Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Ollie Futrell,
(O.I. No. 6-10-40865-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-343

Decision No. CR2901

Date: August 21, 2013

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 *pro se* Ollie Futrell from participation in Medicare, Medicaid, and all other federal health care programs for a period of 15 years. The I.G.'s Motion and determination to exclude Petitioner are based on section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). The undisputed material facts of this case demonstrate that the minimum five-year exclusion must be imposed, and that the I.G.'s determination to enhance that period to 15 years based on proof of 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

On February 8, 2011, the Federal Grand Jury sitting for the United States District Court for the Northern District of Texas handed up a sealed five-count Indictment charging Petitioner Ollie Futrell and four other defendants with a scheme to violate federal statutes intended to protect, among other things, federally-funded health care programs. Futrell herself was charged with Conspiracy to Commit Health Care Fraud, in violation of 18 U.S.C. § 1349, Conspiracy to Defraud the United States and to Receive and Pay Health Care Kickbacks, in violation of 18 U.S.C. § 371, and Payment and Receipt of Health

Care Kickbacks, in violation of 42 U.S.C. §§ 1320a-7b(b)(1) and (b)(2) and 18 U.S.C. § 2. The Indictment also contained the Forfeiture Notice authorized by 18 U.S.C. § 982. Each Count of the Indictment set out a lengthy and elaborate recitation of Petitioner's part in the scheme and the overt acts she and her co-defendants committed between November 2008 and November 2010 in carrying it out. I.G. Ex. 2.

Petitioner and her counsel reached a Plea Agreement with prosecutors. By the terms of that Agreement, signed by all concerned on November 29, 2011, Petitioner pleaded guilty to the Indictment's first count, the violation of 18 U.S.C. § 1349, and proffered a factual recitation of her part in the conspiracy to commit health care fraud. Petitioner specifically acknowledged that her criminal activity had begun in November 2008 and had continued until February 17, 2011. I. G. Exs. 3, 4.

This record does not show the date on which Petitioner tendered her plea of guilty and the District Court accepted it, although both parties assert that the plea was offered on or about the date of the Plea Agreement. What this record does show is that Petitioner appeared with counsel in the District Court on June 28, 2012, and was sentenced to a 33-month term of imprisonment.[1] She was ordered to serve a two-year term of supervised probation following her release from prison, and was ordered — jointly with her codefendants — to pay restitution of $853,702.94 to the District Court, with the funds to be disbursed to the Centers for Medicare & Medicaid Services (CMS) Debt Collection program. She was also ordered to pay an assessment of $100.00. Counts 2, 3, 4, and 5 of the Indictment were dismissed on prosecution motion. I.G. Ex. 5.

On December 31, 2012, the I.G. wrote to Petitioner giving notice that she was to be excluded pursuant to the terms of section 1128(a)(1) of the Act for a period of 15 years. The I.G.'s letter told 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 mailed January 16, 2013.

I convened a prehearing conference by telephone on March 1, 2013, 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, as amended by my subsequent Orders of June 13, 2013 and July 9, 2013, I established a schedule for the submission of documents and briefs.

[1] There is an obvious typographic error on the face of I.G. Ex. 5: it refers to Petitioner's having pleaded guilty to Count "1 of the Indictment filed on February 8, 2012" instead of noting the Indictment's correct filing date, February 8, 2011.

The evidentiary record on which I decide the issues before me contains 11 exhibits. The I.G. proffered five exhibits marked I.G. Exhibits 1-5 (I.G. Exs. 1-5). Petitioner has proffered six exhibits, which she marked Petitioner's Exhibits A-F (P. Exs. A-F). Petitioner's exhibits are obviously not marked in compliance with the plain terms of Civil Remedies Division Procedures § 9 and my Order of March 1, 2013, but given the difficulties and delays inherent in requiring this incarcerated *pro se* Petitioner to resubmit them properly marked, I have admitted all proffered exhibits as marked.

The record in this case closed for purposes of 42 C.F.R. § 1005.20(c) on August 16, 2013.

