**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Brian Justin Hansen, D.O.
(OI File No. H-14-4-0247-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-1536

Decision No. CR3777

Date: April 14, 2015

# DECISION

The Inspector General (IG) of the United States Department of Health and Human Services excluded Petitioner, Brian Justin Hansen, D.O., for 18 years from participating in Medicare, Medicaid, and all other federal health care programs. The exclusion was based on Petitioner's conviction of a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service. Petitioner requested a hearing to dispute the exclusion. For the reasons stated below, I conclude that the IG proved that a basis for a mandatory exclusion exists. Further, I affirm the length of the exclusion because an 18-year exclusion is not unreasonable due to the three undisputed aggravating factors that are present in this case.

## I. Procedural History

In a May 30, 2014 letter, the IG notified Petitioner that he was being excluded from Medicare, Medicaid, and all federal health care programs under section 1128(a)(2) of the Social Security Act, which is codified at 42 U.S.C. § 1320a-7(a)(2), for a period of 18 years. The IG advised Petitioner that the exclusion was based on his felony conviction, in the Iowa District Court for Franklin County, of a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or

service. Further, the IG imposed a length of exclusion in excess of the five-year statutory minimum period because the IG found there was evidence of the following aggravating circumstances:

1) The acts that resulted in Petitioner's conviction, or similar acts, were committed over a period of one year or more. The IG states that Petitioner's acts occurred from about 2006 to about 2012.

2) The acts that resulted in Petitioner's conviction were premeditated, were part of a continuing pattern of behavior, and consisted of nonconsensual sexual acts. The IG asserts that Petitioner engaged in sexual contact with multiple patients who received mental health services from him.

3) Petitioner was convicted of other offenses besides those which formed the basis for his exclusion, or was the subject of another adverse action by a federal, state or local government agency or board, where the adverse action was based on the same set of circumstances that serves as the basis for imposition of the exclusion. The IG asserts that the Iowa Board of Medicine accepted Petitioner's voluntary surrender of his license to practice medicine.

IG Exhibit (Ex.) 1.

On July 21, 2014, Petitioner, through counsel, timely requested a hearing to dispute the exclusion. On August 20, 2014, I convened a telephonic prehearing conference, the substance of which is summarized in my Order and Schedule for Filing Briefs and Documentary Evidence (Order) dated August 22, 2014. *See* 42 C.F.R. § 1005.6. In compliance with the Order, the IG submitted a brief (IG Br.) together with 17 exhibits. Petitioner submitted a response brief (P. Br.) and two exhibits. The IG filed a reply brief (IG Reply Br.)

Petitioner requested that he and another witness testify. I directed Petitioner to submit written direct testimony, *see* 42 C.F.R. § 1005.16(b), and provided the IG with the opportunity to object to that testimony and/or request to cross-examine the witnesses. Petitioner filed the written direct testimony and the IG objected to this testimony.

## II. Issues

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

## III. Evidentiary Rulings and Decision on the Record

Petitioner did not object to IG Exs. 1-7 and 15-17, and the IG did not object to P. Exs. 1 and 2. Therefore, I admit those exhibits into the record.

Petitioner objects to IG Exs. 8 through 14 (investigative report by the Iowa Division of Criminal Investigation and transcripts of interviews of Petitioner's victims by a special agent with the Iowa Division of Criminal Investigation) because they "consist entirely of hearsay statements of [Petitioner's] victims . . . [and] the information provided by these witnesses has never been subjected to testing through cross-examination or discovery by [Petitioner]." P. Br. at 8. I overrule the hearsay objection because the exhibits are relevant to this case, the Federal Rules of Evidence do not directly apply, and there is no reason to believe that these exhibits are unreliable (i.e., that they do not reflect what the individuals told investigators). 42 C.F.R. § 1005.17(b), (c); 57 Fed. Reg. 3298, 3327 (Jan. 29, 1992) ("We expect the ALJs to continue their current practice of admitting evidence that may be barred by the rules of evidence, such as hearsay, if a determination is made that the evidence is reliable. However, if an ALJ believes that proffered evidence inadmissible under the rules of evidence is wholly unreliable, the ALJ should exclude the evidence."). Further, I overrule Petitioner's other objection because Petitioner could have called these individuals as witnesses and, if necessary, requested subpoenas to compel their presence at a hearing. *See* 42 C.F.R. §§ 1005.8(a), 1005.9(a); *see also* 57 Fed. Reg. at 3326 ("Since both parties have the right to submit statements in lieu of testimony, each party bears the burden of subpoenaing witnesses whose statements are proposed as exhibits by the opposing party. The courts have held such statements admissible in administrative proceedings, despite their hearsay character and absent any cross-examination of the witness who gave the statement."). Therefore, I admit IG Exs. 8-14 into the record.

