Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Raymond L. Bedell, D.O.,
(O.I File No. 7-10-40304-9),

Petitioner

v.

The Inspector General,
Department of Health and Human Services.

Docket No. C-11-739

Decision No. CR2507

Date: February 24, 2012

DECISION

Petitioner, Raymond L. Bedell, D.O., is excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(2) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(2)), effective July 20, 2011. There is a proper basis for exclusion. Petitioner's exclusion for the minimum period[1] of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)). [2]

I. Background

The Inspector General (I.G.) notified Petitioner by letter dated June 30, 2011, that he was being excluded from participation in Medicare, Medicaid, and all federal health care

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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.

[2] The hearing scheduled for March 28, 2012, in Salt Lake City, Utah is cancelled.

programs for the minimum statutory period of five years pursuant to section 1128(a)(2) of the Act. The basis cited for Petitioner's exclusion was his conviction in the First Judicial District Court of Cache County, Utah, of a criminal offense related to neglect or abuse of a patient in connection with the delivery of a health care item or service. Petitioner timely requested a hearing by letter dated August 9, 2011. The case was assigned to me on August 30, 2011, for hearing and decision.

On September 14, 2011, the I.G. filed a motion to dismiss the request for hearing with I.G. Exhibits (Exs). 1 and 2. I convened a prehearing conference by telephone on September 15, 2011, the substance of which is memorialized in my order of the same date. During the prehearing conference, Petitioner did not waive an oral hearing. The I.G. requested that I rule on the pending motion to dismiss before ordering further development of the case. Petitioner filed his response opposing the I.G. motion on October 17, 2011. The I.G. filed a reply on November 1, 2011. On November 7, 2011, I issued a ruling and order denying the I.G.'s motion to dismiss; setting this matter for hearing on March 28, 2012; and establishing a schedule for prehearing development.

The I.G. filed a motion for summary judgment and supporting brief (I.G. Br.) on December 5, 2011, with I.G. Exs. 3 through 9. The I.G. also filed a motion to stay proceedings pending a ruling upon the motion for summary judgment, which is moot with the issuance of this decision. Petitioner filed a brief in opposition to the I.G. motion (P. Response), dated December 14, 2011, with an attachment identified as Attachment 1 that I have marked Petitioner's Exhibit (P. Ex.) 1.[3] The I.G. filed its reply brief (I.G. Reply) on January 6, 2012, with I.G. Ex. 10. Petitioner filed a sur-reply (P. Sur-reply) on January 16, 2012.[4] No objections have been made to my consideration any of the exhibits and I.G. Exs. 1 through 10 and P. Ex. 1 are admitted.

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[3] Petitioner titled the pleading "The Petitioner's Response and Motion to Dismiss the Inspector General's Request for Further Discovery." I recognize, based on the content of the pleading that it is Petitioner's response to the I.G.'s motion for summary judgment.

[4] Petitioner titled this pleading "The Petitioner's Response and Motion to Dismiss the Inspector General's Reply Request for Summary Dismissal." The pleading specifically responds to the I.G. Reply but also raises a possible discovery dispute. Petitioner's pleading is accepted as a sur-reply to the I.G. motion for summary judgment. The possible discovery dispute mentioned is rendered moot by my ruling granting summary judgment.

II. Discussion

A. Applicable Law

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

Pursuant to section 1128(a)(2) of the Act, the Secretary must exclude from participation in any federal health care program any individual or entity convicted of a criminal offense under federal or state law, related to neglect or abuse of patients in connection with the delivery of a health care item or service. The statute does not distinguish between felony convictions and misdemeanor convictions and does not require that the health care item or service be delivered under Medicare, Medicaid, or a federal or state healthcare program. The Act defines "conviction" to include: (1) "when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged" or (2) "when there has been a finding of guilt against the individual or entity by a Federal, State, or local court" or (3) when a plea of guilty or no contest is accepted by a court or (4) when an individual enters "a first offender, deferred adjudication, or other arrangement or program where a judgment of conviction has been withheld. Act § 1128(i)(1), (2).

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. The exclusion is effective 20 days from the date of the notice of exclusion. 42 C.F.R. § 1001.2002(b). Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if aggravating factors justify an exclusion of longer than five years are mitigating factors considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

Petitioner bears the burden of going forward with the evidence and the burden of persuasion on any affirmative defenses or mitigating factors. The I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b), (c). The burden of persuasion is judged by a preponderance of the evidence. 42 C.F.R. §§ 1001.2007(c), 1005.15(d). Petitioner may not obtain review of, or collaterally attack on procedural or substantive grounds, a criminal conviction or civil judgment of a federal, state, or local court or another government agency that is cited in this forum as the basis for exclusion. 42 C.F.R. § 1001.2007(d).

