Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Baldwin Ihenacho,
(O.I. File No. H-12-40729-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-1627

Decision No. CR4002

Date: July 1, 2015

DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Baldwin Ihenacho (Petitioner) for 15 years from participating in Medicare, Medicaid, and all other federal health care programs. The exclusion was based on Petitioner's felony conviction of a criminal offense 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 and his felony conviction of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance as defined under Federal or State law. Petitioner requested a hearing to dispute the length of the exclusion. For the reasons stated below, I conclude that the IG proved that two bases for mandatory exclusion exist. Further, Petitioner has not shown by a preponderance of the evidence that he provided assistance sufficient to constitute a mitigating factor under applicable regulations. Accordingly, I affirm the length of the exclusion because a 15-year exclusion is not unreasonable due to the existence of the three undisputed aggravating factors and no mitigating factors.

I. Procedural History

By letter dated May 30, 2014, the IG notified Petitioner that he was being excluded from Medicare, Medicaid, and all federal health care programs for a period of fifteen years, under section 1128(a)(3) and (a)(4) of the Social Security Act (Act) (codified at 42 U.S.C. § 1320a-7(a)(3), (a)(4)). The IG advised Petitioner that the 1128(a)(3) exclusion was based on his felony conviction in the "United States District Court, State of Massachusetts, of a criminal offense 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, including the performance of management or administrative services relating to the delivery of such items or services, or with respect to any act or omission in a health care program (other than Medicare and a State health care program) operated by, or financed in whole or in part, by any Federal, State or local Government agency." The IG advised Petitioner that the section 1128(a)(4) exclusion was based on his felony conviction in the same court of "a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance as defined under Federal or State law." The IG determined to lengthen the minimum statutory period and exclude Petitioner for a 15-year period based on three aggravating factors and no mitigating factors.

Petitioner timely requested a hearing. In his hearing request, Petitioner does not challenge the IG's bases for exclusion or assert that the aggravating factors identified by the IG do not exist. Instead, Petitioner seeks a reduction in the length of exclusion to the minimum amount, five years, and in support asserts that the IG: failed to consider a mitigating factor (namely that Petitioner cooperated with federal or state officials, which resulted in a conviction of one individual and the initiation of an investigation into and indictment of a second individual under 42 C.F.R. § 1001.102(c)(3)), failed to consider Petitioner's good character and good works, is disproportionate when compared with similarly situated individuals, and is punitive. Request for Hearing at 2-6.

On September 3, 2014, I held a telephonic prehearing conference with counsel for the parties and summarized what was said at the conference in my September 8, 2014 Order and Schedule for Filing Briefs and Documentary Evidence (Order). That Order established a schedule for discovery and the submission of prehearing exchanges.

During the discovery process, the IG objected to some of Petitioner's discovery requests. On December 2, 2014, I sustained the IG's objections to Petitioner's discovery requests and denied Petitioner's motion to compel.

As its prehearing exchange, the IG submitted a brief (IG Br.) together with 8 exhibits (IG Exs. 1-8). Petitioner submitted a response brief (P. Br.) with Addendum A-B and 32 exhibits (P. Exs. 1-32). The IG submitted a reply brief (IG Reply Br.) with IG Ex. 9.

Because Petitioner requested that he testify in this proceeding, I directed him to submit his written direct testimony (42 C.F.R. § 1005.16(b)), which he did as a declaration on March 30, 2015, and later as an affidavit (P. Affidavit) on April 22, 2015.

During the prehearing conference, Petitioner sought to seal the record in this case. Petitioner ultimately filed motions on February 2, 2015, March 30, 2015, and April 22, 2015, to seal 20 documents that the Petitioner subsequently submitted in these proceedings. I granted these unopposed motions on May 19, 2015, and ordered, under 42 C.F.R. § 1005.18(c), that the documents Petitioner identified shall only be released to the parties, the parties' representatives, and Department of Health and Human Services employees who have a need to review such documents as part of their official duties, and to a United States District Court should this case be subject to judicial review under 42 U.S.C. § 405(g).

