Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Farzana Begum, M.D.
Docket No. A-16-91
Decision No. 2726
August 8, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Farzana Begum, M.D. (Petitioner) appeals the April 15, 2016 decision of an Administrative Law Judge (ALJ). *Farzana Begum, M.D.*, DAB CR4588 (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 section 1128(a)(1) of the Social Security Act (Act)[1] for eight years based on her conviction for conspiracy to solicit and receive kickbacks in violation of 18 U.S.C. § 371 and 42 U.S.C. § 1320a-7b(b)(1)(A). The ALJ determined that the I.G. properly excluded Petitioner and that the eight-year exclusion period was within a reasonable range. Petitioner disputes only the length of the exclusion. For the reasons set out below, 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). Five years is the minimum period of exclusion for exclusions under section 1128(a)(1) and other mandatory exclusions. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

The mandatory minimum five-year exclusion period imposed under section 1128(a)(1) of the Act may be extended based on the application of the aggravating factors in 42 C.F.R. § 1001.102(b). In this case, the I.G. found two of the nine aggravating factors set out in

[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 1001.102(b): "[t]he acts that resulted in the conviction, or similar acts, were committed over a period of one year or more"; and "[t]he sentence imposed by the court included incarceration." 42 C.F.R. § 1001.102(b)(2), (b)(5).

If an exclusion period is extended based on the application of one or more aggravating factors, any of the mitigating factors set forth in section 1001.102(c) (and only those mitigating factors) may be considered and 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).

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 in 42 C.F.R. § 1001.102(b) and (c). *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491, at 5 (2012), 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 13 (2004), citing *Keith Michael Everman, D.C.*, DAB No. 1880, at 10 (2003).

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]

On June 27, 2012, a special grand jury sitting in the United States District Court for the Northern District of Illinois returned a 42-count indictment against Petitioner and others, including two owners of Grand Home Health Care, Inc. (Grand). Joint Stipulation of Undisputed Facts (Jt. Stip.) at ¶ 2. The indictment charged Petitioner with one count of conspiracy to solicit and receive kickbacks in violation of 18 U.S.C. § 371 and 42 U.S.C. § 1320a-7b(b)(1)(A) (Count I) and three counts of soliciting and receiving kickbacks in violation of 42 U.S.C. 1320a-7b(b)(1)(A) (Counts VII, IX, and XIX). *Id.* On December 2, 2013, Petitioner pled guilty to Count I of the indictment. The District Court accepted the plea, adjudicated Petitioner guilty of the offense as charged, and dismissed all remaining counts against Petitioner. *Id.* at ¶¶ 4, 7. By pleading guilty, Petitioner admitted that, beginning in or about 2005 and continuing through on or about March 15, 2011, she conspired with another physician (Petitioner's then-boyfriend) to knowingly and willfully solicit and receive kickbacks from Grand's owners in return for referring Medicare patients to Grand. *Id.* at ¶ 5. Petitioner admitted that, between approximately January 2006 and May 2008, Petitioner received about $177,000 in cash payments in exchange for her and her then-boyfriend's referral of Medicare beneficiaries to Grand. *Id.* at ¶ 6. From May 2008 through March 2011, Petitioner received approximately $147,000 in cash payments in exchange for referring her own patients to Grand. *Id.* On March 26, 2014, the District Court entered judgment against Petitioner and imposed on her a sentence that included 12 months and one day of incarceration[3] (the sentencing guidelines provided for 30 to 37 months of incarceration for the offense for which Petitioner was convicted). *Id.* at ¶¶ 7, 8. Petitioner also agreed to forfeit $324,000 representing the proceeds traceable to the offense. *Id.* at ¶ 8. She paid $324,000 in satisfaction of the forfeiture, as well as a fine of $60,000 and an assessment of $100. *Id.*

By letter dated July 31, 2014, the I.G. notified Petitioner that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for eight years pursuant to section 1128(a)(1) of the Act, based on her conviction in the District Court of a criminal offense related to the delivery of an item or service under Medicare or

[2] The case background 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. It is not intended to replace, modify, or supplement the ALJ's findings of fact.

[3] "Incarceration" is "imprisonment or any type of confinement with or without supervised release, including, but not limited to, community confinement, house arrest and home detention." 42 C.F.R. § 1001.2. Petitioner does not dispute that incarceration in her case falls within this definition.

a State health care program, and that the exclusion would be effective on August 20, 2014.[4] *Id.* at ¶¶ 9, 10. The I.G. also explained that the mandatory minimum exclusion period of five years was being extended (by three years) based on evidence of two aggravating factors: the acts resulting in the conviction being were committed over a period of one year or more and the sentence imposed by the District Court included incarceration. *Id*. at ¶ 11. The I.G. did not rely on any mitigating factors. *Id.*

On January 29, 2015, the government filed a motion with the District Court requesting to have Petitioner's sentence reduced based on her "substantial assistance in investigating or prosecuting another person" (G.S., who paid kickbacks to physicians for referring patients to another home health agency, not Grand) pursuant to Federal Rules of Criminal Procedure 35(b)(1).[5] *Id.* ¶¶ 13, 14; P. Ex. 13, at 1. On February 5, 2015, the District Court granted the government's motion and reduced Petitioner's sentence to nine months and 15 days. Jt. Stip. ¶ 15. Petitioner and the I.G. stipulated that, by reduction of the sentence, Petitioner "lost the opportunity to receive good time credit, which is only available for sentences greater than one year and which, if granted, could have potentially reduced her incarceration time under the original sentence to 10 ½ months." *Id.* On February 10, 2015, the District Court entered an amended judgment reflecting the reduced sentence. *Id.*

Petitioner filed a request for hearing before an ALJ. Before the ALJ, Petitioner disputed only the extension of the exclusion period by three years for a total of eight years. ALJ Decision at 6. As the ALJ noted, Petitioner conceded that she was convicted of conspiracy to solicit and receive kickbacks and that there is a basis for excluding her, pursuant to section 1128(a)(1), for a mandatory minimum period of five years. *Id*. at 6, citing P. Br. at 1, 2-3, 6 and P. Reply at 1. The ALJ concluded that there is a basis to exclude Petitioner and that the exclusion is mandatory for a minimum period of five years. *Id.* at 6, citing Act §§ 1128(a)(1) and 1128(c)(3)(B).

