Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Subramanya K. Prasad, M.D.,

Petitioner,

v.

The Inspector General.

Docket No. C-13-773

Decision No. CR3014

Date: November 27, 2013

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Disposition affirming the I.G.'s determination to exclude Petitioner Subramanya K. Prasad, M.D., from participation in Medicare, Medicaid, and all other federal health care programs. The I.G.'s Motion and determination are based on section 1128(b)(2) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(b)(2). Petitioner Prasad has asserted his own similar request, seeking summary disposition in his favor.

The undisputed facts of this case fail to demonstrate that the I.G. is authorized to impose an exclusion against Petitioner. Accordingly, I deny the I.G.'s Motion for Summary Disposition, grant summary disposition in Petitioner's favor, and set aside the proposed exclusion.

I. Procedural Background

Petitioner Prasad is a physician licensed to practice medicine in Kentucky and Ohio. In 2006 he sought and obtained employment with an organization called Affpower.

Affpower was an international business enterprise that used the internet to prescribe and distribute a range of medications including controlled substances. Affpower's operations included activity in Costa Rica, Cyprus, Israel, and several locations in the United States.

Petitioner's job at Affpower comprised issuing prescriptions for both controlled-substance and non-controlled-substance prescription drugs. Affpower's activities became the subject of a federal investigation, and on July 27, 2007 the Federal Grand Jury sitting for the United States District Court for the Southern District of California handed up a sealed 313-Count Indictment naming Petitioner as one of 18 defendants and charging an extended array of federal criminal violations under Titles 18 and 21 of the United States Code. I.G. Ex. 2. In addition to a vast number of violations based on the illegal distribution of controlled substances, violations of 21 U.S.C. §§ 841(a)(1) and 846, the Indictment charged crimes including conspiracy, wire fraud, mail fraud, money laundering, and racketeering as a criminal enterprise.

That Indictment was unsealed by the District Court's order of August 2, 2007. I.G. Ex. 2, at 1. Within six weeks, Petitioner and his attorney were able to reach a plea agreement with prosecutors. J. Ex. 2. On September 19, 2007 Petitioner agreed to plead guilty to Count 3 of the Indictment, a violation of 21 U.S.C. § 846 based on his participation in a conspiracy to violate the Controlled Substances Act, 21 U.S.C. §§ 801-971. This agreement reflected a "base offense level" for sentencing purposes to which both defense and prosecution stipulated, and was explicitly based on Petitioner's promised "substantial assistance to the Government in the investigation and prosecution of others." J. Ex. 2, at 23-26. On that same day, Petitioner appeared with counsel in the District Court and tendered his promised guilty plea to the violation of 21 U.S.C. § 846. J. Ex. 1.

No transcript of the September 19, 2007 plea hearing is available. J. Ex. 1. Thus, it is impossible to know what colloquy, if any, attended that plea and what arrangements, if any, were made concerning Petitioner's immediate actions toward beginning his cooperation with prosecutors. But it does appear that some sort of proffer, possibly in the form of an interview with authorities, took place immediately after the hearing. J. Ex. 1. For obvious reasons, no date was set for sentencing on Petitioner's September 2007 plea; in fact, there is nothing in this record to show that the District Court ever formally accepted Petitioner's plea, made a finding of guilt based on it, or entered a judgment of conviction on that plea.

The record before me does not reflect the disposition of all charges made and all defendants named in the Indictment, but it does appear that some of them maintained their innocence and went to trial, which trial took place over the period between April and July 2009. Seven of those defendants were convicted of some or all of the charges they faced. J. Ex. 1. Petitioner's promised "substantial assistance" took the form of extensive cooperation with investigators and prosecutors prior to the 2009 trial, and important testimony over two days at the trial itself. P. Exs. 3, 11.

After that, nothing in this record illuminates the course of proceedings involving Petitioner or the other defendants until October 2010. What may have happened in the 15 months between the end of the trial in July 2009 and Petitioner's next appearance in the District Court on October 18, 2010 is for present purposes unknown, except that Petitioner remained at liberty on an unsecured bond, a condition established at his initial appearance in court two weeks after the Indictment was unsealed. P. Exs. 6, 9.

