Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Peter Victor Ayika
Docket No. A-14-34
March 28, 2014

DISMISSAL OF APPEAL

Peter Victor Ayika, Petitioner, appealed the decision of an Administrative Law Judge sustaining the determination of the Inspector General (I.G.) to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs for a period of 30 years. *Peter Victor Ayika*, DAB CR3031 (2013). The I.G. excluded Petitioner under sections 1128(a)(1) and (3) of the Social Security Act based on his conviction in a United States district court for health care fraud.

On February 12, 2014, the United States Court of Appeals for the Fifth Circuit vacated Petitioner's conviction for health care fraud. By order dated March 5, 2014, I directed the parties to comment in writing on how the court's decision affects Petitioner's appeal before the Board.

Petitioner, by motion dated March 11, 2014, moved that his exclusion be dismissed. The I.G., by letter dated March 18, 2014, notified Petitioner that his exclusion was withdrawn retroactive to March 20, 2013, the effective date of the exclusion. The I.G., by motion dated March 20, 2014, moved that the Board dismiss Petitioner's appeal, and provided a copy of the March 18, 2014 letter withdrawing the exclusion. In an accompanying memorandum of law, the I.G. stated that because Petitioner's underlying conviction was vacated on appeal, the I.G. is required to retroactively reinstate Petitioner, and that his appeal was thus moot. The I.G. cited 42 C.F.R. § 1001.3005(a)(1), which states that "[a]n individual or entity will be reinstated into Medicare, Medicaid and other Federal health care programs retroactive to the effective date of the exclusion when such exclusion is based on— … [a] conviction that is reversed or vacated on appeal[.]"

The regulations authorizing the exclusion of individuals based on convictions including convictions for health care fraud provide appeal rights to "an individual or entity excluded" thereunder. 42 C.F.R. § 1001.2007(a); *see also* 42 C.F.R. §§ 1005.2(a) (providing the right to a hearing before an ALJ to "a party sanctioned" under part 1001 of 42 C.F.R. (implementing the statutory exclusion authority)), 1005.21 (providing for review of the ALJ's decision to the Board). As the I.G. has withdrawn Petitioner's exclusion, there is no basis for Petitioner's appeal, and the appeal is moot.

Accordingly, Petitioner's appeal is dismissed.

/s/
Sheila Ann Hegy
Presiding Board Member

This document has been reformatted for publication.

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Peter Victor Ayika,
(O.I. No. 6-07-40257-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-722

Decision No. CR3031

Date: December 12, 2013

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Disposition affirming the I.G.'s determination to exclude Petitioner *pro se* Peter Victor Ayika from participation in Medicare, Medicaid, and all other federal health care programs for a period of 30 years. The I.G.'s Motion and determination to exclude Petitioner are based on sections 1128(a)(1) and (a)(3) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1) and (a)(3). The undisputed material facts of this case demonstrate that the minimum five-year exclusion must be imposed, and that the I.G.'s determination to enhance that period to 30 years based on proof of the aggravating factors found at 42 C.F.R. § 1001.102(b)(1), (2), (5), (6) and (9) is supported in fact and law. Accordingly, I grant the I.G.'s Motion for Summary Disposition.

I. Procedural Background

Petitioner was a pharmacist licensed in the State of Texas who owned and operated a pharmacy called Najerausa International, Inc. d/b/a Continental Pharmacy of El Paso located in El Paso, Texas. I.G. Ex. 2 at 4. On March 11, 2009, the Texas State Board of Pharmacy revoked Petitioner's pharmacist license. I.G. Ex. 8 at 1-2.

On December 1, 2009, the Texas Health and Human Services Commission, Office of the Inspector General, excluded Petitioner from participation in the Texas Medicaid and other federally funded health care programs due to the revocation of Petitioner's pharmacist license. I.G. Ex. 9 at 1.