---

[4] The parties stipulated that the July 31, 2014 exclusion notice was sent to Petitioner's counsel with a cover letter dated September 4, 2014. Jt. Stip. at ¶ 9; P. Ex. 1. The I.G. did not dispute the timeliness of Petitioner's request for hearing. Jt. Stip. at ¶ 12. As the ALJ noted, "No issue was raised regarding the timeliness of the request for hearing in this case. The parties stipulated that the July 31, 2014 notice of exclusion was served upon counsel for Petitioner on September 4, 2014, fewer than 60 days prior to the filing of the request for hearing. Jt. Stip. ¶ 9." ALJ Decision at 2 n.2.

[5] Rule 35 of the Federal Rules of Criminal Procedure, *Correcting or Reducing a Sentence*, states in relevant part:

> (b) Reducing a Sentence for Substantial Assistance.
>
> (1) *In General.* Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.

Rule 35(b)(2) addresses government motions for reduction of a sentence more than a year after sentencing.

The ALJ noted that Petitioner admitted that her "criminal conduct spanned the time period from in or about 2005 through March 15, 2011" and, "[t]herefore, it is undisputed that [her] criminal acts occurred over a period of one year or more" to establish the aggravating factor in 42 C.F.R. § 1001.102(b)(2). *Id.* at 7. The ALJ also noted that Petitioner "agree[d]" that the district court "sentenced her to a term of incarceration" which Petitioner stipulated was "twelve months and one day of incarceration" (later reduced to nine months and 15 days). The ALJ concluded that the sentence imposed therefore included a period of incarceration to establish the aggravating factor in 42 C.F.R. § 1001.102(b)(5). *Id.* The ALJ concluded that "the two aggravating factors considered by the I.G. are undisputed and are established by the evidence" and that the I.G. was "authorized by the Secretary to rely upon these factors as grounds for extending Petitioner's exclusion by three years." *Id.*

The ALJ then considered Petitioner's assertion that two mitigating factors – 1) the District Court found Petitioner had a mental condition that reduced her culpability (42 C.F.R. § 1001.102(c)(2)); and 2) her cooperation with federal officials resulted in others being convicted and in an additional investigation or report being issued identifying program weaknesses (42 C.F.R. § 1001.102(c)(3)(i) and (ii)) – offset the aggravating factors to support a reduced exclusion to five years. *Id.* at 8. The ALJ devoted nine of 17 pages of his decision to his assessment of the evidence concerning the alleged mitigating factors and rationale for why he ultimately found an eight-year exclusion period to be within a reasonable range. *Id.* at 9-17. He concluded that Petitioner "failed to establish any mitigating factors by a preponderance of the evidence." *Id.* at 8.

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 disputes only the length of the exclusion period, asserting that extending the required minimum five years by three years is unreasonable in light of case-specific circumstances surrounding the two aggravating factors and two proven mitigating factors. Petitioner's Brief in Support of Notice of Appeal (NA) at 2.

As we explain below, the ALJ's determinations that there are two aggravating factors and no mitigating factor, and that the eight-year exclusion period is within a reasonable range, are supported by substantial evidence and are free of legal error.

1. Two aggravating factors exist.

The ALJ found that two aggravating factors exist. ALJ Decision at 7. Petitioner herself admitted to the facts that constitute the aggravating factors under sections 1001.102(b)(2) and (b)(5): that the crime for which she was convicted was committed over a period of over one year and that the District Court's sentence included incarceration. *Id.*; Jt. Stip. ¶¶ 5, 6, 8, 15. Petitioner does not dispute this on appeal.

Petitioner instead argues the existence of two mitigating factors, which she asserts minimize the negative impact of the aggravating factors. She asserts that the I.G. and the ALJ did not consider and accord appropriate weight to the "personal circumstances" surrounding her involvement in the scheme in assessing the aggravating factor in section 1001.102(b)(2). NA at 19. In her view, if, as here, the I.G. and the ALJ considered her financial gain ($324,000) from the scheme relevant, then the fact that she had an "underlying mental disorder" (narcissistic behavior disorder) during the relevant time period is a pertinent factor. *Id.* at 10, 19. Citing the manifestations of the disorder, which Petitioner says "curbed her ability to self-regulate and control her impulses due to her overwhelming need to gain approval from others" and made her "incredibly vulnerable" to the influence of others she perceived as being close to her, she asserts that her "motivation" to participate in the scheme was "self-preservation" rather than "greed" or desire for "luxury." *Id.* at 4, 19; Transcript of the November 17, 2015 ALJ hearing (Tr.) at 116-117, 173-178, 194-195, 196-198.