On October 18, 2010, however, Petitioner returned to District Court with counsel. On his unopposed motion, Petitioner was permitted to withdraw his September 2007 guilty plea to Count 3 of the July 2007 Indictment. I.G. Ex. 3, at 3; P. Ex. 5, at 3. Once that guilty plea was withdrawn, the prosecution presented a two-page Superseding Information charging Petitioner with making False Statements to Federal Agents, a violation of 18 U.S.C. §§ 1001 and 2. The violation was described as a false statement Petitioner made on September 19, 2007 concerning a man named Bill Harrington, one of the named defendants in the July 2007 Indictment. J. Ex. 1; I.G. Ex. 6. There is nothing in this record to indicate the disposition of the charges against Harrington, who was named in most of those 313 Counts, but the Indictment described him as a recruiter and manager of physicians, including Petitioner, who worked for Affpower prescribing drugs. I.G. Ex. 2, at 7.

Petitioner immediately waived presentation of this new charge to the Grand Jury and pleaded guilty to it. I.G. Ex. 3, at 4-15; P. Ex. 3, at 4-15. After a brief discussion of sentence guidelines and another "base offense level" to which both prosecution and defense explicitly subscribed, the District Court proceeded directly to imposing Petitioner's sentence, a one-year term of supervised probation. I.G. Ex. 3, at 20; I.G. Ex. 4; P. Ex. 5, at 20. The term of that probation ended October 17, 2011 without incident. P. Ex. 4.

In a letter dated April 30, 2013, the I.G. took steps to exclude Petitioner from participation in the Medicare and Medicaid programs. In that letter, the I.G. relied on the terms of section 1128(b)(2) of the Act, 42 U.S.C. § 1320a-7(b)(2) and set the period of Petitioner's exclusion at three years.

Acting through counsel, Petitioner sought review of the I.G.'s determination in a request for hearing dated May 10, 2013. Petitioner's request for hearing admitted his conviction but denied that it supported an exclusion based on section 1128(b)(2), and asserted that the three-year period of exclusion then at issue was unreasonable.

I convened a prehearing conference by telephone on June 3, 2013, pursuant to 42 C.F.R. § 1005.6, in order to discuss procedures for addressing the issues presented by this case. By Order of that date I established a schedule for the submission of documents and briefs.

The I.G.'s Reply Brief of August 20, 2013 announced the reduction of the proposed period of Petitioner's exclusion to one year beginning May 20, 2013, and proffered I.G. Ex. 7, the I.G.'s August 16, 2013 letter informing Petitioner of the reduction. The I.G.'s letter explicitly relied on the mitigating factor set out at 42 C.F.R. § 1001.301(b)(3)(ii)(A) and acknowledged that Petitioner's "cooperation with Federal . . . officials resulted in others being convicted or excluded from Medicare, Medicaid, and all other Federal health care programs."

Petitioner's Response Brief of September 3, 2013 asserted his own motion for summary disposition: "Dr. Prasad maintains that he is entitled to summary disposition in his favor . . . because his conviction was not in connection with interference or obstruction of a government investigation . . . ." P. Resp. Br. at 1. Thus, I now have before me explicit cross-motions for summary disposition on the evidentiary record as it is now constituted, and the parties' implicit agreement that I can rely on that written record to reach a full decision on the merits of this appeal.

The evidentiary record on which I decide the issues before me contains 21 exhibits. The I.G. proffered seven exhibits marked I.G. Exhibits 1-7 (I.G. Exs. 1-7). Petitioner proffered 12 exhibits, marked Petitioners' Exhibits 1-12 (P. Exs. 1-12). In response to a letter written at my direction on September 24, 2013, the parties submitted Joint Exhibits 1 and 2 (J. Exs. 1-2) on October 24, 2013. In the absence of objection, I have admitted all proffered exhibits.

The record in this case closed for purposes of 42 C.F.R. § 1005.20(c) on October 24, 2013 with the filing of J. Exs. 1 and 2, as noted in my Order of October 28, 2013.

II. Issues

The legal issues before me are limited to those set out at 42 C.F.R. § 1001.2007(a)(1). In the context of this record, they are:

> a. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(b)(2) of the Act; and if so
>
> b. Whether the one-year length of the proposed period of exclusion is unreasonable.

For reasons more fully set out in the discussion below, I find and conclude that the facts of this case do not support a ruling in favor of the I.G.'s position. Petitioner Prasad is not subject to exclusion by operation of the terms of section 1128(b)(2) of the Act and 42 C.F.R. § 1001.301(a) because his conviction was not in connection with the interference with or obstruction of an investigation into a criminal offense described in

sections 1128(b)(1) or 1128(a) of the Act. The proposed exclusion, even in its reduced one-year length, is not authorized and may not be imposed against Petitioner.

