIVE HEARING RECOMMENDATION

An administrative hearing in the above-referenced matter was held on May 11, 2016, at Portland, Maine, before Hearing Officer Jeffrey P. Strickland. The Hearing Officer's jurisdiction was conferred by appointment from the Commissioner, Maine Department of Health and Human Services.

CASE BACKGROUND AND PROCEDURAL HISTORY:

Stephen Doane, M.D. (Claimant) appeals a decision of the Department of Health and Human Services (Respondent) to terminate his participation in the MaineCare program per a Notice of Violation dated April 9, 2015, and Final Informal Review Determination dated September 11, 2015. Claimant concurrently sought declaratory and injunctive relief in the Kennebec County Superior Court (*Stephen Doane, M.D., v. Maine Dept. of Health & Human Services*, Docket No. CV-15-168) and administrative review was stayed by agreement of the parties through October 2, 2017, pending Respondent's appeal in that matter (*Stephen Doane v. Dept. of Health and Human Services*, 2017 ME 193).

DECISION AUTHORITY:

Authority for the final decision in this matter is reserved to the Commissioner, Maine Department of Health and Human Services. 10-144 C.M.R. Ch. 1, § VI(B)(5); Ch. 101, Chapter I, § 1.21-1(A). And, "Any matter handled by the Commissioner under this section may be delegated to the [DHHS] Chief Administrative Hearing Officer by the Commissioner." Ch. 1, § VI(B)(5)(c).

In accordance with the above, an Order of Reference was issued on December 23, 2015, referring the matter to the Division of Administrative Hearings to select an independent presiding officer to conduct an administrative hearing and prepare written findings of fact and a recommended decision concerning the following issue: *Was the Department correct when it determined that Stephen Doane, M.D., be terminated from his participation in, and reimbursement from, all medical assistance programs administered by the Maine Department of Health & Human Services, based on the action taken by the State of Maine Board of Licensure in Medicine in its Decision and Order effective March 10, 2015?"*

APPEARING ON BEHALF OF RESPONDENT:

Thomas Bradley, Assistant Attorney General
Gregory Nadeau, Audit Program Manager

APPEARING ON BEHALF OF CLAIMANT:

Christopher Taintor, Esq.
Stephen Doane, M.D.
Richard Raskin, M.D.
David Strassler, M.D.

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer exhibits:

H-1: The following items, collectively:

- Reschedule letter dated February 3, 2016.
- E-mail chain dated April 21, 2016, through April 27, 2016.
- Response to continuance request (Thomas Bradley, AAG) dated April 21, 2016.
- Continuance request (Christopher Taintor, Esq.) dated April 19, 2016.
- E-mail chain dated January 26, 2016.
- Continuance request (Christopher Taintor, Esq.) dated January 22, 2016.
- Notice of hearing dated December 30, 2015.
- Order of Reference dated December 23, 2015.
- Fair Hearing Report Form dated December 15, 2015.

H-2: The following items, collectively:

- E-mail chain dated October 2, 2017.
- E-mail chain dated July 13, 2016, through July 21, 2016.
- E-mail chain dated June 3, 2016, through June 6, 2016.
- E-mail chain dated April 21, 2016, through April 27, 2016.

H-3: The following items, collectively:

- Order on motion to reopen dated November 2, 2017.
- Department's response to motion to reopen dated October 23, 2017.
- Claimant's motion to reopen dated October 11, 2017.

Respondent exhibits:

D-1: Order of Reference dated December 23, 2015.

- D-2: "MaineCare exclusion letter" dated April 9, 2015; USPS Certified Mail Receipt.
- D-3: Decision and Order of Maine Board of Licensure in Medicine In Re: Stephen H. Doane, M.D., Complaint No. CR12-103, dated March 10, 2015.
- D-4: Consent Agreement of Maine Board of Licensure in Medicine In Re: Stephen H. Doane, M.D., Complaint No. CR11-397, dated May 8, 2012.
- D-5: Request for Informal Review dated June 10, 2015; Index of Records.
- D-6: Letter from Christopher Taintor, Esq., to Gregory Nadeau dated July 14, 2015; letter from David Strassler, M.D., to Maine Board of Licensure in Medicine dated July 6, 2015.
- D-7: Final Informal Review Decision dated September 11, 2015.
- D-8: Request for administrative hearing dated November 5, 2015.
- D-9: [omitted]
- D-10: MaineCare provider enrollment record (09/01/2010 – 12/03/2012).
- D-11: MaineCare provider enrollment record (12/03/2012 – [left blank]).
- D-12: 10-144 C.M.R. Ch. 101, Chapter I, § 1.

