Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Seth Yoser, M.D.
(O.I. No. 4-10-40316-9),

Petitioner,

v.

The Inspector General.

Docket No. C-11-240

Decision No. CR2400

Date: July 15, 2011

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 Seth Yoser, M.D., from participation in Medicare, Medicaid, and all other federal health care programs for a period of 15 years. The I.G.'s Motion and determination to exclude Petitioner are based on section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). The undisputed facts of this case demonstrate that the minimum five-year exclusion must be imposed, and that the I.G.'s determination to enhance that period to 15 years, based on the aggravating factors found at 42 C.F.R. § 1001.102(b)(1), (2), (5), and (9), is reasonable. Accordingly, I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

Between June 1994 and March 2010, Petitioner Seth Yoder, M.D., was licensed to practice medicine by the State of Tennessee. Between 2005 and 2008 he treated diseases of the eye as part of a group practice known as Eye Specialty Group (ESG), formerly known as Vitreoretinal Foundation (VRF).

In May 2009 Petitioner was charged with a series of federal crimes. An Information filed in the United States District Court for the Western District of Tennessee, charged Petitioner with 10 counts of Mail Fraud, in violation of 18 U.S.C. § 1341, two counts of Wire Fraud, in violation of 18 U.S.C. § 1343, and 23 counts of Unlicensed Wholesale Distribution of Prescription Drugs, in violation of 21 U.S.C. §§ 331(t), 333(b)(1)(D), and 353(e)(2)(A).

Petitioner appeared in the United States District Court with present counsel on July 15, 2009 and pleaded guilty to all 35 counts of the Information. He was sentenced on February 18, 2010 to a 42-month term of imprisonment to be followed by two years' supervised probation. In addition, he was ordered to pay restitution in the sum of $400,000, a criminal fine of $10,000, and a special assessment of $3500.

The Tennessee Board of Medical Examiners (TBME) revoked Petitioner's license to practice medicine in its Consent Order of March 16, 2010. Petitioner and present counsel signed the Consent Order. The TBME's action was based explicitly on Petitioner's conviction, and the Consent Order included language finding that Petitioner's crimes were directly related to his practice of medicine, and were in violation of the Tennessee Medical Practice Act, TENN. CODE ANN. § 63-6-101.

On November 30, 2010 the I.G. notified Petitioner that, based on his conviction, he was to be excluded pursuant to the terms of section 1128(a)(1) of the Act for a period of 15 years. The I.G. notified Petitioner that the mandatory minimum five-year period of exclusion was enhanced based on the presence of four aggravating factors. Acting through present counsel, Petitioner sought review of the I.G.'s determination on January 27, 2011.

Pursuant to 42 C.F.R. § 1005.6, I attempted to convene a prehearing conference by telephone on February 28, 2011. That attempt was unsuccessful. In order to avoid further delay in establishing in a speedy, orderly, and fair manner procedures best suited for addressing the issues presented by this case, I entered my Order of March 1, 2011.

In that Order I noted that it appeared likely this case could be decided in the context of a motion for summary disposition filed by the I.G., and based on the parties' written submissions. Paragraph 9 of that Order set out the standards and procedures by which summary disposition practice would proceed, and paragraph 3 assured the parties of a full evidentiary hearing if circumstances warranted. By that Order I also established a schedule for the submission of documents and briefs.

At paragraph 5(d) of that Order Petitioner was given the option of either filing a Response Brief — the final brief in the exchange — or of giving notice of his intent not to file such a brief. Petitioner submitted neither: he filed no Response Brief nor did he give notice of his intent not to file. In those circumstances, paragraph 8 of the Order of

March 1, 2011, provided for the closure of the record in this case for purposes of 42 C.F.R. § 1005.20(c) on June 8, 2011.

The evidentiary record on which I decide the issues before me contains 14 exhibits. The I.G. proffered 10 exhibits marked I.G. Exhibits 1-10 (I.G. Exs. 1-10). Petitioner proffered four exhibits with his April 28, 2011 Answer Brief. They were originally marked Petitioner's Exhibits A-D, and were returned to be re-marked in compliance with paragraph 10 of the March 1, 2011 Order and CRDP § 9. They were resubmitted marked Petitioner's Exhibits 7-10 (P. Exs. 7-10), still not compliant with CRDP § 9. In the interests of avoiding further delay, I have not required Petitioner to re-mark them again. In the absence of objection, I have admitted all proffered exhibits as designated by the offering party.

