

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Lawrence Carpenter, M.D.  
(OI File No. H-15-40586-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-80

Decision No. CR4541

Date: March 4, 2016

**DECISION**

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Lawrence Carpenter, M.D., from participation in Medicare, Medicaid, and all other federal health care programs based on Petitioner's conviction of a felony offense in connection with the delivery of a health care item or service relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. For the reasons discussed below, I conclude that the IG has a basis for excluding Petitioner because he was convicted of misprision of a felony, a felony offense that involved his active concealment of health care fraud that was committed by his partner in his medical practice. I affirm the 10-year exclusion period because the IG has proven three aggravating factors. Even with the presence of one mitigating factor, the length of the exclusion period is reasonable. I also affirm that the effective date of Petitioner's exclusion is September 20, 2015.

**I. Background**

By letter dated August 31, 2015, the IG notified Petitioner that, pursuant to section 1128(a)(3) of the Social Security Act, 42 U.S.C. § 1320a-7(a)(3), he was being excluded

from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of 10 years, effective 20 days from the date of the letter. IG Exhibit (Ex.) 1 at 1. In the letter, the IG informed Petitioner of the factual basis for the exclusion, stating:

This exclusion is due to your felony conviction as defined in section 1128(i) (42 U.S.C. 1320a-7(i)), in the United States District Court, Southern District of Alabama, Southern Division, 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.

IG Ex. 1 at 1. The IG extended the exclusion period from the statutory minimum of five years to 10 years based on the presence of three aggravating factors and one mitigating factor. I.G. Ex. 1 at 2. As for the three aggravating factors, the IG found: (1) The loss to the Government or other entity as a result of Petitioner's criminal acts was greater than \$5,000; (2) The acts leading to Petitioner's conviction lasted one year or more; and, (3) Petitioner was subject to another adverse action based on the same facts that form the basis for his criminal conviction. IG Ex. 1 at 2; 42 C.F.R. § 1001.102(b)(1), (2), (9). The sole mitigating factor considered by the IG was that Petitioner cooperated with government officials. IG Ex. 1 at 2; 42 C.F.R. § 1001.102(c)(3).

Petitioner, through counsel, timely filed a request for hearing before an administrative law judge on November 2, 2015. On November 18, 2015, I convened a prehearing conference by telephone pursuant to 42 C.F.R. § 1005.6, during which I clarified the issues of the case and established a schedule for the submission of prehearing briefs and exhibits. The schedule and summary of the prehearing conference was memorialized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order), dated November 20, 2015.

Pursuant to the Order, the IG filed an Informal Brief (IG Br.) along with five proposed exhibits (IG Exs. 1-5). Petitioner thereafter filed his Informal Brief (P. Br.) and two proposed exhibits (P. Exs. 1-2). The IG then filed a reply brief (IG Reply). In the absence of any objections, I admit the parties' submissions and exhibits into the record.<sup>1</sup>

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<sup>1</sup> My November 20, 2015 Order detailed the process for filing and marking exhibits. Petitioner submitted two exhibits, Exhibits 1 and 2, in a manner that was not compliant with my Order. *See* Order § IV (stating "[t]he parties must mark all evidence they submit to me" and instructing the parties how to mark exhibits). Neither exhibit was marked

Both parties agreed that an in-person hearing was not necessary for me to decide this case. IG Br. at 13; P. Br. at 9. Therefore, I am deciding this case on the written submissions and documentary evidence. *See* Order § IV.

## II. Issues

The regulations limit the issues in this case to whether there is a basis for exclusion, and, if so, whether the length of the exclusion that the IG has imposed is unreasonable. 42 C.F.R. § 1001.2007(a)(1)-(2).

