Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Lawrence J. White, D.D.S.,	)	Date: April 3, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-06-605
	)	Decision No. CR1584
The Inspector General.	)	
	)	

DECISION

This matter is before me in review of the Inspector General's (I.G.'s) determination to exclude Petitioner *pro se* Lawrence J. White, D.D.S. from participation in Medicare, Medicaid, and all other federal health care programs for a period of 13 years. The I.G.'s determination to exclude Petitioner is based on the terms of section 1128(a)(3) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(3). There is a basis for Petitioner's exclusion and the undisputed facts in this case require the imposition of the minimum five-year period of exclusion. As I shall explain below, the facts in this case support the reasonableness of the I.G.'s determination to enhance that period of exclusion to 13 years. For those reasons, I sustain the I.G.'s determination.

I. Procedural Background

Petitioner *pro se* Lawrence J. White, D.D.S., practiced dentistry in the State of New York since at least the early 1980s. On April 22, 2004, the Federal Grand Jury sitting for the United States District Court for the Southern District of New York handed up an Indictment charging Petitioner with one felony count of Health Care Fraud, in violation of 18 U.S.C. § 1347, and 18 felony counts of False Statements Related to Health Care Matters, in violation of 18 U.S.C. § 1035; all of the charges alleged fraudulent billings in connection with Petitioner's practice of dentistry. The Indictment also contained a forfeiture claim based on 18 U.S.C. § 982.

On April 29, 2004, the New York State Department of Health excluded Petitioner from participation in New York's Medicaid program. The agency stated: "The Department has made this determination because you were charged with a crime relating to the furnishing or billing for medical care, services or supplies."

Represented by counsel, Petitioner pleaded guilty to Counts One and Two of the Indictment, and thus admitted his guilt to one violation of 18 U.S.C. § 1347 and one violation of 18 U.S.C. § 1035. He appeared with counsel for sentencing on March 3, 2005, and was sentenced to two concurrent 24-month terms of incarceration, to be followed by two concurrent 24-month terms of supervised probation. He was, in addition, ordered to pay restitution to twelve insurance companies and the State of New York in the total sum of $212,056 which figure was based on the United States District Court's specific finding of that sum as the total amount of loss to the victims of Petitioner's conduct. The Indictment's remaining counts were dismissed on motion of the United States.

Mandated to do so by the terms of section 1128(a)(3) of the Act, the I.G. began the process of excluding Petitioner from participation in Medicare, Medicaid, and all other federal health care programs. On May 31, 2006, the I.G. notified Petitioner that he was to be excluded for a period of 13 years. The I.G.'s determination to set the period of exclusion at 13 years was based on the apparent presence of four aggravating factors set out at 42 C.F.R. §§ 1001.102(b)(1), (b)(2), (b)(5), and (b)(9).

Petitioner timely sought review of the I.G.'s action in his *pro se* letter of August 1, 2006. I convened a prehearing conference by telephone on August 31, 2006, pursuant to 42 C.F.R. § 1005.6. The I.G. expressed the intention to seek summary disposition on written submissions, and I established a schedule for the filing of documents and briefs. That schedule and other details of the conference are set out in my Order of September 7, 2006. That briefing cycle has been completed, and the record in this case closed February 20, 2007.

The evidentiary record on which I decide this case contains eight exhibits. The I.G. has proffered I.G.'s Exhibits 1-4 (I.G. Exs. 1-4), and Petitioner has proffered Petitioner's Exhibits 1-4 (P. Exs. 1-4). Neither party has objected to the admission of any of these exhibits, and so all are admitted as designated.

II. Issues

The factual and legal issues before me are limited to those listed at 42 C.F.R. § 1001.2007(a)(1). In the specific context of this record, they are:

1. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(3) of the Act; and

2. Whether the 13-year term of the exclusion is unreasonable.

The controlling authorities require that both issues be resolved in favor of the I.G.'s position. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(3) of the Act, for his predicate conviction has been established. A five-year term of exclusion is the minimum established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B).

All four of the aggravating factors relied on by the I.G. in determining to enhance the period to 13 years have been proven, and no mitigating factors recognized by regulation have been pleaded by Petitioner or proven by the evidence before me. The proposed length of the period of exclusion is within a reasonable range, and is therefore not unreasonable.

