Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Robert Kolbusz, M.D.
Docket No. A-17-5
Decision No. 2759
January 6, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Robert Kolbusz, M.D. (Petitioner) appeals a decision by an Administrative Law Judge (ALJ) upholding on the written record his exclusion by the Inspector General (I.G.) from participation in all federal health care programs for a period of 30 years. *Robert Kolbusz, M.D.*, DAB No. CR4700 (2016). The ALJ concluded that, as Petitioner conceded, the I.G. properly excluded Petitioner pursuant to pursuant to section 1128(a)(1) and (a)(3) of the Social Security Act (Act), which mandate a minimum exclusion period of five years.[1] The ALJ further concluded that a 30-year exclusion falls within a reasonable range of exclusion periods based on the four aggravating factors on which the I.G. relied and the absence of any mitigating factors.

On appeal, Petitioner does not dispute that the I.G. had a basis for excluding him under the statute the I.G. cited. Petitioner also does not dispute that there are four aggravating factors. Petitioner challenges only the ALJ's conclusion that a 30-year exclusion is within a reasonable range. As part of this challenge, Petitioner cites remarks by the sentencing judge that the ALJ found did not constitute a mitigating factor. Petitioner also asserts that discovery on the length of exclusions in other cases should have been allowed and that the ALJ should have stayed his exclusion pending disposition of the appeal of his criminal conviction.

For the reasons set out below, we conclude that the 30-year period of exclusion is within a reasonable range based on the four aggravating factors and the absence of mitigating factors. We also find no error in the ALJ's denial of Petitioner's discovery request. Accordingly, we affirm the ALJ's decision to uphold the exclusion imposed by the I.G.

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[1] The current version of the Act can be found at www.ssa.gov/OP_Home/ssact/ssacttoc.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

Legal Background

As relevant here, section 1128(a) of the Act states that the Secretary of the Department of Health and Human Services "shall exclude" from participation in federal health care programs an individual who has been convicted, under federal or state law: "of a criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program" or "of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." Sections 1128(a)(1) and (3).

When an exclusion is imposed under section 1128(a), section 1128(c)(3)(B) requires that the "minimum period of exclusion . . . be not less than five years[.]"[2] That mandatory minimum period of exclusion may be extended based on the application of the aggravating factors in 42 C.F.R. § 1001.102(b), including the following aggravating factors found by the I.G. in this case:

> (1) The acts resulting in the conviction, or similar acts, . . . caused, or were intended to cause, a financial loss to a Government program or to one or more entities of $5,000 or more. . . ;
> (2) The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more;
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> (5) The sentence imposed by the court included incarceration;
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> (9) 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.

If an exclusion period is extended based on the application of one or more aggravating factors, the I.G. may then apply any mitigating factors specified in section 1001.102(c)(1)-(3) to reduce the length of the exclusion period to no less than the mandatory minimum five years. 42 C.F.R. § 1001.102(c).

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 an exclusion longer than the mandatory minimum period is unreasonable in light of any of the aggravating and mitigating factors specified in the regulations. *Id*. §§ 1001.2007(a), 1005.2(a). A party dissatisfied with the ALJ's decision may appeal it to the Board. *Id*. § 1005.21.

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[2] Paragraph (G) of section 1128(c)(3) requires an exclusion of more than five years in circumstances not present here.

Case Background[3]

Petitioner was a dermatologist who owned and operated a clinic in Illinois. From 2003 until 2010, he submitted false claims to Medicare and private insurers. ALJ Decision at 2. Petitioner was indicted by a special grand jury in the U.S. District Court for the Northern District of Illinois. I.G. Ex. 7. In 2015, Petitioner was convicted on three felony counts of mail fraud, in violation of 18 U.S.C. § 1341, and three felony counts of wire fraud, in violation of 18 U.S.C. § 1343. ALJ Decision at 3. The court sentenced Petitioner to 84 months (seven years) in prison, followed by two years of supervised release, and ordered him to pay $3,674,381.69 in restitution. *Id.* Petitioner entered into a Consent Order with the Illinois Department of Financial and Professional Regulation in which he agreed that his Illinois Physician and Surgeon License "will be indefinitely suspended," although it also provides that Petitioner "may file a Petition to Restore his Illinois Physician and Surgeon License once he has completed his criminal sentence and is satisfying any restitution payments in compliance with the applicable court order . . . ." I.G. Ex. 5, at 2, 3.

