Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Jill Turin,	)	Date: October 7, 2008
Petitioner,	)	
	)	Docket No. C-08-298
-v.-	)	Decision No. CR1851
The Inspector General.	)	

DECISION

Petitioner, Jill Turin, is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (the Act) (42 U.S.C. § 1320a-7(a)(1)), effective October 20, 2003, based upon her conviction of a criminal offense related to the delivery of an item or service under a state health care program. There is a proper basis for exclusion. Petitioner's exclusion for the minimum period[1] of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)) and an additional period of exclusion of five years for a total minimum period of exclusion of ten years, is not unreasonable based upon the three aggravating factors in this case.

I. Background

The Inspector General for the United States Department of Health and Human Services (the I.G.) notified Petitioner by letter dated September 30, 2003, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Act for ten years. The I.G. cited as the basis for exclusion Petitioner's conviction, in the United States District Court for the Eastern

[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 period of exclusion.

District of New York, of a criminal offense related to the delivery of an item or service under the Maternal and Child Health Services Block Grant program and the Block Grants to States for Social Services Program, state health care programs within the meaning of section 1128(a)(1) of the Act. Act § 1128(h) (42 U.S.C. § 1320a-7(h)).

Petitioner requested a hearing before an administrative law judge (ALJ) by letter dated February 13, 2008. The case was assigned to me for hearing and decision on February 28, 2008. On March 17, 2008, I convened a prehearing telephonic conference, the substance of which is memorialized in my Order dated March 20, 2008. Petitioner declined to waive oral hearing. The I.G. alleged that Petitioner's request for hearing was untimely filed and that it should be dismissed. I established a briefing schedule for an I.G. motion to dismiss and also granted the I.G. leave to file an alternate motion for summary judgment.

On April 25, 2008, the I.G. filed a motion to dismiss for untimeliness or, in the alternative, for summary judgment, with a supporting brief (I.G. Brief), and exhibits (I.G. Exs.) 1 through 6. Petitioner filed her response to the motions and a cross-motion for summary judgment on August 7, 2008 (P. Brief), with exhibits (P. Exs.) 1 through 7. The I.G. filed a reply to Petitioner's response and cross-motion on August 21, 2008 (I.G. Reply). Petitioner did not object to my consideration of I.G. Exs. 1 through 6 and they are admitted. The I.G. objected in its Reply to the admission of P. Exs. 1, 2, 4, and 5 on grounds they are not relevant to any issue before me. The I.G.'s objection is overruled and P. Exs. 1 through 7 are admitted. The relevance of P. Exs. 1, 2, 4, and 5 to issues pending before me is reflected by Petitioner's argument of her theories regarding both the timeliness of Petitioner's request for hearing and the existence of the aggravating factors cited by the I.G.

II. Discussion

A. Findings of Fact

The following findings of fact are based upon the uncontested and undisputed assertions of fact in the pleadings and the exhibits admitted. Citations may be found in the analysis section of this decision if not included here.

1. The I.G. notified Petitioner by letter dated September 30, 2003, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Act, for a period of ten years. I.G. Ex. 1.

2. Petitioner did not receive the September 30, 2003 I.G. notice of exclusion until December 24, 2007, five days after December 19, 2007, the date the I.G. mailed a copy of the notice to Petitioner. P. Ex. 7.

3. Petitioner requested a hearing by letter dated February 13, 2008, less than 60 days from her presumed receipt of the I.G. notice of exclusion on December 24, 2007.

4. Petitioner admits that on September 20, 2002, she was convicted, pursuant to her plea of guilty, of one count of theft of federal funds intended for a program in violation of 18 U.S.C. § 666(a)(1)(A). P. Brief at 4-5; I.G. Exs. 3, 4.

5. Petitioner admits that she was sentenced to two years of probation, home detention for four months, and to make restitution in the amount of $38,073 if her co-defendant did not do so. P. Brief at 5; I.G. Exs. 3, 4.

6. The acts that resulted in Petitioner's conviction, or similar acts, resulted in financial loss of $5000 or more to a government program or to one or more entities.

7. The acts that resulted in conviction, or similar acts, were committed over a period of one year or more.

8. Petitioner does not deny that she was sentenced to incarceration in the form of home detention.

B. Conclusions of Law

1. Petitioner rebutted the presumption that she received the September 30, 2003 I.G. notice of exclusion five days from the date of the notice.