II. Evidentiary Rulings and Decision on the Record

The IG objected to the admission of Petitioner's Exhibits 9 through14, letters from individuals serving as character references for Petitioner. Petitioner argues that good character can be considered and cites three cases; however, those cases involved rulings when the current regulations were not yet in effect. P. Br. at 19; 57 Fed. Reg. 3298 (Jan. 29, 1992). I sustain the IG's objection to these documents because they are irrelevant in the present case. The character references do not support the existence of any mitigating factor listed in the applicable regulations. 42 C.F.R. § 1001.102(c); *see also* 57 Fed. Reg. 3298, 3314 (Jan. 29, 1992) (rejecting public comments that an Administrative Law Judge (ALJ) should be allowed to consider anything that might be mitigating when setting the length of an exclusion). I must exclude evidence that is irrelevant and immaterial to this case. 42 C.F.R. § 1005.17(c).

The IG objected to the admission of Petitioner's Exhibits 25 through30, documents involving criminal matters that are not directly related to this case. Petitioner submitted this evidence in furtherance of an argument that the IG has not taken action to exclude other individuals convicted on similar grounds. Petitioner argues that the IG has not excluded physicians who prescribed drugs for internet pharmacies and that this lack of action should be used as a basis for reducing Petitioner's length of exclusion. P. Br. at 15. Petitioner also asserts that a "similarly situated" pharmacist, who pled guilty to crimes involving filling prescriptions for eight on-line pharmacies, either was not excluded or, at most, was excluded for six years. P. Br. at 16. I exclude Petitioner's Exhibits 25 through30 from the record because the regulations do not permit me to reduce Petitioner's length of exclusion based on considering the IG's decisions not to exclude other individuals. *See* 42 C.F.R. § 1001.102(c). Further, Petitioner's comparison of his case to another case involving a pharmacist that was not appealed to the Departmental Appeals Board is not a proper case comparison because there is no decision to which I can compare the present case. *See Eugene Goldman, M.D.*, DAB No. 2635 at

11 (2015) (casting doubt that a case comparison can be made to a decision not appealed to the Departmental Appeals Board). Because Petitioner's attempted case comparison fails, the proffered evidence is not relevant here. 42 C.F.R. § 1005.17(c).

The IG objected to the admission of Petitioner's written direct testimony submitted on March 30, 2015, under penalty of perjury. The IG stated that the testimony "amounts to the mere repetitious contention already made in his brief that he made an effort to cooperate and that he feels it was significant." April 13, 2015 IG Renewed Objection at 1. Further, the IG argued that Petitioner's testimony does not prove that his alleged cooperation is sufficient to be considered a mitigating factor, which the IG equates with the testimony lacking relevance. April 13, 2015 IG Renewed Objection at 1-3. Finally, the IG suggested that Petitioner's written direct testimony was defective because it was in the form of a declaration under penalty of perjury and not under oath and in the form of an affidavit. April 13, 2015 IG Renewed Objection at 1-2 n.1.

I conclude that Petitioner's written direct testimony of March 30, 2015, made as a declaration under penalty of perjury (which my order permitted), was sufficient and did not need to be an affidavit, although Petitioner subsequently resubmitted the testimony as an affidavit on April 22, 2015 to cure the alleged defect. The IG is correct that oral testimony must be under oath (42 C.F.R. § 1005.16(a)); however, the regulatory provision for written direct testimony does not provide this requirement. *See* 42 C.F.R. § 1005.16(b). Further, even if the regulations require written direct testimony to be made under oath, 28 U.S.C. § 1746 allows declarations to be used in instances where a regulation requires it to be under oath.

The IG's objection to the testimony as being merely repetitive to arguments Petitioner made in his brief is nonsensical. A brief is argument and testimony is evidence. Petitioner needed to submit the evidence to support the arguments in his brief.

The IG's objection to the relevance of Petitioner's testimony also fails. Petitioner testified about his interactions with federal prosecutors and a prosecutor's statements about the usefulness of Petitioner's grand jury testimony to support his contention that his alleged cooperation with the prosecutors ought to be considered a mitigating factor related to length of exclusion. The IG's argument that the testimony is insufficient to prove the mitigating factor does not make it irrelevant because it bears directly on whether the mitigating factor exists.

I find the IG's strident objection to Petitioner's testimony in this case to be disturbing and frivolous. The IG is taking action against Petitioner that will have the effect of barring him from working at his profession for 15 years. *See* IG Ex. 1 at 1 (IG warning Petitioner that "[t]he scope of this exclusion is broad and has a significant effect on your ability to work in the health care field."). Congress gave excluded individuals the right to a hearing and to call witnesses at such a hearing. 42 U.S.C. §§ 405(b), 1128(f)(1);

42 C.F.R. §§ 1005.3(a)(5)-(6), 1005.16. This right obviously extends to an individual testifying in his own defense. In the future, the IG should more carefully consider the objections that it files.

