Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Spyros N. Panos, M.D.
Docket No. A-16-55
Decision No. 2709
June 2, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Spyros N. Panos, M.D. (Petitioner) appeals the February 8, 2016 decision of an Administrative Law Judge (ALJ). *Spyros N. Panos, M.D.*, DAB CR4525 (2016) (ALJ Decision). The ALJ sustained the determination of the Inspector General (I.G.) of the Department of Health and Human Services to exclude Petitioner from all federal health care programs under sections 1128(a)(1) and 1128(a)(3) of the Social Security Act (Act) for 25 years based on his felony conviction for health care fraud.[1] The ALJ determined that the I.G. properly excluded Petitioner and that the 25-year exclusion was within a reasonable range.

Petitioner does not dispute that the I.G. had a basis to exclude him and appeals only the length of the exclusion. For the reasons discussed herein the Board affirms the ALJ Decision.

Legal background

Section 1128(a)(1) of the Act requires the Secretary of Health and Human Services to exclude from participation in all federal health care programs an individual who 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(a).

[1] The current version of the Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact-toc.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)(3) of the Act requires the Secretary to exclude from participation in all federal health care programs–

> Any individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996 [August 21, 1996], under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in [section 1128(a)(1)]) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

See also 42 C.F.R. § 1001.101(c).

Five years is the minimum period of exclusions under section 1128(a)(1) and section 1128(a)(3). Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a). That period may be extended based on the application of any of the nine aggravating factors in 42 C.F.R. § 1001.102(b). In this case, the I.G. found four aggravating factors: "[t]he acts resulting in the conviction, or similar acts, that caused, or were intended to cause, a financial loss to a Government program or to one or more entities of $5,000 or more"; "[t]he acts that resulted in the conviction, or similar acts, were committed over a period of one year or more"; "[t]he sentence imposed by the court included incarceration"; and "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." 42 C.F.R. § 1001.102(b)(1), (b)(2), (b)(5), (b)(9).

If an exclusion period is extended based on the application of one or more aggravating factors, any of the three mitigating factors set forth in section 1001.102(c) (and only those three mitigating factors) may be applied to reduce the length of the exclusion period to no less than the mandatory minimum five years. 42 C.F.R. § 1001.102(c). Petitioner argued that the following two mitigating factors applied: "[t]he record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional or physical condition before or during the commission of the offense that reduced the individual's culpability"; and "[t]he individual's or entity's cooperation with Federal or State officials resulted in . . . (i) Others being convicted or excluded from Medicare, Medicaid and all other Federal health care programs"; "(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" 42 C.F.R. Part 1003. 42 C.F.R. § 1001.102(c)(2), (c)(3); ALJ Decision at 9.

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 any exclusion longer than the mandatory minimum period is unreasonable. 42 C.F.R. §§ 1001.2007(a), 1005.2(a). 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). *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491, at 5 (2012), *appeal dismissed*, *Sheth v. Sebelius*, No. 13-cv-00448 (BJR) (D.D.C. Oct. 22, 2013), *aff'd*, *Sheth v. Burwell*, No. 14–5179, 2015 WL 3372286 (D.C. Cir. May 7, 2015), citing *Craig Richard Wilder*, DAB No. 2416, at 11 (2011). 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. *Id*., citing *Jeremy Robinson, D.C.*, DAB No. 1905, at 11 (2004), citing *Keith Michael Everman, D.C.*, DAB No. 1880, at 10 (2003).

If the exclusion "is based on the existence of a criminal conviction or a civil judgment imposing liability by Federal, State or local court . . . where the facts were adjudicated and a final decision was made," then "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 in this appeal." 42 C.F.R. §§ 1001.2007(d).

Any party dissatisfied with the ALJ's decision may appeal the decision to the Board. 42 C.F.R. § 1005.21. 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 but was not. 42 C.F.R. § 1005.21(e).