## III. Jurisdiction

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

## IV. Findings of Fact, Conclusions of Law, and Analysis<sup>2</sup>

### ***1. Petitioner’s conviction for misprision of a felony requires his exclusion from all federal health care programs for a minimum of five years.***

The Social Security Act requires the exclusion of any individual or entity from participation in all federal health programs based on four types of criminal convictions. 42 U.S.C. § 1320a-7(a). In this case, the IG relied on section 1320a-7(a)(3) as the legal basis to exclude Petitioner, which states:

#### (a) Mandatory exclusion

The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1320a-7b(f) of this title):

\* \* \*

#### (3) Felony conviction relating to health care fraud

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with a “P” in the lower right corner followed by a whole number for each document offered, and each page of each exhibit was not numbered. Order § IV; *see* Civil Remedies Division Procedures (CRDP) § 14. Nonetheless, I have admitted both of Petitioner’s exhibits into the record. While Petitioner appended six alphabetically referenced “exhibits” to his request for hearing, none of these exhibits are referenced in either his informal brief or in the exhibit list that he submitted on January 27, 2016. I observe that a number of these documents were submitted by the IG as IG Exs. 1-4.

<sup>2</sup> My findings of fact and conclusions of law are set forth in italics and bold font.

Any individual or entity 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 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 in 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.

*Id.* § 1320a-7(a)(3).

The IG argues that Petitioner's exclusion is required based on his conviction for misprision of a felony because it occurred after August 21, 1996, is related to fraud, and was committed in connection with the delivery of a health care item or service. IG Br. at 4-6. Petitioner does not dispute that he was "convicted" for purposes of the Act of misprision of a felony based on his guilty plea to that offense. P. Br. at 1-2; 42 U.S.C. § 1320a-7(i)(3). However, Petitioner argues that his federal felony conviction does not mandate exclusion because it is not related to fraud nor was it committed in connection with the delivery of a health care item or service. P. Br. at 2-5. As explained below, I reject Petitioner's arguments and find that Petitioner's conviction for misprision of a felony requires his exclusion.

On May 6, 2014, the United States Attorney for the Southern District of Alabama filed a one-count Information charging that Petitioner committed the felony offense of misprision of a felony in violation of 18 U.S.C. § 4.<sup>3</sup> IG Ex. 3 at 1. Specifically, the Information charged that "[b]eginning in or about January 2008 and continuing through in or about December 2011," Petitioner, "having knowledge of the actual commission of a felony . . . to wit: healthcare fraud, did actively conceal the same . . . ." IG Ex. 3 at 1. The same day the United States Attorney filed the Information, Petitioner, with the benefit and advice of counsel, entered into a plea agreement in which he pleaded guilty to the sole count listed in the Information. IG Ex. 2 at 2, 12-13. In the plea agreement, Petitioner acknowledged that he was "pleading guilty because he is guilty." IG Ex. 2 at 3. The plea agreement specifically incorporated a separately filed Factual Resume, which was submitted to the District Court as evidence at the guilty plea hearing. IG Ex. 2 at 16. The Factual Resume set forth the four elements of the offense, along with the details of the offense conduct. IG Ex. 2 at 3. Petitioner and his counsel signed the Factual Resume, and both agreed that the contents of the Factual Resume were "true and correct." IG Ex. 2 at 3.

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<sup>3</sup> The parties do not dispute that misprision of a felony is itself a "Class E" felony, punishable by up to three years of incarceration. *See* 18 U.S.C. §§ 4, 3559(a)(5).

The Factual Resume addressed the underlying facts supporting Petitioner's guilty plea to misprision of a felony. In relevant part, the Factual Resume states:

Throughout the time period alleged in the Information, [Petitioner] was a physician, board certified in obstetrics and gynecology. In addition to his OB/GYN practice, [Petitioner] was the majority owner of a dermatology clinic, the Laser Skin Care Center of Mobile ("LSCC"). [Petitioner] owned 60% of LSCC while Certified Registered Nurse Practitioner Diantha Miller owned the remaining 40%.

