Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Farzana Begum, M.D.
(O.I. File No.: 5-10-4-0004-9),

Petitioner,

v.

Inspector General,
U.S. Department of Health and Human Services,
Respondent.

Docket No. C-15-502

Decision No. CR4588

Date: April 15, 2016

DECISION

Petitioner, Farzana Begum, M.D., is excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)), effective August 20, 2014. Petitioner's exclusion for the minimum period of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)). An additional period of exclusion of three years, for a total minimum period of exclusion of eight years, is not unreasonable based upon the two aggravating factors established in this case and the absence of any mitigating factors.[1]

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[1] Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

I. Background

The Inspector General of the Department of Health and Human Services (I.G.) notified Petitioner by letter dated July 31, 2014, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of eight years. The I.G. advised Petitioner that she was being excluded pursuant to section 1128(a)(1) of the Act based on her conviction in the United States District Court, Northern District of Illinois, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. The I.G. considered two aggravating factors when deciding to extend the five-year minimum mandatory period of exclusion to eight years. I.G. Exhibit (Ex.) 1. The I.G. did not consider any mitigating factors. Jt. Stipulation of Undisputed Facts (Jt. Stip.) ¶ 11; Transcript (Tr.) 226.

On November 3, 2014, Petitioner filed a request for hearing dated November 1, 2014 (RFH).[2] The case was assigned to me for hearing and decision on December 3, 2014. A telephone prehearing conference was convened on January 5, 2015, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence (Prehearing Order) issued on January 7, 2015.

On February 4, 2015, the I.G. filed a motion for summary judgment, a brief in support of summary judgment, and I.G. Exs. 1 through 9. Petitioner filed a brief in opposition on March 6, 2015, with Petitioner's exhibits (P. Exs.) 1 through 11. The I.G. filed a reply brief on April 3, 2015. On May 19, 2015, I issued a ruling in which I denied the I.G.'s motion for summary judgment, ordered further development of the case for a hearing on the merits, and set this case for a hearing on November 17, 2015. I convened the hearing by video teleconference (VTC) on November 17, 2015. The I.G. called no witnesses. Petitioner testified as part of her case-in-chief and also called as a witness her son, Syed Lateef. A transcript of the November 17, 2015 hearing was prepared.

During the hearing, the I.G. withdrew its previously filed I.G. Exs. 1 and 2. The I.G. offered as evidence I.G. Exs. 3 through 11. Tr. 56-58. I.G. Exs. 3, 4, and 6 through 11 were admitted without objection. Only pages 1 through 7 of I.G. Ex. 5 were admitted as evidence. Tr. 53, 56-58. Petitioner offered P. Exs. 1 through 3, and 6 through 13 and

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[2] No issue was raised regarding the timeliness of the request for hearing in this case. The parties stipulated that the July 31, 2014 notice of exclusion was served upon counsel for Petitioner on September 4, 2014, fewer than 60 days prior to the filing of the request for hearing. Jt. Stip. ¶ 9.

they were admitted as evidence. Petitioner's previously exchanged P. Exs. 4 and 5 were withdrawn. Tr. 59, 66-67. The parties filed post-hearing briefs on February 8, 2016 (P. Br.; I.G. Br.) and post-hearing reply briefs (P. Reply; I.G. Reply) on March 7, 2016.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's right to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services (the Secretary).

Pursuant to section 1128(a)(1) of the Act (42 U.S.C. § 1320a-7(a)(1)), the Secretary must exclude from participation in any federal health care program any individual convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. The Secretary has promulgated regulations implementing this provision of the Act. 42 C.F.R. § 1001.101(a).[3]

Pursuant to section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)), an individual is convicted of a criminal offense when: (1) a judgment of conviction has been entered against him or her in a federal, state, or local court whether an appeal is pending or the record of the conviction is expunged; (2) there is a finding of guilt by a court; (3) a plea of guilty or no contest is accepted by a court; or (4) the individual has entered into any arrangement or program where judgment of conviction is withheld.

Section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)) provides that an exclusion imposed under section 1128(a) of the Act will be for a period of not less than five years. 42 C.F.R. § 1001.102(a). The Secretary has published regulations that establish aggravating factors the I.G. may consider to extend the period of exclusion beyond the minimum five-year period, as well as mitigating factors that may be considered only if the I.G. proposes to impose an exclusion greater than five years. 42 C.F.R. § 1001.102(b), (c).

