Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Sharad Patel, M.D.,	)	DATE: November 26, 1996
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-085
	)	Decision No. CR447
The Inspector General.	)	
	)	

DECISION

In this case, I uphold the determination made by the Inspector General (I.G.) to exclude Petitioner from participating in the Medicare and Medicaid programs[1] for a period of 10 years.

After Petitioner pled guilty in U.S. District Court to charges of Medicare billing fraud and related crimes, the I.G. notified Petitioner by letter dated November 27, 1995 (Notice Letter) that Petitioner was being excluded for a period of 10 years pursuant to sections 1128(a)(1) and (c)(3)(B) of the Social Security Act (Act) and the implementing regulations codified at 42 C.F.R. § 1001.102. Petitioner agrees that he is subject to an exclusion of five years mandated by sections 1128(a)(1) and (c)(3)(B) of the Act. Petitioner agrees also that three of the aggravating factors enumerated in 42 C.F.R. 1001.102(b) are applicable to his circumstances. However, he asserts that a mitigating factor listed in 42 C.F.R. § 1001.102(c) is applicable as well, and, therefore, the 10 year exclusion imposed and directed by the I.G. is unreasonably long.

An in-person hearing was scheduled and then cancelled by me after I reviewed the parties' proposed exhibits and the summary of testimony Petitioner intended to present.[2] My reasons for vacating the hearing schedule are contained in my Summary of Prehearing Conference and Order Scheduling Case for Briefing, dated May 30, 1996 (May 30, 1996 Order). Based on the parties'

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[1] Unless the context indicates otherwise, I use the term "Medicaid" as an abbreviation for all the State health care programs listed in section 1128(h) of the Social Security Act.

[2] The I.G. intended to present no witnesses at the hearing and had requested that I excuse her counsel from appearing at the hearing.

stipulations of facts and agreement to submit the case for disposition on a written record, I established a briefing schedule for the parties to follow. Id. However, I informed the parties also that if Petitioner's written submissions establish the applicability of the mitigating factor he alleges, then I would conduct a hearing to take testimony from the two witnesses identified in Petitioner's witness list as having information relevant to that factor. Id.

Pursuant to my May 30, 1996 Order, each party has submitted a brief in chief (I.G. Br.[3] and P. Br., respectively). The I.G. submitted also a reply brief (I.G. Reply). Petitioner then moved to file a sur-reply brief (P. Sur-reply) attached to his motion,

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[3] Even though the I.G.'s initial brief is titled "The Inspector General's Memorandum in Support of Summary Disposition," I construe the I.G.'s request to be for affirmance of the 10-year exclusion based on the written record alone. I do not construe the I.G.'s motion as one for summary judgment, which is not appropriate for resolving disputed issues of material facts and which, if denied, would necessitate further on-merits proceedings such as the receipt of witness testimony at an in-person hearing.

My construction of the I.G.'s request is based on several factors. First, in her reply brief, the I.G. asked that the case be decided based on the documentary evidence and briefs alone. I.G. Reply at 5. Even when an in-person hearing was scheduled to take place, the I.G. had exercised her option of waiving the presentation of witnesses and requested that her counsel be excused from personally appearing at the hearing. In addition, the parties' agreement during the last prehearing conference was that they each submit the case for decision based only on their briefs and exhibits. May 30, 1996 Order. My briefing order was to the same effect. Id. The only proviso I made for any possible future in-person hearing was for the taking of live testimony from certain of the witnesses appearing on Petitioner's witness list if Petitioner were able to establish by his written submissions that the mitigating factor he claims exists. Id. In her briefs, the I.G. has denied the existence of this alleged mitigating factor and has asked for affirmance of the 10-year exclusion based solely on the documentary evidence of record even though there exist disputed material facts and the regulations do not specify the weight to be accorded any aggravating or mitigating factor.

Therefore, notwithstanding the title of the I.G.'s initial brief, I consider the I.G. to have made a request for me to resolve all issues of fact before me based solely on the briefs and documentary evidence of record.

which I am granting at this time. In addition, I have received and admitted the following exhibits submitted by the parties:

> the I.G.'s exhibits 1 through 5 (I.G. Exs. 1 - 5); and
>
> Petitioner's exhibits 1 through 5 (P. Exs. 1 - 5).