Petitioner submitted written direct testimony for himself and a witness. The IG objects to Petitioner's written direct testimony and that of his witness, the Chairman and CEO of ABCM Corporation, because it is irrelevant under the limited review that I perform in these cases. I agree with the IG that the testimony of Petitioner's witness' testimony is not relevant because it relates to Petitioner's post-conviction employment at ABCM Corporation and to Petitioner's efforts at rehabilitation. Although this testimony appears to be submitted in an effort to mitigate the length of the exclusion, I am precluded from considering any mitigating factors to reduce the length of exclusion except for the three mitigating factors listed in the regulations. 42 C.F.R. § 1001.102(c). Therefore, Petitioner's witness' testimony must be excluded as irrelevant and immaterial. 42 C.F.R. § 1005.17(c). Although Petitioner's testimony includes matters not relevant under the regulations, he testifies to other matters that are relevant. Therefore, I overrule the IG's objection to Petitioner's testimony (P. Testimony) and admit that into the record.

The IG indicated that he does not think that an in-person hearing is necessary and did not have any witness testimony to offer. IG Br. at 24. The IG stated in his February 9, 2015 and March 6, 2015 objections to the written direct testimony filed by Petitioner that he did not want to cross-examine those witnesses. In my January 8, 2015 Order permitting Petitioner to submit written direct testimony, I stated that if the IG did not seek to cross-examine Petitioner's witnesses, I would decide this case on the written record following the final submissions of the parties. Therefore, I decide this case on the written record.

## IV. Jurisdiction

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

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

The IG must exclude from participation in all federal health care programs "[a]ny individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service." 42 U.S.C. § 1320a-7(a)(2); 42 C.F.R. § 1001.101(a). The minimum length of a mandatory exclusion is five years; however, the IG may impose a longer exclusion if any of the aggravating factors specified in the regulations exist. 42 C.F.R. § 1001.102(b). If aggravating factors justify an exclusion that is longer than five years, then the length of exclusion may be reduced (to no less than five years) if mitigating factors specified in the regulations exist. 42 C.F.R. § 1001.102(c). The IG has the burden of proving, by a preponderance of the evidence, that a basis for exclusion and aggravating factors exists, and Petitioner has the burden of proving that any mitigating factors exist. 42 C.F.R. § 1005.15(c), (d); Order ¶ 5. The IG's length of exclusion may only be modified if it is unreasonable. *See* 42 C.F.R. § 1001.2007(a)(1)(ii).

### *A. Petitioner pled guilty to sexual exploitation by a counselor or therapist, a violation under section 709.15(2)(a), (c) of the Iowa Code, and the Iowa District Court for Franklin County (District Court) entered judgment against Petitioner and imposed a sentence on him.*

Petitioner was a physician licensed to practice in Iowa from 2004 until 2013. In 2012 the Iowa Board of Medicine (Board of Medicine) suspended his license and in 2013, Petitioner surrendered his license. P. Testimony at 2; IG Exs. 2, 15, 17. Based on a complaint alleging Petitioner engaged in doctor/patient and doctor/co-worker sexual relationships as well as other sexually-related misconduct, the Board of Medicine and

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

Iowa law enforcement authorities conducted extensive investigations of Petitioner. IG Exs. 3, 8-14.

Petitioner was contracted to work at Franklin General Hospital and Franklin Medical Center in 2006. IG Ex. 3 at 2; *see also* P. Testimony at 2. The investigations uncovered at least six women who both worked with Petitioner and were Petitioner's patients. Each of these woman described interactions with Petitioner in which he would provide ongoing medical care for them while also aggressively seeking to engage in sexual activity with them. In many cases, Petitioner would call these women, separately, to his office and when they arrived, he would be watching pornography on his computer and, in some cases, masturbating. Petitioner also pursued each of the women, and engaged in some type of inappropriate and/or nonconsensual sexual contact with each. IG Exs. 3, 9-14.

