Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Sushil Aniruddh Sheth, M.D.
Docket No. A-12-87
Decision No. 2491
December 21, 2012

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Sushil Aniruddh Sheth, M.D. (Petitioner), appeals the May 14, 2012 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes sustaining Petitioner's exclusion from all federal health care programs for 95 years. *Sushil Aniruddh Sheth, M.D.*, DAB CR2540 (2012). The Inspector General of the Department of Health and Human Services (I.G.) excluded Petitioner under section 1128(a)(1) of the Social Security Act (Act) based on his conviction for felony health care fraud in United States District Court. Applying the applicable regulatory factors, the ALJ decided the length was reasonable and, thus, upheld the exclusion for the full 95 years. Petitioner challenges here, as below, only the length of the exclusion, not the I.G.'s basis for the exclusion. After carefully considering the arguments made by Petitioner in his Notice of Appeal (NA), the I.G.'s Response (Response) and Petitioner's Reply, we conclude that a 95-year exclusion is unreasonable, but a 60-year exclusion is reasonable.[1] Accordingly, we reduce the exclusion to 60 years as authorized by 42 C.F.R. § 1005.21(g).

Statutory and Regulatory Background

Section 1128(a)(1) of the Social Security Act (Act) requires the Secretary of the Department of Health and Human Services (Secretary) to exclude an individual from participation in all federal health care programs if that individual has been convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. *See also* 42 C.F.R. § 1001.101. Five years is the minimum period of an exclusion under section 1128(a)(1). Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2). That period may be lengthened based on application of

[1] Petitioner asked for an additional 30 days to file his Notice of Appeal; the Board granted his request. Petitioner requested 60 days from receipt of the I.G.'s Response to file a reply brief, rather than the 15 days specified in the Board's Acknowledgment of Appeal; the Board granted 45 days. The record does not show when Petitioner received the I.G.'s response, but the certificate of service says Petitioner placed his reply brief in the prison mail October 11, 2012. The Board did not receive the reply brief until 21 days later, November 1, 2012, but has considered both of Petitioner's briefs in making its decision.

the aggravating factors in 42 C.F.R. § 1001.102(b). If an exclusion period is extended based on application of one or more aggravating factors, any applicable mitigating factors may then be used to reduce the length. 42 C.F.R. § 1001.102(c). The aggravating factors applicable here are as follows:

> (1) The acts resulting in the conviction . . . caused . . . a financial loss to a Government program or to one or more entities of $5,000 or more. (The entire amount of financial loss to such programs or entities, including any amounts resulting from similar acts not adjudicated, will be considered regardless of whether full or partial restitution has been made);
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> (2) The acts that resulted in the conviction . . . were committed over a period of one year or more;
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> (3) The sentence imposed by the court included incarceration;
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> (4) Whether the individual . . . 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.

An excluded individual may request a hearing before an ALJ, but only on the issues of whether the I.G. had a basis for the exclusion and whether the length of the exclusion is unreasonable. 42 C.F.R. §§ 1001.2007(a), 1005.2(a). Any party dissatisfied with the ALJ's decision may appeal to the Board. 42 C.F.R. § 1005.21.

Case Background[2]

Summary of Facts

Petitioner was a practicing cardiologist with a clinical office and two "administrative offices" in his residences and privileges at three Chicago-area hospitals. ALJ Decision at 2, citing I.G. Ex. 3, at 3. He was convicted after pleading guilty to one count of health care fraud under 18 U.S.C. § 1347. *Id*., citing I.G. Exs. 2, 3, 5. Petitioner's fraudulent

[2] The facts stated here are from the ALJ Decision and the record and do not constitute new findings.

scheme, which he perpetrated on his own, consisted of billing Medicare and other insurers for critical medical care services he did not provide. *Id*., citing I.G. Ex. 3, at 2-3. In some cases, Petitioner claimed to have provided services to patients he never met, services rendered in Chicago when he was not in that city or services that consumed more than 24 hours of services in a single day. *Id*., citing I.G. Ex. 3, at 4. Petitioner exploited his staff privileges at the hospitals to steal confidential patient information which he used to write hand-written notes that he faxed to the outside billing companies he paid to submit the claims to Medicare and the other insurers. *Id*., citing I.G. Ex. 3, at 4-5. On August 10, 2010, the court entered judgment against Petitioner, sentenced him to 60 months in prison and ordered him to pay a total of $12,376,310.47 in restitution to Medicare and "a long list of private insurance companies." *Id*., citing I.G. Ex. 5, at 2, 5-8.

Summary of Petitioner's arguments and the ALJ Decision

Petitioner argued below, as here, that a 95-year exclusion is unreasonable when the aggravating and mitigating factors in his case are compared to those in shorter exclusions appealed to ALJs and the Board. Petitioner also argued, and continues to argue, that 95 years was effectively a permanent exclusion; that the effective date of his exclusion should be changed to be effective August 19, 2009, the date of his guilty plea; and that his exclusion violated the Eighth Amendment to the United States Constitution.

The ALJ determined the 95-year exclusion was reasonable by doing a qualitative assessment, based on facts of record, of the circumstances surrounding the four aggravating factors applied by the I.G. in this case: a financial loss of $12,376,310.47 to Medicare and other government and private payors based on the amount of restitution ordered by the court;[3] criminal activities that lasted for about six years (January 2002 through December 2007); court-ordered incarceration of 60 months (five years); and, suspension of Petitioner's medical license by two state licensing boards (Illinois and California). ALJ Decision at 4-5. The ALJ also considered the absence of any mitigating factors.