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[3] Citations are to the 2013 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

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

B. Issues

The Secretary has by regulation limited my scope of review to two issues:

> Whether there is a basis for the imposition of the exclusion; and
>
> Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

1. Petitioner's request for hearing was timely and I have jurisdiction.

2. Petitioner's exclusion is required by section 1128(a)(1) of the Act.

There is no dispute that Petitioner timely requested a hearing and that I have jurisdiction pursuant to section 1128(f) of the Act and 42 C.F.R. pt. 1005.

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. The statute provides:

> (a) MANDATORY EXCLUSION. – The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
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> 1) Conviction of program-related crimes. – 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.

Act § 1128(a)(1). The statute requires that the Secretary exclude from participation any individual or entity: (1) convicted of a criminal offense (whether felony or misdemeanor); (2) where the offense is related to the delivery of an item or service; and (3) the delivery of the item or service was under Medicare or a state health care program. Petitioner concedes that there is a basis for her exclusion for the mandatory minimum period of five years based on the following facts. P. Br. at 2-3, 6; P. Reply at 1.

Petitioner was a physician licensed in Illinois since 1993. RFH; Jt. Stip. ¶ 1. On June 27, 2012, a federal special grand jury convened in the United States District Court, Northern District of Illinois, returned an indictment against Petitioner and other individuals in connection with a kickback scheme. The indictment charged Petitioner with one count of conspiracy to knowingly and willfully solicit and receive kickbacks, in violation of 18 U.S.C. § 371 and 42 U.S.C. § 1320a-7b(b)(1)(A), and three counts of soliciting and receiving kickbacks, in violation of 42 U.S.C. § 1320a-7b(b)(1)(A). I.G. Ex. 4 at 1; I.G. Ex. 5 at 1-7; Jt. Stip. ¶ 2.

On December 2, 2013, Petitioner pleaded guilty to one count of conspiracy to solicit and receive kickbacks. The remaining counts were dismissed. I.G. Exs. 4, 7; Jt. Stip. ¶ 4. Petitioner admitted as part of her plea agreement that:

> Beginning in or about 2005 and continuing through on or about March 15, 2011, at Chicago . . . and elsewhere, [Petitioner] conspired with [another individual] to knowingly and willfully solicit and receive kickbacks, directly and indirectly, overtly and covertly, from [other individuals] in return for the referral of patients to Grand Home Health Care, Inc. for the furnishing of home health care services for which payment may be made in whole or in part under Medicare, a Federal health care program . . . .

I.G. Ex. 4 at 2-3; Jt. Stip. ¶ 5. Petitioner acknowledged that "she knew it was illegal to solicit and receive kickbacks in exchange for patient referrals to a Medicare provider." I.G. Ex. 4 at 3. Petitioner agreed to forfeit to the United States the sum of $324,000, which represented the total amount of kickbacks Petitioner received in connection with her offense. I.G. Ex. 4 at 10; I.G. Ex. 6 at 31.

The district court accepted Petitioner's guilty plea and entered judgment against her on March 26, 2014. The district court sentenced Petitioner to incarceration for twelve months and one day followed by a one-year term of supervised release; a $100 assessment; a $60,000 fine; and 200 hours of community service. Petitioner was ordered to participate in mental health treatment. I.G. Ex. 8 at 2-5; Jt. Stip. ¶¶ 7-8. The sentence included forfeiture of $324,000. I.G. Ex. 8 at 6; I.G. Ex. 9; Jt. Stip. ¶ 8.

On January 29, 2015, the federal prosecutor filed a motion with the district court seeking to have Petitioner's sentence reduced based on Petitioner's post-sentencing "substantial assistance in investigating or prosecuting another person," pursuant to Fed. R. Crim. Proc. 35(b)(1). P. Ex. 6; Jt. Stip. ¶ 13. According to the government's motion, the basis for the requested sentence reduction was that Petitioner had provided information to the government about kickback payments she received from an individual named Gene Schloss, a defendant in another criminal case. P. Ex. 6; Jt. Stip. ¶ 14. On February 5, 2015, the district court granted the government's motion and reduced Petitioner's sentence to nine months and fifteen days. P. Ex. 5; I.G. Ex. 10; Jt. Stip. ¶ 15. The district court entered an amended judgment on February 10, 2015, that reflected Petitioner's reduced sentence. I.G. Ex. 11; Jt. Stip. ¶ 15.