Because Petitioner did not object to any of the IG's exhibits, I admit IG Exhibits 1 through 9 into the record. Further, because the IG did not object to Petitioner's Addendum A-B and Petitioner's Exhibits 1 through 8, 15 through 24, and 31 through 32, I admit them into the record. Finally, for the reasons stated above, I admit Petitioner's Affidavit into the record over the IG's objection.

The decision in this case will be based on the written record. *See* Order ¶ 6. The IG did not propose any witnesses (IG Br. at 12) and the IG did not request to cross-examine Petitioner based on the written direct testimony Petitioner provided. April 13, 2015 IG's Renewed Objection to Petitioner's Testimony and Notice that the I.G. Will Not Cross-Examine Petitioner at 1; Order and Schedule for Filing Briefs and Documentary Evidence ¶ 5; March 9, 2015 Order at 2. Therefore, I issue this decision based on the written record.

III. Issues

The issues in this case are limited to determining if there is a basis for exclusion and, if so, whether the length of the exclusion imposed by the IG is unreasonable after considering relevant aggravating and mitigating factors. 42 C.F.R. § 1001.2007(a)(1); *see also* 42 C.F.R. § 1001.102.

IV. Jurisdiction

I have jurisdiction to adjudicate this case. 42 U.S.C. § 1320a-7(f)(1); 42 C.F.R. §§ 1001.2007, 1005.2.

V. Findings of Fact, Conclusions of Law, and Analysis[1]

A. The IG proved each of the required elements under 42 U.S.C. § 1320a-7(a)(3) and (a)(4); therefore, there is a basis to exclude Petitioner.

Petitioner was excluded from Medicare, Medicaid, and all federal health care programs for a period of 15 years based on section 1128(a)(3) and (a)(4) of the Act (codified at 42 U.S.C. § 1320a-7(a)(3), (a)(4)). Under section 1128(a)(3) of the Act, the IG must exclude from participation in all federal health care programs "[a]ny individual or entity

[1] My findings of fact and conclusions of law are set forth in italics and bold font.

that has been convicted for an offense which occurred after [August 21, 1996], under Federal or State law, in connection with the delivery of a health care item or service . . . of a criminal offense consisting of a felony relating to fraud, theft . . . . or other financial misconduct." 42 U.S.C. § 1320a-7(a)(3). According to section 1128(a)(4) of the Act, the IG must exclude from participation in all federal health care programs "[a]ny individual or entity that has been convicted for an offense which occurred after [August 21, 1996], under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful . . . dispensing of a controlled substance." 42 U.S.C. § 1320a-7(a)(4).

Petitioner owned and operated Meetinghouse Community Pharmacy in Dorchester, Massachusetts, from 1994 to 2008. IG Ex. 7 at 5. Between 2006 and 2008, Petitioner and his wife illegally ran an on-line pharmacy where they dispensed and shipped drugs to customers based on illegitimate prescriptions. IG Ex. 7 at 4-5. On August 18, 2011, Petitioner pled guilty in the United States District Court for the District of Massachusetts (District Court) to 29 counts of criminal conduct that occurred from 2006 through 2008. IG Ex. 6 at 1; IG Ex. 7 at 4, 18. Petitioner admitted to charges of conspiracy to distribute and to possession with intent to distribute controlled substances. He further pled guilty to distribution and dispensing of controlled substances, conspiracy to misbrand drugs, misbranding drugs, conspiracy to commit international money laundering, and international money laundering. IG Ex. 6 at 1. The District Court sentenced Petitioner to serve 63 months in prison and 24 months on supervised release. IG Ex. 6 at 3-4. The Court also ordered Petitioner to pay a $3,000 criminal monetary penalty. IG Ex. 6 at 5.

The IG based its exclusion on two mandatory exclusion provisions: 42 U.S.C. § 1320a-7(a)(3) and (a)(4) (Section 1128(a)(3), (4) of the Act). IG Ex. 1 at 1. Petitioner does not dispute the bases for exclusion, P. Br. at 6-7, both of which require a conviction of a felony offense. Petitioner is considered convicted under 42 U.S.C. § 1320a-7(i) due to Petitioner's guilty plea to numerous offenses and because the District Court issued a Judgment in Criminal Case evidencing that the court both accepted the guilty plea and issued a judgment of conviction. IG Ex. 6 at 1.

