Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

David Wayne Evans, III
(OI File No. 7-10-40225-9),

Petitioner,

v.

The Inspector General,
U.S. Department of Health and Human Services.

Docket No. C-17-727

Decision No. CR4996

Date: December 20, 2017

DECISION

Petitioner, David Wayne Evans, III, is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to sections 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)) effective April 20, 2017. Petitioner's exclusion for five years is required by section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)). An additional period of exclusion of 8 years, for a total exclusion of 13 years,[1] is not unreasonable based upon the aggravating factors established in this case and the absence of any mitigating factors.

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[1] Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the minimum period of exclusion.

I. Background

The Inspector General (I.G.) of the U.S. Department of Health and Human Services notified Petitioner by letter dated March 31, 2017, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of 13 years. The I.G. advised Petitioner that he was being excluded pursuant to sections 1128(a)(1) of the Act based on his convictions in the United States District Court, District of Utah, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. I.G. Exhibit (Ex.) 1.

Petitioner, through counsel, timely requested a hearing on May 25, 2017 (RFH). The case was assigned to me on June 8, 2017, to hear and decide. I convened a prehearing conference by telephone on June 27, 2017, the substance of which is memorialized in my order dated June 27, 2017. During the prehearing conference, Petitioner waived an oral hearing and the parties agreed that this matter may be resolved based upon the parties' briefs and documentary evidence. The I.G. filed a brief (I.G. Br.) and I.G. Exs. 1 through 4 on August 9, 2017. On September 25, 2017, Petitioner filed his brief (P. Br.) along with Petitioner's exhibits 1 through 10, which were refiled on October 5, 2017 at my direction (P. Exs. 1-10). The I.G. filed a reply brief (I.G. Reply) on October 6, 2017.

Petitioner did not object to my consideration of I.G. Exs. 1 through 4 and they are admitted and considered. The I.G. objected to the admission P. Exs. 6, 7, 9, and 10 arguing they are irrelevant because they do not establish the existence of an authorized mitigating factor. I.G. Reply at 5. P. Ex. 6 is a sentencing memorandum; P. Ex. 7 is a judgment and sentencing report; and P. Ex. 9 is the transcript of the sentencing proceedings, all related to the conviction of Jacob Kilgore, Petitioner's co-conspirator. P. Ex. 10 is a screenshot from the I.G.'s website showing that the I.G. has excluded Jacob Kilgore. The I.G. does not object to the authenticity of any of these documents. An ALJ determines the admissibility of evidence and is not bound by the Federal Rules of Evidence but, may apply those rules where appropriate. 42 C.F.R. § 1005.17(a)–(b). The I.G. is correct that I must exclude irrelevant or immaterial evidence. 42 C.F.R. § 1005.17(c). However, the I.G. is incorrect in suggesting that the documents are not relevant or material because they do not establish an authorized mitigating factor in this case. The test for whether evidence is relevant is whether the evidence has "any tendency to make a fact more or less probable than it would be without the evidence;" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. Petitioner argues that I should consider when judging the reasonableness of the period of exclusion, Petitioner's alleged cooperation with authorities related to Kilgore's conviction and eventual exclusion from Medicare. P. Br. at 4, 6-7. Whether or not the period of exclusion proposed by the I.G. is unreasonable is an issue I must decide in this case. P. Exs. 6, 7, 9, and 10 are offered by Petitioner as evidence of his cooperation and those documents have a tendency, no matter how slight, to show that the existence of Petitioner's cooperation is more or less probable than would the record without those exhibits. Accordingly, I

conclude that P. Exs. 6, 7, 9, and 10 are relevant and the I.G.'s objection is overruled. Whether or not the evidence, when considered as a whole, establishes any mitigating factor is the issue that I must resolve in order to judge the issue of whether or not the proposed period of exclusion is unreasonable. The I.G. did not object to P. Exs. 1 through 5 and 8. Accordingly, P. Exs. 1 through 10 are admitted and considered as evidence.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's rights to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services (the Secretary). Pursuant to section 1128(a) of the Act, the Secretary must exclude from participation in any federal health care program any individual convicted under federal or state law of, among other things: a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Act §§ 1128(a)(1). The Secretary has promulgated regulations implementing these provisions of the Act. 42 C.F.R. § 1001.101(a).[2]

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act will be for a period of not less than five years. 42 C.F.R. § 1001.102(a). The Secretary has published regulations that establish aggravating factors that the I.G. may consider to extend the period of exclusion beyond the minimum five-year period, as well as mitigating factors that may be considered only if the minimum five-year period is extended. 42 C.F.R. § 1001.102(b), (c).