On August 24, 2011, the Federal Grand Jury sitting for the United States District Court for the Western District of Texas, El Paso Division, handed up a three-count Indictment charging that between October 1, 2004, and March 11, 2009, Petitioner Peter Victor Ayika did knowingly and willfully execute a scheme to defraud a health care benefit program by submitting false and fraudulent claims to the Medicaid program, the Federal Employees Health Benefits program and various other health care insurers. The Indictment charged Petitioner with Health Care Fraud, in violation of 18 U.S.C. § 1347, Mail Fraud, in violation of 18 U.S.C. § 1341 and Wire Fraud, in violation of 18 U.S.C. § 1343, for submitting false and fraudulent claims to the aforementioned health care programs and insurers for medications and other pharmaceuticals that were never distributed or dispensed to the insured. I.G. Ex. 4.

On October 19, 2011, in a separate proceeding, Petitioner was found guilty by jury verdict of one count of processing with intent to distribute hydrocodone by a practitioner and one count of distributing a listed chemical with knowledge, or reason to know, of its wrongful use, both counts in violation of 21 U.S.C. § 841. I.G. Ex. 10 at 1. On June 12, 2012, the United States District Court for the Western District of Texas, El Paso Division, sentenced Petitioner to 60 months of incarceration for Count One to be served concurrently with 170 months of incarceration for Count Two, followed by three years of supervised release. I.G. Ex. 10 at 2-3.

Petitioner and his counsel negotiated a Plea Agreement with prosecutors in the health care fraud case. By the terms of that Agreement, signed by Petitioner on March 13, 2012, Petitioner agreed to plead guilty to the August 24, 2011 Indictment's first count, Health Care Fraud, in violation of 18 U.S.C. § 1347. Included with the Plea Agreement, incorporated by reference, was Petitioner's factual recitation of his scheme to commit health care fraud. Petitioner specifically acknowledged that his criminal activity began on or about August 1, 2006, and continued until March 11, 2009. I.G. Ex. 5.

On May 2, 2012, in the United States District Court for the Western District of Texas, El Paso Division, Petitioner pleaded guilty to Count One of the Indictment, Health Care Fraud, in violation of 18 U.S.C. § 1347. The Court dismissed the other two counts listed in the Indictment on motion by the prosecutor. I.G. Ex. 7 at 1. On September 11, 2012, Petitioner was sentenced to 63 months of incarceration followed by 24 months of supervised release. Petitioner was also ordered to pay $2,498,586.86 in restitution. I.G. Ex. 7 at 2-3, 7.

On February 28, 2013, the I.G. wrote to Petitioner giving notice of his exclusion for a period of 30 years pursuant to the terms of sections 1128(a)(1) and (a)(3) of the Act. The I.G.'s letter told Petitioner that the mandatory minimum five-year period of exclusion was to be enhanced by an additional 25 years based on the presence of five aggravating factors. I.G. Ex. 1.

Acting *pro se*, Petitioner timely requested a hearing by letter (Req. for Hr'g.) dated April 8, 2013, seeking review of the I.G.'s determination. This letter was received by the Civil Remedies Division on April 24, 2013. In order to discuss the issues presented by this case and procedures for addressing those issues, I convened a telephonic prehearing conference on June 6, 2013, pursuant to 42 C.F.R. § 1005.6. By Order of June 6, 2013, I established those procedures and a schedule for the submission of documents and briefs.

On July 30, 2013, the Civil Remedies Division received Petitioner's motion for extension of time to serve and file his brief dated July 19, 2013. By Order of August 1, 2013, I granted that motion and amended the schedule for submission of documents and briefs.

On August 27, 2013, the Civil Remedies Division received Petitioner's August 19, 2013 pleading entitled "Motion to Dismiss Imposed Exclusion on Jurisdictional Grounds." I denied Petitioner's motion (P. Mot. to Dismiss) by Order dated August 27, 2013.

By Order dated October 29, 2013, I closed the record in this case for purposes of 42 C.F.R. § 1005.20(c) effective October 25, 2013.

The evidentiary record on which I decide the issues before me contains 13 exhibits, all proffered by the I.G. and marked I.G. Exs. 1-13. In the absence of objection, I have admitted all proffered exhibits as marked.