During the time period alleged in the Information, [Petitioner] had actual knowledge that Diantha Miller was committing healthcare fraud. Specifically, [Petitioner] had actual knowledge that Miller, and others at Miller's direction, were falsifying billing records to make it appear as if [Petitioner] treated certain patients, when in fact, he had not done so. [Petitioner] discovered these fraudulent bills were being submitted to the patient's insurance company with the expectation that the insurance company would reimburse at the higher physicians rate. [Petitioner] failed to notify authorities once he had actual knowledge of this felony offense. Rather, [Petitioner] actively concealed the felony offense in order to avoid an investigation.

IG Ex. 2 at 15.

Petitioner points out that his conviction for misprision of a felony was not based on his own fraudulent conduct, but instead was based only on his failure to report the fraudulent conduct of his partner. P. Br. at 3. Petitioner also argues that his failure to report the fraudulent activity that he knew about did not involve his delivery of a health care item or service "of any kind." P. Br. at 3. These arguments are unpersuasive. Petitioner overlooks the plain language of the statute, which clearly states that an exclusion is mandated when the underlying conviction is for a felony "relating to" fraud, meaning that the conviction need not have been based on the actual commission of fraud, but rather, have only been related to fraud. Likewise, Petitioner overlooks the statutory language stating an exclusion is warranted when the conviction is for an offense "in connection with" the delivery of a health care item or service, meaning that a criminal offense warranting exclusion is not limited only to the actual delivery or provision of such an item or service. 42 U.S.C. § 1320a-7(a)(3); *see Charice D. Curtis*, DAB No. 2430 at 4 (2011) ("[T]he plain language of section 1128(a)(3) encompasses felonies 'relating to' fraud . . . not just to felonies that constitute fraud or one of the other listed offenses."). The Departmental Appeals Board (Board) has also explained that an ALJ does not need to limit review to the elements of an offense, but may consider the extrinsic evidence surrounding the conviction to determine whether it is "relating to" fraud and done "in

connection with” the delivery of a health care item or service. *Narendra M. Patel, M.D.*, DAB No. 1736 at 6 (2000), *aff’d*, *Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003).

Petitioner admitted “in open court and under oath” that he committed the offense conduct listed in the Factual Resume that was incorporated into his May 6, 2014 plea agreement. IG Ex. 2 at 14. In that document, Petitioner admitted that he “had actual knowledge” that his partner was committing health care fraud. IG Ex. 2 at 15. Petitioner further admitted he “had actual knowledge” that his partner and others at her direction had falsified billing records to show that he had treated certain patients when he had not treated those patients. IG Ex. 2 at 15. Despite having actual knowledge that his name was being fraudulently listed as the treating doctor for patients he did not treat, Petitioner “actively concealed” the felonious criminal activity rather than reporting it. IG Ex. 2 at 15. Petitioner’s knowledge of the commission of health care fraud by another, coupled with both his failure to report the fraud and his “active concealment” of the fraud, allowed his partner to continue to falsify billing records with *his own name* on them so that the bills would be reimbursed at a higher rate. IG Ex. 2 at 15. Petitioner’s concealment and failure to report these crimes unquestionably establishes a plain nexus between his criminal conduct and his partner’s fraudulent activity. While Petitioner did not actively commit the crime, his failure to report the crime and the active concealment of such allowed the health care fraud to continue. There can be no doubt that Petitioner’s felony conviction is for a crime that relates to health care fraud.

In addition, the offense conduct in the Factual Resume to which Petitioner admitted supports that his crime was in connection with the delivery of a health care item or service. The underlying health care fraud that Petitioner failed to report and concealed involved the submission of false claims to a health insurance provider. The submission of claims for payment for health care services is done “in connection with,” and necessarily follows, the delivery of those services. The Board has long held this to be true. *See Jack W. Greene*, DAB No. 1078 at 7-8 (1989). The Board has also explained that there should be a “common sense connection” between the underlying crime and the delivery of a health care item or service in order to meet the statutory basis for exclusion. *Eric D. DeSimone, R.Ph.*, DAB No. 1932 at 5 (2004). When applying a common sense analysis to the underlying facts of this case, I find that Petitioner’s failure to report and his concealment of the submission of false claims for payment of services was “in connection with” the delivery of such health care services.