Petitioner also argues that, in considering the I.G.'s reliance on the aggravating factor in section 1001.102(b)(5) (imposition of a period of incarceration), the ALJ failed to accord appropriate weight to the fact that the District Court reduced the length of the incarceration period on the government's motion in exchange for her substantial cooperation after the I.G. decided to exclude her for eight years based in part on this aggravating factor. NA at 16. The reduction of the initial sentence based on her cooperation, Petitioner asserts, is a "favorable" factor "surrounding [her] initial sentence" – the duration of which she says was "significantly minimal . . . compared to the [sentencing] guidelines or even compared to the statutory maximum" – that "paints a picture of a woman who is more trustworthy" and thus supports a reduction of the exclusion period. *Id.* at 16-18.

Where, as here, at least one aggravating factor among those enumerated in 42 C.F.R. § 1001.102(b)(1)-(b)(9) is established, the I.G. has express authority to consider lengthening the exclusion period to a period longer than the mandatory minimum. 42 C.F.R. § 1001.102(b) ("Any of the following factors may be considered to be aggravating and a basis for lengthening the period of exclusion"). Accordingly, facts and arguments about the circumstances surrounding the narcissistic behavior disorder and reduced sentence, even if true or undisputed, are irrelevant for the purposes of considering an

extension of the exclusion period based on the existence of aggravating factor(s). The existence of aggravating factors is a foundational inquiry that should be considered first since any discussion about proof of mitigating factors is appropriate only if, as here, an increase in the mandatory minimum exclusion period was sought based on the existence of one or more aggravating factor(s). 42 C.F.R. § 1001.102(c). Petitioner's arguments concerning the circumstances surrounding her narcissistic behavior disorder and reduced sentence are appropriate for consideration, but only within the context of the alleged mitigating factors and, ultimately, a determination of whether the eight-year period is within a reasonable range. Therefore we will revisit the arguments later.

2. *Petitioner has not proven either of the two asserted mitigating factors.*

a. Burden of Proof

Petitioner acknowledges that in the proceedings below she bore the burden to prove the existence of the asserted mitigating factors by a preponderance of the evidence. NA at 7, 9. She argues, however, that the ALJ wrongly held her to a higher standard to prove the mitigating factors. In her brief are multiple references to the burden to which she says the ALJ held her. *Id.* at 2 ("heightened burden of proof"), 11 (the ALJ "unfairly raised the standard of proof"), 12 (he "created a higher burden of proof . . . essentially applying a but-for standard"), 13 (he "relie[d] on an impossible standard for a Petitioner to meet").

Petitioner appears to misread the ALJ Decision. We note that, earlier in the proceedings, before the hearing, the ALJ informed the parties as follows:

> In accordance with 42 C.F.R. § 1005.15(b), Petitioner bears the burden of going forward and the burden of persuasion with respect to any defense and mitigating factors. The IG bears the burden of going forward and the burden of persuasion with respect to all other issues. The burden of persuasion will be judged by a preponderance of the evidence.

May 19, 2015 Order at 11. At the beginning of the November 17, 2015 hearing, the ALJ informed Petitioner that she "bears the burden of going forward with the burden of persuasion respect to any affirmative defenses," referring specifically to the mitigating factors. Tr. at 23. In his decision, the ALJ again stated that Petitioner bears the burden to prove the asserted mitigating factors by a preponderance of the evidence. ALJ Decision

at 4, citing 42 C.F.R. §§ 1001.2007(c) and 1005.15(b); 8, citing 42 C.F.R. § 1005.15(b)(1),[6] *Stacey R. Gale*, DAB No. 1941, at 9 (2004), and *Arthur C. Haspel, D.P.M.*, DAB No. 1929, at 5 (2004). Moreover, in pages 9 and 12 of his decision, the ALJ stated that the evidence did not show that "it is more likely than not"[7] that the District Court judge found Petitioner had a mental condition that reduced her culpability or that her cooperation with the government resulted in certain outcomes. The ALJ's use of the words "it is more likely than not" is another indication that the ALJ held Petitioner to a preponderance of the evidence standard as he said he would elsewhere in his decision, and earlier in his May 19, 2015 Order and at the hearing.

We see no ALJ error. The ALJ stated that he was holding Petitioner to a preponderance of the evidence standard and we see no basis to conclude that he held her to a standard higher than the standard he said he was applying. While we appreciate that Petitioner disagrees with the ALJ's weighing of the evidence concerning the alleged mitigating factors, absent a compelling reason, the Board defers to an ALJ's weighing of the evidence, here, to determine whether Petitioner has proven the mitigating factors by a preponderance of the evidence. *See, e.g., BGI Retirement, LLC, d/b/a Crossbreeze Care Center*, DAB No. 2620, at 13 (2015). Having considered the record and Petitioner's assertions, we find, as we explain below, that the ALJ's determination that the mitigating factors were not proven is supported by substantial evidence of record.

b. Mitigating factor - section 1001.102(c)(2) (mental condition reducing culpability)

Petitioner disputes the ALJ's assessment of the evidence concerning her mental condition, arguing that the weight of the evidence supports the conclusion that the District Court judge determined that her mental condition reduced her culpability. NA at 8-11. According to Petitioner, she provided the government substantial cooperation, "endangering herself by wearing a wire to incriminate [G.S.]," a Medicare and Medicaid provider who Petitioner says initiated the kickback scheme, and later testifying against G.S. *Id.* at 11-12. Her cooperation, she says, led to the investigation of G.S. and his indictment, which constitutes a report issued by a law enforcement agency. *Id.* at 13-14.

[6] Neither party has raised any specific dispute concerning the ALJ's citation of section 1005.15(b) or section 1005.15(b)(1). As noted, the ALJ expressly stated that he was holding Petitioner to a preponderance of the evidence standard, and Petitioner herself says that this is the proper standard. We note, moreover, that section 1005.15(d) states that "[t]he burden of persuasion will be judged by a preponderance of the evidence" – the standard to which the ALJ said Petitioner would be held.