II. Issues

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

> a. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to sections 1128(a)(1) and (a)(3) of the Act; and
>
> b. Whether the 30-year length of the proposed period of exclusion is unreasonable.

For all of the reason set out below, the first issue is resolved in favor of the I.G.'s position. Petitioner's predicate conviction is established in the record before me and both section 1128(a)(1) and (a)(3) of the Act mandate Petitioner's exclusion. A five-year

period of exclusion is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B). The enhancement of that period to 30 years is authorized and supported because the five aggravating factors relied on by the I.G. and found at 42 C.F.R. § 1001.102(b)(1), (2), (5), (6) and (9) are established in the record and the 30-year period is within a reasonable range. Petitioner has demonstrated no mitigating factors that would reduce the proposed period of his exclusion.

III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any individual or entity convicted of a criminal offense related to the delivery of an item or service under Title XVIII of the Act (the Medicare program) or any state health care program (the Medicaid program). The terms of section 1128(a)(1) of the Act are restated in similar language at 42 C.F.R. § 1001.101(a).

Section 1128(a)(3) of the Act, 42 U.S.C. § 1320a-7(a)(3), requires the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any individual or entity convicted, under federal or state law, of a felony offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility , or other financial misconduct which occurred after August 21, 1996, in connection with the delivery of a health care item or service. The terms of section 1128(a)(3) of the Act are restated in similar language at 42 C.F.R. § 1001.101(c).

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a Federal . . . court, regardless of . . . whether the judgment of conviction or other record relating to criminal conduct has been expunged," section 1128(i)(1) of the Act; "when there has been a finding of guilt against the individual . . . by a Federal . . . court," section 1128(i)(2) of the Act; "when a plea of guilty or nolo contendere by the individual . . . has been accepted by a Federal . . . court," section 1128(i)(3) of the Act; or "when the individual . . . has entered into participation in a . . . deferred adjudication . . . program where judgment of conviction has been withheld," section 1128(i)(4) of the Act. 42 U.S.C. §§ 1320a-7(i)(1)-(4). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(1) or (a)(3) of the Act is mandatory and the I.G. must impose it for a minimum period of five years. Act § 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 mandatory minimum period of exclusion may be enhanced in some limited circumstances, but only on the I.G.'s proof of certain narrowly-defined aggravating factors listed at 42 C.F.R. § 1001.102(b). In this case, the I.G. relies on five aggravating

factors set out at 42 C.F.R. § 1001.102(b)(1), (2), (5), (6) and (9) to enhance the period of Petitioner's exclusion to 30 years. The aggravating factor set out at 42 C.F.R. § 1001.102(b)(1) is present when "[t]he acts resulting in conviction, or similar acts, that caused or were intended to cause, a financial loss to a [g]overnment program or to one or more entities of $5,000 or more." The aggravating factor set out at 42 C.F.R. § 1001.102(b)(2) is present when "acts that resulted in the conviction, or similar acts, were committed over a period of one year or more." The aggravating factor set out at 42 C.F.R. § 1001.102(b)(5) is present when the "sentence imposed by the court included incarceration." The aggravating factor set out at 42 C.F.R. § 1001.102(b)(6) is present when "[t]he convicted individual or entity has a prior criminal, civil or administrative sanction record." The aggravating factor set out at 42 C.F.R. § 1001.102(b)(9) is present when "the individual or entity was convicted of other offenses besides those which formed the basis for the exclusion, or has been the subject of any other adverse action by any Federal, State or local 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."

In cases when the I.G. proposes to enhance the period of exclusion by relying on one or more aggravating factors, a petitioner may attempt to limit or nullify the proposed enhancement through proof of certain mitigating factors, carefully defined at 42 C.F.R. § 1001.102(c)(1)-(3). The petitioner who claims the mitigating factor or factors bears the burden of proving any mitigating factors claimed. 42 C.F.R. § 1005.15(b)(1).

