Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Delores L. Knight
Docket No. A-19-54
Decision No. 2945
May 23, 2019

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Petitioner Delores L. Knight, appearing *pro se*, appeals the January 4, 2019 decision by an administrative law judge affirming her exclusion from participation in all federal health care programs for 50 years. *Delores L. Knight*, DAB CR5227 (2019) (ALJ Decision). The ALJ determined on summary judgment that the Inspector General of the Department of Health and Human Services (I.G.) had a legal basis to exclude Petitioner based on her federal court conviction for conspiracy to commit health care fraud, health care fraud, and money laundering. The ALJ determined that the length of the exclusion was not unreasonable based on: (1) the seven-year duration of the activities that resulted in Petitioner's conviction; (2) the loss to government programs caused by Petitioner's acts, reflected in the court's order that Petitioner pay over $8 million in restitution to the government health care programs that she defrauded; and (3) Petitioner's sentence to 120 months of incarceration.

For the reasons set out below, we affirm the ALJ Decision.

Legal Background

Section 1128(a)(1) of the Social Security Act (Act)[1] requires the Secretary of the Department of Health and Human Services to exclude from participation in all federal health care programs any individual who "has been convicted of a criminal offense related to the delivery of an item or service under [Medicare] or under any State health care program." When an exclusion is based on section 1128(a)(1), section 1128(c)(3)(B)

[1] The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact.html. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

mandates the "minimum period of exclusion" to be "not less than five years[.]"[2] The I.G. may extend the mandatory minimum period of exclusion by applying the aggravating factors in 42 C.F.R. § 1001.102(b), including the following factors found by the I.G. in this case:

> (1) The acts resulting in the conviction, or similar acts, caused, or were intended to cause, a financial loss to a government agency or program or to one or more other entities of $50,000 or more . . . ;
>
> (2) The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more;
>
> * * *
>
> (5) The sentence imposed by the court included incarceration[.]

If an exclusion period is extended based on one or more aggravating factors, the I.G. may apply any one or more of the mitigating factors in section 1001.102(c) to reduce the exclusion period to no less than the mandatory minimum period.

An excluded individual may request a hearing before an ALJ, but only on the issues of: (1) whether the basis for the exclusion exists; and (2) whether the length of the exclusion is unreasonable. 42 C.F.R. §§ 1001.2007(a)(1), (2), 1005.2(a). When an exclusion is based on a criminal conviction by a federal, state or local court, the basis for the conviction is not reviewable and the excluded individual may not collaterally attack it on substantive or procedural grounds. *Id.* § 1001.2007(d).

A party dissatisfied with an ALJ decision may appeal it to the Departmental Appeals Board (Board). 42 C.F.R. § 1005.21. A notice of appeal must be accompanied by a brief specifying exceptions to the ALJ decision and reasons supporting the exceptions. *Id.* § 1005.21(c). The Board "will not consider any issue not raised in the parties' briefs, nor any issue in the briefs that could have been raised before the ALJ but was not." *Id.* § 1005.21(e).

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

Case Background[3]

1. *Petitioner's Indictment, Conviction and Sentence*

By indictment dated June 17, 2015, a grand jury in the United States District Court for the Northern District of Ohio charged Petitioner with conspiracy to commit health care fraud and health care fraud, against Medicare, Ohio Medicaid, PASSPORT (a home health care and community-based services program operated by the Ohio Department of Aging), and the Department of Veterans Affairs (VA), in violation of 18 U.S.C. §§ 1349, 1347 and 2. I.G. Ex. 2. The grand jury also charged Petitioner with money laundering of funds derived from the alleged conspiracy and health care fraud in violation of 18 U.S.C. § 1957. *Id.* at 19-25.

