Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Marcellius Jhekwuoba Anunobi,
(O.I. No. 6-08-40328-9),

Petitioner

v.

The Inspector General.

Docket No. C-11-607

Decision No. CR2480

Date: January 4, 2012

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 Marcellius Jhekwuoba Anunobi from participation in Medicare, Medicaid, and all other federal health care programs for a period of 50 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 50 years, based on the aggravating factors found at 42 C.F.R. § 1001.102(b)(1), (2), and (5), is reasonable. Accordingly, I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

Petitioner Marcellius Jhekwuoba Anunobi, a registered pharmacist, owned and operated Advanced Doctor's Prescribed Pharmacy (ADPP), located in San Antonio, Texas. In July 2008 an investigation by the Texas Medicaid Fraud Control Unit revealed that Petitioner had committed theft by using ADPP to bill the Texas Medicaid program for prescription drugs that were not prescribed for or received by several patients. I.G. Ex. 4. On August 8, 2008, Petitioner was arrested and charged with the felony offense of theft, in violation of TEX. PENAL

CODE ANN. § 31.03. I.G. Exs. 4, 5, 6.[1] On November 25, 2008, the Grand Jury sitting for the 227th Judicial District Court, Bexar County, Texas, handed up an Indictment charging Petitioner with five felonies based on actions Petitioner undertook from on or about July 11, 2007 through September 20, 2008. I.G. Ex. 3. On September 3, 2010, upon his plea of not guilty and following a jury trial in the District Court during which Petitioner was represented by counsel, Petitioner was found guilty of three of the charged felonies: Medicaid fraud as charged in Count I; theft with the aggregate value of $200,000 or more as charged in Count II; and money laundering ($200,000 or more) as charged in Count V. That same day, the Judge Presiding sentenced Petitioner to a 20-year term of imprisonment for each of the three counts, the sentences to be served concurrently. In addition, Petitioner was ordered to pay restitution in the amount of $2,220,019.36. I.G. Ex. 2.[2]

---

[1] There are several points in the procedural history of this case where the official court record is either in conflict or is silent. The first point is the exact date of Petitioner's first arrest on the criminal Complaint and Affidavit signed by Sergeant H. Griffin on August 8, 2008 (I.G. Ex. 4, at 4). Sergeant Griffin later asserted that the arrest took place on that same date, August 8, 2008 (I.G. Ex. 5, at 1), and so did Assistant Criminal District Attorney C. H. Rich III (I.G. Ex. 6, at 1). The Court of Appeals of Texas, Fourth District, wrote that the arrest occurred on August 9, 2008 (I.G. App. B, at 1.) This conflict does not appear to be material to the issues before me, and I mention it only to acknowledge its existence in the record.

[2] The second point at which the official court record appears to be silent or in conflict concerns the exact statutory provisions on which Petitioner was convicted, and has at least the potential for materiality. The November 25, 2008 True Bill of Indictment on which he stood trial comprises five Counts. Petitioner was convicted on three of them: Counts I, II, and V, paragraphs A and B. No statutory citation appears in any of the five Counts (I.G. Ex. 3). A separate Judgment of Conviction by Jury was entered for each of the three Counts, but no statutory citation appears in any of the three Judgments (I.G. Ex. 2). Sergeant Griffin relied on a very general citation to TEX. PENAL CODE ANN. § 31.03 twice (I.G. Ex. 4, at 4; I.G. 5, at 1), but reference to that statutory provision reveals it to be an "umbrella" heading with a variety of distinct forms of criminal takings set out in detail under different subsections. The Court of Appeals identified the charges on which Petitioner was originally arrested in August 2008 as violations of TEX. PENAL CODE ANN. § 31.03(a), (e)(5) based on fraudulent billings to Medicaid, but the Court of Appeals did not have the Indictment before it (I.G. App. B, at 1 and 2), and its citation of § 31.03(a), (e)(5) seems only to point out that Petitioner faced unspecified third-degree felony charges. The cited sections make no reference to Medicaid fraud or money laundering. In the absence of full statutory citations, I rely on the language describing the actual details of Petitioner's criminal conduct and the characterization of them as specific violations of law set out in the criminal Complaint and Affidavit (I.G. Ex. 4), the True Bill of Indictment (I.G. Ex. 3), and the Judgments of Conviction by Jury (I.G. Ex. 2). In so relying, I find that language sufficient to support Finding 5, below.

