Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Michael J. Vogini, D.O.
(O.I. File No. H-12-40480-9),

Petitioner,

v.

The Inspector General,
Department of Health and Human Services.

Docket No. C-13-1229

Decision No. CR3118

Date: February 12, 2014

DECISION

Petitioner, Michael J. Vogini, D.O., is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to sections 1128(a)(1), (a)(2), and (a)(4) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1), (a)(2), (a)(4)), effective August 20, 2013. Petitioner's exclusion for five years is required by section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)). An additional period of exclusion of 20 years, for a total period of exclusion of 25 years,[1] is not unreasonable based upon the four aggravating factors established in this case and the absence of any mitigating factors.

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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, 2013, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of 25 years. The I.G. advised Petitioner that he was being excluded pursuant to sections 1128(a)(1), (a)(2), and (a)(3) of the Act based on his conviction in the Court of Common Pleas of Alleghany County, Pennsylvania, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program; of a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service; and of a felony criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance as defined under federal or state law. The I.G. considered four aggravating factors and no mitigating factors when deciding to extend the five-year statutory period of exclusion to 25 years. I.G. Exhibit (I.G. Ex.) 8.

Petitioner timely requested a hearing by letter dated August 4, 2013 (RFH). The case was assigned to me on August 29, 2013 for hearing and decision.. A prehearing telephone conference was convened on September 19, 2013, the substance of which is memorialized in my order dated the same day. During the prehearing conference, Petitioner waived an oral hearing and agreed to proceed upon the documentary evidence and the parties' briefs. On November 4, 2013, the I.G. filed a motion for summary judgment, a brief in support of summary judgment (I.G. Br.), along with I.G. Exs. 1 through 13.[2] Petitioner filed a brief in opposition (P. Br.) on December 16, 2013, with an unmarked 12-page attachment. I treat the attachment as Petitioner's Exhibit (P. Ex.) 1. The I.G. filed a reply brief (I.G. Reply) on January 3, 2014. Neither party objected to any of the offered exhibits. Thus, I.G. Exs. 1 through 13 and P. Ex. 1 are admitted as evidence.

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[2] The I.G. initially filed I.G. Exs. 1 through 4 that were not properly marked as exhibits. The I.G. filed correctly marked I.G. Exs. 1 through 4 on November 5, 2013. This decision refers to the correctly numbered version of these exhibits filed on November 5, 2013.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's rights 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) of the Act, 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; related to the neglect or abuse of a patient in connection with the delivery of a health care item or service under Medicare or state health care program; or that is a felony related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Act § 1128(a)(1), (a)(2), and (a)(4). The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(a), (b), and (d).

Section 1128(c)(3)(B) of the Act 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 that 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 minimum five-year period is extended. 42 C.F.R. § 1001.102(b), (c).

The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that provides 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 sections 1128(a)(1), (a)(2), and (a)(4) of the Act.**

There is no dispute that Petitioner timely filed his request for hearing on August 4, 2013, and that I have jurisdiction pursuant to section 1128(f) of the Act and 42 C.F.R. pt. 1005. Petitioner waived appearance at an oral hearing electing to procedure on the documentary evidence and written argument. 42 C.F.R. § 1005.6(b)(5). Accordingly, it is unnecessary to follow summary judgment procedures and I proceed to a decision on the merits.

Petitioner does not dispute that he pled no contest to one count of violating section 2506(a) of Title 18 of the Pennsylvania Statutes, which prohibits the illegal delivery of a controlled substance that results in death. I.G. Ex. 4; at 1; I.G. Ex. 6, at 4. He also does not dispute that he pled guilty to fifteen other offenses, including:

- Seven counts of violating section 780-113(a)(14) of Title 35 of the Pennsylvania Statutes, which prohibits failure to act in good faith in the course of professional practice, and/or acting outside the scope of doctor-patient relationship, and/or prescribing controlled substances not in accordance with treatment principles accepted by a responsible segment of the medical profession; by unlawfully prescribing controlled substances between June 2005 and October 2008;

- Four counts of violating section 780-113(a)(13) of Title 35 of the Pennsylvania Statutes, which prohibits the prescription of controlled substances, in the capacity of a licensed practitioner, to an individual that the practitioner knows or has reason to know was a drug-dependent person; by prescribing controlled substances to persons he knew or had reason to know were drug dependent between June 2005 and October 2008;