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. Because Petitioner's predicate conviction is established in the record before me, section 1128(a)(1) of the Act mandates Petitioner's exclusion. A five-year period of exclusion is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B). The enhancement of that period to 15 years is not unreasonable because the three aggravating factors relied on by the I.G. and found at 42 C.F.R. § 1001.102(b)(1), (2), and (5) are established in the record, and because Petitioner has demonstrated no mitigating factor that would reduce the proposed period of her 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 Federal . . . court, regardless of . . . whether the judgment of conviction or other record relating to criminal conduct has been expunged," section 1128(i)(1) of the Act; "when there has been a finding of guilt against the individual . . . by a Federal . . . court," section 1128(i)(2) of the Act; "when a plea of guilty or nolo contendere by the individual . . . has been accepted by a Federal . . . court," section 1128(i)(3) of the Act; or "when the individual . . . has entered into participation in a . . . deferred adjudication . . . program where judgment of conviction has been withheld," section 1128(i)(4) of the Act. 42 U.S.C. §§ 1320a-7(i)(1)-(4). 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 15 years.

In cases such as this, when the I.G. proposes to enhance the period of exclusion by relying on one or more 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).

IV. Findings and Conclusions

I find and conclude as follows:

1. On her plea of guilty in the United States District Court for the Northern District of Texas, Petitioner Ollie Futrell was found guilty of Conspiracy to Commit Health Care Fraud, in violation of 18 U.S.C. § 1349. I.G. Ex. 5.

2. Petitioner was sentenced on her guilty plea and judgment of conviction was entered against her in the District Court on June 28, 2012. As part of her sentence, Petitioner was ordered to serve a 33-month term of imprisonment, and was ordered to pay restitution to the CMS Debt Collection program in the sum of $853,702.94. I.G. Ex. 5.

3. The judgment of conviction and finding 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.

4. A nexus and a common-sense connection exist between the criminal offenses of which Petitioner was convicted, as noted above in Findings 1, 2 and 3, and the delivery of an item or service under the Medicare and Medicaid programs. I.G. Exs. 7, 8; *Berton Siegel, D.O.*, DAB No. 1467 (1994).

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

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

7. 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.

8. 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.

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

10. The I.G.'s exclusion of Petitioner for a period of 15 years is supported by fact and law. It is within a reasonable range and is therefore not unreasonable. Findings 1-10 above.

11. 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 proven by the evidence before me.

Petitioner's conviction is shown by I.G. Ex. 5. The date of the proceeding in which Petitioner's plea of guilty was tendered and accepted by the District Court is absent from the evidence tendered by the I.G., but those events can be inferred from the District Court's June 28, 2012 Judgment of Conviction. Nevertheless, I.G. Ex. 5 reflects events that satisfy 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 Medicare program. Petitioner admitted that she acted as a recruiter of patients for Alliance Healthcare Services, L.P. (Alliance), a home health agency and Medicare participant. Alliance's owners and employees conspired to defraud Medicare by falsely certifying the majority of its patients as eligible for home health care benefits under the Medicare program. Petitioner conducted her recruiting efforts by paying monthly bribes or kickbacks to those ineligible patients to assure that they remained Alliance patients, thereby assuring that Alliance continued to receive Medicare payments for those fraudulent claims. I.G. Exs. 2, 3, 4. The submission of false claims to the Medicaid or Medicare programs has consistently been 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).

In challenging the I.G.'s proof of the second element, Petitioner argues that "In Futrell's case there are no probative facts regarding providing service or medical necessities. She did not contribute to any falsification of claims. There are no consciousness of guilt [sic] regarding providing services." P. Ans. Br. at 10. She buttresses this argument by pointing out that she was neither an officer of Alliance nor bore it a fiduciary responsibility. That argument is unavailing because the statute requires only that the conviction be for conduct "related to the delivery of an item or service" in a protected program. *James Randall Benham*, DAB No. 2042 (2006). In this case, it is no more than fair to point out that Petitioner's conduct was related to Alliance's swindling of Medicare by the fact that she recruited the "raw material" for the scheme, those ineligible patients in whose names Alliance billed Medicare. Her claim that "Petitioner Futrell was not aware of Alliances [sic] fraud scheme," made and elaborated in her Answer Brief at pages 5-6, is directly contradicted by her written and signed admissions in the District Court. I.G. Exs. 3, 4. I find the admitted facts of Petitioner's offense demonstrate the required nexus and common-sense connection between the criminal acts and the Medicare and Medicaid programs. *Berton Siegel, D.O.*, DAB No. 1467. The second essential element is established.