[7] *See Claiborne-Hughes Health Ctr.*, DAB No. 2223, at 4 (2008) (once CMS establishes a prima facie case of a skilled nursing home facility's noncompliance with Medicare participation requirements, the facility has the burden at hearing to prove substantial compliance with the requirements by a preponderance of the evidence, which means that "it is more likely than not that the facility was in substantial compliance"), *aff'd*, *Claiborne-Hughes Health Ctr. v. Sebelius*, 609 F.3d 839 (6th Cir. 2010), *rehearing denied* (Aug. 20, 2010).

According to Petitioner, "[e]ven if government officials already knew about [G.S.], or suspected him, the investigation really began with [her] cooperation and her discussion with the prosecutors." *Id.* at 14. Her cooperation was substantial within the meaning of the regulation, she says; otherwise, the government would not have filed a Rule 35 motion for a reduction of her sentence. *Id.* at 13.

Petitioner was diagnosed with narcissistic behavior disorder, and the I.G. does not dispute that she had the disorder "before or during the commission of the offense." 42 C.F.R. § 1001.102(c)(2); ALJ Decision at 9, citing Jt. Stip. ¶ 3 and Tr. at 119; P. Exs. 2, 3. The relevant inquiry, as the ALJ correctly indicated, is whether Petitioner has proven that the District Court determined that her narcissistic behavior disorder reduced her culpability. ALJ Decision at 9. This is what the regulation requires. *Patel v. Shalala*, 17 F. Supp. 2d 662, 667 (W.D. Ky. 1998) ("As is made clear by 42 C.F.R. § 1001.102(c)(2), evidence of this mitigating factor will be considered only if '[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 . . . that reduced the individual's culpability.'") (*affirming Sharad Patel, M.D.*, Dkt. No. A-97-50 (1997), declining review of ALJ Decision No. CR447 (1996)).

Petitioner takes the view that the ALJ reviewed the record of the criminal proceedings to determine whether the sentencing judge specifically or explicitly determined that Petitioner's narcissistic behavior disorder reduced her culpability, and argues that the ALJ "ignored established case law that a mitigating factor like [hers] can exist in a case where the judge does not specifically indicate the effect the information had on his or her decision." NA at 10. She faults the ALJ for not discussing *Arthur C. Haspel, D.P.M.*, DAB No. 1929 (2004), NA at 8, 10-11, in which the Board stated that, while the sentencing judge need not use precise language, it must "be reasonable to infer from the entire record that the presiding judge had made the determinations required by the regulation as part of the sentencing process." *Haspel*, DAB No. 1929, at 4. As we read her brief, this view seems to drive her related argument that the ALJ held her to a heightened standard of proof.

But the ALJ did not examine the record to determine only whether the sentencing judge *expressly* found reduced culpability due to the disorder. He also considered whether, in the absence of an express finding, there is sufficient basis for *inferring* such a finding. We quote the ALJ:

> [T]he [sentencing] judge's statements . . . do not show that he found that Petitioner's mental condition reduced her culpability or otherwise excused her criminal conduct. Based on my review of all the evidence . . ., there is no indication that the judge determined that Petitioner's culpability was reduced by virtue of her mental disorder . . . .

ALJ Decision at 9-10. The ALJ also acknowledged the argument that "a reasonable inference can be drawn from the lenient sentence the judge imposed that he found [Petitioner's] mental disorder reduced her culpability," *id.* at 10 (argument reasserted in NA at 8), but stated:

> [T]he mere fact that the judge sentenced Petitioner to a period of incarceration that was below the range suggested by the federal sentencing guidelines, particularly when considered in the context of his comments during sentencing, does not, in and of itself, mean that he made a finding of reduced culpability due to her mental condition . . . .

ALJ Decision at 10. And, in the last paragraph of the subsection in which the ALJ addressed this asserted mitigating factor, the ALJ wrote:

> [W]hile the sentencing transcript shows that the judge considered a number of factors when he sentenced Petitioner, her mental condition was not considered as a reason for the sentence adjudged. The . . . judge did not specifically state that he determined that Petitioner's culpability was reduced by her mental condition, and I cannot infer from his statements during sentencing or the sentence imposed that he made such a determination.

Id. at 11, citing *Marcia C. Smith, a/k/a Marcia Ellison Smith*, DAB No. 2046, at 5 (2006).

Thus, we see no merit to Petitioner's argument. The express language of the ALJ's analysis shows that the ALJ did consider whether a reasonable inference of the sentencing judge's finding of reduced culpability may be drawn. We observe that Petitioner herself quotes a portion of the ALJ's analysis in which he expressly stated that he could not infer such a finding. NA at 8, quoting ALJ Decision at 11.

There is much in the transcript of the sentencing hearing that, viewed as a whole, amply supports the ALJ's assessment of the evidence relevant to this mitigating factor. The ALJ quoted some portions of the transcript. ALJ Decision at 10, 11. One excerpt from the transcript, which the ALJ quoted, *id.* at 10, is particularly telling. The sentencing judge stated:

> The fact that as a medical doctor the defendant [Petitioner] fully understood that what she was doing was unlawful, you know, that's unfortunate.
>
> And . . . I do certainly respect all the information I have received on this personality disorder, and . . . I can certainly understand where that would be a factor here, but at the end of the day, this, to my knowledge at least, is the

> only manifestation of that behavioral disorder. There was no manifestation of it in any other fashion where she turned to unlawful or dishonest behavior.