On September 25, 2012, the Board of Medicine filed charges against Petitioner for sexual and ethical misconduct related to six female patients. On that same date, the Board of Medicine issued an Emergency Adjudicative Order suspending his license to practice as a physician in Iowa. IG Exs. 15, 16. In suspending Petitioner, the Board of Medicine concluded, following a full investigation, that:

> [Petitioner] may not continue to practice medicine without posing an immediate danger to the public health, safety or welfare . . . . [Petitioner] has engaged in a pattern of behavior toward multiple patients that was threatening, aggressive, and in some cases assaultive. Allowing him to continue to practice with restrictions is not sufficient to protect the public. It is not safe for [Petitioner] to continue to practice medicine until [the Board of Medicine's charges are] resolved.

IG Ex. 15 at 5.

On May 29, 2013, the Iowa Attorney General's Office filed a Trial Information with the District Court charging Petitioner with eight counts of criminal offenses related to sexual misconduct with seven women. IG Ex. 4. The Iowa Attorney General's Office subsequently filed an Amended Trial Information with a single felony charge of engaging in a pattern, practice or scheme, from 2006 to 2012, to have sexual contact with six patients who received mental health services from Petitioner. IG Ex. 5. On May 30, 2013, Petitioner pled guilty to the amended charge and the District Court accepted the plea. IG Ex. 6. The District Court also: entered judgment against Petitioner based on a violation of section 709.15(2)(a), (c) of the Iowa Code (sexual exploitation by a counselor or therapist); sentenced Petitioner to a suspended term of five years in prison; and ordered Petitioner to register as a sex offender, pay a $7,500 fine, and have supervised probation. I.G. Ex. 7.

Following Petitioner's guilty plea, on October 25, 2013, Petitioner surrendered his license to practice as a physician to resolve the charges filed by the Board of Medicine. IG Ex. 17.

### *B. Petitioner was convicted of a state law offense related to abuse of patients in connection with the delivery of a health care item or service. 42 U.S.C. § 1320a-7(a)(2); 42 C.F.R. § 1001.101(b).*

The IG must exclude an individual from participation in all federal health care programs if the individual has been convicted of a criminal offense related to abuse of patients in connection with the delivery of a health care item or service. 42 U.S.C. § 1320a-7(a)(2). An individual is "convicted" of a criminal offense "when a judgment of conviction has been entered against the individual . . . by a Federal, State, or local court . . . ." *Id*. § 1320a-7(i)(1). Further, an individual is also "convicted" of a criminal offense when "a plea of guilty . . . by the individual . . . has been accepted by a Federal, State, or local court." *Id*. § 1320a-7(i)(3). As previously discussed, Petitioner pled guilty to a criminal offense under state law, and the court accepted his plea and issued a judgment of conviction. IG Exs. 6, 7. Further, Petitioner concedes he pled guilty and was convicted. P. Br. at 2. Accordingly, for purposes of exclusion, Petitioner was "convicted" of a criminal offense.

Petitioner disputes that his conviction was related to abuse. Petitioner argues that under the definition of the term "abuse" in 42 C.F.R. § 488.301, Petitioner was not convicted of an offense related to abuse of a patient. As noted by Petitioner, under 42 C.F.R. § 488.301, "*Abuse* means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish." P. Br. at 3 (emphasis added). The IG argues in opposition that the "common and ordinary meaning of the term should control in these proceedings." IG Reply Br. at 4.

I agree with the IG. Neither the statute nor the regulations applicable to exclusion cases define the word "abuse." *See* 42 U.S.C. § 1320a-7; 42 C.F.R. §§ 1000.10, 1001.2. However, this does not mean that I ought to apply a definition of that word used in an unrelated regulation. The definitions in 42 C.F.R. § 488.301 are only applicable to 42 C.F.R. Part 488, Subpart E, and not 42 C.F.R. Part 1001 (i.e., the substantive regulations governing this case). Section 488.301 clearly states as a prefatory phrase before the definitions: "As used in this subpart." Further, the regulations at 42 C.F.R. Part 488, Subpart E, implement 42 U.S.C. §§ 1395i-3 and 1396r, which relate to skilled nursing facilities under the Medicare and Medicaid programs. 42 C.F.R. § 488.300. However, the term "abuse" as used with respect to exclusions appears in 42 U.S.C. § 1320a-7(a)(2), which is an unrelated statute. Therefore, I will not apply the definition of "abuse" in 42 C.F.R. § 488.301 in this case, but will use the common and ordinary meaning of that word.