The indictment alleged that Petitioner was an owner and officer of Just Like Familee II, Inc. (JLF II) and Just Like Familee III, Inc. (JLF III), companies that provided home health services to elderly and disabled persons. I.G. Ex. 2, at 1-2. From approximately November 21, 2007, through November 30, 2014, the indictment alleged, Petitioner and others engaged in a scheme to defraud Medicare, Medicaid, PASSPORT, and the VA "in connection with the delivery of and payment for health care benefits." *Id.* at 12-13. According to the indictment, Petitioner prepared and caused to be prepared false or forged health care certifications, care plans, doctors' orders, assessments, notes and reports. *Id.* at 13-15. The indictment also alleged that Petitioner submitted and caused others to submit claims to Medicaid, Medicare and the VA through JLF III, and claims to PASSPORT through JLF II, for home health services that were not furnished or were provided by unqualified or unauthorized persons. *Id.*

On May 17, 2017, following a trial, Petitioner was adjudged guilty and convicted of one count of conspiracy to commit health care fraud, two counts of health care fraud, and nine counts of money laundering. I.G. Ex. 4, at 1. The court sentenced Petitioner to incarceration for 120 months and ordered her to make restitution in amounts of over $3 million to Medicare, over $4.7 million to "Ohio Medicaid/PASSPORT," and approximately $429,000 to the VA. *Id.* at 1, 2, 5, 6.

2. *The I.G. Decision*

By letter dated December 29, 2017, the I.G. notified Petitioner that she was "being excluded from participation in any capacity in the Medicare, Medicaid, and all Federal health care programs . . . for a minimum period of 50 years." I.G. Ex. 1, at 1 (emphasis omitted). The I.G. stated that the period of Petitioner's exclusion was more than the five-year minimum period based on the following three factors: (1) The amount of loss to

[3] The facts contained in this section are drawn from the ALJ Decision and the record and are presented to provide context for the discussion of the issues raised in this appeal.

government programs caused by the acts resulting in the conviction (the court ordered Petitioner to pay approximately $8,000,000 in restitution); (2) the acts that resulted in the conviction were committed over a period of seven years (November 2007 through November 2014); and (3) the sentence imposed included 120 months of incarceration. *Id.* at 1-2.

3. *The ALJ Proceedings and Decision*

Petitioner timely requested a hearing to contest the I.G.'s decision. The I.G. filed a motion for summary judgment, supporting brief, and I.G. exhibits 1 through 4. Petitioner filed a letter dated October 24, 2018, responding to the I.G.'s motion, and 11 documents marked as exhibits 100 through 111.[4] The I.G. filed a reply and objections to Petitioner's proposed exhibits.

The ALJ admitted I.G. exhibits 1 through 4 into the record as evidence without objection by Petitioner. The ALJ determined that all of Petitioner's exhibits "must be excluded and not considered as evidence" because they attacked her underlying criminal conviction and were not relevant to either issue that he was authorized to decide. ALJ Decision at 2-3.

The ALJ granted summary judgment in favor of the I.G., concluding that the "facts that trigger exclusion under section 1128(a)(1) of the Act" were not disputed. ALJ Decision at 5. The ALJ stated, "Petitioner [did] not dispute that she was convicted of criminal offenses after a trial or that a judgment of conviction was entered against her on May 17, 2017." *Id.* at 6 (citing I.G. Ex. 4, at 1). Petitioner also did not dispute that the offenses for which she was convicted "related to the home health care services companies she owned or that claims were submitted to and paid by Medicare, Medicaid, and the VA as alleged in the indictment." *Id.* (citing I.G. Ex. 2). The ALJ thus concluded, "the elements of section 1128(a)(l) of the Act are satisfied and there is a basis for Petitioner's exclusion." *Id.*

[4] Petitioner's letter and exhibits were uploaded to the Departmental Appeals Board Electronic Filing System (DAB E-File) in Docket C-18-645 on October 30, 2018, with the file name, "C-18-645 LETTER DATED OCTOBER 24 2018 WITH ATTACHMENTS."

The ALJ noted that in "a document dated September 18, 2018, Petitioner argue[d] that the IG should not exclude" JLF II and JLF III, of "which she was one of the owners and an officer." ALJ Decision at 6 (citing P. Br. at 12).[5] The ALJ determined that these arguments were "without merit, as the exclusion at issue before me is Petitioner's exclusion and not an action by the IG against either company." ALJ Decision at 6 (citing I.G. Ex. 1).

The ALJ determined that the 50-year period of Petitioner's exclusion was "in a reasonable range and not unreasonable" based on "the extensive loss to federal and state health care programs, the duration of the offenses, the 120-month prison sentence, and the absence of any mitigating factors." ALJ Decision at 9.