The four essential elements necessary to support an exclusion based on section 1128(a)(3) include: (1) the individual to be excluded must have been convicted of a felony offense; (2) the felony conviction must have been related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the felony offense must be in connection with the delivery of a health care item or service; and (4) the felonious conduct must have occurred after August 21, 1996. 42 U.S.C. § 1320a-7(a)(3).

Petitioner pled guilty to a number of offenses including the felonies of Conspiracy to Commit International Money Laundering in violation of 18 U.S.C. § 1956(h), and International Money Laundering in violation of 18 U.S.C. § 1956(a)(2), for conduct involving the sale of controlled substances that ended in 2008. IG Ex. 6 at 1-2.

Petitioner does not dispute and I conclude that the IG has established that the elements for the mandatory exclusion based on section 1128(a)(3) of the Act are met.

Additionally, four essential elements necessary to support the exclusion based on section 1128(a)(4) include: (1) the individual to be excluded must have been convicted of a criminal offense; (2) the criminal offense must have been a felony; (3) the felony conviction must have been for conduct relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance; and (4) the felonious conduct must have occurred after August 21, 1996. 42 U.S.C. § 1320a-7(a)(4).

Petitioner also pled guilty to the felony offenses of unlawful Conspiracy to Distribute, to Dispense, and to Possess with Intent to Distribute, Controlled Substances in violation of 21 U.S.C. § 846, and Distribution and Dispensing of Controlled Substances in violation of 21 U.S.C. § 841(a)(1), for conduct that ended in 2008. IG Ex. 6 at 1-2. Petitioner does not dispute and I conclude that the IG has established that the criteria for the mandatory exclusion based on section 1128(a)(4) of the Act also are satisfied.

B. The IG's decision to exclude Petitioner for 15 years is not unreasonable based on the presence of three aggravating factors and the absence of any mitigating factors in this case.

Because I have concluded that bases exist to exclude Petitioner pursuant to 42 U.S.C. § 1320a-7(a)(3) and (a)(4), Petitioner must be excluded for a minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B). While the IG must impose the five-year minimum mandatory term of exclusion, the IG is authorized to lengthen that term if certain aggravating factors exist. *See* 42 C.F.R. § 1001.102. Those aggravating factors are detailed at 42 C.F.R. § 1001.102(b)(1)-(9). I must uphold the IG's determination as to the length of exclusion if it is not unreasonable. 42 C.F.R. § 1001.2007(a)(1)(ii). This means that: "So long as the amount of time chosen by the []IG is within a reasonable range, based on demonstrated criteria, the ALJ has no authority to change it under this rule. We believe that the deference § 1001.2007(a)[] grants to the []IG is appropriate, given the []IG's vast experience in implementing exclusions under these authorities." 57 Fed. Reg. at 3298, 3321 (Jan. 29, 1992). I interpret this to mean that if the IG proves that all of the aggravating factors he considered when lengthening an exclusion exist and that Petitioner does not prove that the IG failed to consider a mitigating factor, then I must give deference to the length of exclusion determined by the IG and may only change the length of exclusion if it is otherwise unreasonable. A length of exclusion is not unreasonable unless it is significantly excessive (i.e., outside a reasonable range). If a petitioner proves the existence of one or more mitigating factors listed in the regulations, then I may reduce the length of exclusion imposed by the IG. 42 C.F.R. § 1001.102(c). If that occurs, I would reassess the length of exclusion de novo.

1. The IG proved the existence of three aggravating factors.

The IG added ten years to Petitioner's minimum, five-year exclusion based on the presence of three aggravating factors: 42 C.F.R. §§ 1001.102(b)(2) (the acts resulting in the conviction were committed over a period of one year or more); (b)(5) (the sentence imposed by the court included incarceration); and (b)(9) (an adverse action taken by a State agency, based on the same circumstances that serve as the basis for imposing the exclusion). IG Ex. 1 at 2. Petitioner concedes the existence of these aggravating factors. P. Br. at 6-7.