- Three counts of violating section 1407(a)(6) of Title 65 of the Pennsylvania Statutes, which prohibits the referral of any Medical Assistance (Pennsylvania Medicaid) recipient by prescription for a controlled substance that was not documented in the record in the prescribed manner and were of little or no benefit to the recipient, and/or were below the accepted medical treatment standards, and/or were unneeded by the recipient; by referring individuals by prescriptions for controlled substances to pharmacies and the controlled substances were not documented in the record in the prescribed manner; were of little or no benefit to

the recipient or were unneeded; and/or were below accepted medical treatment stand during the period December 2001 through May 2006; and

- One count of violating section 903(a)(1) of Title 18 of the Pennsylvania Statutes, which prohibits conspiring to commit another crime; by conspiring with others to violate the Controlled Substance, Drug, Device, and Cosmetic Act with the commission of the overt act of unlawfully prescribing controlled substances during the period 1999 through August 2008.

I.G. Ex. 4; I.G. Ex. 6, at 4-9. Before his guilty pleas were accepted by the judge in the Pennsylvania Court of Common Pleas, Petitioner was required to acknowledge in writing that by pleading guilty he admitted to committing the acts alleged in the criminal information which is in evidence before me as I.G. Ex. 4. I.G. Ex. 5, at 1, 4. Petitioner cannot deny before me that by his guilty pleas he admitted that between June 2005 and October 2008, he illegally prescribed controlled substances to seven individuals; between June 2005 and October 2008, he illegally prescribed controlled substances to four individuals that he knew or should have known were drug dependent; between December 2001 and May 2006, he referred three Medicaid recipients by prescription to various pharmacies for the distribution of unnecessary controlled substances; and between 1999 and August 2008, he conspired with three individuals to engage in conduct that violated the Pennsylvania Controlled Substance, Drug, Device, and Cosmetic Act, and that he committed the required overt act by prescribing controlled substances in furtherance of the criminal conspiracy.[3] I.G. Ex. 4.

Petitioner cannot dispute that on January 23, 2012, based on his pleas of no contest to one count and guilty to fifteen others, the Court of Common Pleas of Alleghany County, Pennsylvania sentenced him to incarceration for six to twelve years followed by ten years of probation. I.G. Ex. 7. It is also undisputed that on March 22, 2012, as a result of Petitioner's criminal conviction, the Pennsylvania Board of Osteopathic Medicine entered an order of automatic suspension of Petitioner's license to practice osteopathic medicine in that state retroactive to February 16, 2012. I.G. Exs. 11-13.

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[3] The I.G. also alleges that Petitioner engaged in a sex-for-drugs scheme whereby he agreed to prescribe controlled substances to female patients in exchange for sex acts. I.G. Br. at 2-3. The only evidence supporting these allegations are Grand Jury Presentments submitted by the I.G. I.G. Exs. 2; 3. I give the Grand Jury Presentments no weight as the allegations contained in the Presentments were not proven at trial or admitted by Petitioner. There is also no need in this case to grant the I.G. a hearing to attempt to prove the allegations.

The I.G. cites sections 1128(a)(1), (a)(2), and (a)(4) 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.
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> (2) Conviction relating to patient abuse. – Any individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.
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> * * * *
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> (4) Felony conviction relating to controlled substance. – Any individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

Act § 1128(a)(1), (a)(2), (a)(4).

For an exclusion pursuant to section 1128(a)(1), the Act requires that the Secretary exclude from participation in Medicare, Medicaid, and all federal health care programs any individual or entity: (1) convicted of a criminal offense; (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 does not dispute that he was convicted within the meaning of section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)) when the trial court accepted his plea of no contest to one count of delivery of a controlled substance resulting in death and his pleas of guilty to fifteen other counts of various criminal offenses related to his unlawful prescription of controlled substances. I.G. Ex. 6. Pursuant to section 1128(i) of the Act, an individual is "convicted" of a criminal offense when, among other things, a plea of guilty or no contest has been accepted in a federal, state, or local court. Act § 1128(i)(3). Among the charges to which

Petitioner pled guilty were three counts of unlawfully referring Medicaid recipients by prescription to various pharmacies for the distribution of unnecessary controlled substances. I.G. Ex. 4, at 5-6. The unlawful prescription of unnecessary controlled substances to Medicaid recipients is related to the delivery of a health care item or service under a state health care program because the acts were committed by Petitioner in his capacity as a licensed physician, and I infer that the Pennsylvania Medicaid program, a state health care program under section 1128(h) of the Act, covered the cost of those unlawfully prescribed medications that Petitioner prescribed for three Medicaid recipients. Petitioner does not dispute this. Accordingly, all three elements of section 1128(a)(1) of the Act are met, and there is a basis for Petitioner's exclusion under that section.