By letter dated January 29, 2016, the I.G. notified Petitioner that, pursuant to sections 1128(a)(1) and (3) of the Act, he was being excluded from Medicare, Medicaid, and all federal health care programs for a minimum period of 30 years. I.G. Ex. 1.

Petitioner timely requested a hearing before an ALJ. The ALJ admitted all of the parties' exhibits into evidence, and the parties agreed that this case did not require an in-person hearing. ALJ Decision at 2. The parties also agreed that the I.G. has a basis upon which to exclude Petitioner from program participation. *Id.* The ALJ therefore determined that the sole issue before her was "whether the length of the exclusion (30 years) is reasonable." *Id.* The ALJ upheld the I.G.'s imposition of a 30-year exclusion based on the four aggravating factors found by the I.G. and the absence of any mitigating factors.

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). We review a disputed issue of law as to "whether the initial decision is erroneous." *Id.*

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[3] The factual information in this section is drawn from the ALJ Decision and the record and is presented to provide a context for the discussion of the issues raised on appeal. Nothing in this section is intended to replace, modify, or supplement the ALJ's findings of fact.

Analysis

In the Appellate Brief (P. Br.) accompanying his Notice of Appeal, Petitioner argues that the ALJ erred by taking into consideration when weighing the aggravating factors the extent to which the threshold for finding the aggravating factor was exceeded. P. Br. at 2. Petitioner also argues that a 30-year exclusion constitutes a lifetime ban on his participation in health care programs and is not authorized by the applicable regulations, and that remarks made by the sentencing judge regarding the length of incarceration show that a 30-year exclusion is not reasonable. *Id*. at 2, 3. In addition, Petitioner argues that the ALJ misstated certain facts regarding the charges against him and should have stayed the effective date of his exclusion pending disposition of the appeal of his criminal conviction. *Id*. at 1, 2. Petitioner also argues that the ALJ erred in not granting his request for discovery or addressing his "incomplete" FOIA request. *Id*. at 2, 3.

For the reasons explained below, we conclude that none of Petitioner's arguments have merit and that Petitioner has not shown that the ALJ erred in concluding that a 30-year exclusion is within a reasonable range of exclusion periods and, therefore, is not unreasonable.

A. *The ALJ did not err in determining that a 30-year exclusion was not unreasonable.*

   1. *The ALJ did not misstate facts.*

The ALJ concluded that a 30-year exclusion was not unreasonable given the aggravating factors and circumstances surrounding them and the absence of mitigating factors. The ALJ summarized her conclusion as follows:

> So long as the period of exclusion is within a reasonable range, based on demonstrated criteria, I have no authority to change it. *Jeremy Robinson,* DAB No. 1905 at 5 [(2004)]; *Joann Fletcher Cash,* DAB No. 1725 at 7 (2000), *citing 51* Fed. Reg. 3298, 3321 (1992). In this case, Petitioner's crimes demonstrate that he presents a significant risk to the integrity of health care programs. He billed for procedures that were unnecessary, costing insurance programs, including Medicare, over 3.7 million dollars. Even more reprehensible, to cover his tracks, he falsified patient records. He continued this illegal conduct for about seven years, which is a very long time. His conduct was such that the sentencing judge sent him to prison for seven years. He lost his medical license. Based on these aggravating circumstances, and the absence of any mitigating circumstances, a 30-year exclusion falls within a reasonable range.

Id. at 5-6. With respect to Petitioner's criminal conduct, the ALJ also stated that "[f]rom 2003 until 2010, [Petitioner] submitted false claims to Medicare and private insurers, billing for treatment that he did not provide to patients who did not suffer from the conditions he described." *Id*. at 2.