Based on the foregoing analysis, I conclude that Petitioner’s criminal conviction for misprision of a felony, which consisted of both his failure to report health care fraud and his active concealment of ongoing health care fraud, mandates his exclusion from all federal health care programs. 42 U.S.C. § 1320a-7(a)(3).

**2. A 10-year minimum exclusion is not unreasonable based on the presence of three aggravating factors and one mitigating factor.**

The Act requires a minimum exclusion period of five years when the exclusion is mandated under section 1320a-7(a). 42 U.S.C. § 1320a-7(c)(3)(B). In this case, exclusion is required under section 1320a-7(a)(3), therefore Petitioner must be excluded for a minimum of five years. The IG increased the minimum exclusion period from five years to 10 years based on his consideration of three aggravating factors, along with one mitigating factor. IG Ex. 1 at 2. The IG has the discretion to impose an exclusion longer than the minimum period when there are aggravating factors present. *See* 42 C.F.R. § 1001.102.

The IG asserts that the presence of three aggravating factors, even with the presence of one mitigating factor, warrants an exclusion for 10 years. The first aggravating factor is that the loss to a Government program or other entity as a result of Petitioner's criminal conduct was greater than \$5,000. *Id.* § 1001.102(b)(1). Second, the duration of Petitioner's failure to report and the active concealment of his partner's health care fraud was for a period longer than one year. *Id.* § 1001.102(b)(2). Third, Petitioner was subject to another adverse action based on the same facts that support the exclusion. *Id.* § 1001.102(b)(9). Petitioner does not dispute that the loss to Blue Cross/Blue Shield of Alabama, a health insurer, as a result of his criminal conduct was \$208,000, or that the Alabama Medicaid Agency excluded him from participation in that program as a result of his criminal conviction. IG Ex. 4 at 3; I.G. Ex. 5 at 1; P. Br. at 6. The IG properly considered these two factors as aggravating factors in this case. *Jeremy Robinson*, DAB No. 1905 at 12 (2004) (determining that loss of 41 times the minimum amount required for aggravating factor supported a 15-year exclusion); *Brij Mittal, M.D.*, DAB No. 1894 at 5 (2003) (determining that exclusion from New York State Medicaid program based on same conviction that was basis for exclusion was an aggravating factor that supporting increase to exclusion period).

However, Petitioner disputes that the length of his criminal conduct was longer than one year. P. Br. at 6. He argues that misprision of a felony "requires the failure to act or active concealment as one of its elements." P. Br. at 6. He then explains that the "actual ultimate failure to act and concealment of his partner's fraud was confined to the discovery of fraudulent billing and submissions from his partner after that partner had been terminated and excluded from his practice." P. Br. at 6-7. Petitioner argues that the period of time related to that discovery and the ultimate concealment of that fraud was "substantially less than" one year. P. Br. at 6-7. Petitioner's arguments are unpersuasive.

A federal felony conviction for misprision of a felony requires the following elements to be proven: (1) the commission and completion of a felony offense by a principal; (2) actual knowledge by the defendant of the commission of such a felony; (3) failure by the defendant to notify authorities; and (4) an affirmative act by the defendant to conceal the

