Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jennifer Yvonne Berry, M.D.,

Petitioner

v.

The Inspector General.

Docket No. C-09-408

Decision No. CR2126

Date: May 3, 2010

DECISION

The determination of the Inspector General (I.G.) to exclude Petitioner, Jennifer Yvonne Berry, M.D., from participating in Medicare and other federally-funded health care programs for a period of 14 years is sustained.

I. Procedural Background

The I.G. notified Petitioner on February 27, 2009 that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 14 years, pursuant to section 1128(a)(1) of the Social Security Act (Act). The basis of Petitioner's exclusion was her conviction in the United States District Court for the Northern District of Mississippi[1] of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. *See* Act § 1128(a)(1), 42 U.S.C. § 1320a-7(a)(1); 42 C.F.R. § 1001.101(a). The I.G. told Petitioner that the enhanced period of her exclusion was based on three aggravating factors and no mitigating factors. I.G. Ex. 1.

[1] The February 27, 2009 I.G. notice incorrectly states that the basis of Petitioner's exclusion was her conviction in the United States District Court for the Southern District of Florida, Miami Division. However, by letter dated May 6, 2009, the I.G. amended the February notice. I.G. Ex. 2. I find that this error caused no prejudice to Petitioner.

Acting through counsel, Petitioner perfected her appeal of the I.G.'s proposed action by her April 23, 2009 Request for Hearing. In her Request, Petitioner stated that she was challenging both the basis of the I.G.'s imposition of a sanction against her and the length of the exclusion. Request for Hearing at 2.

On May 8, 2009, I convened a prehearing conference by telephone, the substance of which is summarized in my Order of May 14, 2009. A schedule for motion practice was established, and I required that Petitioner clarify her assertions in this appeal. Petitioner responded on May 18, 2009 with Petitioner's Clarification of Assertions on Appeal. (P. Clarification). In her response, Petitioner stated that she was not challenging the basis of the exclusion action by the I.G. and acknowledged "that a conviction did take place that provides the jurisdictional basis for the exclusion action" currently before me. P. Clarification at 1. Petitioner then narrowed the scope of her appeal to challenge only whether the length of the proposed exclusion was reasonable. Petitioner stated that the "I.G. improperly considered the aggravating factors available to it, as well as failed to properly take into consideration the mitigating factors set out in 42 C.F.R. § 1001.102(c)." *Id.* at 2.

An interval of motion practice followed, thus narrowing the scope of her appeal, and the substantive issues raised in that motion practice were addressed by the parties' filings in response to my Order of May 14, 2009.[2]

My Order Addressing Issues for Summary Disposition and Giving Notice of Hearing of September 9, 2009 summarized my view of the issues and provided the parties with an explanation of why I believed that some of the issues could be resolved by the I.G.'s Motion. I also explained that one material issue of fact could not be resolved without an evidentiary hearing. The parties were told that the uncontested evidence demonstrated that: (1) the I.G. has a basis for the proposed exclusion; and (2) there is no material issue of fact as to the existence of the aggravating factors on which the I.G. proposed to rely in enhancing Petitioner's period of exclusion. The parties were told that because the I.G. had conceded that the determination to enlarge Petitioner's period of exclusion to 14 years was not affected or influenced by consideration of Petitioner's asserted mitigating factor, the factual question of Petitioner's cooperation was a material and unresolved issue of fact. I further ruled that the legal question of the reasonableness of the I.G.'s weighing of the three aggravating factors would remain impossible to assess, until the factual question of the existence of the unconsidered mitigating factor had been resolved. The Order went on to set this matter for hearing.

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[2] On June 18, 2009, the I.G. filed a motion for summary disposition accompanied by five exhibits in support of its motion. On July 20, 2009, Petitioner filed an answer (P. Answer Brief) and attached three exhibits in support of her brief. On August 6, 2009, the I.G. filed a Reply Brief. On August 17, 2009, Petitioner filed her Reply Brief.

I convened the hearing on November 9 and 10, 2009 in Houston, Texas. What remained before me at the hearing were two principal questions: (1) the legal question of the reasonableness of the length of Petitioner's exclusion; which legal question depended on (2) the fact question of whether, as Petitioner asserts, a mitigating factor exists — specifically, that Petitioner cooperated with investigating and prosecuting officials in such a fashion as to invoke the terms of 42 C.F.R. § 1001.102 (c)(3) — that the I.G. did not consider in determining the length of Petitioner's period of exclusion.