Claimant exhibits:

- C-1: [omitted]
- C-2: Curriculum Vitae, Stephen H. Doane, M.D., C.M.D.
- C-3: *The Use of Opioids for the Treatment of Chronic Pain*, the American Academy of Pain Medicine and American Pain Society (1997).
- C-4: *Model Policy for the Use of Controlled Substances for the Treatment of Pain*, Federation of State Medical Boards of the United States, Inc. (2013).
- C-5: [omitted]
- C-6: Excerpt from transcript of adjudicatory hearing of Maine Board of Licensure in Medicine, Complaint No. CR12-103 ("CROSS-EXAMINATION OF JAMES CARDI, M.D.").
- C-7: Treatment records of

- C-8: Letters from David Strassler, M.D., to Maine Board of Licensure in Medicine dated July 6, 2015, September 21, 2015, and February 28, 2016.
- C-9: Letter from Timothy Terranova, Maine Board of Licensure in Medicine Assistant Executive Director, to Christopher Taintor, Esq., dated March 10, 2016.
- C-10: [omitted]
- C-11: Excerpt from transcript of adjudicatory hearing of Maine Board of Licensure in Medicine, Complaint No. CR12-103 ("DELIBERATIONS").

WRITTEN CLOSING ARGUMENTS:

Respondent's closing argument dated June 24, 2016.

Claimant's closing argument dated June 24, 2016.

FINDINGS OF FACT:

1. Claimant is a licensed physician and an enrolled MaineCare Provider. Ex. D-11; Ex. D-12.
2. Claimant is Board Certified by the American Board of Internal Medicine in the specialties of Internal Medicine and Geriatric Medicine. Ex. D-3; Ex. C-2; Test. Stephen Doane.
3. Claimant practiced as an attending physician at Southern Maine Medical Center in Biddeford from 1986 – 2012, as a physician member at SMMC-PrimeCare Physician Associates in Biddeford from 1996 – 2012, and as a volunteer physician at Biddeford Free Clinic from 1996 – 2012. Ex. C-2.
4. Claimant has practiced as a medical director at long-term care and skilled nursing facilities in Maine from 1996 – present as follows: Evergreen Manor Nursing Home, Saco 1996 – 2000; Kennebunk Nursing and Rehabilitation Center 2002 – 2010; RiverRidge Neurorehabilitation Center, Kennebunk (post-acute brain injury/stroke and transitional, residential, and outpatient rehabilitation) 2010 – present; Springbrook Center, Westbrook (assisted living, long-term care, dementia care, skilled nursing care, and short-stay rehabilitation) 2012 – 2013; Pine Point Center, Scarborough, Marshwood Center, Lewiston (respite care, long-term care, hospice care, skilled nursing care, and short-stay rehabilitation, VA-contracted) 2013 – present. Ex. C-2; Test. Stephen Doane.
5. On March 10, 2015, the Maine Board of Licensure in Medicine issued a Decision and Order approving Claimant's application for renewal of his medical license and imposing disciplinary action, including censure and terms of probation, based on his conduct in prescribing controlled substances for the treatment of chronic pain in the case of _____, who died of oxycodone and cyclobenzaprine intoxication on _____. Ex. D-3.

6. The Maine Board of Licensure in Medicine's March 10, 2015, Decision and Order considered Claimant's testimony concerning his care of [redacted] as her primary care physician from 2003 to 2012, treatment records dated from [redacted] 2010, through [redacted] 2012, and the medical examiner's report regarding [redacted] death. Ex. D-3.
7. The Maine Board of Licensure in Medicine's March 10, 2015, Decision and Order considered the written report and testimony of the State's expert witness James Cardi, M.D., concerning his review of [redacted] treatment records from 2003 to 2012, Prescription Monitoring Program reports, and the medical examiner's report regarding [redacted] death. Ex. D-3; Ex. C-6.
8. The Maine Board of Licensure in Medicine's March 10, 2015, Decision and Order considered a May 8, 2012, Consent Agreement for Restricted/Conditional Licensure between Claimant, the Maine Office of the Attorney General, and the Maine Board of Licensure in Medicine concerning Claimant's conduct in prescribing controlled substances for the treatment of chronic pain in the case of "patient A" who died of an apparent drug overdose on [redacted]. Ex. D-3; Ex. C-11.
9. Claimant in entering the May 8, 2012, Consent Agreement for Restricted/Conditional Licensure agreed "that based upon the facts described . . . the Board has sufficient evidence from which it could conclude that he failed to adhere to [Board of Licensure in Medicine] Rule Chapter 21 'Use of Controlled Substances for Treatment of Pain' by: failing to obtain patient A's previous medical records prior to prescribing controlled medications to patient A; failing to access and review the [Prescription Monitoring Program] prior to prescribing the amount and dosage of controlled medications to patient A; failing to recall the telephone message regarding patient A and her recent hospitalization and accompanying respiratory distress prior to prescribing medications to patient A; and increasing the dosage (doubling), frequency, and amount (doubling) of narcotics prescribed to patient A only four days after initially prescribing 15 days' worth of narcotics to patient A - which was done without obtaining patient A's previous medical records or reviewing the [Prescription Monitoring Program]." Ex. D-4.
10. Claimant in entering the May 8, 2012, Consent Agreement for Restricted/Conditional Licensure conceded "that such conduct, if proven, could constitute grounds for discipline of and the denial of his application to renew his Maine medical license for unprofessional conduct pursuant to 32 M.R.S.A. § 3282-A(2)(F)." Ex. D-4.
11. Claimant in entering the May 8, 2012, Consent Agreement for Restricted/Conditional Licensure agreed to accept restrictions on his medical license beginning July 8, 2012, that were to "remain in effect unless or until this Consent Agreement is rescinded or amended by all of the parties thereto", to include: immediately ceasing prescribing any controlled medications for the treatment of chronic pain except for patients in skilled nursing facilities or long-term care facilities, patients in hospice care, and patients with metastatic cancer; prescribing substances for the treatment of acute conditions for no more than ten consecutive days and in compliance with Maine Board of Licensure in Medicine Rule Chapter 21 ("Use of Controlled Substances for Treatment of Pain"); fully