Citing Dictionary.com and Merriam-Webster Dictionary, the IG asserts that abuse means treatment of another individual "in a harmful, injurious, or offensive way" and "improper or excessive treatment." IG Br. at 14-15. A general legal definition appropriate to this case is "[p]hysical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury." Black's Law Dictionary (9th ed. 2009).

Based on the record as a whole, I conclude that Petitioner was convicted of a crime related to the abuse of patients in connection with providing health care items or services. The crime to which Petitioner pled guilty is entitled "Sexual exploitation by a counselor, therapist, or school employee." Iowa Code § 709.15. The definition of "counselor" and "therapist" includes physicians who provide mental health services. *Id*. § 709.15(1)(a). Sexual exploitation under the statute occurs when there is a pattern, practice, or scheme of conduct to engage in:

> Any sexual conduct with a patient or client or former patient or client within one year of the termination of the provision of mental health services by the counselor or therapist for the purpose of arousing or satisfying the sexual desires of the counselor or therapist or the patient or client or former patient or client which includes but is not limited to the following: kissing; touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genitals; or a sex act as defined in [another section].

*Id*. § 709.15(2)(a), (c).

Petitioner argues that this criminal provision is a strict liability provision that criminalizes any sexual contact with a patient regardless as to whether the patient was harmed and that he was not convicted of crimes dealing with sexual abuse or assault. Request for Hearing (RFH) at 1-2. Petitioner asserts that he did not intend to inflict injury, physical harm, pain, or mental anguish on any of the women with whom he had sexual contact, and, "[a]t most, [Petitioner] acted with an intent to achieve sexual gratification for himself." P. Br. at 3. Finally, Petitioner argues that abuse under 42 U.S.C. § 1320a-7(a) does not include consensual sexual contact with patients. RFH at 2.

Petitioner's arguments urge a very narrow application of the exclusion statute. However, the mandatory exclusion provisions have never been viewed in such a constrained manner. In regard to section 1320a-7(a)(2) in particular, the question as to whether a conviction is related to abuse "is a legal determination to be made by the Secretary based on the facts underlying the conviction. Further, the offense that is the basis for the exclusion need not be couched in terms of patient abuse or neglect . . . Since a determination as to whether an offense related to patient abuse or neglect is fact-intensive, we feel it is most appropriate for the []IG to exercise its authority to make such

determinations on a case-by-case basis." 57 Fed. Reg. 3298, 3303 (Jan. 29, 1992). It is significant that the term "related to" simply means that there must be a nexus or common sense connection. *See Quayum v. U.S. Dep't of Health and Human Servs.*, 34 F.Supp.2d 141, 143 (E.D.N.Y. 1998); *see also Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (describing the phrase "related to" in another part of section 1320a-7 as "deliberately expansive words," "the ordinary meaning of [which] is a broad one," and one that is not subject to "crabbed and formalistic interpretation") (internal quotes omitted). Therefore, I must reject Petitioner's arguments that a strict liability statute cannot result in a determination that the criminal offense was related to abuse or that a sex-based offense cannot be related to abuse of a patient because the individuals involved consented to the sexual activity. Finally, it is clear that "the []IG may exclude an individual convicted of an offense related to patient abuse or neglect **irrespective of whether the individual intended to harm patients**." 57 Fed. Reg. at 3303 (emphasis added). As stated by one court:

> there is no requirement that the Secretary demonstrate that actual neglect or abuse of patients occurred, nor is there a requirement that the individual or entity be convicted of an actual offense of patient neglect or abuse. The phrase "relating to" clearly encompasses a broader range of conduct than actual neglect or abuse. Westin's failure to file a report with the Colorado Department of Health or to place a copy of that report in Grundmeier's medical records related to the neglect of a patient.

*Westin v. Shalala*, 845 F.Supp. 1,446, 1,451 (D. Kan. 1994). Therefore, whether Petitioner intended harm or not is immaterial to determining whether the criminal offense for which he was convicted related to abuse. Rather, I must look to the facts underlying the conviction in this case.