Petitioner's criminal acts occurred for a period of time exceeding one year. 42 C.F.R. § 1001.102(b)(2). Count 1 of the Third Superseding Indictment, to which Petitioner pled guilty, indicates that his criminal acts took place from September 2006 until October 2008. P. Ex. 24 at 12. IG Ex. 5 at 1. As noted, Petitioner ran an on-line pharmacy through which he dispensed and shipped controlled substances to customers based on invalid prescriptions. Therefore, Petitioner's repeated criminal acts were carried out during a period of about two years.

The evidence further establishes that the sentence imposed by the court included incarceration for 63 months. 42 C.F.R. § 1001.102(b)(5); IG Ex. 6 at 3. This is a significant length of incarceration, indicating that Petitioner is highly untrustworthy. *Raymond Lamont Shoemaker*, DAB No. 2560, at 8 (2014) ("In light of the high degree of untrustworthiness reflected in the length of Petitioner's term of incarceration [of 55 months], a five year extension of the mandatory minimum five-year exclusion based on this factor alone would not be unreasonable."). Although Petitioner obtained early termination of his supervised release following prison (P. Exs. 31-32), Petitioner served the full term of incarceration of over five years. P. Ex. 31 at 1.

The evidence additionally establishes that Petitioner was subject to an adverse action by a state agency or board based on the same set of circumstances that serves as the basis for the imposition of the exclusion. 42 C.F.R. § 1001.102(b)(9). The Massachusetts Board of Registration in Pharmacy temporarily suspended Petitioner in 2008 because he was determined to be an "imminent danger to the public health or safety." IG Ex. 8 at 3. I consider this factor to be particularly aggravating because the Petitioner was temporarily suspended before he was convicted due to a finding that he posed an imminent danger to the public health or safety. IG Ex. 8.

Access to payment for participating in federal health care programs is a privilege that requires the element of trust. I conclude that these three aggravating factors, taken together, establish that the IG's 15-year program exclusion is not unreasonable.

2. Petitioner did not establish a mitigating factor by a preponderance of the evidence to justify a reduction in the length of exclusion imposed by the IG.

If the IG proves that an aggravating factor listed in the regulations exists to warrant an exclusion of more than five years, then a petitioner may raise mitigating factors listed in the regulations to seek a reduction in the length of exclusion. 42 C.F.R. § 1001.102(c). I assigned Petitioner the burden of proof with regard to all affirmative defenses he raises. Order ¶ 3(c); 42 C.F.R. § 1005.15(d). The standard of proof is the preponderance of evidence. 42 C.F.R. § 1001.2007(c).

The primary issue in dispute in this case is whether Petitioner has shown by a preponderance of the evidence that he provided sufficient cooperation to federal law enforcement to constitute a mitigating factor under the regulations. The relevant regulatory provision states:

> (3) The individual's or entity's cooperation with Federal or State officials resulted in—
>
> > (i) Others being convicted or excluded from Medicare, Medicaid and all other Federal health care programs,
> >
> > (ii) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or
> >
> > (iii) The imposition against anyone of a civil money penalty or assessment under part 1003 of this chapter.

42 C.F.R. § 1001.102(c)(3).

The preamble to the final rule first establishing this mitigating factor states:

> We believe, however, that only significant cooperation should be considered mitigating, and the imposition of a sanction as a result of cooperation establishes that the cooperation was significant. We believe the significance of cooperation is more properly evaluated by those in a position to utilize the information, rather than by an ALJ.

57 Fed. Reg. 3298, 3315 (Jan 29, 1992).[2] This response to a public comment makes clear that in order to qualify as a mitigating factor, cooperation must be "significant," and cooperation that results in the imposition of a sanction is significant. A later final rule modifying section 1001.102(c)(3) clarified the type of evidence needed to prove cooperation and lowered the threshold for validation of cooperation to be in the form of opening an investigation:

> While we expect this mitigating factor to be taken into consideration only in those situations where the law enforcement agency validated the person's information by opening up a case investigation or by issuing a report, we nevertheless believe that this additional factor will afford the OIG greater flexibility in identifying and addressing issues related to program waste, fraud and abuse.