cooperating with the Maine Board of Licensure in Medicine and permitting the Board or its agents to inspect his practice, to include allowing the Board or its agents full access to and copying of patient medical records to the extent permitted by law. Ex. D-4.

12. The Maine Board of Licensure in Medicine's March 10, 2015, Decision and Order considered a May 24, 2012, letter in which Claimant informed the Board "that he was accelerating the terms of his consent agreement and would no longer prescribe controlled medications for pain, including all opioids and benzodiazepines, except for patients in skilled nursing facilities or long-term care facilities, patients in hospice care, or patients with metastatic cancer." Ex. D-3; Ex. D-11.

13. The Maine Board of Licensure in Medicine's March 10, 2015, Decision and Order found that Claimant "[i]n his current role as a medical director at various Genesis Health Care facilities . . . has employed a strategy of tapering patients who are admitted on narcotic medications . . . [and] helped some patients to successfully transition off of narcotic medications." Ex. D-3; Ex. C-7; Ex. C-11.

14. The Maine Board of Licensure in Medicine's March 10, 2015, Decision and Order considered the testimony of Richard Raskin, M.D., Vice President of Medical Affairs for the Northeast with Genesis Health Care, concerning his assessment as Claimant's supervisor of the latter's current performance, including record compliance and clinical care, and concerning his conversations with Claimant regarding "the practice of prescribing narcotics for chronic pain" and their shared opinion "that narcotics were not the ideal way to treat chronic pain." Ex. D-1.

15. The Maine Board of Licensure in Medicine's March 10, 2015, Decision and Order considered the Board hearing officer's instructions concerning the State's and Claimant's respective burdens of proof relative to the issue of whether Claimant's application for renewal of his medical license was to be granted or denied, and that the [32 M.R.S. § 3282-A] "grounds for discipline also include grounds to deny an application to renew a medical license." Ex. C-7.

16. The Maine Board of Licensure in Medicine's March 10, 2015, Decision and Order considered arguments concerning the non-renewal, suspension, or revocation of Claimant's medical license and/or the imposition of civil penalties up to \$1,500.00 per violation as possible sanctions. Ex. C-7.

17. The Maine Board of Licensure in Medicine's March 10, 2015, Decision and Order considered its action in terms of ensuring the safety of the public. Ex. C-7.

18. The Maine Board of Licensure in Medicine's March 10, 2015, Decision and Order considered Claimant's conduct with respect to prescribing controlled substances following the May 8, 2012, Consent Agreement for Restricted/Conditional Licensure. Ex. D-3; Ex. C-7.

19. The Maine Board of Licensure in Medicine's March 10, 2015, Decision and Order concluded "By unanimous vote, that [Claimant] demonstrated incompetence in his treatment and record keeping regarding by not being more aware of the hazards associated with the medications he

was prescribing to . . . not apprising . . . of such hazards, not documenting in . . . record his recognition and communication of such hazards or objective basis for prescribing opiate medications, not considering the combination of the medications prescribed to . . . in the context of the conditions she experienced, and practicing outside of his range of competency." Ex. D-3.

20. The Maine Board of Licensure in Medicine's March 10, 2015, Decision and Order concluded "By vote of five to one, that [Claimant] committed unprofessional conduct by failing to appropriately follow-up on and respond to information obtained from other doctors and reporters as well as from events that occurred in his own office regarding . . . overdoses on the medications he was prescribing for her." Ex. D-3.

21. The Maine Board of Licensure in Medicine's March 10, 2015, Decision and Order concluded "By unanimous vote, that [Claimant] violated Board Rule Chapter 21, Section III, governing the use of controlled substances for the treatment of pain by failing to conduct all aspects required for evaluation of the patient; failing to create a written treatment plan; failing to discuss the risks and benefits of the use of controlled substances with the patient; failing to implement a written agreement outlining patient responsibilities including urine/medication serum level screening, pill counts, the number and frequency of all prescription refills, and the reasons for which drug therapy would be discontinued; and failing to keep accurate and complete medical records." Ex. D-3.