The ALJ rejected Petitioner's argument that she should compare the period of his exclusion to other exclusions, stating that such "comparative analys[e]s" are "[a]t best of limited value; at worst, they are misleading" and "often fail to consider the entire circumstances of the particular cases." *Id*. at 7. As an example, the ALJ noted and rejected Petitioner's reliance on *Paul D. Goldenheim, M.D., et al*., DAB No. 2268 (2009),

[3] The I.G. breaks this down (rounded) into an $8,134,170 loss to Medicare and a $4,242,140 loss to 29 other Government and private payors. Response at 7, citing I.G. Ex. 5 at 5-7. The ALJ noted that in his plea agreement, Petitioner admitted he "fraudulently obtained" approximately $9,000,000 and $4,000,000 from Medicare and the other programs, respectively. ALJ Decision at 4, citing I.G. Ex. 3, at 5. The total of these amounts would exceed the restitution amount. However, the ALJ applied the restitution amount on which the I.G. had relied. *Id*.

aff'd sub nom. Friedman, et al. v. Sebelius, 755 F.Supp.2d 98 (D.D.C. 2010), *rev'd and remanded*, 686 F.3d 813 (D.C. Cir. 2012) (for further consideration of length of exclusion), *reh'g denied*, 1:09-cv-02028-ESH (Nov. 29, 2012), a case involving 20-year exclusions for each of three individuals reduced to 12 years over the course of the appeal. The ALJ found the exclusions in *Friedman et al*. not comparable to Petitioner's for multiple reasons, including the fact that the excluded individuals in that case, officers of a pharmaceutical corporation that introduced misbranded drugs into interstate commerce, were convicted of misdemeanors rather than felonies and were excluded by statutory permission rather than mandate. *Id*. at 7-8. The ALJ also noted the convictions of Goldenheim and the other two individuals were based on their being "responsible corporate officers" under the federal Food, Drug and Cosmetic Act, and there was no allegation that they knew of the corporation's wrongdoing. *Id.* at 8. The ALJ also reasoned that because the exclusions of Goldenheim and the other two officers were the first I.G. exclusions based on convictions under the "responsible corporate officer" doctrine, "for reasons wholly unrelated to whether the period of exclusion was reasonable, the I.G. might have opted to tread lightly." *Id*. As a reason for finding comparative analysis largely unhelpful, the ALJ also cited the Board's statement in *Jeremy Robinson*, DAB No. 1905 (2004) that the I.G. could reasonably decide that increasingly longer periods of exclusion are necessary to fight health care fraud. *Id*., citing DAB No. 1905, at 10 n.8. Finally, the ALJ cited the settled principles of deference to the I.G. articulated in Board decisions such as *Craig Richard Wilder*, DAB No. 2416, at 11 (2011) and *Goldenheim, et al*. Noting that the sample of cases available to the ALJs is limited to those appealed, the ALJ concluded, "We simply lack the experience of these cases that the I.G. has. For this reason, we defer to his judgment and should exercise caution in comparing cases." *Id*. at 7.

With respect to Petitioner's other arguments, the ALJ found she had no authority to review the timing of the I.G.'s decision to exclude Petitioner or to retroactively alter the date the exclusion took effect. *Id*. at 8, citing *Tanya A. Chuoke, R. N.*, DAB No. 1721 (2000); *Samuel W. Chang, M.D.*, DAB No. 1198 (1990). She also found she had no authority to review Petitioner's Eighth Amendment claims. *Id*. at 9.

Standard of Review

Our standard of review of an exclusion imposed by the I.G. is established by regulation. We review a disputed issue of fact as to "whether the initial decision is supported by substantial evidence on the whole record." 42 C.F.R. § 1005.21(h). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citing *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). We review a disputed issue of law as to "whether the initial decision is erroneous." 42 C.F.R. § 1005.21(h).

Analysis

A 95-year exclusion is not within a reasonable range, but a 60-year exclusion is within a reasonable range.

The I.G. excluded Petitioner from Federal health care programs for a period of 95 years, and the ALJ upheld the full exclusion period. The duration of a mandatory exclusion beyond the statutory five-year minimum is determined by evaluating the aggravating factors and mitigating factors set forth at 42 C.F.R. §§ 1001.102(b) and (c). *E.g. Wilder*, DAB No. 2416, at 11. The evaluation does not rest on the specific number of aggravating or mitigating factors or any rigid formula for weighing those factors, but rather on a case-specific determination of the weight to be accorded each factor based on a qualitative assessment of the circumstances surrounding the factors in that case. *E.g. Robinson*, DAB No. 1905 at 3 (citing *Keith Michael Everman, D.C.*, DAB No. 1880, at 10 (2003)). The protective purpose of the exclusion statutes is an overarching consideration when assessing the factors: "It 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." *Donald A. Burstein, Ph.D.*, 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).

An ALJ reviews the length of an exclusion de novo to determine whether it falls within a reasonable range given the aggravating and mitigating factors and the circumstances underlying them. *Joseph M. Rukse, Jr. R.Ph.*, DAB No. 1851, at 10-11 (2002), quoting *Gary Alan Katz, R.Ph.*, DAB No. 1842, at 8 n.4 (2002). As the ALJ here stated, "[a] 'reasonable range' refers to a range of exclusion periods that is more limited than the full range authorized by the statute [i.e., from a minimum of five years to a maximum of permanent] and that is tied to the circumstances of the individual case." ALJ Decision at 6, citing *Rukse* and *Katz*. An ALJ's (and the Board's) review of an exclusion period to determine whether it is unreasonable must reflect the deference owed the I.G. *Robinson*, DAB No. 1905, at 3. The I.G. "has 'broad discretion' in setting the length of an exclusion in a particular case, based on [his] 'vast experience' implementing exclusions." *Wilder*, DAB No. 2416, at 8 (citing 57 Fed. Reg. at 3321). An ALJ may not substitute his or her judgment for that of the I.G. or determine a "better" exclusion period. *Goldenheim, et al.*, DAB No. 2268, at 21.