Case background[2]

Petitioner disputed below only the length of the 25-year exclusion. ALJ Decision at 4, 5-6. The ALJ found that Petitioner, through his October 31, 2013 agreement with the U.S. Department of Justice to plead guilty to a single count of health care fraud in violation of 18 U.S.C. §§ 1347 and 2, admitted that, from about 2006 through July 2011, he submitted and caused to be submitted, to various health insurance providers including Medicare, the New York State Insurance Fund, and private health insurers, false and fraudulent claims for surgical procedures including false information concerning the surgical procedures performed. ALJ Decision at 4; I.G. Ex. 4, at 1-5 (information in criminal case, Oct. 16, 2013), and I.G. Ex. 9, at 1, 4 (plea agreement). The false claims included: claiming

[2] 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.

arthroscopic procedures as open surgeries; claiming to have performed certain surgical techniques and procedures that he did not actually perform, either because they were not medically necessary or because Petitioner performed other techniques and procedures that would have resulted in lower, if any, payments; and having removed loose bodies in excess of certain size criteria when no loose bodies were removed or those that were removed were smaller than the thresholds for payment set by the health insurance providers. ALJ Decision at 4; I.G. Ex. 4, at 3-4. Petitioner also admitted by his guilty plea that as of December 2010, he tried to conceal his fraudulent activity by asserting the false claims were the result of mere clerical errors, and that his fraud resulted in the loss of over $2,500,000 from health insurance providers. ALJ Decision at 4; I.G. Ex. 4, at 4; I.G. Ex. 9, at 2, 4.

The United States District Court for the Southern District of New York entered a judgment of conviction on Petitioner's guilty plea, and sentenced Petitioner to 54 months of imprisonment and ordered him to pay restitution of $2,658,544.11. ALJ Decision at 6, 7; I.G. Exs. 11 (judgment), 12 (order of restitution). The New York Office of the Medicaid Inspector General excluded Petitioner from participation in the New York Medicaid program as a result of his conviction, and he surrendered his medical license to the New York State Board for Professional Medical Conduct. ALJ Decision at 8; I.G. Exs. 2 (New York State Office of the Professions verification search), 5 (surrender order & surrender of medical license & order), 13 (New York State Office of the Medicaid I.G. Notice of Immediate Agency Action).

By letter dated April 30, 2015, the I.G. notified Petitioner that he was being excluded from participation in any capacity in Medicare, Medicaid, and all federal health care programs, as defined in section 1128B(f) of the Act, for a minimum period of 25 years, pursuant to sections 1128(a)(1) and 1128(a)(3) of the Act. I.G. Ex. 1, at 1. The I.G. stated that the exclusion under section 1128(a)(1) was due to Petitioner's conviction, in the United States District Court for the Southern District of New York, of a criminal offense "related to the delivery of an item or service under the Medicare or a State health care program, including the performance of management or administrative services relating to the delivery of items or services, under any such program." *Id.* The I.G. stated that the exclusion under section 1128(a)(3) was due to the felony conviction, in the same court, of a criminal offense "related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service," including "the performance of management or administrative services relating to the delivery of such items or services, or with respect to any act or omission in a health care program (other than Medicare and a State health care program) operated by, or financed in whole or in part, by any Federal, State or local Government agency." *Id.*

The I.G. informed Petitioner that the exclusion would take effect 20 days from the date of the notice of exclusion. *Id.* The I.G. also explained that the minimum exclusion period of five years required by section 1128(c)(3)(B) of the Act was being extended (by 20 years) because the record contained evidence of four aggravating factors: financial loss to a government program of $5,000 or more; the acts resulting in the conviction being committed over a period of one year or more; the sentence including incarceration; and Petitioner being the subject of other adverse action by any Federal State, or local government agency or board based on the same set of circumstances that served as the basis for imposition of the exclusion. *Id*. at 1-2; *see* 42 C.F.R. § 1001.102(b)(1), (b)(2), (b)(5), (b)(9).

