Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Michael J. Vogini, D.O.
Docket No. A-14-52
Decision No. 2584
July 22, 2014

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Michael J. Vogini (Petitioner) appeals the February 12, 2014 decision by an Administrative Law Judge (ALJ) upholding the determination of the Inspector General (I.G.) to exclude Petitioner from all federal healthcare programs for a period of 25 years under sections 1128(a)(1), (a)(2), and (a)(4) of the Social Security Act (Act). The I.G.'s determination to exclude Petitioner was based on Petitioner's conviction for a criminal offense related to the delivery of an item or service under Medicaid; his conviction for a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service; and his conviction for a felony criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. *Michael J. Vogini*, DAB CR3118 (2014) (ALJ Decision). The ALJ decided that Petitioner's exclusion is required by sections 1128(a)(1), (a)(2), and (a)(4), and that a 25-year exclusion is reasonable.

After carefully considering the arguments Petitioner made in his Notice of Appeal (NA)[1] and his Appellate Brief, we affirm the ALJ Decision for the reasons discussed below.

Statutory and Regulatory Background

Section 1128(a)(1) of the Act requires that any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under Medicare or any state health care program be excluded from participation in any federal health care program.[2] *See also* 42 C.F.R. § 1001.101(a).

[1] The Board received Petitioner's notice of appeal on March 5, 2014. It is in the form of a letter and contains no case caption. We refer to this document as the Notice of Appeal to distinguish it from Petitioner's *Appellate* Brief, received on April 22, 2014. We refer to Petitioner's brief before the ALJ, received in the Civil Remedies Division on December 23, 2013 (also styled "Appellate Brief") as the "*ALJ* Brief."

[2] The current version of the Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact.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.

Section 1128(a)(2) of the Act requires that any individual or entity that has been convicted of a criminal offense related to neglect or abuse of patients in connection with the delivery of a health care item or service be excluded from participation in any federal health care program. *See also* 42 C.F.R. § 1001.101(b).

Section 1128(a)(4) of the Act requires that any individual or entity that has been convicted, after the enactment of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), on August 21, 1996, of a felony offense relating to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance be excluded from participation in any federal health care program. *See also* 42 C.F.R. § 1001.101(d).

Five years is the minimum period of an exclusion under sections 1128(a)(1) - (a)(4), and this period may not be reduced by an ALJ or the Departmental Appeals Board (Board) on appeal. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2). The I.G. may lengthen that period based on the aggravating factors in 42 C.F.R. § 1001.102(b).

Under section 1128(i)(3) of the Act, the definition of when an individual or entity is considered to have been convicted of a criminal offense includes when a plea of guilty or nolo contendere by the individual or entity has been accepted by a federal, state, or local court. Under 42 C.F.R. § 1001.2007(d), when the exclusion is based on the existence of a criminal conviction [. . .] by federal, state or local court, [. . .] the basis for the underlying conviction, civil judgment or determination is not reviewable, and the individual or entity may not collaterally attack it either on substantive or procedural grounds on appeal to an ALJ or the Board. *See also Raymond Lamont Shoemaker*, DAB No. 2560, at 5 (2014) (holding that the petitioner's attempt to challenge the time frame of conduct described in one count of his conviction was "an impermissible collateral attack on his conviction.").

Under 42 C.F.R. § 1005.21(e), the Board will not consider any issue not raised in the parties' briefs or any issue in the briefs that could have been raised before the ALJ and was not.

Case Background[3]

Petitioner was an osteopath, licensed in the Commonwealth of Pennsylvania (Pennsylvania) until his license was suspended. I.G. Exs. 11-13. On November 5, 2010, the Attorney General of Pennsylvania filed a criminal Information (Information) against Petitioner in the Court of Common Pleas of Alleghany County, charging him with one

[3] Background information is drawn from the ALJ Decision and the record before the ALJ and is not intended to substitute for his findings.

count of Drug Delivery Resulting in Death, ten violations of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act, three counts of Medical Assistance fraud,[4] and one count of Criminal Conspiracy. I.G. Ex. 4. Rather than go to trial, Petitioner entered into a plea agreement with Pennsylvania on January 23, 2012.