Although he does not deny he filed false claims, Petitioner objects to the ALJ's statements that he falsified medical records and billed for treatments he did not provide. P. Br. at 1. We find no basis for this objection. The revised indictment states that as "part of the [false claims] scheme [Petitioner] documented and caused to be documented in patients' medical charts "false and fictitious signs and symptoms" and "false and fictitious diagnoses of actinic keratosis . . . ." I.G. Ex. 7, at 4. Moreover, reading the ALJ's statements as a whole, it is clear she did not mean that Petitioner provided no services at all but, rather, that the services provided were not medically necessary (which Petitioner does not dispute) because the patients did not have the condition – actinic keratosis – for which the services were provided. In any event, the challenged descriptions are not material, since there is no dispute that Petitioner was convicted of mail and wire fraud based on filing false claims as described in the revised indictment. Petitioner may not collaterally attack his conviction. 42 C.F.R. § 1001.2007(d)("When the exclusion is based on the existence of a criminal conviction . . . or any other prior determination where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal.")

2. *The ALJ did not err in weighing the aggravating factors in sections 1001.102(b)(1), (b)(2) and (b)(5) and determining that the length of the exclusion was within a reasonable range..*

In reviewing Petitioner's 30-year exclusion, the ALJ needed to determine whether "[t]he length of [Petitioner's] exclusion is unreasonable." 42 C.F.R. § 1001.2007(a)(1)(ii). Although her review was de novo, the ALJ was not allowed to substitute her judgment for that of the I.G. or to determine what period might be "better." *Craig Richard Wilder*, DAB No. 2416, at 8 (2011), citing *Paul D. Goldenheim, M.D*., et al., DAB No. 2268, at 21 (2009), *aff'd in part sub nom Friedman v. Sebelius*, 686 F.3d 813 (D.C. Cir. 2012); *see also Barry D. Garfinkel M.D*., DAB No. 1572, at 6-7, 10-11 (1996), *aff'd*, *Garfinkel v. Shalala*, No. 3-96-604 (D. Minn. June 25, 1997). "Instead, [her] role [was] limited to considering whether the period of exclusion imposed by the I.G. was within a reasonable range, based on demonstrated criteria." *Wilder* at 8; *see also* 57 Fed. Reg. 3298, 3321 (Jan. 29, 1992) (the I.G. has "broad discretion" in setting the length of an exclusion in a particular case, based on the I.G.'s "vast experience in implementing exclusions.")

The “demonstrated criteria” referred to in *Wilder* are the aggravating factors (and, if aggravating factors are found, any listed mitigating factors) set forth at 42 C.F.R. §§ 1001.102, as they apply in the particular case before the ALJ. Here, there is no dispute that the ALJ correctly found four aggravating factors applicable: sections 1001.102(b)(1), 1001.102(b)(2), 1001.102(b)(5) and 1001.102(b)(9).

With respect to section 1001.102(b)(1), the ALJ concluded that the “enormity of the [Medicare and Medicaid and other] programs’ financial losses [$3,764,381.69 in total] [was] an ‘exceptionally aggravating’ factor that compels a period of exclusion significantly longer than the five-year minimum.” ALJ Decision at 4; *see also id*. at 3 (referring to the “whopping $3,764,381.69 in restitution to the victims of his crime”). With respect to section 1001.102(b)(2), the ALJ found the undisputed duration of Petitioner’s criminal conduct (approximately seven years) “significantly longer than [the] one year necessary for aggravation.” *Id*. at 4. With respect to section 1001.102(b)(5), the ALJ concluded that 84 months was a “substantial” period of incarceration. *Id.* Finally, the ALJ found with regard to section 1001.102(b)(9) that the State of Illinois “indefinitely suspended Petitioner’s license to practice medicine.” *Id*. at 5.

Petitioner does not dispute that these factors apply but only how the ALJ weighed them. Petitioner argues that the ALJ essentially created a new aggravating factor when evaluating the financial loss to federal programs and private entities because the regulations do “not contain a provision for ‘Exceptionally aggravating Factors,’” the descriptive term used by the ALJ. P. Br. at 2. In a similar vein, Petitioner argues that there is no regulatory basis “for a sliding scale of losses equating to an increased length of exclusion” or for proportionate lengthening of an exclusion based on the duration of the criminal conduct or the incarceration. *Id*.

Petitioner’s arguments have no merit. The purpose of the exclusion regulations, including those establishing the aggravating factors, is remedial; that is, the regulations are designed to protect federal health care programs from untrustworthy individuals. *E.g*. *Richard E. Bohner*, DAB No. 2638, at 19, citing *Friedman et al. v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012); *Narendra M. Patel, M.D*., DAB No. 1736, at 25 (2000), *aff’d*, *Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003). Accordingly, in deciding whether an exclusion is within a reasonable range, an ALJ must consider not just the number of aggravating factors that apply but “the quality of the circumstances” surrounding those factors in order to assess the risk the excluded individual poses to federal health care programs and beneficiaries. *Bohner* at 2, 19, citing *Wilder*, DAB No. 2416, at 8, quoting *Joseph M. Ruske Jr*., R.Ph., DAB No. 1851, at 11 (2002).