On June 30, 2011, the I.G. notified Petitioner that he was to be excluded pursuant to the terms of section 1128(a)(1) of the Act for a period of 50 years. The I.G. advised Petitioner that the mandatory minimum five-year period of exclusion would be enhanced based on the presence of three aggravating factors. Acting *pro se*, Petitioner sought review of the I.G.'s determination in a request for hearing dated July 11, 2011 and received by the Civil Remedies on July 18, 2011.

I convened a prehearing conference by telephone on August 10, 2011, pursuant to 42 C.F.R. § 1005.6, in order to discuss procedures for addressing the issues presented by this case. By order of that date I established a schedule for the submission of documents and briefs.

The evidentiary record on which I decide the issues before me contains sixteen exhibits. The I.G. proffered seven exhibits marked I.G. Exhibits 1-7 (I.G. Exs. 1-7) and two appendices, marked I.G. Appendix A and I.G. Appendix B (I.G. Apps. A and B), which I have treated as exhibits. Although he proffered no exhibits with his September 9, 2011 Answer Brief, Petitioner proffered seven exhibits with his November 13, 2011 Response Brief. They were marked Petitioner's Exhibits A-G (P. Exs. A-G). Although Petitioner's exhibits were not marked in compliance with paragraph 10 of the August 20, 2011 Order and Civil Remedies Division Procedures § 9, in the interests of avoiding further delay, I have not required Petitioner to re-mark his exhibits. In the absence of objection, I have admitted all proffered exhibits as designated by the offering party.

The record in this case closed for purposes of 42 C.F.R. § 1005.20(c) with the receipt of Petitioner's Response Brief on November 21, 2011.

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. 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 50 years is not unreasonable because the three aggravating factors relied on by the I.G. and found at 42 C.F.R. § 1001.102(b)(1), (2), and (5) 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 Medicaid program). The terms of section 1128(a)(1) are restated in similar language at 42 C.F.R. § 1001.101(a). Section 1128(a)(1) does not distinguish between felonies and misdemeanors as predicates for exclusion.

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a . . . State . . . court;" Act § 1128(i)(1); or "when there has been a finding of guilt against the individual . . . by a . . . State . . . court;" Act § 1128(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 § 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 three aggravating factors set out at 42 C.F.R. § 1001.102(b)(1), (2) and (5) in seeking to enhance the period of Petitioner's exclusion to 50 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 appears to claim the benefit of the mitigating factor set out at 42 C.F.R. § 1001.102(c)(2). Petitioner bears the burden of proof regarding mitigating factors by a preponderance of the evidence. 42 C.F.R. § 1005.15(b) and (c).

The standard of proof is a preponderance of the evidence and there may be no collateral attack of the conviction that is the basis for the exclusion. 42 C.F.R. § 1001.2007(c) and (d). 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(b) and (c).

IV. Findings and Conclusions

I find and conclude as follows:

1. On November 25, 2008, the Grand Jury sitting for the 227th Judicial District Court, Bexar County, Texas, handed up an Indictment charging Petitioner with five criminal counts relating to Medicaid fraud based on actions Petitioner undertook from on or about July 11, 2007 through September 20, 2008. I.G. Ex. 3.

2. On September 3, 2010, following a jury trial on his plea of not guilty in the 227th Judicial District Court, Petitioner was found guilty of one count of Medicaid fraud in the amount of $200,000 or more (Count I of the Indictment); one count of theft with the aggregate value of $200,000 or more (Count II of the Indictment); and one count of money laundering in the amount of $200,000 or more (Count V, paragraphs A and B of the Indictment). Judgment of Conviction by Jury on all three counts was entered against Petitioner on that date. I.G. Ex. 2; I.G. App. B at 1.

3. Petitioner was sentenced in the District Court on September 3, 2010. As part of his sentence, Petitioner was ordered to serve three concurrent 20-year terms of incarceration and was ordered to pay restitution in the sum of $2,220,019.36. I.G. Ex. 2, at 1, 3, 5.

4. The judgments of conviction and findings of guilt described above in Findings 1 and 2 constitute a "conviction" within the meaning of sections 1128(a)(1) and 1128(i)(1) and (2) of the Act, and 42 C.F.R. § 1001.2.

5. A nexus and a common-sense connection exist between the criminal offenses of which Petitioner was convicted, as noted above in Findings 1 and 2, and the delivery of an item or service under the Medicaid program. I.G. Exs. 3, 5, 7, at 1; *Berton Siegel, D.O.,* DAB No. 1467 (1994).

6. 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.