Under the plea agreement, Petitioner entered a plea of no contest[5] to Drug Delivery Resulting in Death (Count 1 of the Information), and guilty pleas to the remaining 15 counts. I.G. Ex. 6. The underlying conduct addressed in the charging and conviction documents, and to which Petitioner pled no contest, was delivery of a controlled substance resulting in death. The underlying conduct addressed in the charging and conviction documents, and to which Petitioner pled guilty, included failing to act in good faith in the course of his professional practice, or acting outside of the scope of the doctor-patient relationship and prescribing controlled substances not in accordance with treatment principles accepted by a responsible segment of the medical profession; knowingly prescribing controlled substances to individuals whom Petitioner "knew and/or to a person whom he had reason to know was a drug dependent person"; referring Medicaid patients by prescription for controlled substances to pharmacies without documenting the referrals in the prescribed manner, and which substances were of little or no benefit to recipients or were unneeded, and were below the medical treatment standard; and conspiring with others to violate the Pennsylvania Controlled Substance, Drug, Device, and Cosmetic Act by prescribing controlled substances in furtherance of the conspiracy. I.G. Exs. 4, 5, 6.[6]

Prior to entering his pleas, Petitioner was provided a written explanation of his rights. I.G. Ex. 5. Petitioner indicated that he understood that he was waiving his rights by placing his initials on the form, in the space indicated, below the following language:

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[4] Pennsylvania's Medicaid program, known as Medical Assistance (MA), is governed by 55 Pa. Code § 101.1(e). Under the MA program, the state pays for various medical services and items, including prescription drugs, which are ordered for and provided to MA recipients by medical practitioners, including osteopaths, who are enrolled MA providers. Certain acts by MA providers constitute MA fraud, and are prohibited under 62 Pa. Code § 1407. The counts in the Information related to MA fraud (counts 13-15) are charged as "Provider Prohibited Acts."

[5] Petitioner's plea to Count 1 of the Information is formally entered in Latin as "*nolo contendere*"; however, throughout his decision, the ALJ refers to Petitioner's Count 1 plea in its English form, "no contest." There is no difference in meaning between the English and Latin forms, and, consistent with the ALJ's usage, we use "no contest" here.

[6] Since Petitioner may not collaterally attack his conviction, the ALJ properly relied on these I.G. exhibits as evidence of Petitioner's admitted criminal acts. We note that Petitioner objected to the I.G.'s reliance on the Grand Jury Presentments, in I.G. Exhibits 2 and 3, and the ALJ did not rely on those exhibits.

> In order for you to have your plea accepted by this Court here today, you must waive your right to confront prosecution witnesses against you and agree to permit the Attorney for the Commonwealth to summarize the Commonwealth's evidence against you.
>
> * * * *
>
> By pleading guilty to any charge, you are admitting that you committed that offense. The Commonwealth would not have to prove beyond a reasonable doubt each and every element of the offenses with which you are charged as would be required in a jury or non-jury trial.

Id. at 1. Petitioner further indicated that he had "discussed with [his] attorney the elements of each charged offense," and that he had "discussed with [his] attorney the factual basis of each charged offense." *Id.* at 2.[7] As a result of his pleas, the court convicted Petitioner on all 16 counts and sentenced him to a period of incarceration of 6 to 12 years, followed by 10 years of probation. I.G. Ex. 7.

On February 1, 2012, the prosecuting attorney for the State of Pennsylvania petitioned the State Board of Osteopathic Medicine for an order automatically suspending Petitioner's license to practice osteopathic medicine, based upon his criminal conviction and sentencing. I.G. Exs. 11, 12. Petitioner was notified on March 22, 2012 that the State Board of Osteopathic Medicine had issued its Final Order suspending Petitioner's license. I.G. Ex. 13.

By letter dated August 31, 2012, the I.G. notified Petitioner that based on his criminal conviction, he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of 25 years under section 1128(a)(1), (a)(2) and (a)(4) of the Act. I.G. Ex. 8, at 1. Petitioner timely requested a hearing before an ALJ to challenge the I.G.'s determination. Petitioner waived an oral hearing and agreed to proceed on the documentary evidence and the parties' briefs. ALJ Decision at 2. Accordingly, the ALJ decided the case on the written record without ruling on the I.G.'s motion for summary judgment. *Id.* at 4.