For this reason, the Board has consistently held that an ALJ’s analysis of the factors must be qualitative, not just quantitative. The Board summarized its position in *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491, at 5 (2012).

> 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). . . . 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. . . . 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).[4]

See also Vinod Chandrashekhar Patwardhan, *M.D*., DAB No. 2454, at 6 (2012) (stating that there is no "rigid formula" for determining an exclusion period). Moreover, as evidenced by the *Patwardhan* decision, among others, the Board itself has used the type of qualitative evaluation and descriptive terminology used by the ALJ here. In the *Patwardhan* decision, for example, the Board upheld a 12-year exclusion based, in part, on a 1.3 million dollar loss to federal programs and other entities that the Board described as "over 262 times larger than the $5,000 required to increase the minimum exclusion period." *Id.* In doing so, the Board noted that "[t]he Board has described the financial loss to a government program as an 'exceptional aggravating factor' when, such as here, the loss is 'very substantially greater than the statutory minimum.'" *Id.* (case citations omitted). In essence, Petitioner's suggestion that the ALJ was required to limit her "reasonable range" assessment to whether the facts met the minimum requirements of the factors proposes the kind of quantitative or formulaic analysis the Board has rejected. By considering relevant facts, such as the amount of the program loss, the duration of Petitioner's criminal conduct, and the length of his incarceration, and assigning more weight to the corresponding aggravating factors based on such facts, the ALJ correctly performed a "qualitative assessment of the circumstances surrounding" each aggravating factor.

With respect to section 1001.102(b)(9), Petitioner takes issue with the ALJ's reference to the State's suspension of his medical license as "indefinite." Petitioner states that under "the agreed order," the length of the suspension "equals my period of incarceration." P. Br. at 2. That is not correct. The Consent Order expressly states that Petitioner's license "will be indefinitely suspended" although it also provides that Petitioner "may file a

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[4] The Board in *Sheth* concluded that the 95-year exclusion imposed by the I.G and upheld by the ALJ was not within a reasonable range but that an exclusion of 60 years was within a reasonable range.

Petition to Restore his Illinois Physician and Surgeon License once he has completed his criminal sentence and is satisfying any restitution payments in compliance with the applicable court order . . . ." I.G. Ex. 5, at 2, 3. In any event, as the I.G. points out, the pertinent fact for purposes of section 1001.102(b)(9) is that the State of Illinois took an adverse action against Petitioner based on the same facts underlying his criminal conviction, not whether the adverse action would endure for some finite period of time. *See* I.G. Response at 9. Thus, we find no merit to Petitioner's challenge to this finding.

3. The ALJ correctly found that the sentencing judge's remarks did not constitute a mitigating factor.

Petitioner argues that the ALJ ignored remarks made by the sentencing judge when deciding his sentence, statements that Petitioner asserts support a shorter exclusion period. P. Br. at 2. The ALJ did not ignore these remarks; rather, she considered them but concluded, "I do not consider these remarks mitigating." ALJ Decision at 5. The ALJ made no error. The regulations provide only three mitigating factors: 1) that the excluded individual was convicted of three or fewer misdemeanors which resulted in financial loss of less than $1,500; 2) the criminal proceeding records evidence reduced culpability because of a mental, physical or emotional condition; and 3) the excluded individual's cooperation with law enforcement officials resulted in others being convicted or excluded or in additional cases being investigated or a civil money penalty being imposed. 42 C.F.R. §1001.102(c)(1)-(3). The ALJ found none of these mitigating factors present here, and Petitioner does not dispute this but, instead, essentially attempts to add a new mitigating factor to those specified in the regulations. The mitigating factors listed in the regulations are the only ones that ALJs and the Board may consider. *Mohamed Basel Aswad, M.D.*, DAB No. 2741, at 8-9 (2016).[5]

a. The ALJ committed no error in denying Petitioner's discovery request and not addressing his FOIA requests.