7. Because the acts resulting in Petitioner's conviction caused a financial loss to the Texas Medicaid 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 resulting 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. None of the mitigating factors set out at 42 C.F.R. § 1001.102(c)(1)-(3) are present.

11. The I.G.'s exclusion of Petitioner for a period of 50 years is supported by fact and law, is within a reasonable range, and is therefore not unreasonable. Findings 1-10 above.

12. 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 (Medicaid). *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); *see also Russell Mark Posner*, DAB No. 2033, at 5-6 (2006). Those two essential elements are fully demonstrated in the evidence before me.

Petitioner does not dispute that he was found guilty of one count of defrauding Medicaid, one count of theft, and one count of money laundering in violation of various provisions of Texas law. Petitioner does not dispute that he was sentenced to a 20-year term of incarceration for each count on which he was convicted, to be served concurrently, and was ordered to pay restitution of $2,220,019.36 to the Texas Medicaid program. P. Ans. Br. at 11-12. However, what Petitioner does dispute are the legitimacy of his convictions and thus the validity of the sentences imposed as the result of them.

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

Petitioner's conviction is shown by I.G. Ex. 2. The District Court's acceptance of the jury's verdicts and its judgments of conviction on September 3, 2010 satisfied the definitions of "conviction" set out at sections 1128(i)(1) and 1128(i)(2) of the Act. The first essential element is established by the record.

The evidence also shows that Petitioner's conviction is related to the delivery of an item or service under the Medicaid program. Petitioner submitted fraudulent claims to the Texas Medicaid program for prescription drugs. The aggregate value of those fraudulent claims was over $200,000. Between July 2007 and September 2008 Petitioner received payment on those claims, which he misrepresented as having been ordered by a physician and having been received by a Medicaid recipient on whose behalf they were billed. I.G. Exs. 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 Texas Medicaid program. *Berton Siegel, D.O.*, DAB No. 1467. The second essential element is established by the record.

The I.G. relies on three aggravating factors set out at 42 C.F.R. § 1001.102(b)(1), (2) and (5) in seeking to enhance the period of Petitioner's exclusion to 50 years. Petitioner challenges two of the aggravating factors on which the I.G. relies.

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 certain other entities of more than $5000. Petitioner asserts that the State of Texas did not correctly calculate the amount of restitution he owed. Petitioner also claims that the State of Texas already recovered from him the value of his ADPP inventory and fixtures in excess of three million dollars, and that the State *actually owes him money*. Request for Hearing at 2, 15; P. Ans. Br. at 27-28. In making these arguments, Petitioner in effect 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. The court records show that Petitioner was required to pay restitution in the amount of $2,220,019.36. I.G. Ex. 2. Although the Texas Medicaid program is not explicitly named as the restitution-payee, the language of Counts I, II, and V of the Indictment makes it clear that the Texas Medicaid program is the agency to which the losses accrued and to which restitution was owed. Restitution has long been considered a reasonable measure of program losses. *See Jason Hollady, M.D.*, DAB No. 1855 (2002). Petitioner's crimes caused the Medicaid program significant financial losses, far in excess of the $5000 threshold for aggravation. The Departmental Appeals Board has characterized amounts substantially greater than the statutory standard as an "exceptionally aggravating factor" entitled to significant weight. *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, PhD.*, DAB No. 1865 (2003). I agree, and I explicitly observe that the very substantial program loss shown here — even in the absence of any other aggravating factors — more than justifies a significant increase in the period of exclusion.

The aggravating factor set out 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." Petitioner concedes that his pharmacy was opened in July 2007, but argues that the termination of his crimes should be calculated to be May 2008, when ADPP was "raided" and "the state placed on hold [his] Medicaid account." P. Ans. Br. at 41. Petitioner has offered no evidence or cogent argument to support his assertions. The Indictment and the Judgments of Conviction all note that the scheme underlying Petitioner's convictions lasted from July 11, 2007 and continued through on or about September 30, 2008. I.G. Ex. 2, at 1, 3, and 5; I.G. Ex. 3. Thus, the "duration of offense" factor is present here. I also observe that at least part of the period over which Petitioner's criminal activity extended included a period while he was released on

bond after his original arrest in early August 2008. I.G. Ex. 6; I.G. App. B. To be plain in making this observation, it should suffice to say that after Petitioner was arrested for swindling the Texas Medicaid program, and after he won his release on bond, he immediately resumed his abuse of the Texas Medicaid program until taken again into custody. This element of the I.G.'s proof of the "duration of offense" factor has obvious and serious implications for the need to protect the program from Petitioner's depredations, and would — even in the absence of any other aggravating factors — amply support a very significant enhancement of the period of exclusion.