IV. Findings and Conclusions

Based on the undisputed material facts in the record before me, I find and conclude as follows:

1. On May 2, 2012, as noted in the September 11, 2012 Judgment in a Criminal Case, in the United States District Court for the Western District of Texas, El Paso Division, Petitioner Peter Victor Ayika pleaded guilty to one count of Health Care Fraud, in violation of 18 U.S.C. § 1347. I.G. Ex. 7.

2. On September 11, 2012, a finding of guilt and a judgment of conviction based on that plea were entered against Petitioner. The District Court sentenced Petitioner to serve 63 months of imprisonment; to pay restitution in the amount of $2,498,586.86; and after his release from imprisonment, to serve two years of supervised release. I.G. Ex. 7.

3. The finding of guilt and judgment of conviction based on Petitioner's accepted guilty plea described above in Findings 1 and 2 constitute a "conviction" within the meaning of sections 1128(a)(1) and 1128(i)(1), (2) and (3) of the Act, and 42 C.F.R. § 1001.2.

4. A nexus and a common-sense connection exist between the criminal offenses of which Petitioner was convicted, as noted above in Findings 1, 2 and 3, and the delivery of an

item or service under the Medicare and Medicaid programs. I.G. Exs. 5, 7; *Berton Siegel, D.O.*, DAB No. 1467 (1994).

5. By reason of Petitioner's conviction, a basis exists for the I.G.'s exercise of authority, pursuant to section 1128(a)(1) and (a)(3) of the Act, 42 U.S.C. § 1320a-7(a)(1) and (a)(3), to exclude him from participation in Medicare, Medicaid, and all other federal health care programs.

6. Because the acts resulting in Petitioner's conviction caused a financial loss to a government program and other entities of over $5,000, the aggravating factor set out at 42 C.F.R. § 1001.102(b)(1) is present.

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

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

9. Because Petitioner has a prior administrative sanction record, the aggravating factor set out at 42 C.F.R. § 1001.102(b)(6) is present.

10. Because Petitioner was convicted of other offenses besides those which formed the basis for his exclusion, the aggravating factor set out at 42 C.F.R. § 1001.102(b)(9) is present.

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

12. The I.G.'s exclusion of Petitioner for an enhanced period of 30 years is supported by fact and law and is within a reasonable range. *See* Findings 1-11 above.

13. There are no disputed issues of material fact and summary disposition is appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

The parties do not debate the Secretary's authority to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128 of the Act. However, Petitioner repeatedly challenges the I.G.'s authority — *as distinct from that of the Secretary herself* — to impose such an exclusion on him. Petitioner argues that "[t]he Secretary has no power to confer power to the Inspector General in undertaking statutory exclusion proceeding or judicial proceeding. The power to award process is conferred by Congress. Rice v. Ames, 180 U.S. 371 (1905)." P. Br.

at 8; P. Mot. to Dismiss at 2; P. Rep. Br. at 7. As I noted in my August 27, 2013 Order denying Petitioner's motion, and notwithstanding Petitioner's repeated insistence to the contrary, that proposition is directly refuted by the well-settled and longstanding principles announced by the Departmental Appeals Board (Board) in, *inter alia*, *Jack W. Greene*, DAB No. 1078 (1989); *Vincent Baratta, M.D.*, DAB No. 1172 (1990); *Joyce Faye Hughey*, DAB No. 1221 (1991); and *Michael Travers, M.D.*, DAB No. 1237 (1991). The latter three decisions are based in turn on 48 Fed. Reg. 21,662 (May 13, 1983). As I wrote in my August 27, 2013 Order, Petitioner's argument on this point is frivolous and warrants no further discussion here. In addition, under 42 C.F.R. § 1001.2007(a)(1), an excluded individual or entity may file a request for a hearing before an Administrative Law Judge only on the issues of whether the basis for the exclusion exists and whether the length of the exclusion is unreasonable. Accordingly, these issues are addressed below.