When he filed his July 15, 2016 brief and exhibits in the ALJ proceeding (received in the Civil Remedies Division on July 27, 2016), Petitioner asked for production of copies of cases the I.G. cited in the section of its brief addressing the length of Petitioner's exclusion. Attachment to Petitioner's Informal Brief at 2. Petitioner stated that such copies were necessary to fact-check the cases because he did not have access to a computer in prison. Petitioner also argued that he was entitled to compare the length of exclusions in other cases with the length of his exclusion in arguing that his was

[5] We also fail to see, as the I.G. points out, how remarks that may be appropriate in the context of a court's determining a criminal sentence would have any relevance in the context of determining the length of an exclusion, which is governed by different law and, unlike a criminal sentence, is remedial in nature, not punitive. *See* I.G. Response at 10.

unreasonable. *Id*. Petitioner stated that "his attempt at multiple FOIA [Freedom of Information Act] requests regarding length of exclusions ha[d] to date been thwarted by the Freedom of Information Office, HHS, office of the O.I.G."[6] *Id*. Petitioner included an exhibit containing copies of a letter dated May 5, 2016 from the Office of Inspector General FOIA office and his May 22, 2016 letter responding to that letter. Petitioner's May 22, 2016 letter asked for documents by which he could compare the length of his exclusion to those of other excluded individuals and "[a]ll documents that were used in making the decision" as well as other information about the I.G.'s decision-making process in his case, such as "[t]he names and credentials of the individuals or panel that made the determination." P. Ex. 3 at 1, 2. The FOIA office's May 5, 2016 letter indicates that the office sent Petitioner some of the information he had requested but that more information responding to Petitioner's request could not be provided because the request sought "a list of the exclusions for all 2900 [providers] . . . that currently does not exist." P. Ex. 3, at 1. Neither Petitioner Exhibit 3 nor any other document of record contains a FOIA office response to Petitioner's May 22, 2016 letter responding to the May 5, 2016 letter. However, after receiving Petitioner's production request and exhibits, the I.G. filed a Reply Brief opposing discovery on grounds that the lengths of exclusions in other cases were not material and that Petitioner's FOIA request for information on the I.G.'s decision-making process in his case sought privileged information. I.G. Reply at 2-5.

The ALJ denied Petitioner's production request, stating as follows:

> Had Petitioner made this request at the time of the prehearing conference, I'd likely have directed the I[.]G[.] to do so as a courtesy. However, providing the cited cases would not have changed the outcome here, and, at this point, directing the IG to produce them would unduly delay these proceedings.

ALJ Decision at 5, citing 42 C.F.R. § 1005.7(e)(2)(iii).

On appeal, Petitioner does not directly challenge the ALJ's denial of his production request but complains that the ALJ "has not considered" or "admitted" an alleged "Supplemental response for a Motion to Compel discovery, dated August 26, 2016," and alleged "proposed additional exhibits 7, 8, 9, and 10." P. Br. at 2. The ALJ Decision does not discuss any supplemental response or proposed additional exhibits, and the Civil Remedies Division of the Departmental Appeals Board has no record of ever receiving

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[6] Petitioner had stated in his hearing request that he had filed a FOIA request for "information regarding OIG exclusions of physicians who have felony convictions," including "all physicians and the length of the exclusion" for at least the two previous years and asked that he be allowed to "supplement the record after receiving supporting documentation from [that] request." Request for Hearing and attachment.

the alleged supplemental filings.[7] Nor has Petitioner submitted any evidence to support his assertion of the alleged supplemental filings. Moreover, the August 26, 2016 date Petitioner ascribes to those alleged filings postdates the close of the record in the ALJ proceeding, which, under the ALJ's scheduling order, was August 18, 2016, the date the I.G. filed its Reply. *See* ALJ's Order and Schedule for Filing Briefs and Documentary Evidence, dated 5/3/16, at 4, 5 (providing that the briefing schedule would end on August 18, 2016, the last date for the I.G. to file a Reply, and that the record close date "will be the date my office receives the last submission filed in the case"). Thus, the record before us indicates that the ALJ considered the complete record of the proceeding before her when making her decision.