During the hearing, I admitted without objection Petitioner's Exhibits 1-10 (P. Exs.) and I.G. Exhibits 1-12 (I.G. Exs. 1-12). Tr. at 12. The I.G. proffered two additional exhibits designated I.G. Exs. 13 and 14. Tr. at 215-16. Petitioner objected. Tr. at 216. Because I found that the I.G.'s proffer of the two exhibits was untimely and therefore prejudicial to Petitioner, I declined to admit them to the evidentiary record. Tr. at 118-20; 221.

The post-hearing briefing cycle in this case closed for purposes of 42 C.F.R. § 1005.20(c) with the Civil Remedies Division's receipt of the I.G.'s Post-Hearing Answer on March 15, 2010.

II. Issues

The legal issues before me are expressly limited to those set out at 42 C.F.R. § 1001.2007(a)(1). In the specific 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 section 1128(a)(1) of the Act;

and

b. Whether the 14-year length of the proposed period of exclusion is unreasonable.

The controlling authorities require that these issues be resolved in favor of the I.G.'s position. Section 1128(a)(1) of the Act mandates Petitioner's exclusion, since her predicate conviction is not in dispute. 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 14 years is not unreasonable. All three of the aggravating factors relied on by the I.G. to enhance the period are fully demonstrated in the record before me, and no mitigating factor has been proven by Petitioner.

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 terms of section 1128(a)(1) are restated in similar language at 42 C.F.R. § 1001.101(a)(1). This mandatory exclusion must be imposed for a minimum of five years. Section 1128(c)(3)(B) of the Act; 42 U.S.C. § 1320a-7(c)(3)(B).

The minimum period may be lengthened if the I.G. has determined that certain aggravating factors are present. 42 C.F.R. § 1001.102(b). Certain mitigating factors may be considered as a basis for reducing the period of exclusion when the presence of aggravating factors is found to justify a period of exclusion greater than five years. 42 C.F.R. § 1001.102(c).

The standard of proof is a preponderance of the evidence. 42 C.F.R. § 1001.2007(c). 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) and (c).

IV. Findings and Conclusions

I find and conclude as follows:

1. On November 17, 2007, Petitioner appeared with counsel in the United States District Court for the Northern District of Mississippi, pleaded guilty to one felony count of Theft of Government Money, in violation of 18 U.S.C. § 641, and was adjudged guilty on her plea. I.G. Ex. 5; I.G. Ex. 9, at 21-31.

2. Judgment of conviction on her guilty plea was entered against Petitioner, and sentence was imposed on her on July 16, 2008. I.G. Ex. 3; I.G. Ex. 10.

3. As part of her sentence, Petitioner was ordered to pay restitution to the Medicare program in the amount of $458,237.00. I.G. Ex. 3, at 4.

4. The acts for which Petitioner was convicted occurred from about December 2003 to about May 2005. I.G. Ex. 4.

5. Petitioner was sentenced to a six-month term of home detention, to be followed by a five-year term of probation. I.G. Ex. 3, at 2, 5.

6. On February 27, 2009, the I.G. notified Petitioner that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the period of 14 years, pursuant to section 1128(a)(1) of the Act. I.G. Ex. 1.

7. On April 23, 2009, Petitioner perfected her appeal from the I.G.'s action.

8. The guilty plea, adjudication of guilt, judgment of conviction, and sentence based on Petitioner's violation of 18 U.S.C. § 641, as described in Findings 1 and 2 above, constitute a conviction related to the delivery of an item or service under Medicare or Medicaid within the meaning of section 1128(a)(1) of the Act. *Berton Siegel, D.O.*, DAB No. 1467 (1994).

9. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act.

10. The I.G. has shown by a preponderance of the evidence that the acts for which Petitioner was convicted resulted in a loss of $5,000 or more to a government program or one or more entities, the aggravating factor established by 42 C.F.R. § 1001.102(b)(1).

11. The I.G. has shown by a preponderance of the evidence that the acts for which Petitioner was convicted were committed over a period of one-year or more, the aggravating factor established by 42 C.F.R. § 1001.102(b)(2).