Petitioner concedes that she was convicted as alleged by the I.G. and that there is a basis for her exclusion pursuant to section 1128(a)(1) of the Act. P. Br. at 2-3, 6; P. Reply at 1. Accordingly, I conclude that there is a basis for Petitioner's exclusion, and her exclusion is mandated by section 1128(a)(1) of the Act.

3. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) of the Act is five years.

Petitioner does not dispute that the minimum period of an exclusion pursuant to section 1128(a)(1) of the Act is five years, as mandated by section 1128(c)(3)(B) of the Act. P. Br. at 1, 6; P. Reply at 1. Accordingly, Petitioner must be excluded for at least five years.

4. Two aggravating factors exist in this case that justify extending the minimum period of exclusion to eight years.

Petitioner argues that her minimum five-year period of exclusion should not be extended by three years. Petitioner argues that there are mitigating factors that the I.G. failed to consider and that the weight of the aggravating factors and mitigating factors does not support an eight-year exclusion. P. Br. at 1, 6, 16, 17, 22; P. Reply at 1, 2, 10, 11. The issue under the regulation is whether the period of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(1).

My determination of whether the period of exclusion is unreasonable turns on whether: (1) the I.G. has proven that there are aggravating factors within the meaning of 42 C.F.R. § 1001.102(b); (2) Petitioner has proven that there are mitigating factors within the meaning of 42 C.F.R. § 1001.102(c) that the I.G. failed to consider or that the I.G. considered an aggravating factor that does not exist; and (3) the period of exclusion is within a reasonable range.

Petitioner does not dispute the existence of the aggravating factor established by 42 C.F.R. § 1001.102(b)(2) and the aggravating factor established by 42 C.F.R. § 1001.102(b)(5). The I.G. alleged in the July 31, 2014 notice that there were two aggravating factors present in this case that justified excluding Petitioner for more than five years: (1) the acts that resulted in Petitioner's conviction, or similar acts, occurred over a period of one year or more; and (2) the sentence imposed by the court included incarceration. I.G. Ex. 1. The evidence before me shows that both aggravating factors are present in this case.

a. The I.G. has proven the aggravating factor established by 42 C.F.R. § 1001.102(b)(2), *i.e.*, the acts that resulted in Petitioner's conviction occurred over a period of one year or more.

Petitioner admits that her criminal conduct spanned the time period from in or about 2005 through March 15, 2011. Jt. Stip. ¶ 5. Therefore, it is undisputed that Petitioner's criminal acts occurred over a period of one year or more. I conclude that the I.G. has proven the aggravating factor established by 42 C.F.R. § 1001.102(b)(2).

b. The I.G. has proven the aggravating factor established by 42 C.F.R. § 1001.102(b)(5), *i.e.*, the sentence imposed against Petitioner included a period of incarceration.

Petitioner agrees that the district court sentenced her to a term of incarceration. Jt. Stip. ¶ 8. Thus, the I.G. has proven the aggravating factor established by 42 C.F.R. § 1001.102(b)(5).

The district court originally sentenced Petitioner to twelve months and one day of incarceration. I.G. Ex. 8 at 2-5; Jt. Stip. ¶¶ 7-8. Subsequently, the district court reduced Petitioner's sentence to nine months and fifteen days. P. Ex. 5; I.G. Ex. 10; Jt. Stip. ¶ 15. The district court entered an amended judgment on February 10, 2015, that reflected Petitioner's reduced sentence. I.G. Ex. 11; Jt. Stip. ¶ 15.

I conclude that the two aggravating factors considered by the I.G. are undisputed and are established by the evidence. The I.G. was authorized by the Secretary to rely upon these factors as grounds for extending Petitioner's exclusion by three years. 42 C.F.R. § 1001.102(b)(2) and (b)(5).

5. Petitioner has not proven any of the mitigating factors established by the regulations.

If any of the aggravating factors authorized by 42 C.F.R. § 1001.102(b) justify an exclusion of longer than five years, then mitigating factors may be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

The only authorized mitigating factors that I may consider are those established by 42 C.F.R. § 1001.102(c):

> (1) The individual or entity was convicted of 3 or fewer misdemeanor offenses, and the entire amount of financial loss (both actual loss and intended loss) to Medicare or any other Federal, State or local governmental health care program due to the acts that resulted in the conviction, and similar acts, is less than $1,500;
>
> (2) The record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional or physical condition before or during the commission of the offense that reduced the individual's culpability; or
>
> (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.