2. Petitioner's February 13, 2008 request for hearing was timely filed within 60 days of Petitioner's December 24, 2007 receipt of the September 30, 2003 I.G. notice of exclusion.

3. Dismissal of the request for hearing is not required.

4. I have jurisdiction.

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

6. Petitioner's conviction related to the delivery of an item or service under a state health care program. *See* 42 U.S.C. §§ 701-09 (Act, §§ 501-09), 1320a-7 (Act, § 1128(h)); 1397-97f (Act, §§ 2001-07). P. Brief at 3, n.3; 4-5; 12.

7. Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Act. P. Brief at 3, n.3; 4-5; 12.

8. Pursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is not less than five years and that period is presumptively reasonable. *See also* 42 C.F.R. § 1001.102(a).

9. Summary judgment is appropriate.

10. Petitioner admitted by her guilty plea all elements necessary to establish a violation of 18 U.S.C. § 666(a)(1)(A), including the element that the value of the property involved was $5000 or more.

11. Petitioner admitted by her guilty plea to the charge of a violation of 18 U.S.C. § 666(a)(1)(A), that her acts occurred between January 1, 1995 and December 31, 1999, a period of more than one year.

12. Petitioner was sentenced to incarceration within the meaning of the regulations. 42 C.F.R. §§ 1001.2; 1001.102(b)(5).

13. The I.G. did not consider an aggravating factor that did not exist or fail to consider a mitigating factor that has been shown to exist, a ten-year period of exclusion falls within a reasonable range, and, therefore, I have no authority to reassess the additional period of exclusion.

14. Extension of Petitioner's period of exclusion by five years, for a total minimum period of exclusion of ten years, is not unreasonable.

15. Petitioner's exclusion began on October 20, 2003, the twentieth day after the September 30, 2003 I.G. notice of exclusion. 42 C.F.R. § 1001.2002.

C. Issues

The Secretary of the Department of Health and Human Services (the Secretary) has by regulation limited my scope of review to the following issues:

– Whether Petitioner's request for hearing was timely filed;

– 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); 42 C.F.R. § 1005.2(c).

D. Applicable Law

Petitioner's right to a hearing by an ALJ and judicial review of the final action of the Secretary is provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). Pursuant to 42 C.F.R. § 1005.2(c), a request for hearing must be filed within 60 days of the date on which the notice of exclusion is received by the person to be excluded. The regulation establishes the rebuttable presumption that the date of receipt is five days after the date of the notice unless there is a reasonable showing to the contrary. 42 C.F.R. § 1005.2(c). A request for hearing that is not filed timely must be dismissed. 42 C.F.R. § 1005.2(e)(1).

Pursuant to section 1128(a)(1) of the Act, the Secretary must exclude from participation in Medicare and Medicaid programs any individual convicted of a criminal offense related to the delivery of an item or service under Medicare or any state health care program.

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years may mitigating factors be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

The standard of proof is a preponderance of the evidence and there may be no collateral attack of the conviction that is the basis for the exclusion. 42 C.F.R. § 1001.2007(c) and (d). 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).

E. Analysis

1. Petitioner has rebutted the presumption of receipt of the I.G. notice of exclusion, Petitioner's request for hearing is timely, and dismissal of the request for hearing is not required.

There is no dispute that the I.G. notice of exclusion was dated September 30, 2003, or that it included advice to Petitioner of the right to request a hearing within 60 days of receipt of the notice. I.G. Ex. 1. Pursuant to 42 C.F.R. § 1005.2(c), Petitioner is presumed to have received the I.G. notice five days after the date on the I.G. notice or, in this case, October 5, 2003. There is also no question that Petitioner did not request a hearing until she did so by letter dated February 13, 2008, obviously more than 60 days after the I.G. notice of exclusion should have been received based upon the presumption. Pursuant to 42 C.F.R. § 1005.2(e)(1), a request for hearing that is not timely filed must be dismissed. The regulations grant me no discretion to waive a late filing or to extend the time for filing. In this case, however, Petitioner argues that she did not receive the I.G. notice of exclusion until the I.G. sent her a copy on December 19, 2007, and that her request for a hearing was timely filed relative to her receipt of the copy of the I.G. notice. P. Ex. 2, at 2, 7. Thus, the issue is whether Petitioner has rebutted the presumption of receipt of the notice. I conclude that she has rebutted the presumption and therefore dismissal for untimely filing is not required.