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 15 years. Although Petitioner's briefing is not always clear, it does obviously object to the length of the period, and so must first be construed to challenge 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. This factor has been proven here. The District Court records show that Petitioner and her convicted codefendants were jointly obliged to pay restitution to the CMS Debt Collection program in the sum of $853,702.94. I.G. Ex. 5. The record before me does not disclose how large a share of the ordered restitution has been paid by Petitioner, but the relevant figure is the total amount of restitution ordered, not the amounts individually paid by the individual codefendants. 42 C.F.R. § 1001.102(b)(1). The actual amount of restitution ordered has long been considered a reasonable measure of program losses. *See Jason Hollady, M.D.*, DAB No. 1855 (2002). Petitioner's crimes caused the Medicare and Medicaid programs financial losses vastly in excess of the $5000 threshold for aggravation. The Departmental Appeals Board (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, Ph.D.*, DAB No. 1865 (2003). The calculated abuse of the protected programs in the sum shown here — a peculation more than one-hundred-seventy times the threshold amount — more than justifies a significant increase in the period of exclusion, even if the I.G. could prove no other aggravating factors.

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." The Count of the Indictment to which Petitioner pleaded guilty sets the span of Petitioner's crime from November 2008 to November 2010, and her Factual Resume of November 29, 2011 makes it even longer, from November 1, 2008 until February 17, 2011. I.G. Exs. 2, 4. The "duration of offense" factor is clearly present here, and its span as admitted by Petitioner projects a course of practiced conduct far more persistently dishonest than the "short-lived lapse of integrity" to which the Board alluded in *Burstein*, DAB No. 1865, at 8. The duration of Petitioner's illegal conduct renders it obvious that the need to protect the programs from Petitioner would — even in the hypothetical absence of any other aggravating factors — amply support a substantial 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 sent to prison for a total of 33 months. I.G. Ex. 5. The "incarceration" aggravating factor is present here, and it is far more significant than a token term spent in jail or under house arrest. Petitioner is serving her sentence in a federal correctional institution: she will

serve it there for nearly three years. The sentence underscores the District Court's serious view of Petitioner's crime. I adopt that serious view. The length of Petitioner's prison term is sufficient, in and of itself, to justify a considerable increase in the period of exclusion.

Evidence relating to aggravating factors may be countered by evidence relating to any of the mitigating factors set forth at 42 C.F.R. § 1001.102(c)(1)-(3). Since any petitioner's invocation of a mitigating factor is in the nature of an affirmative defense, the petitioner who claims the factor 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 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). As I have written above, Petitioner objects to the enhanced period of her exclusion, but she has not met that burden of proof: Petitioner has shown nothing in this record that could constitute a mitigating factor.

Although she does not explicitly rely on any of the factors defined by regulation, she does complain that "Futrell's exclusion is constitutionally unfair by the Equal Protection of the law." She offers the assertion that "Alliance owners and employees have been defrauding the government before Ms. Futrell came to know them" and by this assertion presumably suggests that she was not the most blameworthy of the conspirators. P. Ans. Br. at 7-8. These claims do not invoke any of the mitigating factors defined and enumerated at 42 C.F.R. § 1001.102(c)(1)-(3). Nothing I have found in this record hints at the presence of any of those enumerated and defined mitigating factors, and Petitioner is entitled to claim none of the mitigating factors set out at 42 C.F.R. § 1001.102(c)(1)-(3).