Petitioner requested ALJ review.[3] The ALJ found that Petitioner "d[id] not dispute that there is a basis for his exclusion pursuant to sections 1128(a)(1) and (a)(3) of the Act" and "is clear that he challenges only the reasonableness of the 25-year exclusion exclusion." ALJ Decision at 4, citing Request for Hearing and P. Br. at 1. The ALJ reviewed the record and concluded that "all three elements of section 1128(a)(1) of the Act [(1) Petitioner pled guilty to a criminal offense that (2) was related to the delivery of an item or service that (3) was under Medicare or a state health care program] are met, and there is a basis for Petitioner's exclusion under that section." *Id*. at 5. The ALJ further concluded that "all of the necessary elements of section 1128(a)(3) of the Act [(1) conviction of an offense under federal or state law that (2) occurred after August 21, 1996, and (3) was committed in connection with the delivery of a health care item or service, or with respect to any act or omission in a government-financed health care program other than Medicare or Medicaid; (4) the criminal offense was a felony that (5) was related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct] are met, and there is a basis for Petitioner's exclusion under that section." *Id*. at 5-6.

The ALJ then addressed "[t]he remaining issue . . . whether it is unreasonable to extend Petitioner's exclusion by an additional 20 years" and concluded that "[f]our aggravating factors are present that justify extending the minimum period of exclusion to 25 years." *Id*. at 6-8, citing 42 C.F.R. § 1001.102(b)(1), (b)(2), (b)(5), (b)(9). The ALJ rejected Petitioner's argument that he had made full restitution, stating that "[p]ayment of restitution . . . does not negate the presence of this clearly established aggravating factor" since the regulation states that the "'entire amount of financial loss to such programs or entities . . . *will be considered regardless of whether full or partial restitution has been made*.'" *Id.* at 7, quoting 42 C.F.R. 1001.102(b)(1) (emphasis added in ALJ Decision).

[3] The ALJ admitted into the record all of the parties' offered exhibits. ALJ Decision at 2. Petitioner filed a written notice waiving an oral hearing and elected to proceed on the documentary evidence and written argument. *Id.* at 2, 4. The I.G. did not request an oral hearing (*id.* at 4) and moved for summary judgment (*id.* at 2). The ALJ determined that it was "not necessary to follow summary judgment procedures" and "proceed[ed] to a decision on the merits." *Id*. at 4.

The ALJ also rejected Petitioner's argument that the duration of his criminal activity was only two years rather than the five and a half years cited by the I.G. as a prohibited collateral attack on his conviction and as contrary to the record evidence. *Id*. The ALJ further noted, "[Petitioner] indeed concedes that his criminal conduct lasted at least two years, which is sufficient to establish the presence of the aggravating factor . . . [in] 42 C.F.R. § 1001.102(b)(2)." *Id*. Moreover, the ALJ noted that Petitioner raised no dispute that his sentence included 54 months of incarceration, which established the presence of the aggravating factor at 42 C.F.R. § 1001.102(b)(5). *Id.* at 8. The ALJ also found that Petitioner did not dispute that he was "subject to two adverse actions taken by two separate boards that were based on the same set of circumstances that are the basis for [his] exclusion," i.e., the New York Office of the Medicaid Inspector General excluded him from participation in the New York Medicaid program, and the New York State Board for Professional Medical Conduct ordered him to surrender his medical license. *Id.*, citing I.G. Exs. 2, 5, 13. Accordingly, the ALJ found the fourth aggravating factor, set out in 42 C.F.R. § 1001.102(b)(9), existed. *Id.*

The ALJ next concluded that Petitioner "has not established the presence" of either of the two mitigating factors he asserted, that he "was suffering from alcoholism and depression and had bladder cancer at the time of the underlying scheme to defraud" and that he "provided information to the government about the underlying scheme to defraud, which 'helped secure a $5,000,000 civil forfeiture settlement' against his former employer." *Id*. at 8-10, citing P. Br. at 1, and P. Aff. at ¶¶ 2, 24. The ALJ concluded that Petitioner had not met the requirements of the regulations for establishing the existence of the mitigating factors. *Id.* at 10.