Standard of Review

The standard of review by the Board "on a disputed issue of law is whether the initial decision is erroneous." 42 C.F.R. § 1005.21(h).

"Whether summary judgment is appropriate is a legal issue the Board addresses de novo." *Kimbrell Colburn*, DAB No. 2683, at 3-4 (quoting *West Texas LTC Partners, Inc.*, DAB No. 2652, at 5 (2015)). "Summary judgment is appropriate when the record shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.* The applicable "substantive law will identify which facts are material," and "[o]nly disputes over facts that might affect the outcome of the [case] under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986).

Analysis

1. *Introduction*

Petitioner contends that the Board should reverse or dismiss her exclusion and that the ALJ's determination that her exhibits were inadmissible denied her due process of law. She also asks for a waiver of the exclusion. Petitioner included 24 exhibits with her request for Board review, 5 of which duplicate documents that she previously proffered and the ALJ excluded from evidence.

[5] While the ALJ refers to a September 18, 2018 document and cites "P. Br. at 12" as the source of Petitioner's arguments, ALJ Decision at 6, we note that the September 18, 2018 document containing the arguments was marked by Petitioner as "Exhibit 110" and is located in the record on the 12th unnumbered page of Petitioner's October 24, 2018 submission. While Petitioner's designation of the document as an exhibit and the ALJ's citation to "P. Br. at 12" are confusing, the ALJ properly addressed the content of the document as Petitioner's legal arguments against exclusion, not as evidence or proof of any fact.

As discussed below, Petitioner's arguments mischaracterize the scope of the I.G.'s determination and mostly consist of irrelevant assertions and convoluted collateral attacks on the conviction underlying her exclusion. Throughout her request for review, Petitioner refers to herself, JLF II, and JLF III collectively as petitioners, and she indicates that the I.G.'s decision excluded the two companies as well as herself. *See, e.g.*, Request for Review (RR) at 2-3 (referring to "the 50-year exclusion of Pets., Delores Knight (JLFII and JLFIII) from participation"); *id.* at 5 (seeking "dismissal exclusion of Delores L. Knight Pets (JLF II and JLF III)").[6] Petitioner asserts that section 1128(a)(1) of the Act was improperly applied to JLF II because it did not transact business with, or participate in, Medicare or Medicaid. *Id.* Petitioner also contends that during her criminal trial, 42 C.F.R. § 488.6, a Medicaid accreditation regulation, was improperly applied to JLF III. *Id.* at 3, 6, 15-16.

We emphasize before setting out our full analysis below that Delores L. Knight is the sole Petitioner in this matter. As the plain language of the I.G.'s notice of exclusion makes clear, and the ALJ accurately stated, the I.G.'s decision did not take any action against JLF II or JLF III in the present matter. I.G. Ex. 1; ALJ Decision at 6. Consequently, we explain below, Petitioner's contention that the exclusion should be reversed because section 1128(a)(1) was wrongly applied to JLF II has no merit. Moreover, Petitioner's arguments that the prosecution mischaracterized JLF II and misapplied a Medicaid regulation to JLF III during Petitioner's criminal case constitute impermissible collateral attacks on her conviction. As we discuss below, the undisputed material facts establish that the basis for Petitioner's exclusion exists. Undisputed material facts also establish the existence of the three aggravating factors identified by the I.G. and Petitioner does not assert that any mitigating factors exist. We conclude that the ALJ's conclusion that the length of the exclusion was not unreasonable is free from error. Lastly, we explain that we have no authority to address Petitioner's request for a waiver.

2. *The ALJ did not err in excluding Petitioner's exhibits.*

Petitioner asserts that she was "den[ied] due process of law" by the ALJ's exclusion of her exhibits from evidence. RR at 7. The exhibits that Petitioner proffered included: a summary description of Medicare; a copy of 42 C.F.R. § 488.6 (relating to participation in Medicaid); documents relating to JLF II's and JLF III's enrollment in different government health care programs; several pages of the transcript of Petitioner's criminal proceeding; and a copy of 32 C.F.R. § 199.6(b)(4)(xv), addressing home health agency requirements under Tricare. P. Exs. 100 – 109, 111.[7]

[6] Petitioner's arguments on appeal to the Board are set out in a 23-page, handwritten submission, titled "Delores Knight Brief, January 31, 2019." The submission consists of a cover page, a document titled "The Petitioner Motion for Summary Dismissal Judgment," and a document titled "The Pets Memorandum in Support of Summary Judgment Dismissal Exclusion." None of the pages are numbered, so we cite them in numerical order.