The I.G. sent Petitioner a letter, dated September 30, 2003, to an address in Weston, Florida. I.G. Ex. 1, at 1. The address on the September 30, 2003 I.G. letter is the same mailing address as that which appears on the judgment entered against Petitioner by the District Court on September 24, 2002. I.G. Ex. 3, at 1. The September 30, 2003 letter advised Petitioner that she was being excluded from participation pursuant to section 1128(a)(1) of the Act. I.G. Ex. 1, at 1-2. According to an I.G. official, there is no record that the September 30, 2003 notice of exclusion was returned to the I.G. by the United States Postal Service (USPS).[2] Therefore, the presumption is that Petitioner received the notice on October 5, 2003.

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[2] The I.G. official does not indicate that this notice of exclusion was sent by certified or registered mail, and based on prior experience adjudicating these cases, I am aware that the I.G. typically does not request evidence of delivery from the USPS. Rather, the I.G. relies upon the regulatory presumption of receipt. The I.G. should reconsider that practice to ensure excluded individuals are actually notified and avoid the need to litigate the issue in future cases.

However, the presumption that Petitioner received the I.G. notice of exclusion by October 5, 2003 is a rebuttable presumption and I find Petitioner has rebutted that presumption. Petitioner does not attempt to explain why she did not receive the I.G. notice of exclusion on October 5, 2003. Rather, Petitioner points to evidence that she acted inconsistently with having received the I.G. notice on October 5, 2003. Petitioner's evidence is persuasive.

The evidence includes Petitioner's affidavit in which she attests that she did not receive the I.G. notice until December 2007. She attests that in 2005 she enrolled in a program to obtain her bachelor's degree in nursing. Petitioner attests that she first learned of the exclusion in November 2007, when after being offered employment as a nurse, the offer was rescinded because she was on the I.G. list of excluded individuals. She attests that she then called and wrote to the I.G. and was provided a copy of the exclusion letter. P. Ex. 2, at 2. Petitioner's affidavit is consistent with and supported by her school transcript, which shows she was enrolled at Nova Southeastern University from the fall term of 2005 through the winter term of 2007, and completed the requirements for a bachelor's degree in nursing. P. Ex. 3. Her affidavit is consistent with and supported by the letter from the Executive Secretary to the New York State Board for Nursing, which found Petitioner acceptable for licensing as a Registered Nurse. P. Exs. 4, 5. Petitioner's affidavit is supported by the affidavit of Kathleen Dooley, who attests that she was the representative of Mercy Medical Center in New York who advised Petitioner that the offer of employment was withdrawn due to her listing on the I.G. list of excluded individuals. P. Ex. 6. Petitioner's affidavit is also consistent with and supported by the fact that the I.G. does not deny that in December 2007, Petitioner requested a copy of the exclusion letter and the I.G. responded by letter dated December 19, 2007 with a copy of the September 30, 2003 I.G. notice letter attached.[3]

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[3] Petitioner refers to the I.G. letter, dated December 19, 2007, as a "re-issuance" of the notice of exclusion letter. P. Brief at 6, 8. Petitioner does not make a specific argument that turns upon her characterization of the December 19 letter as a re-issuance. To the extent that the use of the term "re-issuance" suggests that the I.G. took a new action on December 19, 2007 to effect Petitioner's exclusion, I find that suggestion is unsupported. The December 19, 2007 letter clearly indicates that it was issued in response to Petitioner's letter requesting a copy of the notice of exclusion from 2003. Thus, I conclude that the December 19, 2007 I.G. letter had no effect upon the running of the period of exclusion which began 20 days after the date of the September 30, 2003 notice of exclusion.

Petitioner's argument is simple – why would she spend two years to obtain a nursing degree, endure the tests necessary to obtain a nursing license in the State of New York, and suffer the embarrassment of having an offer of employment withdrawn, if she had received notice that she was excluded from participating for ten years? The enclosure to the September 30, 2003 I.G. notice clearly explains the impact of the exclusion upon Petitioner's ability to obtain gainful employment in the medical community. P. Ex. 7, at 4. Petitioner's ability to read and understand the September 30, 2003 I.G. notice is clearly demonstrated by her completion of the requirements for a bachelor's degree in nursing and obtaining a nursing license in the State of New York. I find it highly unlikely that Petitioner would proceed to obtain a degree and a license speculating that her exclusion would not be discovered by a future employer. I find it also unlikely that Petitioner would have proceeded as she did with the notion she could challenge the exclusion at a later date – the I.G. notice is clear.