Finally, the ALJ "conclude[d] that a period of exclusion of 25 years is in a reasonable range and not unreasonable considering the existence of four aggravating factors and the absence of any mitigating factors," noting that "Petitioner has not established that the I.G. failed to consider any mitigating factor or considered an aggravating factor that did not exist." *Id*. at 11.

Standard of review

The standard of review on a disputed issue of law is whether the ALJ's decision is erroneous. 42 C.F.R. § 1005.21(h). The standard of review on a disputed issue of fact is whether the ALJ's decision is supported by substantial evidence in the record as a whole. *Id.*; *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.

Analysis

Before the Board, Petitioner again disputes only the length of the exclusion period, asserting that the 20-year extension of the required minimum five years is unreasonable. Petitioner disputes the ALJ's determination that the two mitigating factors Petitioner claimed did not apply to reduce the length of the exclusion. Petitioner calls "incorrect and unsupported" the ALJ's determinations that Petitioner's "alcoholism, depression and bladder cancer during his participation in the underlying scheme . . . were not raised in the underlying criminal action" and that no record evidence showed that Petitioner's "cooperation with various government authorities result[ed] in an ancillary forfeiture action against a former employee." P. Appeal Br. at 1. Petitioner also argues that the ALJ's determination "that the 25-year exclusion is in a reasonable range and that no basis exists for reassessment of the period of exclusion . . . is incorrect and unsupported." *Id.* at 2.

We conclude that the ALJ's determinations that there are four aggravating factors and no mitigating factors, and that the 25-year exclusion period is within a reasonable range, are supported by substantial evidence of record and free of legal error.

1. *ALJ's determination that there are four aggravating factors is supported by substantial evidence and free of legal error.*

The I.G. extended the mandatory minimum five-year exclusion period by 20 years based on four aggravating factors: (1) the crimes for which Petitioner was convicted caused the government to lose at least $5,000; (2) the crimes for which Petitioner was convicted were committed over a period of over one year; (3) the court sentenced Petitioner to incarceration; and (4) Petitioner was subject to adverse action by a state government agency and board based on the same circumstances that served as the basis for the exclusion. I.G. Ex. 1, at 1-2; 42 C.F.R. § 1001.102(b)(1), (b)(2), (b)(5), (b)(9). For the reasons discussed below, we uphold the ALJ's determination that all "[f]our aggravating factors are present." ALJ Decision at 6.

a. Program loss is at least $5,000.

It is undisputed that Petitioner was sentenced to pay restitution in the amount of $2,658,544.11. ALJ Decision at 6, 7; I.G. Ex. 12, at 1. The amount of the restitution is considered a reasonable valuation of financial losses of the program. *Michael D. Miran, Esta Miran, & Michael D. Miran, Ph.D. Psychologist P.C.*, DAB No. 2469, at 5 (2012); *Juan de Leon, Jr.*, DAB No. 2533, at 5 (2013); *Craig Richard Wilder* at 9. Additionally, the ALJ noted that Petitioner admitted as part of his plea agreement to defrauding at least

$2,500,000 from health insurers including Medicare and the New York Medicaid program. ALJ Decision at 7, citing I.G. Ex. 9, at 2. We agree with the ALJ that "[t]here can be no question that based on the amount of loss to which Petitioner admitted and the restitution ordered, Petitioner's criminal conduct caused losses to Medicare and Medicaid substantially above $5,000," the amount that triggers the applicability of the aggravating factor in section 1001.102(b)(1). *Id*.

The ALJ also rejected as "irrelevant" Petitioner's argument that he had already made full restitution, as the regulation states that the "entire amount of financial loss to such programs or entities . . . will be considered *regardless of whether full or partial restitution has been made*." *Id*., quoting 42 C.F.R. § 1001.102(b)(1) (ALJ's emphasis). Petitioner does not dispute the ALJ's correct application of that regulation or his conclusion that "[p]ayment of restitution, however, does not negate the presence of this clearly established aggravating factor." *Id*.

b. Crimes were committed over a period of one year or longer.