III. Controlling Statutes and Regulations

Section 1128(b)(2) of the Act, 42 U.S.C. § 1320a-7(b)(2), authorizes the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of "[a]ny individual or entity convicted, under Federal or State law, in connection with the interference with or obstruction of any investigation into any criminal offense described in [section 1128(b)(1) or section 1128(a) of the Act]." The terms of section 1128(b)(2) are restated in similar regulatory language at 42 C.F.R. § 1001.301(a).

Criminal offenses described in section 1128(a) of the Act include those related to the delivery of an item or service under the Medicare or State health care programs, those relating to neglect or abuse of patients in connection with the delivery of a health care item or service, those consisting of felony offenses in connection with health care fraud committed after August 21, 1996, and, as specifically provided by section 1128(a)(4), felonies "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance" committed after August 21, 1996.

Criminal offenses described in section 1128(b)(1) of the Act include those committed after August 21, 1996, and relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by any federal, state, or local government agency.

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a Federal, State, or local court," Act § 1128(i)(1); "when there has been a finding of guilt against the individual . . . by a Federal, State, or local court," Act § 1128(i)(2); "when a plea of guilty . . . by the individual . . . has been accepted by a Federal, State, or local court," Act § 1128(i)(3); or "when the individual . . . has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld." Act § 1128(i)(4). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based in section 1128(b)(2) of the Act is permissive and discretionary with the I.G., and the I.G.'s decision to exercise that discretion is not subject to review. 42 C.F.R.§ 1005.4(c)(5). If the I.G. exercises his discretion and proceeds with the sanction, then the prescribed period of exclusion to be imposed under section 1128(b)(2) of the Act is three years unless the I.G. "determines in accordance with published

regulations that a shorter period is appropriate because of mitigating circumstances or that a longer period is appropriate because of aggravating circumstances." Act, section 1128(c)(3)(D); 42 U.S.C. § 1320a-7(c)(3)(D). The regulatory language of 42 C.F.R. § 1001.301(b) affirms the statutory provision.

In this case the I.G. does not seek to enhance the prescribed three-year period by reliance on any of the aggravating factors listed at 42 C.F.R. § 1001.301(b)(2), and at Petitioner's urging, has relied upon the mitigating factor set out at 42 C.F.R. § 1001.301(b)(3)(ii)(A) to reduce the term of Petitioner's exclusion to one year beginning May 20, 2013.

IV. Findings and Conclusions

I find and conclude as follows:

1. Petitioner pleaded guilty to and was convicted of one count of False Statements to Federal Agents, in violation of 18 U.S.C. §§ 1001 and 2, in the United States District Court for the Southern District of California on October 18, 2010. I.G. Exs. 3, 4, 5, 6; P. Exs. 4, 5, 6.

2. Petitioner's false statement was made during the course of the Affpower investigation, and thus was made in connection with an investigation into a criminal offense described in section 1128(a) of the Act. *Frank R. Pennington, M.D.*, DAB No. 1786 (2001); 21 U.S.C. §§ 841(a)(1), 846. I.G. Exs. 2, 6.

3. There is no evidence in the record before me that Petitioner's false statement described above in paragraph 1 was connected with the obstruction of or interference with the Affpower investigation.

4. Because there is no evidence that Petitioner's false statement was connected with the obstruction of or interference with the Affpower investigation, the I.G.'s exclusion of Petitioner pursuant to section 1128(b)(2) of the Act is not authorized. Act, section 1128(b)(2); 42 U.S.C. § 1320a-7(b)(2).

5. There are no disputed issues of material fact and summary disposition in Petitioner's favor is therefore appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

The exclusion of an individual based on section 1128(b)(2) of the Act, 42 U.S.C. § 1320a-7(b)(2) is a derivative action, and depends upon proof of two essential elements. The two essential elements necessary to support an exclusion based on section 1128(b)(2) of the Act are: (1) the individual to be excluded must have been convicted of a criminal

offense; (2) the conviction must have been in connection with the interference with or obstruction of an investigation into any criminal offense described in section 1128(b)(1) or 1128(a) of the Act. *Katherine Elaine Turner*, DAB CR2030 (2009); *Philip J. Bisig*, DAB CR1288 (2005); *Nazirul Quayum, D.D.S.*, DAB CR408 (1995).[1]

In this case, the I.G. has made the first showing and part of the second. Petitioner has been convicted of a criminal offense, specifically a violation of 18 U.S.C. §§ 1001 and 2. I.G. Exs. 3, 4, 5, 6. Petitioner concedes the fact of his conviction, and thus concedes the I.G.'s proof of the first essential element. P. Ans. Br. at 5; P. Exs. 4, 5. It is also clear, and more importantly it is uncontested by the parties, that the conviction is predicated on Petitioner's false statement made during the course of the Affpower investigation and prosecution, and thus made in connection with "an investigation into [a] criminal offense described in section 1128(a) of the Act."