III. Controlling Statutes and Regulations

Section 1128(a)(3) of the Act, 42 U.S.C. § 1320a-7(a)(3), requires the mandatory exclusion from participation in Medicare, Medicaid, and all other federal health care programs of "[a]ny individual or entity that has been convicted for an offense which occurred after [August 21, 1996,] under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in [section 1128(a)(1)] operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." The regulation implementing section 1128(a)(3) appears at 42 C.F.R. § 1001.101(c)(1).

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a Federal . . . court . . . ;" or "when there has been a finding of guilt against the individual . . . by a Federal . . . court." Act, section 1128(i)(1), 42 U.S.C. § 1320a-7(i)(1); Act, section 1128(i)(2), 42 U.S.C. § 1320a-7(i)(2). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(3) is mandatory: the I.G. must impose it for a minimum period of five years. Act, section 1128(c)(3)(B), 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision.

The minimum mandatory period of exclusion is subject to enhancement in some limited circumstances and on the I.G.'s proof of narrowly-defined aggravating factors set out at 42 C.F.R. §§ 1001.102(b)(1)-(9). In this case, the I.G. seeks to enhance the period of Petitioner's exclusion to 13 years, and relies on the four aggravating factors listed at 42 C.F.R. §§ 1001.102(b)(1), (b)(2), (b)(5), and (b)(9).

If the I.G. determines to enhance the period of exclusion by relying on any of those aggravating factors, a petitioner may attempt to limit or nullify the proposed enhancement through proof of certain specifically-defined mitigating factors set out at 42 C.F.R. §§ 1001.102(c)(1)-(3). In this case, the mitigating factor set out at 42 C.F.R. § 1001.102 (c)(2) requires discussion.

The standard of proof in this case is a preponderance of the evidence. Petitioner bears the burden of proof and 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).

IV. Findings and Conclusions

I find and conclude as follows:

1. In the United States District Court for the Southern District of New York, on a date not shown on this record, Petitioner Lawrence J. White, D.D.S., pleaded guilty to one felony charge of Health Care Fraud, in violation of 18 U.S.C.§ 1347, and one felony charge of False Statements Relating to Health Care Matters, in violation of 18 U.S.C. § 1035. I.G. Ex. 3.

2. Final adjudication of guilt, judgment of conviction, and sentence based on those pleas of guilty were imposed on Petitioner in the United States District Court on March 3, 2005, and recorded in its Judgment in a Criminal Case filed on March 9, 2005. I.G. Ex. 3.

3. On May 31, 2006, the I.G. notified Petitioner that he was to be excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of 13 years, based on the authority set out in section 1128(a)(3) of the Act and the aggravating factors set out at 42 C.F.R. § 1001.102(b)(1), (b)(2), (b)(5), and (b)(9). I.G. Ex. 1.

4. Petitioner perfected his appeal from the I.G.'s action by filing a *pro se* hearing request on August 1, 2006.

5. The adjudication of guilt, judgment of conviction, and sentence described above in Findings 1 and 2 constitute a felony conviction within the meanings of sections 1128(a)(3) and 1128(i)(1) and (2) of the Act, and 42 C.F.R. § 1001.2.

6. The conduct that resulted in Petitioner's conviction described above in Findings 1 and 2 related to financial misconduct. I.G. Exs. 2, 3.

7. The conduct that resulted in Petitioner's conviction described above in Findings 1 and 2 related to the delivery of a health care item or service. I.G. Exs. 2, 3.

8. The conduct that resulted in Petitioner's conviction described above in Findings 1 and 2 occurred after August 21, 1996. I.G. Exs. 2, 3.

9. By reason of his conviction of a felony offense related to financial misconduct in connection with the delivery of a health care item or service which occurred after August 21, 1996, Petitioner was subject to, and the I.G. was required to impose, a period of exclusion from participation in Medicare, Medicaid, and all other federal health care programs of not less than five years. Act, sections 1128(a)(3) and 1128(c)(3)(B).

10. The acts resulting in Petitioner's conviction as described in Findings 1 and 2 above caused a financial loss to one or more entities of $212,056. I.G. Ex. 3.

11. Because the acts resulting in Petitioner's conviction caused a financial loss to one or more entities of $5,000 or more, the aggravating factor set out in 42 C.F.R. § 1001.102(b)(1) is present.

12. The acts resulting in Petitioner's conviction as described in Findings 1 and 2 above were committed over a period from July 1997 through October 2003. I.G. Ex. 2, 3.