The ALJ found that Petitioner "pled guilty to engaging in a scheme to defraud Medicare and other health insurance providers during the period of 2006 through July 2011" and that these admitted facts "clearly demonstrate that his criminal conduct lasted one year or more." ALJ Decision at 7, citing I.G. Ex. 4, at 4, and I.G. Ex. 9, at 1. The ALJ also rejected Petitioner's argument that his role in the scheme to defraud health insurers "lasted only two years" as an "attempt to re-litigate the facts of his underlying criminal conduct to which he has already pled guilty." *Id*. As such, the ALJ concluded, Petitioner's assertion was a collateral attack on the underlying criminal conviction that "[t]he regulations strictly prohibit[.]" *Id*., citing 42 C.F.R. § 1001.2007(d). We agree with the ALJ that section 1001.2007(d) barred Petitioner from challenging the facts stated in the criminal information to which he pled guilty and in his plea agreement. Those record materials establish his participation in a scheme to defraud Medicare, the New York State Insurance Fund, and private health insurers, from "at least in or about 2006 through in or about July 2011." I.G. Ex. 9, at 1; I.G. Ex. 4, at 4 (criminal activity lasted "[f]rom at least in or about 2006, through and including in or about July 2011").

Even absent the prohibition on collateral attacks, the ALJ also found that Petitioner's "plea agreement, in which he acknowledged he was pleading guilty because he was actually guilty of the offense alleged . . . bears substantially more weight than his unsupported claim that he was not involved in the criminal scheme for as long as he previously admitted." ALJ Decision at 7, citing I.G. Ex. 9, at 4. The ALJ also noted that the more-than-two-year duration of the criminal conduct that Petitioner admitted "is sufficient to establish the presence of the aggravating factor." *Id*. Petitioner does not appeal these ALJ determinations.

c. Sentence included incarceration.

The ALJ found that Petitioner did not dispute that he was sentenced to 54 months of incarceration, as shown by the judgment in his criminal case, and the ALJ concluded that this established the third aggravating factor the I.G. cited. ALJ Decision at 8, citing I.G. Ex. 11, at 2; 42 C.F.R. § 1001.102(b)(5). Petitioner on appeal does not dispute the ALJ's determinations. We conclude that substantial evidence supports the ALJ's determination that this aggravating factor applied.

d. Petitioner was subject to other adverse actions by state government agency and board.

The ALJ found that "Petitioner . . . does not dispute that as a result of his conviction the New York Office of the Medicaid Inspector General excluded him from participation in the New York Medicaid program" and "does not dispute that he surrendered his medical license to the New York State Board for Professional Medical Conduct after he had been charged with professional misconduct and he acknowledged that he could not successfully defend at least one of the misconduct allegations." ALJ Decision at 8, citing I.G. Exs. 2, 5, 13. The ALJ thus found that Petitioner was "subject to two adverse actions taken by two separate boards that were based on the same set of circumstances that are the basis for Petitioner's exclusion." *Id*. Petitioner on appeal does not dispute the ALJ's findings, which we find no basis to disturb.

Substantial evidence thus supports the ALJ's determination that four aggravating factors applied. The ALJ's determination is free of legal error.

2. The ALJ's determination that Petitioner did not establish the presence of any of the mitigating factors is supported by substantial evidence of record and is free of legal error.

Petitioner argued below that mitigating factors existed to reduce his exclusion because he "was suffering from alcoholism and depression and had bladder cancer at the time of the underlying scheme to defraud" and he "provided information to the government about the underlying scheme to defraud, which 'helped secure a $5,000,000 civil forfeiture settlement' against his former employer." ALJ Decision at 9, citing P. Br. at 1, and P. Aff. at ¶¶ 2, 24. The ALJ found that Petitioner "has not established the presence" of the two regulatory mitigating factors that correspond to Petitioner's claims (criminal court determined that the excluded individual's culpability was reduced by mental, emotional or physical condition; the excluded individual's cooperation with Federal or State officials produced results stated in regulation). *Id*. at 10.