I have excluded the eight additional exhibits offered by Petitioner (P. Exs. 6 - 13) due to their irrelevancy.

Having considered the briefs and documentary evidence submitted by the parties, I conclude that there is no need to reschedule an in-person hearing because, for the reasons detailed below, Petitioner has not established the applicability of the mitigating factor he alleges. The evidence of record establishes the reasonableness of the 10-year exclusion imposed and directed by the I.G. against Petitioner.

STIPULATIONS

As noted in my May 30, 1996 Order, the parties have stipulated as follows:

> A. that Petitioner is subject to a mandatory exclusion of five years under sections 1128(a)(1) and (c)(3)(B) of the Act;
>
> B. that there is no dispute under the facts of this case concerning the existence of the following three aggravating factors relied upon by the I.G. in setting the exclusion period in controversy:
>
> > 1. the acts that resulted in Petitioner's conviction, or similar acts, resulted in financial loss to the Medicare and Medicaid programs of $1,500 or more (see 42 C.F.R. § 1001.102(b)(1); Notice Letter);
> >
> > 2. the criminal acts that resulted in Petitioner's conviction, or similar acts, were committed over a period of one year or more (see 42 C.F.R. § 1001.102(b)(2); Notice Letter); and

3. the sentence imposed by the court included incarceration (see 42 C.F.R. § 1001.102(b)(4); Notice Letter).

C. that notwithstanding the information to the contrary contained in the Notice Letter, the I.G. does not allege that the acts that resulted in Petitioner's conviction, or similar acts, had a significant adverse physical, mental, or financial impact on one or more program beneficiaries or other individuals (see 42 C.F.R. § 1001.102(b)(3); Notice Letter).

ISSUE

Given the stipulations of the parties, the only issue before me is whether the additional five years of exclusion imposed and directed by the I.G. is reasonable. 42 C.F.R. § 1001.2007(a)(1)(ii). The resolution of this issue requires me to decide the following in sequence:

A. to what extent, if any, the evidence relevant to the above-mentioned three aggravating factors justifies an exclusion longer than five years (see 57 Fed. Reg. 3314; 42 C.F.R. § 1001.102(c));

B. if an exclusion longer than five years is justified by the evidence relevant to the aggravating factors, then whether, as alleged by Petitioner, there exists a mitigating factor, in that the record from Petitioner's criminal proceedings demonstrates that the court determined Petitioner to have had a mental, emotional, or physical condition before or during his commission of the offenses and thereby reduced his culpability (see 42 C.F.R. § 1001.102(c)(2)); and

C. if Petitioner establishes the existence of the mitigating factor, then to what extent, if any, the evidence relevant to the mitigating factor justifies reducing the lengthened exclusion period to a period of not less than five years (42 C.F.R. § 1001.102(c)).

FINDINGS AND CONCLUSIONS ON DISPUTED ISSUE

1. The evidence relevant to the three aggravating factors relied upon by the I.G. justified the I.G.'s increasing Petitioner's exclusion to 10 years. See discussion and citations in sections A and B of Analysis.

2. Petitioner has not proven the existence of the mitigating factor he relies upon. See discussion and citations in section C of Analysis.

3. The 10-year exclusion imposed and directed by the I.G. against Petitioner is reasonable. Findings 1 and 2.

ANALYSIS

A. Evidence relevant to the three aggravating factors

Prior to the imposition of the exclusion in controversy, Petitioner was a psychiatrist entitled to bill for health care services rendered to patients insured or covered by the Medicare program, the State of Kentucky's Medicaid program, and the Civil Health and Medical Program of the Uniformed Services (CHAMPUS). I.G. Ex. 2 at 3; I.G. Ex. 3 at 2. As a participating provider in these programs, Petitioner was obligated to submit bills only for services that were medically necessary and that were actually performed. I.G. Ex. 3 at 2. During August of 1992, an Indictment issued by the Grand Jury was filed in U.S. District Court for the Western District of Kentucky, charging Petitioner with 55 counts of criminal wrong-doings relating to the submission of false, fictitious, and fraudulent claims by Petitioner and others to the Medicare, Medicaid, and CHAMPUS programs from about October 1, 1989 to December 31, 1990. I.G. Ex. 2.