I am mindful that Petitioner did not plead guilty to all of the charges originally brought against him, two of which included "sexual abuse," and that Petitioner's "guilty plea is not a blanket admission of the [victims'] statements within the []IG's attached interviews . . . ." P. Testimony at 3; IG Ex. 4. However, I cannot disregard consideration of the facts uncovered during the parallel investigations into Petitioner's sexual misconduct by the Board of Medicine and Iowa law enforcement.

The record is clear that Petitioner, during periods of time while he medically treated multiple female patients, engaged in aggressive efforts to have sexual relations with them. Petitioner either succeeded in this or, at the least, engaged in physical contact of a sexual nature in attempting to have sexual relations. A review of the investigation interview statements of the victims reveals that their experiences were abusive in nature under the ordinary meaning of that word. IG Exs. 3, 9-14.

Finally, Petitioner does not dispute that his conviction was related to the delivery of an item or service under a state health care program. Petitioner admits that much of his sexual advances and contact with the victims coincided with Petitioner's medical treatment of these women. P. Br. at 4. Further, the victims often indicated that their time spent with Petitioner during treatment led to a sexual encounter or attempted sexual encounter. IG Ex. 3. Finally, the Board of Medicine concluded in its Emergency Adjudicative Order suspending Petitioner's medical license that five of the six victims were patients of Petitioner during the period of time in which Petitioner engaged in sexual and ethical misconduct. IG Ex. 15. Therefore, I conclude that the IG has proven that Petitioner is subject to a mandatory exclusion under 42 U.S.C. § 1320a-7(a)(2).

### *C. Based on the presence of three aggravating factors and the absence of any mitigating factors, Petitioner's exclusion for 18 years is not unreasonable.*

Because I have concluded that a basis exists to exclude Petitioner pursuant to 42 U.S.C. § 1320a-7(a)(2), Petitioner must be excluded for a minimum period of five years. 42 U.S.C. § 1320a-7(c)(3)(B). While the IG must impose the five-year minimum mandatory term of exclusion, the IG is authorized to lengthen that term if certain aggravating factors exist. *See* 42 C.F.R. § 1001.102. Those aggravating factors are detailed at 42 C.F.R. § 1001.102(b)(1)-(9). The IG added 13 years to Petitioner's five-year minimum exclusion based on the presence of three aggravating factors: 42 C.F.R. §§ 1001.102(b)(2) (the acts resulting in the conviction were committed over a period of one year or more); (b)(4) (the acts resulting in the conviction were premeditated, were part of a continuing pattern of behavior, or consisted of nonconsensual sexual acts); and (b)(9) (the individual has been the subject of an adverse action taken by a state agency, based on the same circumstances that serve as the basis for imposing the exclusion).

I must uphold the IG's determination as to the length of exclusion if it is not unreasonable. 42 C.F.R. § 1001.2007(a)(1)(ii). This means that: "So long as the amount of time chosen by the []IG is within a reasonable range, based on demonstrated criteria, the ALJ has no authority to change it under this rule. We believe that the deference § 1001.2007(a)[] grants to the []IG is appropriate, given the []IG's vast experience in implementing exclusions under these authorities." 57 Fed. Reg. at 3321.

Petitioner does not dispute that the aggravating factors relied on by the IG exist. P. Br. at 3. Petitioner, however, argues that the IG has placed too much weight on these factors resulting in a length of exclusion that is too long. P. Br. at 3. Both parties recognize that it is the quality of the aggravating (or mitigating) factors that is most important when considering the length of exclusion, and not the sheer number of aggravating factors that are present in a given case. As the Secretary stated in the preamble to the final rule establishing the exclusion regulations:

> We do not intend for the aggravating and mitigating factors to have specific values; rather, these factors must be evaluated based on the circumstances of a particular case. For example, in one case many aggravating factors may exist, but the subject's cooperation with the OIG may be so significant that it is appropriate to give that one mitigating factor more weight than all of the aggravating. Similarly, many mitigating factors may exist in a case, but the acts could have had such a significant physical impact on program beneficiaries that the existence of that one aggravating factor must be given more weight than all of the mitigating. The weight accorded to each mitigating and aggravating factor cannot be established according to a rigid formula, but must be determined in the context of the particular case at issue.

