Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	Date: February 6, 2008
Vladimir Kirkorov, M.D.,	)	
	)	
Petitioner,	)	Docket No. C-07-664
	)	Decision No. CR1732
-v.-	)	
	)	
The Inspector General.	)	
	)	

DECISION

Petitioner, Vladimir Kirkorov, M.D., is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(3) of the Social Security Act (the Act) (42 U.S.C. § 1320a-7(a)(3)), effective July 19, 2007, based upon his conviction in a state court of felony criminal offenses committed after August 21, 1996 (the date on which the Health Insurance Portability and Accountability Act of 1996 (HIPAA) was enacted); his offenses were related to the delivery of a health care item or service; and the offenses of which he was convicted included fraud and theft. There is a proper basis for exclusion. Petitioner's exclusion for five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)) and an additional period of exclusion of five years, for a total minimum period of exclusion of ten years, is not unreasonable based upon four aggravating factors in this case.[1]

[1] Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon the expiration of the period of exclusion.

I. Background

The Inspector General for the Department of Health and Human Services (the I.G.) notified Petitioner by letter dated June 29, 2007, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for ten years, pursuant to section 1128(a)(3) of the Act. The basis cited for Petitioner's exclusion was his conviction, in the Supreme Court of the State of New York, Queens County, of criminal offenses related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. *See* Act, section 1128(a)(3) (42 U.S.C. § 1320a-7(a)(3)); 42 C.F.R. § 1001.101(c).

Petitioner timely requested a hearing by letter dated August 14, 2007. The case was assigned to me for hearing and decision on September 6, 2007. On September 20, 2007, I convened a prehearing telephonic conference, the substance of which is memorialized in my Order dated September 24, 2007. Petitioner agreed that it was not necessary for him to present evidence at an oral hearing and that this case may be decided upon the briefs and documentary evidence. Petitioner knowingly waived his right to an oral hearing in this case.

The I.G. filed its brief in support of Petitioner's exclusion on October 19, 2007 (I.G. Brief), with I.G. Exhibits (I.G. Exs.) 1 through 12. Petitioner filed his brief in response on November 13, 2007, with Exhibits (P. Exs.) 1 through 13. The I.G. filed a reply brief on December 6, 2007 (I.G. Reply). No objection has been made to the admissibility of any of the proposed exhibits. I.G. Exs. 1 through 12, and P. Exs. 1 through 13 are admitted. Petitioner requested leave to file a sur-reply by letter dated December 17, 2007, and I granted Petitioner until January 12, 2008, to do so. Petitioner filed his sur-reply dated January 10, 2008, with a document comprised of multiple pages from various documents preceded by a cover sheet marked Exhibit A (P. Ex. A), which is admitted and which I have reviewed and considered.[2]

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[2] Many of the documents Petitioner has marked as exhibits are related to his criminal convictions and challenges thereto. For reasons discussed hereafter, the pages related only to Petitioner's criminal convictions and challenges are not relevant. Nevertheless, because Petitioner is *pro se* I carefully reviewed all the pages he submitted for any evidence that might aid my decision-making. Rather than excluding individual pages which Petitioner did not mark as exhibits and because I have reviewed all pages, I have placed all pages in evidence.

II. Discussion

A. Findings of Fact

The following findings of fact are based upon the uncontested and undisputed assertions of fact in the pleadings and the exhibits admitted. Citations may be found in the analysis section of this decision if not included here.

1. On June 29, 2006, Petitioner was convicted in the Supreme Court of the State of New York, Queens County, Case Number 00808-2005, of 7 counts of insurance fraud in the 3rd degree, a class D felony pursuant to N.Y. Penal Law § 176.20; 17 counts of insurance fraud in the 4th degree, a class E felony pursuant to N.Y. Penal Law § 176.15; one count of 3rd degree grand larceny, a class D felony pursuant to N.Y. Penal Law § 155.35; 7 counts of 4th degree grand larceny, a class E felony pursuant to N.Y. Penal Law § 155.30; 24 counts of 1st degree falsifying business records, a class E felony pursuant to N.Y. Penal Law § 175.10; and one count of 1st degree scheme to defraud, a class E felony pursuant to N.Y. Penal Law § 190.65. I.G. Ex. 7.

