Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Kamal Tiwari,
(OI File No.: 5-05-40877-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-815

Decision No. CR3106

Date: February 7, 2014

DECISION

Petitioner, Kamal Tiwari, appeals the determination of the Inspector General (I.G.) for the U.S. Department of Health and Human Services to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs pursuant to sections 1128(a)(1) and 1128(a)(4) of the Social Security Act (Act) (42 U.S.C. §§ 1320a-7(a)(1), 1320a-7(a)(4)) for a period of 20 years. For the reasons explained below, I find that there is a basis for the I.G. to exclude Petitioner and that an exclusion period of 20 years is reasonable based on three aggravating factors and no mitigating factors.

I. Background and Procedural History

Petitioner, a physician who practiced in several pain management offices in Indiana, pleaded guilty to two felonies, one count of Health Care Fraud Resulting in Serious Bodily Injury, in violation of 18 U.S.C. § 1347, and one count of Illegal Drug Distribution, in violation of 21 U.S.C. § 841(a)(1). I.G. Exs. 1, 2. In a letter dated March 29, 2013, the I.G. notified Petitioner that he was being excluded from participating in Medicare, Medicaid, and all federal health care programs effective

April 18, 2013, pursuant to sections 1128(a)(1) and (a)(4) of the Act (42 U.S.C. §§ 1320a-7(a)(1) and (a)(4)). The basis cited for Petitioner's exclusion under section 1128(a)(1) was his conviction in the United States District Court, Southern District of Indiana, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. The basis cited for Petitioner's exclusion under section 1128(a)(4) was 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 I.G. excluded Petitioner for 20 years, 15 years above the statutory minimum exclusion period for mandatory exclusions, based on three aggravating factors: (1) the acts resulting in his conviction caused, or were intended to cause, a financial loss to a government program of $5,000 or more; (2) the acts resulting in his conviction were committed over a period of one year or more; and (3) the court's sentence of Petitioner included incarceration.

By letter dated May 14, 2013, Petitioner, appearing *pro se*, requested a hearing before an administrative law judge (ALJ). This case was assigned to me for a possible hearing and written decision. I convened a prehearing conference by telephone on June 26, 2013, the substance of which I summarized in my Order and Schedule for Filing Briefs and Documentary Evidence issued on June 28, 2013. On July 31, 2013, the I.G. filed a brief (I.G. Br.) and five proposed exhibits (I.G. Exs. 1-5). After receiving an extension of time to file, on October 21, 2013, Petitioner filed his written arguments, consisting of three separate submissions: "Answer to the Inspector General's Brief" (P. Answer); a response to the questions contained in the short-form informal brief (P. Response to Informal Brief Questions); and a letter (P. Letter). Petitioner also submitted thirteen proposed exhibits (P. Exs. 1-6, 8-11, 13-15) with his submissions. Because there appeared to be discrepancies between Petitioner's exhibit list and the exhibits submitted, as well as pages missing from Petitioner's exhibits, I issued an Order to Supplement Petitioner's Exhibits and To Extend Deadline For The Inspector General's Reply Brief on November 13, 2013.[1] In a letter dated November 19, 2013, Petitioner stated that he "apologize[d] for missing and/or mis-numbered pages. Please consider the submission complete." The I.G. filed a reply brief (I.G. Reply) with an amended I.G. Ex. 3 on December 11, 2013.