The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that provides the basis of the exclusion. 42 C.F.R. § 1001.2007(c), (d). Petitioner bears the burden of proof and the burden of persuasion on any affirmative defenses or mitigating factors, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b).

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[2] Citations are to the 2016 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

B. Issues

The Secretary has by regulation limited my scope of review to two issues:

> Whether there is a basis for the imposition of the exclusion; and
>
> Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold, followed by the pertinent findings of fact and analysis.

1. Petitioner's request for hearing was timely, and I have jurisdiction.

2. Petitioner's exclusion is required by section 1128(a)(1) of the Act.

The I.G. cites section 1128(a)(1) of the Act as the bases for Petitioner's mandatory exclusion. The statute provides in relevant part:

> (a) MANDATORY EXCLUSION. – The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):
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> (1) Conviction of program-related crimes. – Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program.

Act § 1128(a)(1). For an exclusion pursuant to section 1128(a)(1), the plain language of the Act requires that the Secretary exclude from participation in Medicare, Medicaid, and all federal health care programs any individual or entity: (1) convicted of a criminal offense; (2) where the offense is related to the delivery of an item or service; and (3) the delivery of the item or service was under Medicare or a state health care program.

Petitioner does not dispute that on April 21, 2016, judgment was entered finding him guilty pursuant to his guilty plea of one count of conspiracy to commit health care fraud. Petitioner was sentenced to six months in prison and to pay restitution of $957,055.77 to the Centers for Medicare & Medicaid Services (CMS), the component of the United States Department of Health and Human Services responsible for administering the

Medicare program. Petitioner was found jointly and severally liable for the restitution amount with his co-conspirator Jacob Kilgore. Petitioner was also ordered to forfeit $417,445.66, property of the United States. I.G. Ex. 4; P. Ex. 8 at 64, 91-94.

On September 30, 2013, Petitioner executed a statement in advance of his guilty plea in which he admitted to Count 1 of the Felony Information filed against him (I.G. Ex. 2; P. Ex. 1) and stipulated to the details of the conspiracy. P. Ex. 2. Petitioner stipulated that the conspiracy involved the delivery of power wheelchairs to Medicare beneficiaries and that Medicare is a federal health care program administered by CMS. P. Ex. 2 at 4.

The elements for exclusion under section 1128(a)(1) are satisfied in this case. Petitioner does not dispute that there is a basis for his exclusion pursuant to section 1128(a)(1) of the Act. P. Br. Accordingly, I conclude that there is a basis for exclusion and exclusion is mandated by sections 1128(a)(1) of the Act.

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

I have concluded that there is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act. Therefore, the I.G. must exclude Petitioner for a minimum period of five years pursuant to section 1128(c)(3)(B) of the Act. The I.G. has no discretion to impose a lesser period and I may not reduce the period of exclusion below five years. Petitioner agrees that the minimum period of exclusion under section 1128(a)(1) is five years. P. Br. at 2-3. The remaining issue is whether it is unreasonable to extend Petitioner's exclusion by an additional 8 years for a total period of exclusion of 13 years.

4. Three aggravating factors are present that justify extending the minimum period of exclusion to 13 years.

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

6. Exclusion for 13 years is not unreasonable in this case.

Petitioner argues that the mandatory five-year exclusion should not be extended by eight years. The issue under the regulation is whether the period of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(1).

