Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Baldwin Ihenacho
Docket No. A-15-94
Decision No. 2667
November 18, 2015

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Baldwin Ihenacho (Petitioner) appeals a decision by an Administrative Law Judge (ALJ) upholding his exclusion by the Inspector General (I.G.) from all federal health care programs for 15 years based on his conviction of certain types of criminal offenses described in section 1128(a)(3) and (a)(4) of the Social Security Act (Act).[1] *Baldwin Ihenacho*, DAB CR4002 (July 1, 2015) (ALJ Decision) and Order Denying Petitioner's Motion for Reconsideration of Decision (July 21, 2015) (Order). Petitioner argues principally that the ALJ erred in concluding that there were no mitigating factors and that the length of the exclusion was not unreasonable. In particular, Petitioner argues that he met his burden to prove the existence of a mitigating factor under 42 C.F.R. § 1001.102(c) relating to cooperation with federal or state officials that resulted in additional cases being investigated. Petitioner also maintains that the ALJ erred in holding that his other arguments regarding the length of the exclusion are irrelevant.

For the reasons explained below, we conclude that the ALJ did not err in concluding that Petitioner had not proven the existence of a mitigating factor under section 1001.102(c) and in holding that Petitioner's other arguments are irrelevant. Accordingly, we sustain the ALJ's decision to uphold the 15-year exclusion imposed by the I.G.

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[1] The current version of the Act can be found at http://www.socialsecurity.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.

Background[2]

Petitioner owned and operated Meetinghouse Community Pharmacy in Dorchester, Massachusetts, from 1994 to 2008. I.G. Ex. 7, at 5. Between 2006 and 2008, Petitioner and his wife ran an on-line pharmacy where they dispensed and shipped drugs to customers based on illegitimate prescriptions. *Id*. at 4-5. On August 18, 2011, Petitioner pled guilty in the U.S. District Court for the District of Massachusetts to 29 counts of criminal conduct that occurred from 2006 through 2008. ALJ Decision at 6. Petitioner admitted to charges of conspiracy to distribute, and to possess with intent to distribute, controlled substances. I.G. Ex. 6, at 1. He further pled guilty to distribution and dispensing of controlled substances, conspiracy to misbrand drugs, misbranding drugs, conspiracy to commit international money laundering, and international money laundering. *Id*. at 1-2. The Court sentenced Petitioner to serve 63 months in prison and 24 months on supervised release. I.G. Ex. 6, at 3-4. The Court also ordered Petitioner to pay a $3,000 criminal monetary penalty. *Id*. at 5.

Petitioner provided information to law enforcement officials at proffer sessions in September 2009, November 2009, March 2010, and April 2010, and testified in April 2010 before a grand jury based on a proffer agreement. ALJ Decision at 10. Petitioner provided information about S.I. in two proffer sessions and mentioned S.I. in his grand jury testimony. *Id*. at 11. S.I. was charged and pled guilty to conspiracy to distribute, and to possess with intent to distribute, controlled substances and unlawful use of communication facility.[3] P. Exs. 19-21. Petitioner provided information about M.G. in three proffer sessions and testified about M.G. before the grand jury. ALJ Decision at 11. After Petitioner's proffers and testimony, M.G. was indicted, together with Petitioner and others, on the same charges of which Petitioner was ultimately convicted. P. Ex. 24.

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[2] The following background information is provided for the convenience of the reader. It is drawn from the undisputed facts in the ALJ Decision at pages 6 and 10-11 and in the record before the ALJ and should not be treated as new findings.

[3] The ALJ Decision stated that Petitioner had admitted that S.I. was already under charges before Petitioner's proffer sessions. ALJ Decision at 11. However, the ALJ acknowledged in his Order that Petitioner had instead asserted that the "Government filed a sealed complaint against [S.I.] … three months ***after*** [Petitioner] provided information about him in his proffer interviews." Order at 1 (quoting Petitioner's Appeal Br. at 11). The ALJ stated that even "[p]resuming S.I. was charged after Petitioner's proffers, the evidence still fails to . . . prove that Petitioner's cooperation 'resulted in' an investigation of S.I. or in S.I.'s ultimate conviction[.]" *Id*. at 3.

