Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Russell J. Ellicott, D.P.M.,	)	Date: January 10, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-06-550
	)	Decision No. CR 1552
The Inspector General.	)	
	)	

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Affirmance of the I.G.'s determination to exclude Petitioner *pro se*, Russell J. Ellicott, D.P.M., from participation in Medicare, Medicaid, and all other federal health care programs for a period of 10 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). Petitioner's only defense to the I.G.'s proposal is an impermissible collateral attack on his conviction, which was based on four counseled and negotiated guilty pleas.

The undisputed facts in this case require the imposition of at least the minimum five-year exclusion, and fully support the reasonableness of the I.G.'s revised determination to enhance that period of exclusion to 10 years. For those reasons, I grant the I.G.'s Motion for Summary Affirmance.

I. Procedural Background

Petitioner *pro se* Russell J. Ellicott, D.P.M. was, between 1997 and 2002, a Doctor of Podiatric Medicine who practiced in the State of Georgia, and who during that time was a provider of podiatric services to beneficiaries of the Medicare program. A substantial part of his practice was based on providing such services to residents of nursing homes.

Petitioner's nursing home practice attracted the scrutiny of the Federal Grand Jury sitting for the United States District Court for the Southern District of Georgia, which, on June 22, 2004, handed up a 22-count Indictment that named Petitioner as the sole defendant.[1] The Indictment charged him with one felony count of health care fraud in his dealings with Medicare and Medicaid, in violation of 18 U.S.C. § 1347, and 21 felony counts of false statements to those programs related to health care matters, in violation of 18 U.S.C. § 1035(a)(2); the Indictment also set out a forfeiture claim against Petitioner based on 18 U.S.C. §§ 982(a)(7) and 982(b)(1) and 21 U.S.C. U.S.C. § 853(p).

On January 6, 2005, the Grand Jury revised its view of Petitioner's transactions with Medicare and Medicaid. It named him as the sole defendant in a Superseding Indictment of 181 felony counts and a forfeiture claim. The original Indictment's 22 counts were re-alleged, but the Superseding Indictment added 159 new felony counts charging Petitioner with mail fraud in his dealing with Medicare Part B, in violation of 18 U.S.C. § 1341.

Represented by two attorneys, Petitioner negotiated a Plea Agreement with the United States on July 12, 2005. By that Agreement he pleaded guilty to all four counts of an Information filed on July 8, 2005, and admitted that he had violated his Medicare provider agreement contrary to 42 U.S.C. § 1320a-7b(e), section 1128B(e) of the Act, as to each count. Each of the four violations charged was a misdemeanor. The Plea Agreement stipulated that for sentencing purposes the amount of loss to the Medicare program was $113,101.00. The date on which Petitioner's guilty pleas were actually tendered and accepted in open court does not appear in this record.

Petitioner appeared with both his counsel for sentencing on October 25, 2005. He was sentenced to a four-year period of probation, and was in addition required to pay restitution in the amount stipulated as the loss to Medicare, $113,101.00, a fine of $20,000.00, and a $40.00 assessment. As the Plea Agreement required, the United States moved the dismissal of the Superseding Indictment.

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[1] The facts regarding Petitioner's indictment and plea agreement that I recite in this section are drawn from the Summary of Plea Agreement, Indictment, and Superseding Indictment. Each of these documents was proffered by Petitioner as an exhibit (Petitioner's Exhibits 1, 2, and 7, respectively). As discussed below, the exhibits have been received in evidence. Because Petitioner offered the documents, I presume he does not dispute their contents.

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), mandates the exclusion for a period of not less than five years of "any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under Title XVIII . . . ", the Medicare program. On May 31, 2006, the I.G. notified Petitioner that he was to be excluded for a period of 10 years pursuant to the terms of section 1128(a)(1) of the Act. The I.G.'s determination to set the period of exclusion at 10 years was based on the apparent presence of two aggravating factors set out at 42 C.F.R. §§ 1001.102(b)(1) and (b)(2).