The Indictment issued by the Grand Jury charged Petitioner with conspiring with others to commit various fraud-related offenses against the United States. I.G. Ex. 2 at 1 - 2. Many of the counts charged Petitioner also with submitting, attempting to submit, or causing to be submitted to the Medicare, Medicaid and CHAMPUS programs, multiple claims for physician services, even though the services were not rendered by any person licensed as a physician ("noncredentialed" services). I.G. Ex. 2 at 5, 9 - 10. Other counts charged him with having submitted, or caused to be submitted, claims for services which were different in amounts or types than those actually rendered ("upcoding"). See I.G. Ex. 2 at 5. Still other charges involved the submission of claims for "unrendered" physician services. Id. The Indictment charged Petitioner with having violated numerous federal statutes: i.e., 18 U.S.C. § 371 ("Conspiracy to File False Medical Claims and to Commit Maid Fraud"); 18 U.S.C. § 287 and § 2 ("Making False Medical Claims to Medicare and CHAMPUS. Aiding and Abetting"), 18 U.S.C. § 1341 and § 2 ("Mail Fraud. Aiding and Abetting"); 42 U.S.C. § 1320(a)-7b(a)(1)&(5) and 18 U.S.C. § 2 ("Making False Medical Claims to State Programs for Payment. Aiding and

Abetting"); and 42 U.S.C. § 1320a-7b(a)(5) and 18 U.S.C. § 2 ("Making False Medical Claims to Federal programs for Payment. Aiding and Abetting."). I.G. Ex. 2; I.G. Ex. 4 at 2.

In December of 1993, Petitioner voluntarily entered a plea of guilty to all 55 counts in the Indictment, specifically acknowledging that "he is in fact guilty of the charges." I.G. Ex. 3 at 1. He acknowledged specifically also that he had knowingly conspired and engaged in a pattern and practice of submitting and causing others to submit false and fraudulent claims to the Medicare, Medicaid, and CHAMPUS programs. Id. at 2. The Plea Agreement contains also Petitioner's admission that he committed the criminal offenses between at least October 1, 1989 and December 31, 1991. Id. at 2 - 3.

Thereafter, U.S. District Judge Charles Simpson accepted Petitioner's guilty plea to the 55 counts and entered judgment against him. I.G. Ex. 4. The sentence imposed by Judge Simpson included four months of incarceration in a federal prison for each count, to be served concurrently; four months of home incarceration for each count, to be served concurrently; and an additional three-year period of supervised release for each count, also to be served concurrently. I.G. Ex. 4 at 3 and 4; P. Br. at 2.[4] Even though Petitioner was subject to fines in an amount between $2,000 to $20,000, Judge Simpson waived the payment of such fines due to Petitioner's inability to pay it. I.G. Ex. 4 at 5. In addition, Judge Simpson ordered no payment of restitution by Petitioner because restitution was being satisfied pursuant to a settlement agreement reached in a related civil action. Id.; I.G. Ex. 5; P. Ex. 5 at 12.

In a civil action, the United States, on behalf of the various agencies which administered the health care programs defrauded by Petitioner, had sued Petitioner under the False Claims Act, 42 U.S.C. § 3729, for the submission of false claims to the Medicare, Medicaid, and CHAMPUS programs from January 1, 1988 until December 31, 1991. I.G. Ex. 5; P. Ex. 4. The matter was described as a "parallel civil proceeding" by the Asst. U.S. Attorney during Petitioner's sentencing proceedings in the criminal case. P. Ex. 5 at 5. In settlement of the civil fraud charges against him, Petitioner agreed to pay the United States $200,000, in addition to any amount he is required to pay in the criminal action. I.G. Ex. 5. The United States did not seek any

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[4] As Petitioner noted in his brief, the federal sentencing guidelines applicable to the plea agreement reached by the parties required eight to 14 months of imprisonment. What the court imposed, after accepting Petitioner's guilty plea, is known as a "split sentence" of imprisonment, with four months served in a federal prison and four months served as home incarceration.