What has not been shown by this evidence is any connection between the act underlying Petitioner's conviction and the obstruction or interference by Petitioner with the Affpower investigation, whether intentional or not. That failure of proof leaves the I.G.'s case incomplete and the proposed exclusion unauthorized.

Now, the I.G. is entirely correct to point out that the statutory phrase "in connection with," as used at certain places in section 1128, is very broad in its reach, and has consistently been interpreted by the Departmental Appeals Board (Board) as the functional equivalent of the statutory phrase "related to" found in other parts of sections 1128(a) and 1128(b) of the Act. *Mark B. Kabins, M.D.*, DAB No. 2410, at 9-10 (2011). The phrase "in connection with" must therefore be understood to comprehend any combination of facts and law that can establish a "common sense connection or nexus" between a conviction and the underlying forbidden conduct. *Lyle Kai, R.Ph.*, DAB No. 1979 (2005); *Salvacion Lee, M.D.*, DAB No. 1850 (2002); *Berton Siegel, D.O.*, DAB No. 1467 (1994); *Chander Kachoria, R.Ph.*, DAB No. 1380 (1993). Thus, to paraphrase the

[1] On the unique facts of this case, and in light of its unusual and still largely-obscure history in the District Court, it may be more helpful to think of the I.G.'s position as requiring proof of three essential elements, not two. The first element can still be understood as Petitioner's conviction, as described above. But, in this case, the second element really demands proof of two important and independent parts: proof of the existence of an investigation into a criminal offense described in sections 1128(b)(1) or 1128(a) of the Act, and proof of a connection between the acts underlying Petitioner's conviction and an interference with or obstruction of that investigation.

Board's language in *Siegel*, here I must examine whether there is some nexus or common sense connection between the acts constituting the offense of which Petitioner was convicted and the obstruction of or interference with the Affpower investigation. *Siegel*, DAB No. 1467, at 5. But it is in the course of that examination that the I.G.'s evidence fails.

That examination need not proceed without guidance: the common sense connection for which I am to look has been discussed at length by the United States Supreme Court. In *United States v. Aguilar*, 515 U.S. 593 (1995), the Court reviewed the operation of 18 U.S.C. § 1503, the general obstruction-of-justice statute, and acknowledged the importance of what it called the "'nexus' requirement — that the act must have a relationship in time, causation, or logic . . ." with the process said to be obstructed or frustrated. The Court made plain that it understood the "nexus requirement" to mean that the conduct charged as an act of obstruction must have as its "natural and probable effect" the real subornation of the investigative or judicial process. *Aguilar*, 515 U.S. 593, 599. I apply that requirement here, and review the evidence of record asking whether the "common sense connection or nexus" demanded by *Kai*, *Lee*, *Siegel*, and *Kachoria*, and defined by *Aguilar* as a "natural and probable effect" through a "relationship in time, causation, or logic" is present.

The mere fact that Petitioner admitted that he made a false material statement about a contact with Harrington when interviewed by investigators does not amount to such a showing. It has been conceded here that the interview on September 19, 2007 was part of the investigative process that had led to the return of the July 27, 2007 Indictment. But there is no inherent blanket requirement that a violation of 18 U.S.C. § 1001 actually effect an obstruction: for example, if a false statement were made "in any matter within the jurisdiction of . . . the Government of the United States . . ." *before* an investigation began, it would still violate 18 U.S.C. § 1001. As another example: a false statement made to investigators who, based on their other inquiries, *were undeceived because they knew the false statement to be false*, would nevertheless be a violation of section 1001. Plainly, there is no basis for the I.G.'s argument that Petitioner's conviction based on 18 U.S.C. § 1001 amounts *per se* to proof that he obstructed any part of the Affpower investigation, most especially because government reliance on or frustration by the false statement is not an essential element of the crime in the Ninth Circuit. *United States v. Goldfine*, 538 F.2d 815 (9th Cir. 1976); *United States v. Cole*, 469 F.2d 640 (9th Cir. 1972).