As indicated above, the ALJ found Petitioner's 95-year exclusion reasonable by weighing the aggravating factors (and the absence of a mitigating factor) in this case but declined to discuss the case comparisons set forth by Petitioner in his brief and, to a lesser extent, in the I.G.'s Response. The Board has recognized that case comparisons are of limited value and are not controlling on the issue of whether an exclusion period is reasonable. *See Goldenheim et al.*, DAB No. 2268, at 29 (citing 57 Fed. Reg. at 3314 and stating,

"Comparisons with other cases are not controlling and of limited utility given that aggravating factors and mitigating factors 'must be evaluated based on the circumstances of a particular case' . . . which can vary widely"). However, the Board has also recognized that "[w]hile direct case comparisons are not dispositive, they can inform whether an exclusion falls within a reasonable range, considering the evidence supporting the aggravating and mitigating factors." *Robinson*, DAB No. 1905, at 10 n.6. The ALJ here acknowledged this precedent, stating --

> In . . . *Robinson*, the Board faulted the [ALJ] for comparing the petitioner's situation to only one other case. [footnote omitted] In the Board's view, one case represented too small a sample to allow for a meaningful comparison. It pointed out that the ALJ might have considered other cases involving 15-year exclusions which could "inform" whether the exclusion falls within a reasonable range.

ALJ Decision at 7.

Thus, while the Board has made it clear that the assessment of aggravating and mitigating factors is first and foremost case specific and that the value of case comparisons to that assessment is limited, the Board has also recognized that such comparisons can inform an ALJ's or the Board's decision making in a given case. This is such a case, as the I.G. itself appears to recognize in its Response. While the I.G. begins by arguing that the ALJ Decision should be affirmed because the I.G. "carefully considered the facts and circumstances of [Petitioner's] case and determined that, based on demonstrated criteria, 95-years was a reasonable term of exclusion," the I.G. alternatively argues, at some length, that "[t]he length of [Petitioner's] exclusion is consistent with prior exclusions." Response at 6, 11-15. In particular, the I.G. compares the exclusion here to those in three 50-year exclusion cases and concludes that when compared to those exclusions, "the egregiousness of the facts and circumstances in [Petitioner's] case supports the reasonableness of a 95-year exclusion." *Id*. at 11.

By making this argument the I.G., in effect, acknowledges that a comparative analysis does help inform a determination of the reasonableness of the exclusion period in this case, even if it is not dispositive. For reasons we explain below, we reject the I.G.'s argument that the comparison to the cases cited by the I.G. supports the 95-year exclusion the I.G. imposed. However, we agree that comparing the factors here to those in the cases the I.G. cites (and distinguishing them from the factors in the cases Petitioner cites for substantially more limited exclusions) does inform our decision as to a reasonable period of exclusion. In particular, as we will discuss, that comparison, focusing on the aggravating (and absence of mitigating) factors and the statutory purpose, persuades us that an exclusion of more than 50 years is reasonable in this case.

A. A qualitative assessment of the factors in Petitioner's case compared to the 50-year exclusions the I.G. cites persuades us that excluding Petitioner for more than 50 years is reasonable.

The I.G. compares the factors in Petitioner's exclusion to those in three 50-year exclusion cases, *Marcellius Jhekwuoba Anunobi*, DAB CR2480 (2012), *Christopher George Collins*, DAB CR2515 (2012) and *Mukunda Mukherjee, M.D.*, DAB CR1835 (2008), and asserts that the length of Petitioner's exclusion is consistent with the length of those exclusions. Response at 11-15. We agree that excluding Petitioner for some period of time exceeding 50 years is reasonable based on a qualitative comparison of the factors and the circumstances surrounding them.

In *Anunobi*, the petitioner, a pharmacist who billed for drugs which had no prescriptions and, in some cases, were not received by patients, was excluded, like Petitioner, under section 1128(a)(1) of the Act. DAB CR2480, at 1-3. The I.G. excluded Anunobi for 50 years based on application of three aggravating factors: a program financial loss of $2,220,019.36; the persistence of Anunobi's criminal conduct for a period of 14 months; and, Anunobi's 20-year prison sentence. As here, the I.G. applied no mitigating factors.

The I.G. argues that the "aggravating factors applicable in [Petitioner's] case, taken together, reflect significantly more egregious facts and circumstances than *Anunobi*." Response at 12. We agree. Petitioner's criminal conduct cost Medicare, other government and a large number of private payors a total of $12,376,310. The Board has characterized amounts substantially greater than the statutory standard (more than $5,000) as an "exceptional aggravating factor" entitled to significant weight. *Robinson*, DAB No. 1905, at 12; *Burstein*, DAB No. 1865, at 12 (2003). The $12,376,310 loss in this case, as the ALJ stated, was "more than 2,475 times greater than the $5,000 threshold for aggravation . . . ." ALJ Decision at 5. As the I.G. notes, the loss in this case is "5.57 times greater than the financial loss in *Anunobi.*" Response at 12. The ALJ described the program loss here as "a phenomenal amount, particularly considering that those losses are attributable to one person." ALJ Decision at 5. We too find compelling the fact that Petitioner single-handedly caused a program loss of more than $12,000,000. This conduct reflects the kind of focused motivation to defraud Medicare and other programs that evidences a high degree of untrustworthiness. Our conclusion in this regard is enhanced by the fact that the duration of Petitioner's criminal activities was six times that required to trigger the aggravating factor. We also note it was more than five and a half times longer than the duration of Anunobi's criminal activities.

The only factor more significant in *Anunobi* was the petitioner's 20-year prison sentence, as compared to five years in this case. Petitioner asserts that Anunobi's prison sentence was 12 times longer than his own and that this factor "should be an indicator of unreasonableness" with respect to his exclusion and "should substantially reduce Petitioner's exclusionary period to a more appropriate time frame such as less than 200%

of Petitioner's Federal Sentence or less than 10 years." NA at 9. Petitioner's "12 times longer" argument greatly exaggerates the sentencing differential. Anunobi's prison sentence was only four times longer than Petitioner's, because while Anunobi was sentenced to three 20-year terms, they were to be served concurrently. DAB CR2480 at 8. Petitioner's argument also ignores settled law, stated in cases such as *Robinson* and *Everman*, 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 such as the one he urges. But, even assuming Petitioner's five-year prison term was 12 times shorter than Anunobi's, which it is not, the I.G. could reasonably accord greater weight to the 5.57 times greater program loss caused by Petitioner.