13. Because the acts resulting in Petitioner's conviction were committed over a period of one year or more, the aggravating factor set out in 42 C.F.R. § 1001.102(b)(2) is present.

14. As the result of his conviction as described in Findings 1 and 2 above, Petitioner was sentenced to incarceration for two concurrent terms of 24 months. I.G. Ex. 3.

15. Because Petitioner was sentenced to a term of incarceration, the aggravating factor set out in 42 C.F.R. § 1001.102(b)(5) is present.

16. As a consequence of the same set of circumstances that served as the basis for the conviction described in Findings 1 and 2 above, Petitioner has been the subject of an adverse action by the New York State Department of Health, excluding him from participation in the New York Medicaid program effective April 29, 2004. I.G. Ex. 4.

17. Because Petitioner has been the subject of an adverse action by the New York State Department of Health based on the same set of circumstances that served as the basis for the conviction described in Findings 1 and 2 above, the aggravating factor set out in 42 C.F.R. § 1001.102(b)(9) is present.

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

19. The I.G.'s exclusion of Petitioner for a period of 13 years is supported by fact and law, is within a reasonable range, and is therefore not unreasonable. I.G. Exs. 2, 3, and 4; Findings 1-18, above.

20. There are no disputed issues of material fact and summary affirmance is appropriate in this matter. *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

The four essential elements necessary to support an exclusion based on section 1128(a)(3) of the Act are: (1) the individual to be excluded must have been convicted of a felony offense; (2) the felony offense must have been based on conduct relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the felony offense must have been for conduct in connection with the delivery of a health care item or service, *or* the felony offense must have been with respect to any act or omission in a health care program operated by or financed in whole or in part by any federal, state, or local government agency; and (4) the felonious conduct must have

occurred after August 21, 1996. *Andrew D. Goddard*, DAB No. 2032 (2006); *Erik D. DeSimone, R.Ph.*, DAB No. 1932 (2004); *Jeremy Robinson*, DAB No. 1905 (2004); *Morganna Elizabeth Allen*, DAB CR1478 (2006); *Theresa A. Bass*, DAB CR1397 (2006); *Michael Patrick Fryman*, DAB CR1261 (2004); *Golden G. Higgwe, D.P.M.*, DAB CR1229 (2004); *Thomas A. Oswald, R.Ph.*, DAB CR1216 (2004); *Katherine Marie Nielsen*, DAB CR1181 (2004).

Petitioner does not deny the fact of his two-count felony conviction, its character as financial misconduct, its nexus to the delivery of health care items and services, and the time when his felonious conduct occurred. He concedes that his two-count conviction is sufficient to support a mandatory minimum five-year exclusion pursuant to section 1128(a)(3) of the Act. Petitioner's Answer Brief (P. Ans. Br.) at 1-2. In any case, the four essential elements are demonstrated in the United States District Court records before me. I.G. Exs. 2, 3.

Nor does Petitioner deny the facts relied on by the I.G. in asserting the existence of four aggravating factors. What Petitioner does deny, however, is the reasonableness of the I.G.'s determination to enhance the period of exclusion to 13 years in reliance on those facts, and to consider none of the facts asserted by Petitioner as mitigating factors. Thus, it may be helpful to review all of those facts, beginning with the facts tending to prove the four aggravating factors on which the I.G. relies.

The first aggravating factor on which the I.G. relies is present when "[t]he acts resulting in the conviction, or similar acts . . . caused . . . a financial loss to a Government program or to one or more entities of $5,000 or more." 42 C.F.R. § 1001.102(b)(1). Petitioner was ordered to pay the total of $212,056 in restitution to twelve private insurance companies and the State of New York as part of his sentence. I.G. Ex. 3, at 5. The adjudicated amount of restitution is *prima facie* proof of the amount of loss. *Russell J. Ellicott, D.P.M.* DAB CR1552 (2007); *Becalo Utuk*, DAB CR1547 (2006); *Stanley Junious Benn*, DAB CR1501 (2006); *Dr. Darren J. James, D.P.M.*, DAB CR860 (2002). In this case it is unnecessary to rely on the amount of restitution as the sole statement of the total loss caused by Petitioner's crimes, for the sentencing judge explicitly found the total loss to the insurance companies and the State of New York in the same amount. I.G. Ex. 3, at 5. That sum satisfies the requirement of 42 C.F.R. § 1001.102(b)(1). The I.G. has established this first aggravating factor.