Acting *pro se*, Petitioner sought review of the I.G.'s action by his letter dated June 26, 2006. I convened a prehearing conference by telephone on August 3, 2006, pursuant to 42 C.F.R. § 1005.6. The I.G. expressed the intention to seek summary disposition on written submissions, and I established a schedule for the filing of documents and briefs. That schedule and other details of the conference are set out in my Order of August 10, 2006. That briefing cycle has been completed, and the record in this case closed November 16, 2006.

The evidentiary record on which I decide this case contains 28 exhibits. The I.G. submitted five proposed exhibits with his September 8, 2006 filing, marked I.G. Exhibits 1-5 (I.G. Exs. 1-5). Petitioner submitted 22 proposed exhibits with his September 14, 2006 Brief for Denial of Summary Affirmance (P. Br.), marked P. Exhibits 1-22 (P. Exs. 1-22). Petitioner submitted an additional exhibit with his November 15, 2006 Response to OIG Reply Brief for Denial of Summary Affirmance (P. Resp. Br.). Petitioner designated this exhibit as "P. Ex. 1" even though he had previously proffered an exhibit so designated. I have redesignated the exhibit submitted with the November filing as P. Ex. 23. Neither party has objected to any of the opposing party's proposed exhibits, and in the absence of objection I.G. Exs. 1-5 and P. Exs. 1-23 are admitted to the record. In admitting P. Exs. 3-6, 8-12, and 14-23, however, I note that they are irrelevant to these proceedings. I shall discuss their irrelevance below.

II. Issues

The issues before me are limited to those noted at 42 C.F.R. § 1001.2007(a)(1), and both issues must be resolved in favor of the I.G.'s position. In the context of this record those two issues are:

> 1. 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

2. Whether the 10-year length of the period of exclusion is unreasonable.

Section 1128(a)(1) of the Act mandates Petitioner's exclusion, for his predicate conviction has been established. A five-year period of exclusion is the minimum period established by section 1128(c)(3)(B) of the Act.

The enhancement of that period to 10 years is not unreasonable. Both of the aggravating factors relied on in the I.G.'s determination to enhance the period to 10 years are demonstrated in the record before me, and no mitigating factors have been pleaded or proven by Petitioner. The proposed length of the period of exclusion is within a reasonable range, and is therefore not unreasonable.

III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the mandatory exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any "individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under Title XVIII or under any State health care program." Title XVIII of the Act is the Medicare program. The terms of section 1128(a)(1) are restated in similar regulatory language at 42 C.F.R. § 1001.101(a). This statutory provision makes no distinction between felony convictions and misdemeanor convictions as predicates for conviction.

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a Federal . . . court . . . " (Act, section 1128(i)(1), 42 U.S.C. § 1320a-7(i)(1)); or "when there has been a finding of guilt against the individual . . . by a Federal . . . court," (Act, section 1128(i)(2), 42 U.S.C. § 1320a-7(i)(2)). 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, section 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 minimum mandatory period of exclusion is subject to enhancement in some limited circumstances and on proof of narrowly-defined aggravating factors set out at 42 C.F.R. §§ 1001.102(b)(1)-(9). In this case, the I.G. seeks to enhance the period of Petitioner's exclusion to 10 years, and relies on the two aggravating factors listed at 42 C.F.R. §§ 1001.102(b)(1) and (b)(2).

If the I.G. seeks to enhance the period of exclusion by relying on any of those aggravating factors, a petitioner may attempt to limit or nullify the proposed enhancement through a showing of certain mitigating factors set out at 42 C.F.R. §§ 1001.102(c)(1)-(3).

The standard of proof in this case is a preponderance of the evidence. Petitioner bears the burden of proof and persuasion on any affirmative defenses or mitigating factors and the I.G. bears the burden on all other issues. 42 C.F.R. §§ 1005.15.