Petitioner did not object to the I.G.'s exhibits, and I admit into evidence I.G. Exs. 1-5. The I.G. objected to all of Petitioner's proposed exhibits except P. Ex. 15. With respect to P. Exs. 1, 2-3, 5, 8, 10-11, and 13-14, the I.G. argued that they are

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[1] Among other things, my Order noted that Petitioner had not submitted a P. Ex. 7 and a P. Ex. 12 although he had listed these on his exhibit list, and Petitioner had submitted a document marked as P. Ex. 15, which he had not listed on his exhibit list.

irrelevant because they are offered in support of an impermissible collateral attack on Petitioner's underlying convictions. I.G. Reply at 5. The I.G. objected further to P. Exs. 1 and 5 on the grounds that they were incomplete and missing pages. I.G. Reply at 5. P. Exs. 1 and 2 comprise the medical records of patient "D.K." P. Ex. 3 is an excerpt from a response by CMS contractor National Government Services (NGS) regarding a draft local coverage determination (LCD) (the name or the number of the LCD is not apparent). P. Ex. 5 is an excerpt of a LCD (the LCD name or number is not apparent). P. Ex. 8 is the prescription record for patient "D.O." P. Ex. 10 is a letter from W. Stephen Minore, M.D. to John Muller, Esq. dated September 3, 2012. P. Ex. 11 is the medical record of patient "D.O." P. Ex. 13 is a log containing graphs titled "Patients vs Number of Procedures" and "Patient Percentage vs. Number of Procedures." P. Ex. 14 is an excerpt from a response by NGS regarding a draft LCD (the name or the number of the LCD is not apparent).

It appears that Petitioner has offered P. Exs. 1, 2-3, 5, 8, 10-11, and 13-14 in support of an attack on his underlying convictions. Such collateral attacks are impermissible under the regulations. 42 C.F.R. § 1001.2007(d). However, I overrule the I.G.'s objections and admit P. Exs. 1, 2-3, 5, 8, 10-11, and 13-14 as relevant to the underlying basis of the I.G.'s exclusion.

Additionally, the I.G. objected to P. Ex. 4 on the grounds that it comprised a portion (five pages) from the I.G.'s brief, which is already a part of the record. The I.G. also objected to P. Ex. 6 on the grounds that it appears to be incomplete, given that it is one page of an arrest affidavit and the exhibit notation on it states that it is "page 35 of 35." Lastly, the I.G. objected to P. Ex 9, which is a page from the indictment, on the grounds that the complete indictment is already a part of the record as I.G. Ex. 4. I note that in his response dated November 19, 2013, Petitioner indicated that he "apologize[d] for missing and/or mis-numbered pages" and confirmed that his exhibits were complete. Considering Petitioner is aware of the irregularities in his exhibits, I will admit P. Exs. 4, 6, and 9 to the record as originally filed.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary and, if so, to describe the testimony the party wishes to present, the names of the witnesses it would call, and a summary of each witness' proposed testimony. Both parties indicated that they did not believe an in-person hearing was necessary to decide this case. P. Response to Informal Brief Questions at 5; I.G. Br. at 8. I therefore decide this case based upon its written record.

II. Discussion

A. Applicable Law

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the Secretary of the U.S. Department of Health and Human Services (Secretary) to exclude from participation in all federal health care programs "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under [Medicare] or under any State health care program." Act § 1128(a)(1) (42 U.S.C. § 1320a-7(a)(1)); *see also* 42 C.F.R. § 1001.101(a). Section 1128(a)(1) of the Act does not distinguish between felonies and misdemeanors as predicates for exclusion.

Section 1128(a)(4) of the Act, 42 U.S.C. § 1320a-7(a)(4), requires the Secretary to 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 manufacture, distribution, prescription, or dispensing of a controlled substance." Act § 1128(a)(4) (42 U.S.C. § 1320a-7(a)(4)); *see also* 42 C.F.R. § 1001.101(d).

An exclusion made pursuant to section 1128(a)(1) or section 1128(a)(4) is mandatory. The I.G. must impose such a mandatory exclusion for a minimum period of five years. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)); *see* 42 C.F.R. § 1001.102(a). The I.G. may increase an exclusion period based on the presence of certain aggravating factors that the Secretary has established by regulation. 42 C.F.R. § 1001.102(b). Here, the I.G. relied on three aggravating factors to enhance the period of Petitioner's exclusion beyond the minimum mandatory period:

> (1) The acts resulting in the conviction, or similar acts, that caused, or were intended to cause, a financial loss to a Government program or to one or more entities of $5,000 or more. (The entire amount of financial loss to such programs or entities, including any amounts resulting from similar acts not adjudicated, will be considered regardless of whether full or partial restitution has been made);
>
> (2) The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more;

* * *

(5) The sentence imposed by the court included incarceration[.]