During the sentencing phase of Petitioner's criminal case, prosecutors refused to recommend a reduced sentence based on the information Petitioner had provided to law enforcement. ALJ Decision at 10. The judge who sentenced Petitioner stated that he was required to rely on the prosecution to determine whether to provide credit for Petitioner's cooperation in determining the length of Petitioner's sentence and thus "cannot award the additional point, which [he] otherwise would have, for acceptance of responsibility. . . ." *Id.*, quoting I.G. Ex. 9, at 44.

The I.G. notified Petitioner that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 15 years. I.G. Exs. 1, 2. As authority for the exclusion, the I.G. cited section 1128(a)(3) and 1128(a)(4) of the Act. I.G. Ex. 1, at 1. Section 1128(a)(3) requires the mandatory exclusion of any individual or entity convicted of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. Section 1128(a)(4) requires the mandatory exclusion of any individual or entity convicted of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. In either case, the exclusion must be for a period of not less than five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a). The regulations list aggravating factors that may be considered as a basis for imposing a longer exclusion period. 42 C.F.R. § 1001.102(b)(1)-(9). Based on a finding of three aggravating factors, the I.G. extended Petitioner's period of exclusion to 15 years. [4] I.G. Ex. 1, at 2.

The ALJ found that a 15-year exclusion period was not unreasonable based upon the three aggravating factors found by the I.G., which Petitioner conceded were present, and the absence of a proven mitigating factor. ALJ Decision at 7-9. If the exclusion period has been lengthened beyond five years based on an aggravating factor, as it was in this case, any of the mitigating factors listed in section 1001.102(c)(1)-(3) may be considered to reduce the exclusion period, but not below five years. 42 C.F.R. § 1001.102(c). Before the ALJ, Petitioner argued that the mitigating factor in section 1001.102(c)(3) was present in his case. Section 1001.102(c)(3) identifies the mitigating factor as follows:

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

[4] The aggravating factors were: the acts resulting in the conviction were committed over a period of one year or more, the sentence imposed by the court included incarceration, and an adverse action was taken by a State agency based on the same circumstances that serve as the basis for imposing the exclusion. I.G. Ex. 1, at 2; *see also* 42 C.F.R. §§ 1001.102(b)(2), (5), (9).

(ii) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or

(iii) The imposition against anyone of a civil money penalty or assessment under part 1003 of this chapter.

In Petitioner's view, the information in his proffers and grand jury testimony supported the charges of which S.I. was convicted and on which M.G. was indicted, thus establishing that his cooperation resulted in S.I.'s conviction and M.G.'s indictment. ALJ Decision at 2, 11; Petitioner's Appeal Br. (C-14-1627) at 11-13.

The ALJ rejected Petitioner's argument that the I.G. should have applied the mitigating factor in section 1001.102(c)(3) in determining the length of exclusion. The ALJ stated that while "it is clear that Petitioner cooperated with law enforcement . . . it is also clear that federal prosecutors . . . did *not* consider Petitioner's efforts at cooperation sufficient" since "[d]uring the sentencing phase of Petitioner's criminal case, prosecutors refused to give Petitioner credit for the information he had provided to investigators." ALJ Decision at 10 (emphasis in original). Based on his review of language in the preamble to the final rule first establishing the mitigating factor at section 1001.102(c)(3) and in the preamble to a later final rule modifying this section, the ALJ opined that "[a]though not expressly stated in section 1001.102(c)(3), it is critical for Petitioner to have an official involved in the criminal case acknowledge the usefulness of his proffers and grand jury testimony." *Id*. at 11; *see also* Order at 3 ("law enforcement" must "authenticat[e] . . . the usefulness of the cooperation provided" in order to prove "that cooperation resulted in an investigation or conviction").[5]

The ALJ stated specifically with respect to M.G.:

> Petitioner's cooperation appears important to the government's case. However, I am troubled by a lack of direct evidence to connect Petitioner's statements with the charges against M.G.[6]

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[5] The ALJ Decision quotes preamble language at 57 Fed. Reg. 3298, 3315 (Jan. 29, 1992) and 63 Fed. Reg. 46676, 46681 (Sept. 2, 1998). ALJ Decision at 9-10. Section 1001.102(c)(3) as adopted in 1992 referred only to cooperation that results in a conviction, exclusion or civil money penalty. The reference to cooperation that results in the investigation of additional cases or to the issuance of reports was added in 1998. 63 Fed. Reg. at 46676, 46681, 46686-87.