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(a)(1) of the Act; and
>
> b. Whether the length of the proposed period of exclusion is unreasonable.

These issues must be resolved in favor of the I.G.'s position. Section 1128(a)(1) of the Act mandates Petitioner's exclusion, for his predicate conviction is not in dispute. A five-year period of exclusion is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B). The enhancement of that period to 15 years is not unreasonable because the four aggravating factors relied on by the I.G. found in 42 C.F.R. § 1001.102(b)(1), (2), (5) and (9) are fully established in the record, and because Petitioner has not demonstrated any mitigating factor that would reduce the proposed period of exclusion.

III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any individual or entity convicted of a criminal offense related to the delivery of an item or service under title XVIII of the Act (the Medicare program) or any state health care program. The terms of section 1128(a)(1) are restated in similar language at 42 C.F.R. § 1001.101(a).

The Act defines "conviction" as including those circumstances "when a judgment of

conviction has been entered against the individual . . . by a Federal . . . court," Act § 1128(i)(1); "when there has been a finding of guilt against the individual . . . by a Federal . . . court," Act § 1128(i)(2); or "when a plea of guilty . . . by the individual . . . has been accepted by a Federal . . . court," Act § 1128(i)(3). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(1) is mandatory and the I.G. must impose it for a minimum period of five years. Act § 1128(c)(3)(B), 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision. The mandatory minimum period of exclusion may be enhanced in some limited circumstances and on the I.G.'s proof of certain narrowly-defined aggravating factors listed at 42 C.F.R. § 1001.102(b). In this case, the I.G. relies on the four aggravating factors set out at 42 C.F.R. § 1001.102(b)(1), (2), (5) and (9) in seeking to enhance the period of Petitioner's exclusion to 15 years.

In cases such as this, where the I.G. proposes to enhance the period of exclusion by relying on any aggravating factors, a petitioner may attempt to limit or nullify the proposed enhancement through proof of certain mitigating factors, carefully defined at 42 C.F.R. § 1001.102(c)(1)-(3). In this case, Petitioner claims the benefit of the mitigating factor set out at 42 C.F.R. § 1001.102(c)(3)(ii). Petitioner bears the burden of proof regarding mitigating factors by a preponderance of the evidence. 42 C.F.R. § 1005.15(b) and (c).

IV. Findings and Conclusions

I find and conclude as follows:

1. On his accepted plea of guilty on July 15, 2009, in the United States District Court for the Western District of Tennessee, Petitioner Seth Yoser, M.D., was found guilty of 10 counts of Mail Fraud, in violation of 18 U.S.C. § 1341, two counts of Wire Fraud, in violation of 18 U.S.C. § 1343, and 23 counts of Unlicensed Wholesale Distribution of Prescription Drugs, in violation of 21 U.S.C. §§ 331(t), 333(b)(1)(D), and 353(e)(2)(A). I.G. Exs. 2, 3, 4, 5.

2. Petitioner was sentenced on his guilty plea in the United States District Court on February 18, 2010. As part of his sentence, Petitioner was ordered to serve a 42-month term of imprisonment, and was ordered to pay restitution in the sum of $400,000. I.G. Exs. 4, 5, 7; P. Ex. 9.

3. The judgment of conviction, finding of guilt, and accepted plea of guilty described above in Findings 1 and 2 constitute a "conviction" within the meaning of sections 1128(a)(1) and 1128(i)(1), (2), and (3) of the Act, and 42 C.F.R. § 1001.2.

4. A nexus and a common-sense connection exist between the criminal offenses to which Petitioner pleaded guilty and of which he was convicted, as noted above in Findings 1, 2 and 3, and the delivery of an item or service under the Medicare program. I.G. Exs. 2, 3, 5, 8; P. Ex. 9; *Berton Siegel, D.O.*, DAB No. 1467 (1994).

5. By reason of Petitioner's conviction, a basis exists for the I.G.'s exercise of authority, pursuant to section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.