Collins, on which the I.G. also relies, involved a mandatory exclusion for 50 years under section 1128(a)(1) for conspiracy to commit health care fraud by working as a "beneficiary recruiter" for two home health agencies, giving beneficiaries kickbacks in exchange for Medicare patient information so that home health agencies could submit false claims. As in *Anunobi*, the I.G. applied three aggravating factors: a program financial loss of $6,967,500; the fact that Collins' criminal acts were committed over 26-27 months; and the fact that Collins was imprisoned for 63 months (5.25 years), roughly the same amount of time as Petitioner. As here and in *Anunobi*, there were no mitigating factors. From a qualitative standpoint, the most important facts distinguishing *Collins* from this case are that the program financial loss Petitioner caused was almost twice that caused by Collins, and Petitioner's criminal conduct lasted more than twice as long. We must also accord some weight to the fact the I.G. applied a fourth aggravating factor in Petitioner's case – the suspension of his medical license in two states – that highlights his lack of trustworthiness.

In *Mukherjee*, another 50-year exclusion on which the I.G. relies, the I.G. excluded Mukherjee under section 1128(a)(4) of the Act (a mandatory exclusion provision) based on a conviction for illegal distribution of controlled substances. Mukherjee distributed prescriptions for controlled substances without a legitimate medical purpose and outside the course of professional practice. DAB CR1835, at 3. The I.G. applied two aggravating factors: the fact that Mukherjee's sentence included incarceration (328 years on 44 felony counts) and the fact that he was subject to adverse action by two state licensing authorities. The decision does not indicate any financial loss to Medicare or other health care programs or discuss the duration of Mukherjee's criminal conduct beyond indicating that it occurred between April 2 and June 21, 2004. *Id*.

In asserting his exclusion is unreasonably long when compared to Mukherjee's, Petitioner ignores the aggravating factors present in his case but absent in that one, especially the "phenomenal" financial loss Petitioner caused. ALJ Decision at 5. Instead, as he did in his comparison to *Anunobi*, Petitioner focuses on what he calls the "jaw-dropping, humungous difference in the length of incarceration" between his case and that of

Mukherjee. Reply at 3. Petitioner accuses the I.G. of trying to make light of this "overwhelming" difference and characterizes the incarceration factor as an "extremely critical aggravating factor, the one that most closely correlates with the degree of the egregiousness of any criminal offense." *Id*. at 3, citing Response at 14. The I.G. does not make light of the sentencing differential. Rather, he acknowledges the difference but also notes, correctly, that it is "[t]he only factor that was more significant in *Mukherjee*" and also noted the absence of any discussion of program financial loss or the duration of Mukherjee's criminal conduct. Response at 14.

We find no basis in the regulations for Petitioner's suggestion that the I.G. should give more weight to the incarceration factor because it "most closely correlates with the degree of the egregiousness of any criminal offense." The regulations do not rank factors by importance, and the incarceration factor rests merely on whether the sentence included incarceration; it does not specify that more or less weight should be given based on the length of a prison term. Furthermore, the length of a criminal sentence is influenced by factors not present in the exclusion context, such as sentencing guidelines and the number of counts. We note, for example, that Mukherjee, who received a 328-year sentence, was convicted by a jury of 44 separate felony counts. *Mukherjee*, DAB CR1835, at 3, 4. A criminal sentence also serves different purposes than those of the exclusion statute and regulations, including punishment which, as we discuss later, is not a purpose of the exclusion statute. Moreover, as stated earlier, financial loss to health care programs is "an exceptional aggravating factor," *supra* at 7 (citing *Robinson* and *Burstein*), that the I.G. may reasonably conclude outweighs the incarceration factor in any given case.

With respect to the program financial loss factor, Petitioner points to three cases in which he asserts the ALJ and/or Board upheld shorter exclusions than his notwithstanding greater program losses, but these cases do not support Petitioner's argument for reducing his exclusion period. NA at 28-29. The first, *Goldenheim, et al.*, involved a 20-year exclusion reduced to 12 years by the Board, and there were very substantial program losses, $34,500,000 attributed to the individual corporate officers and $160,000,000 to the corporation.[4] However, comparison to *Goldenheim et al*. is essentially meaningless for the reasons given by the ALJ, which we discussed above. *See* ALJ Decision at 8; supra at 3-4.

The second case Petitioner cites is *Callie Hall Herpin*, DAB CR2333 (2011), where the excluded individual, a physician, pled guilty to one felony count of conspiracy to commit health care fraud and violation of the anti-kickback statute and one count of conspiracy to distribute and dispense narcotics outside the scope of professional practice and not for a legitimate purpose. DAB CR2333, at 1-2. Herpin was excluded for 50 years, but the I.G. reduced that period to 45 years during the appeal based on cooperation leading to

[4] As noted earlier, the D.C. Circuit subsequently remanded this case for further consideration of the length of the exclusion.

conviction of a co-conspirator. *Id*. at 2, 5. Contrary to Petitioner's assertion, the ALJ did not "[hold] [Herpin] accountable for Medicare program losses of more than $30 million." NA at 29; Reply at 4. Rather, the ALJ, like the I.G., used the amount of court-ordered restitution ($12,926,680) as the amount of the financial loss to programs, and that amount is comparable to the amount of restitution by which the I.G. and ALJ measured the program loss here. *See* DAB CR2333 at 3. Restitution is a recognized measure of program loss. *E.g*. *Craig Richard Wilder*, DAB No. 2416, at 9. The ALJ cited the $30 million amount (the amount Herpin attributed to the fraudulent billing conspiracy as a whole in her plea agreement) only as evidence undercutting Herpin's argument that she personally had realized "only" $184,000. *Herpin*, DAB CR2333, at 3.