[7] As noted above, the document that Petitioner marked as exhibit 110 set out Petitioner's legal arguments on appeal to the ALJ, which the ALJ appropriately addressed and did not treat as evidence or proof of any fact.

On appeal to the ALJ, Petitioner cited the exhibits to support her contention that the I.G. had wrongly excluded JLF II and III. Specifically, Petitioner asserted that the government had alleged in the June 2015 indictment, and subsequently at trial, that JLF II and JLF III committed health care fraud against Medicaid, Medicare and the VA. Petitioner argued that JLF II should not have been excluded because it was never "a provider for Medicaid, VA, waiver Programs and Medicare." C-18-645 Letter Dated October 24, 2018 With Attachments at 12. She further asserted that JLF III should not have been excluded because in the indictment and at trial, "the government appl[ied a] regulation that did not relate to JLF III." *Id.*

The admission of evidence in appeals of I.G. exclusions is governed by regulations. During ALJ proceedings, parties may present "evidence relevant to the issues at the hearing," and the ALJ has the authority to "[r]eceive, rule on, exclude or limit evidence." 42 C.F.R. §§ 1005.3(a)(5), 1005.4(b)(10). The regulations require an ALJ to "exclude irrelevant or immaterial evidence." *Id.* 1005.17(c). When an exclusion is based on a criminal conviction, the regulations provide, the ALJ may not review the basis for the conviction and a party may not collaterally attack the conviction on procedural or substantive grounds. 42 C.F.R. § 1001.2007(d).

Applying the regulations here, we conclude that the ALJ did not err in determining that Petitioner's exhibits were not relevant or material to the basis for Petitioner's exclusion or the length of her exclusion. Petitioner's exhibits instead relate to the program participation status of each company. She cited the documents to support her arguments that the I.G. wrongly excluded JLF II and JLF III because, she contends, the prosecution in her criminal case erred in characterizing JLF II as a Medicare, Medicaid and VA provider and misapplied a CMS regulation to JLF III. C-18-645 Letter Dated October 24, 2018 With Attachments at 12. As explained by the ALJ, these arguments have no merit because the I.G. decision on appeal in this case did not exclude either company. Furthermore, Petitioner's allegations that the government erred in prosecuting her criminal case constitute collateral attacks on the conviction underlying Petitioner's exclusion, which are impermissible under 42 C.F.R. § 1001.2007(d).

3. *Petitioner is not entitled to consideration of her newly submitted evidence.*

The regulation at 42 C.F.R. § 1005.21(f) provides that if a party demonstrates to the Board that additional evidence not presented during the ALJ proceedings is "relevant and material" and that there were "reasonable grounds" for the failure to produce the evidence at the ALJ level, the Board may remand the matter to the ALJ for consideration of such evidence.

On appeal to the Board, Petitioner submitted 19 additional exhibits, numbered exhibits 002, 003, 005, 006, 010, 70, 71, 72, 73, 74, 76, 79, 104, 136, 137, 142, 143, 200, and 201.[8] These exhibits include: CMS survey, accreditation and home health services regulations; federal regulations and OMB guidelines relating to debarment and suspension of excluded persons; copies of a page from the government's sentencing memorandum in Petitioner's federal criminal case; and pages from the transcript of her criminal trial.

Petitioner did not offer any reason why she failed to produce these exhibits during the ALJ proceedings. Furthermore, Petitioner fails to demonstrate that any of these exhibits are relevant or material to the existence of the basis of her exclusion or the reasonableness of the duration of her exclusion. Petitioner appears to have proffered some of the additional documents to support the same arguments that she made to the ALJ. She again argues that JLF II was not a Medicare, Medicaid or VA provider and that the government in her criminal trial misapplied a CMS regulation to JLF III. She also asserts that "a fraudulent contract" relating to JLF II was "introduced as authentic." RR at 5-6. As explained above, the I.G. did not exclude JLF II and JLF III, and Petitioner's allegations amount to impermissible collateral attacks on Petitioner's conviction. Consequently, the exhibits relating to the status of the companies and the proceedings leading to Petitioner's conviction are irrelevant and immaterial.