1. ***Petitioner's exclusion is mandated by section 1128(a)(1) of the Act because Petitioner was convicted of a criminal offense related to the delivery of an item or service under a state health care program (the Medicaid program).***

The two essential elements necessary to support an exclusion based on section 1128(a)(1) of the Acts are: (1) the individual to be excluded must have been convicted of a criminal offense; and (2) the criminal offense must have been related to the delivery of an item or service under Title XVIII of the Act (the Medicare program) or any state health care program (the Medicaid program). *Tamara Brown*, DAB No. 2195 (2008); *Thelma Walley*, DAB No. 1367; *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Lyle Kai, R.Ph.*, DAB CR1262 (2004), *rev'd on other grounds*, DAB No. 1979 (2005). *See Russell Mark Posner*, DAB No. 2033, at 5-6 (2006).

The United States District Court's records clearly show that the first issue before me is resolved in the I.G.'s favor. As noted in the September 11, 2012 Judgment in a Criminal Case, I.G. Ex. 7, Petitioner pleaded guilty to the criminal offense of Health Care Fraud, in violation of 18 U.S.C. § 1347, on May 2, 2012. Petitioner's guilty plea and the District Court's subsequent actions constitute a conviction within the meaning of sections 1128(a)(1) and 1128(i)(1), (2)and (3) of the Act. Thus, the first essential element is established by the record.

The evidence also establishes that Petitioner's conviction satisfies the second essential element since it is related to the delivery of an item or service under the Medicaid program. In his Plea Agreement, Petitioner admitted that he electronically submitted materially false claims for reimbursement from Medicaid and various other insurance providers between August 1, 2006, and March 11, 2009. Petitioner admits to using patient insurance information to bill Medicaid and other insurance providers for reimbursement for prescription drugs and other pharmaceuticals that were never provided to, or on behalf of, patients or customers. I.G. Ex. 5 at 11-17. The submission of false

claims to the Medicaid or Medicare programs has consistently been held to be a program-related crime within the reach of section 1128(a)(1). *Douglas Schram, R.Ph.*, DAB No. 1372 (1992); *Dewayne Franzen*, DAB No. 1165 (1990); *Jack W. Greene*, DAB No. 1078 (1989), *aff'd sub nom. Greene v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990). Thus, the second essential element is also established by the record.

In his submissions in this case, Petitioner does not challenge these assertions and, in fact, concedes that there is a factual basis for his exclusion under the Act. Petitioner admits that the Secretary has "the factual basis to exclude Petitioner from participation in any Federal health care programs because of his conviction." P. Br. at 6. Petitioner also begins his arguments by stating "[a]lthough the Secretary has a basis for the imposition of the exclusion sanction . . . ." P. Br. at 7. In the absence of a challenge from Petitioner and based on the record before me, I find that the facts fully establish the evidentiary foundation necessary for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act.

The I.G. also cites a separate and independent legal basis for Petitioner's exclusion, section 1128(a)(3) of the Act. 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 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); *Kenneth M. Behr*, DAB No. 1997 (2005); *Erik D. DeSimone, R.Ph.*, DAB No. 1932 (2004); *Jeremy Robinson*, DAB No. 1905 (2004); *Breton Lee Morgan, M.D.*, DAB CR1913 (2009); *Morganna Elizabeth Allen*, DAB CR1479 (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 Nielson*, DAB CR1181 (2004).

While the record before me also supports an exclusion based on section 1128(a)(3) of the Act, no extended discussion of this legal basis is necessary since the basis for Petitioner's exclusion has already been established pursuant to section 1128(a)(1) of the Act.

2. Based on the aggravating factors in this case and the absence of any mitigating factors, the 30-year exclusion falls within a reasonable range.

The I.G. relies on five aggravating factors to support Petitioner's proposed 30-year exclusion period. The aggravating factor set out at 42 C.F.R. § 1001.102(b)(1) is present when there is a showing of financial loss to a government program or certain other entities of more than $5,000. This factor has been proven here. The District Court

records show that Petitioner was ordered to pay restitution in the amount of $2,498,586.86 to the Texas Medicaid program and various other entities. I.G. Ex. 7 at 7. The actual amount of restitution ordered is considered a reasonable measure of program losses. *See Jason Holladay, M.D.*, DAB No. 1855 (2002). Petitioner's crimes caused the Texas Medicaid program and other insurance entities financial losses almost 500 times the $5,000 threshold required for aggravation. The Board has characterized amounts substantially greater than the statutory standard as "an exceptionally aggravating factor" entitled to significant weight. *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003). The extensive loss to the programs targeted by Petitioner's crimes justifies a significant increase in the period of exclusion.