Rather than supporting Petitioner's assertion that *Herpin* supports a reduction of his exclusion period, the case supports a conclusion that excluding Petitioner for a period of more than 50 years is reasonable because, in addition to involving a comparable financial loss, *Herpin* involved fewer aggravating factors (three as opposed to four), and, more importantly from the standpoint of qualitative analysis, a very significant mitigating factor that is not present here. Herpin cooperated with law enforcement, and that cooperation led to the conviction of one of her co-conspirators. Moreover, Herpin's criminal conduct occurred over a substantially shorter period of time than Petitioner's, 15 months for Herpin as compared to six years for Petitioner.[5]

Petitioner finally points to the *Wilder* case in which the Board found a 35-year exclusion unreasonable and reduced it to 18 years. Petitioner implies that the Board reduced Wilder's exclusion period despite his causing a program loss of $30,000,000, but that suggestion is not accurate. *See* NA at 29. In considering what was a reasonable exclusion period based on the aggravating factors, the Board considered only the program loss attributable to Wilder's criminal conduct, which was measured by the amount of the restitution the court ordered him to make – $4,002,312.14. *Wilder*, DAB No. 2416, at 9. The Board discussed the $30 million figure only as the amount the I.G. attempted to recover in multiple cases involving Wilder's cooperation, making it relevant to the Board's assessment of the mitigating factor, Wilder's cooperation.[6] *Id*. at 13. The Board reduced the exclusion period based on "Petitioner's significant and extensive cooperation with law enforcement officials . . . ." *Id*. at 8. The Board noted that law enforcement officials were able to convict seven other participants in the conspiracy to defraud Medicare and the California Medicaid program primarily because of Wilder's cooperation. *Id*. at 4. The Board further noted that the ALJ herself had called this

[5] Petitioner cites the fact that Herpin's prison sentence was twice the length of his. Reply at 4. However, in light of the other aggravating factors (and the mitigating factor) in *Herpin*, which Petitioner ignores, that fact would not change our conclusion.

[6] Wilder asserted, and the I.G. did not dispute, that Wilder's cooperation was responsible for the Department of Health and Human Services' attempt to recover more than $30 million in multiple cases involving the other individuals participating in his fraud scheme.

cooperation "extraordinary." The Board also found that although the ALJ "upheld the full 35-year exclusion on the ground that '[t]he period of exclusion would have been substantially longer had [Petitioner] not cooperated,' " the ALJ did "not cite or rely on any documentary evidence submitted by the I.G. to support her statement." *Id.* at 11-12.

Petitioner asserts that he too "cooperated" with law enforcement "to the fullest extent," noting, among other things, that he paid his restitution in full. NA at 21-23; Reply at 20. This is not "cooperation" within the meaning of 42 C.F.R. § 1001.102(c)(3). To be a mitigating factor, cooperation with law enforcement must have one of the results listed in the regulation, such as others being convicted or excluded. There is no evidence that any of the listed results occurred in this case; indeed, the record indicates that Petitioner carried out his fraudulent scheme single-handedly and, thus, could not have implicated anyone else. Moreover, Petitioner's making restitution was merely carrying out part of his court ordered sentence. Nor does the fact Petitioner paid the restitution mean there is "no effective resultant financial loss to [Federal or other insurance] programs," as he asserts. Reply at 20. The regulations, as Petitioner concedes, expressly provide that in calculating program financial loss, "[t]he entire amount of financial loss . . . will be considered regardless of whether full or partial restitution has been made. . . ." 42 C.F.R. § 1001.102(b)(1); Reply at 17.

As we have noted, the overarching issue in determining whether the length of an exclusion is reasonable is whether it is consistent with the statutory purpose of protecting federal health care programs and their beneficiaries. It is informative to our decision that Petitioner accomplished his criminal scheme by stealing patient information from the hospitals in which he had privileges and by falsifying patient records. As the ALJ noted, this conduct poses a serious risk to legally protected privacy interests as well as being an abuse of hospital privileges and records to commit fraud against essential health care programs. *See* ALJ Decision at 2, n.1. Citing the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191, 110 Stat. 1936 (1996)), the ALJ noted that Petitioner's theft and dissemination of confidential patient information undermined his contention that he did not harm patients. However, she also noted the I.G. did not apply the aggravating factor for patient harm that exists in the regulations and, thus, did not consider this an aggravating factor. *Id.*, citing 42 C.F.R. § 1001.102(b)(3). The fact that the I.G. did not cite the theft and misuse of patient information as an aggravating factor, however, does not preclude considering those circumstances in the context of the exclusion statute's overarching concern of protecting the Medicare program from untrustworthy individuals. Petitioner's abuse of his relationships with hospitals, and the access to patient records he enjoyed because of those relationships, is a part of the record surrounding his conviction that, as stated in the I.G. Response, "demonstrates a fundamental untrustworthiness to continue to be eligible to bill the Federal health care programs." Response at 23; *see* I.G. Ex. 3 at 4-5.

Based on the qualitative comparisons above, we conclude that excluding Petitioner for some period more than 50 years is reasonable. Petitioner's criminal conduct reflects a degree of untrustworthiness that is much more acute than he admits in his discussion of those cases. The single-handed execution of such a sustained fraud and the very large amount of the program financial loss, together with Petitioner's abuse of his hospital privileges and his accessing and using confidential patient information and falsifying medical records to accomplish that fraud, are especially informative.

B. The five to fifteen-year exclusion cases Petitioner cites are largely irrelevant.

In reaching our conclusion that an exclusion of more than 50 years is reasonable in Petitioner's case, we have also considered but find no merit to Petitioner's contention that his case is comparable to the following cases involving substantially shorter exclusions: *Goldenheim, et al*. (reduced to 12 years by the Board), *Burstein* (reduced to 10 years by the Board) and *Mark B. Kabins, M.D.*, DAB No. 2410 (2011), *rev'd*, *Kabins v. Sebelius*, No. 2:11-cv-01742-JCM-RJJ, 2012 WL 4498295 (D.Nev. Sept. 28, 2012) and *Kailash C. Singhvi, M.D.*, DAB No. 2138 (2007), *aff'd*, *Kailash C. Singhvi, M.D. v. Inspector General Dep't of Health & Human Servs.*, No. CV-08-0659 (SJF) (E.D. N.Y. Sept. 21, 2009) (five-year exclusions). *See* NA at 7-8. The cited cases are largely irrelevant because they are so factually different from this case and provide no basis for the Board to reduce Petitioner's exclusion to the five to 15-year exclusions imposed in those cases.