For an exclusion pursuant to section 1128(a)(2), the Act requires that the Secretary exclude from participation in Medicare, Medicaid, and all federal health care programs any individual or entity: (1) convicted of a criminal offense under federal or state law; (2) the conviction was related to the neglect or abuse of patients; and (3) the patient neglect or abuse occurred in connection with the delivery of a health care item or service. Among the offenses for which Petitioner was convicted were four counts of unlawfully providing controlled substances to individuals that Petitioner knew or should have known were drug dependent. As I previously explained in *Christine Dusenberry*, DAB CR2491, at 6-7 (2012), the definition of "abuse" in 42 C.F.R. § 488.301 should be applied to that term as used in section 1128(a)(2) of the Act, in the absence of another definition promulgated by the Secretary or the I.G. Thus, "abuse" means "the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish." 42 C.F.R. § 488.301. Here, Petitioner's conduct was related to the "abuse" of patients because he disregarded his patients' drug dependency and prescribed addictive Schedule II, III, IV, and V controlled substances, facilitating those patients' addictions. Knowingly engaging in conduct that furthered his patients' known drug dependency amounted to Petitioner's willful infliction of harm on those patients that had the potential to worsen their addiction or cause physical harm and mental anguish. Petitioner does not argue otherwise. In addition, it is undisputed that Petitioner's conduct was done through his role as a licensed physician, and thus was in connection with the delivery of a health care item or service. Accordingly, all three elements of section 1128(a)(2) of the Act are met, and there is a basis for Petitioner's exclusion under that section.

For an exclusion pursuant to section 1128(a)(4), the Act requires that the Secretary exclude from participation in Medicare, Medicaid, and all federal health care programs any individual or entity: (1) convicted of a felony criminal offense under federal or state law; (2) where the offense occurred after August 21, 1996; and (3) the criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. All of the offenses for which Petitioner was convicted directly related to his unlawful prescription of controlled substances to various patients.

Beginning in 1999, he conspired to prescribe controlled substances to some of his patients, and for nearly nine years thereafter, he prescribed Schedule II, III, IV, and V controlled substances to those patients – including Medicaid recipients and drug dependent patients – that had no medical necessity whatsoever, in violation of Pennsylvania's Controlled Substance, Drug, Device, and Cosmetic Act. Twelve of the unlawful prescription offenses for which Petitioner was convicted were felonies ranging from first to third degree. Again, Petitioner does not dispute this, and, in fact, admitted to such felonious conduct by his guilty pleas. Accordingly, all three elements of section 1128(a)(4) of the Act are met, and there is a basis for Petitioner's exclusion under that section as well.

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

I have concluded that a basis exists to exclude Petitioner pursuant to sections 1128(a)(1), (a)(2), and (a)(4) of the Act. Therefore, the I.G. must exclude Petitioner for a minimum period of five years pursuant to section 1128(c)(3)(B) of the Act. The I.G. has no discretion to impose a lesser period and I may not reduce the period of exclusion below five years. The remaining issue is whether it is unreasonable to extend his period of exclusion by an additional 20 years.

My determination of whether the exclusionary period in this case is unreasonable turns on whether: (1) the I.G. has proven that there are aggravating factors; (2) Petitioner has proven that there are mitigating factors 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 that there is a basis for his exclusion, but he argues that his 25-year exclusion is unreasonable. RFH; P. Br. at 4. Petitioner contends that much of the evidence that the I.G. relies on to establish four aggravating factors is drawn from the Grand Jury Presentments, which were based on witness testimony before a grand jury that was never subject to cross-examination, never proven at trial, and never admitted by Petitioner's pleas. P. Br. at 4-6. The thrust of Petitioner's argument is that the I.G. cannot rely on "unreliable" evidence to establish the presence of certain aggravating factors. P. Br. at 4-6. I agree with Petitioner that the I.G. cannot meet its burden by reliance upon grand jury findings that were not specifically recited in any charge to which Petitioner pled guilty or for which Petitioner was found guilty. There is nothing in the record that sufficiently establishes Petitioner admitted — through prior statements or his guilty plea — to many of the facts alleged by the I.G. in its brief. The I.G. cites *Craig Richard Wilder*, DAB No. 2416, at 10 (2011) to suggest that he may rely on "underlying criminal documents" (presumably including the Grand Jury Presentments here) to establish surrounding facts by a preponderance of the evidence. But the I.G. overlooks that the Board in *Wilder* referred to the charging document and specific charge to which