6. As a consequence of the same set of circumstances that served as the basis for the conviction and exclusion described above, Petitioner has been the subject of an adverse action by the Tennessee Board of Medical Examiners, to-wit: the revocation of his license to practice medicine in the State of Tennessee effective March 16, 2010. I.G. Ex. 6.

7. Because the acts resulting in Petitioner's conviction caused a financial loss to a government program of more than $5000, the aggravating factor set out at 42 C.F.R. § 1001.102(b)(1) is present.

8. Because the acts that resulted in Petitioner's conviction were committed over a period of one year or more, the aggravating factor set out at 42 C.F.R. § 1001.102(b)(2) is present.

9. Because Petitioner was sentenced to a term of imprisonment, the aggravating factor set out at 42 C.F.R. § 1001.102(b)(5) is present.

10. Because Petitioner has been the subject of an adverse action by the Tennessee Board of Medical Examiners based on the same set of circumstances that served as the basis for the conviction and exclusion described above, the aggravating factor set out at 42 C.F.R. § 1001.102(b)(9) is present.

11. None of the mitigating factors set out at 42 C.F.R. § 1001.102(c)(1)-(3) are present. I.G. Ex. 10; P. Ex. 10.

12. The I.G.'s exclusion of Petitioner for a period of 15 years is supported by fact and law, is within a reasonable range, and is therefore not unreasonable. Findings 1-11 above.

13. There are no disputed issues of material fact and summary disposition 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 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; and (2) the criminal offense must have been related to the delivery of an item or service under Title XVIII of the Act (Medicare) or any state health care program. *Tamara Brown*, DAB No. 2195 (2008); *Thelma Walley*, DAB No. 1367; *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Lyle Kai, R.Ph.*, DAB CR1262 (2004), *rev'd on other grounds*, DAB No. 1979 (2005), *aff'd sub nom. Kai v. Leavitt*, Civ. No. 05-00514 (D. Haw. July 17, 2006); s*ee also Russell Mark Posner*, DAB No. 2033, at 5-6 (2006). Those two essential elements are fully demonstrated in the evidence before me, and their demonstration is conceded by Petitioner.

Although the two elements essential to the basic exclusion are not the points on which Petitioner rests his opposition to the I.G.'s actions, it may be helpful to point out briefly the evidence of those two essential elements.

Petitioner's conviction is shown by I.G. Exs. 3, 4, and 5, and P. Ex. 9. His guilty pleas were negotiated in terms set out in writing. I.G. Ex. 3. The guilty pleas were tendered and accepted on July 15, 2009, in satisfaction of the definition of "conviction" set out at section 1128(i)(3) of the Act. I.G. Exs. 4, 5; P. Ex. 9. The judgment of conviction and finding of guilt entered against him on February 23, 2010, satisfied the definitions of "conviction" set out at sections 1128(i)(1) and 1128(i)(2) of the Act. I.G. Ex. 5. The first essential element is established by the record.

The language of the Information describes how "the defendant, Seth Yoser did knowingly devise and intend to devise a scheme and artifice to defraud ESG, and Medicare, in order to obtain money and property by means of false and fraudulent representations, billings, and pretenses." I.G. Ex. 2, at 2. The Information goes on to assert that "It was further a part of said scheme that the diversion of said drugs by the defendant, Yoser, would cause false billings to be submitted to Medicare, which would ultimately be paid to ESG. As a result of the defendants actions, the false billings submitted to Medicare totaled to approximately $1.6 millions." I.G. Ex. 2, at 2-3. The submission of false claims to the Medicaid or Medicare programs has been consistently held to be a program-related crime within the reach of section 1128(a)(1). *Douglas Schram, R.Ph.*, DAB No. 1372 (1992); *Dewayne Franzen*, DAB No. 1165 (1990); *Jack W. Greene,* DAB No. 1078 (1989), *aff'd sub nom. Greene v. Sullivan,* 731 F. Supp. 835 (E.D. Tenn. 1990). I find the facts of Petitioner's offenses demonstrate the required nexus and common-sense connection between the criminal acts and the Medicaid and Medicare programs. *Berton Siegel, D.O.,* DAB No. 1467. The second essential element is established by the record.

The I.G. relies on four aggravating factors set out at 42 C.F.R. § 1001.102(b)(1), (2), (5), and (9) in seeking to enhance the period of Petitioner's exclusion to 15 years. Petitioner concedes the presence of two aggravating factors, but denies the existence of two others.