The second aggravating factor asserted by the I.G. is specified at 42 C.F.R. § 1001.102(b)(2). That factor is present if "[t]he acts that resulted in the conviction, or similar acts, were committed over a period of one year or more." The language of the first charge to which Petitioner pleaded guilty demonstrates the factor. The telling lines of Count One of the Indictment read: "From at least in or about July 1997 through in or about October 2003, in the Southern District of New York and elsewhere, LAWRENCE WHITE, the defendant, unlawfully, willfully and knowingly did execute, and attempt to execute, a scheme and artifice to defraud health care benefit programs . . . ." I.G. Ex. 2, at 4. Petitioner's admission of guilt on Count One is sufficient to demonstrate the temporal span of his crime. The I.G. has established this second aggravating factor.

The third aggravating factor relied on by the I.G. is specified at 42 C.F.R. § 1001.102(b)(5), and is present if "[t]he sentence imposed by the court included incarceration." The court records show that Petitioner was sentenced to a prison term of 24 months on each count, the two terms to run concurrently. I.G. Ex. 3, at 2. The I.G. has established this third aggravating factor.

The fourth aggravating factor invoked by the I.G. is set out at 42 C.F.R. § 1001.102(b)(9). That factor is present when a convicted individual "has been the subject of any other adverse action by any . . . State . . . government agency or board, if the adverse action is based on the same set of circumstances that serves as the basis for imposition of the exclusion." The New York State Department of Health excluded Petitioner from the New York Medicaid program in a Notice of Immediate Agency Action dated April 29, 2004. The Department's action was explicitly based on the fact that Petitioner had been "charged with a crime relating to the furnishing or billing for medical care, services or supplies." I.G. Ex. 4, at 1. The I.G. has established this fourth aggravating factor.

Evidence relating to aggravating factors may be countered by evidence relating to any of the mitigating factors set forth at 42 C.F.R. §§ 1001.102(c)(1)-(3). Those mitigating factors are listed below the regulation's strict injunction that "[o]nly the following factors may be considered mitigating . . . ." 42 C.F.R. § 1001.102(c). As to each mitigating factor, Petitioner has the burden of proving it by a preponderance of the evidence, for a mitigating factor is in the nature of an affirmative defense. This allocation of the burden of proof, set out at 42 C.F.R. § 1005.15(b)(1), has been regularly affirmed in Board rulings. *Stacey R. Gale*, DAB No. 1941 (2004); *Dr. Darren James, D.P.M.*, DAB No. 1828, at 7-8 (2002); *Barry D. Garfinkel, M.D.*, DAB No. 1572, at 12 (1996).

Here, Petitioner has submitted evidence that implicates only one of the listed mitigating factors, although he does not urge the presence of that factor clearly. His exhibits suggest that the state of his physical and emotional health during relevant times contributed to his criminal behavior, and this suggestion raises the potential application of the mitigating factor listed at 42 C.F.R. § 1001.102 (c)(2).

The remainder of his position challenges the proven aggravating factors only tangentially. Petitioner argues that the financial losses caused by his criminal behavior were not as great as recited by the sentencing court in its Judgment in a Criminal Case, that unclear billing conventions were to blame for his criminal behavior, that another New York dentist convicted of similar crimes was sentenced to a shorter term of incarceration, and that the state board responsible for the professional licensing and discipline of dentists imposed what he views as a modest term of license suspension. These tangential arguments can be addressed first, and briefly.

In challenging the accuracy of the loss figures set out in the Judgment in a Criminal Case, and in claiming that unclear or confusing billing rules contributed to his criminal acts, Petitioner attempts a collateral attack on his guilty pleas and the two-count conviction based on them. But insofar as Petitioner now seeks to hedge his admissions of criminality, he is bound by the facts established by his pleas of guilty to the two counts in the Indictment, including his specific admissions that "[t]hese claims were false and fraudulent in that they falsely and fraudulently represented that WHITE had performed PSRP procedures on patients when in fact, as WHITE well knew, those procedures had not been performed by WHITE or anyone else in his office." I.G. Ex. 2, at 4, 5-6. He may not recant those admissions now. *See Susan Malady, R.N.*, DAB No. 1816 (2002); *Russell J. Ellicott, D.P.M.*, DAB CR1552; *Theodore Sabot, M.D.*, DAB CR1160 (2004); *Dirk G. Wood, M.D.*, DAB CR1068 (2003). Any broader form of collateral attack on predicate convictions in exclusion proceedings is precluded by regulation at 42 C.F.R. § 1001.2007(d), a preclusion affirmed repeatedly by the Departmental Appeals Board (Board). *Susan Malady, R.N.*, DAB No. 1816; *Dr. Frank R. Pennington, M.D.*, DAB No. 1786 (2001); *Joann Fletcher Cash*, DAB No. 1725 (2000). That principle of preclusion has been specifically applied to collateral attacks on a sentencing court's findings as to amount of loss. *Rajitha Goli, M.D., a/k/a Rajitha Bijanki*, DAB CR1155 (2004); *John V. Wozniak*, DAB CR1108 (2003).[1]