The split sentence was agreed to by the parties and ordered by Judge Simpson, in accordance with the plea agreement. P. Ex. 1 at 18; P. Ex. 5 at 5; P Ex. 2 at 6.

additional amount in restitution because the U.S. Attorney's Office was persuaded, after reviewing Petitioner's financial statements, that he could not be reasonably expected to pay more. P. Ex. 4 at 3.

B. The relationship between the evidence relevant to the three aggravating factors and the I.G.'s authority to increase the period of exclusion

The regulation at 42 C.F.R. § 1001.102 permits the I.G. to lengthen the five-year exclusion required by sections 1128(a)(1) and (c)(3)(B) of the Act only if certain aggravating factors exist. Where both aggravating and mitigating factors enumerated by the regulations exist, increasing the minimum mandatory exclusion period is appropriate only when the weight of the evidence relevant to the aggravating factors is not offset completely by the evidence relevant to any mitigating factor also in existence. As explained in the agency's commentaries to these regulations, there is no rigid formula establishing the weight to be accorded to each aggravating factor. 57 Fed. Reg. 3314 - 15. Instead, the weight to be assigned these factors depends on the context of the particular case at issue. Id. As also explained in these commentaries, "[t]he primary purpose of an exclusionary sanction is remedial, not punitive." 57 Fed. Reg. 3300. Any exclusion imposed by the I.G. under section 1128 of the Act should carry out Congress' intent to protect the integrity of the Medicare and Medicaid programs and those covered by the programs. See, 57 Fed. Reg. 3300 - 01. Therefore, the weight to be assigned the aggravating factors present in a case depends on the relevant facts as they relate to the remedial purpose of an exclusion.

As relevant to the aggravating factor listed at 42 C.F.R. § 1001.102(b)(1), the facts relating to Petitioner's settlement of the civil fraud charges for $200,000 establish that the acts which resulted in Petitioner's criminal conviction, or similar acts, have caused great financial losses to the Medicare and Medicaid programs. Whereas the threshold amount of loss specified by the regulation is $1,500, Petitioner has caused much more extensive financial damage to the Medicare and Medicaid programs. Neither party before me has alleged any precise amounts or argued the exact extent of financial damage caused by Petitioner to the two programs. However, according to the calculations used by the U. S. Attorney's Office, Petitioner's criminal acts during the period specified in the Indictment (October 1, 1989 to December 31, 1990) defrauded the Medicaid program of $20,880, and the Medicare program of $20,007.72. P. Ex. 4 at 3.[5] In the Plea Agreement, Petitioner and the

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[5] However, as discussed below, Petitioner admitted in his Plea Agreement to having committed the criminal offenses against these programs for one year longer than the period alleged in the Indictment. Therefore, the amount of damages caused by Petitioner to these programs could have been greater than the amounts calculated by the U.S. Attorney's Office.

Government stipulated that the aggregate loss to all programs for federal sentencing guidelines purposes was an amount greater than $40,000 but less than $70,000. I.G. Ex. 3 at 3.

In addition, for the longer period of violations alleged in the civil suit brought under the False Claims Act, the same U.S. Attorney's Office calculated the loss to the Medicare program to be $20,007.20, and $66,844.85 to the Medicaid program.[6] No restitution amount was decided or ordered in the criminal case only because the court found it unnecessary to address a matter already disposed of in the civil action. As noted above also, the U.S. Attorney's office agreed to Petitioner's offer to pay $200,000 in the civil action because Petitioner was not able to pay more.

Therefore, even though the evidence of record does not permit me to determine what precise amount, below the $200,000 settlement amount, constituted the full extent of financial damages caused by Petitioner to the Medicare and Medicaid programs for the periods involved in both the criminal and civil actions, it is clear that such damages are substantially in excess of the $1,500 minimum specified by 42 C.F.R. § 1001.102(b)(1). Based on the acts which resulted in Petitioner's conviction and similar acts, the amount of damages Petitioner caused to the Medicare and Medicaid programs amounted to at least the approximately $87,000 the U.S. Attorney's Office calculated for the period from October 1988 to December 31, 1990.