2. On July 25, 2006, in the Supreme Court of the State of New York, Queens County, Case Number 02674-2003, Petitioner was convicted pursuant to his plea of guilty of one count of insurance fraud in the 3rd degree, a class D felony pursuant to N.Y. Penal Law § 176.20. I.G. Ex. 8.

3. On July 25, 2006, Petitioner was sentenced to confinement for two to six years and to pay restitution of $21,468. I.G. Ex. 7, at 2-5; I.G. Ex. 8.

4. The offenses of which Petitioner was convicted involved submitting claims to various automobile insurance companies for medical treatment or services that were not actually delivered or performed. P. Ex. 1 (pages 12 and 13).

5. The offenses of which Petitioner was convicted were committed between February 1, 2001 and March 16, 2005, after August 21, 1996. I.G. Exs. 5, 6, 7, and 8.

6. The amount of restitution ordered, $21,468, is good and convincing evidence of the amount of the financial loss determined by the trial court and establishes that the financial loss in this case was $5000 or more.

7. The New York State Department of Health, State Board for Professional Medical Conduct, took adverse action against Petitioner and the New York State Office of Medicaid Inspector General excluded him from participation in the New York Medicaid program, and both actions were based upon Petitioner's criminal conviction.

8. The I.G. notified Petitioner by letter dated June 29, 2007, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for ten years, pursuant to section 1128(a)(3) of the Act.

9. Petitioner timely requested a hearing by letter dated August 14, 2007.

B. Conclusions of Law

1. Petitioner's request for hearing was timely and I have jurisdiction.

2. Petitioner was convicted of felony criminal offenses of fraud and theft in a state court within the meaning of section 1128(a)(3) of the Act.

3. Petitioner does not dispute that he was convicted of a criminal offense within the meaning of section 1128(i) of the Act.

4. There is a "nexus" or "common sense connection" between the crimes of which Petitioner was convicted and the delivery of a health care item or service, i.e., Petitioner used his status as a licensed physician to perpetrate crimes that involved false representation that he had delivered medical treatment or services.

5. The crimes of which Petitioner was convicted were committed after the effective date of HIPAA, August 21, 1996.

6. The Secretary has provided by regulation that when an exclusion is based upon a criminal conviction where the facts were adjudicated and a final decision was made, the criminal conviction is not subject to review in this forum and Petitioner's collateral attacks, whether substantive or procedural, may not be considered. 42 C.F.R. § 1001.2007.

7. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(3) of the Act.

8. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is five years and that period is presumptively reasonable.

9. There are four aggravating factors present in this case that justify an exclusion of more than five years: (1) Petitioner's criminal acts resulted in financial loss to one or more entities and the loss was $5000 or more; (2) that Petitioner's criminal conduct occurred over a period of one year or more; (3) that Petitioner was sentenced to incarceration; and (4) that Petitioner was subject to adverse action by the state licensing board based upon the same conduct for which he was convicted.

10. Aggravating factors justify extending the period of exclusion to ten years.

11. Petitioner has presented no evidence or argument that would tend to establish any of the permitted mitigating factors.

12. A period of exclusion of ten years is in a reasonable range.

13. Exclusion for ten years is not unreasonable in this case.

C. Issues

The Secretary of the Department of Health and Human Services (the Secretary) has by regulation limited my scope of review to two issues:

> Whether there is a basis for the imposition of the exclusion; and,
>
> Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

D. Applicable Law

Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary is provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). Petitioner's request for a hearing was timely filed and I do have jurisdiction.

Pursuant to section 1128(a)(3) of the Act, the Secretary must exclude from participation in the Medicare and Medicaid programs any individual convicted in any federal or state court of a felony criminal offense that was committed after August 21, 1996 (the date HIPAA was enacted); where the offense is related to the delivery of a health care item or service or any act or omission in a health care program, other than Medicare or Medicaid,

financed in whole or part by a federal, state, or local government; and the offense of which Petitioner is convicted is related to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct.