B. Issue

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. Summary judgment is appropriate in this case.

There is no dispute that Petitioner timely requested a hearing and I have jurisdiction.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The right to hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. §§ 1001.2007(a) and 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified by 42 C.F.R. § 1005.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). In this case, Petitioner has not waived an oral hearing and the I.G. has moved for summary judgment.[5]

An ALJ may resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12). Summary judgment is appropriate, and no hearing is required where either: there are no disputed issues of material fact, and the only questions that must be decided involve application of law to the undisputed facts; or the moving party prevails as a matter of law, even if all disputed facts are resolved in favor of the party against whom the motion is made. A party opposing summary judgment must allege facts that, if

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[5] Petitioner asserts that the I.G. did not timely file its motion for summary judgment. P. Response at 1; P. Sur-reply at 1. Petitioner is in error. My November 7, 2011, Ruling Denying Respondent's Motion to Dismiss; Order Establishing the Schedule for Prehearing Development; and Notice of Hearing, ¶ II.A.2, provided that either party could file a motion for summary judgment not later than December 5, 2011, with any response or cross-motion due January 6, 2012, and any reply due 15 days thereafter. The I.G.'s motion for summary judgment was filed on December 5, 2011, and was therefore, timely.

true, would refute the facts that the moving party relied upon. *See, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. and Med. Ctr.*, DAB No. 1628, at 3 (1997) (finding in-person hearing required where non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also New Life Plus Ctr.*, DAB CR700 (2000); *New Millennium CMHC*, DAB CR672 (2000).

Petitioner claims that there are material facts in dispute that require a hearing and prevent entry of summary judgment against him. P. Response; P. Sur-reply. Petitioner does not deny that he was convicted of sexual battery by a jury in a Utah court. Issues raised by Petitioner include whether or not his conviction may be grounds for his exclusion while the conviction is pending appeal; whether the exclusion may be based on the conviction if there is any evidence that the conviction was affected by perjured testimony; whether the offense of which Petitioner was convicted was related to abuse within the meaning of section 1128(a)(2) of the Act; and whether any delay in imposing the exclusion is grounds for granting Petitioner relief. The issues raised by Petitioner must all be resolved against him as a matter of law, even if any favorable inferences are drawn in his favor. There is no genuine dispute as to any issue of fact material to my determination of the issues before me, that is, whether there is a basis for exclusion, and whether the period of exclusion is unreasonable. Accordingly, I conclude that summary judgment is appropriate and no hearing is necessary.

3. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(2) of the Act.

Exclusion from participation in Medicare, Medicaid, and all federal health care programs is required by section 1128(a)(2) of the Act when: (1) the individual was 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.

a. Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(2) of the Act.

Petitioner does not deny that on March 5, 2007, a jury in the First Judicial District Court of Cache County Utah, found him guilty of one count of sexual battery, a class A misdemeanor under Utah Code section 76-9-702. I.G. Ex. 3, at 930-31; I.G. Ex. 6; P. Response; P. Sur-reply. It is also undisputed that, on November 5, 2008, Petitioner was sentenced based on his conviction. I.G. Ex. 7. The jury's finding that Petitioner was guilty of sexual battery amounts to a conviction under section 1128(i)(2) of the Act for purposes of exclusion pursuant to section 1128(a) of the Act.

Petitioner argues that the I.G. cannot exclude him based on this conviction because his appeal of the conviction is still pending in the Utah courts. P. Response at 2; P. Sur-reply at 4. This argument is without merit and must be resolved against Petitioner as a matter of law. Section 1128(a)(2) of the Act requires exclusion based upon the conviction of a criminal offense related to neglect or abuse of a patient in connection with the delivery of a health care item or service. The finding of guilt is the conviction under section 1128(i)(2) of the Act that triggers the exclusion pursuant to section 1128(a). Congress did not grant the Secretary the discretion to delay exclusion pending completion of criminal appeals. However, the Secretary has provided a remedy for an excluded individual in case the criminal conviction that is the basis for exclusion is overturned or reversed on appeal, by providing that the excluded individual that notifies the I.G. of the action will be reinstated to the program effective the date of exclusion. 42 C.F.R. § 1001.3005.