Petitioner bears the burden of going forward and the burden of persuasion on any mitigating factors. 42 C.F.R. § 1005.15(b)(1); *Stacey R. Gale*, DAB No. 1941 at 9 (2004); *Arthur C. Haspel, D.P.M.*, DAB No. 1929 at 5 (2004).

Petitioner argues that the evidence shows that there are two mitigating factors in this case that would justify reducing the period of her exclusion. She urges me to find that the record in the criminal proceedings demonstrates that the district court found that she had a mental condition that reduced her culpability – the mitigating factor established by 42 C.F.R. § 1001.102(c)(2). She also urges me to find that her cooperation with federal officials resulted in others being convicted and resulted in an additional investigation or report being issued identifying program weaknesses – mitigating factors established by 42 C.F.R. § 1001.102(c)(3)(i) and (ii). P. Br.; P. Reply. I have examined Petitioner's arguments and the evidence that she offered in support of those arguments. I conclude that she has failed to establish any mitigating factors by a preponderance of the evidence.

a. The evidence does not show it is more likely than not that the district court judge found that Petitioner had a mental condition that reduced her culpability. 42 C.F.R. § 1001.102(c)(2).

In claiming that a mental condition reduced her culpability, Petitioner argues that the district court judge considered her psychologist's evaluations and her diagnosis of narcissistic behavioral disorder, and acknowledged that her criminal conduct "was a manifestation" of her mental condition. P. Br. at 9. Petitioner agrees that the judge did not make an explicit finding of reduced culpability. But Petitioner argues that despite characterizing her as one of the more culpable members of the conspiracy, he gave her a lenient sentence rather than a harsh sentence. Petitioner attempts to convince me that the lenient sentence, which is well below the maximum imposable under the federal sentencing guidelines, shows that the district court judge concluded that Petitioner is less culpable due to her mental condition. P. Br. at 8-10; P. Reply at 4-7.

The parties have stipulated that Petitioner had a mental condition before or during commission of her offense:

> In or about October 2012, Petitioner was diagnosed by clinical psychologist Dale S. Gody, Ph.D., ABPP with Narcissistic Behavior Disorder. According to Dr. Gody's initial and follow-up evaluation reports submitted to the court for consideration in sentencing, this mental condition is a variation of a type of Narcissistic Personality Disorder, recognized in the Diagnostic and Statistical Manual of Mental Disorders-IV.

Jt. Stip. ¶ 3; Tr. 119.[4]

It is evident from the transcript of Petitioner's sentencing hearing that the district court judge did read the psychologist's reports and did acknowledge Petitioner's mental diagnosis and other health issues when he sentenced her. I.G. Ex. 6 at 34-39. Contrary to what Petitioner argues, however, the judge's statements during sentencing do not show that he found that Petitioner's mental condition reduced her culpability or otherwise excused her criminal conduct. Based on my review of all the evidence including the

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[4] Dr. Gody's reports, dated October 23, 2012, and January 6, 2014, have been admitted as P. Exs. 2 and 3.

transcript of the sentencing proceeding, there is no indication that the judge determined that Petitioner's culpability was reduced by virtue of her mental disorder, and such a diminution is required to trigger the mitigating factor established by 42 C.F.R. § 1001.102(c)(2). The transcript reflects that the district court judge recognized that Petitioner's mental condition may have contributed to her decision to engage in criminal misconduct in some fashion, but Petitioner made the choice despite knowing the difference between right and wrong. The judge's monologue shows that he was concerned about the deterrent effect of his sentencing of Petitioner and ensuring that the sentences of the co-conspirators were not too disparate. Tr. 31-42. In fact, one comment of the district court judge reflects that he mostly discounted any impact of Petitioner's mental disorder:

> The fact that as a medical doctor the defendant fully understood that what she was doing was unlawful, you know, that's unfortunate.
>
> And, you know, I do certainly respect all the information I have received on this personality disorder, and you know, I can certainly understand where that would be a factor here, but at the end of the day, this, to my knowledge at least, is the only manifestation of that behavioral disorder. There was no manifestation of it in any other fashion where she turned to unlawful or dishonest behavior.

I.G. Ex. 6 at 37.