IV. Findings and Conclusions

I find and conclude as follows:

1. On a date in 2005 not established by this record, in the United States District Court for the Southern District of Georgia, Petitioner Russell J. Ellicott, D.P.M., pleaded guilty to four counts of having violated his Medicare provider agreement, contrary to 42 U.S.C. § 1320a-7b(e), section 1128B(e) of the Act. I.G. Exs. 2, 3.

2. Final adjudication of guilt, judgment of conviction, and sentencing based on that plea of guilty were imposed on Petitioner in the United States District Court on October 25, 2005. I.G. Ex. 2.

3. On May 31, 2006, the I.G. notified Petitioner that he was to be excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of 10 years, based on the authority set out in section 1128(a)(1) of the Act and the aggravating factors set out at 42 C.F.R. § 1001.102(b)(1) and (b)(2). I.G. Ex. 1.

4. Petitioner perfected his appeal from the I.G.'s action by filing a *pro se* hearing request on June 26, 2006.

5. The adjudication of guilt, judgment of conviction, and sentence based on Petitioner's violations of 42 U.S.C. § 1320a-7b(e), as described in Finding 2 above, constitute a "conviction" related to the delivery of an item or service under the Medicare program, within the meaning of sections 1128(a)(1) and 1128(i)(1) and (2) of the Act, and 42 C.F.R. § 1001.2.

6. Because of his conviction, Petitioner was subject to, and the I.G. was required to impose, a period of exclusion from Medicare, Medicaid, and all other federal health care programs of not less than five years. Act, sections 1128(a)(1) and 1128(c)(3)(B).

7. The acts resulting in Petitioner's conviction as described in Finding 2 above caused a financial loss to the Medicare program of $113,101.00. I.G. Ex. 2, at 3; I.G. Ex. 5, at 4-5; P. Ex. 1, at 5-6.

8. Because the acts resulting in Petitioner's conviction caused a financial loss to the Medicare program of $5,000 or more, the aggravating factor set out in 42 C.F.R. § 1001.102(b)(1) is present.

9. The acts resulting in Petitioner's conviction as described in Finding 2 above were committed over the period from in and about January of 1997 through June of 2002. I.G. Ex. 3, at 1; I.G. Ex. 5, at 4.

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

11. None of the mitigating factors set out in 42 C.F.R. §§ 1001.102(c)(1)-(3) is present.

12. The I.G.'s exclusion of Petitioner for a period of 10 years is supported by fact and law, is within a reasonable range, and is therefore not unreasonable. I.G. Exs. 2, 3, and 5; P. Ex. 1; Findings 1-11, above.

13. There are no disputed issues of material fact and summary affirmance is appropriate in this matter. *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. *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). Those two essential elements are established in the record before me.

The fact of Petitioner's criminal conviction is shown by I.G. Ex. 2. Although the date and circumstances of Petitioner's guilty plea do not appear in this record, the District Court's adjudication of Petitioner's guilt and its judgment of his conviction on October 25, 2005, as recorded in its October 28, 2005 Judgment in a Criminal Case, satisfy the definitions of "conviction" set out at sections 1128(i)(1) and (2) of the Act. The I.G. has proved the first essential element.

The second essential element, the relation of Petitioner's criminal conviction to the delivery of items or services under the Medicare program, appears in detailed recitations throughout I.G. Exs. 3 and 5, and P. Ex. 1. Those recitations explicitly identify Petitioner's crimes as billing for Medicare benefits using treatment codes for services defined in a manner he knew to be materially different from that then established and published by Medicare. I.G. Ex. 3; P. Ex. 1, at 5. Petitioner admitted that he had agreed to participate in the Medicare program as a physician, that he knew the terms of his agreement, especially the terms governing his acceptance of Medicare benefits assignments for podiatric services, and that he willfully and repeatedly violated the terms of his Medicare agreement. I.G. Ex. 5, at 2; P. Ex. 1, at 2.