57 Fed. Reg. at 3314-3315.

As indicated by the analysis below, I conclude that each of the aggravating factors present in this case is extremely significant. Further, there are no mitigating factors. Therefore, based on the cumulative aggravating factors, I cannot conclude that the IG's determination to impose an 18-year exclusion is unreasonable.

***1. The acts resulting in Petitioner's conviction were committed over a period of one year or more.***

The IG asserts that the criminal conduct Petitioner engaged in lasted nearly seven years. IG Br. at 18; IG Reply Br. at 6. Petitioner argues that I should look at the time span of Petitioner's conduct in relation to each of his victims rather than consider the total time he engaged in the criminal conduct with all of his victims cumulatively. P. Br. at 4. To facilitate this, Petitioner provided a chart, based on information from the Board of Medicine's investigation (IG Ex. 3), showing the period of time Petitioner treated each victim in comparison with the length of time Petitioner made sexual advances/contact with the victims. P. Br. at 4. The chart shows that none of the six victims was subject to Petitioner's sexual advances/contact for the entire time the IG asserts Petitioner engaged in his criminal behavior. As Petitioner points out, one victim was subject to his sexual advances/contact for less than a year. P. Br. at 4. As the IG points out, the chart shows that one victim was subject to Petitioner's sexual advances/contact for five and a half years. IG Reply Br. at 6-7; *see* P. Br. at 4.

I conclude that the IG has demonstrated that 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 was charged with and pled guilty to a criminal offense that expressly referenced the existence of a pattern, practice, or scheme to engage in sexual contact with

six women from 2006 to 2012. IG Exs. 5-7. I find it immaterial that Petitioner did not engage in criminal conduct for the entire period of 2006 through 2012 with any one victim, although Petitioner admits, through his chart, that two of the victims were subject to his sexual advances/contact for five or more years. Further, the fact that Petitioner engaged in illegal conduct for a period of time that is six to seven times longer than the minimum one year required for aggravation means that this aggravating factor provides strong support for a lengthy exclusion. *See Anderson v. Thompson*, 311 F.Supp.2d 1,121, 1,130 (D. Kan. 2004) (ten-year length of criminal conduct along with another aggravating factor supported 15-year exclusion). The duration of Petitioner's misconduct shows a prolonged lack of integrity that supports the IG's decision to increase the five-year minimum exclusion period to 18 years.

***2. The acts resulting in Petitioner's conviction were premeditated, part of a continuing pattern of behavior, and consisted, at least in certain circumstances, of nonconsensual sexual acts.***

The IG asserts that the record is clear that the conduct resulting in Petitioner's conviction was premeditated, part of a continuing pattern of behavior, and included nonconsensual sexual acts. IG Br. at 19-20. Specifically, the IG argued:

> For purposes of the aggravating factor found at 42 C.F.R. § 1001.102(b)(4), Petitioner does not contest the premeditated nature of his conduct or the fact that his actions represented a continuous pattern of behavior. In pleading guilty, Petitioner admitted that he "engaged in a pattern, practice[,] or scheme to engage in sexual contact" with six female patients over the course of seven years. I.G. Ex. 5; *see also* I.G. Ex. 7 at 1; I.G. Ex. 17 at 4. During that time, Petitioner repeatedly and strategically took sexual advantage of female patient-employees who had confided in him about their mental health problems and consulted him for other medical services. *See* I.G. Ex. 3 at 3–14; I.G. Ex. 15 at 2–5; I.G. Ex. 16 at 6–8; I.G. Ex. 17 at 2–4. His behavior reflected a *modus operandi* of luring patients into a false sense of security, then incrementally ratcheting up his sexual actions when their defenses were down. *See* I.G. Ex. 3 at 8; I.G. Ex. 9 at 32–33; I.G. Ex. 10 at 16; I.G. Ex. 12 at 38; I.G. Ex. 13 at 6; I.G. Ex. 14 at 21. Petitioner engaged in a continuous, almost methodical pattern that began with flirting; graduated to sexually explicit communications, displaying of pornographic videos, and masturbating in front of his patients; and culminated in Petitioner coercing patients into performing sex acts. *See* I.G. Ex. 3 at 3–4, 8–13; I.G. Ex. 9 at 4–7, 11–12, 30;

> I.G. Ex. 10 at 15–16, 21, 28–30; I.G. Ex. 11 at 9–10, 11–17; I.G. Ex. 12 at 9–15, 20, 25; I.G. Ex. 13 at 9–13; I.G. Ex. 14 at 8–9, 14, 20.