The transcript shows that the judge recognized that Petitioner was suffering from a mental disorder, but he nevertheless found Petitioner to be highly culpable for her criminal acts. The judge noted that "the amount of the kickbacks was considerable [and] [Petitioner's] conduct took place over several years." I.G. Ex. 6 at 32, 38. The judge noted that Petitioner had requested an increase in her kickback payments, which made her more culpable compared to the other co-conspirators. I.G. Ex. 6 at 32-33. The judge's statements during sentencing clearly show that not only did he find that Petitioner appreciated the criminality of her actions, but he also determined that Petitioner, despite having a mental condition, was highly culpable, not less culpable.

Petitioner also claims that a reasonable inference can be drawn from the lenient sentence the judge imposed that he found her mental disorder reduced her culpability. However, the mere fact that the judge sentenced Petitioner to a period of incarceration that was below the range suggested by the federal sentencing guidelines, particularly when considered in the context of his comments during sentencing, does not, in and of itself, mean that he made a finding of reduced culpability due to her mental condition as required by 42 C.F.R. § 1001.102(c)(2).

In discussing what punishment to impose, the judge stated there was a need for deterrence, but at the same time acknowledged that Petitioner's case presented a challenge of setting a suitable jail sentence that would be "sufficient, but not greater than necessary." Tr. 38-39. The judge emphasized further that it was "very important . . . to avoid unwarranted sentencing disparities" between Petitioner and the other co-defendants. I.G. Ex. 6 at 38-40. He noted that Petitioner's situation differed from that of three other co-defendants, whom he had already sentenced:

> Each of [the other three co-defendants] took a smaller amount of kickbacks, . . . were involved for a shorter period of time, and none of them was a doctor at the time of the offense. And these are important considerations . . . in mitigation for the other defendants that aren't present for [Petitioner], at least to the same degree.

I.G. Ex. 6 at 40. Additionally, the judge noted that the co-owners of Grand Home Health Care had yet to be sentenced, but stated that he believed they would be receiving a sentence of 18 months or less. I.G. Ex. 6 at 40-41. Finally, the judge explained as follows:

> I don't see any additional . . . value to tacking on additional months. I think the same lessons and values will be advanced with the 12 months and a day sentence as 30 months or any other number in between. . . . I think that even a day in prison will be quite a shock for a doctor . . . .

I.G. Ex. 6 at 43.

Thus, while the sentencing transcript shows that the judge considered a number of factors when he sentenced Petitioner, her mental condition was not considered as a reason for the sentence adjudged. The district court judge did not specifically state that he determined that Petitioner's culpability was reduced by her mental condition, and I cannot infer from his statements during sentencing or the sentence imposed that he made such a determination. *Marcia C. Smith, a/k/a Marcia Ellison Smith*, DAB No. 2046 at 5 (2006). Petitioner has failed to carry her burden of proving that the record of the criminal proceedings shows that the district court judge determined that her mental condition reduced her culpability. Accordingly, I conclude that Petitioner has not established the mitigating factor under 42 C.F.R. § 1001.102(c)(2).

b. The evidence does not show it is more likely than not that Petitioner's cooperation with federal officials resulted in others being convicted or resulted in an additional investigation or report being issued identifying program weaknesses. 42 C.F.R. § 1001.102(c)(3)(i) and (ii).

Petitioner also urges that I find that she has established mitigating factors under 42 C.F.R. § 1001.102(c)(3)(i) and (ii) because her cooperation led to the investigation and conviction of another defendant, Gene Schloss, and resulted in a report being issued by an appropriate law enforcement agency that identified program weaknesses. P. Br. at 10-16; P. Reply at 7-10. The evidence offered by Petitioner fails to satisfy her burden of persuasion on these mitigating factors.

It is not disputed that Petitioner cooperated with federal officials and gave them information about Gene Schloss, who was charged in connection with the kickback scheme. P. Exs. 5, 6, 10; Tr. 201-03; Jt. Stip. ¶¶ 13-15. At the hearing, Petitioner testified that Schloss was initially one of the providers with Grand Home Health Care, and then he started his own home health agency, and paid kickbacks to Petitioner for the referral of patients to his business. Tr. 201. In describing the assistance she gave federal officials in the case against Schloss, Petitioner testified that she recorded phone calls with him, wore a wire to record a conversation with him, and also testified against Schloss. Tr. 138, 202-05. A federal grand jury indicted Schloss in January 2014, and he was subsequently convicted. P. Exs. 10, 13. Petitioner relies upon the government's Fed. R. Crim. Pro. 35(b) motion in her criminal case as evidence that her cooperation resulted in the conviction of Schloss. There is no dispute that Petitioner cooperated with the government in the prosecution of Schloss; that he was convicted; or that the government in its Fed. R. Crim. Pro. 35(b) motion characterized Petitioner's cooperation as substantial. Jt. Stip. ¶¶ 13-15; P. Exs. 5, 6 at 2.