The specific manner in which Petitioner admitted violating his Medicare agreement was the criminal practice widely called "up-coding." Petitioner charged Medicare using billing codes for more expensive procedures than those he actually performed, by which practice Medicare was induced to pay more to Petitioner than it would otherwise have paid if the procedures had been truthfully coded. I.G. Ex. 5, at 4; P. Ex. 1, at 5. The submission of false claims to the Medicare and Medicaid programs has been consistently held to be a program-related crime within the reach of section 1128(a)(1). *Jack W. Greene*, DAB No. 1078 (1989), *aff'd sub nom. Greene v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990); *Julius Williams, III*, DAB CR1464 (2006); *Kennard C. Kobrin*, DAB CR1213 (2004); *Norman Imperial*, DAB CR833 (2001); *Egbert Aung Kyang Tan, M.D.*, DAB CR798 (2001); *Lorna Fay Gardner*, DAB CR648, *aff'd* DAB No. 1733 (2000); *Mark Zweig, M.D.*, DAB CR563 (1999); *Alan J. Chernick, D.D.S.*, DAB CR434 (1996).

The required nexus and common-sense connection between the crime of which Petitioner was convicted and the Medicare program is present here as a matter of fact. *Berton Siegel, D.O.*, DAB No. 1467 (1994). Moreover, I believe that Petitioner's conviction for violating section 1128B(e) of the Act, 42 U.S.C. § 1320a-7b(e), is a conviction for a program-related offense as a matter of law. The I.G. has proved the second essential element.

Petitioner stridently denies that he is subject to exclusion, and depicts his conviction as an inadequate basis for the I.G.'s proposed action. The core of Petitioner's argument is his opinion that the podiatric procedures required by Medicare to support the billings he submitted were medically improper, perhaps to the point of being harmful or dangerous to patients. He insists that he was therefore free — in fact, obliged — to perform procedures other than the ones for which he submitted his bills to Medicare. It may be best to set out Petitioner's principal tenet in his own words:

> The failure to torture or abuse patients could never be considered a "criminal offense related to the delivery of an item or service under title XVIII or under any State health care program". Several Federal and State laws make illegal the abuse of patients necessitated by the toenail debridement requirement (i.e. denailing or complete avulsion without anesthesia) of Georgia Medicare, Part B, policies 306 and 307, Indictment CR 104-60, and the plea agreement.

P. Br. at 19.

> Petitioner's Conviction is not related to the Delivery of an item or service under a State Health Care Program within the Meaning of Section 1128(a)(1) of the Act because the basis or meaning of the conviction is derived from an abusive act that wasn't performed.

P. Br. at 22.

> In order to have a conviction there has to be a criminal offense. The mere fact that CMS, OIG and the Georgia Medicare Carrier have allowed or overlooked the creation of a procedure by Georgia Medicare that is truly objectionable to the public places the onus upon these agencies to eliminate this procedure from being performed upon the public. Government agencies should not be in the torture or abuse business.

P. Resp. Br. at 1.

> IG cannot escape the fact that Georgia Medicare's guidelines require an illegal act to be performed for toenail debridement reimbursement that makes the provider agreement voidable. That voidable agreement existed long before the plea agreement. Those illegal guidelines have been used to falsely convict Petitioner. That false conviction based on illegal guidelines is the mitigating factor that completely trumps any aggravating factor the IG represents because Petitioner's so called program-related crime is completely dependent on reasonable, publicly or medically accepted guidelines.

P. Resp. Br. at 2-3.

That argument is not the only one at Petitioner's command. Raising what might be understood as the defense of selective prosecution, he portrays his conviction as the fruition of a Medicare vendetta:

> Petitioning Congressman Norwood in 1999 (P. Ex.16), which I thought was allowed by the First Amendment appears to have brought on a response that would result in my demise. Petitioner petitioned Congressman Norwood in response to an erroneous letter Georgia Medicare, Part B was sending to nursing home attending physicians . . . That is when Georgia Medicare began to look for a way to take revenge against me.