The aggravating factor at 42 C.F.R. § 1001.102(b)(2) is present when "[t]he acts that resulted in the conviction, or similar acts, were committed over a period of one year or more." The Information to which Petitioner pleaded guilty is clear in its recitation that the scheme underlying the convictions lasted from July 1, 2002 to May 12, 2008, and the specific overt acts relating to the convictions occurred between April 14, 2004 and April 30, 2008. I.G. Ex. 2, at 2, 6, 8. Thus, the "period of time" aggravating factor is present here. Petitioner does not argue otherwise.

The aggravating factor set out at 42 C.F.R. § 1001.102(b)(5) is present when the "sentence imposed by the court included incarceration." In this case, Petitioner was sentenced to imprisonment for 42 months. I.G. Ex. 5, at 2; P. Ex. 9, at 2. The "incarceration" aggravating factor is therefore present here. Petitioner does not contest the proof of this aggravating factor.

The aggravating factor set out at 42 C.F.R. § 1001.102(b)(1) is present when there is a showing of financial loss to a Government program or other entities of more than $5000. Petitioner asserts that "the government did not sustain any financial loss by virtue of his criminal acts." P. Ans. Br., 6. In making this argument, Petitioner alleges the presence of a genuine dispute as to an issue of material fact on the point. If such a genuine dispute of material fact were present, it would place the issue beyond application of the summary disposition mechanism. This record, however, reveals no such genuine dispute, and amply demonstrates a loss to the Medicare program of as much as $1,600,000.

The parties have concentrated their debate of this point on three documents. The first document, admitted as I.G. Ex. 5, is a copy of the United States District Court's Judgment in a Criminal Case, apparently signed by the United States District Judge on February 23, 2010. It reflects that restitution of $400,000 was ordered paid to "Medicare and Medicaid Services." I.G. Ex. 5, at 5. It bears a filing stamp dated April 15, 2010. The second document, admitted as P. Ex. 9, is captioned "REDACTED *A*M*E*N*D*E*D* JUDGMENT IN A CRIMINAL CASE." It bears no filing stamp, but is generally similar to I.G. Ex. 5 except for one entry: the payee of the ordered $400,000 restitution on this exhibit reads "*VRF EYE SPECIALTY GROUP." P. Ex. 9, at 5. Neither of these first two documents bears the United States District Judge's original signature. The third document, admitted as I.G. Ex. 7, is a printout of electronic docket entries — obtained through the so-called PACER system — related to the proceedings against Petitioner in the United States District Court.

Petitioner relies on the change in the restitution-payee from "Medicare and Medicaid Services" to "*VRF EYE SPECIALTY GROUP" to support his argument that "the

government did not sustain any financial loss" as a result of his crimes. The I.G.'s position relies on the PACER printout to argue that the Amended Judgment "was never executed." I.G. Reply Br., 4. The I.G. characterizes the handwritten notations dated March 31, 2010 on the "Return" portion of the original Judgment, I.G. Ex. 5, at 2, and the April 15, 2010 filing stamp as indicating that the original Judgment — and thus the original restitution-payee — remains the controlling document in terms of the identity of the restitution-payee.

I am not convinced that the I.G. has properly interpreted the PACER printout, the handwritten notations on the "Return" portion of the original Judgment, or the significance of the April 15, 2010 filing stamp on the original Judgment. It seems much more likely that the handwritten notations reflect the United States Marshal's delivery (or Petitioner's surrender) to the Federal Correctional Institution at Memphis, Tennessee, on March 31, 2010. I.G. Ex. 5, at 2. The April 15, 2010 filing stamp would be the logical result of the United States Marshal's filing of his copy of the original Judgment as proof that the order of imprisonment had been executed. The PACER printout adds nothing to clarify any of this: I.G. Ex. 5 bears imprints identifying it as documents 22 and 29 in the PACER list, and P. Ex. 9 has a similar imprint identifying it as PACER document 27, but the dates and other entries on the PACER list show that six other documents were filed between February 18 and April 15, 2010. Although some are described in terms that suggest they might be helpful in understanding the situation, none have been proffered. Thus, whether the original Judgment or the Amended Judgment represents the true identity of the restitution-payee is impossible to determine on this record, and I explicitly decline to rely on either. There are, however, other avenues to resolution of the "loss to government program" question, and they do not require the weighing or evaluation of competing evidence.