42 C.F.R. § 1001.102(b)(1), (2), (5); *see* I.G.'s March 29, 2013 Notice Letter.[2]

Where, as here, the I.G. determines that one or more aggravating factors may support increasing an exclusion period beyond the five-year minimum, the I.G. may then only consider certain specified mitigating factors "as a basis for reducing the period of exclusion to no less than 5 years." 42 C.F.R. § 1001.102(c).

Rights to an ALJ hearing and judicial review of the final action of the Secretary are provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). 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), (d). Petitioner bears the burden of proof, and the burden of persuasion on any affirmative defenses or mitigating factors, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(c). An ALJ reviews the length of an exclusion *de novo* to determine whether it falls within a reasonable range considering any aggravating and mitigating factors. *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491, at 5 (2012) (citing *Joseph M. Rukse, Jr., R.Ph.*, DAB No. 1851, at 10-11 (2002)).

B. Issues

Under 42 C.F.R. § 1001.2007(a)(1), the scope of my review is limited to two issues:

> Whether there is a basis for the I.G. to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs; and
>
> Whether the length of the exclusion is unreasonable.

C. Findings of Fact and Conclusions of Law

1. There is a basis for the I.G. to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

The essential elements necessary to support an exclusion based on section 1128(a)(1) of the Act are: (1) the individual to be excluded must have been convicted of a criminal offense, whether felony or misdemeanor; and (2) the

[2] Petitioner claims that the I.G. also alleged an aggravating factor "related to the State Licensing Board action." P. Response to Informal Brief Questions at 4. However, Petitioner is mistaken considering that none of the aggravating factors the I.G. relied upon related to the Indiana Medical Licensing Board's actions against him.

criminal offense is related to the delivery of an item or service under Medicare or any state health care program.

a. Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Act.

An individual is "convicted" of a criminal offense when: (1) a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; (2) there has been a finding of guilt in a federal, state, or local court; (3) a plea of guilty or no contest has been accepted in a federal, state, or local court; or (4) an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. Act § 1128(i) (42 U.S.C. § 1320a-7(i)); *see also* 42 C.F.R. § 1001.2.

On June 16, 2010, a federal grand jury sitting for the United States District Court for the Southern District of Indiana indicted Petitioner on 13 counts charging him with Health Care Fraud (Count One), in violation of 18 U.S.C. § 1347, Health Care Fraud Resulting in Serious Bodily Injury (Count Two), in violation of 18 U.S.C. § 1347, and Illegal Drug Distribution (Counts Three – Thirteen), in violation of 21 U.S.C. § 841(a)(1). I.G. Ex. 4. The Grand Jury alleged, among other things, that from about 2002 through about December 2008, Petitioner engaged in a scheme where he "claimed and received reimbursement from health care benefit programs for medical procedures, such as facet blocks, radiofrequency ablations, and epidurals and other injection procedures, when these procedures were not medically necessary." I.G. Ex. 4, at 8. The Grand Jury alleged that Petitioner "required and attempted to require patients to undergo medically unnecessary injection procedures . . . as a condition of receiving controlled substance prescriptions that he issued, which injection procedures were beyond the bounds of medical practice." I.G. Ex. 4, at 8. The Grand Jury alleged further that Petitioner "prescribed controlled substances, including Schedule II and III controlled substances, at such dosage frequencies, . . . and in such amounts . . . as were likely to cause and that did cause those patients to submit to unwanted and unnecessary injection procedures and other services, and to cause those patients to become dependent on the medically unnecessary procedures of [Petitioner]." I.G. Ex. 4, at 9.