22. The Maine Board of Licensure in Medicine's March 10, 2015, Decision and Order concluded "By unanimous vote, [the Board] as a result of the violations" imposed sanctions on Claimant's medical license including censure and terms of probation, the latter consisting of practice restrictions in addition to conditions imposed under the May 18, 2012, consent agreement (FINDING #6) including: overseeing only one mid-level practitioner at a time for the remainder of his licensure; overseeing no more than 200 beds in a maximum of two facilities for the remainder of his licensure; providing no longer than a seven-day prescription for patients leaving a facility at which he is employed for the remainder his licensure; and engaging a practice monitor, approved by the Board, for purposes of: 1) reviewing all cases in which he were to prescribe controlled substances for more than one week, and 2) reporting to the Board every four months for a period of one year. Ex. D-3.

23. The Maine Board of Licensure in Medicine's March 10, 2015, Decision and Order concluded "By unanimous vote, [the Board] granted [Claimant's] renewal application." Ex. D-3.

24. On April 9, 2015, Respondent notified Claimant that it was terminating his participation in medical assistance programs "[a]s a result of the action taken by the Maine Board of Licensure in Medicine, in its Decision and Order, effective March 10, 2015 . . ." and that it would "apply this exclusion upon the end of your 60 day period for appeal or upon the conclusion of your appeal, whichever is later." Ex. D-2.

25. On September 11, 2015, Respondent notified Claimant that it had determined, after reviewing "all available information in this matter, . . . that [Program Integrity] was correct in terminating

[Claimant's] participation in MaineCare" and that "[t]his exclusion will take effect 60 days after you receive this informal review decision, or if you timely appeal this exclusion, upon a decision at the conclusion of your final appeal." Ex. D-7.

26. Claimant as of March 10, 2016, satisfied the terms and conditions of licensure imposed by the Maine Board of Licensure in Medicine in its Decision and Order dated March 10, 2015. Ex. C-9.

CONCLUSIONS OF LAW:

Claimant's continued participation in the MaineCare program does not present a risk to the program or beneficiaries.

RECOMMENDED DECISION:

The Hearing Officer recommends that the Commissioner REVERSE Respondent's April 9, 2015, decision to terminate Claimant's MaineCare participation.

REASON FOR RECOMMENDATION:

On April 9, 2015, the Maine Department of Health and Human Services ("Respondent") notified Stephen Doane, M.D. ("Claimant") that his participation in "all medical assistance programs" administered by Respondent was being terminated in 60 days "or upon the conclusion of your appeal, whichever is later." Respondent's notice cites the following grounds for sanction under § 1.19-1:

M. Violation of any laws, regulations or code of ethics governing the conduct of occupations or professions or regulated industries;

O. Failure to meet standards required by State or Federal law for participation (e.g. licensure or certification requirements) [presumably abandoned (omitted from Respondent's closing argument)];

R. Formal reprimand or censure by an association of the provider's peers for unethical practices;

I. Basis of disputed action:

Respondent's notice states that the action is based on "the action taken by the Maine Board of Licensure in Medicine, in its Decision and Order, effective March 10, 2015, . . ." The decision in question was issued following an adjudicatory hearing of the Maine Board of Licensure in Medication ("MBOLIM" / "the Board") concerning two matters: 1) the Board's complaint against Claimant's license concerning Claimant's prescribing controlled substances in the case of " . . . , Claimant's patient since 2003, who died of oxycodone and cyclobenzaprine intoxication . . . and 2) Claimant's application to the Board for renewal of his medical license. As will be discussed later, the Board in its single Decision and Order both censured Claimant and approved his medical license renewal application.

II. Issues raised on appeal:

Claimant argues on appeal that the grounds cited for Respondent's action are not authorized under State statute and are therefore promulgated in excess of Respondent's authority. Claimant further argues that Respondent's action violates the right of Medicaid beneficiaries per 42 U.S.C. § 1396a(a)(23) to choose from among qualified providers. Finally, Claimant argues that Respondent's action is inconsistent with both the purpose of exclusion and Respondent's rules concerning factors to be considered in determining sanctions, and thus amounts to an abuse of discretion. Specifically, Claimant argues that the Board's decision to censure him for his past conduct does not constitute a valid basis for termination given the fact of their simultaneous decision to renew his medical license, in that the latter implies a finding that he was a competent practitioner at that time.

Respondent argues that its decision to terminate Claimant's participation in the MaineCare program properly considered the factors listed under § 1.19-3(A)(1) relative to the Board's decision to censure Claimant, and that termination is warranted based on that decision alone. As will be discussed later (IV.B Appeal procedure), Respondent further argues that evidence relating to anything other than the factual basis of the Board's decision to censure Claimant is irrelevant to this proceeding.