The aggravating factor set out at 42 C.F.R. § 1001.102(b)(2) is present when "[t]he acts that resulted in the conviction, or similar acts, were committed over a period of one year or more." Count One of the Indictment, to which Petitioner pleaded guilty, describes the time span of Petitioner's crimes from October 1, 2004, through March 11, 2009. I.G. Ex. 4 at 1. The written factual basis, incorporated by reference into the Plea Agreement and signed by Petitioner, sets the time span of Petitioner's crimes from August 1, 2006, through March 11, 2009. I.G. Ex. 5 at 16-17. Regardless of this discrepancy, Petitioner's factual basis admits that his crimes spanned much more than the threshold one year period required under this aggravating factor and much more than just a "short-lived lapse of integrity" to which the Board alluded in *Burstein*, DAB No. 1865, at 8. The duration of Petitioner's illegal conduct shows the need to protect federally-funded programs from Petitioner for a substantial period of time and supports the enhancement of the period of exclusion.

The aggravating factor set out at 42 C.F.R. § 1001.102(b)(5) is present when "[t]he sentence imposed by the court included incarceration." In this case, Petitioner was sentenced to prison for 63 months. I.G. Ex. 7 at 2. Thus, this aggravating factor is present. It is significant to note that Petitioner is serving his lengthy sentence in a federal correctional institution and not in some less-severe setting; that fact, alone, is evidence of the District Court's serious view of Petitioner's crimes. As I recently wrote in *Raymond Lamont Shoemaker*, DAB CR2993, at 16-19 (2013), the length of Petitioner's prison term has intrinsic importance to my evaluation of the weight to be given this factor, and I have no difficulty in concluding that the length of Petitioner's incarceration is sufficient to justify an increase in the period of exclusion.

The aggravating factor set out at 42 C.F.R. § 1001.102(b)(6) is present when "[t]he convicted individual or entity has a prior criminal, civil or administrative sanction record." Here, the Texas State Board of Pharmacy revoked Petitioner's pharmacist license on March 11, 2009. I.G. Ex. 8. Petitioner was indicted by the Federal Grand Jury sitting for the United States District Court for the Western District of Texas on August 24, 2011, I.G. Ex. 4, and the District Court accepted Petitioner's guilty plea on May 2, 2012. I.G. Ex. 7 at 1. It is this conviction that serves as the basis for this exclusion

action. I.G. Ex. 1 at 1. Therefore, the decision of the Texas State Board of Pharmacy to revoke Petitioner's pharmacist license is an administrative sanction that occurred prior to Petitioner's conviction. Additionally, on December 1, 2009, in response to Petitioner's loss of his pharmacist license, the Texas Health and Human Services Commission Office of the Inspector General excluded Petitioner from the Texas Medicaid and other federally funded health care programs. I.G. Ex. 9 at 1. This administrative sanction also occurred prior to Petitioner's conviction. Thus, this aggravating factor is present and justifies an increase in the exclusion period.