The remainder of Petitioner's challenges amount to efforts to minimize her role in the conspiracy she admitted to sharing with the other Alliance figures, to other collateral attacks on her conviction, and to exercises in impugning the fairness of the proceedings surrounding it. Those challenges 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 (2000); *Chander Kachoria, R.Ph.*, DAB No. 1380, at 8 (1993).[2]

[2] I also find that Petitioner was well aware that her plea of guilty would result in her exclusion from the Medicare and Medicaid programs. Page 5 of her Plea Agreement reads in part:

> Futrell understands and acknowledges that as a result of this plea, she will

But even though the I.G. has proven the aggravating factors exactly as alleged, and even though Petitioner has failed to prove even a single mitigating factor, Petitioner's claim that the 15-year length of her exclusion is unreasonably long raises an issue that may have recently grown more complex.

Formerly, the Administrative Law Judge (ALJ) evaluating such a claim was guided by a settled line of authority in doing so and the I.G.'s discretion when weighing the importance of aggravating and mitigating factors commanded great deference. *Jeremy Robinson*, DAB No. 1905; *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); *Stacy Ann Battle, D.D.S., et al.*, DAB No. 1843 (2002). The rationale for that doctrine was anchored by the drafters of the regulations in the I.G.'s "vast experience" in implementing exclusions. 57 Fed. Reg. 3298-3321 (January 24, 1992). According to that doctrine, an ALJ might not substitute his or her own view of what period of exclusion might seem 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 the ALJ discovered some meaningful evidentiary failing in the aggravating factors upon which the I.G. relied, or when the ALJ was shown evidence reliably establishing a mitigating factor not considered by the I.G. in setting the enhanced period. *Jeremy Robinson*, DAB No. 1905.

That line of authority appeared to have been modified by the Board's decision in *Craig Richard Wilder, M.D.*, DAB No. 2416 (2011). Although the *Wilder* ALJ found that the I.G. had considered all proven aggravating and mitigating factors, and although the Board acknowledged that there were no differences whatsoever 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 the period might conform more satisfactorily to what the Board considered best. In doing so, the Board implicitly rejected the I.G.'s and the ALJ's assessment of the *value* of Wilder's cooperation and, on exactly the same evidence, substituted its own assessment.

> be excluded from Medicare, Medicaid, and all Federal health programs. Futrell agrees to complete and execute all necessary documents provided by any department or agency of the federal government, including but not limited to the United States Department of Health and Human Services, to effectuate this exclusion within 60 days of receiving the documents.

I.G. Ex. 3, at 5 ¶ 12.

The Board returned to this issue in *Vinod Chandrashekhar Patwardhan, M.D.*, DAB No. 2454 (2012). That decision failed to mention *Wilder*, and seemed at least to pay lip-service to the *Robinson-Everman-Battle-Cash* line of authority. But it also affirmed — on proof of the same three aggravating factors here proven, and in the absence of any mitigating factors, as here — the ALJ's reduction of the I.G.'s proposed 23-year period of exclusion to 12 years. And eight months later the Board decided *Sushil Anniruddh Sheth*, DAB No. 2491 (2012), and there set out at length both its theoretical justification for its *de novo* review of enhanced periods of exclusion in general and the specific rationale for its *de novo* determination that a 95-year period was unreasonable, but that a 60-year period was best. The Board accomplished this substitution of judgment on the same evidence considered by the I.G. who set the 95-year term, and examined in detail with approval by the ALJ who found the 95-year period perfectly reasonable and declined to reduce it.