III. Evidence:

Respondent in support of its action submits its notice, Maine Board of Licensure in Medicine Decision and Order dated March 10, 2015, and Consent Agreement for Discipline and Restricted / Conditional Licensure dated May 18, 2012, Claimant letters requesting informal review and administrative hearing, Claimant cover letter for informal review additional document submittal, Respondent Final Informal Review Decision, SMHC Provider Agreement, and DHHS records of Claimant enrollment. Claimant on appeal also submits Maine Board of Licensure in Medicine Decision and Order dated March 10, 2015, MBOLIM hearing transcripts, patient treatment records submitted in connection with MBOLIM hearing and informal review, monitoring report to MBOLIM submitted in connection with informal review, monitoring reports to MBOLIM generated following Respondent Final Informal Review Decision, professional society journal articles concerning use of opiates in treating pain, and MBOLIM letter confirming completion of licensure terms of probation.

IV. Authority:

A. Disputed action:

Respondent per 22 M.R.S. § 42 is required to "issue rules and regulations considered necessary and proper for . . . the successful operation of the health and welfare laws." Respondent additionally per § 3173 "is authorized and empowered to make all necessary rules and regulations consistent with the laws of the State for the administration of" the MaineCare program. Per 10-144 C.M.R. Ch. 101, Chapter I, § 1.19-2, Respondent is authorized to impose sanctions, including termination / exclusion, against MaineCare providers based on any of the grounds enumerated under § 1.19-1, ¶¶ (A) - (Y), "in accordance with applicable State and Federal rules and regulations." *Id.*

Claimant argues that the rule in question exceeds the authority delegated to Respondent by the Legislature in that the authorizing statutes neither: 1) expressly authorize promulgation of rules for termination/exclusion, nor 2) provide sufficient standards to prevent arbitrariness in the exercise of authority by legislation that "clearly reveals the purpose to be served by the regulations, explicitly defines what can be regulated for that purpose, and suggests the appropriate degree of regulation" (quoting *Brackett v. Town of Rangeley*, 2003 ME 109, ¶ 27, 831 A.2d 422, 430). Claimant notes that, in contrast: 1) 22 M.R.S. §§ 13-A and 1714-E expressly authorize Respondent to sanction providers in cases of overpayment and fraud, and 2) 42 U.S.C. § 1320a-7, the authorizing statute for OIG rules, describes reasons / grounds for "mandatory" and "permissive" exclusions in explicit detail.

Relative to the above, 42 C.F.R. § 1002.210 requires as a condition of program participation that the State have administrative procedures in place that allow it to exclude a provider for any reason the United States Secretary of Health and Human Services ("HHS") could exclude a provider under Part 1001 or Part 1003. Per § 1002.3, a State may exclude for any reason under Part 1001 or Part 1003, "in addition to any other authority it may have . . ." Furthermore, the Federal rule "is not to be construed to limit a State's own authority to exclude an individual or entity from Medicaid for any reason or period authorized by State law." With respect to the State's exercise of the latter authority, the stated purpose of exclusion is "to protect [Federal health care] programs from fraud and abuse, and to protect the beneficiaries of those programs from incompetent practitioners and from inappropriate or inadequate care." S. Rep. No. 100-109, at 2 (1987), reprinted 1987 U.S.C.C.A.N. 682.

Grounds for sanctioning providers and recouping MaineCare payments are listed together under 10-144 C.M.R. Ch. 101, Chapter I, § 1.19-1, ¶¶ (A) – (Y), and apply to all sanctions including termination "in accordance with applicable State and Federal rules and regulations" per § 1.19-2. While certain of the grounds for sanction under § 1.19-1 approximate reasons for exclusion by OIG (42 C.F.R. §§ 1001.101 – 1001.1701), those cited by Respondent in this case do not, and are silent or ambiguous with respect to applicable "violations" and "unethical practices". Factors for imposing sanctions per MCBM.I § 1.19.3 provide additional clarity but do not obviate the exercise of discretion. It is therefore understood for purposes of this review that those grounds are valid for termination where the latter action is warranted "to protect the beneficiaries of [Federal and State health care] programs from incompetent practitioners and from inappropriate or inadequate care."

B. Appeal procedure:

Claimant does not dispute the factual basis, merits, or validity of the Board's decision to censure him for his conduct during the period June 2010 – May 2011. Respondent does not offer rebuttal evidence or otherwise dispute Claimant's evidence in substance, but objects to its admission based on relevance.

The pivotal issue in this case concerns the limits of authority with respect to issue(s) other than those directly concerning the factual basis of the action on which Respondent's decision was based, i.e., the censure that was imposed under the March 21, 2015, Decision and Order of the Maine Board of Licensure in Medicine. Respondent argues that no evidence of other conduct, including evidence presented in connection with that proceeding, subsequent evidence of conduct, or evidence relating to any other conduct, or any other aspect of the Board's decision, is relevant to the matter on appeal.

Per 42 C.F.R. Subpart C (Procedures for State-Initiated Exclusions) § 1002.213, "Before imposing an exclusion under § 1002.210, the State agency must give the individual or entity the opportunity to submit documents and written argument against the exclusion. The individual or entity must also be given any additional appeals rights that would otherwise be available under procedures established by the State." Per 10-144 C.M.R. Ch. 101, Chapter I, § 1.19, issues in an administrative hearing concerning a provider appeal are limited to those raised in connection with the review required per 42 C.F.R. § 1002.213 (i.e., the informal review prior to the hearing). The MaineCare Benefits Manual (10-144 C.M.R. Ch. 101) and Administrative Hearing Regulations (10-144 C.M.R. Ch. 1) are otherwise silent with respect to limits of review in an administrative hearing concerning termination.