The aggravating factor set out in 42 C.F.R. § 1001.102(b)(9) is present when an "individual or entity was convicted of other offenses besides those which formed the basis for the exclusion . . . ." On October 19, 2011, Petitioner was found guilty by jury verdict of one count of processing with intent to distribute hydrocodone by a practitioner, in violation of 21 U.S.C. § 841, and one count of distributing a listed chemical with knowledge, or reason to know of its wrongful intended use, also in violation of 21 U.S.C. § 841. I.G. Ex. 10 at 1. Neither of these criminal offenses formed the basis for Petitioner's exclusion. Petitioner's exclusion action is based on his conviction for Health Care Fraud, in violation of 18 U.S.C. § 1347. I.G. Ex. 1. Transcripts from Petitioner's jury trial document witness testimony describing how Petitioner provided the witness and others hydrocodone without a valid prescription. I.G. Ex. 11 at 22-31. The transcripts also document a Drug Enforcement Agency agent's testimony that Petitioner provided him with large quantities of pseudoephedrine, and that Petitioner knew of the agent's purported intent to use the pseudoephedrine in the manufacture of methamphetamine. I.G. Ex. 12 at 37, 60-68. The facts clearly show that Petitioner used his pharmacist license in an egregious manner to perpetrate criminal acts for his own personal financial gain. This aggravating factor is not only present, but Petitioner's conviction for these criminal offenses demonstrates a persistence in criminal conduct exploiting his healthcare-related professional position that further supports the I.G.'s decision to increase Petitioner's exclusion well beyond the five-year minimum.

Petitioner does not deny the existence of these aggravating factors. In fact, Petitioner explicitly concedes the existence of the five aggravating factors. P. Br. at 6, 17. Instead, Petitioner claims that his "63-month prison sentence and $2,529,945.81 in restitution are mitigating circumstances requiring a shorter period of exclusion." P. Br. at 16; P. Rep. Br. at 14. The regulations consider only three factors to be mitigating: (1) that a petitioner was convicted of three or fewer misdemeanor offenses and the resulting financial loss to the program was less than $1, 500; (2) that the record in the criminal proceedings demonstrates that a petitioner had a mental, physical, or emotional condition that reduced his culpability; and (3) that a petitioner's cooperation with federal or state officials resulted in others being convicted or excluded, or additional cases being investigated, or a civil money penalty being imposed. 42 C.F.R. § 1001.102(c). The Board has characterized a mitigating factor as being "in the nature of an affirmative defense" and has ruled that Petitioner has the burden of proving any mitigating factor by

a preponderance of the evidence. *Barry D. Garfinkel, M.D.*, DAB No. 1572, at 8 (1996). In the present case, Petitioner failed to allege the elements of any of the three mitigating factors that may be considered when the I.G. sets forth aggravating factors to justify an exclusion period longer than five years.

Petitioner argues there is a "lack of mathematical objectivity method in the calculation" of his exclusion period and that while "there are five aggravating factors that govern how the exclusion period shall be determined[,] [t]he calculation showing how these five factors, when computed, sum up to equate 30 years is not clear to any reasonable person." P Br. at 17. Petitioner goes on to argue that since the "aggravating factors are not assigned numerical weight or numbers . . . the weight of the aggravating factors [is] arbitrarily assigned." P. Br. at 17. However, the Board has held that "the assessment of aggravating and mitigating factors is qualitative, focusing on the circumstances of the case at hand, rather than quantitative or a matter of mathematical formulas . . . ." *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491 at 8 (2012). In addition, the Secretary has stated that "[t]he weight accorded to each mitigating and aggravating factor cannot be established according to a rigid formula, but must be determined in the context of the particular case at issue." 57 Fed. Reg. 3315 (January 29, 1992). The Board has previously declared that "a holding that the exclusion period chosen by the I.G. was unreasonable must be based on an analysis of those [aggravating] factors, *considering the particular circumstance*s and according them appropriate weight." *Robinson*, DAB No. 1905 at 7 (2004)(emphasis added).

Additionally, Petitioner argues that "[t]he statutory sanction of the exclusion as applied to Petitioner, is punitive and not remedial" and that if the purpose of his exclusion is punitive then it violates the "Double Jeopardy Clause." P. Br. at 12. However, the Board has held that "[i]t is well-established that section 1128 exclusions are remedial in nature, rather than punitive, and are intended to protect federally-funded health care programs from untrustworthy individuals." *Burstein*, DAB No. 1865 at 12 (2003), citing *Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003), *cert denied*, 123 S.Ct. 2652 (2005); *Mannocchio* v. Kusserow, 961 F.2d 1539, 1543 (11th Cir. 1992). In the present case, I find that Petitioner's crimes have shown him to be particularly untrustworthy, and that the I.G.'s assessment that federally-funded health care programs should be protected from Petitioner for a period of 30 years is completely reasonable.