IG Br. at 19-20. The IG points out that in order for this aggravating factor under 42 C.F.R. § 1001.102(b)(4) to apply, the acts resulting in the conviction only need to be part of a continuing pattern or involve nonconsensual sexual acts. *See* IG Br. at 20.

Petitioner concedes that this aggravating factor applies because he engaged in a continuing pattern of behavior, but argues that this aggravating factor is not very important because all of Petitioner's victims were, first and foremost, Petitioner's co-workers and not patients. Petitioner asserts that co-workers at a hospital or clinic who regularly interact with a physician are less vulnerable to sexual advances from the physician than individuals who are only patients. P. Br. at 5-6. Petitioner, however, disputes any allegation that he engaged in a sex act with any of the victims by force and asserts that he pled guilty to an offense for which lack of consent was not an element. P. Testimony at 2-3.

I conclude that the IG has demonstrated that the acts resulting in the underlying conviction were part of a continuing pattern of behavior. 42 C.F.R. § 1001.102(b)(4). As the IG points out, Petitioner was charged with and pled guilty to a criminal offense that expressly referenced the existence of a pattern, practice, or scheme to engage in sexual contact with six women. IG Exs. 5-7. Further, it is clear from the investigation into Petitioner's actions that Petitioner did not randomly or accidentally engage in sexually-related conduct with six victims, but rather, followed a preconceived method that included luring the victims to his office, displaying pornography to them, performing a sexual act on himself while they were in his office, and eventually engaging or attempting to engage in sexual contact with the victims. *See* IG Ex. 3.

Although Petitioner argues that Petitioner's victims were in an excellent position, as co-workers, to rebuff Petitioner, the record reflects that Petitioner's victims were actually more vulnerable to Petitioner because of their dual role as patient/employee. Petitioner was the medical director for the clinic at Franklin Medical; therefore, Petitioner was not only a physician but also a manager who held a position of authority over his victims. P. Testimony at 2. Further, I consider it significant that none of Petitioner's victims were other physicians. IG Ex. 3; IG Ex. 9 at 3; IG Ex. 10 at 4; IG Ex. 11 at 4; IG Ex. 12 at 4; IG Ex. 13 at 4; IG Ex. 14 at 3. This brings credibility to the concerns voiced by some of his victims that Petitioner might try to have their employment adversely affected for refusing to provide sex. IG Ex. 3 at 4, 9, 10; IG Ex. 17 at 2. I note that two of Petitioner's physician colleagues told the Board of Medicine's investigator that Petitioner was a "predator." IG Ex. 3 at 15, 16. Petitioner's pattern of conduct is extremely egregious and further strengthens the IG's position that an 18-year exclusion is warranted.

### *3. Petitioner was charged with ethical misconduct and suspended from practice as a physician by the Iowa Board of Medicine, and Petitioner surrendered his license to practice as a physician in Iowa following his conviction.*

On September 25, 2012, the Board of Medicine filed charges against Petitioner for ethical misconduct and issued an emergency order suspending Petitioner's license to practice as a physician. IG Exs. 15-16. The Board of Medicine conducted its own investigation of Petitioner while Iowa law enforcement conducted a parallel investigation. *See* IG Exs. 3, 8. The charges filed by the Board of Medicine involved allegations of misconduct related to the criminal charges that the Iowa Attorney General's Office later filed in District Court in May 2013. *Compare* IG Exs. 4, 5 *with* IG Ex. 16. The settlement agreement that Petitioner signed in his misconduct case, which also became a final order of the Board of Medicine, indicated that Petitioner surrendered his license to practice as a physician in Iowa. IG Ex. 17. That settlement agreement referenced Petitioner's conviction. IG Ex. 17 at 4-5.