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[1] Even granting the accuracy and relevance of the smaller loss figures Petitioner offers in P. Ex. 1, at 2-3, the proffered smaller figures are still in excess of $100,000 well above the $5000 threshold for invoking the "amount of loss" aggravating factor.

Petitioner describes the case of another dentist, one Litt, convicted in United States District Court for the Southern District of New York on a single count of a similar but unrelated offense. P. Ans. Br, at 2-3; P. Ex. 3. Petitioner points out that Litt caused somewhat greater losses and did so over a somewhat longer period than Petitioner, but was sentenced by a different United States District Judge to six months' community confinement followed by six months home confinement. This juxtaposition is the basis for Petitioner's present claim that because he was more harshly sentenced than Litt, he is now entitled to offer that alleged disparity in treatment as a factor in mitigation:

> The Petitioner's sentence was much greater at 24 months of incarceration. If the Petitioner's sentence was similar to the almost identical Litt case then the sentence imposed would not have be (*sic*) as much of an aggravating factor. The Petitioners (*sic*) 24 month sentence resulted in severe emotional and economic hardship that should be considered a mitigating rather than an aggravating factor.

P. Ans. Br., at 2.

Now, it may be conceivable that Petitioner's crimes and Litt's bear comparison, and it may be possible to argue that there exists some inequitable disparity in the sentences imposed on the two criminals. But this record does not allow that comparison and certainly does not permit any such conclusion: the Litt Indictment is not before me, nor is the presentence report in Petitioner's case or Litt's, nor are their respective plea agreements, nor are complete transcripts of the sentencing hearings in the two cases, nor are any of the myriad other details that might lead two independent judicial officers to impose different sentences in separate, unrelated, proceedings on two different defendants, one of whom pleaded guilty to two counts, and one of whom admitted only a single charge. *See* P. Ex. 3, at 13, line 9-14, line 3. But Petitioner's argument is essentially irrelevant, for it does not negate the fact that he was sentenced to prison, and the unpleasant consequences of that prison term are not to be treated as if their unpleasantness has earned Petitioner some compensatory measure of mitigation outside the strict limitations of 42 C.F.R. §§ 1001.102(c)(1)-(3). As will be seen below, Petitioner's substantial prison term tends to support, rather than contraindicate, the I.G.'s enhancement of Petitioner's period of exclusion.

Petitioner's argument based on his license-suspension proceeding misses the point in a similar way. He points out that in the license proceeding he was in jeopardy of a permanent revocation of his license. P. Ans. Br. at 3; P. Ex. 4, at 4. He argues that because a less-permanent interdiction of his practice was imposed, the I.G. should have considered that result as a mitigating factor because "[t]he Professional Licensing Board

deems it acceptable for Petitioner to resume the practice of dentistry after a one year suspension, having taken into consideration much of the same aggravating factors as the DHHS . . . ." P. Ans. Br. at 3. There is simply no provision in 42 C.F.R. §§ 1001.102 (c)(1)-(3) that would authorize or permit the I.G. to do so, and the law of this forum has consistently read the list of mitigating factors set out there narrowly. *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); *Frank A. DeLia, D.O.*, DAB No. 1620 (1997); *See* also *Detra Tate Fairly*, DAB CR1349 (2005). [2]

But by any fair reading of his exhibits, Petitioner does raise his potential entitlement to benefit of the mitigating factor listed at 42 C.F.R. § 1001.102(c)(2). That mitigating factor is set out in the following language:

> (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 . . . .