Petitioner acknowledges that he entered into a plea agreement with federal prosecutors pursuant to Fed. R. Crim. P. 11(c)(1)(C). P. Response to Questions at 1. On March 9, 2012, Petitioner agreed to plead guilty to the charge of Felony Health Care Fraud Resulting in Serious Bodily Injury (Count Two), in violation of 18 U.S.C. § 1347, and the charge of felony Illegal Drug Distribution (Count Three) in violation of 21 U.S.C. § 841(a)(1). I.G. Exs. 1, 2. On September 18,

2012, the United States District Court of the Southern District of Indiana accepted Petitioner's guilty plea and entered judgment of conviction against him. I.G. Ex. 2, at 1. The court sentenced Petitioner to: 42 months of incarceration; three years of supervised release; forfeiture of certain assets (real property, bank accounts, and life insurance); payment of a $200 assessment; and payment of $1,121,872.24 in restitution to the Centers for Medicare & Medicaid Services (CMS) and the Indiana Medicaid Program, and $178,014.30 in restitution to Anthem Blue Cross Blue Shield (total amount of restitution was $1,299,886.54). I.G. Ex. 2, at 5. The court's acceptance of Petitioner's guilty plea, its finding of his guilt, and its entry of judgment of conviction on September 18, 2012, satisfy the definitions of "conviction" set out at sections 1128(i)(1), 1128(i)(2), and 1128(i)(3) of the Act.

b. Petitioner's conviction was for a criminal offense related to the delivery of an item or service under Medicare and Medicaid.

A conviction is related to the delivery of a health care item or service under Medicare or a state health care program if there is a "common-sense connection or nexus between the offense and the delivery of an item or service under the program." *Scott D. Augustine*, DAB No. 2043, at 5-6 (2006) (citations omitted). Here, one of the offenses for which Petitioner was convicted related to health care fraud resulting in serious bodily injury. I.G. Exs. 1, 2.

An examination of Count 2 of the indictment, to which Petitioner pleaded guilty, as well as the "Stipulated Factual Basis for Plea of Guilty" (Stipulation), which Petitioner signed as part of his guilty plea, shows that Petitioner, beginning in or about 2002 through December 2008, engaged in a scheme to "defraud a health care benefit program" and obtain money from a health care benefit program "by false and fraudulent pretenses . . . resulting in serious bodily injury" to patients. I.G. Exs. 3; 4, at 8-9, 16. Petitioner admitted in the Stipulation that "[f]rom January 2007 through December 2007, [he] "performed injection procedures, such as facet blocks, epidurals and radiofrequency ablations, on a portion of his patients that were not medically necessary." I.G. Ex. 3, at 2. He admitted that the "number of procedures he performed . . . exceeded the standard of care in interventional pain medicine practice" and amounted to a scheme to defraud Medicare, Medicaid, and Anthem Blue Cross Blue Shield. I.G. Ex. 3, at 2. The Stipulation states that the procedures carried risks of serious infections and side effects from too many steroids, and Petitioner therefore put patients at risk of suffering serious bodily injury. I.G. Ex. 3, at 2. The Stipulation also states that the total amount Petitioner received in 2007 from Medicare, Medicaid, and Anthem from billing for medically unnecessary procedures was approximately $1.3 million. I.G. Ex. 3, at 3.

Petitioner's conviction for health care fraud resulting in serious bodily injury thus directly involved a scheme to defraud Medicare and Medicaid through the dangerous and unnecessary procedures he provided to his patients under the guise of pain management. There is a direct "nexus" between Petitioner's criminal acts and the delivery of items or services under the Medicare and Medicaid programs. Moreover, the submission of false claims to the Medicare and Medicaid programs has been held to be program-related misconduct. *See, e.g., Jack W. Greene*, DAB No. 1078 (1989), *aff'd sub nom. Greene v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990). Here, the District Court ordered Petitioner to pay restitution of $1,299,886.54, and this figure was allocated as follows: $967,510.63 to CMS; $154,361.61 to the Indiana Medicaid Program; and $178,014.30 to Anthem Blue Cross Blue Shield. I.G. Ex. 2, at 5. Considering the court specifically ordered Petitioner to pay restitution to CMS and the Indiana Medicaid Program confirms that a nexus existed between his fraudulent conduct and the delivery of items or services under Medicare and Medicaid.