With respect to the aggravating factor codified at 42 C.F.R. § 1001.102(b)(2), the relevant evidence shows that Petitioner's criminal acts that resulted in his conviction, and similar acts, took place numerous times during a period in excess of the minimum one-year period specified by said regulation. He was charged with 55 counts of criminal violations, which took place during the one year and three month period from October 1, 1989 to December 31, 1990. I.G. Ex. 2. In his Plea Agreement, Petitioner admitted to having committed all his criminal offenses for a period which lasted two years and three months (from at least October 1, 1989 to December 31, 1991), which is one year longer than the period alleged in the Indictment. I.G. Ex. 3 at 2 - 3.

The relevant evidence establishes also that, for a period longer than one year, Petitioner violated multiple federal statutes in perpetration of criminal conspiracy and numerous overt criminal

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[6] According to Petitioner's evidence, the civil suit alleged that Petitioner violated the False Claims Act between January 1, 1988 and December 31, 1991. P. Ex. 4 at 1. However, the same evidence from Petitioner shows also that, in deciding whether to accept Petitioner's settlement offer of $200,000, the U.S. Attorney's Office used the amount of damages to the Medicare and Medicaid programs calculated for a partial period alleged in the complaint (i.e., only from October 1988 until December 31, 1990). P. Ex. 4 at 2.

activities. He specifically admitted in the Plea Agreement that, for at least two years and three months between October 1, 1989 and December 31, 1991, he had engaged in a pattern of crimes involving the submission of false or inflated billings for services allegedly rendered to patients. As noted above also, the United States sued him under the False Claims Act for the submission of false and fraudulent claims to the Medicare, Medicaid, and CHAMPUS programs for a period of nearly four years, from January 1, 1988 to December 31, 1991. The evidence of record concerning the civil case shows that the U.S. Attorney's Office had evidence that, even for the lesser period of October 1, 1988 to December 31, 1990, Petitioner had submitted approximately 870 false claims to the Medicaid program and approximately 400 false claims to the Medicare program. P. Ex. 4 at 2.

In sum, the evidence relevant to the aggravating factor codified at 42 C.F.R. § 1001.102(b)(2) shows that, over a period of time longer than what is specified by said regulation, Petitioner had engaged repeatedly in various carefully planned schemes to defraud the Medicare, Medicaid, and CHAMPUS programs. In the criminal proceedings, he admitted to having committed his offenses for a period of at least two years and three months. In settlement of the civil claims against him, Petitioner did not contest the Government's allegation that he defrauded the programs for a period of four years.

With respect to the evidence relevant to the aggravating factor codified at 42 C.F.R. § 1001.102(b)(4), I have noted above that the sentence imposed by the court included four months of imprisonment and four months of home incarceration for each of the 55 criminal counts, to be served concurrently. This split sentence of incarceration was imposed in addition to the three years of supervised release imposed for each of the 55 counts (also to be served concurrently), as well as the $2,700 in special assessment Petitioner was required to pay (I.G. Ex. 4 at 1), and the $200,000 Petitioner had agreed to pay in settlement of the Government's parallel civil suit. Therefore, the sentence of incarceration imposed by the court is an indication that the crimes committed by Petitioner were very serious indeed.

The evidence relevant to all three aggravating factors discussed above establishes a prima facie case for the I.G.'s increasing Petitioner's exclusion under section 1128(a)(1) of the Act by adding five years to the minimum period required by section 1128(c)(3)(b) of the Act. The relevant evidence shows that the fiscal integrity of the Medicare and Medicaid programs need very considerable protection from Petitioner. Petitioner had intentionally bilked the Medicare and Medicaid programs of very substantial sums of money by committing very serious criminal offenses and civil violations on hundreds of occasions during a protracted period of time. While a 10-year exclusion may not be the only period of exclusion that is reasonable under the facts of this case, a 10-year exclusion is within the continuum of all that may constitute a reasonable period of exclusion.