crime. 18 U.S.C. § 4; IG Ex. 2 at 14. Petitioner willingly, and with the advice of counsel, entered a plea agreement in which he admitted “in open court and under oath” that he was “pleading guilty because he was guilty,” and that the length of his criminal conduct was for a period of approximately four years.<sup>4</sup> *See* IG Ex. 3 at 1 (Count One of the Information charging that Petitioner committed the offense of misprision of a felony “[b]eginning in or about January 2008 and continuing in or about December 2011”); IG Ex. 2 at 3 (guilty plea to Count One of the Information). In pleading guilty to Count One of the Information, Petitioner admitted that his felonious conduct satisfied *all* elements of the charge of misprision of a felony, including the active concealment of the crime. IG Ex. 2 at 2, 14. Therefore, by admitting that his criminal conduct took place from approximately January 2008 through December 2011, Petitioner necessarily admitted that he committed all elements of the offense, to include actively concealing his partner’s health care fraud, during that entire time period. Petitioner’s current argument, that he only committed all elements of misprision of a felony for less than a year, is disingenuous and contradicts his guilty plea to Count One of the Information, which unambiguously states that the duration of Petitioner’s offense conduct was for a period of approximately four years in length. Finally, I point out that Petitioner cannot attack the factual underpinnings of his guilty plea. *See* 42 C.F.R. § 1001.2007(d). The IG properly considered the length of Petitioner’s crime from “in or about January 2008 and continuing through in or about December 2011” as an aggravating factor in this case. *See Vinod Chandrashekar Patwardhan, M.D.*, DAB No. 2454 at 7 (2012) (determining that three-year duration of criminal conduct was an aggravating factor).

The IG also considered one mitigating factor in this case: Petitioner cooperated with Federal or State officials. I.G. Ex. 1 at 2; *see* 42 C.F.R. § 1001.102(c)(3)(i). There is no dispute that this mitigating factor is present and that the IG evaluated this factor prior to determining the length of Petitioner’s exclusion. IG Br. at 9; P. Br. at 9; IG Ex. 1 at 2; *Craig Richard Wilder*, DAB No. 2416 (2011) (reducing exclusion period based on

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<sup>4</sup> Petitioner cited an excerpt from the Factual Resume in his brief, arguing that the Factual Resume only supports that he had knowledge of his partner’s health care fraud but was not concealing that fraud. P. Br. at 5. However, the Petitioner fails to acknowledge that the final sentence of the same document, which the plea agreement recognized was “submitted to the Court as evidence at the guilty plea hearing,” states that Petitioner “actively concealed the felony offense in order to avoid an investigation.” IG Ex. 2 at 15; *see* IG Ex. 2 at 2. Petitioner did not plead guilty to concealing a felony for only a portion of the period stated in Count One of the Information; rather, he pleaded guilty to Count One, without any exception, to the offense of misprision of a felony for the entire period alleged in the Information, which was specified as “[b]eginning in or about January 2008 and continuing through in or about December 2011.” IG Ex. 3 at 1; *see* IG Ex. 2 at 14-15. I reiterate that Petitioner clearly stated that he pleaded guilty “because he was guilty.” IG Ex. 3 at 1.



mitigating factor of significant cooperation). Petitioner has not argued that any additional mitigating factors are present in this case.<sup>5</sup> P. Br. at 9.

The 10-year period of Petitioner's exclusion is not unreasonable based on the three aggravating factors and one mitigating factor present in this case. The amount of loss caused by Petitioner's criminal conduct is very substantial, and is more than 40 times higher than the threshold \$5,000 amount of loss necessary to trigger consideration of this aggravating factor. In addition, Petitioner was not simply an unwitting observer of his partner's health care fraud; rather, he appears to have been a financial beneficiary of the fraud, based on the District Court's order that Petitioner pay \$208,000 in restitution to a single insurance company, Blue Cross/Blue Shield of Alabama.<sup>6</sup> IG Ex. 4 at 3. Petitioner owned 60 percent of the practice that received the fraudulent payments his partner had devised, so it is hardly conceivable that he realized no financial gain from his partner's fraudulent billing entries that listed his name as the treating physician for patients he did not treat.<sup>7</sup> Therefore, this aggravating factor amply supports an increase to the length of Petitioner's exclusion. In addition, Petitioner's criminal activity lasted for approximately four years, as evidenced by his guilty plea to Count One of the Information. IG Exs. 2, 3. Petitioner's failure to report, and to even conceal, his partner's scheme to defraud a health insurance program for nearly four years underscores a level of untrustworthiness in his dealing with health care programs. The length of his