On appeal to the Board, Petitioner challenges two of the three bases for the exclusion – sections 1128(a)(2) and (a)(4) – as well as the length of the exclusion upheld by the ALJ.

[7] The exact offenses for which Petitioner was charged and convicted are listed in the criminal Information filed by the Attorney General of Pennsylvania in Criminal Action No. CP-02-CR-0013824-2010, admitted into the record by the ALJ as I.G. Exhibit 4.

Standard of Review

The standard of review on a disputed issue of law is whether the ALJ decision is erroneous. 42 C.F.R. § 1005.21(h). The standard of review on a disputed issue of fact is whether the ALJ decision is supported by substantial evidence in the record as a whole. *Id*. 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), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

Analysis

1. **The ALJ's determination that the I.G. had a basis to exclude Petitioner under sections 1128(a)(1), (a)(2), and (a)(4) of the Act is correct as a matter of law because Petitioner raises before us no challenge to the first basis, and we may not entertain his challenge to the second and third bases because Petitioner did not challenge those bases before the ALJ.**

    a. **Petitioner does not challenge the ALJ's decision to uphold the exclusion under section 1128(a)(1).**

Section 1128(a)(1) makes mandatory the exclusion from participation in any federal health care program (as defined in section 1128B(f)) of individuals and entities convicted of a criminal offense related to the delivery of an item or service under any state health care program, such as Pennsylvania's MA program. The I.G. based exclusion of Petitioner under section 1128(a)(1) on the fact that Petitioner was convicted of criminal acts involving unlawfully issuing prescriptions to Medicaid recipients. I.G. Ex. 8. The ALJ found that these acts were related to the delivery of a health care item or service under a state health care program because Petitioner issued the prescriptions in his capacity as a licensed physician. ALJ Decision at 7. The ALJ also found that Medicaid covered the cost of those unlawful prescriptions. *Id.* Petitioner pled guilty to the charges in state court (I.G. Exs. 4-7), and did not dispute these facts before the ALJ. ALJ Decision at 7. Accordingly, the ALJ found that the elements of section 1128(a)(1) of the Act were met and that there was a basis for excluding Petitioner under that section. *Id.*

On appeal, Petitioner does not challenge the ALJ's determination that the I.G. had a basis to exclude him under section 1128(a)(1). Upholding a single legal basis for a mandatory exclusion is sufficient to uphold the exclusion. Therefore, we affirm the ALJ's determination to uphold Petitioner's exclusion. We rely on the analysis in the ALJ Decision, which we need not discuss further since Petitioner does not challenge that analysis or the ALJ's conclusion on appeal.

b. The Board is prohibited by regulation from considering Petitioner's challenges to the two remaining bases for the I.G.'s exclusion because he did not challenge these bases before the ALJ.

Petitioner attempts to challenge here the ALJ's conclusion that the I.G. also had a basis for excluding him under sections 1128(a)(2) and (a)(4). With respect to section 1128(a)(2), which relates to felony offenses involving patient neglect or abuse in the delivery of health care items or services, Petitioner argues that there was no evidence in the record before the ALJ that he acted willfully and, thus, his conduct did not meet the definition of abuse in section 488.301 that the ALJ applied. *See* App. Br. at 1 (relying on the definition of "abuse" as "the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish"). Petitioner also argues that there is no proof that he knowingly prescribed controlled substances to addicted persons. *Id*. With respect to section 1128(a)(4), which relates to felony offenses involving the unlawful manufacture, distribution, prescription or dispensing of controlled substances, Petitioner argues that "all three elements of section 1128(a)(4) . . . were not met." *Id*.