I.G. Ex. 6, at 37. Immediately before speaking the above words, the judge said:

> When I look at the seriousness of the offense, promoting respect for the law, providing just punishment, again, [Petitioner] received more than $300,000. She took the kickbacks for more than five years. She actively solicited a boost in the per patient payment. All those underscore the seriousness of the offense, and they justify substantial punishment.

Id. The judge also stated:

> [T]he amount of the kickbacks was considerable. The conduct took place over several years. Another unfortunate aspect of [Petitioner's] involvement was her request for the payors to kick back, if they could increase the payment from $400 to $500 [per patient certification] . . . this was not an intimidation scheme. In fact, it seems that [Ms. B., an owner of Grand], who was one of the payors, and [Petitioner], one of the payees, got along very well. I don't know whether they were friends, but they certainly were friendly acquaintances. Nevertheless, by asking for an additional hundred dollars per patient, [Petitioner] was more culpable than, for instance, [Dr. P.], who simply pocketed what was offered without comment.

Id. at 32-33. *See also id.* at 33-34 (the judge, stating that Petitioner, "the number one payee in the scheme," demonstrated dishonesty and lack of integrity as a physician in a system (Medicare program) that permits physicians to "self report[]"), 40 (noting that three co-defendants who already had been sentenced, none physicians, took smaller kickbacks and were involved in the scheme for shorter periods, which were mitigating for the other defendants though not for Petitioner, "at least to the same degree"), 41-42 (stating that Petitioner and Grand's owners were "at the high end of the culpability for this offense").

The ALJ determined, and we agree, that the evidence shows that the sentencing judge recognized that Petitioner had narcissistic behavior disorder, but nevertheless found that she "appreciated the criminality of her actions" and, despite the disorder, was "highly culpable, not less culpable" for numerous reasons. ALJ Decision at 10. Among them, Petitioner, a physician entrusted to play an important role in maintaining the integrity of the Medicare program, took kickbacks for a lengthy period knowing that what she was doing was wrong. It is not accurate to characterize the ALJ's analysis as one mainly focused on Petitioner as one of the more culpable individuals involved in the scheme.

NA at 9. The ALJ did not "arbitrar[ily]" "deny proof of a mitigating factor based on the other defendants in the case." *Id.* The ALJ considered the full transcript of the sentencing hearing, during which the sentencing judge himself considered the circumstances of the scheme involving many individuals, including Petitioner, and determined that Petitioner was highly culpable.

Petitioner asserts that she has proven the narcissistic behavior disorder's "direct effect on her judgment when engaging in the illegal activity" as evidenced by the District Court's express acknowledgement of her mental condition as a factor in her favor during the sentencing phase. *Id.* at 10. According to Petitioner, we may infer that the sentencing judge made the requisite finding based on the duration of the sentence that she says was "significantly below the guidelines." *Id.* at 8.

We find no merit to this argument. There is no question the sentencing judge was well aware of Petitioner's narcissistic behavior disorder. The question is whether the judge made the requisite finding of reduced culpability. The ALJ determined there was neither an express finding nor a basis to infer such a finding. In our view, the judge's comment that "this was not an intimidation scheme" (see above, quoting I.G. Ex. 6, at 32-33), viewed in the context of his repeated statements about Petitioner's status as physician and solicitation of higher kickbacks, is revealing as it suggests the judge was not convinced that the disorder rendered Petitioner so vulnerable to the influence of others involved in the scheme that it impaired her judgment or that she could not appreciate that what she was doing was wrong so as to reduce her culpability.

Moreover, Petitioner glosses over the ALJ's analysis of portions of the transcript in which the sentencing judge discussed the importance of imposing punishment that would be an effective deterrent against future crime (ALJ Decision at 11), which, when viewed in context of the entire transcript of the sentencing proceeding, indicates that one of the judge's concerns, if not his main concern, in setting an appropriate sentence was the need for deterrence. As the ALJ noted, the judge expressly stated that he saw no "'additional . . . value to tacking on additional months'" because the judge believed the "'same lessons and values will be advanced with the 12 months and a day sentence as 30 months or any other number in between'" and that "'even a day in prison will be quite a shock for a doctor . . . .'" *Id.*, quoting I.G. Ex. 6, at 43. Nor does Petitioner point to specific evidence (and we see none) that subsequent reduction of the initial sentence had anything to do with the judge's impression of reduced culpability due to narcissistic behavior disorder. Nor does Petitioner cite any authority on point in support of her suggestion that the fact of a sentence for a period shorter than that established in the guidelines or any applicable required minimum is evidence sufficient to support an inference that the sentencing judge found reduced culpability due to a condition that potentially could affect a person's judgment. NA at 8, 10.

c. Mitigating factor - sections 1001.102(c)(3)(i) and (ii) (cooperation with government officials)

Petitioner asserts that she has proven the mitigating factor in sections 1001.102(c)(3)(i) and (ii) because her cooperation with the government resulted in the outcomes set out in this regulation. She argues that the ALJ held her to a "but for" standard of proof that "exceed[s] even that required in criminal prosecutions" to find this mitigating factor not proven even though she has "most definitively" proven that her substantial cooperation led to the investigation of G.S.'s involvement, his indictment, and his conviction. NA at 11-12, 13-14.