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<sup>5</sup> Petitioner points out that his license to practice medicine has not been revoked or suspended as a result of his criminal conduct. P. Br. at 8. He argues that the medical board's decision not to restrict his medical license serves to reduce the significance of the aggravating factors. However, a medical board's decision not to take an adverse action is not a recognized mitigating factor and does not reflect any evaluation of the aggravating factors present in this case. 42 C.F.R. § 1001.102(c).

<sup>6</sup> The Amended Judgment in a Criminal Case directed restitution pursuant to 18 U.S.C. § 3664. Section 3664 addresses the procedure for issuing an order of restitution. It directs a sentencing court to "consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate."

<sup>7</sup> Petitioner's financial gain is not a basis for the aggravating factor. *Barry D. Garfinkel, M.D.*, DAB No. 1572 at 36 (1996). However, I find that Petitioner's financial gain is relevant because it demonstrates that the financial loss incurred as a result of Petitioner's conduct actually benefited Petitioner, and not just the partner who actively committed health care fraud. Thus, while Petitioner's financial gain is not the basis for the aggravating factor related to an entity's financial loss, I find that it serves to increase the severity of that aggravating factor.

criminal conduct also amply supports a significant increase to Petitioner's exclusion period. The fact that the Alabama Medicaid Agency also excluded Petitioner from that program is further evidence of his risk to health care programs and lends further support to an increase of the exclusion period.

The single mitigating factor in this case supports some tempering of any increase to Petitioner's exclusion period, in that Petitioner cooperated with Federal or State officials. I.G. Ex. 1 at 2; *see* IG Ex. 2 at 6-10 (discussing that the United States agreed to move for a downward departure of his sentence so long as he provided, *inter alia*, substantial assistance to law enforcement authorities). I acknowledge that Petitioner faced a maximum of three years of incarceration and that the loss to Blue Cross/Blue Shield exceeded \$200,000, meaning that he faced the likelihood of incarceration but for a request by the United States for sentencing leniency due to substantial assistance. *See, e.g.*, United States Sentencing Guidelines (U.S.S.G) § 2B1.1 (noting a significantly increased offense level for sentencing purposes based on a monetary loss in excess of \$150,000); U.S.S.G., Ch. 5 (Sentencing Table); U.S.S.G. § 5K1.1 (motion by the United States for sentencing judge to depart downward from the U.S.S.G. sentencing range). Thus, I conclude that Petitioner's cooperation was substantial and undoubtedly was a significant factor in the imposition of a period of probation by the sentencing judge, rather than incarceration. *See* I.G. Ex. 2 at 6 (stating that the United States would recommend that Petitioner be sentenced at the low end of the sentencing guidelines range and that the United States would move for a downward departure based on additional cooperation and substantial assistance). However, even assuming a level of extraordinary cooperation that enabled the United States to prosecute another individual or individuals successfully, such cooperation *followed* a lengthy felonious offense and does not entirely negate the three aggravating factors present in this case. While Petitioner's cooperation with law enforcement authorities is laudable and likely enabled him to avoid incarceration, such cooperation is one mitigating *factor* in the face of a serious offense with three aggravating factors. Petitioner provided cooperation to law enforcement authorities after approximately *four years* of concealing his partner's fraud. IG Exs. 2, 3. The IG appropriately considered Petitioner's cooperation to be a mitigating factor and determined that a 10-year exclusion period, and not longer, was appropriate. IG Ex. 1 at 2. In light of three aggravating factors, it appears that the IG gave a significant weight to this mitigating factor, in that the IG imposed only a 10-year exclusion period. I find there is no basis to modify the IG's determination to impose a 10-year exclusion period against Petitioner, and a 10-year period of exclusion is reasonable.