In his request for hearing before the ALJ, Petitioner did not argue that his conduct did not constitute "abuse" or "neglect" or raise any other challenge to the bases for the exclusion. Instead, Petitioner challenged only the length of the exclusion. Petitioner described the period of exclusion as "overly excessive," and "unnecessarily punitive," and "a lifetime exclusion based upon my age of 57." Petitioner added that he found "it incongruent that my exclusion should last 4 times the length of my sentence." *H'g Request*. Without making any argument about whether facts in the record supported a finding that he was convicted of an offense related to abuse or neglect of his patients, or of a felony offense for prescribing controlled substances to addicted persons, Petitioner requested "a reduction in my exclusion to a more reasonable length of time commensurate with my sentence (6 years)." *Id*. The hearing request is silent as to whether there is a basis for Petitioner's exclusion under any of the statutory sections on which the I.G. and ALJ relied.

In his ALJ Brief, Petitioner stated as follows:

> The issues are 1) whether there are legal grounds for the Petitioner to be excluded under Sections 1128(a)(1), 1128(a)(2) and 1128(a)(4), and whether the length of the exclusion of a minimum of twentyfive [sic] years is unreasonable?

However, Petitioner devoted none of the balance of his ALJ Brief to arguing that there were no legal grounds for the exclusion. Instead, he argued exclusively for a reduction of the exclusion period, based on his assertion that there is not adequate evidence to justify such a lengthy exclusion period. ALJ Br. at 3 (emphasis added).

The regulations provide that the "DAB will not consider . . . any issue in the briefs that could have been raised before the ALJ but was not." 42 C.F.R. § 1005.21(e); *Steven C. Wein*, DAB No. 2473 at 3 (2012); *accord Michael J. Rosen*, DAB No. 2096 at 16 (2007) ("Petitioner did not raise that argument before the ALJ, and we are barred from considering it."), *aff'd*, *Michael J. Rosen, M.D., v. Johnson*, No. cv07-1686-PHX-EHC (D. Ariz. Aug. 10, 2009). Here, Petitioner did not dispute any of the I.G.'s stated bases for the exclusion in his hearing request or his ALJ Brief. Specifically, Petitioner did not argue before the ALJ, as he does here, that there was no basis for exclusion under section 1128(a)(2) on the grounds that he neither abused nor neglected a patient. Similarly, Petitioner did not make below the argument he makes here that "all three elements of section 1128(a)(4) were not met." App. Br. at 1. The record shows that Petitioner had the opportunity to raise these arguments before the ALJ, and did not.[8] Accordingly, we may not consider them here.

Petitioner did below challenge the I.G.'s reliance on accusations made during the Grand Jury Investigation, arguing generally that "all of the alleged information that was relied on to formulate this exclusion should be deemed inadmissible." ALJ Br. at 4. The I.G.'s argument below about why Petitioner's convictions were related to neglect or abuse of patients did depend in part on allegations from the Grand Jury Investigation, but the ALJ made it clear that he did not rely on those allegations. *See* ALJ Decision at 9 ("However, many of the statements in the Grand Jury Presentments, including those describing the alleged sex-for-drugs scheme, were not expressly included in the specific charges against Petitioner and to which he eventually pled guilty. Therefore, I consider only the charges to which Petitioner pled no contest or guilty . . . ."). The I.G. also argued, moreover, that Petitioner's offenses related to the neglect or abuse of patients in that he prescribed controlled substances for drug dependent women without regard to whether the prescriptions had any legitimate medical purpose. I.G. Summary Judgment Br. at 11.[9] Petitioner did not directly respond to this argument; nor did he argue before the ALJ that he did not know that the women were drug dependent.

In response to one of the I.G.'s arguments regarding aggravating factors, Petitioner did argue that there "was in fact adequate documentation of appropriate diagnosis and physical findings located in the patient charts." ALJ Br. at 5. However, this argument, like Petitioner's challenge here to the ALJ's finding that "for nearly nine years thereafter, [Petitioner] prescribed Schedule II, III, IV and V controlled substances to those patients – including Medicaid recipients and drug dependent patients – that had no

[8] After Petitioner filed his Request for Hearing, the I.G. sent him copies of the statutes and regulations applicable to the exclusion process. Subsequently, the ALJ issued a Pre-Hearing Conference Order and Schedule for briefing. Petitioner filed his brief only after the I.G. filed his motion for summary judgment, which specifically relied on section 1128(a)(2), and it was accepted and considered by the ALJ.