12. The I.G. has shown by a preponderance of the evidence that the sentence imposed upon Petitioner, as the result of her conviction, included incarceration, the aggravating factor established by 42 C.F.R. § 1001.102(b)(5).

13. Petitioner has not shown by a preponderance of the evidence any mitigating factor that I am authorized to consider under 42 C.F.R. § 1001.102(c) and has, in particular, failed to establish the mitigating factor established by 42 C.F.R. § 1001.102(c)(3)(i).

14. Petitioner's exclusion for five years is mandatory pursuant to section 1128(c)(3)(B) of the Act. 42 U.S.C. § 1320a-7(c)(3)(B). That period is presumptively reasonable.

15. Exclusion of Petitioner for an additional period of nine years, and thus for a total period of exclusion of 14 years, is not unreasonable based upon the three aggravating factors in this case and the absence of any mitigating factors.

V. Overview and Background of Petitioner, Johnnie Lee Winfield, and RehabSource, Inc.

To discuss with clarity the relationship among the entities RehabSource, Inc., Johnnie Lee Winfield, and Petitioner, and to understand Petitioner's role in that relationship, it is important to provide this brief overview, although I note that it is not intended as a substitute for my findings listed above.

Petitioner, a physician, owned and operated RehabSource, Inc., which provided physical therapy services to patients in Greenville, Mississippi. Petitioner also served as the Medical Director at RehabSource, Inc. Tr. at 27, 28. At all material times, she was married to Johnnie Lee Winfield.

In late October 2005, there was a meeting among federal prosecutors and investigators and Petitioner. At that meeting, counsel represented Petitioner. Tr. at 283. Sometime in September 2007, a second meeting occurred, again among federal officials and Petitioner. This meeting occurred at Petitioner's attorney's office. Tr. at 42. The general purpose of these meetings was to explore the possibility of Petitioner's cooperating with the federal authorities and to provide Petitioner with an opportunity to explain "her side of the story" to them.

Petitioner was neither cooperative nor convincing at those meetings, for she, Johnnie Lee Winfield, and RehabSource, Inc. were indicted on June 22, 2006 for submitting false claims to Medicare for physical therapy and evaluations that were not provided as claimed. It was alleged, *inter alia*, that Petitioner, through RehabSource, Inc., billed Medicare for evaluations and physical therapy services that: (1) were not ordered pursuant to a proper medical evaluation; (2) were not reasonable and necessary for the medical condition of the patient under Medicare guidelines; (3) were not ordered by a physician as an integral part of a physician's continuing active participation and management of the course of treatment; (4) were not provided by qualified persons; or (5) were not actually provided. The period of time during which these actions were alleged to have occurred was from December 2003 through May 2005. I.G. Ex. 4; I.G. Ex. 9, at 27-31.

On November 5, 2007, the criminal trial in the case of *United States v. Jennifer Yvonne Berry, Johnnie Lee Winfield, and RehabSource,* No. 4:06CR104-P-B (2007) commenced in the United States District Court for the Northern District of Mississippi. Tr. at 43. Johnnie Lee Winfield was at the time Petitioner's husband and was charged as her co-conspirator. On Friday, November 9, 2007 — while the trial was in progress — Winfield entered a plea of guilty to one count of Conspiracy to Commit Health Care Fraud, in violation of 18 U.S.C. § 1347. I.G. Ex. 11. The trial continued with Petitioner, the remaining personal defendant, and RehabSource, Inc. as a corporate defendant, but not for long. On the seventh day of trial, Tuesday, November 13, 2007, Petitioner entered her personal plea of guilty to one count of Theft of Government Money, a violation of 18 U.S.C. § 641, and entered a plea of guilty for the corporation RehabSource, Inc. on an identical charge. I.G. Ex. 5; I.G. Ex. 9.

Petitioner's criminal conduct resulted in RehabSource Inc.'s receipt of $458,237.00 in proceeds traceable to the offense to which Petitioner pleaded guilty. I.G. Ex. 4; I.G. Ex. 5. The terms of Petitioner's plea agreement acknowledged that amount and also required that she consent to the civil settlement of treble damages of $1,374,711.00 arising from her criminal behavior. I.G. Ex. 5; I.G. Ex. 9.