63 Fed. Reg. 46676, 46681 (Sept. 2, 1998).

In the present case, it is clear that Petitioner cooperated with law enforcement. Petitioner provided information to law enforcement officials at proffer sessions in September 2009, November 2009, March 2010, and April 2010 (P. Exs. 1-6), and testified in April 2010 before a grand jury based on a proffer agreement. P. Ex. 7 at 7-11. Petitioner testified that the prosecutors were pleased with his grand jury testimony and initially indicated that they would "issue a 5K letter recommending a reduced sentence." P. Affidavit at 2-3. However, it is also clear that federal prosecutors – those in a position to utilize information Petitioner provided -- did *not* consider Petitioner's efforts at cooperation sufficient. During the sentencing phase of Petitioner's criminal case, prosecutors refused to give Petitioner credit for the information he had provided to investigators. IG Ex. 9 at 19. Petitioner's counsel in the criminal case considered this inexplicable and was shocked that Petitioner's assistance not only failed to cause a reduction in Petitioner's sentence, but actually resulted in additional criminal charges being filed against Petitioner. IG Ex. 9 at 19. On March 31, 2011, a third superseding indictment was issued which added a number of additional charges against Petitioner including Continuing Criminal Enterprise and International Money Laundering, among others. *Compare* P. Ex. 23 *with* P. Ex. 24.

[2] Although the response was related to permissive exclusions, I find the language instructive for mandatory exclusions as well. *See Stacey R. Gail*, DAB No. 1941, at 8 (citing the preamble regarding when cooperation should be mitigating in a mandatory exclusion).

The District Judge who sentenced Petitioner stated that he was not privy to why the relationship between Petitioner and the prosecution deteriorated, but noted that Petitioner had "a history of attempted cooperation" with the prosecution. IG Ex. 9 at 42. The District Judge stated that he was required to rely on the prosecution to determine whether to provide credit for Petitioner's cooperation under the "acceptance of responsibility" clause in the sentencing guidelines. The judge stated that while he "cannot award the additional point, which [he] otherwise would have for acceptance of responsibly, but [he] can sentence at the lowest end of the guideline range. . . ." IG. Ex. 9 at 44.

Although not expressly stated in section 1001.102(c)(3), it is critical for Petitioner to have an official involved in the criminal case acknowledge the usefulness of his proffers and grand jury testimony. 57 Fed. Reg. at 3315. In this case, however, the record shows that neither the prosecutor in Petitioner's criminal case nor the judge who sentenced Petitioner directly acknowledged that Petitioner's cooperation was significant.

Petitioner attempts to prove that his cooperation was significant through evidence of what he told law enforcement at proffer sessions and while testifying before a grand jury about S.I and M.G., and showing validation of cooperation through the conviction of S.I. and the indictment of M.G. Petitioner provided some information in two proffer sessions about S.I. (P. Exs. 2, 4) and mentioned S.I. during the grand jury testimony (P. Ex. 7 at 38). S.I. was charged and pled guilty to a crime. P. Exs. 19-21. Petitioner admits, however, that S.I. was already under charges before Petitioner's proffer sessions. Petitioner asserts that his assistance resulted in additional charges against S.I., P. Br. at 11-12. However, the evidence of record does not make it more likely than not that Petitioner's cooperation resulted in S.I.'s conviction. The evidence submitted by Petitioner of his limited assistance with regard to SI is simply insufficient to prove that Petitioner's cooperation resulted in a new investigation or a conviction.

Petitioner argues that he provided information about M.G. in three proffer sessions. P. Ex. 2 at 5; P. Ex. 5 at 7-10; P. Ex. 6 at 3-5. Petitioner also testified before the grand jury as to M.G.'s actions, roles, and involvement in the internet pharmacy scheme. P. Ex. 7 at 90-93, 109-110, 122-128, 139. Namely, that Petitioner met M.G. when he traveled to the Dominican Republic to meet with the head of an internet pharmacy's parent company. M.G. acted as the translator, assisted the parent company's head with business development, and acted as the customer service manager. *Id*. M.G. was not included in the initial indictments predating Petitioner's cooperation. *See* P. Exs. 22-23. However, after Petitioner's proffers and testimony, M.G. was charged with 18 criminal counts. P. Ex. 24. That indictment names M.G. as responsible for assuring Petitioner's pharmacy filled orders that were placed through her company, paying Petitioner for services, and troubleshooting complaints made to law enforcement and pharmacy and medical boards. P. Ex. 27 at 9-10. Petitioner's cooperation appears important to the government's case. However, I am troubled by a lack of direct evidence to connect Petitioner's statements with the charges against M.G.