The first avenue begins with the May 12, 2009 Information, I.G. Ex. 2. That document sets out an elaborate scheme by which Petitioner diverted prescription drugs — Visudyne or Lucentis — from patients to himself in order that he might re-sell them. The drugs were paid for by Medicare, I.G. Ex. 2, at 1; Medicare paid for them on the basis of Petitioner's false billings, I. G. Ex. 2, at 2-3; and "the false billings submitted to Medicare totaled to approximately $1.6 millions." I.G. Ex. 2, at 3. Specific transactions involving mail fraud are itemized in the first 10 counts of the Information, and none involves less than $39,000.

Now, the guilty pleas tendered by Petitioner were the result of negotiations, P. Ans. Br., 4. The July 15, 2009 Plea Agreement reflects his and his attorney's understanding of the charges. I.G. Ex. 3. It is significant that both Information and Plea Agreement were executed well after Petitioner had agreed to cooperate with authorities in April 2009, for that sequence makes it clear that Petitioner was perfectly aware of his exposure to criminal charges and sanctions, and of what their exact bases and dimensions might be. And so, in proffering a knowing and counseled guilty plea to the entire Information, he

admitted and bound himself by all the factual allegations set out in it, including the alleged loss to Medicare of approximately $1,600,000. *Susan Malady, R.N.*, DAB No. 1816 (2002); *see also Dr. Frank R. Pennington, M.D.*, DAB No. 1786 (2001).

The second avenue begins with a Settlement Agreement executed well after the negotiated Information was filed and Petitioner's negotiated pleas accepted, and while Petitioner awaited his eventual sentencing. I.G. Ex. 8. It was signed by Petitioner and his present counsel on November 9 and 10, 2009 respectively, and Federal officials signed it approximately one month later. I.G. Ex. 8, at 13-14. Section II, paragraphs B and C of the Settlement Agreement declare:

> B. The United States contends that Dr. Yoser submitted or caused to be submitted claims for payment to the Medicare Program (Medicare), Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395hhh.
>
> C. The United States contends that it has certain civil claims . . . against Dr. Yoser for engaging in the following conduct during the period from August 2006 to May 2008: improperly billing for the administration of one vial of Lucentis to two patients, submitting multiple claims for the one vial of Lucentis, when proper administration required that each patient be administered one vial of Lucentis and any leftover be discarded . . . .

Section III, paragraphs 1 and 1(a) of the Agreement set out Petitioner's response:

> 1. Dr. Yoser agrees to pay to the United States $1,600,000 (the "Settlement Amount"). Dr. Yoser further agrees to pay $800,000 of the Settlement Amount to the United States by electronic funds transfer pursuant to written instructions to be provided by the United States. Dr. Yoser agrees to make an electronic funds transfer of $800,000 no later than 30 days after the Effective Date of this Agreement.
>
> a. The remaining sum, $800,000, is to be paid no later than one year or earlier based on the sell of property located at 109 N. Main 1604/5, Memphis, Tennessee 38103.

I.G. Ex. 8, at 1-2.

Although provided an opportunity to do so, Petitioner has not offered to deny or explain this Agreement, nor has he offered to argue that it is not conclusive evidence of the "loss to government program" aggravating factor. On its face it is, and when considered in combination with Petitioner's guilty plea to the Information charging the same loss, it

leaves no room for genuine dispute as to the fact of government-program loss in excess of $5000. The "amount of loss" aggravating factor is present here.[1]

The aggravating factor set out at 42 C.F.R. § 1001.102(b)(9) is present when a convicted individual "has been the subject of any other adverse action by any . . . local government agency or board, if the adverse action is based on the same set of circumstances that serves as the basis for imposition of the exclusion." Petitioner denies that this factor is present, and "further disagrees that he has been convicted of any other offense besides those which form the basis for the exclusion which resulted in adverse action by a local government agency or board." P. Ans. Br., 3. It may be best to analyze this disagreement in the words Petitioner has chosen to frame it:

> The voluntary loss of medical license is only an adverse action within the meaning of 42 C.F.R. § 1001.102(b)(9) if the action is based on the same set of circumstances that serve as the basis for imposition of the exclusion. The exclusionary period of fifteen years in this matter is based upon loss to the government, which did not occur and on healthcare fraud, which was not included in the Information. Accordingly, the loss of license was predicated on the conviction of Dr. Yoser of the unauthorized distribution of pharmaceuticals and the use of wire and mail to transfer the monies attendant to those transactions. At the very least, a fact issue has arisen concerning this aggravating factor, and it should not be, as a matter of law, an inescapable conclusion that the conviction in and of itself justifies the fifteen year exclusion.