Regarding the mitigating factor at section 1001.102(c)(2), the regulation does not permit this factor to be established based only on a showing that a Petitioner had "a mental, emotional or physical condition before or during the commission of the offense." Instead, "[t]he record in the criminal proceedings" must "demonstrate[] that the ***court determined***" both "that the individual had a mental, emotional or physical condition before or during the commission of the offense" ***and*** that the condition "reduced the individual's culpability . . . ." 42 C.F.R. § 1001.102(c)(2) (emphasis added). The ALJ concluded that Petitioner had not established this mitigating factor because he found "no evidence that the District Court made such a determination." ALJ Decision at 9. The ALJ also noted that the plea agreement Petitioner signed "discusses his culpability with regard to the 'offense level' for the Sentencing Guidelines, but does not reference Petitioner's alcoholism, depression, or bladder cancer," from which language, the ALJ found, it "appears . . . that neither the government nor Petitioner considered his conditions to reduce his culpability at the time of his guilty plea or sentencing." *Id*. at 9-10, citing I.G. Ex. 9.

Petitioner argues that the ALJ's determination that this mitigating factor was, in Petitioner's words, "not raised in the underlying criminal action" and that Petitioner's conditions "were not valid mitigating factors . . . is incorrect and unsupported." P. Appeal Br. at 1. Petitioner, however, cites nothing in the record indicating that the court in his criminal proceedings ever took note of his conditions or determined that they reduced his culpability for the offense to which he pled guilty. *See Guidelines* ("where appropriate, each argument should be supported by precise citations to the record"). Nor do we find from the record that the court made the required determination.

Regarding the mitigating factor at section 1001.102(c)(3), the ALJ found that Petitioner "has not presented any evidence that his alleged 'cooperation' had any of the results described in the regulation" and that "[a]side from Petitioner's claim that his assistance resulted in a civil forfeiture action against his former employer, there is no actual evidence in the record that supports this assertion." ALJ Decision at 10. The ALJ concluded that "simply providing information to the government about a scheme to defraud that the government is already investigating is not the type of 'cooperation' recognized as a mitigating factor by the regulation." *Id*. This is consistent with Board precedent. *See, e.g.*, *Christopher Switlyk*, DAB No. 2600, at 6 (2014) ("even if Petitioner cooperated with authorities, that is not sufficient to meet his burden to show that the factor applies"). The ALJ also concluded that "a civil forfeiture action, presumably taken pursuant to 18 U.S.C. § 981 *et seq.*, is not a 'civil money penalty or assessment under part 1003,' and therefore not a mitigating factor in this case." ALJ Decision at 10. This is consistent with the regulation, 42 C.F.R. § 1001.102(c)(3), which requires that the

excluded individual's cooperation result in specific actions that do not include civil forfeiture (i.e., others being convicted or excluded from federal health care programs; additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses; or the imposition against anyone of a civil money penalty or assessment under 42 C.F.R. Part 1003).

Petitioner calls "incorrect and unsupported" the ALJ's determinations that, in Petitioner's words, "there is no actual evidence in the record" supporting the mitigating factor of cooperation and "that a civil forfeiture action is not applicable." P. Appeal Br. at 1. However, Petitioner does not explain why the ALJ's determinations are not correct, and does not cite anything in the record showing that his cooperation with federal or state officials had any of the results the regulation requires to establish this mitigating factor. 42 C.F.R. § 1001.102(c)(3).

We accordingly affirm the ALJ's determination that Petitioner did not establish any mitigating factor that the ALJ was permitted to consider to reduce the period of exclusion. ALJ Decision at 10.