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 20 years. I.G. Ex. 2, at 1, 2. The "incarceration" aggravating factor is therefore present here. Petitioner does not contest the proof of this aggravating factor but rather argues that his sentence was excessive and the result of improper — but unproven — activities by various state and federal officials. Request for Hearing at 12-13. The sentence imposed by the District Court was indeed lengthy, and I find that the I.G. correctly considered both the fact that incarceration was ordered and the fact of its substantial length in increasing the period of exclusion. The "incarceration" factor is present here, and the length of Petitioner's sentence — again, even in the absence of any other aggravating factors — would warrant the imposition of a greatly-enhanced period of exclusion.

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). In his briefing Petitioner raises three matters that I construe as assertions that he is entitled to claim benefit of the mitigating factor set out at 42 C.F.R. § 1001.102(c)(2).

The mitigating factor Petitioner seeks to invoke may be claimed if the record in the criminal proceedings "demonstrates that the individual had a mental, emotional or physical condition before or during the commission of the offense that reduced the individual's culpability." 42 C.F.R. § 1001.102(c)(2).

Here Petitioner offers three theories to explain that he "was not thinking right" and that his actions were "supposed to give any person a clue that I was not aware what I was doing." P. Ans. Br. at 46. First, Petitioner claims that he was distraught over several "bounced" checks he received from a customer. P. Resp. Br. at 6-7. Next, Petitioner asserts that in 2006, after undergoing spinal cord surgery, he was prescribed pain medication that altered his state of mind. P. Resp. Br. at 10-11. Finally, Petitioner states that through his landlord's machinations he was "set up for failure," resulting in a financial loss for his business and causing him further distress. P. Resp. Br. at 11-13.

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) and 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).

Petitioner's claim of "not thinking right" and of being in mental or emotional distress is not in itself a mitigating factor under the regulation. Rather, the regulation requires that Petitioner produce evidence that the sentencing court determined that he had a mental, emotional or physical condition that reduced his culpability, and the regulation further requires that any such evidence must address Petitioner's capacities before or at the time of the criminal acts. *Russell Mark Posner*, DAB No. 2033; *Joseph M. Rukse, Jr., R.Ph*, DAB No. 1851 (2002); *Frank R. Pennington, M.D.*, DAB No. 1786, at 6 (2001). In reviewing the record of the proceedings in this matter I find that there is nothing in this record to support or corroborate Petitioner's allegations of "bounced" checks, medication side effects, or landlord *animus*. Those allegations are simply not backed up with evidence that they ever happened. Moreover, there is no evidence at all suggesting a causal link between any of these unproven events and a hypothetical effect on Petitioner's physical or mental wellbeing. Finally, there is nothing to support even optimistic speculation that the sentencing judge determined Petitioner's mental, emotional or physical condition reduced his culpability for the crimes he committed between July 2007 and September 2008. It might very well be suggested that the 20-year sentence actually imposed argues rather forcefully to the contrary. In any case, given the complete absence of evidence in support of his assertions, Petitioner is not entitled to claim the mitigating factor set out at 42 C.F.R. § 1001.102(c)(2).

A review of his remaining arguments shows that Petitioner presents no basis to overturn the I.G.'s exclusion or the I.G.'s enhancement of the exclusion period. Petitioner's arguments that his protracted crimes were mere business mistakes and that the Texas Medicaid program actually owes him money; his assertions regarding the lawyers who defended him during his criminal proceedings; his claim that he was a victim of disparate treatment or corrupt manipulation during the criminal investigation and trial; his allegation that all pharmacies engage in fraud similar to the crimes he committed and was caught at; his complaints about the amount of restitution he was ordered to pay and the amount of prison time he was ordered to serve; his over-arching complaint that his defense in these proceedings has been stymied by the loss of certain documents that would prove the jury's verdicts wrongful — all of these challenges amount to collateral attacks on his conviction and sentence. They are attacks unburdened by proof and unembarrassed by the shrillness of their tone. They are irrelevant here, for the regulations explicitly preclude any collateral attack on Petitioner's conviction. "When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds, in this appeal." 42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725; *Chander Kachoria, R.Ph.*, DAB No. 1380, at 8 (1993) ("There is no reason to 'unnecessarily encumber the exclusion process' with efforts to reexamine the fairness of state convictions.").