P. Ans. Br., 6-7.

Precisely what "fact issue has arisen concerning this aggravating factor" is simply not apparent in this language, and as I have noted above, Petitioner declined the opportunity to expand or refine it. The language quoted above seems to concede that when the TBME suspended Petitioner's license on March 16, 2010, its action was based on his conviction of all the charges in the 35-count Information. Petitioner stipulated to the

---

[1] Petitioner's sentencing hearing was initially set for November 5, 2009. I.G. Ex. 4. He signed the Settlement Agreement on November 9, 2009. I.G. Ex. 8, at 14. The PACER list of documents shows that the initial sentencing setting was vacated and continued on November 4, 2009, and was continued twice more, on December 1, 2009 and January 26, 2010. I.G. Ex. 7. This sequence of events might suggest that Petitioner's sentencing was first postponed to allow him to complete the Settlement Agreement, and later to encourage his compliance with it. And if, as Petitioner claims, the true payee of his $400,000 restitution was VRF, then VRF passed that exact sum on to the United States pursuant to its own Settlement Agreement executed in May 2010. I.G. Ex. 9.

TBME that he was "convicted of felony charges of illegally and improperly committing wire and mail fraud and improperly selling . . . non-narcotic legend drugs without a proper license to do so." I.G. Ex. 6, at 2. Those are accurate descriptions of the crimes identified in the Information and the United States District Court's Judgment in a Criminal Case. I.G. Exs. 2, 5; P. Ex. 9. Petitioner has offered no evidence or cogent argument pointing to any other basis for the license revocation, and the TBME's Consent Order establishes that basis explicitly. I do not weigh or evaluate conflicting evidence on the point because there is no conflicting evidence to be evaluated or weighed: all the evidence shows that the "other adverse action" aggravating factor is present here.

Evidence relating to aggravating factors may be countered by evidence relating to any mitigating factors set forth at 42 C.F.R. § 1001.102(c)(1)-(3). Here, Petitioner asserts that in April 2009 he "participated with an investigation by the U. S. Attorney's Office . . . and cooperated . . . wore a wire and allowed recording of private conversations in an ongoing investigation concerning pharmaceutical companies promoting off-label use." P. Ans. Br., 7; P. Ex. 10, at 2-4. Petitioner asserts that he is therefore entitled to claim benefit of the mitigating factor set out at 42 C.F.R.
§ 1001.102(c)(3)(ii).

The mitigating factor Petitioner seeks to invoke may be claimed if:

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

42 C.F.R. § 1001.102(c)(3).

Since Petitioner's invocation of the mitigating factor is in the nature of an affirmative defense, Petitioner bears the burden of proving it. This allocation of the burden of proof is set out at 42 C.F.R. § 1005.15(b)(1). It is acknowledged in Departmental Appeals Board (Board) decisions. *Russell Mark Posner*, DAB No. 2033; *Stacey R. Gale*, DAB No. 1941 (2004); *Dr. Darren James, D.P.M.*, DAB No. 1828, at 7-8 (2002); *Barry D. Garfinkel, M.D.*, DAB No. 1572 (1996). And it

is particularly important that it be kept in mind now, given the procedural and evidentiary context in which Petitioner's claim of cooperation must be evaluated.

Petitioner's willingness to assist authorities by cooperating in "an investigation by the U.S. Attorney's Office . . ." in which he "wore a wire and allowed recording of private conversations in an ongoing investigation" is not in and of itself a mitigating factor under the regulation. Rather, the regulation requires that Petitioner's activities must produce positive results of a particularly-objective kind. The Board has made it plain that even enthusiastic cooperation is not enough to invoke the mitigating factor unless it results in the investigation of a new case or the issuance of a report. *Hazem Garada, M.D.*, DAB No. 2027 (2006); *Marcia C. Smith, a/k/a Marcia Ellison Smith*, DAB No. 2046 (2006); *Stacey R. Gale*, DAB No. 1941.