Petitioner implicates this factor by submitting *in this case* evidence and arguments made on his behalf *elsewhere* suggesting that the state of his physical and emotional health during relevant times contributed to his criminal behavior. That evidence and those arguments require at least a limited discussion here; although they are not ultimately successful, Petitioner's *pro se* status requires that they receive some extra measure of consideration, and not be simply brushed aside *sub silentio*. *Louis Mathews*, DAB No. 1574 (1996); *Edward J. Petrus, M.D., et al.*, DAB No. 1264 (1991).[3]

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[2] I am aware that an important part of the *Everman* decision explains how the I.G. and an ALJ may consider facts that do not in themselves amount to mitigating factors if, but only if, they are connected with a listed mitigating or aggravating factor in a manner bearing on the appropriate weight to be given that factor. *Everman*, DAB No. 1880, at 7. But Petitioner has established none of the listed mitigating factors here, and so the outcome of the license proceeding has no mitigating factor to illuminate further or explain in more detail, and has no bearing on the four proven aggravating factors.

[3] The I.G. appears to have overlooked this issue, or has not been troubled to address it in the two I.G. briefs placed before me. This is what the I.G. has to say on the matter: "Petitioner raises circumstances in his reply brief (*sic*) that he asserts should be considered as mitigating factors. *See* Pet. Brief. However, the I.G. does not have authority to consider these circumstances because they are not identified as mitigating factors in the regulations. Therefore, Petitioner has not shown that any applicable mitigating factors are present in his case." I.G. Reply Br. at 3.

The major component of Petitioner's claim to the mitigation available through 42 C.F.R. § 1001.102(c)(2) lies in the undated one-page letter submitted by Z. Block, Ph.D., to the United States District Judge in connection with Petitioner's sentencing. P. Ex. 2, at 2. The letterhead describes Dr. Block as a psychologist, and in his letter Dr. Block writes that "I have known and worked with Lawrence White off and on for more than thirty years from his High School days up to the present." Dr. Block does not describe his relationship with Petitioner further, and stops short of characterizing it as that of a therapist or clinical care-provider. It seems likely, but not certain, that Dr. Block's letter was among the "numerous letters from numerous individuals from all different walks of life" to which the sentencing judge and Petitioner's counsel referred at the sentencing hearing. P. Ex. 2, at 3-4. Dr. Block's letter was submitted on Petitioner's behalf to the I.G. twice during the pre-exclusion review stages of the I.G.'s determination process. P. Exs. 1, at 2; 2, at 1.

Dr. Block's letter describes Petitioner's emotional makeup as conflict-avoidant and containing a large measure of "denial as his primary defense mechanism." P. Ex. 2, at 2. This statement by Dr. Block has been explicitly relied on by Petitioner twice before the I.G. (P. Ex. 1, at 2, para. 4; P. Ex. 2, at 1, para. 3) and implicitly before the District Court and the Professional Licensing Board (P. Ex. 2, at 1, para. 3) for the proposition that Petitioner's emotional makeup impaired his ability to heed and respond to warning letters about his billing practices. In combination with Petitioner's anxiety about his diagnosis and treatment for Hodgkin's Lymphoma, Petitioner has built a record suggestive of a claim of reduced culpability during the times of his crimes.

Now, nothing in this Decision need be understood as trivializing the disruptive effects of Petitioner's anxiety about his physical illness, of the physical illness itself, or of avoidant behavior. And, for purposes of the brief discussion that follows, I am prepared to accept *arguendo* that Dr. Block wrote professionally as Petitioner's therapist, that Petitioner's physical illness and treatment were to some degree disruptive of his emotional state, and that all of these phenomena were contemporaneous with the criminal conduct Petitioner admitted. But nothing in this information constitutes sufficient evidence to support a reasonable inference that the sentencing judge made a determination that Petitioner's mental, emotional and physical conditions reduced his culpability for his crimes.

In cases like this one, where there is no explicit reference by the sentencing judge to a petitioner's reduced culpability because of a "mental, emotional or physical condition," the Board has erected a comprehensive schema for the examination of a claim in mitigation based on 42 C.F.R. § 1001.102(c)(2). The details and application of that schema can be seen in *Russell Mark Posner*, DAB No. 2033 (2006) and *Arthur C. Haspel, D.P.M.*, DAB No. 1929 (2004). The schema is case-specific and requires a

search of the sentencing record: it first identifies any "mental, emotional or physical condition" involved; it seeks information in presentence reports and FED. R. CRIM. P. 32(h) notices; it examines the claims made by and on behalf of a petitioner at sentencing relative to condition-caused reduced culpability; it considers evidence of a petitioner's efforts to obtain treatment and rehabilitation for the identified conditions; it reviews details of the negative effects of the identified conditions on a petitioner's life generally and mental state in particular; and — perhaps most crucially — it inspects the sentence actually imposed for clear indications that the sentencing judge was moved toward lenity by a petitioner's demonstrated condition-caused reduced culpability.