The I.G. undertook exclusion proceedings against Johnnie Lee Winfield, relying on section 1128(a)(1) of the Act, the same authority relied on here. The I.G.'s exclusion of Winfield for 15 years was upheld by Administrative Law (ALJ) Judge Steven T. Kessel in *Johnnie Lee Winfield*, DAB CR1971 (2009).

VI. Discussion

The essential elements necessary to support an exclusion based on section 1128(a)(1) of the Act 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 (Medicare) or any state health care program. *See Tamara Brown*, DAB No. 2195 (2008); *Thelma Walley*, DAB No. 1367 (1992); *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Lyle Kai, R.Ph.*, DAB CR1262 (2004), *rev'd on other grounds*, DAB No. 1979 (2005); s*ee also Russell Mark Posne*r, DAB No. 2033, at 5-6 (2006). As discussed above, Petitioner has conceded that these two essential elements are present in the case now before me. And, as noted above, the record amply demonstrates that a factual basis exists for that concession. The essential elements of this exclusion have been proven.

The I.G. relies on three aggravating factors set out at 42 C.F.R. § 1001.102(b)(1), (b)(2), and (b)(5) in seeking to enhance to 14 years the period of Petitioner's exclusion. Petitioner does not challenge the actual existence of the three factors but argues that: the I.G. incorrectly weighed the incarceration factor at 42 C.F.R. § 1001.102(b)(5) in setting Petitioner's period of exclusion; and failed to take into consideration Petitioner's alleged cooperation with federal officials. I address each of the three aggravating factors and Petitioner's alleged mitigating factor below.

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 . . . of $5,000 or more." 42 C.F.R. § 1001.102(b)(1). The court records show that Petitioner was required to pay $458,237.00 in restitution to the Medicare program. I.G. Ex. 4, at 3; I.G. Ex. 5, at 3; I.G. Ex. 5, at 5-6. Appellate panels of the Departmental Appeals Board (Board) have characterized restitution in amounts greater than the regulatory standard as an "exceptional aggravating factor" that is entitled to significant weight. *Jeremy Robinson*, DAB No. 1905 (2004); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003). I agree. 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." Here, the language of the charge to which Petitioner pleaded guilty demonstrates the existence of this factor. The criminal Information describes the period during which Petitioner "did knowingly embezzle, steal, and purloin money of the Centers for Medicare and (*sic*) Medicaid Services" as "beginning on or about around December 2003, and continuing without

interruption until on or about May 2005." I.G. Ex. 4. The acts that resulted in Petitioner's conviction took place over a period of about 18 months, half again more than the one-year regulatory standard. The I.G. has established this second aggravating factor.

The regulation at 42 C.F.R. § 1001.102(b)(5) provides that where "[t]he sentence imposed by the court included incarceration," an aggravating factor is present. "Incarceration" is defined as "imprisonment or any type of confinement with or without supervised release, including, but not limited to, community confinement, house arrest and home detention." 42 C.F.R. § 1001.2. Here, Petitioner was sentenced to a six-month period of home detention, and this sentence constitutes an aggravating factor within 42 C.F.R. § 1001.102(b)(5).

Petitioner does not deny that the sentence to home detention amounted to a sentence of incarceration within the meaning of the regulation. Rather, Petitioner argues that her six-month home detention should be given less weight than traditional incarceration in assessing her period of exclusion, since "the absence of any term of imprisonment must be relevant . . . in deciding the inherent trustworthiness of the Petitioner and the reasonableness of the period of exclusion." P. Reply Brief at 2.

Petitioner relies on *John (Juan) Urquijo*, DAB No. 1735 (2000) to support her assertion that not all forms of incarceration are to be treated as deserving equal weight. Petitioner asserts that if the underlying issue is the trustworthiness of an individual to resume participation in federal health programs, it is reasonable to give less weight to a sentence consisting primarily of home detention, which could include permission to work outside the home, rather than prison. Petitioner's reliance on *Urquijo* and this argument is misplaced.