[6] Section 1001.102(c)(3) does not identify cooperation that results in others being charged as a mitigating factor. However, we read the ALJ's reference to "the charges against M.G." as a reference to the investigation leading to those charges.

> Petitioner could have requested subpoenas for any investigator or prosecutor who could testify as to his cooperation. *See* 42 C.F.R. § 1005.9. The record names numerous individuals - Federal Bureau of Investigations investigators, Food and Drug Administration special agents, United States Postal Service inspectors, Drug Enforcement Administration personnel, Internal Revenue Service special agents, and Assistant United States Attorneys - who could provide corroboration of the effect of Petitioner's proffers. P. Exs. 1-6 at 3. However, Petitioner did not subpoena any individual to support his assertion that his cooperation was validated by law enforcement. *See Stacey R. Ga[le],* DAB No. 1941, at 11, 13 [(2004)].

ALJ Decision at 11-12.

With respect to S.I., the ALJ stated:

> Petitioner failed to offer any evidence supporting that Petitioner's cooperation was the link leading to the investigation or eventual guilty plea of S.I. . . . . Petitioner could have offered testimony, documentary evidence such as a letter or memorandum, or other evidence by someone involved in the investigation or prosecution of S.I., showing that Petitioner's information "resulted in" the investigation or conviction of S[.]I. However, he did not. Even Petitioner's testimony did not establish that his information "resulted" in action against S.I. In order for me to find that by a preponderance of the evidence, I would need additional evidence supporting Petitioner's contention.

Order at 3.

The ALJ observed, "As Petitioner asserts, it is possible that prosecutors have vindictively withheld corroboration of Petitioner's cooperation because Petitioner refused to testify against his wife. It could be that Petitioner risked his own health and safety and that of his family to help cooperate with officials to try to make up for his wrongdoing." ALJ Decision at 12. Nonetheless, the ALJ concluded that "Petitioner has not met his burden to present evidence to support his assertion that Petitioner's cooperation resulted in the conviction of S.I. or the indictment of M.G."[7] *Id.* Accordingly, the ALJ rejected

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[7] As authorized by the regulations, the ALJ allocated to Petitioner the burden of persuasion on the existence of any mitigating factors, requiring proof by a preponderance of the evidence. *See* 42 C.F.R. § 1005.15(c) (stating that, with exceptions not relevant here, "the ALJ will allocate the burden of proof as the ALJ deems appropriate"); 42 C.F.R. § 1005.15(d) ("The burden of persuasion will be judged by a preponderance of the evidence."); ALJ's Order and Schedule for Filing Briefs and Documentary Evidence at 4, requiring Petitioner to use attached Petitioner's Short Form Brief (which states,"If you believe that a mitigating factor or factors exist(s), state what it is/they are and . . . [s]tate which exhibits support your argument(s) and explain why they do."). Petitioner has not alleged any error in the ALJ's allocation of the burdens of proof or persuasion or the use of a preponderance of the evidence standard, and we find none.

Petitioner's argument that the I.G. should have applied the mitigating factor in section 1001.102(c)(3) in determining the length of the exclusion.

As relevant here, the ALJ also ruled that Petitioner's Exhibits 9 - 14, "letters from individuals serving as character references for Petitioner," and Petitioner's Exhibits 25 - 30, "documents involving criminal matters that are not directly related to [Petitioner's] case," were inadmissible. ALJ Decision at 3.

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," and we review a disputed issue of law as to "whether the ALJ decision is erroneous." 42 C.F.R. § 1005.21(h); *see also Guidelines – Appellate Review of Decisions of Administrative Law Judges in Cases to Which Procedures in 42 C.F.R. Part 1005 Apply* (*Guidelines*). The *Guidelines* are available at http://www.hhs.gov/dab/divisions/appellate/guidelines/procedures.html.

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

A. The ALJ did not err in concluding that Petitioner did not meet his burden of proof to establish the presence of the mitigating factor in section 1001.102(c)(3).