Petitioner argues that imposition of a 10-year exclusion would be contrary to congressional intent, in that federal funds and programs were not involved in the fraud. He also argues that the potential deterrent effect of the exclusion "does not exist given that Petitioner himself did not engage in the conduct," and that he has not demonstrated "untrustworthiness" with regard to the delivery of health care services. P. Br. at 7-8.

While Petitioner cites to the discussion of congressional intent as the Board described it in *Robinson*, DAB No. 1905, he fails to allege that there is any ambiguity in the plain language of the statute in question. Absent any allegation or showing of ambiguity in the statute, or demonstration that the plain meaning of Congress's language is unclear, it is unnecessary for me to delve into the congressional intent of section 1128(a)(3). *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (“In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.”).

I wholeheartedly disagree with Petitioner's assertions that section 1128(a)(3) does not mandate exclusion because federal funds were not involved in the fraud, there is no need for deterrence in his case, and that his conduct does not show he was untrustworthy. P. Br. at 6-7. First, while Petitioner was afforded substantial leniency by the criminal justice system, his receipt of a sentence sparing him incarceration does not render him a trustworthy individual for purposes of having access to the public fisc and treating health care program beneficiaries. *See Henry L. Gupton*, DAB No. 2058 at 7 (2007) (explaining that while an IG exclusion aims to protect beneficiaries of health care programs and the federal fisc, a criminal law proceeding involves “punishment, rehabilitation, and the deterrence of future misconduct”). Petitioner's failure to report, along with his concealment of, his partner's scheme to defraud a health insurance program of hundreds of thousands of dollars underscores his untrustworthiness in dealing with health care programs. While Petitioner may not have actively committed the health care fraud himself, he certainly demonstrated a lack of integrity when he allowed the fraud, which included the use of his own name, to continue and even concealed the fraud. Congress, in the plain language of the statute, made it clear that it sought to exclude untrustworthy individuals such as Petitioner from participating in federal health care programs. Likewise, Congress did not limit exclusions to only those individuals who committed fraud themselves. Similarly, the plain language of the statute indicates that Congress intended to exclude such untrustworthy individuals from participation in federal health care programs in order to deter health care fraud. Congress sought to exclude individuals who were convicted of felony offenses and whose crimes were “connected to” the delivery of *any* health care item or service and were “relating to” fraud. Nothing in Congress's language limited such an exclusion to offenses that involved federal funds.

Finally, the 10-year exclusion period appears to be of shorter duration than the exclusion periods sustained by the Board in other cases in which it affirmed an increased exclusion period based on three aggravating and one mitigating factor. *See Juan De Leon*, DAB No. 2533 (2013) (sustaining 20-year exclusion based on three aggravating factors including financial loss of \$750,000, criminal conduct over 20 months, and sentence including incarceration, as well as one mitigating factor of government cooperation); *Wilder*, DAB No. 2416 (establishing an 18-year exclusion based on three aggravating factors including financial loss of over \$4,000,000, criminal conduct over two years, and

other convictions, as well as one mitigating factor of government cooperation). While the loss that Petitioner's criminal conduct caused is substantially less than in *De Leon* and *Wilder*, the length of Petitioner's criminal conduct was longer than in either of those cases. The significantly shorter exclusion period that the IG imposed against Petitioner adequately weighed the severity of the three aggravating factors and one mitigating factor based on prior Board decisions. Therefore, the 10-year exclusion period is not unreasonable.

#### **V. Effective Date of Exclusion**

The effective date of the exclusion, September 20, 2015, is established by regulation, and I am bound by that provision. 42 C.F.R. §§ 1001.2002(b), 1005.4(c)(1)

#### **VI. Conclusion**

For the foregoing reasons, I affirm the IG's decision to exclude Petitioner from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of 10 years.

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Leslie C. Rogall  
Administrative Law Judge