As previously discussed, *Goldenheim et al.* is not even remotely comparable because it involved a permissive exclusion and criminal conduct that did not require proof of intent. Without diminishing the seriousness of the crime of which the corporate executives in that case were convicted, it is fair to say that Petitioner's attempt to equate his single-handed, six-year intentional scheme to defraud Medicare and other health care programs to the crime in that case is specious.

Kabins received the mandatory minimum five-year exclusion based on his conviction of felony misprision for covering up a scheme to defraud a patient and other healthcare providers involved in the patient's care in order to avoid a potential malpractice suit. DAB No. 2410, at 1-3. Since the ALJ could not reduce the period of exclusion (which was at the statutory minimum), the ALJ did not need to weigh the aggravating and mitigating factors. For that reason alone, the case has little, if any, relevance. Moreover, although Petitioner is correct that Kabins was ordered to pay $3.5 million in restitution, NA at 7, he was ordered to pay it to the patient, not to "[g]overnment programs or [other] entities," as provided in 42 C.F.R. § 1001.102(b)(1). As the I.G. points out, there is no indication that the ALJ in the *Kabins* case considered restitution paid to a patient, rather

than to "government programs or other entities," an aggravating factor within the meaning of the regulation. *See* Response at 16, n. 3. Kabins also was not incarcerated or subjected to an adverse licensing action. *Kabins* is simply too different in both its facts and its review posture to have any value in informing our decision.

Burstein was convicted of mail fraud for submitting false information to the Pennsylvania Medicaid program regarding the number of qualified clinical staff employed by the outpatient mental health and partial hospitalization provider for which he worked as assistant director. DAB No. 1865, at 6. The I.G. increased Burstein's mandatory five-year exclusion to 15 years based on two aggravating factors, program financial loss of $1,749,453 and conduct occurring over a 15-month period, and one mitigating factor, cooperation with law enforcement. *Id*. at 2, 3, 8 at n.5, 11. The ALJ found that the record did not support the presence of the second aggravating factor, but the Board reversed that finding. *Id*. at 4, 5-9. Nonetheless, the Board reduced the exclusion period to ten years, because it found that Burstein's cooperation with law enforcement was "extensive" and included "some cooperative acts in which he put himself at risk." *Id*. at 12-13. Burstein's case is materially different from Petitioner's given the limited nature and duration of Burstein's criminal scheme, the approximately six times lower amount of the program loss and the presence of a substantial mitigating factor not present to any extent here.

The *Singhvi* case does not inform our decision because of its unique circumstances. The I.G. excluded Singhvi for the minimum five years based on his conviction under section 1128(a)(1) of health care fraud, payment of kickbacks and conspiracy. DAB No. 2138, at 1-2. However, as in *Kabins*, the length of the exclusion period was not at issue on review because it was the statutory minimum; rather, the issue was whether the exclusion was timely because the I.G. did not exclude Singhvi until the court sentenced him, which occurred more than four and a half years after he was convicted. *Id*. at 2-3. Thus, *Singhvi*, like *Kabins*, has little, if any, relevance to our inquiry. Moreover, we note that by the time the I.G. took its exclusion action in *Singhvi*, the petitioner had engaged in substantial cooperation, and the court, which could have sentenced Singhvi to up to 25 years in prison, had sentenced him to time served. *Id.* at 8, n.11 and 9. The I.G. considered this circumstance and the presence of the mitigating factor of cooperation, which was substantial, in deciding not to increase Singhvi's exclusion period.[7] *Id*. at 7-9. These unique facts add to our conclusion that the case is irrelevant for purposes of informing our decision here.

[7] In addition, the Board noted Singhvi's assertion that his medical license had been reinstated. *Id.* at 3.

Petitioner points to the fact that the petitioners in cases such as *Kabins* and *Singhvi*, among others, were all physicians like himself, were convicted of felonies and caused program losses of over a million dollars. However, Petitioner does not explain why these similarities, without more, establish his exclusion should have been no more than five to 15 years given the important distinctions discussed above. Petitioner's reliance on such superficial comparisons illustrates why the Board, while finding comparative analysis informative in this case, does not hold that such comparisons are dispositive or that ALJs err if they do not engage in such comparative analysis in cases where it is unnecessary or does not inform the decision.

C. The 95-year exclusion period imposed by the I.G. here is not supported by the aggravating factors or consistent with the remedial purposes of the statute.

As discussed above, our role is not to substitute our judgment on the length of an exclusion for that of the I.G. On the other hand, the regulations, which the I.G. developed for the Secretary's promulgation, task ALJs and the Board with the obligation to review the reasonableness of exclusion periods selected by the I.G. and authorize ALJs and the Board to reduce an exclusion period. 42 C.F.R. §§ 1001.2007(a)(1)(ii), 1005.4(c)(6), 1005.21(g). Thus, while ALJs and the Board are required to accord appropriate deference to the I.G.'s judgment on this issue, the regulations do not allow them to simply accept that judgment but, instead, require a de novo review and a determination, based on that review, of whether an exclusion is within a reasonable range. In the final analysis, we are left in this case with criminal conduct by Petitioner that presents a compelling case for a very substantial period of exclusion and, for the reasons discussed above, we have concluded that an exclusion of some period longer than 50 years is reasonable. However, the ALJ Decision and the I.G.'s Response on appeal, while well-reasoned as to the seriousness of the circumstances surrounding Petitioner's conviction, do not explain why a 95-year exclusion is within a reasonable range or show that an exclusion of this length is supported by the facts of record surrounding the factors or serves the remedial purposes of the exclusion statute.