Moreover, the I.G. has cited three Departmental Appeals Board decisions wherein an administrative law judge upheld the I.G.'s impositions of 10-year exclusions pursuant to section 1128(a)(1) of the Act. I.G. Br. at 6 (citing Hill v. I.G., DAB CR347 (1994); Middleton v. I.G., DAB CR297 (1993); Weiss v. I.G., DAB CR421 (1996)). Those cases were decided on facts very similar to those before me. Therefore, based on the evidence relevant to the aggravating factors before me and the regulations permitting the I.G. to increase the minimum five-year period of exclusion on the basis of those factors (42 C.F.R. § 1001.102(b)), I conclude that the I.G. has proven that five additional years constitute a reasonable increase for Petitioner's exclusion period.

C. The potential effect of a mitigating factor and Petitioner's evidence concerning the alleged existence of a mitigating factor

Because the I.G. has properly increased the statutorily mandated exclusion period in accordance with 42 C.F.R. § 1001.102(b), Petitioner is entitled to prove as an affirmative defense that the increased exclusion period is unreasonable due to the presence of a mitigating factor also specified by regulation. 42 C.F.R. § 1001.102(c). In this case, Petitioner has endeavored to prove that "[t]he 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 offence that reduced the individual's culpability." 42 C.F.R. § 1001.102(c)(2). Petitioner's arguments concerning the applicability of this mitigating factor are built upon the following two statements appearing in the sentencing documents he submitted as evidence:

> [by U.S. District Judge Simpson:] I have reviewed the presentence report in this case and have determined to accept the plea agreement and sentence in accordance with it.

P. Ex. 5 at 5.

> [by the U.S. Probation Officer in his presentencing report:] The defendant has indicated some inpatient and outpatient treatment as well as ongoing counseling; however, this information appears to best be addressed in the substance abuse section of the report as it appears that the majority of the problems have arisen due to the defendant's use of alcohol.

P. Ex. 1 at 13. Based on these two statements, Petitioner argues that Judge Simpson adopted the presentencing report in its entirety (P. Br. at 2); that Judge Simpson therefore concluded, as did the Probation Officer, that "the majority of the problems have arisen due to the defendant's use of alcohol" (id. at 5); that Judge Simpson also discussed during the sentencing hearing Petitioner's need for treatment of his alcoholism while he is

incarcerated (id. at 6); and therefore, Judge Simpson had made a determination meeting the requirements of 42 C.F.R. § 1001.102(c)(2) (id.).

I agree with the I.G. that Petitioner failed to prove with the evidence from his criminal proceedings that the court had made a determination that Petitioner suffered from any mental, emotional, or physical condition before or during the commission of his offenses which reduced his culpability. Unless all these elements are satisfied, Petitioner cannot avail himself of the effect of the mitigating factor codified at 42 C.F.R. § 1001.102(c)(2). Here, the evidence before me establishes only that Judge Simpson reviewed the presentencing report, as he stated (P. Ex. 5 at 5), and, based on Petitioner's request to continue his past treatment for substance abuse at the time of sentencing and the absence of objection from the United States, Judge Simpson expressed a willingness to order Petitioner's incarceration at an institution which offered alcohol-abuse counseling and was located as close as possible to Petitioner's place of residence. P. Ex. 5 at 4 - 9.

I find that Petitioner has attributed undue significance to Judge Simpson's statement that he had "reviewed the presentencing report in this case and have determined to accept the plea agreement and sentence in accordance with it" (P. Ex. 5 at 5). First of all, there is no finding by Judge Simpson or by the Probation Officer who authored the presentencing report concerning the severity or onset date of Petitioner's alleged alcoholism or substance abuse problems. Neither determined that Petitioner had any alcohol or substance abuse problems during the time he committed those crimes which resulted in his conviction. Nor does the evidence show that either the judge or the Probation Officer was in possession of those facts necessary for making a determination meeting the requirements of 42 C.F.R. § 1001.102(c)(2), even assuming that the judge adopted the presentencing report in its entirety as argued by Petitioner.