My determination of whether the period of exclusion in this case is unreasonable turns on whether: (1) the I.G. has proven that there are aggravating factors; (2) Petitioner has proven that there are mitigating factors the I.G. failed to consider or that the I.G.

considered an aggravating factor that does not exist; and (3) the period of exclusion is within a reasonable range.

The I.G. notified Petitioner that three aggravating factors are present in this case that justify an exclusion of more than five years: (1) the acts resulting in Petitioner's conviction, or similar acts, caused or were intended to cause a financial loss to a government program or one or more entities of $50,000 or more shown by court ordered restitution of $957,000; (2) the acts resulting in Petitioner's conviction occurred over a period of one year or more as the criminal conduct occurred from about September 2008 to about June 2011; and (3) the sentence imposed by the court included 6 months of incarceration. I.G. Ex. 1 at 2. The three aggravating factors cited by the I.G., are proved by the documentary evidence.

Petitioner was ordered to pay restitution of $957,055.77 to CMS the agency responsible for administering Medicare. I.G. Ex. 4. Petitioner argued in his request for hearing (but seems to have abandoned the argument in his brief) that it was unreasonable for the I.G. to consider the amount of the restitution ordered as an aggravating factor, i.e., that the amount of restitution was a measure of the intended or actual loss to the Medicare program. RFH at 1: P. Ex. 8 at 62-63 (sentencing transcript discussion of loss and relationship to restitution amount). However, the Departmental Appeals Board (the Board) has consistently found that the amount of restitution ordered is a reasonable valuation of the amount of loss to the program. *Juan de Leon, Jr.*, DAB No. 2533 at 5 (2013); *Craig Richard Wilder*, DAB No. 2416 at 9 (2011).

Petitioner also asserted in his request for hearing but not in his brief, that it was not reasonable to consider the period of the "scheme" as an aggravating factor. RFH at 1. Petitioner pleaded guilty to and admitted the charge that the conspiracy occurred from around September 2008 to around June 2011. I.G. Ex. 2 at 4; P. Exs. 1 at 5. Petitioner actually stipulated that the conspiracy occurred from around October 2006 to around June 2011. P. Ex. 2 at 3. Pursuant to 42 C.F.R. § 1001.102(b)(2), the I.G. is expressly authorized to consider as an aggravating factor that the acts that resulted in the conviction that is the basis for exclusion occurred over a period of one year or more. In this case, Petitioner admitted that the conspiracy occurred for a period of a year or more and, therefore, the I.G. is permitted to consider that an aggravating factor.

Similarly, Petitioner argues in his request for hearing, but not his brief, that it was not reasonable for the I.G. to consider as an aggravating factor that incarceration was imposed. Petitioner does not dispute he was sentenced to six months incarceration. I.G. Ex. 4. Pursuant to 42 C.F.R. § 1001.201(b)(5), the I.G. is authorized to consider that the sentence related to the conviction for which exclusion is imposed included incarceration.

Petitioner appears to concede in his brief that the I.G. may consider the foregoing aggravating factors to justify extending the period of exclusion in this case. P. Br. at 2.

Petitioner's arguments that he briefs on the merits are that the I.G. failed to consider mitigating factors authorized by 42 C.F.R. § 1001.102(c) and, therefore, I must re-evaluate the extended 13-year period of exclusion and find it excessive. Petitioner specifically urges me to find that the mitigating factors authorized by 42 C.F.R. § 1001.102(c)(2) and (3)(i) are present in this case and not considered by the I.G. P. Br. at 2-3.

If any of the aggravating factors authorized by 42 C.F.R. § 1001.102(b) justify an exclusion of longer than five years, as they do in this case, then mitigating factors may be considered as a basis for reducing the period of exclusion to no fewer than five years. 42 C.F.R. § 1001.102(c). The only authorized mitigating factors that I may consider are those established by 42 C.F.R. § 1001.102(c):

> (1) The individual or entity was convicted of 3 or fewer misdemeanor offenses, and the entire amount of financial loss (both actual loss and intended loss) to Medicare or any other Federal, State or local governmental health care program due to the acts that resulted in the conviction, and similar acts, is less than $1,500;
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> (2) The record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional or physical condition before or during the commission of the offense that reduced the individual's culpability; or
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> (3) The individual's or entity's cooperation with Federal or State officials resulted in –
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>> (i) Others being convicted or excluded from Medicare, Medicaid and all other Federal health care programs,
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>> (ii) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or
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>> (iii) The imposition against anyone of a civil money penalty or assessment under part 1003 of this chapter.