I have noted that Petitioner's home detention is defined by the regulation as incarceration at 42 C.F.R. § 1001.2, and there is no dispute among the parties that this definition fits these circumstances. However, the facts in *Urquijo* are not analogous to those in the case before me. First, the petitioner in *Urquijo* was involved in a long-running conspiracy, but his own participation in that conspiracy lasted less than a year. In the case before me, in contrast with *Urquijo*, Petitioner was culpable for the entire period of the scheme, which lasted 18 months. Second, in *Urquijo*, the United States District Judge specifically stated when sentencing petitioner that she believed that the petitioner was a good person who had made a mistake. *Urquijo*, DAB 1735, at n.2. However, in the case before me now, Petitioner has not been able to present similar evidence. In reviewing the transcript of Petitioner's July 16, 2008 sentencing hearing, the contrast with the petitioner in *Urquijo* is as stark as it is revealing. During her sentencing hearing, Petitioner advanced to the sentencing judge the proposition that, to avoid revocation of her Texas medical license as one result of her felony conviction, "my company could take the pleas of felony and I could take a plea of misdemeanor," thus allowing her to continue to practice at a hospital in Texas where she was employed at the time. In forceful terms, United States District Judge Pepper made clear his position in declining Petitioner's proposal, stating directly to

Petitioner, "[t]he consequences of the actions that led us here today are large. Let's just say that. I didn't put you in that box. You did." I.G. Ex. 10, at 7. In announcing his decision to impose a sentence outside the advisory guidelines, Judge Pepper stated that the "[r]eason for the sentence outside the advisory guideline is to provide restitution to victims of the offense." I.G. Ex. 10, at 14.

However, I believe that the Board's decision in *Jeremy Robinson*, DAB No. 1905, is instructive in this context. The Board noted, "in *Jason Hollady, M.D.*, [DAB 1855] at 12 [(2002)], we determined that a nine-month incarceration with work release was 'relatively substantial' and more than 'token' incarceration." *Jeremy Robinson*, DAB No. 1905, at 12 (*citing Jason Hollady, M.D., a/k/a Jason Lynn Hollady*, DAB 1855, at 9-10 (2002)). In *Hollady*, the Board found irrelevant to the issue of whether Petitioner's sentence included incarceration the fact that a few days after petitioner's sentence began he was placed on a work release program. *Jason Hollady, M.D.*, DAB 1855, at 9-10. Following the Board's guidance in *Robinson*, I find that Petitioner's six-month term of incarceration was more than "token" incarceration and that it manifested the sentencing court's "relatively substantial" doubt of Petitioner's trustworthiness. *See, e.g.*, I.G. Ex. 10, at 7. I can find nothing unreasonable in the I.G.'s reliance on Petitioner's six-month period of home detention to enhance Petitioner's period of exclusion. The I.G. has established this third aggravating factor.

As noted above, 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). It is well-settled that Petitioner bears the burden of going forward with the evidence and the burden of persuasion, in her effort to establish the mitigating factor at issue. *See Stacey R. Gale*, DAB No. 1941 (2004); *Arthur C. Haspel, D.P.M.*, DAB No. 1929 (2004); *see also Dr. Darren James, D.P.M.*, DAB No. 1828 (2002). The parties were specifically advised of this requirement in a letter issued at my direction on October 26, 2009, and were directed to those cases for guidance.

The central point of contention in this case is not the existence of a basis for the proposed exclusion, nor is it the existence of the three aggravating factors. It is Petitioner's allegation that she cooperated with federal investigators and the United States Attorney's Office in the Northern District of Mississippi within the meaning of 42 C.F.R. § 1001.201(c)(3)(i). This cooperation, Petitioner asserts, constituted a mitigating factor that the I.G. failed to consider in setting the length of her exclusion.

Petitioner contends that it was her persuasive efforts in pleading with her husband and co-conspirator before and during the trial that led to his decision to reach the plea agreement and hence resulted in his conviction. Petitioner asserts that these persuasive efforts entitle her to claim the existence of a mitigating factor, a factor that the I.G. should have, but did not, take into consideration in determining her period of exclusion. Tr. at 32-34, 36-37; P. Post-Hearing Brief at 6.

The regulation at issue is set out here in pertinent part:

> (3) The individual's or entity's cooperation with Federal or State officials resulted in —
> (i) Others being convicted or excluded from Medicare, Medicaid and all other Federal health care programs . . . .