Again, 42 C.F.R. § 1002.210 requires as a condition of program participation that the State have administrative procedures in place that allow it to exclude a provider for any reason permitted under Parts 1001 and 1003. Applicable requirements include providing the opportunity to submit documents and written argument against the exclusion for review prior to the administrative hearing required under State rules. In appeals concerning OIG-initiated exclusions, second-level review is limited in certain cases as a consequence of the grounds for exclusion. To the extent such grounds are analogous to those underlying Respondent's action, and the associated limits are otherwise consistent with applicable requirements, the Hearing Officer in accordance with 10-144 C.M.R. Ch. 1, (B)(3)(b) relies on OIG-initiated exclusion appeal procedure rules where applicable.

There are potentially two levels of review in appeal proceedings concerning OIG-initiated exclusions; whether both levels are available, and their scope of review, depends on the grounds for exclusion. Exclusions are categorized generally as "mandatory" or "permissive". Grounds for "mandatory" exclusion include criminal convictions for controlled substance and program-related felony offenses, health care fraud, and patient-related abuse or neglect. Grounds for "permissive" exclusion are many and varied but are identifiable under two subcategories: 1) specific actions of adjudicatory authorities (e.g., revocation of a health care license by a licensing authority), and 2) original determinations of the OIG concerning specific conduct by individuals or entities (kickbacks, excessive claims, etc.), respectively identified as "derivative-permissive" and "nonderivative-permissive." 57 FR 3298-01.

Again, grounds for "mandatory" exclusions consist of specific criminal convictions. The right to administrative review in mandatory exclusion cases includes only a hearing before an ALJ, or "ALJ appeal" concerning issues that are essentially limited to the fact of the conviction and whether it relates to a controlled substance, or program-related crime, fraud, or patient abuse / neglect. See *Travers v. Shalala*, 20 F.3d 993, 998 (9th Cir. 1994).

In cases of "derivative-permissive exclusion" (exclusion based on an action), appeal rights also include (prior to ALJ appeal) the opportunity to submit documentation and written argument to the OIG. Relative to the latter, "[t]he OIG always considers whether continued participation presents a risk to the programs or their beneficiaries in deciding whether an exclusion is warranted [emphasis added]." 57 FR 3298-01. The ALJ's authority does not extend to matters committed to the sole discretion of the Secretary HHS, which include the OIG's decision to impose exclusion; the latter constitutes an exercise of the Secretary's sole discretion, which is delegated to the OIG, and as such is not reviewable

(see Social Security Act § 1128 [42 U.S.C. § 1320a-7]; 53 FR 12993). The basis of the action underlying a permissive-derivative exclusion likewise is not reviewable. 42 C.F.R. § 1001.2607.

As discussed, Respondent's action is based on a disciplinary action (censure) by a licensing authority (the Board), and not on either an OIG determination of conduct or a criminal conviction; Respondent's action is therefore analogous to an OIG-initiated "derivative-permissive exclusion" for purposes of appeal procedures in OIG-initiated exclusions.

Again, appeal procedures in OIG-initiated derivative-permissive exclusions include OIG review prior to ALJ appeal. Respondent in accordance with 42 C.F.R. § 1002.213 provides individuals and entities the opportunity at that point to submit documents and written argument "against the exclusion", and "be given any other appeals rights that would otherwise be available under procedures established by the State" (i.e., right to an administrative hearing subsequent to the latter review). While OIG and State procedures appear similar in that regard, the OIG's decision to impose permissive-exclusion, being an exercise of the Secretary's discretion, again is not reviewable in an ALJ appeal.

In contrast, final decision authority in the immediate matter as indicated previously is reserved to the Commissioner, Maine Department of Health and Human Services, as opposed to being delegated. Therefore, while the factual basis of the action underlying Respondent's action is not reviewable, the Division of Audit's (in contrast to the OIG's) decision to impose permissive exclusion is reviewable.

V. Decision and Order of the Board:

The underlying action is censure, under a decision of the Board that resolved two licensing matters: 1) Claimant's application to the Board for renewal of his medical license, and 2) the Board's complaint against Claimant's license concerning his prescribing controlled substances in the case of " a patient of Claimant since 2003, who died of oxycodone and cyclobenzaprine intoxication on [REDACTED], 2012, during the period [REDACTED] 2010 - [REDACTED] 2011. Claimant prior to the latter Board complaint had entered a Consent Agreement for Discipline and Restricted / Conditional Licensure with the Board and the Office of the Attorney General concerning his prescribing controlled substances in the case of "patient A" who, after being prescribed "a significant amount of narcotics" by Claimant¹ on [REDACTED], 2011, died of an "apparent drug overdose" on [REDACTED], 2011.