Petitioner again misconstrues the ALJ's analysis. As we said earlier, the ALJ did not hold Petitioner to a "but for" standard. He expressly noted that it is undisputed that Petitioner cooperated with the government, provided information about G.S., wore a wire to record conversations with G.S., and testified against G.S. He also noted that there is no dispute that G.S. was convicted or that the government moved for a Rule 35 motion that resulted in a reduced sentence for Petitioner. ALJ Decision at 12. Relying on the Board's decision in *Stacey R. Gale*, DAB No. 1941 (2004), the ALJ ultimately concluded that Petitioner did not carry her burden to "establish by a preponderance of the evidence that her cooperation . . . caused federal officials to initiate the case against G.S." or "led to the opening of a new case against [G.S.]" or that it "resulted in [G.S.'s] conviction." *Id.* at 12, 13, 15. The ALJ noted that the government's Rule 35 motion stated that Petitioner provided substantial assistance in investigating or prosecuting another person, but found that the motion did not "suggest that [her] cooperation was the key to the conviction of [G.S.]." *Id.* at 13-14. The ALJ rejected what he understood to be Petitioner's position, i.e., the I.G. should be bound by the prosecutor's characterization of her cooperation, noting that Petitioner cited no authority to support the position nor provided "more facts" to enable him to determine whether the cooperation amounted to that contemplated by sections 1001.102(c)(3)(i) and (ii). *Id.* at 14. The ALJ also noted that Petitioner's own testimony indicated that an investigation of G.S. was underway when Petitioner gave the government information about him, and that wearing a wire to record conversations with G.S. does not itself prove that her cooperation resulted in the opening of a new case against G.S. *Id.* Nor did Petitioner demonstrate to the ALJ that the information "she provided the government – as opposed to information obtained from other sources – was instrumental in obtaining [G.S.'s] conviction." *Id.* at 15.

The Board agrees with the ALJ's analysis, as to both Petitioner's burden to prove and the required proof. In *Gale*, the Board said:

> [I]t is Petitioner's responsibility to locate and present evidence to substantiate the existence of any alleged mitigating factor . . . [To prove] the factor at 42 C.F.R. § 1001.102(c)(3)(ii), Petitioner must demonstrate that she cooperated with a state or federal official and this cooperation resulted in '[a]dditional cases being investigated' . . . .

Gale, DAB No. 1941, at 9, quoting 42 C.F.R. § 1001.102(c)(3)(ii). The Board also said:

> [T]he regulation requires that the cooperation result in one of two specified forms of validation: additional cases being investigated or reports being issued . . . [It] requires an individual to demonstrate that a law enforcement official actually exercised his or her discretion and began an investigation or issued a report as a result of the individual's cooperation . . . The rule is not designed to reward individuals who may have provided evasive, speculative, unfounded or even spurious information that proved to be so useless that the government official was unable even to open a new case for investigation. Rather, the regulation is designed to authorize mitigation for significant or valuable cooperation that yielded positive results for the state or federal government in the form of a new case actually being opened for investigation or a report actually being issued.

Id. at 10-11. *See also* Final Rule, 63 Fed. Reg. 46,676, 46,681 (Sept. 2, 1998) (in response to comments on the proposed rule on this new mitigating factor, the Centers for Medicare and Medicaid Services (CMS) said that "we expect this mitigating factor to be taken into consideration only in those situations where the law enforcement agency validated the person's information by opening up a case investigation or by issuing a report").

Before the Board, Petitioner does not point to anything specific in the evidence that is contrary to the ALJ's fact-finding, or establishes that *the government initiated or opened a new investigation or case as a result of her cooperation*. Nor does Petitioner identify any evidence establishing that G.S. or others were convicted or excluded as a result of her cooperation. Rather, she repeats much of what she asserted below, which the ALJ fully addressed in his decision, arguing, unconvincingly, that the ALJ held her to an "impossible standard" of proof. NA at 13. He did not hold her to such a standard; he held her to the applicable standard.

Lastly on this mitigating factor, the ALJ concluded that the indictment against G.S., issued by a federal grand jury, Petitioner's Exhibit 10, does not constitute a report issued by an appropriate law enforcement agency that identified program vulnerabilities or weaknesses. ALJ Decision at 12, 15; 42 C.F.R. § 1001.102(c)(3)(ii). The ALJ went on to state that, "[e]ven if I treated the grand jury as an 'appropriate law enforcement

agency' within the meaning of [section] 1001.102(c)(3)(ii), the indictment does not identify 'program vulnerabilities or weaknesses,' not already well known considering the similar charges of receiving kickbacks against Petitioner and her co-conspirators." ALJ Decision at 15.

On this, Petitioner states that the indictment "meets the intended definition of a report issued by a law enforcement agency" because "it was a report to the district court issued by the federal government" that "clearly validated the cooperation of Petitioner in her interviews with the FBI" and demonstrated G.S.'s "impact" on the Medicare program. NA at 14. Petitioner maintains that G.S.'s actions were "much more condemnable than any conduct Petitioner was guilty of" and that the scheme G.S. perpetrated was a weakness in the program identified in the indictment that she says resulted in part from her substantial cooperation. *Id.*

We reject Petitioner's argument. Petitioner is again emphasizing her position that her cooperation with the government played a significant part in G.S. being convicted and that the indictment of G.S. is evidence of the benefit her cooperation provided. But there is no dispute that Petitioner cooperated with the government. The record, even without the indictment, demonstrates that Petitioner provided cooperation. There also is evidence, aside from the indictment, which demonstrates G.S.'s wrongdoing and its adverse impact on the Medicare program. *E.g.*, P. Ex. 13 (sentencing memorandum for G.S.). Moreover, importantly, the ALJ's statement that *the indictment of G.S. did not identify program vulnerabilities or weaknesses not already known to the government* (which Petitioner does not specifically dispute) is entirely consistent with his earlier finding that "Petitioner's own testimony indicates that federal officials were already investigating [G.S.'s] involvement in the kickback scheme by the time she gave them any information." ALJ Decision at 14. Thus, Petitioner has failed to show how the indictment of G.S. itself – aside from the questions of whether the grand jury is an "appropriate law enforcement agency" within the meaning of the regulation or whether an indictment is a "report" within the meaning of the regulation – is evidence of the significant benefit Petitioner says she conferred on the government. Petitioner has not demonstrated how the indictment of G.S. identified vulnerabilities or weaknesses in the Medicare program when the government already had cause to investigate, and evidently was investigating, G.S. and numerous others.