It appears that Petitioner proffered the other additional documents to support a request for a waiver of the exclusion. *See, e.g.*, RR at 9-10 (citing Act § 1128(c)(3)(B) and P. Ex. 142, and stating an excluded "individual may request that CMS present, on JLF III behalf" and "JLF III [is] requesting to OIG for a waiver of the exclusion according to audit and survey by CMS Medicare Surveyor perform for years 2007 through mid 2012"). As we explain below, while the I.G. has the authority to waive an individual's exclusion from participation in federal health care programs in limited circumstances, whether an individual qualifies for such a waiver is not an issue that the ALJ or the Board may consider in these proceedings. The plain language of the I.G.'s notice of Petitioner's exclusion and the ALJ Decision made clear that Petitioner's right to appeal her exclusion is limited to two issues: (1) whether the I.G. has a basis to impose the exclusion; and (2) whether the length of the exclusion is unreasonable. I.G. Ex. 1, at 4; ALJ Decision at 4, 6. Petitioner has not demonstrated how any of her additional exhibits are relevant or material to either of these issues.

[8] Petitioner also resubmitted five of the exhibits that she filed below. P. Exs. 101 (renumbered 001), 102, 105, 106, and 109. Because we have explained in the prior section of our analysis that these documents are irrelevant and immaterial, we do not further address them here.

Accordingly, we conclude that the additional exhibits submitted by Petitioner with her request for review are inadmissible and we decline to remand to the ALJ for consideration of that evidence.

4. *The undisputed material facts establish that the I.G. had a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act.*

Two conditions must be present to support a mandatory exclusion based on an individual's conviction of a "program-related crime" under section 1128(a)(1) of the Act. First, the individual must have "been convicted of a criminal offense." Second, the offense must relate to the delivery of an item or service under Medicare or under any state health care program.

Petitioner challenges the basis of her exclusion on two general grounds. First, she argues that JLF II never transacted business with, or participated in, Medicare or Medicaid, but was only a subcontractor under the PASSPORT program. RR at 3, 5, 7-9, 16, 18-19, 21. Petitioner also asserts that a fraudulent contract relating to JLFII was "introduce[d] as authentic" in her criminal case. *Id.* at 5-6, 17. Second, she argues that a Medicaid regulation was wrongly applied to JLF III during the proceedings that led to her conviction. RR at 6-7, 11-15, 21-22.

When the I.G. excludes an individual based on the existence of a criminal conviction by a federal, state or local court, where the facts were adjudicated and a final decision was made, the basis for the underlying conviction is not reviewable and the individual may not collaterally attack it either on substantive or procedural grounds. 42 C.F.R. § 1001.2007(d); *e.g. Laura Leyva*, DAB No. 2704, at 7-8 (2016), *upheld in Leyva v. Price*, No. 8:16-CV-1986-T-27AEP (D. Fla. Apr. 24, 2017). The regulation's prohibition on collateral attacks recognizes that it is "the fact of the conviction which causes the exclusion. The law does not permit the Secretary to look behind the conviction." *Peter J. Edmonson*, DAB No. 1330, at 4 (1992); *see also Donald W. Hayes, DPM*, DAB No. 2862, at 11 (2018) (and cases cited therein for Board's consistent application of this principle). Thus, how JLF II and JLF III were characterized or analyzed in the criminal proceedings that led to Petitioner's conviction is irrelevant and immaterial to the question whether Petitioner was convicted of criminal offenses. Moreover, how the two companies were used to bill and obtain payment from the various health care programs is not relevant to whether Petitioner was convicted of the offenses. The facts bearing on Petitioner's criminal case were adjudicated, and a final decision was made -- that Petitioner was guilty of conspiracy to commit health care fraud and health care fraud as well as money laundering. It is the judgment on these criminal charges that establishes the basis for the exclusion. In this case, Petitioner does not deny the material fact, evidenced by the district court's May 17, 2017 Judgment, that she was convicted of conspiracy to commit health care fraud, health care fraud, and money laundering in violation of 18 U.S.C. §§ 1349, 1347 and 2, 1957(a) and (b)(1). I.G. Ex. 4, at 1.