The Board's decision was issued following a two-day evidentiary hearing before a six-member "quorum" consisting of four physicians, one physician assistant, and one member of the public. Board members heard evidence concerning Claimant's conduct in prescribing controlled medications, with respect both to the period [REDACTED] 2010 through [REDACTED] 2011 in the case of " and subsequently, and arguments concerning possible sanctions to include non-renewal of Claimant's medical license. The Board, after deliberating the matter, decided both to censure Claimant and to renew his license.

¹ The agreement notes, "a number of prescription drugs were found at the scene, including medications prescribed by [Claimant]" and "only 48 of 180 tablets of Oxycodone prescribed by [Claimant] on [REDACTED], 2011, were still present in the bottle." Ex. D-4, pp. 1-2.

A. Actions of the Board:

1. Censure:

Broadly, the Board found that multiple instances of conduct constituting grounds for discipline under 32 M.R.S. § 3282-A had occurred between █████ 2010 and █████ 2012 in the case of his patient " █████ " in connection with Claimant's prescribing of controlled substances during that period. Specific conduct for which Claimant was censured included incompetence (FINDING OF FACT #19), unprofessional conduct (FINDING OF FACT #20), and Board rule violations (FINDING OF FACT #21).

Applicable statute definitions per § 3282-A are as follows:

2. Grounds for discipline.

E. Incompetence in the practice for which the licensee is licensed. A licensee is considered incompetent in the practice if the licensee has:

- (1) Engaged in conduct that evidences a lack of ability or fitness to discharge the duty owed by the licensee to a client or patient or the general public; or
- (2) Engaged in conduct that evidences a lack of knowledge or inability to apply principles or skills to carry out the practice for which the licensee is licensed;

F. Unprofessional conduct. A licensee is considered to have engaged in unprofessional conduct if the licensee violates a standard of professional behavior, including engaging in disruptive behavior, that has been established in the practice for which the licensee is licensed. For purposes of this paragraph, "disruptive behavior" means aberrant behavior that interferes with or is likely to interfere with the delivery of care;

H. A violation of this chapter or a rule adopted by the board;

§ 3282-A; See 02-373 C.M.R. Ch. 21 "USE OF CONTROLLED SUBSTANCES FOR TREATMENT OF PAIN".

2. Renewal of medical license:

While the basis of the Board's action in censuring Claimant is clearly expressed in the findings of its March 10, 2015, Decision and Order, the basis of its action in approving Claimant's application for renewal of his medical license is not. In any event, to the extent the Board's Decision and Order is the authority for both actions, the merits, etc. of both actions are outside the scope of this proceeding.

With respect to Claimant's conduct since the period █████ 2010 - █████ 2012, the Board found that, "[i]n his current role as a medical director at Genesis Health Care facilities, [Claimant] has employed a strategy of tapering patients who are admitted on narcotic medications and to use narcotics only as needed." And, "[Claimant] has helped some patients transition successfully off of narcotics."

Based on its findings, the Board both: 1) censured Claimant for his conduct between █████ 2010 and █████ 2012 in the case of ' █████ ', and 2) approved Claimant's application for renewal of his medical license, with terms of probation. In sum, the latter consisted of monitoring / reporting and practice restrictions (FINDING OF FACT #22), and continuation of conditions imposed under the 2012 Consent Agreement (FINDING OF FACT #11). The Board in rendering its decision considered each of these measures from the standpoint of its duty to protect the public. Ex. C-11, pp. 33-35, 42-50.

B. Implications of the Board's decision:

As a professional regulatory board, the "sole purpose" of the Maine Board of Licensure in Medicine "is to protect the public health and welfare", which it carries out "by ensuring that the public is served by competent and honest practitioners and by establishing minimum standards of proficiency . . . [and] by examining, licensing, regulating and disciplining practitioners . . ." 10 M.R.S. § 8008. The State "through the professional licensing of physicians . . . exercises its police power on behalf of all Maine citizens to "preserv[e] . . ." the health, safety and comfort of [its] citizens" from unqualified, incompetent, or unethical physicians." *Doane v. Dep't of Health & Human Services*, 2017 ME 193, ¶ 29, 170 A.3d 269, 278 ((quoting *State v. Pelletier*, 2015 ME 129, ¶ 7, 125 A.3d 354 (quoting *Hendrick v. Maryland*, 235 U.S. 610, 622, 35 S.Ct. 140, 59 L.Ed. 385 (1915))).

Again, the Board's actions in this case included disciplinary action against Claimant's medical license, based on his conduct in prescribing controlled medications in the case of " during the period 2010 - 2012, and the approval of Claimant's application for renewal of his medical license, with terms of probation and continuing conditions of licensure per the May 18, 2012, Consent Agreement. And, again, the Board's decision considered Claimant's conduct in prescribing controlled substances, both in connection with " during the period 2010 - 2012 and since that time, specifically from the standpoint of protecting the public. Based on that evidence, the Board found that Claimant in his current role "employed a strategy of tapering patients" who had been admitted on narcotics and that Claimant furthermore had "helped some patients successfully transition off of narcotic medications." Reported deliberations of Board members included comments reflecting that Claimant's testimony regarding his recent / current cases evidenced significant improvement in his level of competency in this area, and that Board members were favorably impressed regarding his current approach and level of competency in prescribing controlled substances.