In this case, evidence of Petitioner's physical and emotional conditions and their effects is sparse, especially when compared with the record "replete with details" in *Haspel*, where the Board found that the requisite judicial determination of reduced culpability had been demonstrated implicitly. Dr. Block's letter is the only qualified source of such evidence in this case, and all else is simply the commentary of non-experts about the effects of Petitioner's physical illness and treatment on his emotional state. Dr. Block's letter is not even in itself a firm assertion of Petitioner's reduced culpability: it has been put to that use only later, in the I.G.'s pre-exclusion review and the state license proceeding. The six pages of transcript from Petitioner's sentencing hearing simply do not reveal reliance by Petitioner or by his counsel on reduced culpability. P. Ex. 2, at 3-8. But — again, perhaps most crucially — the sentence actually imposed gives no indication of unusual lenity. It imposes a substantial prison term and orders restitution in a significant amount, and can in no manner whatsoever be understood as tempered by the sentencing judge's belief that Petitioner was less culpable in his crimes because impaired when he committed them. Thus, I can find neither in the record of Petitioner's sentencing, nor in the record before me as a whole, evidence sufficient to support the reasonable inference that the sentencing judge made the determination of reduced culpability necessary for Petitioner to claim benefit of the mitigating factor set out at 42 C.F.R. § 1001.102(c)(2). Petitioner has not established this or any other mitigating factor.

The I.G.'s discretion in weighing the importance of aggravating and mitigating factors in exclusion cases commands great deference when reviewed by Administrative Law Judges (ALJs). *Jeremy Robinson*, DAB No. 1905; *Keith Michael Everman, D.C.*, DAB No. 1880; *Stacy Ann Battle, D.D.S., et al.*, DAB No. 1843 (2002). That deference requires that the ALJ not substitute her or his own view of what period of exclusion might appear "best" in any given case for the view of the I.G. on the same evidence. In general, the Board has insisted that ALJs may reduce an exclusionary period only when they discover some meaningful evidentiary failing in the aggravating factors upon which the I.G. relied,

or when they discover evidence reliably establishing a mitigating factor not considered by the I.G. in setting the enhanced period. *Jeremy Robinson*, DAB No. 1905. Where, as here, all of the aggravating factors on which the I.G. relied are present and there are no mitigating factors, a holding that the exclusion period chosen by the I.G. was unreasonable could be reached only through the precise substitution of views that the doctrine of deference forbids. The only question now before me is whether the exclusion period is within a reasonable range. In the instant case, the proposed 13-year period is commensurate with the range established as reasonable in *Russell Mark Posner*, DAB No. 2033; *Stacey R. Gale*, DAB No. 1941; *Jeremy Robinson*, DAB No. 1905; *Thomas D. Harris*, DAB No. 1881 (2003); *Fereydoon Abir, M.D.*, DAB No. 1764 (2001); *Joann Fletcher Cash*, DAB No. 1725; and *Stanley Junious Benn*, DAB CR1501.

Summary disposition in a case such as this is appropriate when there are no disputed issues of material fact and when the undisputed facts, clear and not subject to conflicting interpretation, demonstrate that one party is entitled to judgment as a matter of law. *Thelma Walley*, DAB No. 1367. Summary disposition is explicitly authorized by the terms of 42 C.F.R. § 1005.4(b)(12). This forum looks to FED. R. CIV. P. 56 for guidance in applying that regulation. *Robert C. Greenwood*, DAB No. 1423 (1993). The material facts in this case are undisputed, clear, and unambiguous. They support summary disposition as a matter of law, and this Decision issues accordingly.

VI. Conclusion

For the reasons set out above, the I.G.'s determination to exclude Petitioner Lawrence J. White, D.D.S. from participation in Medicare, Medicaid, and all other federal health care programs for a term of 13 years should be, and it is, SUSTAINED, pursuant to section 1128(a)(3) of the Act, 42 U.S.C. § 1320a-7(a)(3).

/s/
Richard J. Smith
Administrative Law Judge