Aside from the fact that the Probation Officer never explained what he meant by "the problems" which he said were mostly due to Petitioner's use of alcohol (P. Ex. 1 at 13),[7] the Probation Officer's narrative of Petitioner's alleged history of substance abuse prior to his Indictment was based solely on Petitioner's own statements. P. Ex. 1 at 14. Virtually every sentence in the Probation Officer's narrative on the matter makes explicit that the information is what "the defendant advised" or what "the defendant indicates." Id. Moreover, nothing in the

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[7] Since the observation was placed under the heading of "Mental and Emotional Health" under "PART C. OFFENDER CHARACTERISTICS," the Probation Officer's reference to "the problems" which mostly arose from Petitioner's use of alcohol could well mean that Petitioner's mental and emotional health problems mostly arose from his use of alcohol, and not that his commission of the crimes mostly arose from his use of alcohol as implied by Petitioner's arguments.

presentencing report suggests that Petitioner had ever alleged to have committed his offenses as a result of his alleged abuse of alcohol or other substances. Nor does the report suggest that Petitioner asked for a finding of lesser culpability on the basis of his alleged substance abuse problems. Nor do Petitioner's descriptions of his own history of alcohol and substance abuses indicate the degree of his alleged problems during the time he committed his criminal offenses. Id.

At the time the presentencing report was prepared in March of 1994, the Probation Officer could not even obtain confirmation of the history provided by Petitioner from a treatment facility named by Petitioner. Id. The only treatment notes discussed in the presentencing report pertained to Petitioner's progress as of December 2, 1993, after the Indictment against him had been filed and his trial date had been set. Id. Nothing in these treatment notes appear to indicate when the alleged disorders began or the degree, if any, to which Petitioner's alleged disorders have affected his ability to think and act in accordance with the dictates of law during any particular period of time. Id. It simply does not follow that any alleged alcohol or substance abuse of unproven severity and unproven onset would diminish an individual's culpability for his criminal conduct.

In addition, Judge Simpson did not say that he was accepting everything stated in the presentencing report. He said only that he decided to "accept the plea agreement and sentence in accordance with" the presentencing report. P. Ex. 5 at 5. The section of the presentencing report dealing with the plea agreement and recommended sentence sets out the parties' stipulations and the requirements of the federal sentencing guidelines applicable to those stipulations. P. Ex. 5 at 14 - 16. Nothing in said section of the report, or in the Plea Agreement itself, indicates that a finding had been made by the Probation Officer or the U.S. Attorney's Office prosecuting the case that Petitioner suffered from any physical, emotional, or mental disorder before or during his commission of the crimes which reduced his culpability.

During the sentencing hearing, Judge Simpson asked Petitioner whether there were changes, errors, or problems with the presentencing report. P. Ex. 5 at 4. Even at that time Petitioner did not allege reduced criminal culpability based on any disorder. Nor did he allege that he suffered any disorder before or during the period he committed the offenses.[8] Instead, Petitioner merely asked the court to order that his sentence of incarceration be served at a prison where he could continue to receive alcohol-abuse counseling. P. Ex. 5 at 6 - 11. There was never any allegation or determination made during the sentencing

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[8] Petitioner's counsel told Judge Simpson that he had reviewed the presentencing report with Petitioner "in great detail." He stated further that "[t]here are no changes or amendments that we could suggest at this time." P. Ex. 5 at 3 - 4.

proceedings concerning an onset date for the alcoholism to be treated during Petitioner's incarceration.

In sum, the record does not even contain the underlying facts necessary for Judge Simpson to have reached a determination as to whether Petitioner suffered from alcoholism or substance abuse prior to or during his commission of the criminal offenses, much less whether Petitioner's culpability was reduced by such alleged abuses. For all of the reasons stated above, I find that Judge Simpson has not made a determination meeting the requirements of 42 C.F.R. § 1001.102(c)(2) in this case. Because Petitioner has not proven the mitigating factor he alleges, Petitioner has failed to rebut the I.G.'s evidence that a 10-year exclusion is reasonable based on the evidence relevant to three aggravating factors.

CONCLUSION

Based on the foregoing facts and the reasons explained in my May 30, 1996 Order, I will not schedule any additional proceedings in this case. I conclude that the 10-year exclusion is reasonable. Therefore, I uphold the I.G.'s imposition of this exclusion against Petitioner.

/s/

Mimi Hwang Leahy

Administrative Law Judge