P. Br. at 26-27.

But there remains yet a third argument in Petitioner's briefing. It will be recalled that the Superseding Indictment of January 6, 2005, charged Petitioner with a total of 181 felonies. The potential consecutive prison exposure on conviction of those 181 felonies was 1705 years. The potential fine exposure was $250,000.00 *on each felony count*. The Superseding Indictment pleaded a forfeiture claim, and conviction on even a single felony would have, as matters of state and federal statutes, terminated many of Petitioner's civil rights, such as his right to own firearms, or to vote and hold public office. The bargain that Petitioner's attorneys were able to negotiate on his behalf allowed him to plead guilty to four misdemeanors for which the total consecutive prison exposure was two years and the cumulative fine exposure was $20,000.00, the amount actually imposed. The four-misdemeanor Information contained no forfeiture claim. This is what Petitioner says about the effectiveness of his counsel:

> Poor lawyering has resulted in Petitioner pleading guilty to a non-crime that was supposed to result in mere Class B misdemeanor charges that would not have future affect on Petitioner or Petitioner's family.

P. Resp. Br. at 4.

These are, at best, but speculative defenses to the criminal charges themselves. They could have been raised in the District Court or in the United States Court of Appeals for the Eleventh Circuit, but for the fact that Petitioner accepted the deal his lawyers negotiated, pleaded guilty to four misdemeanors, and served no prison time at all. They are not defenses here. They are irrelevant to these proceedings, as are P. Exs. 3-6, 8-12, and 14-23. Those exhibits are proffered by Petitioner in an effort to bolster his claim of

selective prosecution and to support his assault on the Medicare podiatry procedures he admitted flouting, but his efforts are beside the point here. Neither those procedures nor Petitioner's conviction may be attacked or impeached by indirect assault in this exclusion case, and thus those Exhibits have no bearing on the issues in this exclusion case.

Petitioner cannot directly deny the procedural facts of his conviction. Instead, he protests that he is not really guilty of the charges he admitted. But insofar as Petitioner now seeks to abjure or disavow his admission of criminality, he is bound by the facts established by his pleas of guilty to the four counts in the Information, including the specific admissions that he ". . . did knowingly, willfully, and repeatedly violate the terms of . . ." his Medicare agreement in that he "[W]illfully billed for Medicare benefits using treatment codes for services defined in a manner he knew to be materially different from that then established and published by Medicare . . . ." I.G. Ex. 3. He will not be heard to recant those admissions now. *See Susan Malady, R.N.*, DAB No. 1816 (2002); *Theodore Sabot, M.D.*, DAB CR1160 (2004); *Dirk G. Wood, M.D.*, DAB CR1068 (2003). Any form of collateral attack on predicate convictions in exclusion proceedings is precluded by regulation at 42 C.F.R. § 1001.2007(d), and that preclusion has been affirmed repeatedly by the Departmental Appeals Board (Board). *Susan Malady, R.N.,* DAB No. 1816; *Dr. Frank R. Pennington, M.D.*, DAB No. 1786 (2001); *Joann Fletcher Cash*, DAB No. 1725 (2000); *Paul R. Scollo, D.P.M.*, DAB No. 1498 (1994); *Chander Kachoria, R.Ph.*, DAB No. 1380 (1993). Petitioner's conviction stands and, as I have explained above, it satisfies both essential elements necessary to sustaining the exclusion.

Once a predicate conviction within the scope of section 1128(a) has been shown, exclusion for the minimum period of five years is mandatory. *Mark K. Mileski*, DAB No. 1945 (2004); *Salvacion Lee, M.D.*, DAB No. 1850 (2002); *Lorna Fay Gardner*, DAB No. 1733 (2000). The period of exclusion may be enhanced to more than five years if the I.G. proves the existence of certain aggravating factors listed at 42 C.F.R. § 1001.102(b)(1)-(9). In this case the I.G. has asserted the presence of two aggravating factors.