Petitioner could have requested subpoenas for any investigator or prosecutor who could testify as to his cooperation. *See* 42 C.F.R. § 1005.9 The record names numerous individuals – Federal Bureau of Investigations investigators, Food and Drug Administration special agents, United States Postal Service inspectors, Drug Enforcement Administration personnel, Internal Revenue Service special agents, and Assistant United States Attorneys – who could provide corroboration of the effect of Petitioner's proffers. P. Exs. 1-6 at 3. However, Petitioner did not subpoena any individual to support his assertion that his cooperation was validated by law enforcement. *See Stacey R. Gail,* DAB No. 1941, at 11, 13.

The purpose of section 1001.103(c)(3) is "to authorize mitigation for significant or valuable cooperation that yielded positive results" which are validated in very specific ways. *Id*. at 8. These ways include a conviction, program exclusion or civil money penalty, or the initiation of an investigation or issuance of a report. As Petitioner asserts, it is possible that prosecutors have vindictively withheld corroboration of Petitioner's cooperation because Petitioner refused to testify against his wife. It could be that Petitioner risked his own health and safety and that of his family to help cooperate with officials to try to make up for his wrongdoing. However, Petitioner has not met his burden to present evidence to support his assertion that Petitioner's cooperation resulted in the conviction of S.I. or the indictment of M.G.

C. Petitioner's other arguments are not relevant to this proceeding or are beyond the scope of my review.

Petitioner indicates that the exclusion will worsen his financial condition. However, in evaluating whether the length of an exclusion imposed on an individual is reasonable, I may not take into account any adverse financial effect on the individual because the purpose of an exclusion is primarily to protect federal health care programs. 57 Fed. Reg. 3298, 3316 (Jan. 29, 1992) ("If it is determined that someone should be excluded from the programs because continued participation puts the program at risk, the fact that the exclusion may affect his or her financial condition is not our concern; our concern is in protecting the programs.").

Petitioner further argues that the 15-year exclusion imposed by the IG here is unreasonable compared to the shorter exclusions of petitioners in three prior cases who committed more serious crimes or whose convictions involved as many or more aggravating factors. P. Br. at 16-17, citing *Sylvia F. Redd,* DAB CR2959 (2013); *Joby George,* DAB CR2482 (2012); *Isaac Aaron Sultan,* DAB CR839 (2001). The "assessment of aggravating factors (and mitigating factors, if any), is first and foremost case-specific" because each case "involves a complex interaction of diverse circumstances and regulatory factors with varying weights." *Eugene Goldman, M.D.,* DAB No. 2635, at 11. Thus, case comparisons are of limited value and ultimately are not dispositive of the question whether an exclusion period is within a reasonable range. *Id.*

Moreover, for any cited case to inform my evaluation of the reasonableness of an exclusion period, the petitioner must identify specific commonalities (or differences) between the case under review and the cited comparable case. Here, none of the cases cited by the Petitioner concerns an individual who engaged in a conspiracy to distribute, and who possessed with intent to distribute controlled substances; a conspiracy to misbrand drugs; a conspiracy to commit international money laundering, and international money laundering. For example, one case involved a nurse who defrauded the Medicare program by referring Medicare patients to a supplier that sold power wheelchairs in exchange for payments for the referrals (DAB CR1959); the second case involved a pharmacist who submitted false claims to Medicare for dispensing prescription drugs that were never dispensed and for dispensing brand name prescription drugs where less expensive generic drugs were actually dispensed (DAB CR 2482); and the third involved a neurologist who defrauded Medicare and MediCal by "systematically claiming reimbursement for patients' brief office visits as if they involved more complicated procedures that were entitled to a higher level of remuneration" (DAB CR839). In sum, the cited cases involved actions that are sufficiently dissimilar from the actions for which Petitioner was convicted to do little to inform my evaluation of whether the 15-year period of exclusion here falls within a reasonable range.

Petitioner asserts that the IG uses a chart to aid in determining the length of exclusion to be imposed. *See* P. Ex. 18 at 114-118. Petitioner concludes from the IG's chart that his exclusion should be from five to ten years and not 15 years. P. Br. at 17-18. However, the specific internal method the IG may have used to determine the length of exclusion in this case is not subject to review. As explained above, I am to determine whether the IG's exclusion is unreasonable based on the record before me. My review of the record as a whole indicates that the IG's fifteen-year exclusion is within the reasonable range based on the aggravating factors present in this case.

VI. Conclusion

For the foregoing reasons, I affirm the IG's determination to exclude Petitioner for 15 years from participating in Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(3) and (a)(4).

/s/
Scott Anderson
Administrative Law Judge