It is not disputed that Petitioner provided assistance in the government's prosecution of Schloss. But, I conclude that the evidence presented by Petitioner is insufficient to establish by a preponderance of the evidence that her cooperation either caused federal officials to initiate the case against Schloss, or resulted in his conviction. I also conclude that the indictment against Schloss does not constitute a law enforcement-issued report that identified program weaknesses.

In *Stacey R. Gale*, the Departmental Appeals Board (Board) elaborated on a petitioner's burden related to proving a mitigating factor under 42 C.F.R. § 1001.102(c)(3):

> Thus, it is Petitioner's responsibility to locate and present evidence to substantiate the existence of any alleged mitigating factor in her case. In alleging the existence of the

> factor at 42 C.F.R. § 1001.102(c)(3)(ii), Petitioner must demonstrate that she cooperated with a state or federal official and this cooperation resulted in "[a]dditional cases being investigated." As is apparent from the foregoing, the I.G. does not have the responsibility to prove the non-existence of the mitigating factor under the regulation. For example, the I.G. does not have the responsibility to substantiate under the regulation that even though Petitioner may have cooperated with a state or federal official, that cooperation did not result in additional cases being investigated. It is entirely Petitioner's burden to demonstrate that her cooperation with a state or federal official resulted in additional cases being investigated.

DAB No. 1941 at 9. The Board went on to explain that mere cooperation is not enough. A petitioner must show that the cooperation resulted in another individual being convicted or additional cases being investigated or reports being issued. The regulation does not "authorize" the I.G. to independently determine whether or not state or federal investigators should have opened an investigation or issued a report. The Board found that the regulation requires that a petitioner show that law enforcement officials actually exercised discretion and began a new investigation or issued a report as a result of his or her cooperation.

> The rule is not designed to reward individuals who may have provided evasive, speculative, unfounded or even spurious information that proved to be so useless that the government official was unable even to open a new case for investigation. Rather, the regulation is designed to authorize mitigation for significant or valuable cooperation that yielded positive results for the state or federal government in the form of a new case actually being opened for investigation or a report actually being issued.

Id. at 10-11. The Board further explained that the regulation requires that the cooperation be validated by the fact that investigators opened a "new case" rather than simply providing investigators additional information related to an ongoing case. *Id*. at 14, 17.

In the case at hand, the evidence offered by Petitioner fails to demonstrate that the information she provided federal officials about Schloss led to the opening of a new case against Schloss. The evidence also fails to show that Petitioner's cooperation resulted in Schloss being convicted. While the government stated in its Fed. R. Crim. Pro. 35(b) motion that Petitioner provided substantial assistance, the motion does not suggest that Petitioner's cooperation was the key to the conviction of Schloss. The government's

motion indicates that after her sentencing, Petitioner gave the government information about Schloss paying kickbacks to her. The motion states that Petitioner had provided some assistance before her sentencing, but it was insufficient for a motion for a reduction under the federal sentencing guidelines. But the motion characterizes the information provided by Petitioner after her sentencing as amounting to "substantial assistance in investigating or prosecuting another person" under Fed. R. Crim. Pro. 35(b)(1). P. Ex. 6 at 1-2. Petitioner's argument before me, in essence, is that the I.G. should be bound by the federal prosecutor's characterization of Petitioner's assistance. Petitioner cites no authority that supports her position. Furthermore, without more facts, it is not possible to determine that the cooperation referred to by the federal prosecutors as "substantial assistance" amounts to the cooperation contemplated by 42 C.F.R. § 1001.102(c)(3)(i) and (ii).