3. The eight-year exclusion period is within a reasonable range.

An ALJ reviews the length of an exclusion de novo to determine whether it is within a reasonable range in consideration of the aggravating and mitigating factors and the circumstances underlying them. *See, e.g., Joseph M. Rukse, Jr. R.Ph.*, DAB No. 1851, at 10-11 (2002); *Gary Alan Katz, R.Ph.*, DAB No. 1842, at 8 n.4 (2002). The ALJ weighed

the two aggravating factors and concluded that those factors, and the absence of mitigating factors, supported an extension of the mandatory minimum exclusion period to eight years. ALJ Decision at 16-17.

Significantly undercutting Petitioner's arguments in an effort to have the exclusion period reduced is her acknowledgment that "'she knew it was illegal to solicit and receive kickbacks in exchange for patient referrals to a Medicare provider'" (ALJ Decision at 5, quoting I.G. Ex. 4 (plea agreement), at 3) and undisputed evidence indicating that she took far more in kickbacks than any other doctor of the approximately 20 doctors involved in the kickbacks-for-referrals scheme involving Grand. I.G. Ex. 3 (sentencing memorandum), at 2; *id.* at 8 (Petitioner took over 30 percent of the total amount of kickbacks Grand paid from 2006 through 2011). Moreover, in 2009, Petitioner demanded increased kickbacks from $400 to $500 per patient certification presumably after learning that another or other participant(s) in the scheme was (were) receiving higher kickbacks. *Id.* at 2; I.G. Ex. 6, at 32-33. Petitioner admittedly took kickbacks of approximately $324,000 (Jt. Stip. ¶ 6), a significant sum.[8] Moreover, she was involved, as the ALJ noted, for "nearly five-and-a half years" (ALJ Decision at 16) and was sentenced to a period of incarceration that, even reduced to nine and a half months on the government's motion, was "relatively substantial" (*id.* at 16-17, quoting *Jason Hollady, M.D.*, DAB No. 1855, at 12 (2002) (holding that a nine-month incarceration, even with work release, was more than a "token incarceration" and was a factor supporting an eight-year exclusion)).

Petitioner has made much of certain evidence, in particular, photographs of her home that appear to show a sparsely furnished interior (Petitioner's Exhibit 9), in an effort to show that she was not motivated by a desire for material possessions, but was instead heavily influenced by others who turned her on to participating in the scheme and to asking for more kickbacks and encouraged her to buy things like a nice home and car. Tr. at 116-117, 173-178, 194-195, 196-198. She again emphasizes that she was not motivated by greed. NA at 19. What a person chooses to buy of her own volition or due to the influence or encouragement of others is not the issue. Petitioner would have us accept

[8] Petitioner repaid the government $324,000 in satisfaction of the forfeiture, agreeing that this amount represented the proceeds traceable to the underlying offense. Jt. Stip. ¶ 8. This amount is effectively restitution that is considered a reasonable valuation of financial loss to the Medicare program caused by Petitioner's crime. *See, e.g., Craig Richard Wilder, M.D.*, DAB No. 2416, at 9 (2011) ("restitution has long been considered a reasonable measure of program loss"). We note that the I.G. could have relied on a third aggravating factor in section 1001.102(b)(1) (program loss of $5,000 or more) when considering an extension of the minimum exclusion period despite the fact that Petitioner repaid $324,000, since section 1001.102(b)(1) states that "[t]he entire amount of financial loss . . . will be considered regardless of whether full or partial restitution has been made[.]" *See Laura Leyva*, DAB No. 2704, at 10 n.6 (2016). But, in this case, the I.G. exercised its discretion to rely only on two aggravating factors, in section 1001.102(b)(2) and section 1001.102(b)(5).

the argument that saving her money, presumably some of it proceeds from the scheme, rather than spending any more than she already spent at others' urging on things like furniture, indicates lack of greed that should somehow be a basis for reducing the exclusion period. It strikes us as disingenuous that she would now attempt to cast herself as someone who was simply unable to stand her ground against others who pushed her into the kickback scheme in the face of undisputed evidence of her active, lengthy participation in the scheme and solicitation of higher kickbacks to match the amounts others were being paid. Petitioner knew she was breaking the law by taking kickbacks, in an amount that the sentencing judge said was "considerable" (I.G. Ex. 6, at 32), for "more than five years" (*id.* at 37). This case hardly paints a picture of a person whose lapse in integrity was short-lived or isolated. As the ALJ said, Petitioner's "'word' is hardly a credible basis for determining that she is now trustworthy." ALJ Decision at 17.

Based on the presence of two aggravating factors and the absence of any demonstrated mitigating factors, we conclude that the eight-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.