Mr. Wilder pled guilty without modification. *Wilder*, DAB No. 2416, at 10. The Board found that Mr. Wilder admitted to the conduct recited in the specific charge when he pled guilty to it and did not offer a differing factual basis for his plea. *Id.* Here, the I.G. attempts to rely on allegations in the Grand Jury Presentments for many of his arguments. However, many of the statements in the Grand Jury Presentments, including those describing the alleged sex-for-drugs scheme, were not expressly included in the specific charges against Petitioner and to which he eventually pled guilty. Therefore, I consider only the charges to which Petitioner pled no contest or guilty in assessing whether the period of exclusion is unreasonable.[4]

4. Four aggravating factors exist that justify extending the minimum period of exclusion to 25 years.

The I.G. notified Petitioner that four aggravating factors are present in this case that justify an exclusion of more than five years: (1) the acts resulting in Petitioner's conviction occurred over a period of one year or more, as Petitioner admitted in his guilty plea that his criminal conduct occurred from December 2001 to October 2008; (2) the acts resulting in Petitioner's conviction had a significant adverse physical, mental, or financial impact on one or more individuals because a patient died as a result of taking medication that Petitioner prescribed; (3) the sentence imposed by the court included incarceration of 6 to 12 years; and (4) Petitioner has been subject to an adverse action by a federal, state, or local government agency or board, and the adverse action is based on the same set of circumstances that served as the basis for the imposition of the exclusion because the Pennsylvania Board of Osteopathic Medicine suspended his medical license as a result of his conviction. I.G. Ex. 8, at 2. The aggravating factors cited by the I.G. are four aggravating factors recognized by the regulations that may serve as a basis for extending the period of exclusion. 42 C.F.R. § 1001.102(b)(2), (b)(3), (b)(5), (b)(9).

Petitioner pled guilty to a conspiracy to violate Pennsylvania's Controlled Substance, Drug, Device, and Cosmetic Act during the period 1999 and August 2008. I.G. Ex. 4, at 6. Petitioner pled guilty to seven counts of unlawfully prescribing controlled substances from June 2005 to October 2008. I.G. Ex. 4, at 1-3. He pled guilty to four counts of

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[4] The I.G. moved for summary judgment and has not specifically requested the opportunity to present evidence to prove by a preponderance of the evidence in a de novo hearing before me the allegations from the Grand Jury Presentments (I.G. Exs. 2, 3) that were not subject to trial or admitted by Petitioner's pleas. Furthermore, the aggravating facts are established by other evidence and no hearing on the allegations from the Grand Jury Presentments is necessary, even if, the I.G. urged me to provide such a hearing.

unlawfully prescribing controlled substances to drug dependent persons. I.G. Ex. 4 at 4-5. Petitioner also pled guilty to three counts of prescribing unnecessary controlled substances to Medicaid recipients from December 2001 to May 2006. I.G. Ex. 4, at 5-6. The facts Petitioner admitted by his guilty pleas clearly demonstrate that his criminal conduct lasted one year or more. Petitioner argues that the "information used to determine this [aggravating factor] was Grand Jury testimony. This testimony was untested and unchallenged . . . ." P. Br. at 5. But it is not necessary for me to consider the Grand Jury Presentments (I.G. Exs. 2, 3) in concluding that Petitioner's crimes occurred over a period of one year or more. 42 C.F.R. § 1001.102(b)(2).