Petitioner also argues that his conviction was based on perjured testimony that has been recanted. P. Response at 2; P. Sur-reply at 4. This argument is also without merit in this proceeding. When the I.G. proposes to exclude an individual based on a criminal conviction by a federal, state, or local court in which the facts were adjudicated, the basis for the conviction is not reviewable and not subject to collateral attack on substantive or procedural grounds in this proceeding. 42 C.F.R. § 1001.2007(d). Therefore, Petitioner is bound in this proceeding by the facts on which he was convicted in the Utah court.

b. Petitioner's conviction was related to abuse or neglect of a patient in connection with the delivery of a health care item or service within the meaning of section 1128(a)(2) of the Act.

The second and third elements of section 1128(a)(2) require that: Petitioner's offense is related to the neglect or abuse of a patient; and the offense was committed in connection with the delivery of a health care item or service. Act § 1128(a)(2).

Petitioner was convicted by a jury based on evidence presented at trial. I.G. Ex. 3. The transcript of the trial shows that Petitioner, an osteopathic physician and pain specialist, had a doctor-patient relationship with the female victim of his sexual battery. The transcript shows that Petitioner committed his criminal conduct while delivering a health care service to the victim in October 2003. The evidence shows that on the first visit to Petitioners office, the victim complained of ankle and knee pain. However, the victim testified that Petitioner manipulated her breast while discussing her breast augmentation and the sensitivity of her nipples. Petitioner subsequently gave the victim a prescription for pain medication. On the second visit, while discussing the ethical implications of prescribing pain medication for his wife and the appearance that the drugs were in exchange for sex, the victim complained that the Petitioner rubbed against her leg and she could feel he had an erection through his clothing. As there were no other witnesses to these incidents, Petitioner was clearly convicted on the strength of the victim's testimony,

despite her admitted drug seeking behavior and drug addiction. I.G. Ex. 3, at 345-60. Petitioner does not specifically admit the conduct, but he does not deny that he had a treatment relationship with the victim or that the conduct for which he was convicted occurred in his office while he was delivering health care services to the victim. Thus, there is no genuine dispute that Petitioner's conviction related to the delivery of a health care item or service to a patient under his care, satisfying the third element under section 1128(a)(2) of the Act.

Petitioner does dispute that his conviction was related to abuse or neglect. The gist of his argument is that he was convicted of sexual battery not sexual abuse under Utah law. P. Response at 3-4; P. Sur-reply at 2-3. Petitioner was originally charged with forcible sexual abuse in violation of Utah Code Ann. § 76-5-404 (1953). The trial judge instructed the jury on the elements of that offense. The judge instructed the jury that if they did not find guilt beyond a reasonable doubt of forcible sexual abuse, the lesser included offense of sexual battery must be considered. The judge instructed the jury that it could find Petitioner guilty of the offense of sexual battery only if the jury found beyond a reasonable doubt that on or about October 2003 in Cache County Utah, Petitioner intentionally touched, whether or not through the clothing, the anus, buttocks, or any part of the genitals of another person or the breasts of a female; and Petitioner's conduct was under the circumstances such that he should have known that the touching would cause affront or alarm to the person touched. I.G. Ex. 3, at 801-03. The jury found Petitioner guilty of sexual battery and, therefore, found each element of that offense beyond a reasonable doubt. I.G. Ex. 6.

Petitioner argues that under Utah state law sexual battery is a non-intent crime that contains no element of abuse or neglect of a patient, but rather, requires only the element of "alarm or affront" of the person subject to the sexual battery. P. Response at 3, 4. Contrary to Petitioner's assertions, he was found guilty beyond a reasonable doubt of intentionally touching his victim's breasts under such circumstances that he knew or should have known would cause the victim alarm or affront. The offense of sexual battery under Utah Code Ann. § 76-9-702 requires intentional touching and the judge so instructed the jury. The statute does not require that the touching be for a specific purpose such as sexual gratification. The statute only requires that touching of the anus, buttocks, genitals, or female breasts be under such circumstances that the person who did the touching either knew or should have known the touching would likely cause affront or alarm of the person touched. The testimony of the victim establishes touching of her breasts and the jury verdict establishes that Petitioner was convicted for touching the victim's breasts, thereby causing the victim to suffer an affront or alarm. I.G. Ex. 3, at 345-60. The fact that the Utah statute under which Petitioner was convicted does not refer to abuse is not controlling. Rather, the circumstances surrounding the offense need only show a relation to neglect or abuse of a patient to fall within the ambit of section 1128(a)(2) of the Act. *Narendra M. Patel,* DAB No. 1736, at 8 (2000); *Bruce Lindberg, D.C.*, DAB No. 1280 (1991). In this case, the evidence shows that Petitioner was

convicted for touching the victim's breasts under such circumstances as he knew or should have known would cause the victim affront or alarm. The testimony shows she did experience an affront or alarm.