Petitioner argues that the ALJ erred in determining that the mitigating factor in section 1001.102(c)(3) was not present. Petitioner reprises his argument before the ALJ that the information about M.G. and S.I. in his proffers and grand jury testimony supported the charges of which S.I. was convicted and on which M.G. was indicted, thus showing that Petitioner's cooperation "resulted in" S.I.'s conviction and M.G.'s case "being investigated" as an "[a]dditional" case within the meaning of section 1001.102(c)(3). P. Reply Br. at 2.[8] Petitioner also asserts, as he did before the ALJ, that the prosecutor reneged on her promise to recommend a reduction of his sentence based on his cooperation because Petitioner refused to testify against his wife and that the prosecutor's action was "discriminatory, prejudicial and vindictive." *Id.* at 3-4; *see also* P. Appeal Br.

[8] Petitioner also asserts that his "testimonies helped the government apprehend and prosecute" at least one individual in addition to M.G. and S.I. P. Reply Br. at 2. Since Petitioner did not make this assertion before the ALJ, we do not consider it. *See* 42 C.F.R. § 1005.21(e) ("The DAB will not consider . . . any issue in the [parties'] briefs that could have been raised before the ALJ but was not.").

(C-14-1627) at 13-14; Ihenacho Affidavit at 2-3. Petitioner urges the Board to subpoena the individual who was his lawyer at the time to provide support for this assertion. P. Reply Br. at 3-4. Petitioner asserts that the lawyer was willing to testify but "was unavailable at the time the appeal was being initiated[.]" *Id*. at 4.

We conclude there was no error in the ALJ's determination that the mitigating factor at issue was not present. The ALJ could reasonably conclude based on the facts of this case that there was insufficient evidence to establish the presence of the mitigating factor. Petitioner does not dispute that during the sentencing phase of Petitioner's criminal case, prosecutors did not recommend a reduced sentence based on the information Petitioner had provided to law enforcement, and that the judge, deferring to the prosecutors, did not reduce Petitioner's sentence on that basis. Petitioner seems to suggest the ALJ should have inferred a connection between the information he provided and the charges of which S.I. was convicted and based on which M.G. was indicted. However, even if the evidence submitted by Petitioner regarding the information he provided and these charges provided a basis for such an inference (an issue we do not reach), any such inference appears to be undercut by the facts that law enforcement did not recommend to the judge that Petitioner's sentence be reduced based on his cooperation and that the judge did not reduce Petitioner's sentence on that basis. Thus, we agree with the ALJ that Petitioner did not provide sufficient evidence to establish the presence of the mitigating factor.

As noted, Petitioner urges the Board to subpoena his former lawyer, claiming that the lawyer would support his assertion that the prosecutor had promised to recommend a reduction of his sentence based on the information he provided in his proffer sessions and his grand jury testimony and reneged on that promise only because Petitioner refused to testify against his wife. The Board has no direct subpoena authority and Petitioner's attempt to put in testimony from his former lawyer is too late. If Petitioner believed the lawyer's testimony would support his case, it was Petitioner's responsibility to identify the lawyer as a witness during the ALJ proceedings since Petitioner bore the burden of proving the presence of any mitigating factor. Petitioner could have requested that the ALJ make arrangements to permit the lawyer to testify at a time when he was available or that the ALJ subpoena him if he would not appear voluntarily since ALJs do have direct subpoena authority. *See* 42 C.F.R. § 1005.9(a) ("A party wishing to procure the appearance and testimony of any individual at the hearing may make a motion requesting the ALJ to issue a subpoena . . . ."). However, Petitioner failed to even identify the lawyer as a potential witness before the ALJ. Thus, even if Petitioner had shown that the testimony Petitioner claims the lawyer would provide would have probative value (which he has not), there is no legal basis for remanding the case to the ALJ to obtain the lawyer's testimony.