Petitioner also appears to argue that the period of exclusion in his case should be governed by "[s]ection 1320a-7(c)(3)(D)" which mandates a three-year exclusion for offenses "under paragraph (1), (2) or (3) of subsection (b)." P. Br. at 16. When this statement is cross-referenced with Petitioner's April 8, 2013 Request for Hearing, it appears that Petitioner is arguing that his exclusion should fall under section 1128(b)(1)(B) of the Act. Req. for Hr'g. at 4. Section 1128(b) of the Act states the following:

> Permissive Exclusion.—The Secretary may exclude the following individuals and entities from participation in any Federal health care program . . .
> (1) Conviction relating to fraud.—Any individual or entity that has been convicted for an offense . . . under Federal or State law—
> . . .
> (B) of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct with respect to any act or omission in a program (*other than a health care program*) operated or financed in whole or in part by any Federal, State or local government agency. (emphasis added)

This provision of the Act governs permissive exclusions for convictions related to fraud for criminal offenses relating to government programs *other* than health care programs. Petitioner's exclusion is based on his conviction for health care fraud where Petitioner fraudulently billed the Texas Medicaid program, a government health care program, and other health care insurance programs. As detailed above, the I.G. has proven that a legal basis exists to exclude Petitioner under section 1128(a)(1) of the Act. And once a conviction is shown to be within the ambit of section 1128(a), the mandatory operation of that section bars any petitioner, including this one, from demanding that other more lenient, more discretionary, or more favorable exclusionary provisions of sections 1128(b) should be applied instead. Even in situations where the underlying conviction could plausibly be argued to fall within section 1128(a) *and* one or more of the permissive exclusions or three-year mandatory minimum periods of sections 1128(b)(1)-(15), the rule is clear: if section 1128(a) fits, then the mandatory exclusion and at least the mandatory minimum period prescribed by section 1128(a) must be imposed. Neither the I.G. nor the Administrative Law Judge may choose to proceed otherwise. *Stacy Ann Battle, D.D.S.*, DAB No. 1843 (2002); *Tarvinder Singh, D.D.S.*, DAB No. 1752 (2000); *Lorna Fay Gardner*, DAB No. 1733; *Douglas Schram, R.Ph.*, DAB No. 1372 (1992); *Niranjana B. Parikh, M.D.*, DAB No. 1334 (1992); *David S. Muransky, D.C.*, DAB No. 1227 (1991); *Leon Brown, M.D.*, DAB No. 1208 (1990); *Napoleon S. Maminta, M.D.*, DAB No. 1135 (1990); *Charles W. Wheeler*, DAB No. 1123 (1990); *Jack W. Greene*, DAB No. 1078 , *aff'd sub nom. Greene v. Sullivan*, 731 F. Supp. 835.

I note that Petitioner appears here *pro se*. Because of that, I have been guided by the Board's reminders that pro se litigants should be offered "some extra measure of consideration" in developing their records and their cases. *Louis Mathews*, DAB No. 1574 (1996); *Edward J. Petrus, Jr., M.D., et al.*, DAB No. 1264 (1991). I have searched all of Petitioner's pleadings for any arguments or contentions that might raise a valid, relevant defense to the I.G.'s Motion, but have found nothing that could be so construed.

Resolution of a case by summary disposition is fitting when settled law can be applied to undisputed material facts. *Michael J. Rosen, M.D.*, DAB No. 2096; *Thelma Walley*,

DAB No. 1367. Summary disposition is 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 and unambiguous. They support summary disposition as a matter of settled law. This Decision issues accordingly.

VI. Conclusion

For the reasons set forth above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Peter Victor Ayika from participation in Medicare, Medicaid, and all other federal health care programs pursuant to the terms of section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1) is SUSTAINED. Based on the provisions of 42 C.F.R. § 1001.102(b)(1), (2), (5), (6) and (9), the period of Petitioner's exclusion is 30 years.

/s/
Richard J. Smith
Administrative Law Judge