The first aggravating factor on which the I.G. relies is present when "[t]he acts resulting in the conviction, or similar acts . . . caused . . . a financial loss to a Government program . . . of $5,000 or more." 42 C.F.R. § 1001.102(b)(1). Petitioner was ordered to pay $113,101.00 in restitution to the Centers for Medicare (and Medicaid Services) as part of his sentence. I.G. Ex. 2, at 3. The law of this forum supports reliance on this adjudicated amount of restitution as *prima facie* proof of the amount of loss. *Dr. Darren J. James, D.P.M.*, DAB CR860 (2002); *Ruth Ferguson*, DAB CR725 (2000); *Steven Alonzo Henry, M.D.*, DAB CR638 (2000); *Thomas P. Whitfield, D.P.M.*, DAB CR539 (1998); *Gilbert Ross, M.D., et al.*, DAB CR478 (1997). But here it is unnecessary to rely on the amount of restitution as the only expression of the total loss caused by Petitioner's crime, for the

Plea Agreement submitted to the District Court as the basis of Petitioner's guilty plea includes Petitioner's stipulation to the same amount: "The course of conduct and series of transactions of which Counts One through Four are representative involved the receipt by defendant [here, Petitioner] of Medicare benefits overpayments of not less than $113,101.00 for the time period embraced by the Information." I.G. Ex. 5, at 2, 3, and 4-5; P. Ex 1, at 4, and 5-6. That substantial and uncontested sum satisfies the requirement of 42 C.F.R. § 1001.102(b)(1). The I.G. has established this first aggravating factor.

The second aggravating factor asserted by the I.G. is specified at 42 C.F.R. § 1001.102(b)(2). That factor is present if "[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 demonstrates the factor. The first lines of each Count in that Information read: "From in and about January of 1997 through June of 2002, in Richmond County . . . RUSSELL J. ELLICOTT, D.P.M., . . . did knowingly, willfully, and repeatedly violate the terms of such (Medicare) agreement . . ." I.G. Ex. 3. Petitioner's admission of guilt to those four charges is sufficient to demonstrate the 65-month temporal span of his crimes. The I.G. has established this second aggravating factor.

When the I.G. offers evidence of aggravating factors, a petitioner may attempt to limit or nullify the proposed enhancement through proof of certain mitigating factors set out at 42 C.F.R. §§ 1001.102(c)(1)-(3). Those mitigating factors are listed immediately following the regulation's limiting language specifying that "[o]nly the following factors may be considered mitigating . . ." 42 C.F.R. § 1001.102(c). As to each of the mitigating factors, ". . . Petitioner ha[s] the burden of proving any mitigating factor by a preponderance of the evidence, since the mitigating factor is in the nature of an affirmative defense." *Barry D. Garfinkel, M.D.*, DAB No. 1572, at 12 (1996). This allocation of the burden of proof, set out at 42 C.F.R. § 1005.15(b)(1), has been reaffirmed consistently. *Stacey R. Gale*, DAB No. 1941 (2004); *Dr. Darren James, D.P.M.*, DAB No. 1828, at 8-9 (2002).

Petitioner has made no attempt to assert the existence of any mitigating factors. Without forgetting the rule that assigns to him the burden of proving any mitigating factor by a preponderance of the evidence, I have searched all of the pleadings in this case for any suggestion that one or more of those additional mitigating factors might be brought into consideration. That search has revealed nothing that suggests any additional claim in mitigation. Since Petitioner was convicted of four misdemeanors and the amount of loss to Medicare was far more than $1500.00, 42 C.F.R. § 1001.102(c)(1) cannot apply. Nothing in Petitioner's briefing asserts that his conduct in connection with the events in the criminal case was affected by a mental, emotional, or physical condition that led to his reduced culpability at the time of those events. None of the Exhibits makes such a

suggestion, and I have given particular attention to the District Court's sentencing documents at I.G. Ex. 2. Thus, 42 C.F.R. § 1001.102(c)(2) cannot be brought into consideration. Petitioner has neither demonstrated the attitude nor claimed the actions which might even hint at the possibility of his invoking the mitigating factor set out at 42 C.F.R. § 1001.102(c)(3).