B. There is no basis for Petitioner's allegations of other errors.

1. The ALJ's ruling that Petitioner's Exhibits 9 – 14 are inadmissible

Petitioner argues that the ALJ erred in ruling that Petitioner's Exhibits 9 – 14, letters from individuals serving as character references for Petitioner, are inadmissible The ALJ provided the following explanation for excluding these exhibits as irrelevant:

> The character references do not support the existence of any mitigating factor listed in the applicable regulations. 42 C.F.R. § 1001.102(c); *see also* 57 Fed. Reg. 3298, 3314 (Jan. 29, 1992) (rejecting public comments that an Administrative Law Judge (ALJ) should be allowed to consider anything that might be mitigating when setting the length of an exclusion). I must exclude evidence that is irrelevant and immaterial to this case. 42 C.F.R. § 1005.17(c).

ALJ Decision at 3.

According to Petitioner, the letters show that he is not the "monster criminal" that he alleges the prosecutor and the I.G. allegedly made him out to be and are relevant "because speculative character evaluation was one of the reasons the I.G. imposed this ridiculous and punitive exclusion period." P. Reply Br. at 4-5. In effect, Petitioner contends that the letters are a basis for reducing the 15-year exclusion that he conceded was reasonable based on the three aggravating factors.

The ALJ correctly concluded that the alleged character references are irrelevant because the regulations do not provide for consideration of character as a mitigating factor. ALJs (and the Board) are limited to considering the mitigating factors set forth in the regulations, here, those at section 1001.102(c). *See* 42 C.F.R. § 1005.4(c)(1) (the ALJ has no authority to "[f]ind invalid or refuse to follow [the] . . . regulations . . .") and (c)(4) (ALJs cannot "[e]njoin any act of the Secretary [of Health and Human Services]"); *Ethan Edwin Bickelhaupt*, *M.D.*, DAB No. 2480, at 3 (2012) ("The limitations on the ALJ's authority in section 1005.4(c)(1) and (c)(4) also apply to the Board in its review of the ALJ Decision."), *aff'd*, *Bickelhaupt v. Sebelius*, No. 12 C 9598 (N.D. Ill. May 29, 2014).

2. The ALJ's ruling that Petitioner's Exhibits 25 – 30 are inadmissible

Petitioner also argues that the ALJ erred in ruling that Petitioner's Exhibits 25 – 30 are inadmissible. These exhibits are comprised of an individual's plea agreement and the transcript of that individual's grand jury testimony (P. Exs. 25 and 26); two other individuals' superseding indictments (P. Ex. 27); and three documents concerning one of those two individuals: his plea agreement (P. Ex. 28), a transcript of his grand jury testimony (P. Ex. 29), and the report of a U.S. Drug Enforcement Administration agent's investigation report of an interview with him (P. Ex. 30). The ALJ stated in relevant part:

> Petitioner submitted this evidence in furtherance of an argument that the IG has not taken action to exclude other individuals convicted on similar grounds. Petitioner argues that the IG has not excluded physicians who prescribed drugs for internet pharmacies and that this lack of action should be used as a basis for reducing Petitioner's length of exclusion. P. Br. at 15. Petitioner also asserts that a "similarly situated" pharmacist, who pled guilty to crimes involving filling prescriptions for eight on-line pharmacies, either was not excluded or, at most, was excluded for six years. P. Br. at 16. I exclude Petitioner's Exhibits 25 through 30 from the record because the regulations do not permit me to reduce Petitioner's length of exclusion based on considering the IG's decisions not to exclude other individuals. *See* 42 C.F.R. § 1001.102(c) [(listing the only mitigating factors)].

ALJ Decision at 3.

Petitioner contends that the exhibits at issue "showcase doctors, some of whom wrote the pres[cri]ptions that were filled at my pharmacy, but who were neither charged nor excluded." P. Reply Br. at 5. Petitioner continues: "Although some of the exhibits have persons not associated with my case, . . . they show those who directly cheated the government through the [M]edicaid and [M]edicare prescription plans but who were either not excluded or were minimally excluded." *Id.* In Petitioner's view, "these exhibits are directly relevant, related, and material to the length of exclus[]ion imposed by the IG." *Id.* Petitioner also refers to a pharmacist, presumably the "similarly situated" pharmacist mentioned in the ALJ Decision, who Petitioner says "acknowledged that he filled way more online prescriptions than I ever did [and] was never imprisoned nor was he ever excluded by the I.G." *Id.*