42 C.F.R. § 1001.102(c)(3)(i).

There are two conditions that must be satisfied as matters of fact for Petitioner to establish the "cooperation" mitigating factor. First, she must show by a preponderance of the evidence that she cooperated with Federal officials. Second, she must show by a preponderance of the evidence that her cooperation resulted in the conviction of another. And I emphasize that in this case it was entirely Petitioner's burden to show that her cooperation with government authorities resulted in Johnnie Lee Winfield's conviction. *Stacey R. Gale*, DAB No. 1941, at 9 (2004).

In *Gale,* the Board recited, and I recite here, the preamble to the regulation at 42 C.F.R. § 1001.102 where the drafters of the regulation stated what they had in mind as they created the mitigating factor based on cooperation:

> As a practical matter, . . . [w]e believe . . . that only significant cooperation should be considered mitigating, and the imposition of a sanction of a result of cooperation establishes that the cooperation was significant. We believe that the significance of cooperation is more properly evaluated by those in a position to utilize the information, rather than by an ALJ . . . .

Stacey R. Gale, DAB No. 1941, at 12 (*citing* 57 Fed. Reg. 3298, 3315 (Jan. 29, 1992)).

Petitioner asserts that she persuaded her husband to plead guilty, and she goes on to make the claim that he "would not have pled guilty or accepted his conviction BUT FOR the actions of the Petitioner begging him and pushing him in that direction." Petitioner argues that her actions are sufficient to establish "cooperation" under the regulation and thus to justify a re-evaluation of her period of exclusion. P. Post-Hearing Brief at 13. It must be emphasized, however, that Petitioner does not suggest that the investigators or the prosecutors instigated or suggested her "begging" and "pushing" Winfield to seek a plea bargain, and there is no hint or suggestion whatsoever in this record that the investigators or prosecutors were even aware of her "begging" and "pushing." Thus, even if accepted at its absolute face value, Petitioner's story of "begging" and "pushing" represents an entirely unilateral, independent, undirected, and undisclosed effort, motivated not by an interest in aiding law enforcement, but explicitly by self-interest. Tr. at 116-20.

The record before me shows plainly what the limits of that face value are. First, during the November 2009 hearing, Petitioner was directly questioned as to whether anyone in the prosecution asked her to persuade her husband to plead guilty, to which she responded: "I don't believe so." Tr. at 120. Petitioner testified that when she recognized the implications of what was at stake for her — "her freedom, her medical license and her pregnancy" — it was then that she "began to push Mr. Winfield regarding the possibility of accepting a deal." P. Post-Hearing Brief at 10; Tr. at 46-49. When asked whether she was thinking of helping the prosecution when she urged her husband to plead guilty, she specifically conceded that she was not and flatly admitted that "I was thinking of myself and my pregnancy." Tr. at 118-19.

Moreover, the federal officials with whom Petitioner claims she cooperated testified at the November 2009 hearing, and each rejected Petitioner's description of her role in Winfield's plea. Consistently, each vigorously disputed Petitioner's claim of cooperation, and each did so from a perspective of intimate familiarity with the evidence, both sides' trial tactics, the dynamics of the proceedings, and the timing of Winfield's sudden decision to strike the best deal he could before the jury might deprive him of that choice.

OIG Special Agent U. Powell testified about her reaction upon hearing Petitioner's claim of cooperation, stating "I thought it was a joke, it was so absurd. And I guess it was so absurd to me because it had never – – I knew that she had entered a plea." Tr. at 179. Special Agent Powell testified that "some of her statements were also contradictory to the medical records that we had and other evidence that we had already gathered," and when asked if Petitioner provided any information that was helpful to the investigation, Special Agent Powell responded bluntly: "Not a single thing." Tr. at 172-73.

FBI Special Agent B. Harris-Williams testified with reference to the October 2005 proffer meeting: "We found that she did not provide any relevant information that would assist us in our investigation." Tr. at 224 As to Petitioner's claim of cooperation with the government by facilitating Winfield's plea she testified: "To be honest, I thought . . . it was a joke." Tr. at 227.

Assistant U.S. Attorney R. W. Coleman, co-counsel for the prosecution in the criminal case, testified: "[S]he didn't cooperate . . . [t]here is no cooperation . . . she never cooperated." Tr. at 252. AUSA Coleman testified: "Dr. Berry did not assist in any way, much less give substantial assistance." Tr. at 257.