Both sides of this debate cite the 1995 Administrative Law Judge (ALJ) decision in *Nazirul Quayum, D.D.S.*, DAB CR408, as support for their positions here. In that case the ALJ held that Quayum's conviction on a plea of guilty to a state charge of attempted perjury, which plea and conviction were based on Quayum's untruthful testimony under oath before a state-court grand jury, supported the I.G.'s proposed exclusion of Quayum pursuant to section 1128(b)(2) because the false testimony was "material to the grand

jury's investigation." *Quayum*, DAB CR408, at 7. Here, the I.G. asserts that Petitioner's admission in his plea that his false statement about contacting Harrington was made "as to a material fact" is the functional equivalent of Quayum's false testimony before the grand jury. Petitioner denies the equivalence and insists that the materiality of Quayum's grand jury lies was only one of the factors relied on by the ALJ in analyzing the common-sense connection between Quayum's lies and the actual obstruction of the grand jury's investigation. My reading of *Quayum* suggests that neither side is entirely correct in its assertions about that case, but that on the critical point the I.G.'s view is too narrow, and that Petitioner's argument comes closer to the correct interpretation: Quayum's false testimony was shown to have had the natural and probable effect of obstructing the grand jury's work, and thereby created the common-sense connection and nexus between his conviction and the predicate for a section 1128(b)(2) exclusion.

That linkage between the "natural and probable effect" in "time, causation, or logic" of Petitioner's September 2007 false statement about the Harrington contact, his October 2010 conviction for making it, and any common-sense connection of that conviction with the notion of an obstruction of the Affpower investigation simply cannot be found in the undisputed evidence before me. That evidence is, as I have said above, limited, and limited presumably by the parties' own choices, but it is also entirely uncontested: all proffered exhibits have been admitted without objection and no party to this appeal disagrees about what those exhibits show within their four corners. Thus, I can look to that evidentiary record as a presentation of undisputed facts, material and otherwise, and can draw such conclusions and inferences as those facts support.

Viewed chronologically, the record in this case begins with the 313-Count Indictment handed up in July 2007, and in particular with Count 3 of the Indictment, a violation of 21 U.S.C. § 846. Petitioner reached a plea agreement as to this Count, and pleaded guilty to it in September 2007. That agreement was explicitly based on Petitioner's promised "substantial assistance to the Government in the investigation and prosecution of others." J. Ex. 2, at 23-26. Had matters ended with a finding of guilt and conviction on that plea, Petitioner would have been subject to the mandatory minimum five-year exclusion required by section 1128(a)(4). *Frank R. Pennington, M.D.*, DAB No. 1786 (2001); *Russell A. Johnson*, DAB CR1378 (2005); *Karl Eric Swanson, M.D.*, DAB CR1000 (2003). Had Petitioner been found guilty and convicted on that plea, his sentence would have been calculated on a "base offense level" of 19, to which both prosecution and defense agreed. J. Ex. 2, at 16. His potential exposure to prison time in that plea would have been five years. J. Ex. 2, at 11. Significantly, the prosecution reserved the right to withdraw from the agreement if Petitioner "has engaged or engages in additional criminal conduct . . . or breaches any of the terms of any agreement with the government . . . ." J. Ex. 2, at 20.

This record does not reveal the substantive details of two potentially-critical events that attended on Petitioner's September 2007 guilty plea. There is no transcript available of the plea hearing itself, and thus no way of knowing with certainty that Petitioner's guilty plea was even accepted.[2] There are no details whatsoever in this record about the interview between Petitioner and federal investigators that apparently followed immediately upon the plea hearing. J. Ex. 1. Thus it is impossible to tell what representations may have been made to the District Court about Petitioner's knowledge of the Affpower operation, his knowledge of or interaction with Harrington's position in it, or his immediate recollections about contacts with Harrington. And although some sort of memorandum of Petitioner's interview must surely have been made, neither side has attempted to make it part of this record, so it is impossible to know anything about the context of his statement about contacting Harrington — except that it was described in the Superseding Information as "false, fictitious, and/or fraudulent" and "material." I.G. Ex. 6, at 2.

It is at this point of uncertainty that the value of *Quayum* to the I.G.'s case collapses. In *Quayum*, the exact nature of the perjury — and based on the *Quayum* decision's language, it was real perjury, not merely an attempt at it — was manifest, and its crucial effect on the investigation was obvious. In *Quayum,* the term "material" is clearly synonymous with "important." Here, what that term might mean in the Superseding Information is obscure at best and empty in any case.