The, critical issue is whether the Petitioner's criminal conduct was "abuse" within the meaning of section 1128(a)(2) of the Act. The term "abuse" is not defined by section 1128(a)(2) of the Act. In fact, the Act provides no definition for the term abuse. There is also no definition for the term abuse found in the Secretary's regulations implementing the Congressional mandate and the Secretary's authority to exclude providers and suppliers from participation in Medicare. 42 C.F.R. Part 1001. The I.G. advocates that the he is free to apply the common definition of abuse citing prior decisions by ALJs. I.G. Br. at 6-7; I.G. Reply at 4-5. However, the Secretary has provided a definition of abuse in another regulation implementing provisions of the Act, specifically 42 C.F.R. § 488.301, The I.G.'s assertion that he may elect to apply the common meaning of abuse rather than the definition adopted by the Secretary is in error. Congress tasked the Secretary, not the I.G., with prescribing the regulations necessary to carry out the insurance programs under the Act. Act § 1871(a)(1) and (2) (42 U.S.C. § 1395hh(a)(1) and (2)). Congress required that nursing homes (skilled nursing facilities and nursing facilities) protect and promote a resident's right to be free from physical or mental abuse. Act §§ 1819(c)(1)(A)(ii) and 1919(c)(1)(A)(ii) (42 U.S.C. §§ 1395i-3(c)(1)(A)(ii) and 1396r(c)(1)(A)(ii). The Secretary promulgated regulations as Congress required. The Secretary's regulations establish standards for participation by nursing homes in Medicare and Medicaid. It is also the Secretary and not the I.G. that Congress tasked to exclude individuals pursuant to section 1128 of the Act. The Secretary promulgated regulations that set forth the standards and procedures for the I.G. to following in excluding providers and suppliers from participation under the insurance programs that the Secretary was tasked to control. The I.G. has only such authority to exclude individuals as is delegated by the Secretary to the I.G. pursuant to 42 C.F.R. Part 1001. The Secretary has promulgated one regulation that defines the term abuse and that definition is found at 42 C.F.R. Part 488, subpart E, among the standards for long-term care providers. There is no definition of abuse under the exclusion regulations. It is logical that the Secretary would promulgate only one regulation establishing a definition of the term abuse applicable to the insurance programs the Secretary is tasked to administer to avoid, for example, inconsistent definitions. It would be illogical for the Secretary to promulgate multiple different regulations defining the term abuse. Even if it was deemed necessary to define the term abuse in multiple regulations related to the various aspects of the insurance programs the Secretary is charged to administer, it would be illogical for the term abuse to be given different meanings for different programs. Thus, the I.G.'s argument that the absence of a specific definition of abuse in 42 C.F.R. Part 1001 frees the I.G. to adopt the most favorable common definition that can be found, is not persuasive. The I.G. cites no authority for the proposition that he is not bound to follow the Secretary's regulations. I am certainly bound by all the Secretary's regulations and I have no authority to find them invalid or to refuse to follow them. 42 C.F.R. §

1005.4(c)(1). Accordingly, I conclude that the definition of the term abuse that the Secretary promulgated at 42 C.F.R. § 488.301 must be applied to the facts in this case.

> *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 (emphasis in original).

Applying the definition of abuse at 42 C.F.R. § 488.301 to the facts, I have no trouble concluding that Petitioner's criminal conviction related to abuse of his patient. The jury that convicted him concluded beyond a reasonable doubt that he intentionally touched the victim's breasts causing her to suffer alarm or an affront. The findings of the jury, which are not subject to dispute before me, show that Petitioner's willful action caused injury or intimidation of the patient-victim with resulting mental anguish. Accordingly, I conclude that Petitioner's criminal conduct did amount to abuse within the meaning of the Secretary's regulation.

If I had authority not to comply with the Secretary's regulations and if I concluded that the I.G. was also not bound to follow the Secretary's regulations so that the I.G. could apply whatever definition of abuse he deemed most suitable, the result would be no different. Various ALJs have elected to apply the common meaning of the terms "abuse" and "neglect" in exclusion cases under section 1182(a)(2) of the Act rather than the definition adopted by the Secretary in 42 C.F.R. § 488.301. Various appellate panels of the Departmental Appeals Board (the Board) have reviewed and affirmed ALJ decisions in which the common meaning of abuse or neglect was applied by the ALJ rather than the Secretary's regulatory definition. *See, e.g., Lee G.Balos*, DAB No. 1541 (1995); *Janet Wallace, L.P.N.*, DAB No. 1326 (1992); *Summit Health Ltd., d/b/a Marina Convalescent Hosp.*, DAB No. 1173, at 8 (1990). However, the Board was not called upon in any of those cases to approve or disapprove of the use of the common meaning rather than the definition adopted by the Secretary. Of course, it is no simple matter to determine which common meaning is appropriate and none of the prior decisions explain how one definition is more appropriate than another. Merriam-Webster[6] provides the following definitions: (1) a corrupt practice or custom; (2) improper or excessive use or treatment, misuse (such as drug abuse); (3) a deceitful act, deception; (4) language that condemns or vilifies usually unjustly, intemperately, and angrily; and (5) physical maltreatment. Dictionary.com[7] provides the following definitions: (1) to use wrongly or improperly, misuse; (2) to treat in a harmful, injurious, or offensive way; (3) to speak insultingly,

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[6] Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/abuse.