I conclude that Petitioner has made the reasonable showing necessary to rebut the presumption that she received the September 30, 2003 I.G. notice of exclusion by October 5, 2003. The evidence shows that the notice was mailed to her again on December 19, 2007, and the presumed date of receipt was December 24, 2007. Petitioner requested a hearing by letter dated February 13, 2008, less than 60 days from her presumed receipt of the I.G. notice of exclusion. Petitioner's request for hearing was timely and dismissal is not required.

2. Summary judgment is appropriate in this case.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The right to a hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. § 1005.2, and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified in 42 C.F.R. § 1005.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). An ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12). Summary judgment is appropriate and no hearing is required where either: there are no disputed issues of material fact and the only questions that must be decided involve application of law to the undisputed facts; or, the moving party must prevail as a matter of law even if all disputed facts are resolved in favor of the party against whom the motion is made. *See White Lake Family Medicine, P.C.,* DAB No. 1951 (2004); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004). A party opposing summary judgment must allege facts which, if true, would refute the facts relied upon by the moving party. *See, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Medical Clinic*, DAB No. 1763 (2001); *Everett Rehabilitation and Medical Center*, DAB No. 1628, at 3 (1997) (in-person hearing required where non-movant shows there

are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also, New Millennium CMHC Inc.*, DAB CR672 (2000); *New Life Plus Center CMHC,* DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case and summary judgment is appropriate. CMS moved for summary judgment in the alternative and Petitioner filed a cross-motion for summary judgment. Petitioner does not dispute that she was convicted or that the I.G. was required to exclude her for not less than five years. P. Brief at 3, n. 3; 4-5; 12. Petitioner argues that she is entitled to summary judgment and the I.G. is not because the I.G. cannot satisfy its burden of proving two of the aggravating factors, i.e., that the acts of which Petitioner was convicted resulted in a loss to the government of $5000 or more or that Petitioner's offense occurred over a period of a year, and because Petitioner's incarceration did not warrant an extension of the period of exclusion. P. Brief at 11. As discussed hereafter, the evidence does not show a dispute as to a genuine issue of material fact. Further, Petitioner asks that I assess the weight to be accorded to an aggravating factor that is not in dispute in this case and then reassess the appropriate period of exclusion in excess of the mandatory five years. As discussed hereafter, I do not have the authority in this case to reassess the additional period of exclusion as Petitioner requests.

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

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

> (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)):
>
> > (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.

Petitioner admits that on September 20, 2002, Petitioner was convicted, pursuant to her plea of guilty, of one count of theft of federal funds intended for a program in violation of 18 U.S.C. § 666(a)(1)(A). P. Brief at 4-5; I.G. Exs. 3, 4. Petitioner admits that she was sentenced to two years of probation, home detention for four months, and to make

restitution in the amount of $38,073, if her co-accused did not do so. P. Brief at 6; I.G. Exs. 3, 4. Petitioner does not dispute that her conviction related to the delivery of an item or service under a state health care program. *See* 42 U.S.C. §§ 701-09 (Act, §§ 501-09); 1320a-7 (Act, § 1128(h)); 1397-97f (Act, §§ 2001-07). Petitioner does not dispute that she was convicted of a criminal offense within the meaning of section 1128(i) of the Act. Petitioner also does not dispute that she is subject to mandatory exclusion pursuant to section 1128(a)(1) of the Act. P. Brief at 3, n.3; 4-5; 12.

Accordingly, I conclude that there is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act.

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

Petitioner does not dispute that the I.G. was required to exclude her for a minimum period of five years pursuant to section 1128(c)(3)(B) of the Act. P. Brief at 3, n.3; 12. The issue remaining is whether or not it is unreasonable to extend her period of exclusion by an additional five years.

5. 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)) and an additional period of exclusion of five years for a total minimum period of exclusion of ten years, is not unreasonable based upon the three aggravating factors in this case.

The I.G. cited three aggravating factors in its September 30, 2003 notice of exclusion: (a) the acts that resulted in Petitioner's conviction, or similar acts, resulted in financial loss to a government program or to one or more entities of $5000 or more and Petitioner was ordered to pay restitution of $38,073; (b) the acts that resulted in conviction, or similar acts, were committed over a period of one year or more and Petitioner's acts occurred from about January 1995 to December 1999; and (c) Petitioner was sentenced to four months of home detention which is considered incarceration. Based upon the three cited aggravating factors, the I.G. determined to extend the period of Petitioner's exclusion by five years for a total period of exclusion of ten years. I.G. Ex. 1; P. Ex. 7. Petitioner argues in its cross-motion for summary judgment that the I.G. cannot, as a matter of law, satisfy its burden of proving the first two aggravating factors and that the third factor does not warrant an extension. P. Brief at 11. The I.G. argues in its motion for summary judgment that there is no genuine issue of material fact in dispute as to the three aggravating factors it cites in support of the I.G. determination to extend the period of exclusion by five years. I.G. Brief at 15-17.