Petitioner argues the I.G. failed to consider the mitigating factors detailed at 42 C.F.R. §§ 1001.102(c)(2) and (3)(i). P. Br. at 2-3, 5-7. Petitioner has the burden to prove by a preponderance of the evidence that there is a mitigating factor for me to consider that was

not considered by the I.G. 42 C.F.R. § 1005.15(b)(1); *Stacey R. Gale*, DAB No. 1941 at 9 (2004); *Arthur C. Haspel, D.P.M.*, DAB No. 1929 at 5 (2004).

The mitigating factor established by 42 C.F.R. § 1001.102(c)(2) requires that "[t]he record in the criminal proceedings including sentencing documents," must "demonstrate[] that the ***court determined***" both "that the individual had a mental, emotional or physical condition before or during the commission of the offense" ***and*** that the condition "reduced the individual's culpability . . . ." 42 C.F.R. § 1001.102(c)(2) (emphasis added). Petitioner contends his mental or emotional state made him a target of Mr. Kilgore, and his "ability to be manipulated" is an emotional or mental condition that reduced his culpability. P. Br. at 5-6. Petitioner claims "[t]he government in Kilgore's criminal proceeding acknowledged that [Petitioner] looked up to Kilgore and Kilgore took advantage of [Petitioner]." P. Br. at 5. Petitioner's argument and evidence fail to establish the mitigating factor established by 42 C.F.R. § 1001.102(c)(2). The two documents that reflect the criminal court action related to sentencing are the Presentence Investigation Report (P. Ex. 5) (presentence report) and the transcript of Petitioner's sentencing proceeding (P. Ex. 8). The presentence report reflects that Petitioner stated that he was young when he became engaged in the conspiracy and that he was under enormous pressure to meet sales quotas, but he admitted that his conduct was wrong and he stated he would never place himself in such a situation again. The presentence report shows his offense level was decreased due to his acceptance of responsibility based in part upon the foregoing statement. P. Ex. 5 at 9 ¶ 18, at 10 ¶ 28. The presentence report states that Petitioner has never been under the care of mental health professionals; he displayed no symptoms suggestive of serious emotional problems; and he had no history of drug or alcohol abuse. P. Ex. 5 at 11 ¶¶ 43-44. The presentence report concludes that Petitioner knew what he was doing was wrong but he made a conscious decision to participate. P. Ex. 5 at 16 ¶ 74. The presentence report does not suggest departure from sentencing guidelines based on any mental or emotional impairment. P. Ex. 5. The transcript of the sentencing proceeding includes no evidence that the judge considered Petitioner's culpability reduced due to some mental, emotional, or physical condition. P. Ex. 8 at 46-56. In fact, the sentencing judge recognized that the crime was motivated by greed. P. Ex. 8 at 83-84. In announcing sentence, the judge made no mention of reduced culpability due to mental or emotional condition. P. Ex. 8 at 89-94. Petitioner has the burden to prove by a preponderance of the evidence that the mitigating factor detailed at 42 C.F.R. § 1001.102(c)(2) existed. But Petitioner has failed to show it is more likely than not that the "court determined that [Petitioner] had a mental, emotional or physical condition before or during the commission of the offense that reduced the [Petitioner's] culpability," which is the mitigating factor established by 42 C.F.R. § 1001.102(c)(2). Therefore, I conclude that the I.G. did not fail to consider this mitigating factor.