Do *Wilder*, *Patwardhan*, and *Sheth* announce the Board's assumption of a new authority in overseeing the I.G.'s application of his "vast experience," and do *Wilder*, *Patwardhan*, and *Sheth* vest the ALJ with discretion to alter — that is, <u>to lengthen or to shorten</u> — the period determined by the I.G? It is impossible for me not to conclude that the *Robinson-Everman-Battle-Cash* line of authority has been overruled *sub silentio* by *Wilder*, *Patwardhan*, and now, *Sheth*. I have suggested as much in *Anthony Lynn Hester*, DAB CR2529, at 9 (2012); *Edward Alexander Birts*, DAB CR2516, at 9, n.1 (2012) and *Marcellius Jhekwuoba Anunobi*, DAB CR2480, at 10 (2012), cases in which, as here, each Petitioner appeared *pro se*. Those decisions were not appealed to the Board (although *Anunobi* was cited by the Board without obvious disapproval in *Sheth*) and no further explication of *Wilder*, *Patwardhan*, and *Sheth* is available in any other Board decision to date. But if the *Robinson-Everman-Battle-Cash* rule has been abandoned and no longer restricts an ALJ's considering what term of exclusion might be best on the facts of record, I can see no reason why an ALJ now lacks the authority <u>to lengthen as well as to shorten</u> the term proposed by the I.G. Were it not for the fact that this Petitioner appears *pro se* this case presents an attractive opportunity to exercise that authority and lengthen the period of this exclusion. An array of cases including *Mark A. Maher*, DAB CR678 (2000); *Golden G. Higgwe, D.P.M.*, DAB CR1229 (2004); *Peggy A. Bisig, a/k/a Peggy A. Fritz*, DAB CR1416 (2006); *Dinesh Dayabhai Shah*, DAB CR2143 (2010); and *Edward Alexander Birts*, DAB CR2516 (2012) suggests that this 15-year exclusion falls short of a "reasonable range" and would be best lengthened.

But here it is enough to repeat that all three of the aggravating factors pleaded by the I.G. have been established 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 and a menace to the protected health care programs. She is a felon convicted of a crime characterized by fraud as a goal, and by persistent, deliberate, coordinated, dishonest activity as a means. Her crimes constituted an eight-hundred-fifty-thousand dollar attack on Medicare's financial resources. She demonstrated a

constancy of purpose and a consistency of method in doing so: her conspiracy spanned at least two years. Her crime was serious enough to earn a sentence of 33 months in prison. Perhaps most significantly, it will be noted that by bribing ineligible patients to join Alliance and remain on its roster, she suborned the criminal acts of many others, thus adding exponentially to the evidence that she is untrustworthy and a proven danger to the protected programs.

Given these considerations, the 15-year term of Petitioner's exclusion is not unreasonably long. Comparison with other cases is of limited utility and is certainly not controlling, but that comparison can illustrate what a reasonable range has been understood to mean when the ALJ examines an exclusion longer than the statutory minimum. *Paul D. Goldenheim, M.D., et al.*, DAB No. 2268, at 29 (2009). The length of this exclusion is commensurate with the range established as reasonable in *Russell Mark Posner*, DAB No. 2033; *Stacey R. Gale*, DAB No. 1941; *Jeremy Robinson*, DAB No. 1905; *Thomas D. Harris*, DAB No. 1881 (2003); *Fereydoon Abir, M.D.*, DAB No. 1764 (2001); and *Joann Fletcher Cash*, DAB No. 1725.

I note once more that Petitioner appears here *pro se*. Because of that I have borne in mind the Board's admonition 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.[3]

Resolution of a case by summary disposition is 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 Rule 56 of the Federal Rules of Civil Procedure 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.

---

[3] Petitioner's final brief devotes much argument to a discussion of *Alleyne v. United States*, 133 S. Ct. 2151 (June 17, 2013). That case has no application here, since it deals with factors involved in determining sentences in federal criminal convictions. These proceedings are not criminal, and the exclusion here at issue is not a criminal sentence but a civil measure, remedial in nature. *W. Scott Harkonen, M.D.*, DAB No. 2485 (2012); *Susan Malady, R.N.*, DAB No. 1816 (2002); *Narendra M. Patel, M.D.*, DAB No. 1736 (2000); *Joann Fletcher Cash*, DAB No. 1725 .

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 Ollie Futrell from participation in Medicare, Medicaid, and all other federal health care programs for a period of 15 years pursuant to the terms of section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), is sustained.

_____/s/_____
Richard J. Smith
Administrative Law Judge