3. The ALJ's determination that the 25-year exclusion period is within a reasonable range is supported by substantial evidence of record and is free of legal error.

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." *Sheth* at 5, 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, however, may not substitute his or her judgment for that of the I.G. or determine a "better" exclusion period than set by the I.G., who "has 'broad discretion' in setting the length of an exclusion in a particular case, based on [his] 'vast experience' implementing exclusions." *Id.*, quoting *Craig Richard Wilder* at 9, and *Paul D. Goldenheim, M.D., et al.*, DAB No. 2268, at 21 (2009), *aff'd*, *Friedman v. Sebelius*, 755 F. Supp. 2d 98 (D.D.C. 2010), *rev'd on other grounds and remanded*, 686 F.3d 813 (D.C. Cir. 2012).

The ALJ weighed the four aggravating factors and concluded that those factors and the absence of mitigating factors supported an extension of the mandatory minimum exclusion period to the 25 years the I.G. imposed. ALJ Decision at 10-11. Petitioner argues that the ALJ's determination "is incorrect and unsupported" but does not state why this is so. Petitioner thus provides no basis for us to reduce the period of the exclusion that the I.G. imposed and the ALJ sustained. *See Guidelines* (appeal of ALJ Decision must be accompanied by written brief "specifying . . . your basis for contending that each such finding or conclusion [by the ALJ] is unsupported or incorrect").

Moreover, we conclude based on our review that the ALJ's determination that the exclusion period is within a reasonable range is free of legal error. We have sustained the ALJ's findings that four aggravating factors and no mitigating factors are present. Regarding the aggravating factor of the financial loss to government programs, the ALJ noted that the loss Petitioner's conduct caused was "substantially above $5,000," the threshold for establishing that factor. ALJ Decision at 7. The Board has held that it is "entirely reasonable to consider a program loss amount substantially above the $5,000" to be "an 'exceptional aggravating factor' to be accorded significant weight." *Laura Leyva*, DAB No. 2704, at 9-10 (2016), citing *Sheth* at 7 (2012). The amount of the program loss here is over 500 times the threshold amount, making it indeed an exceptional aggravating factor.

Regarding the aggravating factor of incarceration, the Board has held that a period of incarceration for 51 months "is a significant period" and concluded "that the ALJ's consideration of the long period of incarceration in determining how much weight to give the aggravating factor of a sentence including incarceration was not improper." *Eugene Goldman, M.D., a/k/a Yevgeniy Goldman, M.D.*, DAB No. 2635, at 5, 8 (2015). The Board has also characterized a nine-month incarceration, which included a period of work release, as "more than a token incarceration and, in that sense, relatively substantial." *Jason Hollady, M.D., a/k/a Jason Lynn Hollady*, DAB No. 1855, at 12 (2002). Petitioner's 54 months of incarceration was thus unquestionably a significant period.

The duration of Petitioner's conduct from 2006 through July 2011 is substantially longer than the one year threshold for it to become an aggravating factor. As the Board stated in *Vinod Chandrashekhar Patwardhan, M.D.*, DAB No. 2454, at 7 (2012) (quoting *Donald A. Burstein, Ph.D.*, DAB No. 1865, at 8 (2003)), the purpose of this aggravating factor "is to distinguish . . . petitioners whose lapse in integrity is short-lived from those who evidence a lack of such integrity over a longer period . . . ."

Accordingly, based on the presence of four aggravating factors, two of them exceptional or significant, and the absence of any mitigating factors permitted by regulation, we conclude that the 25-year exclusion the I.G. imposed was within a reasonable range, and that the ALJ's determination sustaining the period of exclusion was free of legal error.

Conclusion

The period of exclusion imposed by the I.G. and upheld by the ALJ lies within a reasonable range and is, thus, lawful. We affirm the ALJ Decision.

/s/
Sheila Ann Hegy

/s/
Christopher S. Randolph

/s/
Susan S. Yim
Presiding Board Member