Petitioner's own testimony indicates that federal officials were already investigating Schloss's involvement in the kickback scheme by the time she gave them any information. When asked about how she brought up this information to the government, Petitioner stated, "[t]hey were questioning me on Grand and they came up with questions, I think, related to Gene Schloss, so I mentioned to them." Tr. 202. Additionally, Petitioner's son testified as to his knowledge about Petitioner's involvement in the case against Schloss and stated, "when the FBI approached [Petitioner], they asked her if she could give assistance to getting other people indicted. So the initial steps were recorded phone calls with Gene Schloss and recorded text messages." Tr. 138.

Petitioner makes much of the fact that she wore a wire to record conversations with Schloss; however, her willingness to assist authorities in this manner does not, in and of itself, demonstrate that her cooperation resulted in authorities opening a case against Schloss. As the Board has held, "the mere receipt and evaluation of the information provided during the 'cooperation' cannot itself be viewed as the 'investigation' of an additional case." *Stacey R. Gale*, DAB No. 1941 at 8. Petitioner could have subpoenaed federal authorities to present testimony on the issue of whether the information she provided caused them to exercise their discretion and begin an investigation into Schloss. However, she did not do so. Although Petitioner's son testified at the hearing that he believed that the FBI learned about Schloss from Petitioner, his opinion is based on pure speculation as he admitted that he was not involved in any way with the prosecutors in the case against Schloss. Tr. 140-41.

Petitioner has offered no evidence that establishes that she was the source relied upon by federal officials for initiating an investigation of Schloss. Because Petitioner has not met her burden to show that her cooperation resulted in additional cases being investigated, I conclude that she has not established the mitigating factor under C.F.R. § 1001.102(c)(3)(ii).

Furthermore, the record fails to establish that Petitioner's cooperation resulted in Schloss's conviction. Petitioner's interviews with federal authorities and secretly recorded conversations with Schloss are insufficient alone to show that her cooperation was the basis for the conviction of Schloss. Petitioner offered no evidence to show that the information she provided the government – as opposed to information obtained from other sources – was instrumental in obtaining Schloss's conviction. Moreover, Petitioner can only speculate as to how the government evaluated or used the information she provided regarding Schloss. Petitioner could have subpoenaed federal authorities who could have testified as to the substance of her cooperation in their investigation of Schloss, but she did not do so. The fact that the government moved to have Petitioner's sentence reduced acknowledges her assistance in the case against Schloss, but it does not by itself establish that her cooperation led to his conviction. I conclude that Petitioner has failed to establish the existence of the mitigating factor at 42 C.F.R. § 1001.102(c)(3)(i).

In a further attempt to establish a mitigating factor under 42 C.F.R. § 1001.102(c)(3)(ii), Petitioner claims that her cooperation led to the indictment issued against Schloss, which "identif[ied] [his] fraud within the Medicare program." P. Reply at 7; P. Ex. 10. Petitioner argues that the indictment is a law enforcement-issued report that identified program weaknesses that satisfies the mitigating factor established by 42 C.F.R. § 1001.102(c)(3)(ii). P. Brief at 13-15; P. Reply at 7, 9-10; P. Ex. 10. Petitioner's argument has no merit.

The indictment against Schloss, which was issued by a federal grand jury, sets forth his alleged offenses in connection with his participation in an illegal kickback scheme for referrals of Medicare patients. The indictment alleges in four counts that Schloss paid kickbacks in violation of federal law. P. Ex. 10. Even if I treated the grand jury as an "appropriate law enforcement agency" within the meaning of 42 C.F.R. § 1001.102(c)(3)(ii), the indictment does not identify "program vulnerabilities or weaknesses," not already well known considering the similar charges of receiving kickbacks against Petitioner and her co-conspirators. 42 C.F.R. § 1001.102(c)(3)(ii). I conclude that Petitioner has failed to establish that her cooperation with federal authorities led to reports being issued that identified program vulnerabilities or weaknesses, as required by 42 C.F.R. § 1001.102(c)(3)(ii).

I conclude that Petitioner has failed to establish any mitigating factor that I am permitted to consider under 42 C.F.R. § 1001.102(c). Accordingly, this case presents no mitigating factors the I.G. failed to consider that may have justified reducing the period of Petitioner's exclusion.