The I.G. acknowledges that "[t]his is the first case to be appealed regarding the reasonableness of an exclusion longer than 50 years" (Response at 11), and Petitioner's exclusion is nearly two times greater. The I.G. argues that Petitioner's 95-year exclusion is consistent with the 50-year exclusions. As discussed above, we agree that an exclusion in some increment longer than 50 years is reasonable when compared to those cases, or even without such a comparison. However, the I.G. does not explain why an exclusion that is a full 45 years longer is either consistent with those cases or reasonable if the factors are evaluated without comparison to other cases. In particular, the I.G. has not shown that 95 years is reasonable in the context of the legislative intent to protect the Medicare program from untrustworthy individuals, not to punish them. *See Robinson*, DAB No. 1905, at 8 ("The purposes of an exclusion are to protect federally-funded

programs from untrustworthy individuals and to deter health care fraud."); *see also John N. Crawford Jr., M.D.*, DAB No. 1324, at 7-8 (1992)(citing *Manocchio v. Sullivan*, 768 F.Supp. 814, 817 (S.D. Fla. 1991), *aff'd*, *Manocchio v. Kusserow*, 961 F.2d 1539 (11th Cir. 1992), and stating that a purpose of the statutes is to protect health care "programs, beneficiaries, and recipients from future misconduct by a provider who has proved himself untrustworthy"), *aff'd*, *Crawford v. Sullivan*, No. 92 C 3926, 1993 WL 122294 (N.D. Ill. Jan. 28, 1993).

Our conclusion that a 95-year period of exclusion is not reasonable in this case is not a holding that *any* exclusion longer than one in a prior case that appears to have been imposed based on similar circumstances is necessarily unreasonable or even suspect. Decisions about the reasonableness of exclusion periods must be made on a case-by-case basis, and, similarities notwithstanding, the facts of each case are unique to that case. Moreover, as we indicated earlier, precedent on the length of exclusions is merely informative, not dispositive. We also recognize, as the ALJ noted, that since deterrence is one of the purposes of the exclusion statutes, "the I.G. could . . . reasonably determine that increasingly longer periods of exclusion may have been needed not only to protect federal funds, but also to stanch an increasing amount of health care fraud."[8] *Robinson*, DAB No. 1905, at 10, n.8 (cited in ALJ Decision at 8). We also agree that reducing an exclusion period merely because it is longer than one imposed under similar circumstances carries the risk that we would "deprive the I.G, of a useful tool for deterring program fraud." *See* ALJ Decision at 8. However, this does not mean that reducing an exclusion period under such circumstances necessarily deprives the I.G. of its ability to stem fraud. Nor, given our regulatory responsibilities can we, simply because of this risk, decline to reduce an exclusion period that we conclude is unreasonable in light of the applicable factors, and the evidence of record surrounding them, or the overarching statutory intent. In any event, in this case, the I.G. does not assert that reducing the 95-year exclusion to some period between 50 years and 95 years would have any detrimental impact on its ability to deter fraud. Nor does the I.G. assert that such a reduction in this case would adversely impact its ability to protect health care programs, beneficiaries or recipients from future misconduct by untrustworthy providers generally or Petitioner specifically.

[8] *Robinson* involved an exclusion under section 1128(a)(3), which specifically covers felonies related to "fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct" rather than section 1128(a)(1), which covers program-related crimes more generally. However, the Board cited the same deterrence purpose in *Joann Fletcher Cash*, DAB No. 1725, at 10-11, 13, 19 (2000), an exclusion for fraud under section 1128(a)(1). *Id.*

In conclusion, neither the ALJ nor the I.G. has given us any basis for concluding that 95 years – a period the I.G. concedes is 45 years longer than any prior exclusionary period that has been appealed – is within a reasonable range in light of the aggravating factors in this case, the facts of record addressing those factors and the remedial purposes of the statute, and we conclude that it is not.

D. An exclusion of 60 years is within a reasonable range.

Having concluded that an exclusion of more than 50 years is within a reasonable range but an exclusion of 95 years is not, the question remaining is what exclusion period more than 50 years but less than 95 years is within a reasonable range. In the final analysis, this question involves an assessment of the threat Petitioner poses to the Medicare program and its beneficiaries. The aggravating and mitigating factors, which we analyzed above, were designed to evaluate that risk. *Robinson*, DAB No. 1905, at 8, 11; *see also Cash*, DAB No. 1725, at 15-16, 18 (discussing the role of the factors in assessing trustworthiness and deterrence). The threat Petitioner poses to Federal health care programs is extremely high given the sophisticated scheme to defraud Medicare and other payors that Petitioner single-handedly executed and the quality of the aggravating factors here. The breadth and duration of this solo scheme as well as the more than $12,000,000 program loss Petitioner's scheme caused are strong evidence of Petitioner's untrustworthiness. As the I.G. noted, and Petitioner does not dispute, the scheme defrauded not only Medicare but 29 other government and private payors and persisted for almost six years. Response at 7. Petitioner's proven lack of trustworthiness is exacerbated by his demonstrated willingness to abuse confidential medical information and falsify patient records during that period in order to carry out his scheme.

Petitioner's arguments in his briefs before us do nothing to assuage our concerns in this regard. Petitioner attempts to minimize the degree of his untrustworthiness by claiming that he caused no "actual" program loss because he paid the court-ordered restitution while at the same time acknowledging that by law, financial loss to programs includes any amounts repaid through restitution. NA at 22. As discussed earlier, Petitioner also attempts to minimize the seriousness of his behavior when compared to that of other excluded individuals by inaccurately stating some of the aggravating factors or mischaracterizing ALJ findings in cases he cites in his comparative analysis.