Petitioner argues the I.G. failed to consider the mitigating factor established by 42 C.F.R. §§ 1001.102(c)(3)(i). P. Br. at 2-3, 5-7. In order to meet his burden to show the existence of a mitigating factor established by 42 C.F.R. § 1001.102(c)(3), Petitioner

needs to show that his cooperation with authorities: (1) lead to others being convicted or excluded from Medicare, Medicaid and other federal health care programs, (2) additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or (3) the imposition against anyone of a civil money penalty or assessment 42 C.F.R. pt. 1003 of this chapter. 42 C.F.R. § 1001.102(c)(3)(i-iii). Petitioner focuses upon the mitigating factor established by 42 C.F.R. § 1001.102(c)(3)(i), i.e., that his cooperation led to another, specifically his co-conspirator Jacob Kilgore, being convicted or excluded. Petitioner's evidence clearly shows that his co-conspirator was convicted of his involvement in the conspiracy with Petitioner and he was also excluded from participating in Medicare by the I.G. P. Exs. 3, 4, 6, 7, 9, 10.

Petitioner argues he "assisted authorities in the investigation and prosecution of [Petitioner's] misconduct, which includes the conspiracy with Kilgore." P. Br. at 4, P. Ex. 5 at 10. Petitioner contends he cooperated with law enforcement by submitting a statement against himself which implicated Mr. Kilgore in the scheme to carry out various criminal acts. P. Br. at 4. Petitioner further contends his cooperation, which included a promise to testify against Mr. Kilgore, resulted in Mr. Kilgore's conviction, who ultimately pled guilty. P. Br. at 6.

In *Stacey R. Gale*, the Board elaborated on a petitioner's burden related to proving a mitigating factor under 42 C.F.R. § 1001.102(c)(3):

> Thus, it is Petitioner's responsibility to locate and present evidence to substantiate the existence of any alleged mitigating factor in her case. In alleging the existence of the factor at 42 C.F.R. § 1001.102(c)(3)(ii), Petitioner must demonstrate that she cooperated with a state or federal official and this cooperation resulted in "[a]dditional cases being investigated." As is apparent from the foregoing, the I.G. does not have the responsibility to prove the non-existence of the mitigating factor under the regulation. For example, the I.G. does not have the responsibility to substantiate under the regulation that even though Petitioner may have cooperated with a state or federal official, that cooperation did not result in additional cases being investigated. It is entirely Petitioner's burden to demonstrate that her cooperation with a state or federal official resulted in additional cases being investigated.

Stacey R. Gale, DAB No. 1941 at 9. The Board went on to explain that mere cooperation is not enough. A petitioner must show that the cooperation resulted in another being convicted or excluded or additional cases being investigated or reports being issued. The

regulation does not "authorize" the I.G. to independently determine whether or not state or federal investigators should have opened an investigation or issued a report. The Board found that the regulation requires that a petitioner show that law enforcement officials actually exercised discretion and began a new investigation or issued a report as a result of a petitioner's cooperation.

> The rule is not designed to reward individuals who may have provided evasive, speculative, unfounded or even spurious information that proved to be so useless that the government official was unable even to open a new case for investigation. Rather, the regulation is designed to authorize mitigation for significant or valuable cooperation that yielded positive results for the state or federal government in the form of a new case actually being opened for investigation or a report actually being issued.

Id. at 10-11. The Board further explained that the regulation requires that the cooperation be validated by the fact that investigators opened a "new case" rather than simply providing investigators additional information related to an ongoing case. *Id*. at 14, 17.

The evidence in this case is insufficient to meet Petitioner's burden to show the existence of a mitigating factor under 42 C.F.R. § 1001.102(c)(3). The presentence report shows Petitioner assisted authorities in investigation and prosecution of his misconduct and his offence level was decreased for that reason. P. Ex. 5 at 10 ¶ 29. The presentence report does not suggest departure from sentencing guidelines based on cooperation in prosecution of other defendants or even refer to such cooperation. P. Ex. 5. During sentencing Petitioner's attorney asserted that Petitioner spent hours helping the prosecution and had agreed to testify as necessary, but he did not represent to the judge that Petitioner had testified against Kilgore or others. P. Ex. 8 at 54-55. In announcing sentence for Petitioner, the judge acknowledged that Petitioner and other co-conspirators sentenced during the joint sentencing proceeding cooperated with the government in the overall investigation but the judge did not describe the cooperation in detail. P. Ex. 8 at 80.