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify exclusion for a period longer than five years may mitigating factors be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

The standard of proof is a preponderance of the evidence and there may be no collateral attack of the conviction that is the basis for the exclusion. 42 C.F.R. § 1001.2007(c) and (d). Petitioner bears the burden of proof and persuasion on any affirmative defenses or mitigating factors. The I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b) and (c).

E. Analysis

1. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(3) of the Act.

The I.G. cites section 1128(a)(3) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides:

> (a) MANDATORY EXCLUSION. – The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
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> * * * *
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> (3) FELONY CONVICTION RELATING TO HEALTH CARE FRAUD. – Any individual or entity that has been convicted for an offense which occurred after the date of the Health Insurance Portability and Accountability Act of 1996 [footnote omitted], under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in paragraph (1)) operated by or

> financed in whole or part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

The statute requires the Secretary to exclude from participation in Medicare or Medicaid any individual or entity: (1) convicted in any federal or state court of a felony criminal offense that was committed after August 21, 1996 (the date HIPAA was enacted); (2) where the offense is related to the delivery of a health care item or service or any act or omission in a health care program, other than Medicare or Medicaid, financed in whole or part by a federal, state, or local government; and (3) the offense of which Petitioner is convicted is related to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct.

The I.G. presented evidence that on June 29, 2006, Petitioner was convicted in the Supreme Court of the State of New York, Queens County, Case Number 00808-2005, of 7 counts of insurance fraud in the 3rd degree, a class D felony pursuant to N.Y. Penal Law § 176.20; 17 counts of insurance fraud in the 4th degree, a class E felony pursuant to N.Y. Penal Law § 176.15; one count of 3rd degree grand larceny, a class D felony pursuant to N.Y. Penal Law § 155.35; 7 counts of 4th degree grand larceny, a class E felony pursuant to N.Y. Penal Law § 155.30; 24 counts of 1st degree falsifying business records, a class E felony pursuant to N.Y. Penal Law § 175.10; and one count of 1st degree scheme to defraud, a class E felony pursuant to N.Y. Penal Law § 190.65. I.G. Ex. 7. The I.G. also presented evidence that on July 25, 2006, in the Supreme Court of the State of New York, Queens County, Case Number 02674-2003, Petitioner was convicted pursuant to his plea of guilty of one count of insurance fraud in the 3rd degree, a class D felony pursuant to N.Y. Penal Law § 176.20. I.G. Ex. 8. Petitioner was sentenced to confinement for two to six years and to pay restitution of $21,468. I.G. Ex. 7, at 5; I.G. Ex. 8.

The evidence of conviction presented by the I.G. does not provide detail regarding the facts alleged in the charges of which Petitioner was convicted. However, the I.G. presented as evidence and without objection, the indictments related to case 02674-2003 (I.G. Ex. 5) and 00808-2005 (I.G. Ex. 6). The indictment related to case 02674-2003 includes the count of insurance fraud in the 3rd degree to which Petitioner pled guilty and was convicted pursuant to his plea. The count alleging insurance fraud does not allege facts that show that the crime charged was "in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program" as required by section 1128(a)(3). I.G. Ex. 5, at 2-3. Similarly, the indictment related to case 00808-2005 does not reflect on its face that any of the charges allege a criminal offense "in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program" as required by section 1128(a)(3). I.G. Ex. 6.

The I.G. submitted for my consideration the statement of Detective Ronald Georg signed on March 16, 2005. I.G. Ex. 4. Although the text of the statement indicates that it is sworn, the attestation that it was sworn is unsigned and undated. The document does include a certification that it is a correct transcript of a document from the file of the Supreme Court of the State of New York, Queens County, but that does not indicate that the deponent was sworn or understood his obligation to tell the truth. If Detective Georg was called as a witness at an oral hearing, his testimony would be permitted only under oath or affirmation. 42 C.F.R. § 1005.16(a). Although the regulation gives me discretion to permit "testimony" in the form of a written statement and the regulation does not specify that such a written statement must be under oath or affirmation, I find that the protection of an oath or affirmation is necessary and required within the meaning of the regulation. Accordingly, I give no weight to the unsworn statement of Detective Georg.