Furthermore, there is no dispute of material fact that the crimes for which Petitioner was convicted included offenses related to the delivery of items or services under Medicare and state health care programs. The Board has repeatedly held that the phrase "related to" within the context of section 1128(a)(1) requires only that a common-sense nexus exists between the offense and the delivery of a health care item or service under Medicare or a state healthcare program. *See, e.g., James O. Boothe*, DAB No. 2530, at 3 (2013); *James Randall Benham*, DAB No. 2042, at 5 (2006). In addition, federal courts have "held that crimes which occur when services are billed to Medicare or Medicaid are included among those crimes which are related to the delivery of items or services under Medicare or Medicaid." *Paul R. Scollo, D.P.M.*, DAB No. 1498, at 10 (1994) (citing *Greene v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990), and *Travers v. Sullivan*, 791 F. Supp. 1471 (E.D. Wash. 1992)). As shown in the indictment and the district court's judgment, Petitioner was convicted of conspiracy to commit health care fraud and health care fraud relating to a scheme in which claims were submitted to Medicare, Ohio Medicaid, and PASSPORT (a health care program administered by the State of Ohio) for services that were not furnished or were furnished by unqualified or unauthorized persons. Moreover, Petitioner was ordered to pay restitution to Medicare and "Medicaid/PASSPORT." I.G. Ex. 4, at 6; *see also* I.G. Ex. 3, at 1, 5-7. Thus, the nature of Petitioner's criminal offenses and the government entities to which she was ordered to pay restitution --- Medicare, Ohio Medicaid and PASSPORT -- establish the required nexus or common sense connection between Petitioner's conviction and the delivery of items or services under Medicare and state health care programs. We also note that, notwithstanding Petitioner's contention that JLF II did not participate in Medicare or Medicaid, she does not deny that claims were submitted through JLF III to, and payment was received from, Medicare and Medicaid. Nor does she deny that PASSPORT, the program under which JLF II billed for services and obtained payment, was a state health care program.

5. *The 50-year period of Petitioner's exclusion is not unreasonable based on the undisputed material facts.*

Because the I.G. had a legal basis for Petitioner's exclusion under section 1128(a)(1), the only other issue before the ALJ was whether "[t]he length of exclusion is unreasonable." 42 C.F.R. § 1001.2007(a)(1)(ii). In addressing that issue, the Board has explained:

> [A]n ALJ's - and the Board's - role is limited to considering whether the period of exclusion the I.G. imposed was within a reasonable range, based on demonstrated criteria. In determining whether a period of exclusion is within a reasonable range, an ALJ may not substitute his judgment for that of the I.G. or determine what period of exclusion would be better. The preamble to 42 C.F.R. Part 1001 indicates that the I.G. has broad discretion

> in setting the length of an exclusion in a particular case, based on the I.G.'s vast experience in implementing exclusions. The preamble also states 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.

Christopher Switlyk, DAB No. 2600, at 3-4 (2014) (internal quotation marks and citations omitted); *see also Leyva*, DAB No. 2704, at 2 ("[T]he ALJ must weigh the aggravating and [any] mitigating factors and must evaluate the quality of the circumstances surrounding those factors." (internal quotation marks and citations omitted)).

Here, the ALJ concluded that the 50-year exclusion, 45 years beyond the mandatory statutory minimum, was not unreasonable in light of undisputed facts establishing the presence of the three aggravating factors identified by the I.G. and no mitigating factors. ALJ Decision at 7-9. First, the ALJ determined that there was no dispute that the acts for which Petitioner was convicted resulted in a loss to federal and state health care programs exceeding $50,000. ALJ Decision at 7; 42 C.F.R. § 1001.102(b)(1). Petitioner did not dispute that the indictment alleged losses to federal and state health care programs in excess of $7 million or that she was ordered to make restitution of over $8 million to those programs. I.G. Decision at 7 (citing I.G. Ex. 2, at 15; I.G. Ex. 4, at 5-6). The ALJ recognized that the Board has held that the "amount of the restitution is considered a reasonable valuation of [government program] financial losses." *Leyva*, DAB No. 2704, at 9; ALJ Decision at 7-8.