2. There is a basis for the I.G. to exclude Petitioner pursuant to section 1128(a)(4) of the Act because he pleaded guilty to a felony relating to unlawfully providing controlled substances to his patients.

The I.G. is required to exclude from participation in Medicare, Medicaid, and all federal health care programs any individual or entity: (1) convicted of a felony criminal offense under federal or state law; (2) where the offense occurred after August 21, 1996; and (3) the criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Act § 1128(a)(4) (42 U.S.C. § 1320a-7(a)(4)); *see also* 42 C.F.R. § 1001.101(d).

As discussed above, in addition to his conviction for Health Care Fraud Resulting in Serious Bodily Injury, Petitioner was also convicted, pursuant to his guilty plea, of a felony charge of Illegal Drug Distribution (Count Three), in violation of 21 U.S.C. § 841(a)(1). I.G. Exs. 1, 2. Based on the language of Count Three of the Indictment and the facts set forth in the Stipulation, another part of Petitioner's fraudulent scheme involved Petitioner improperly providing opioid prescriptions to his patients that were "not for a legitimate medical purpose and [were] beyond the bounds of medical practice." I.G. Ex. 4, at 17; *see* I.G. Ex. 3, at 3. The Stipulation notes that "[t]hese opioids, along with excess steroids from the procedures caused certain patients . . . serious bodily injury." I.G. Ex. 3, at 3. Count Three relates to one of Petitioner's patients, "D.O," who not only received injection procedures from Petitioner but also improperly received prescriptions for Methadone in 2008. I.G. Ex. 3, at 3.

The Schedules of Controlled Substances in the Code of Federal Regulations list Methadone as a controlled substance. 21 C.F.R. § 1308.12. Thus, there can be no

dispute that the felony drug offense of which Petitioner was convicted was clearly related to the unlawful prescription of a controlled substance. Accordingly, I conclude that there is also a basis to exclude Petitioner pursuant to section 1128(a)(4) of the Act.

> ***3. I am unable to consider collateral attacks on Petitioner's underlying conviction.***

Despite pleading guilty to the felony offenses of Health Care Fraud Resulting in Serious Bodily Injury and Illegal Drug Distribution, Petitioner contends that his "clinical conduct [was] not consistent with felonious acts" and was within the standard of care. P. Response to Informal Brief Questions at 1; P. Answer at 3-26. Petitioner explains that he accepted the plea agreement "solely for the purpose of limiting my exposure to an unpredictable jury trial with potentially more severe punitive consequences." P. Answer at 1. Petitioner argues that the Stipulation he signed as part of his plea agreement "is incongruous with my clinical conduct" and that there are "inconsistencies in the dates." P. Answer at 1, 7; *see* P. Response to Informal Brief Questions at 3-4. Further, Petitioner challenges the factual bases underlying his convictions as outlined in the indictment. P. Answer at 3-21. With respect to his conviction for illegal drug distribution, Petitioner argues that it was clinically appropriate for him to provide the prescription to D.O., which was the basis of his conviction. Petitioner claims that the federal prosecutors had a faulty "foundation" with respect to this charge. P. Answer at 25.

Petitioner's arguments, however, amount to collateral attacks on his conviction. Petitioner has not disputed that he was in fact convicted. The regulation explicitly precludes any such collateral attack:

> When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal.

42 C.F.R. § 1001.2007(d). The Departmental Appeals Board (Board) has repeatedly affirmed this categorical preclusion. *See, e.g.*, *Lyle Kai, R.Ph.*, DAB No. 1979, at 8 (2005) ("Excluding individuals based on criminal convictions 'provides protection for federally funded programs and their beneficiaries and recipients, without expending program resources to duplicate existing criminal processes.'" (internal citation omitted)). Thus, I do not consider Petitioner's arguments attacking his underlying conviction.