The I.G. also provided me a "Commisioner's (sic) Order and Notice of Referral Proceeding" from the New York State Department of Health, State Board for Professional Medical Conduct, dated December 21, 2006. I.G. Ex. 9. The Order and Notice is addressed to Petitioner and advises he was to cease practicing medicine under his New York license immediately due to his conviction of a felony under New York law, and that a hearing would be conducted upon a statement of charges to determine whether or not Petitioner's licence to practice medicine should be revoked, suspended, and/or whether other sanctions should be imposed. I.G. Ex. 9. The Order and Notice does not show that Petitioner's conviction in state court was for offenses committed "in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program" as required by section 1128(a)(3).

The I.G. provided me the "Statement of Charges" from the New York State Department of Health, State Board for Professional Medical Conduct. I.G. Ex. 10. The Statement of Charges alleges that Petitioner was convicted and lists various offenses and the sentence. However, the statement of charges does not allege or show that the offenses were committed "in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program" as required by section 1128(a)(3).

The I.G. presented a letter from the State of New York, Office of the Medicaid Inspector General, dated January 8, 2007, that advised Petitioner he was excluded from participation in the New York Medicaid program, effective December 21, 2006. I.G. Ex. 11. The letter states that the exclusion is based upon the suspension of Petitioner's license to practice medicine by the New York State Department of Health. The letter tells me nothing about Petitioner's criminal conviction.

Petitioner presented many documents, all of which have been admitted to ensure the record is complete, but many contain irrelevant information and arguments that could not be readily segregated from the relevant. P. Ex. 1 includes letters dated March 7, 2007 and

May 29, 2007, from Gary Tsirelman, who represents he was counsel to Petitioner during Petitioner's criminal trial. Attorney Tsirelman reveals that the charges of which Petitioner was convicted involved medical services that were not performed, but that were billed to various automobile insurance companies. P. Ex. 1 (pages 12 and 13). P. Ex. 5 includes the affidavit of Frances Impellizzeri, sworn on June 15, 2006. Mr. Impellizzeri was an Assistant District Attorney for Queens County, New York. He states that the charges against Petitioner involved the submission of bills to various car insurance companies for medical treatment or services purportedly delivered to, or performed for, several individuals, but that such treatment or services were never performed or delivered. P. Ex. 5 (pages 6 and 7).[3]

In his response brief, Petitioner primarily focuses upon issues concerning his convictions in the Supreme Court of the State of New York, Queens County. In his sur-reply, he encourages me to consider issues related to the underlying convictions in the interest of justice. Petitioner does not deny that he was convicted of offenses as alleged by the I.G. Petitioner does not dispute that he was convicted of a criminal offense within the meaning of section 1128(i) of the Act. Petitioner also does not deny the I.G.'s allegations that the offenses of which he was convicted involved submitting claims to various automobile insurance companies for medical treatment or services that were not actually delivered or performed. I.G. Brief at 2-3.

Considering all the evidence, I conclude that Petitioner was convicted in the Supreme Court of the State of New York, Queens County, of felony offenses that occurred after 1996. Many of the charges of which Petitioner was convicted were for insurance fraud or theft, or closely related thereto considering the elements specified in the New York Penal Code sections cited above. The evidence does not show that any of Petitioner's offenses were related to any act or omission in a health care program, other than Medicare or Medicaid, financed in whole or part by a federal, state, or local government. The I.G. argues that Petitioner's offenses were related to the delivery of a health care item or service. I.G. Brief at 9-10.

In determining whether an offense is related to the delivery of an item or service, appellate panels of the Departmental Appeals Board (the Board) have been consistent in their approach, considering whether there is a "common sense connection" or "nexus" between the offense of which a petitioner was convicted and the delivery of a health care item or service. *Andrew D. Goddard*, DAB No. 2032 (2006); *Kenneth M. Behr*, DAB No. 1997 (2005); *Erik D. DeSimone, R.Ph.*, DAB No. 1932 (2004); *see also Berton Siegel, D.O.*, DAB No. 1467 (1994); *Thelma Walley*, DAB No. 1367 (1992); *Niranjana B.*

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[3] The same affidavit appears in P. Ex. A, which was submitted with Petitioner's sur-reply.