Petitioner has offered no evidence whatsoever of any "significant or valuable cooperation that yielded positive results . . . in the form of a new case actually being opened for investigation or a report actually being issued." *Gale*, DAB No. 1941, at 11. His proffered evidence obviously fell short of that critical point when it failed to assert or describe any such "positive results." P. Ex. 10. But he certainly had reason and opportunity to correct the deficiency if he could: the filing of I.G.'s Reply Brief put Petitioner on notice that the I.G. denied the application of the mitigating factor because no "positive results" had come of Petitioner's cooperation. I.G. Reply Br., 6; I.G. Ex. 10. Nevertheless, although aware of the obvious need to plead facts that would create a genuine issue as to the results of his cooperation, and although given an opportunity to do so at paragraph 5(d) of the Order of March 1, 2011, Petitioner did nothing. He did not file a Response Brief or proffer additional evidence, and thereby left the I.G.'s evidence on the utter absence of "positive results" completely uncontradicted. As above, on this point, I need not weigh or evaluate conflicting evidence about "positive results" because there is no conflicting evidence to be considered. Petitioner's only evidence of cooperation is set out in P. Ex. 10, and nothing in that Exhibit so much as hints at positive results in the form of a new case actually being opened or a report actually being issued. All the evidence shows that no such results were derived from Petitioner's cooperation. I.G. Ex. 10. In the absence of such results, Petitioner is not entitled to claim the mitigating factor set out at 42 C.F.R. § 1001.102(c)(3)(ii).

Petitioner maintains that the 15-year length of his exclusion is unreasonable. However, the I.G.'s discretion in exclusion cases when weighing the importance of aggravating and mitigating factors commands great deference when reviewed by an Administrative Law Judge (ALJ). *Jeremy Robinson*, DAB No. 1905 (2004); *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); *Stacy Ann Battle, D.D.S., et al.*, DAB No. 1843 (2002). The ALJ may not substitute his or her own view of what period of exclusion might appear "best" in any given case for the view of the I.G. on the same evidence; so long as the period chosen by the I.G. is within a reasonable range and is based on demonstrated criteria, the ALJ must not alter it. *Jeremy Robinson*, DAB No. 1905; *Joann Fletcher Cash*, DAB No.

1725, at 20 (2000). The ALJ may reduce an exclusionary period only when she or he discovers some meaningful evidentiary failing in the aggravating factors upon which the I.G. relied, or when he or she discovers evidence reliably establishing a mitigating factor not considered by the I.G. in setting the enhanced period. *Jeremy Robinson*, DAB No. 1905. Here, all four of the aggravating factors relied on by the I.G. have been established as pleaded and Petitioner has not established the mitigating factor based on his cooperation with authorities. Given these considerations, the I.G.'s determination to enhance the term of Petitioner's exclusion to 15 years is manifestly not unreasonable. While comparisons with other cases are of limited utility and are certainly not controlling, they can illustrate what a reasonable range has been understood to mean when the ALJ examines a lengthy exclusion. *Paul D. Goldenheim, M.D., et al.*, DAB No. 2268, at 29 (2009). The length of this exclusion is well within a reasonable range and is commensurate with the range established as reasonable in *Russell Mark Posner*, DAB No. 2033; *Stacey R. Gale*, DAB No. 1941; *Jeremy Robinson*, DAB No. 1905; *Thomas D. Harris*, DAB No. 1881 (2003); *Fereydoon Abir, M.D.*, DAB No. 1764 (2001); *Joann Fletcher Cash,* DAB No. 1725.

Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts. *Marvin L. Gibbs, Jr., M.D.*, DAB No. 2279 (2009); *Michael J. Rosen, M.D.*, DAB No. 2096. The material facts in this case are undisputed and unambiguous. They support summary disposition as a matter of settled law, and this Decision issues accordingly.

VI. Conclusion

For the reasons set forth above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Seth Yoser, M.D., from participation in Medicare, Medicaid, and all other federal health care programs for a period of 15 years pursuant to the terms of section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), is sustained.

/s/
Richard J. Smith
Administrative Law Judge