[9] All of the pages in the I.G.'s Brief to the ALJ in support of Summary Judgment after the first page show the number 2, but the actual page for the citation is page 11.

medical necessity whatsoever," amounts to a collateral attack on his conviction and is inconsistent with his guilty plea. *See* App. Br. at 1, citing ALJ Decision at 8. Count 14 of the Information specifically states that he prescribed "substances and/or medications . . . [that] were of little or no benefit to the recipient and/or were below the accepted medical treatment standards, and/or were unneeded by the recipient." I.G. Ex. 4. Petitioner pled guilty to and was convicted of Count 14 and may not now collaterally attack that conviction. *See* I.G. Exs. 5,7.

We recognize that Petitioner arguably may not have had notice that the ALJ would rely on the specific definition of "abuse" at 42 C.F.R. § 488.301 because, although the I.G. cited in a footnote an ALJ decision relying on that definition, the I.G.'s argument focused on Board and ALJ decisions finding abuse for other reasons. I.G. Summary Judgment Br. at 11. We also recognize that Petitioner's conviction based on the fact that he "knew or had reason to know" his patients were drug dependent does not definitively establish that he actually knew they were drug dependent, rather than had reason to know. Petitioner is mistaken, however, in equating the term "willful" in the cited definition of abuse with "knowledge." The Board has held that as used in section 488.301, the word "willful" means only that the actor must have acted deliberately, not that the actor must have intended to inflict injury or harm (or one of the other specified types of prohibited conduct). *Britthaven, Inc., d/b/a/ Britthaven of Smithfield*, DAB No. 2018, at 4 (2006) citing *Western Care Management Corp., d/b/a/ Rehab Specialties Inn*, DAB No. 1921, at 14 (2004); *Vandalia Park*, DAB No. 1939, at 9 (2004). In any event, even if Petitioner's offenses were based only on his having a reason to know that his patients for whom he prescribed controlled substances were drug dependent, we would agree with the ALJ's conclusion that his offenses were related to neglect or abuse of patients.

In sum, Petitioner's challenges here to the ALJ's upholding the exclusion under section 1128(a)(2) and (a)(4) consist of issues we are precluded from considering under 42 C.F.R. § 1005.21(e), because Petitioner did not raise them before the ALJ when he had an opportunity to do so. We also are precluded from considering his arguments to the extent they constitute an impermissible collateral attack on the criminal convictions which led to Petitioner's exclusion. Accordingly, we uphold the ALJ's determinations regarding all of the I.G.'s bases for excluding Petitioner.

2. The ALJ's determination that a 25-year exclusion is within a reasonable range is based on substantial evidence in the record and is not erroneous.

On appeal, Petitioner challenges the length of the 25-year exclusion imposed by the I.G. The I.G. added an additional period of 20 years to the minimum five-year exclusion period that section 1128(c)(3)(B) of the Act mandates for exclusions under section

1128(a) of the Act. I.G. Ex. 8. The I.G. considered the factors set forth in 42 C.F.R 1001.102(b) and found evidence in the record of the aggravating factors listed in sections 1001.102(b)(2), (b)(3), (b)(5), and (b)(9).[10] ALJ Decision at 9.

The 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. *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491, at 5 (2012), citing *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). 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. *Id.*, citing *Jeremy Robinson*, DAB No. 1905, at 3 (2004). The I.G. "has 'broad discretion' in setting the length of an exclusion in a particular case, based on [his] 'vast experience' implementing exclusions." *Id.*, citing *Craig Richard 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. *Id.*, citing *Paul D. Goldenheim, M.D.*, et al., DAB No. 2268 (2009), at 21.