Petitioner has failed to meet the heavy burden to demonstrate that his cooperation led to the conviction or exclusion of Kilgore or any of his other co-conspirators. While Petitioner may have been willing to testify and do more to help with the conviction of Kilgore, he has not shown he was called upon to do so.

Based on my review of the entire record, I conclude, Petitioner has failed to establish any mitigating factor that I am permitted to consider under 42 C.F.R. § 1001.102(c) to reduce the period of his exclusion. Accordingly, I conclude this case presents no mitigating

factors the I.G. failed to consider that may have justified reducing the period of Petitioner's exclusion.

The regulation requires that the ALJ determine whether the length of exclusion imposed by the I.G. is "unreasonable." 42 C.F.R. § 1001.2007(a)(1). The Board, however, has made clear that the role of the ALJ in exclusion cases is to conduct a de novo review of the facts related to the basis for the exclusion and the existence of aggravating and mitigating factors identified at 42 C.F.R. § 1001.102 and to determine whether the period of exclusion imposed by the I.G. falls within a reasonable range. *Juan de Leon, Jr.*, DAB No. 2533 at 3; *Craig Richard Wilder, M.D.*, DAB No. 2416 at 8 ; *Joann Fletcher Cash*, DAB No. 1725 at 17 n.9 (2000). The Board has explained that, in determining whether a period of exclusion is "unreasonable," the ALJ is to consider whether such period falls "within a reasonable range." *Cash*, DAB No. 1725 at 17 n.9. The Board cautions that whether the ALJ thinks the period of exclusion too long or too short is not the issue. The ALJ may not substitute his or her judgment for that of the I.G. and may only change the period of exclusion in the limited circumstances identified by the Board.

In *John (Juan) Urquijo*, DAB No. 1735 (2000), the Board made clear that, if the I.G. considers an aggravating factor to extend the period of exclusion and that factor is not later shown to exist on appeal, or if the I.G. fails to consider a mitigating factor that is shown to exist, then the ALJ may make a decision as to the appropriate extension of the period of exclusion beyond the minimum. In *Gary Alan Katz, R.Ph.*, DAB No. 1842 (2002), the Board suggests that, when it is found that an aggravating factor considered by the I.G. is not proved before the ALJ, then some downward adjustment of the period of exclusion should be expected absent some circumstances that indicate no such adjustment is appropriate. The Board has by its prior decisions effectively limited the scope of my authority under the regulations to judging the reasonableness of the period of exclusion by determining whether or not aggravating and mitigating factors are proven. If the aggravating factors cited by the I.G. are proved and Petitioner fails to prove that the I.G. failed to consider a mitigating factor, the Board's interpretation of the regulations is that I have no discretion to change the period of exclusion. Neither the regulations nor the Board's interpretation of those regulations allows an ALJ to consider whether or not an excluded individual or entity is trustworthy as a basis for concluding that the period of exclusion imposed by the I.G. is unreasonable and should be reduced.

In this case, after de novo review, I have concluded that a basis for exclusion exists and that the evidence establishes the three aggravating factors that the I.G. relied on to impose the 13-year exclusion. Petitioner has not met his burden to establish that the I.G. failed to consider any mitigating factor or considered an aggravating factor that did not exist. I conclude that the 13-year exclusion falls within a reasonable range and is not unreasonable considering the existence of three aggravating factors and the absence of any mitigating factors. No basis exists for me to reassess the period of exclusion in this case.

Exclusion is effective 20 days from the date of the I.G.'s written notice of exclusion to the affected individual or entity. 42 C.F.R. § 1001.2002(b). The I.G.'s notice to Petitioner is dated March 31, 2017. Therefore, the effective date of Petitioner's exclusion is April 20, 2017.

III. Conclusion

For all of the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs for a minimum of 13 years, effective April 20, 2017.

/s/

Keith W. Sickendick
Administrative Law Judge