We are also troubled by the following statement by Petitioner, which, even allowing some leeway for vigorous self-advocacy, reflects a failure to accept full responsibility for the seriousness of his criminal conduct and the harm he has done to Medicare and other health care programs:

> Petitioner argues that the fact that he neither had any confederates nor was he engaged in any illegal conspiracies, demonstrates the narrowness of his financial misconduct irrespective of the absolute dollar amount involved and therefore, the exclusionary period should be reflective of a financial misconduct that caused no patient harm nor any "real" program financial loss.

NA at 20-21 (emphasis in original). As discussed, the court-ordered restitution Petitioner was required to pay evidenced a "real" program loss under the law. Petitioner's "financial misconduct" was felony fraud against government and private health care programs and was certainly not "narrow" given its duration, the very large amount of the program loss, the patients whose information was misused and the very large number of payors affected. The fact that Petitioner was able to operate such an extensive fraud for so long without "any confederates" and without any "illegal conspiracies" enhances rather than undercuts our conclusion that his untrustworthiness poses a very serious risk to federal health care programs because it illustrates the determined nature and skillful execution of his fraud against those programs. Finally, as we have already discussed, Petitioner's claim that he "caused no patient harm" (emphasis in original) rings hollow in light of his theft of patient identities and falsification of patient records to accomplish his fraud.

In light of our qualitative assessment of the aggravating factors and the extremely serious risk Petitioner poses to the Medicare program and its beneficiaries, we conclude that a 60-year exclusion is within a reasonable range. In reaching this conclusion, we readily acknowledge that it is not possible to make this determination with mathematical precision and that we do not rule out the possibility of upholding a 95-year exclusion in another case if the rationale for that long an exclusion is adequately explained and supported by the record, as it was not here. In the instant case, however, a 60-year exclusion is supported by substantial evidence in the record, adequately protects the Medicare program and its beneficiaries from any future misconduct by Petitioner and, while this is not dispositive, is also consistent with prior I.G. exclusions for the reasons discussed above.

We recognize that even if Petitioner succeeds in reinstating his physician licenses after being released from prison, an exclusion of this length (like the 95-year exclusion we are reversing), while finite, will effectively bar Petitioner from participating in the Medicare program for the duration of his medical career. Petitioner argues such an exclusion amounts to cruel and unusual punishment and violates the Eighth Amendment to the

United States Constitution.[9] NA at 32-33. This argument incorrectly assumes the purpose of the exclusion statutes is punitive rather than remedial. As the Board noted in *Robinson*, "Federal courts and this Board 'have repeatedly held that a section 1128 exclusion is civil and remedial rather than criminal and punitive'" and that "[t]he deterrent goal of the exclusion does not transform this civil remedy into a criminal or punitive sanction." DAB No. 1905, at 4 n.4, citing *Cash* at 12 (citations omitted). Petitioner himself acknowledges the remedial purpose of the exclusionary period, "to protect against future misconduct by a provider who has proved to be untrustworthy." NA at 32, citing *Manocchio v. Kusserow*, 961 F.2d at 1541, 42. This acknowledgment, in effect, concedes that the length of his exclusion is not a punishment that might have constitutional implications. Because his exclusion is a civil remedy, not criminal punishment, Petitioner's constitutional argument has no basis.

In addition, the Board has held that the practical effect of a finite exclusion period on the individual's ability to participate in the Medicare program in the future is irrelevant to determining a reasonable exclusion period. "While the practical effect … in any particular case might be to prevent a provider from ever participating in federally funded programs again, the Board has repeatedly declined to consider an individual's age or financial or employment prospects in determining whether an exclusion period is reasonable." *Robinson*, DAB No. 1905, at 7; *see also Burstein*, DAB No. 1865, at 13 (rejecting the petitioner's argument that the Board should take into account that a lengthy exclusion would effectively bar him from ever practicing medicine again, given his age and other factors).

E. *ALJs and the Board have no authority to review or change the effective date of an exclusion.*

Petitioner argues the effective date of his exclusion period should be August 19, 2009, the date he says he was convicted, instead of October 20, 2011.[10] NA at 33. The date Petitioner's exclusion took effect is dictated by the exclusion statute and regulations. Section 1128(c) of the Act provides that an exclusion "shall be effective at such time . . . and upon such reasonable notice . . . as may be specified in regulations." The implementing regulation provides that an exclusion "will be effective 20 days from the

[9] Petitioner argues for creation of a "Remedial Provisional Program, subject to certain compliance and audit standards, which would . . . permit reinstatement to Federal Health Care Programs" once he has served his sentence and succeeds in having his medical license reinstated. NA at 33. We have only the authority set out in the Secretary's regulations, which does not include authority to create an alternative remedy to exclusion.

[10] Petitioner also asserts this is the date his provider agreement with Wisconsin Physician's Service, a Medicare contractor, was terminated. While we find no evidence of record to support this assertion, if true, it makes no difference to our decision. We note the August 19, 2009 date Petitioner asserts is his "conviction" date is the date petitioner pled guilty, and a "[j]udgment of guilty [was] entered." I.G. Ex. 2. However, the court did not impose judgment in the case until August 10, 2010. I.G. Ex. 5, at 1.

date of the [I.G.] notice" of the exclusion. 42 C.F.R. § 1001.2002. In this case, the date of the notice of exclusion is September 30, 2011; accordingly, the effective date of the exclusion is October 20, 2011. I.G. Ex. 1, at 1. ALJs and the Board are bound by this regulation; thus, the Board has "repeatedly held" that they have "no authority to adjust the beginning date of an exclusion . . . ." *Singhvi*, DAB No. 2138, at 4-5 (citations omitted). Applying that well-established Board holding here, we reject Petitioner's argument for an earlier effective date.

Conclusion

We conclude that the 95-year exclusion imposed by the I.G. is not within a reasonable range but that a 60-year exclusion is. Accordingly, we reverse the ALJ's decision to uphold the full 95-year exclusion period and reduce the exclusion period to 60 years.

/s/
Leslie A. Sussan

/s/
Stephen M. Godek

/s/
Sheila Ann Hegy
Presiding Board Member