Assistant U.S. Attorney C. Ivy, Jr., who served as lead prosecutor in the criminal case, testified: "[S]he did not cooperate." Tr. at 304. Before reaching that summation of his views, however, AUSA Ivy explained that there had been an opportunity in open court — at Petitioner's sentencing hearing, the transcript of which appears in this record as I.G.

Ex. 10 — for the prosecution, the defense, or both, to assert Petitioner's cooperation. AUSA Ivy pointed out:

> There are many ways for that to be expressed. One would actually be the pre-sentence investigation report that we just covered. A second place for a person to raise that would be at the sentencing hearing, which would have been raised by either her attorney, or I as basically stated in the plea would announce what has taken place regarding her cooperation. That is not going to appear in this sentencing transcript, as, again, she did not cooperate.

Tr. at 304.

Some brief mention is warranted of testimony from L.T. Quiñones, Winfield's defense counsel, during the criminal trial. *See* P. Ex. 4. The story of her very late entry into the case strongly suggests some last-minute manipulation by Winfield intended to delay the start of the trial. Tr. at 135-37. Once she had undertaken Winfield's defense, she described her strategic situation thus: "I just felt that with all that the Government had, we weren't equipped to handle it . . . it was too late in the game . . . [t]here were no motions filed . . . we were really under the gun in my opinion, and understaffed." Tr. at 138-39. Ms. Quiñones was particularly clear that: "I felt that they were at a complete disadvantage, and I began having serious conversations with my client in regards to whether or not there should be a deal taken." Tr. at 139. It is simply impossible to reconcile these statements with the notion that Petitioner was the deciding factor in Winfield's decision to plead guilty, and I cannot accept that notion as credible. I find instead that Ms. Quiñones' testimony describes an extremely desperate situation for the Winfield defense, a situation in which virtually the only option open was to, in AUSA Ivy's words, "make the best deal he could possibly get." Tr. at 309.

In summary, then, the testimonial evidence presented at the hearing clearly establishes that the federal officials who were instrumental in the prosecution of Petitioner and Winfield were of the opinion that Petitioner was not only uncooperative, but believed that if she had been cooperative in precisely the way she claims, they would have been aware of it. That testimonial evidence is corroborated to a large extent by the absence of any references to her alleged cooperation in any of the official records where it might be expected to appear. I.G. Exs. 3-5, 8-10, and 12. Significantly, there is no reference to Petitioner's cooperation in the transcript of Winfield's guilty-plea proceeding. I.G. Ex. 11. And weighing heavily on the scale against Winfield's and Petitioner's credibility are several additional factors. First, both Petitioner and Winfield are *crimen falsi* felons convicted of crimes involving dishonesty and untruthfulness. Winfield's capacity for dishonesty is particularly florid. Tr. at 307-09. Winfield's credibility is further damaged by the fact that he was willing to shape his testimony in an effort to create an impression of government heavy-handedness, but was shown to have testified falsely on the point. Tr. at 204-06, 211. Next, what Petitioner and Winfield say now under oath is at variance

with positions they have taken elsewhere under oath. I. G. Ex 11. Third, they can offer no objective corroboration of their stories, although some corroboration is to be expected in court records. Fourth, the reported reactions of Petitioner's defense attorney to Winfield's change-of-plea strongly suggests that Winfield's plea was a detriment to Petitioner, rather than the benefit she claims it was. Tr. at 176, 226-27, 230-33, 254-55, 310-11. Fifth, the timing of Petitioner's plea, tendered only after four more days of trial once Winfield had pleaded guilty and only after she herself had testified and been cross-examined, belies her claim that she had a motive to "cooperate" in her fear for her health and her pregnancy. Tr. at 309. Sixth, it cannot be overlooked that while the incentives Petitioner has claimed as the basis for her "cooperation" have been shown to be illusory, there is a very real and non-illusory incentive — earlier access to the financial benefits of Medicare practice — for her to claim the mitigating factor now. Seventh, for the reasons I have noted above, the Quiñones testimony must be evaluated with great caution when it describes Petitioner's role in Winfield's change-of-plea.