4. Petitioner must be excluded for a minimum of five years.

Five years is the minimum authorized period for a mandatory exclusion pursuant to Section 1128(a). Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)). Because I have concluded that a basis exists to exclude Petitioner pursuant to sections 1128(a)(1) and 1128(a)(4) of the Act (42 U.S.C. § 1320a-7(a)(1) and (a)(4)), Petitioner must be excluded for a minimum period of five years. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)).

5. The I.G. proved that three aggravating factors exist in this case that justify lengthening the period of exclusion beyond the five-year statutory minimum.

The regulations establish aggravating factors that the I.G. may consider to lengthen the period of exclusion beyond the five-year minimum for a mandatory exclusion. 42 C.F.R. § 1001.102(b). Only if an aggravating factor justifies an exclusion 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). In this case, the I.G. established the presence of three aggravating factors by a preponderance of the evidence. I address these three aggravating factors below.

a. The acts resulting in Petitioner's conviction caused a loss to government programs and Anthem Blue Cross Blue Shield of $5,000 or more.

The I.G. may increase the length of an exclusion if the acts resulting in the underlying conviction caused, or were intended to cause, a loss to a government program or to one or more entities of $5,000 or more. 42 C.F.R. § 1001.102(b)(1). The court documents show that the District Court ordered Petitioner to pay $1,299,886.54 in restitution resulting from his criminal conduct, and this figure was allocated as follows: $967,510.63 to CMS, $154,361.61 to the Indiana Medicaid Program, and $178,014.30 to Anthem Blue Cross Blue Shield. I.G. Ex. 2, at 5. It is well established that restitution is a recognized measure of program loss. *See, e.g., Craig Richard Wilder*, DAB No. 2416, at 9 (2011). Petitioner's crimes caused Medicare, the Indiana Medicaid Program and Anthem Blue Cross Blue Shield financial losses of almost 260 times the $5,000 threshold required to trigger this particular aggravating factor.

Petitioner does not deny that he was ordered to pay restitution in the amount of $1,299,886.54. Petitioner argues, however, that Medicare and Medicaid withheld payments from him in 2009 and 2010 totaling approximately $1.5 million, and because he is attempting to apply these withheld monies to pay his restitution, he

does not actually "owe any restitution." P. Answer at 27; P. Response to Informal Brief at 4. Petitioner's argument is without merit. There is no dispute that the District Court ordered Petitioner to pay approximately $1.3 million in restitution, and this amount reflects the financial losses to CMS, the Indiana Medicaid program, and Anthem Blue Cross Blue Shield. It is irrelevant how or from what source Petitioner chooses to pay the restitution amount.

b. The acts resulting in Petitioner's conviction occurred over a period of one year or more.

The I.G. may increase the length of an exclusion if the acts resulting in the underlying conviction occurred over a period of one year or more. 42 C.F.R. § 1001.102(b)(2). Petitioner pleaded guilty to Count Two of the indictment, Health Care Fraud Resulting in Serious Bodily Injury, and this count stated that Petitioner engaged in his scheme to defraud from "in or about 2002 and continuing through December 2008." I.G. Ex. 4, at 16. Petitioner also pleaded guilty to Count Three of the indictment, Illegal Drug Distribution, and this count specifically related to a prescription that Petitioner had written in December 2008. I.G. Ex. 4, at 17.