In approving Claimant's application for renewal of his medical license and allowing him to continue practicing medicine, albeit with the aforementioned terms of probation and conditions of licensure, the Board by implication found both: 1) that Claimant was a "competent and honest" practitioner, and 2) that the public was protected, per 10 M.R.S. § 8008, on the basis of the evidence considered. *See also Forester v. City of Westbrook*, 604 A.2d 31, 33 (Me.1992) (agency decision deemed to be supported by implicit findings where "there is sufficient evidence on the record"). Again, therefore, consideration of the evidence considered by the Board does not amount to a collateral attack on that action, an assessment of the merits or validity of the action or underlying findings, or the like. The evidence is relevant to determining whether termination is necessary in order "to protect the beneficiaries of [health care] programs from incompetent practitioners and from inappropriate or inadequate care."

VI. Decision to impose sanction:

Factors that "may be considered in determining the sanction(s) to be imposed" per MCBM.1 § 1.19-3 include: a. Seriousness of the offense(s); b. Extent of violation(s); c. History of prior violation(s); d. Prior imposition of sanction(s); e. Prior provision of provider education; f. Provider willingness to obey MaineCare rules; g. Whether a lesser sanction will be sufficient to remedy this problem; and h. Actions taken or recommended by peer review groups, other payors, or licensing boards.

Relative to the above, factor "c" (concerning history of prior MaineCare violations) does not apply, and factors "d", "e", "f", and "g" do not apply. Factor "a" applies: the offenses were serious, per the Board, but assigning weight is problematic as there is no clear standard for comparison. Factor "b" applies: extent of offense was significant, per the Board, but, again, assigning weight is problematic as there is no clear standard for comparison. Factor "h" applies: actions taken by the Board otherwise include the May 8, 2012, Consent Agreement for Discipline and for Restricted / Conditional Licensure and the March 10, 2015, Decision and Order approving Claimant's application for renewal of his medical license. The former appears serious, but again there is no clear standard provided.

The March 10, 2015, Decision and Order allowing Claimant to continue practicing medicine in Maine is favorable, as it implies a finding that Claimant is an honest and competent practitioner per the statute and case law cited. The action accounts for the Consent Agreement and thus negates its value as a factor. More significantly, the action accounts for the factual basis of Respondent's decision to terminate (the disputed action). In view of the timelines for the conduct addressed in the Board's Decision and Order and the significance of the latter action with respect to the purpose of exclusion, the clear outcome of this analysis is that Claimant should not be terminated or excluded from MaineCare participation. The outcome is amplified when the purpose of exclusion is accounted for.

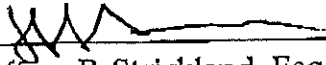
VII. Conclusion:

As discussed, the grounds cited by Respondent for its action, in consideration of the factors pertaining to the imposition of sanctions, do not warrant the imposition of termination in this case. However, viewed in relation to the applicable factors and to the express purpose of exclusion ("to protect . . . beneficiaries from incompetent practitioners and from inappropriate or inadequate care"), the permissive imposition of termination clearly is not warranted in this case. Accordingly, the Hearing Officer recommends that the Commissioner find that Respondent was not correct in excluding Claimant, and any entity of which Claimant is an employee, partner, or owner, from reimbursement under all medical assistance programs administered by Respondent.

RIGHT TO FILE EXCEPTIONS AND RESPONSES:

THE PARTIES MAY FILE WRITTEN EXCEPTIONS AND RESPONSES TO THE ABOVE RECOMMENDATIONS. ANY WRITTEN EXCEPTIONS AND RESPONSES MUST BE RECEIVED BY THE DIVISION OF ADMINISTRATIVE HEARINGS WITHIN FIFTEEN (15) CALENDAR DAYS OF THE DATE OF MAILING OF THIS RECOMMENDATION. A REASONABLE EXTENSION OF THE TIME LIMIT FOR FILING EXCEPTIONS AND RESPONSES MAY BE GRANTED BY THE CHIEF ADMINISTRATIVE HEARING OFFICER FOR GOOD CAUSE SHOWN OR IF ALL PARTIES ARE IN AGREEMENT. EXCEPTIONS AND RESPONSES SHOULD BE FILED WITH THE DIVISION OF ADMINISTRATIVE HEARINGS, 11 STATE HOUSE STATION, AUGUSTA, ME 04333-0011. THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER. COPIES OF WRITTEN EXCEPTIONS AND RESPONSES MUST BE PROVIDED TO ALL PARTIES.

DATED: 1-19-17

SIGNED: 
Jeffrey P. Strickland, Esq.
Hearing Officer

cc: Stephen Doane, M.D.
Christopher Taintor, Esq.
Thomas Bradley, AAG
Herb Downs