Petitioner maintains that the 50-year length of his exclusion is unreasonably long. Until very recently, the Administrative Law Judge (ALJ) evaluating such a claim could rely on a clear, rational, and settled line of authority in doing so. According to that line of authority, the I.G.'s discretion in exclusion cases when weighing the importance of aggravating and mitigating factors commanded great deference when reviewed by an 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 wellspring of that doctrine was identified by the drafters of the regulations as the I.G.'s "vast experience" in implementing exclusions. 57 Fed. Reg. 3298-3321 (January 24, 1992). According to that line of authority, an ALJ might 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. was within a reasonable range and was based on demonstrated criteria, the ALJ was forbidden to alter it. *Jeremy Robinson*, DAB No. 1905; *Joann Fletcher Cash*, DAB No. 1725, at 20. According to that line of authority, an ALJ might 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.

That clear, rational, and settled line of authority may not have survived the recent decision of the Board in *Craig Richard Wilder, M.D.*, DAB No. 2416 (September 30, 2011). Although the ALJ found that the I.G. had considered all proven aggravating and mitigating factors, and although the Board acknowledged that there were no differences between the record of those factors before it and the record before the ALJ and the I.G., the Board nevertheless departed from its own settled rule and revised the 35-year period of exclusion downward to 18 years, so that it might conform more satisfactorily to what the Board considered best. It may be too soon to tell whether *Wilder* signals new responsibility for the Board and ALJs in overseeing the I.G.'s application of his "vast experience," or whether any such new responsibility includes the discretion to lengthen, as well as shorten, the period determined by the I.G. But lest there be any doubt of the reasonableness of *this 50-year period* of exclusion, it should be noted that the I.G. could have alleged and proven a fourth aggravating factor, the one set out at 42 C.F.R. § 1001.102(b)(9): on February 8, 2011 the Texas State Board of Pharmacy revoked Petitioner's pharmacist's license, relying on his Medicaid fraud conviction set out above as its basis for doing so. I.G. Ex. 7. The decisions of this forum and of the Board have rarely — perhaps never — contemplated a situation in which the record shows four aggravating factors, no mitigating factors, a 20-year prison term, program losses of well over two million dollars, and a Petitioner who continued his criminal activity while free on bond and who still asserts that he, not the Texas Medicaid program and its beneficiaries, is the real victim.

But here, it should be enough to note that all three of the aggravating factors relied on by the I.G. have been established as pleaded and Petitioner has established none of the mitigating factors defined in 42 C.F.R. §1001.102(c)(1)-(3). Overall, the record in this case establishes that Petitioner is untrustworthy, a felon convicted of crimes based on deception and falsehood, who presents a significant risk to the integrity of health care programs, and who has demonstrated his

unremitting willingness to abuse those programs and misuse their beneficiaries if given the slightest opportunity to do so. Significantly, when he was first released on bond he immediately returned to submitting fraudulent claims to the Medicaid program. The financial loss he caused the Medicaid program greatly exceeds the regulatory threshold for aggravation, yet he insists that Texas Medicaid should pay him. His crimes continued for at least a year, and they were serious enough to earn his 20-year incarceration from the judge who heard all the trial evidence. If his actions show that he continues to pose a significant threat to program integrity, his *pro se* pleadings in this case do nothing to suggest that Petitioner has even now begun to acknowledge his plundering of the Texas Medicaid program, and by extension, of the program's beneficiaries. Based on the number and nature of the aggravating factors and there being no mitigating factors, I find that the 50-year exclusion falls well within a reasonable range.

I note once more that Petitioner appears here *pro se*. Because of that I have been guided by the Board's reminders that *pro se* litigants should be offered "some extra measure of consideration" in developing their records and their cases. *Louis Mathews*, DAB No. 1574 (1996); *Edward J. Petrus, Jr., M.D., et al.*, DAB No. 1264 (1991). I have searched all of Petitioner's pleadings for any arguments or contentions that might raise a valid, relevant defense to the I.G.'s Motion, but have found nothing that could be so construed.

Resolution of a case by summary disposition is particularly fitting when settled law can be applied to undisputed material facts. *Michael J. Rosen, M.D.*, DAB No. 2096; *Thelma Walley*, DAB No. 1367. Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). This forum looks to FED. R. CIV. P. 56 for guidance in applying that regulation. *Robert C. Greenwood*, DAB No. 1423 (1993). The material facts in this case are undisputed and unambiguous. They support summary disposition as a matter of settled law. 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 Marcellius Jhekwuoba Anunobi from participation in Medicare, Medicaid, and all other federal health care programs for a period of 50 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