Petitioner contends that the duration of his criminal conduct was less than a year. Petitioner points to the Stipulation and argues that it describes the time span of his criminal scheme as having occurred from January 2007 to December 2007, which is less than a year. P. Answer at 27; P. Response to Informal Brief Questions at 2-3; I.G. Ex. 3, at 2. As noted above, Count Two of the indictment, to which Petitioner pleaded guilty, specifically gave the time frame of "in or about 2002 and continuing through December 2008" in outlining Petitioner's criminal conduct. I.G. Ex. 4, at 16. Moreover, Petitioner also pleaded guilty to Count Three of the indictment. The Stipulation establishes that his scheme took place, at a minimum, from January 2007 through December 2008, which is almost twice as long as one year. I.G. Ex. 3. Therefore, I conclude that the I.G. has established the presence of this aggravating factor for both convictions.

c. The court's sentence of Petitioner included incarceration.

The I.G. may increase the length of an exclusion if the court's sentence includes a period of incarceration. 42 C.F.R. § 1001.102(b)(5). Here, the District Court sentenced Petitioner to 42 months in prison based on his convictions for Health Care Fraud Resulting in Serious Bodily Injury and Illegal Drug Distribution. Petitioner is currently incarcerated under the District Court's sentence. Thus, the I.G. has established the presence of this aggravating factor.

d. No mitigating factors justify reducing the period of exclusion.

Because I found that aggravating factors are present in this case that justify an exclusion of longer than five years, I next consider whether any mitigating factors authorized in the regulations are present to reduce the exclusion period to no less than five years. 42 C.F.R. § 1001.102(c). Petitioner concedes that there are no mitigating factors in this case. P. Answer to Informal Brief Questions at 5. Accordingly, I find that no mitigating factors exist which would justify reducing the period of exclusion.

6. Based on the three aggravating factors in this case, and the absence of any mitigating factors, an exclusion period of 20 years is within a reasonable range.

To determine whether an exclusion period is within a reasonable range, an ALJ must weigh any aggravating and mitigating factors in the case, and evaluate the quality of the circumstances surrounding the factors. *Vinod Chandrashekhar Patwardhan, M.D.*, DAB No. 2454, at 6 (2012) (citing *Jeremy Robinson,* DAB No. 1905, at 11 (2004)). There is no "rigid formula" for the I.G. or an ALJ to determine an exact exclusion period when weighing and evaluating aggravating and mitigating factors. *Patwardhan*, DAB No. 2454, at 6. Rather, the ALJ must review the factors de novo to determine whether the exclusion imposed is within a "reasonable range" of exclusion periods. *Ruske*, DAB No. 1851, at 11, (citing *Gary Alan Katz, R.Ph.*, DAB No. 1842, at 8 n.4 (2002)). A "reasonable range" is "a range of exclusion periods that is more limited than the full range authorized by the statute and that is tied to the circumstances of the individual cases." *Robinson*, DAB No. 1705, at 5 (quoting *Ruske*, DAB No. 1851, at 11). Here, the severity of the three aggravating factors and the absence of any mitigating factors support an increase in the length of Petitioner's exclusion period beyond the five-year minimum. A 20-year exclusion period is within a reasonable range based upon the aggravating factors.

Petitioner's crimes resulted in significant financial losses to Medicare, the Indiana Medicaid program, and Anthem Blue Cross Blue Shield. As I discussed above, the District Court ordered Petitioner to pay restitution in the total amount of $1,299,886.54, and of this amount, he was ordered to pay $967,510.63 to CMS, $154,361.61 to the Indiana Medicaid program, and $178,014.30 to Anthem Blue Cross Blue Shield. I.G. Ex. 2, at 5. The Board has characterized program loss amounts substantially greater than the $5,000 statutory threshold "as an 'exceptional aggravating factor' entitled to significant weight." *Sheth,* DAB No. 2491, at 7 (2012), citing *Robinson*, at 12, and *Donald A. Burstein, Ph.D.*, DAB No. 1865, at 12 (2003). The financial losses in this case to government health care programs and a private insurance company, almost 260 times the $5,000 threshold