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, which includes aggravating factors. 42 C.F.R. §1005.15(b) and (c). Evidence which does not relate to an aggravating factor or a mitigating factor is irrelevant to determining the length of an exclusion. The burden is upon Petitioner to show the presence of mitigating factors. 42 C.F.R. § 1005.15; *Darren James, D.P.M.*, DAB No. 1828 (2002). Petitioner has presented no evidence or argument that would tend to establish any of the recognized mitigating factors. Rather, Petitioner only attacks the aggravating factors considered by the I.G.

The I.G. must prevail on summary judgment in this case as to the existence of the aggravating factors as there is no genuine dispute as to any material fact necessary to establish the three aggravating factors cited by the I.G., even considering the evidence in a light most favorable to Petitioner.

> **(a) The acts that resulted in Petitioner's conviction, or similar acts, resulted in financial loss to a government program or to one or more entities of $5000 or more.**

Petitioner does not deny that she was convicted pursuant to her plea of violation of 18 U.S.C. § 666(a)(1)(A), which provides:

> Sec. 666. Theft or bribery concerning programs receiving Federal funds
>
> (a) Whoever, if the circumstance described in subsection (b) of this section exists--
>
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--
>
> (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that--
>
> (i) is valued at $5,000 or more, and
>
> (ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or . . . .

Petitioner does not dispute that by her plea she admitted to all elements necessary to establish a violation of 18 U.S.C. § 666(a)(1)(A), including the element that the value of the property involved was $5000 or more. The undisputed fact that Petitioner pled guilty to the offense, an essential element of which is that the value of the property was $5000

or more, is sufficient to satisfy the I.G.'s burden. Petitioner does not and cannot offer evidence to rebut the prima facie evidence that she admitted the element that the property was of a value of $5000 or more.

Petitioner's argument is that I should not infer that Petitioner's acts caused a loss to the government of $5000 or more because the sentencing judge ordered restitution of $38,073. P. Brief at 14-15. Although the I.G. refers to the restitution ordered as a basis for its finding that the loss was $5000 or more, in this case that inference is unnecessary because an element of the offense to which Petitioner pled guilty required her admission that the value was $5000 or more. Further, even if the presence of this aggravating factor depended upon the inference arising from the amount of restitution ordered, I do not find Petitioner's argument persuasive. Petitioner argues that because the trial court ordered that both Petitioner and the co-defendant were jointly responsible for making restitution, the I.G. cannot prove the amount of loss caused by Petitioner. The judgment provides that Petitioner was to pay restitution in the amount of $38,073, unless it was paid by Petitioner's co-defendant, her mother. I.G. Ex. 3, at 2. Contrary to Petitioner's argument, the judgment shows that the trial judge concluded that both Petitioner and her co-defendant were responsible for causing a loss of $5000 or more. In order for the trial judge to have found a basis for ordering restitution of $38,073 by either of the co-defendants, the judge obviously found a basis for finding both responsible for a loss in that amount or more. The judgment is all the evidence the I.G. needs to prove the aggravating factor. Petitioner offers no evidence to rebut the prima facie evidence.

(b) The acts that resulted in conviction, or similar acts, were committed over a period of one year or more.

The judgment shows that Petitioner pled guilty to a single-count information that alleged that she violated 18 U.S.C. § 666(a)(1)(A). The judgment does not show any change to the charge based upon Petitioner's plea. I.G. Ex. 3. The charge specifically alleges that between January 1, 1995 and December 31, 1999, Petitioner and her co-defendant intentionally embezzled, stole, and fraudulently converted property of a value in excess of $5000. I.G. Ex. 4, at 2. Petitioner argues that the I.G. cannot prove Petitioner's dates of involvement and therefore cannot prove her acts were committed over a period of more than a year. P. Brief at 12-14. Contrary to Petitioner's argument, the evidence shows she pled guilty to the single count of the indictment and thereby admitted that her acts occurred over a period of more than one year. Petitioner presents no evidence to raise a genuine dispute as to this fact.