[7] Dictionary.com, http://www.dictionary.reference.com/browse/abuse.

harshly, and unjustly to or about, revile, malign; (4) to commit sexual assault upon; and (5) to deceive or mislead. Black's Law Dictionary defines the noun "abuse" as: (1) a departure from legal or reasonable use, abuse; (2) physical or mental maltreatment, often resulting in mental, emotional, sexual or physical injury. *Black's Law Dictionary* 10 (8th ed. 2004). Applying any of these common definitions, I also have no difficulty concluding that Petitioner's conviction related to abuse of his victim. Under the guise of providing treatment to his victim, Petitioner manipulate her breasts and nipples causing alarm or affront to the victim. The Board has accepted that such conduct constitutes abuse for purposes of section 1128(a)(2) of the Act. *Michael Rudman, M.D.*, DAB No. 2171, at 8 (2008).

The elements of section 1128(a)(2) of the Act are satisfied. Petitioner was convicted of the criminal offense of sexual battery in the state court. The conduct that formed the basis of his conviction related to abuse of his patient. The abuse was in connection with the delivery of a health care item or service. Accordingly, I conclude that there is a basis for Petitioner's exclusion, and his exclusion is mandated by section 1128(a)(2) of the Act.

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

5. Petitioner's exclusion for five years is not unreasonable as a matter of law.

Petitioner asks that I consider the duration of the I.G.'s delay in imposing his exclusion when determining whether the length of his exclusion is unreasonable. Petitioner maintains that the I.G.'s exclusionary actions are "unduly delayed and prejudicial." He states that the actions that resulted in his conviction occurred in October 2003, that he was convicted on March 7, 2007, and that the I.G.'s action to exclude him did not occur until July 20, 2011. Petitioner argues that the I.G. effectively extended his period of exclusion beyond five years by the delay without citing any aggravating factors. Petitioner cites *Connell v. Sec'y of Health and Human Servs.* No. 05-CV-4122-JPG, 2007 WL 1266575 (S.D. Ill. Apr. 30, 2007), in support of his argument. P. Response at 2-3. Petitioner's reliance on *Connell* is misplaced. Section 1128(a) does not establish a deadline by which the I.G. must act and there is no regulatory provision that establishes a deadline. I am bound to follow the Secretary's regulations regarding the effective date of the running of the period of exclusion. 42 C.F.R. § 1005.4(c)(1). The Board has held that the Act and regulations implementing the Act do not authorize an ALJ or the Board to review the reasons for the I.G.'s delay in giving the notice of a mandatory exclusion, which triggers the running of the period of exclusion, or to alter the effective date. *Thomas Edward Musial*, DAB No. 1991, at 4-5 (2005). The Board has concluded that the *Connell* decision does not compel either reversal of an exclusion or review of the reasonableness of the delay in effectuating a mandatory exclusion. *Randall Dean Hopp,*

DAB No. 2166, at 4 (2008); *Kevin J. Bowers,* DAB No. 2143, at 6-7 (2008); *Kailash C. Singhvi, M.D.* DAB No. 2138, at 5-7 (2007).

Petitioner also argues that he is the only specialist within 100 miles, and his exclusion will adversely affect his patients. Petitioner implies that he should be granted a waiver of his exclusion. P. Response at 2. The Secretary is granted authority to waive mandatory exclusion under section 1128(a)(1), (3), and (4) of the Act only. Congress did not authorize the Secretary to waive a mandatory exclusion under section 1128(a)(2) of the Act. Congress also provided that the Secretary's decision to grant or deny a waiver is not subject to review. Act § 1128(c)(3)(B).

Five years is the minimum authorized period for a mandatory exclusion pursuant to section 1128(a) of the Act. Act § 1128(c)(3)(B). Accordingly, exclusion for five years is not unreasonable as a matter of law.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for five years pursuant to section 1128(a)(2) of the Act, effective July 20, 2011.

/s/
Keith W. Sickendick
Administrative Law Judge