There is no doubt that Petitioner was subject to an adverse action by a state government board and that the adverse action was based on the same set of circumstances that serves as the basis for his exclusion. 42 C.F.R. § 1001.102(b)(9). Although in some cases an action by a state licensing board might be merely based on the fact that a petitioner had been convicted of a crime, this case presents a significantly more egregious scenario. In the present case, the Board of Medicine not only initiated its charges against Petitioner months before criminal charges were filed, but the Board of Medicine issued an Emergency Adjudicative Order suspending Petitioner's license to practice as a physician at the same time. IG Exs. 15, 16. The Board of Medicine stated that, after it "conducted a full investigation of this matter," the Board of Medicine found "that it was presented with evidence which establishes that [Petitioner's] continued treatment of female patients without appropriate monitoring constitutes an immediate danger to the public health, safety, and welfare." IG Ex. 15 at 1. The Board of Medicine concluded in its order that Petitioner may not continue to practice medicine without posing an immediate danger to the public and that the "imposition of other interim safeguards would not be sufficient to protect the public health, safety, or welfare." IG Ex. 15 at 5.

The Board of Medicine's Emergency Adjudicative Order suspending Petitioner's medical license is particularly aggravating because the Board of Medicine, following a full investigation and providing Petitioner an opportunity to respond, concluded that Petitioner was such a threat to the public that no safeguard short of suspension would be effective. Petitioner ultimately surrendered his license without defending against the Board of Medicine's allegations that formed the basis of the Emergency Adjudicative Order. Such a surrender is not "any less serious than if the license was revoked." 57 Fed. Reg. at 3305. This aggravating factor underscores why the IG believes Petitioner is significantly untrustworthy to participate in federal health care programs.

### *4. Petitioner did not prove the existence of any mitigating factors that would justify a reduction in the length of exclusion imposed by the IG.*

If the IG proves that an aggravating factor listed in the regulations exists to warrant an exclusion of more than five years, then a petitioner may raise mitigating factors listed in the regulations to seek a reduction in the length of exclusion. 42 C.F.R. § 1001.102(c). Petitioner did not raise any mitigating factors listed in the regulations.

Petitioner submitted numerous letters from his family, friends, former co-workers, and former patients attesting to Petitioner's good character, skill as a physician, and ability to rehabilitate. P. Ex. 1; P. Ex. D attached to P. Testimony. Petitioner testified to his rehabilitation as well. P. Testimony at 4-5. However, as discussed early in relation to the IG's objection to testimony from Petitioner's witness, I may not consider such information to mitigate the length of exclusion because none of it proves the existence of a listed mitigating factor in the regulations. 42 C.F.R. § 1001.102(c)(1)-(3). I am prohibited from considering any other factors to reduce the length of exclusion. *Id*. § 1001.102(c); *see also* 57 Fed. Reg. at 3314 (rejecting suggestions from the public that an ALJ should be allowed to consider anything that might be mitigating when setting the length of an exclusion).

Petitioner also submitted a proposed decision issued by an Iowa Administrative Law Judge (Iowa ALJ) reversing a determination by state officials to deny Petitioner authorization to work as a contractor for ABCM Corporation. The Iowa ALJ concluded:

> While I agree with the Department's finding that [Petitioner] committed a very serious offense, the ultimate purpose of this background check evaluation process is to protect patients from potential abuse or criminal activity by care givers – not to further punish offenders. Based on the absence of patient care or contact and the willingness of [ABCM's CEO] to provide direct supervision, I am convinced that [Petitioner] can be allowed to work for ABCM, with restrictions, without placing facility residents at risk of harm.

P. Ex. 2 at 7.

Although I respect the Iowa ALJ's evaluation of the evidence in the case before her, the decision does not provide a basis for reducing the length of exclusion. I note that the Iowa ALJ considered factors well beyond the mitigating factors listed in the regulations applicable here. P. Ex. 2 at 7 ("[T]he evidence presented at hearing regarding rehabilitation, the restrictions of probation, and the nature of the proposed work convince me that [Petitioner] should be allowed to work for ABCM, with restrictions."). Further,

the Iowa ALJ's decision was very limited in scope because it only applied to Petitioner's employment with a single company. P. Ex. 2 at 6 ("With limited exceptions, the outcome of a record check evaluation applies only to employment in a specific position with the requesting employer."). In contrast, the issue before me is whether and how long Petitioner should be excluded from participation in all federal health care programs.

## VI. Conclusion

For the foregoing reasons, I affirm the IG's determination to exclude Petitioner for 18 years from participating in Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(2).

/s/
Scott Anderson
Administrative Law Judge