The I.G. argues that two facts support the second aggravating factor, *i.e.*, that Petitioner's criminal conduct had a significant adverse impact on an individual. 42 C.F.R. § 1001.102(b)(3). First, the I.G. claims that Petitioner's conduct resulted in the death of one of his patients and cites to the Grand Jury Presentments for support. I.G. Br. at 17. Second, the I.G. also points out that Petitioner's conduct furthered the drug dependency of six of his patients, again relying on findings in the Grand Jury Presentments to demonstrate that Petitioner's conduct in this regard caused at least one of his patients to relapse into drug addiction. Again, Petitioner disputes that he caused the death of one of his patients and argues that the I.G.'s use of Grand Jury Presentments is improper. Petitioner submitted a report from another physician who reviewed that patient's autopsy report and determined that the controlled substances that Petitioner prescribed was not the cause of death of that patient. P. Ex. 1. As explained above, I agree with Petitioner that the I.G. may not rely on the Grand Jury Presentments in this case because Petitioner did not admit to the facts alleged in that document.

Nevertheless, the I.G. has presented other evidence that establishes this aggravating factor by a preponderance of the evidence, namely the charging documents, Petitioner's no contest and guilty pleas; and Petitioner's conviction. I.G. Exs. 4, 5, 6. By statute and regulation, a "conviction" includes when a federal, state, or local court "has accepted a plea of guilty or nolo contendre by an individual or entity." Act § 1128(i); 42 C.F.R. § 1001.2. The regulation also states that "[w]hen an exclusion is based on the existence of a criminal conviction . . . 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). In addition, the aggravating factor at 42 C.F.R. § 1001.102(b)(3) refers to the "acts that resulted in the conviction, or similar acts . . . ." Here, Petitioner entered a plea of no contest to prescribing controlled substances that resulted in the death of a patient. I.G. Ex. 3. His no contest plea means that he was "convicted" of that offense for purposes of this proceeding. Act § 1128(i); 42 C.F.R. § 1001.2. The "acts that resulted in the conviction" for purposes of establishing the aggravating factor at 42 C.F.R. § 1001.102(b)(3) necessarily include the specific facts recited in the charge for which Petitioner was convicted. Therefore, the "acts that resulted in the conviction" include that he unlawfully prescribed controlled substances, and a patient referred to as B.S. "died as a result of

using the substances . . . ." I.G. Ex. 4, at 1.[5] It is beyond dispute that the death of an individual is a "significant adverse physical . . . impact" on that individual. In addition, Petitioner admitted through his guilty plea that he unlawfully prescribed controlled substances to individuals he knew or should have known were drug dependent. Even though there is no direct evidence demonstrating that Petitioner's conduct furthered the drug addiction of those drug-dependent individuals, a reasonable inference based the nature of the offense, and one that I draw here, is that Petitioner contributed to ongoing drug dependency for those individuals which was a significant adverse physical impact on them. Therefore, Petitioner's conviction for unlawfully prescribing controlled substances that resulted in the death of an individual and his conviction for unlawfully prescribing controlled substances to individuals who he knew or should have known were drug dependent, sufficiently establish the second aggravating factor cited by the I.G. under 42 C.F.R. § 1001.102(b)(3).

Petitioner does not dispute that he was sentenced to imprisonment for a period of six to twelve years. I.G. Ex. 7, at 1; P. Br. at 5. Based on the evidence before me, I conclude the third aggravating factor cited by the I.G. is established. 42 C.F.R. § 1001.102(b)(5).

Petitioner also does not dispute that as a result of his conviction, the Pennsylvania Board of Osteopathic Medicine suspended his license to practice medicine in the state. Petitioner argues that the potential loss of his license will be for less time than the 25-year exclusion, claiming that he can reapply for his license after only 10 years. P. Br. at 6. However, the suspension of Petitioner's medical license is an adverse action taken by a board that was based on the same set of circumstances that are the basis for Petitioner's exclusion. I.G. Ex. 13. Accordingly, the evidence before me establishes the fourth aggravating factor cited by the I.G. 42 C.F.R. § 1001.102(b)(9).

I conclude that the I.G. established four aggravating factors, and the I.G. was authorized by the Secretary to rely upon these factors as a basis for extending Petitioner's exclusion by 20 years.

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[5] The physician's report that Petitioner submitted with his brief is entitled to no weight before me because it is a collateral attack on the substance of Petitioner's underlying criminal conviction. Petitioner is prohibited from arguing before me that he was not properly convicted; or that his pleas were improvident or not consistent with the facts he admitted by his guilty pleas or the admission of his no contest plea that the prosecution could present enough evidence to secure Petitioner's conviction at trial. 42 C.F.R. § 1001.2007(d).