needed to support an increase to the exclusion period, must thus be afforded such substantial weight as to support a significant increase to the reasonable range of exclusion periods that the I.G. may impose. The reasonable range of exclusion periods must reflect the substantial government loss as well as the need to protect government programs from untrustworthy individuals. *See Burstein,* DAB No. 1865, at 12 (2003). The 20-year exclusion period imposed here is within a reasonable range because it is long enough to reflect the scope of government loss and ensure that government programs are protected for a significant period from an individual proven to be untrustworthy when participating in such programs. *See Michael D. Miran, et al.*, DAB No. 2469, at 5-6 (2012) (upholding 13-year exclusion based on $257,946 loss to government program and one additional aggravating factor); *Emem Dominic Ukpong*, DAB No. 2220, at 4 (2012) (upholding 10-year exclusion based on $125,800 loss to government program and one additional aggravating factor); *Brenda Mills, M.D.*, DAB No. 2061, at 5-6 (2007) (upholding 10-year exclusion based on $84,112 loss to government program and one additional aggravating factor); *Robinson*, DAB No. 1905, at 12 (upholding a 15-year exclusion based on a $205,000 loss to government program and two additional aggravating factors).

The record shows that Petitioner's criminal conduct took place at least from around 2002 through December 2008. As the Board has stated, the purpose of the aggravating factor addressing the length of criminal conduct "is to distinguish between petitioners whose lapse in integrity is short-lived from those who evidence a lack of such integrity over a longer period of time." *Burstein,* DAB No. 1865, at 8. Previously, the Board has accorded enough weight to sustain a 15-year exclusion to the fact that underlying criminal conduct was committed for "slightly more" than one year. *Burstein*, at 12. Here, as in *Burstein*, the length of Petitioner's criminal conduct shows prolonged lack of integrity that was more than just "short-lived" and supports an increase from the five-year minimum exclusion period to twenty years.

The other proven aggravating factor relates to Petitioner's prison sentence of 42 months for his crimes. Petitioner's sentence represents substantial jail time which indicates the severity of the scheme in which Petitioner was involved. The Board once determined that a nine-month period of incarceration was "relatively substantial," and supported an eight-year exclusion period. *Jason Hollady, M.D.*, DAB No. 1855, at 12 (2002). Here, the length of Petitioner's incarceration was almost five times that imposed in *Hollady*. Accordingly, this aggravating factor bears substantial weight and supports an increase well beyond the five-year minimum exclusion period to twenty years.

Petitioner has conceded that none of the authorized mitigating factors under 42 C.F.R. § 1001.102(c) are present in his case. Nevertheless, he argues that his

period of exclusion is unreasonable and urges me to consider the following: an exclusion would essentially result in a lifetime bar from the practice of medicine due to his age (61 years), there are "dire Physician's shortages," his significant investment in his education and board certifications, he no longer intends to practice pain management but will practice in a different specialty so that the circumstances for possible criminal or fraudulent activity will not occur again, his participation in a rehabilitation program as a volunteer, his release from prison in the next few months, his desire to contribute to society, and the fact that he had participated in a community health access program and provided care to patients for free. Request for Hearing; P. Answer at 27-29; P. Letter at 1-2.

I reiterate that the regulations specifically outline what factors may be considered mitigating and none of Petitioner's arguments relates to any of those mitigating factors. *See* 42 C.F.R. § 1001.102(c). Moreover, "the practical effect of a finite exclusion period on the individual's ability to participate in the Medicare program in the future is irrelevant to determining a reasonable exclusion period." *Sheth*, DAB No. 2491, at 18 (explaining that the Board "has repeatedly declined to consider an individual's age or financial or employment prospects in determining whether an exclusion period is reasonable," citing *Jeremy Robinson*, DAB No. 1905, at 7 (2004)).

III. Conclusion

For the foregoing reasons, the I.G. has a basis to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs. After considering all three aggravating factors and the absence of any mitigating factors, an exclusion of 20 years is within a reasonable range. Therefore, I sustain the I.G.'s exclusion of Petitioner for 20 years, effective April 18, 2013.

/s/

Joseph Grow
Administrative Law Judge