In any event, we find no error in the ALJ's denial of the production request of record and further conclude that the information Petitioner sought to discover in the alleged supplemental filings would not change the outcome of his case. The documents sought by Petitioner in the production request denied by the ALJ, and that he claims to have sought in the alleged supplemental filings, were not material in that Petitioner sought those documents in order to compare the length of his exclusion to other exclusions. The Board has consistently held, as it and recently reiterated in the *Aswad* decision, that "case comparisons are of limited value and not dispositive." DAB No. 2741, at 10. The Board in *Aswad* quoted the summary of its position in *Eugene Goldman, M.D., a/k/a Yevgeniy Goldman, M.D.*, DAB No. 2635 (2015):

> The Board has made it clear that the assessment of aggravating factors (and mitigating factors, if any), is first and foremost case-specific. Every case involves a complex interaction of diverse circumstances and regulatory factors with varying weights. For this very reason case comparisons, while sometimes informative for the ALJ's or the Board's decision-making in a given case, are of limited value and ultimately are not dispositive on the question of reasonableness of an exclusion period in a given case. *See, e.g.*, [*Sheth* supra] at 6.

Id., citing DAB No. 2635, at 11.

Accordingly, the ALJ here correctly focused on the facts specific to this case because those are the dispositive facts. The Board has long held that the amount of restitution is a reasonable measure of program losses. *E.g. Jeremy Robinson*, DAB No. 1905 (2004); *Donald A Burstein, Ph.D.*, DAB No. 1865 (2003). The $3.7 million loss here is a very large amount of restitution when the minimum loss required under the aggravating factor is $5,000. Moreover, as Petitioner does not dispute on appeal, the ALJ correctly found

[7] We note that the date Petitioner gives for the alleged supplemental submission was less than two weeks prior to the date the ALJ issued her decision.

that she was required to consider the restitution regardless of whether Petitioner had repaid it. 42 C.F.R. § 1001.102(b)(1). We find no reason to disturb the ALJ's conclusion that the program losses here were "an exceptionally aggravating factor that compels a period of exclusion significantly longer than the five-year minimum." *Id.* at 4.

Similarly, the ALJ was entitled to accord significant weight to the fact that Petitioner was incarcerated for seven years since, as the ALJ noted, the Board has found an incarceration period of less than one year "relatively substantial". *Id.*, citing *Robinson* at 12. We make the same finding with respect to the ALJ's weighting of the fact that Petitioner filed false claims for approximately seven years while even one year is sufficient to increase an exclusion period and the fact that the ALJ suspended Petitioner's license to practice medicine indefinitely. In summary, the ALJ's analysis of the four aggravating factors and the absence of a mitigating factor provide ample support for her conclusion that the 30-year exclusion period is within a reasonable range and, therefore, not unreasonable.

As indicated above, Petitioner argues that the ALJ erred by not addressing his FOIA requests. The ALJ did not err. The FOIA process is completely independent from the appeal proceedings in exclusion cases and governed by different legal authorities. *Wayne E. Imber, M.D.*, DAB No 1740, at 10 (2000). Thus, Petitioner's concerns regarding the FOIA process, whether well-founded or not, are not properly before this tribunal and were not properly before the ALJ.

b. The ALJ had no authority to stay Petitioner's exclusion pending his appeal of his conviction.

Petitioner argues that the ALJ should have stayed his exclusion pending disposition of the appeal of his conviction. P. Br. at 1. There is no merit to that argument. The regulations applicable to exclusion appeals provide that ALJs "do not have the authority to . . . [f]ind invalid or refuse to follow Federal statutes or regulations . . . ." 42 C.F.R. § 1005.4(c)(1). 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 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 January 29, 2016. Accordingly, the legally required effective date of Petitioner's exclusion is February 18, 2016, and the ALJ had no authority to change that date and, therefore, correctly declined to stay the effective date pending disposition of Petitioner's appeal of his criminal conviction. ALJ's Order and Schedule for Filing Briefs and Documentary Evidence, dated 5/3/16, at 2. Moreover, "the Board has 'repeatedly held, that [ALJs and the Board] have 'no authority to adjust the beginning date of an exclusion . . . .'" *Sheth*, DAB No. 2491, at 19, citing [Kailash C.] *Singhvi*, DAB No. 2138, at 4-5 (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)].

Conclusion

For the reasons stated above, we affirm the ALJ Decision.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member