Parikh, M.D., et al., DAB No. 1334 (1992). Petitioner's crimes are based on conduct that involved billing for medical services or treatments that were not delivered. The I.G. simply asserts there is a nexus without explaining the nexus. Petitioner does not address the issue. After careful consideration of the facts, I conclude that there is a "nexus" or "common sense connection" between Petitioner's misconduct and the delivery of a health care item or service. The connection in this case is that Petitioner's status as a licensed physician was used to perpetrate crimes that involved the false representation that he had delivered medical treatment or services. Because Petitioner was convicted of felony offenses that occurred after 1996; the offenses were related to the delivery of health care items or services; and the offenses involved fraud and theft, section 1128(a)(3) of the Act requires his exclusion from participation in Medicare, Medicaid, and all other federal health care programs.

Petitioner urges me to consider errors that he alleges occurred prior to and during his criminal trial. The I.G. is correct that the Secretary has provided by regulation that when an exclusion is based upon a criminal conviction and where the facts were adjudicated and a final decision was made, the criminal conviction is not subject to review in this forum and Petitioner's collateral attacks, whether substantive or procedural, may not be considered. 42 C.F.R. § 1001.2007. Petitioner does not deny that he was convicted after trial upon the counts in one indictment and pursuant to his guilty plea to the count in the other indictment. Thus, I may not consider his procedural and substantive challenges to the underlying criminal convictions. Even absent the regulatory prohibition, this is not an appropriate forum for challenging convictions in a state court.[4]

2. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is five years.

3. Aggravating factors exist which justify extending the period of exclusion to ten years.

4. Exclusion for ten years is not unreasonable in this case.

Congress has specified that the minimum period of an exclusion pursuant to section 1128(a)(3) is five years as mandated by section 1128(c)(3)(B). I have found there is a basis for Petitioner's exclusion pursuant to section 1128(a)(3) and he must be excluded for at least five years.

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[4] The regulation does specify a procedure to be followed if Petitioner is successful in having his criminal conviction reversed or vacated on appeal. 42 C.F.R. § 1001.3005.

The Secretary has provided by regulation that the period of exclusion may be extended based on the presence of specified aggravating factors. 42 C.F.R. § 1001.102(b). The I.G. found, and urges me to find, that there are four aggravating factors present in this case that justify exclusion for more than five years: (1) Petitioner's criminal acts resulted in financial loss to one or more entities and the loss was $5000 or more; (2) that Petitioner's criminal conduct occurred over a period of one year or more; (3) that Petitioner was sentenced to incarceration; and (4) that Petitioner was subject to adverse action by the state licensing board based upon the same conduct for which he was convicted.

I find that the evidence shows there are four aggravating factors in this case. Petitioner does not deny that he was sentenced to be incarcerated for two to six years. I.G. Exs. 7, 8, and 12. Petitioner does not deny that his sentence also included a requirement to pay restitution of $21,468. I.G. Ex. 7, at 5. Absent evidence to the contrary, the amount of restitution is good and convincing evidence of the amount of the financial loss determined by the trial court and establishes that the financial loss in this case was $5000 or more. Petitioner suggests in his brief that the conduct for which he was convicted did not occur over a period of one year or more, but that the conduct consisted of discrete incidents of less than one year in duration. This argument is without merit. Considering all the evidence, it is clear that Petitioner was convicted for multiple incidents of misconduct that were part of a larger pattern of misconduct that lasted for more than a year. I.G. Ex. 6. I also note that the one count of grand larceny in the 3rd degree (Count 14), for which Petitioner was charged and convicted, specifically alleged that it occurred between April 18, 2002 and June 12, 2003, which was a period in excess of one year. I.G. Ex. 6, at 16; I.G. Ex. 7, at 1. Petitioner was also charged with, and convicted of, 1st degree scheme to defraud (Count 77) between March 1, 2001 and March 16, 2005, which also was a period in excess of one year. I.G. Ex. 6, at 57; I.G. Ex. 7, at 2. The fourth aggravating factor is that the New York State Department of Health, State Board for Professional Medical Conduct, took adverse action against Petitioner and the New York State Office of Medicaid Inspector General excluded him from participation in the New York Medicaid program. Both actions were based upon Petitioner's criminal conviction. Petitioner's argument is that the underlying conviction is invalid and, therefore, this should not be considered an aggravating factor. P. Brief. Petitioner's argument is not persuasive before me as I have no ability to review his underlying criminal conviction, but must accept it as valid.