The ALJ found that the 20 years added by the I.G. to the statutory minimum exclusion period in this case was not unreasonable in view of the aggravating factors established on the record, and in the absence of any mitigating factors. ALJ Decision at 1. The ALJ found that Petitioner was convicted of criminal conduct occurring between 2001 and 2008, a period of seven years. *Id.* at 9. This established the fact that Petitioner's acts occurred over a period of one year or more, as required under 42 C.F.R. § 1001.102(b)(2). The ALJ found that Petitioner was convicted of prescribing controlled substances to a patient who subsequently died of a drug overdose. *Id.* This established the fact of the adverse physical impact on one of Petitioner's Medicaid patients, as required under 42 C.F.R. § 1001.102(b)(3). The ALJ found that Petitioner was sentenced to at least six years of incarceration as a result of his conviction. *Id.* This established the

[10] 42 C.F.R. § 1001.102 Length of exclusion.

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(b) Any of the following factors may be considered to be aggravating and a basis for lengthening the period of exclusion—

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

(3) The acts that resulted in the conviction, or similar acts, had a significant adverse physical, mental or financial impact on one or more program beneficiaries or other individuals;

****

(5) The sentence imposed by the court included incarceration;

****

(9) Whether the individual or entity was convicted of other offenses besides those which formed the basis for the exclusion, or has been the subject of any other adverse action by any Federal, State or local government agency or board, if the adverse action is based on the same set of circumstances that serves as the basis for imposition of the exclusion.

fact that the court's sentence included incarceration, as required under 42 C.F.R. § 1001.102(b)(5). Finally, the ALJ found that the Pennsylvania State Board of Osteopathic Medicine suspended Petitioner's Osteopath's license. *Id.* This established the fact that a state board had taken adverse action against Petitioner based upon the same set of circumstances upon which the I.G. based Petitioner's exclusion, as required by 42 C.F.R. § 1001.102(b)(9).

Petitioner challenges none of these findings on appeal. Petitioner's argument that the length of the exclusion is unreasonable rests solely on the following portion of the ALJ's analysis:

> Petitioner admitted through his guilty plea that he unlawfully prescribed controlled substances to individuals he knew or should have known were drug dependent. Even though there is no direct evidence demonstrating that Petitioner's conduct furthered the drug addiction of those drug-dependent individuals, **a reasonable inference based [on] the nature of the offense, and one that I draw here**, is that Petitioner contributed to ongoing drug dependency for those individuals which was a significant adverse physical impact on them.

ALJ Decision at 11 (emphasis added). Petitioner claims that "there is no evidence to support" the ALJ's conclusion, based upon the inference he drew, that "Petitioner had knowledge of the patients [sic] drug dependence." App. Br. at 1. However, the ALJ identified this as an additional basis for concluding that the aggravating factor in section 1001.102(b)(3) was present. As indicated above, the ALJ first found this aggravating factor was present based on Petitioner's *conviction* for prescribing controlled substances to a patient who subsequently died of a drug overdose. On appeal, Petitioner does not dispute that he was *convicted* for Drug Delivery Resulting in Death. Thus, we need not reach the question of whether the ALJ reasonably inferred that Petitioner contributed to his patients' ongoing drug dependency, and that his doing so had a significant adverse impact on them, in order to sustain the ALJ's conclusion that this aggravating factor was present. At most this inference affected the weight the ALJ gave to this aggravating factor, but his conclusion that the length of the exclusion is reasonable is fully supported without this finding.

Finally, the ALJ considered and rejected the arguments Petitioner raised below as allegedly supporting reduction of the period of exclusion. ALJ Decision at 12-13. Petitioner does not contend before us that the ALJ erred in concluding that there were no mitigating factors. The ALJ determined that the basis for exclusion exists and that the evidence establishes the four aggravating factors on which the I.G. relied to impose the

25-year exclusion. ALJ Decision at 14. The ALJ further determined that Petitioner did not establish that the I.G. failed to consider any mitigating factor or considered an aggravating factor not supported by evidence. *Id.* The ALJ concluded that the 25-year period of exclusion is within a reasonable range and is not unreasonable, considering the presence of four aggravating factors and the absence of mitigating factors. *Id.* Petitioner did not point to any error in the ALJ's analysis aside from the one alleged error discussed above that is not material to our decision.

We therefore conclude that a 25-year exclusion period is within a reasonable range in light of the evidence in the record establishing four aggravating factors and no mitigating factors.

Conclusion

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

/s/
Judith A. Ballard

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member