Second, the ALJ stated that there was no dispute that Petitioner's acts resulting in her conviction were committed over a period of more than one year. ALJ Decision at 8; 42 C.F.R. § 1001.102(b)(2). Petitioner did not contest that her criminal activities lasted roughly seven years, from approximately November 21, 2007 through November 30, 2014. Third, there was no dispute that Petitioner was sentenced to prison for 120 months, establishing the existence of the third aggravating factor. ALJ Decision at 8; 42 C.F.R. § 1001.102(b)(5).

Based on his review, the ALJ concluded:

> [T]he undisputed evidence establishes the three aggravating factors that the IG relied on to extend the period for exclusion by 45 years to a 50-year exclusion. Petitioner has not presented any evidence that would establish that the IG failed to consider any mitigating factor recognized under 42 C.F.R. § 1001.102(c) or considered an aggravating factor under 42 C.F.R. § 1001.102(b) that did not exist. I conclude that a period of exclusion of 50 years is in a reasonable range and not

> unreasonable considering the existence of three aggravating factors, including the extensive loss to federal and state health care programs, the duration of the offenses, the 120-month prison sentence, and the absence of any mitigating factors.

ALJ Decision at 9.

On our de novo review of whether summary judgment was appropriate on this issue, we conclude that the material facts are not disputed: The loss to government health care programs caused by Petitioner's crimes, over $8 million, was enormous; her criminal activities lasted for a protracted period, seven years; and she was sentenced to a lengthy, 10-year term of incarceration. In light of these aggravating factors and no mitigating factors, we find no error in the ALJ's conclusion, based on the applicable law, that the period of Petitioner's exclusion is not unreasonable. We also note that Petitioner's brief on appeal did not identify any specific exception to the ALJ's conclusion that the length of her exclusion was not unreasonable.

Accordingly, we affirm the duration of Petitioner's 50-year exclusion.

6. *We reject Petitioner's waiver request*.

Petitioner asserts that "[s]ection 1128(c)(3)(B) of the Act specifies that in the case of exclusion from participation in the Medicare program based upon section 1128(a)(1)(a)(3) or (a)(4) [sic] of the Act, the individual may request that CMS present, on JLF III behalf." RR at 9. Petitioner states: "JLF III [is] requesting to OIG for a waiver of the exclusion according to audit and survey by CMS Medicare surveyor perform for years 2007 through 2012." *Id*. at 9-10.

Section 1128(c)(3)(B) provides that –

> . . . in the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years, except that, upon the request of the administrator of a Federal health care program . . . who determines that the exclusion would impose a hardship on beneficiaries . . . of that program, the Secretary may, after consulting with the [I.G.], waive the exclusion under subsection (a)(1), (a)(3), or (a)(4) with respect to that program in the case of an individual or entity that is the sole community physician or sole source of essential specialized services in a community. The Secretary's decision whether to waive the exclusion shall not be reviewable.[9]

[9] The waiver authority is subject to paragraph (G) of section 1128(c)(3), which requires an exclusion of more than five years in circumstances not present here.

The I.G. has the authority to grant or deny a request for a waiver of an exclusion. 42 C.F.R. § 1001.1801. The regulation implementing the statute plainly states that a waiver "request must be . . . from an individual directly responsible for administering the Federal health care program" and the "decision to grant, deny or rescind a request for a waiver is not subject to administrative or judicial review." 42 C.F.R. § 1001.1801(a), (f). Moreover, the regulations governing these proceedings make clear that the ALJ's and the Board's review authority is limited to addressing whether the basis for the exclusion exists and whether the duration of the exclusion is not unreasonable. 42 C.F.R. §§ 1001.2007(a)(1), 1005.21. Accordingly, we have no authority to address Petitioner's waiver request.

Conclusion

We affirm the ALJ Decision sustaining the 50-year exclusion imposed on Petitioner by the I.G.

/s/
Christopher S. Randolph

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member