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

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 listed in 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;
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> (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,
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> > (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 has the burden to prove by a preponderance of the evidence that there is a mitigating factor for me to consider. 42 C.F.R. § 1005.15(b)(1).

Petitioner argues there are two mitigating factors: first, that by agreeing to a plea deal, he saved the state the time and expense of having to put on a two-week trial, which he views as "cooperation" with government officials; and second, that his conduct did not result in "any significant loss by Federal or State funded programs." P. Br. at 6. Pleading guilty and avoiding a trial is not the type of "cooperation" recognized as a mitigating factor by

the regulation. 42 C.F.R. § 1001.102(c)(3). Petitioner has not presented any evidence that his "cooperation" had any of the results described in the regulation. Regarding the second alleged mitigating factor, Petitioner cannot dispute that he was convicted of 16 offenses, 13 more than the mitigating factor established by 42 C.F.R. § 1001.102(c)(1), which is the only mitigating factor that permits consideration of governmental loss. [6]

Accordingly, I conclude that Petitioner has failed to establish any mitigating factor that I am permitted to consider to reduce the period of his exclusion.

6. Exclusion for 25 years is not unreasonable in this case

The Board has 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 identified at 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 17, 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 17, 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.

In *John (Juan) Urquijo*, DAB No. 1735 (2000), the Board made clear that, if the I.G. considers an aggravating factor to extend the period of exclusion and that factor is not later shown to exist on appeal, or if the I.G. fails to consider a mitigating factor that is shown to exist, then the ALJ may make a decision as to the appropriate extension of the period of exclusion beyond the minimum. In *Gary Alan Katz, R.Ph.*, DAB No. 1842 (2002), the Board suggests that, when it is found that an aggravating factor considered by the I.G. is not proved before the ALJ, then some downward adjustment of the period of exclusion should be expected absent some circumstances that indicate no such adjustment is appropriate.

I have found that four aggravating factors cited by the I.G. are established and that no mitigating factors have been established by Petitioner. Petitioner argues that one of the

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[6] Petitioner also failed to submit any evidence showing the loss to the government was less than $1,500. P. Br. at 6.

aggravating factors should not be given much weight in determining the reasonableness of a 25-year exclusion. P. Br. at 5-6. Petitioner argues that his sentence to imprisonment for 6 to 12 years should not be given any more weight than if he had been sentenced to incarcerated for only 6 to 12 months, citing *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491 (2012), for support. Petitioner goes on to argue that he was "sentenced using the lowest gravity scores possible." P. Br. at 5. Petitioner misreads *Sheth*, wherein the Board clarified that the aggravating factor is the imposition of confinement, not the duration of confinement. DAB No. 2491, at 9. The Board did not state in *Sheth*, however, that it is not permissible to consider the duration of confinement as an indication of the seriousness of the underlying criminal conduct. Instead, the Board rejected the premise that any one aggravating factor necessarily bears more weight than others, but a case-by-case analysis of all the aggravating factors is required to determine a reasonable exclusion period. *Id.* In addition, other Board cases have clearly placed more weight on higher prison sentences. In *Katz*, DAB No. 1842, the Board stated that "[i]ncarceration for an indeterminate period with a minimum of one year and a maximum of seven is significant in itself and *certainly justifies a longer period of exclusion than* if there was no incarceration or *incarceration of a lesser type or shorter period*." DAB No. 1842, at 10 (emphasis added). Notably, Petitioner's own argument, *i.e.*, that he was sentenced using the lowest scores, demonstrates that he understands the weight that should be accorded to this aggravating factor is arguable. Therefore, the length of Petitioner's imprisonment may, considering the circumstances of Petitioner's conduct, reasonably reflect the seriousness of Petitioner's crimes and may be given considerable weight in determining whether a period of exclusion is unreasonable.

In this case, after de novo review I have concluded that a basis for exclusion exists and that the evidence establishes the four aggravating factors that the I.G. relied on to impose the 25-year exclusion. Petitioner has not established that the I.G. failed to consider any mitigating factor or considered an aggravating factor that did not exist. I conclude that a period of exclusion of 25 years is in a reasonable range and not unreasonable considering the four aggravating factors and the absence of any mitigating factors. No basis exists for me to reassess the period of exclusion.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum of 25 years, effective August 20, 2013.

/s/
Keith W. Sickendick
Administrative Law Judge