With all of those considerations in mind, I find and conclude that the testimony given by Petitioner and Winfield is inherently untrustworthy, logically inconsistent, objectively unsupported, and in all material matters false. I find and conclude that Petitioner did not attempt to persuade Winfield to plead guilty and that she did not thereby assist Federal authorities in winning his conviction.

But there must needs be more to this discussion than a rejection of Petitioner's version of the facts, for both Petitioner and the I.G. have vigorously debated another way of looking at this appeal. Both sides have made arguments that seem at times to posit *arguendo* a state of facts very much as Petitioner claims them to be. Their arguments then debate this question: assuming *arguendo* that Petitioner did through her own unilateral actions persuade Winfield to plead guilty, but also assuming that the prosecuting authorities neither solicited nor encouraged her efforts, were unaware of them at the time, and remained unaware of them through the conclusion of all proceedings in both prosecutions, can Petitioner's efforts be characterized as "cooperation" as contemplated by 42 C.F.R. § 1001.102(c)(3)(i)?

There need be little debate about the meaning of the word. It is defined in BLACK'S LAW DICTIONARY (8th ed. 2004) as contemplating " . . . individuals who join together for a common benefit." The COMPACT OXFORD ENGLISH DICTIONARY (Rev. ed. 2008) definition is based on the word "cooperate," which is defined as meaning to "work jointly towards the same end." The I.G.'s briefing cites similar definitions. I.G.'s Post-Hearing Brief at 8-9. Petitioner does likewise. P. Post-Hearing Brief at 3-4. The common thread in this web of lexicography is the repetition of the words "joint" or "together," and the sense that whatever else may be intended by the term "cooperation," it necessarily excludes actions taken unilaterally by a party, even if those actions are helpful to another party remaining wholly unaware of them, bearing no responsibility for them, and exercising no control over them.

There need be even less debate about the importance of excluding such unilateral actions from the concept of "cooperation" when the concept involves the enforcement of criminal laws. A person who proposes to "cooperate" with law enforcement officers without informing them of her or his intentions is effectively beyond their control. That person is at best a "Lone Ranger," and at worst a "cowboy cop." The officers cannot control his actions, her methods, her targets, or his goals. The officers have no assurances of his personal agenda or her *bona fides*. If they are very lucky, the officers will only learn of this "cooperation" when it brings them useful information. If they are unlucky, they will learn of these activities when something goes wrong — potentially, very dangerously wrong. It is beyond reasonable argument that the regulation's drafters could have intended their words to be understood as including such an unsupportable reading, particularly when it is recalled "that the scope of section 1001.102(c)(3) is narrow." *Marcia C. Smith, a/k/a Marcia Ellison Smith*, DAB No. 2046 (2006).

The plain meaning of the regulation excludes the unsolicited, unilateral, and undisclosed activity in which Petitioner asserts that she engaged. Even if it occurred exactly as she and Winfield say, it does not amount to "cooperation" within the meaning of 42 C.F.R. § 1001.102(c)(3)(i) and would not entitle her to claim the benefit of the mitigating factor there set out. In so concluding, I intend this conclusion to stand as an entirely independent and fully sufficient reason for rejecting Petitioner's claim for the benefit of 42 C.F.R. § 1001.102(c)(3)(i).

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. *Jeremy Robinson*, DAB No. 1905; *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); *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 three 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. is unreasonable could be reached only through the substitution of views that the doctrine of deference forbids.

Accordingly, the only question now before me is whether the length of the period of exclusion is within a reasonable range. In this case, it may be noted that the proposed 14-year period of Petitioner's exclusion is in fact one year shorter than the 15-year period imposed on Winfield and affirmed as reasonable in *Johnnie Lee Winfield*, DAB CR1971. It is comparable to periods I have held reasonable on similar facts and aggravating factors in *Deborah Morris*, DAB CR1877 (2008) and *Julius Williams, III*, DAB CR1464 (2006). It 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); and *Joann Fletcher Cash*, DAB No. 1725 (2000). I have no difficulty in concluding that the length of the period of exclusion is within a reasonable range.

VII. Conclusion

For the reasons set forth above, the I.G.'s exclusion of Jennifer Yvonne Berry, M.D., from participation in Medicare, Medicaid, and all other federal health care programs for a period of 14 years pursuant to the terms of section 1128(a)(1) of the Act is sustained.

/s/
Richard J. Smith
Administrative Law Judge