As the Board has previously noted, the preamble to 42 C.F.R. Part 1001 indicates that the aggravating and mitigating factors do not "have specific values; rather, these factors must be evaluated based on the circumstances of a particular case." *See Raymond Lamont Shoemaker*, DAB No. 2560, at 7 (2014), citing 57 Fed. Reg. at 3314. Thus, comparisons with other cases are not controlling and are of limited utility in an appeal of an exclusion action. Here, the exhibits at issue do not even show whether or not any of the three individuals to which they pertain were excluded by the I.G., much less the length of any exclusion; nor does Petitioner point to any exhibit pertaining to the "similarly situated" pharmacist who was allegedly not excluded. Thus, it would not be possible to compare

the I.G.'s treatment of these individuals with the I.G.'s treatment of Petitioner even if we were to conclude that the ALJ somehow erred in not admitting the exhibits, which we do not.[9]

3. Miscellaneous arguments

Petitioner asks the Board to "disregard" statements made by the I.G. in response to his notice of appeal that he says are "inflammatory and false and show that the I.G. has no knowledge of what this case is all about." P. Reply Br. at 5, 6. Petitioner objects, for example, to what he describes as the I.G.'s statement that Petitioner "was involved in 'a massive enterprise involving serious drug distribution and money Laundering.'." *Id.* at 5. The I.G. actually stated, "Appellant pled guilty to 28 different counts of criminal conduct in a massive enterprise involving serious drug distribution and money laundering offenses . . . ." I.G. Response Br. at 3, citing I.G. Ex. 6, at 1-2 and I.G. Ex. 7. Thus, the I.G. articulated facts of record, the number of pleas entered by Petitioner and the nature of those pleas, facts Petitioner himself does not dispute. *See* ALJ Decision at 6.[10] In any event, our decision is based on record facts and the law, not characterizations in either party's brief.

Finally, Petitioner asks that the Board determine that he has "been punished enough and therefore reduce the length of exclus[]ion to 5 years," asserting that the "authors of this exclus[]ion law did not make it punitive in nature as the prosecutor and the I.G. are making it to be." P. Reply Br. at 6. Petitioner is correct that the exclusion law was not intended to be punitive. *See, e.g., Donald A. Burstein, Ph.D.*, DAB No. 1865, at 12 (2003) ("The Board has recognized that 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.'."), citing *Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003), *cert. denied*, 123 S. Ct. 2652 (2005), and *Mannocchio v. Kusserow*, 961 F.2d 1539, 1543 (11th Cir. 1992). However, in light of

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[9] Before the Board, Petitioner also asserts for the first time that "[t]here have been cases in [the] state of Massachusetts where pharmacy owners who directly cheated the government sponsored insurance programs received a shorter exclusion period than [he, Petitioner] did." P. Reply Br. at 6. Petitioner then cites as an example only "the case of Joseph Onujiogu or Amadiegwu Onujiogu v. Inspector General," asserting that "DAB [Departmental Appeals Board] . . . reduced [Onujiogu's] length of . . . exclusion different than what the I.G. imposed." *Id.* at 6-7. Petitioner asks that "the DAB do[] the same in [his] case." *Id.* at 7. The Departmental Appeals Board's records show that a request for hearing on an exclusion imposed by the I.G. was filed by Amadiegwu Onujiogu but was dismissed by an ALJ after the petitioner withdrew the request. Docket No. C-12-745, Order Dismissing Case dated 10/17/12. In any event, as noted above, comparisons with other cases are not controlling in the appeal of an exclusion action. We also reiterate that the regulations preclude the Board's consideration of issues that could have been raised before the ALJ but were not. 42 C.F.R. § 1005.21(e).

[10] The ALJ Decision states, and Petitioner does not dispute, that he pled guilty to 29 counts, not 28 counts as stated by the I.G. It is immaterial whether Petitioner pled guilty to 28 or 29 counts.

the purpose of the exclusion law to protect federal health care programs from untrustworthy individuals, the ALJ could reasonably conclude that a 15-year exclusion was reasonable based on the offenses of which Petitioner was convicted and the presence of the three aggravating factors.

Conclusion

For all of the foregoing reasons, we sustain the ALJ Decision.

/s/
Sheila Ann Hegy

/s/
Constance B. Tobias

/s/
Susan S. Yim
Presiding Board Member