If any of the aggravating factors listed at 42 C.F.R. § 1001.102(b) are argued to justify exclusion for more than five years, then mitigating factors may be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c). Pursuant to 42 C.F.R. § 1001.102(c), the following factors may be considered as mitigating and a basis for reducing the period of exclusion:

> (1) the individual or entity being excluded was convicted of three or fewer misdemeanor offenses, and the entire amount of financial loss to Medicare and/or the state health care programs due to the criminal acts is less than $1500;
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> (2) the record of the criminal proceedings shows that the court determined that the individual to be excluded had a mental, emotional, or physical condition before or during the commission of the offense that reduced his or her culpability; or,
>
> (3) the individual or entity to be excluded cooperated with federal or state officials with the result that:
>
> > (i) others were convicted or excluded from Medicare, Medicaid, and other federal health care programs,
> >
> > (ii) additional cases were investigated or reports issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or
> >
> > (iii) a civil money penalty or assessment was imposed against another individual under part 1003 of this chapter.

These are the only mitigating factors that may be considered. Evidence that does not relate to an aggravating factor or a mitigating factor is irrelevant to determining the length of an exclusion. The burden is upon Petitioner to show the presence of mitigating factors. 42 C.F.R. § 1005.15; *Dr. Darren James, D.P.M.*, DAB No. 1828 (2002). Petitioner has presented no evidence or argument that would tend to establish any of the permitted mitigating factors.

Appellate panels of the Board have made clear that the role of the ALJ in cases such as this is to conduct a "*de novo*" review as to the facts related to the basis for the exclusion and the facts related to the existence of aggravating and mitigating factors identified at 42 C.F.R. § 1001.102. *See Joann Fletcher Cash*, DAB No. 1725, n.6 (2000), *available at* (http://www.hhs.gov/dab/decisions/dab1725.html), (n.9 in the original decision and Westlaw™), and cases cited therein. The regulation specifies that I must determine whether the length of exclusion imposed is "unreasonable" (42 C.F.R. § 1001.2007(a)(1)(ii)). The DAB has explained that, in determining whether a period of exclusion is "unreasonable," I am to consider whether such a period falls "within a reasonable range." *Cash*, n.6. The DAB cautions that whether I think the period of exclusion too long or too short is not the issue. I am not to substitute my judgment for that of the I.G. and may only change the period of exclusion in limited circumstances. In

John (Juan) Urquijo, DAB No. 1735 (2000), the Board made clear that if the I.G. considers an aggravating factor to extend the period of exclusion and that factor is not later shown to exist on appeal, or if the I.G. fails to consider a mitigating factor that is shown to exist, then the ALJ may make a decision as to the appropriate extension of the period of exclusion beyond the minimum. In *Gary Alan Katz, R.Ph.*, DAB No. 1842 (2002), the DAB suggests that, when it is found that an aggravating factor considered by the I.G. is not proved before the ALJ, then some downward adjustment of the period of exclusion should be expected absent some circumstances that indicate no such adjustment is appropriate.

In this case, upon *de novo* review, I have found that a basis for exclusion exists and that the evidence shows four aggravating factors as found by the I.G. when determining whether to impose a ten-year exclusion. Petitioner has not established that there are mitigating factors not considered by the I.G. Further, based upon all the evidence, a period of exclusion of ten years is in a reasonable range and is not unreasonable. Accordingly, there is no basis upon which I might reassess the period of exclusion.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of ten years, effective July 19, 2007, 20 days after the June 29, 2007, I.G. notice of exclusion.

/s/ Keith W. Sickendick
Administrative Law Judge