6. An exclusion for eight years is not unreasonable in this case.

Appellate panels of the Board have made clear that the role of the ALJ in cases such as this is to conduct a de novo review of the facts related to the basis for the exclusion and the existence of aggravating and mitigating factors established by 42 C.F.R. § 1001.102 and to determine whether the period of exclusion imposed by the I.G. falls within a reasonable range. *Juan De Leon, Jr.*, DAB No. 2533 at 3 (2013); *Craig Richard Wilder, M.D.*, DAB No. 2416 at 8 (2011); *Joann Fletcher Cash*, DAB No. 1725 at 10 n.9 (2000). The applicable regulation specifies that the ALJ must determine whether the length of exclusion imposed is "unreasonable." 42 C.F.R. § 1001.2007(a)(1). The Board has explained that, in determining whether a period of exclusion is "unreasonable," the ALJ is to consider whether such period falls "within a reasonable range." *Cash*, DAB No. 1725 at 10 n.9. The Board cautions that whether the ALJ thinks the period of exclusion too long or too short is not the issue. The ALJ may not substitute his or her judgment for that of the I.G. and may only change the period of exclusion in limited circumstances. I have concluded that two aggravating factors cited by the I.G. are established by the evidence. I have also concluded that Petitioner has failed to meet her burden to show the existence of any mitigating factors that may justify a reduction of the period of her exclusion. Based on Board guidance in prior cases, my authority to alter the period of exclusion is, therefore, limited.

Petitioner argues that the two aggravating factors that exist in this case should be given less weight in determining whether or not the period of her exclusion is unreasonable. P. Br. at 16-22; P. Reply at 10-15. Petitioner argues that the duration of her criminal activity cannot justify extending her exclusion beyond five years and should be given less weight because she suffered from a mental disorder during that time frame and experienced challenging life circumstances. P. Br. at 20-22; P. Reply at 13-14. Petitioner's involvement in the kickback scheme went on for nearly five-and-a-half years. During the span of her criminal activity, Petitioner received approximately $324,100 in cash kickback payments between January 2006 and March 2011. Jt. Stip. ¶ 6. It is not within my authority to substitute my judgment for that of the I.G. in the circumstances of this case. However, if I were to do so, I would be inclined to increase the period of exclusion given the duration of Petitioner's criminal activity and the need to protect the trust fund from Petitioner's future involvement.

Petitioner argues further that because her original prison sentence was reduced from twelve months and one day to nine months and fifteen days, her exclusion period should also be reduced. P. Br. at 17-20; P. Reply at 11-13. According to Petitioner, the reduction was due to her cooperation with the government and shows that the court found her to be trustworthy. P. Br. at 18; P. Reply at 12. The lenient sentence meted out by the district court and the further reduction at the request of the government based on Petitioner's cooperation by turning on her co-conspirator do not reflect that Petitioner was found to be trustworthy by either the judge or the prosecutor. The judge discussed

many considerations in arriving at a sentence and trusting Petitioner was not mentioned. The government's Fed. R. Civ. Pro. 35(b) motion also does not reflect an endorsement of Petitioner's trustworthiness. Furthermore, even Petitioner's reduced sentence of nine months and fifteen days represents a significant term of imprisonment. The Board has determined in another case that a nine-month period of incarceration was "relatively substantial," and supported an eight-year exclusion. *Jason Hollady, M.D.*, DAB No. 1855 at 12 (2002).

Petitioner argues further that she should only be excluded for five years because that period is sufficient to protect program beneficiaries and ensure that she is completely rehabilitated. Petitioner claims that she intends to practice in underserved communities. P. Br. at 25. None of Petitioner's arguments relate to any of the mitigating factors specified under 42 C.F.R. § 1001.102(c), and her "word" is hardly a credible basis for determining that she is now trustworthy.

Based on my de novo review, I conclude that there is a basis for Petitioner's exclusion, and that the evidence establishes the existence of the two aggravating factors that the I.G. relied on to impose the eight-year exclusion. Petitioner has not met her burden to establish the existence of any authorized mitigating factors that would support reducing the period of her exclusion. Accordingly, there is no basis for me to reassess the period of exclusion. I conclude that a period of exclusion of eight years is in a reasonable range and not unreasonable considering the two aggravating factors and the absence of any mitigating factors in this case.

Exclusion is effective 20 days from the date of the I.G.'s written notice of exclusion to the affected individual or entity. 42 C.F.R. § 1001.2002(b). The I.G.'s notice to Petitioner is dated July 31, 2014. Therefore, the effective date of Petitioner's exclusion is August 20, 2014.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of eight years pursuant to section 1128(a)(1) of the Act, effective August 20, 2014.

/s/
Keith W. Sickendick
Administrative Law Judge