The I.G.'s discretion in weighing the importance of aggravating and mitigating factors in exclusion cases is due great deference when reviewed by Administrative Law Judges (ALJs). This rule evolved in such Board decisions as *Barry D. Garfinkel, M.D.*, DAB No. 1572; *Frank A. DeLia, D.O.*, DAB No. 1620 (1997), and *Gerald A. Snider, M.D.*, DAB No. 1637 (1997). With the Board's decisions in *Joann Fletcher Cash*, DAB No. 1725 (2000); *Stacy Ann Battle, D.D.S., et al.*, DAB No. 1843 (2002), and *Jeremy Robinson*, DAB No. 1905 (2004), the rule took its present form.

Stated in its present form, the rule forbids that ALJs substitute their own views of what period of exclusion might appear "best" in any given case for the view of the I.G. on the same evidence. The Board has insisted that ALJs reduce an exclusionary period only when they discover some meaningful evidentiary failing in the aggravating factors upon which the I.G. relied, or when they discover evidence reliably establishing a mitigating factor not considered by the I.G. in setting the enhanced period. *Jeremy Robinson*, DAB No. 1905.

Where, as here, the I.G. has weighed all of the aggravating and mitigating factors established by the evidence, and where, as here, there are no aggravating or mitigating factors relied on but unproven, a holding that the exclusion period chosen by the I.G. is unreasonable could be reached only through an exercise that the *Cash-Battle-Robinson* rule forbids that I undertake. The only question now before me is whether the exclusion period is within a reasonable range.

In the instant case, the proposed 10-year period is commensurate with the range established as reasonable in such cases as *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003); *Ira Katz, Little Five Points Pharmacy*, DAB CR1044 (2003); *Alfredo Robert*, DAB CR1033 (2003); *Paul W. Williams, Jr., et al.*, DAB CR787 (2001); *Tarvinder Singh, D.D.S.*, DAB CR697 (2000); *Howard S. Weiss, M.D.*, DAB CR421 (1996). I rely on those cases as points of reference because they were, like this one, based on convictions for crimes of dishonesty and, like this one, contained evidence of the aggravating factors set out at 42 C.F.R. § 1001.102(b)(1) and (b)(2). The loss attributed to Petitioner's crime is well in excess of the minimum necessary to invoke the "amount of loss" factor, and the temporal span of his crimes was more than five years, a period quite

sufficient for him to have demonstrated both practiced duplicity and chronic untrustworthiness. The 10-year length of the proposed exclusion is within a reasonable range, and it is therefore not unreasonable.

Summary disposition is appropriate when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *Thelma Walley*, DAB No. 1367. Summary disposition is explicitly authorized by the terms of 42 C.F.R. § 1005.4(b)(12), and this forum looks to FED. R. CIV. P. 56 for guidance in applying that regulation. *Robert C. Greenwood*, DAB No. 1423 (1993); *Thelma Walley*, DAB No. 1367; *John W. Foderick, M.D.*, DAB No. 1125 (1990). When the undisputed material facts of a case support summary disposition, a full evidentiary hearing is unnecessary. *Surabhan Ratanasen, M.D.*, DAB No. 1138 (1990); *John W. Foderick, M.D.*, DAB No. 1125. The material facts in this case are undisputed, clear, and unambiguous. They support summary disposition and this decision.

VI. Conclusion

For the reasons set out above, the I.G.'s Motion for Summary Affirmance must be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Russell J. Ellicott, D.P.M., from participation in Medicare, Medicaid, and all other federal health care programs for a period of 10 years, pursuant to the terms of section 1128(a)(1) of the Act, is sustained.

/s/
Richard J. Smith
Administrative Law Judge