4. The ALJ did not err in not considering Petitioner's revocation of enrollment in Medicare.

Lastly, Petitioner faults the ALJ for "completely ignor[ing]" the regulations she brought to the ALJ's attention and which she says have "persuasive value" in her case. NA at 20. Specifically, citing 42 C.F.R. § 424.535(a)(3)(ii),[9] Petitioner says that this regulation "only bar[s] providers for ten years based upon a second subsequent conviction." *Id.* (emphasis in original). In contrast, she says, "[e]xclusions" (in context, meaning revocation of enrollment in Medicare) based on "first convictions" are "purely discretionary, and do not even have the mandatory minimum five-year period at issue in this case." *Id.* She reports that CMS "excluded" her for "only three years" from the date

[9] The regulations in 42 C.F.R. § 424.535(a) enumerate the grounds on which CMS may revoke a provider's or supplier's Medicare enrollment and billing privileges. Among them is when a provider, supplier, or any owner of the provider or supplier, within 10 years preceding enrollment or revalidation of enrollment, was convicted of a Federal or State felony offense that CMS has determined to be detrimental to the best interests of the program and its beneficiaries. 42 C.F.R. § 424.535(a)(3). The offenses specified in section 424.535(a)(3) are conviction of felony crimes against persons, such as murder; financial crimes, such as insurance fraud; any felony that placed the Medicare program or its beneficiaries at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct; and any felony that would result in a mandatory exclusion under section 1128(a). *Id.* § 424.535(a)(3)(i)(A)-(D). Section 424.535(a)(3)(ii) states: "Denials based on felony convictions are for a period to be determined by Secretary, but not less than 10 years from the date of conviction if the individual has been convicted on one previous occasion for one or more offenses." The re-enrollment bar is a minimum of one year, but not greater than three years, depending on the severity of the basis of revocation. *Id.* § 424.535(c).

of her conviction, i.e., through December 2, 2016,[10] a period which she says is "considered a benchmark for a presumptively reasonable exclusion period," and, accordingly, the mandatory minimum five-year exclusion period here is "already well beyond CMS' reasonable exclusion determination." *Id.* at 20-21. We understand Petitioner's argument to be that she is a first-time offender whose Medicare enrollment and billing privileges have been revoked for a three-year period ending December 2, 2016 – a period that is shorter than the mandatory minimum period of a section 1128(a)(1) exclusion – and that this is one more consideration weighing in favor of reducing the eight-year exclusion period to five years.

An I.G. exclusion can affect an excluded individual's qualification to enroll in or maintain enrollment in Medicare. Apparently the section 1128 exclusion did result in revocation of Petitioner's enrollment. An exclusion under section 1128 and revocation of enrollment share a commonality. Both are remedial measures intended to protect the program and its beneficiaries from harm. *Robert T. Tzeng, M.D.*, DAB No. 2169, at 14 (2008) ("Revocation is a remedial measure whose purpose is not to punish the program participant for past misconduct but to protect the program and its beneficiaries from fraud, abuse, and other harm that might arise in the future."); *Donald A. Burstein, Ph.D.*, DAB No. 1865, at 12 (2003), citing *Patel v. Thompson*, 319 F.3d 1317, 1319 (11th Cir. 2003) (I.G. exclusion serves a remedial, rather than punitive, purpose, i.e., to "protect federally-funded health care programs from untrustworthy individuals"), *cert. denied*, 539 U.S. 959 (2003).

Contrary to Petitioner's argument, however, the ALJ did not err in not addressing the section 424.535(a)(3) regulations or CMS's revocation in this appeal of a section 1128 I.G. exclusion. "[R]evocation under section 424.535 and exclusion under section 1128 are distinct remedial tools, each with its own set of prerequisites and consequences for the provider or supplier." *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 13 (2009), *aff'd, Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010). *See also Dinesh Patel, M.D.*, DAB No, 2551, at 9 (2013) (distinguishing revocation from exclusion, as two

[10] Petitioner acknowledges that the record does not include evidence of revocation for a three-year period ending December 2, 2016, and offers to provide the Board proof of same if the Board determines that it should be of record. NA at 20 n.1. In general, the Board decides I.G. exclusion appeals based on the record developed through the ALJ proceedings. If, however, a party demonstrates to the Board's satisfaction that evidence not presented to the ALJ is relevant and material and that there were reasonable grounds for not presenting the evidence to the ALJ, the Board may remand the case to the ALJ for consideration of such evidence. 42 C.F.R. § 1005.21(f); *Guidelines*. Petitioner neither offers the evidence to the Board, attempting to make any such showing, nor asks for remand to have the ALJ consider such evidence in the first instance. We see no indication that she even sought to have evidence of revocation of enrollment admitted in the proceedings below. In any case, we do not see a need for evidence of revocation for the purposes of deciding this appeal and accept as true Petitioner's report that CMS revoked her Medicare enrollment for a three-year period ending December 2, 2016.

different types of administrative enforcement actions that two different Department of Health and Human Services components (I.G. and CMS) are responsible for carrying out pursuant to different authorities, i.e., 42 C.F.R. Parts 1001 and 1005 (I.G. exclusions) and 42 C.F.R. Part 424 (CMS revocation)). The statutory authority for I.G. exclusion in this case mandates a minimum exclusion period of five years, and the I.G. is empowered to increase this period where, as here, there is at least one aggravating factor with no mitigating factor to offset the effect of the aggravating factor. The ALJ reviewed the I.G.'s determination to set an eight-year exclusion period, the only matter that was before him, in accordance with the applicable authorities. We are not aware of, and Petitioner has not cited, any authority under which the ALJ or the Board may consider regulations on the revocation of Medicare enrollment or the fact of revocation for a duration that Petitioner says is shorter than the duration of the section 1128 exclusion imposed on her to determine the reasonableness of the section 1128 exclusion period.

Conclusion

The eight-year 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/
Christopher S. Randolph

/s/
Constance B. Tobias

/s/
Susan S. Yim
Presiding Board Member