(c) Petitioner was sentenced to incarceration.

Petitioner does not deny that the sentence to home detention amounted to a sentence of incarceration within the meaning of the Secretary's regulations. 42 C.F.R. §§ 1001.2; 1001.102(b)(5). Rather, Petitioner argues that her four-month home detention warrants less weight than traditional incarceration. P. Brief at 15. Petitioner argues that I should give the factor little or no weight when reassessing the period of exclusion. However, for reasons discussed hereafter, I am without authority to reassess the period of exclusion in this case.

(d) The I.G. did not consider an aggravating factor that did not exist or fail to consider a mitigating factor that has been shown to exist, a ten-year period of exclusion falls within a reasonable range, and, therefore, I have no authority to reassess the additional period of exclusion but conclude it is not unreasonable.

If it were my prerogative to simply reassess the period of exclusion, I would be inclined to reduce the discretionary period of exclusion imposed by the I.G. The evidence shows that rehabilitation may have occurred in this case. Petitioner has completed a nursing degree and obtained a nursing license in the State of New York. Further, the New York licensing authority recommends that Petitioner's exclusion be lifted. Petitioner has nearly completed the five-year minimum period of exclusion. The evidence suggests Petitioner may again be trustworthy. However, I do not have authority to reassess the period of exclusion in this case.

The Departmental Appeals Board (the Board) has made clear that the role of the ALJ in cases such as this is to conduct a "*de novo*" review as to the facts related to the basis for the exclusion and the facts related to the existence of aggravating and mitigating factors identified at 42 C.F.R. § 1001.102. *See Joann Fletcher Cash*, DAB No. 1725, n.6 (2000) (www.hhs.gov/dab/decisions/dab1725.html).[4] The regulation specifies that I must determine whether the length of exclusion imposed is "unreasonable." 42 C.F.R. § 1001.2007(a)(1). Appellate panels of the Board have explained that in determining whether a period of exclusion is "unreasonable," I am to consider whether such period falls "within a reasonable range." *Cash,* DAB No. 1725, n.6. The Board cautions that whether I think the period of exclusion too long or too short is not the issue. I am not to substitute my judgment for that of the I.G. and may only change the period of exclusion if I conclude it does not fall within a reasonable range. The Board has indicated by its prior

[4] Footnote 9 in Westlaw™ 20 WL 710697(H.H.S.).

decisions that it is reluctant to uphold a change in the period of exclusion unless there is a finding that the period of exclusion determined by the I.G. is not within a reasonable range because the I.G. considered an aggravating factor that did not exist or failed to consider a mitigating factor that did exist. In *John (Juan) Urquijo,* DAB No. 1735 (2000), the Board upheld a reassessment because the I.G. considered an aggravating factor to extend the period of exclusion that was later shown not to exist and the I.G. failed to consider a mitigating factor that was shown to exist. Thus the Board accepted that the ALJ could determine that the period of exclusion was not within a reasonable range and reassess the period of exclusion. *See also Jeremy Robinson*, DAB No. 1905 (2004) (ALJ review must reflect deference accorded to I.G. and ALJ has no authority to change period of exclusion so long as it is within a reasonable range); *Joseph M. Rukse*, DAB No. 1851 (2002) (reasonable range is less than full range authorized by Act and is tied to circumstances of individual case); *Stacy Ann Battle, D.D.S., and Stacy Ann Battle, D.D.S., P.C.,* DAB No. 1843 (2002); *Gary Alan Katz, R.Ph.*, DAB No. 1842 (2002) (ALJ finding aggravating factor not proved required reduction in period of exclusion).

In this case, there is no genuine issue of material fact as to the existence of the three aggravating factors considered by the I.G. Further, Petitioner does not allege and has offered no evidence to show that there are mitigating factors under 42 C.F.R. § 1001.102(c) that were not considered by the I.G. I have no basis to determine that the ten-year period of exclusion is not within a reasonable range, or that it is unreasonable. Accordingly, I have no grounds to reassess the period of exclusion in this case.

I recommend, based upon evidence of probable rehabilitation in this case, that the I.G. lift the exclusion and permit Petitioner to apply for reinstatement.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid and all federal health care programs for a period of ten years, effective October 20, 2003, 20 days after the September 30, 2003 I.G. notice of exclusion.

/s/
Keith W. Sickendick
Administrative Law Judge