The expression of materiality in the Superseding Information is empty because of its timing: it turns up three years after Petitioner's first plea, an identical period after the interview in which his allegedly-material false statement was made, and a year and a half after his trial testimony described as "forthright and open" cooperation over the period between first plea and trial by one of the prosecutors. As this evidence shows, during that entire period Petitioner "cooperated extensively with the government." P. Ex. 3.

The expression of materiality in the Superseding Information is empty because of the contents of the plea agreement on which it was predicated. The 2010 plea agreement contained the same language found in the 2007 agreement concerning the prosecution's right to withdraw from the agreement if Petitioner were untruthful, yet the prosecution never sought to do so. There may have been many reasons for the prosecution's forbearance, but the most likely ones must be that Petitioner's false statement about the Harrington contact was either already known by investigators to be false or was quickly recanted, or was simply *de minimis* to the prosecution's work.

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[2] And of course nothing in what this record reveals about the 2007 guilty plea proceeding would allow it to be treated as a "conviction" under any of the definitions set out at sections 1128(i)(1) – (4) of the Act, or at 42 C.F.R. § 1001.2.

The expression of materiality in the Superseding Information is empty because of the strategic effect of the plea agreement on which it was predicated. Not only was the prosecution apparently satisfied of Petitioner's overall truthfulness between September 2007 and October 2010, but it was so well satisfied that it agreed to exchange the earlier plea and its automatic invocation of a mandatory exclusion under section 1128(a)(4) for a plea that *only might* invoke the discretionary authority to exclude pursuant to section 1128(b)(2). Beyond that patent reflection of the prosecution's satisfaction, the "base offense level" agreed to by the prosecution in the new plea was reduced from 19 to 4, while Petitioner's exposure to prison time remained the same at five years. P. Ex. 4.

The expression of materiality in the Superseding Information is empty because of the stated eagerness of the prosecution to deal with Petitioner not as an adversary who had misled or frustrated its efforts, but as a trusted ally whose valued cooperation deserved to be acknowledged. P. Ex. 3; 5, at 16-19; 11. Noting that his false statement was made at the very early stages of his work with prosecutors, it is quite plain that nothing in Petitioner's false statement troubled the prosecution even enough to demand changes in the extremely-lenient conditions of release imposed on him in August 2007. P. Ex. 9.[3]

Thus, by the time the chronology of Petitioner's case in the District Court reached his discharge from probation in October 2011, there is nothing to be found in the District Court's records that so much as hints at the significance, importance, weight, or effect of his 2007 false statement about contacting Harrington. Put in another and more precise way, my examination of this record discloses no linkage between the natural and probable effect in time, causation, or logic of Petitioner's September 2007 false statement about the Harrington contact and any common-sense connection of that statement to any obstruction of the Affpower investigation. It discloses a clear effort by the prosecution to do everything but baldly overlook Petitioner's misconduct while employed at Affpower, and perhaps to make an issue of his false statement in 2007 only insofar as it might provide a useful basis for a much-reduced and much less consequential plea and sentence. This evidence does not support the I.G.'s assertion that Petitioner's conviction was in connection with an interference with or obstruction of the Affpower investigation. Instead, it leaves Petitioner's case uncontradicted and entitled to a favorable summary ruling.

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[3] I intend no criticism whatsoever of the I.G.'s decision to reduce the three-year period of Petitioner's proposed exclusion to one year based on his cooperation with the investigation and prosecution of the Affpower matter. I.G. Ex. 6. But I do note a certain dissonance between the I.G.'s acknowledgment of his effective assistance over almost two years, on the one hand, and the I.G.'s present insistence that he obstructed the investigation and prosecution by a single statement to an investigator in September 2007, on the other.

Because the I.G. has not established a basis for the exclusion of Petitioner pursuant to section 1128(b)(2) of the Act, his exclusion for one year beginning May 20, 2013 is unauthorized and must be set aside.

VI. Conclusion

For the reasons set forth above, the I.G.'s Motion for Summary Disposition must be DENIED. Petitioner's motion for summary disposition in his favor must be GRANTED. The I.G.'s exclusion of Petitioner Subramanya K. Prasad, M.D., from participation in Medicare, Medicaid, and all other federal health care programs for a period of one year pursuant to the terms of section 1128(b)(2) of the Act, 42 U.S.C. § 1320a-7(b)(2), is unauthorized. It must be, and it is, SET ASIDE and VACATED.

/s/
Richard J. Smith
Administrative Law Judge