Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Laura Leyva
Docket No. A-16-49
Decision No. 2704
May 24, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Laura Leyva (Petitioner) appeals the January 29, 2016 decision of an Administrative Law Judge (ALJ). *Laura Leyva*, DAB CR4516 (2016) (ALJ Decision). The ALJ sustained the determination of the Inspector General (I.G.) to exclude Petitioner from all federal health care programs under section 1128(a)(1) of the Social Security Act (Act)[1] based on her convictions for conspiracy to commit health care fraud and conspiracy to commit money laundering. The ALJ determined that the I.G. properly excluded Petitioner and that the ten-year exclusion fell within a reasonable range.

The Board affirms the ALJ Decision for the reasons discussed herein.

Legal background

Section 1128(a)(1) of the Act requires the Secretary of Health and Human Services to exclude an individual from participation in all federal health care programs if that individual 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. 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 three of the nine aggravating factors set out in section 1001.102(b): "[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

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[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.

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"; and "[t]he sentence imposed by the court included incarceration." 42 C.F.R. § 1001.102(b)(1), (b)(2), (b)(5). "Incarceration" is defined as "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. 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).

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). When determining whether an exclusion period set based on the presence of one or more aggravating factor(s) "falls within a reasonable range, the ALJ must weigh the aggravating and [any] mitigating factors" and "must evaluate the quality of the circumstances surrounding these factors." *Jeremy Robinson, D.C.*, DAB No. 1905, at 11 (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]

By indictment filed in the United States District Court for the Middle District of Florida, Tampa Division, on March 20, 2014, Petitioner was charged with two felonies – conspiracy to commit health care fraud and conspiracy to commit money laundering in violation of 18 U.S.C. §§ 1349 and 1956(h). I.G. Ex. 2. The indictment states that, beginning in June 2007 through November 2009, Petitioner conspired with others to defraud Medicare by, among other things, submitting false claims for Medicare payment, paying individuals to obtain Medicare beneficiaries' personal health care information to be used to file false claims, and paying co-conspirators in exchange for falsified medical records for the purpose of claiming Medicare payment. Petitioner was charged with committing these crimes using two Florida companies, American Rehab of Kissimmee, Inc., a/k/a American Rehab of South Florida, Inc. (American Rehab), a comprehensive

[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.

outpatient rehabilitation facility, and Physician Consultants, Inc., where she held various executive positions. I.G. Ex. 2, at 8-14. She pleaded guilty to both crimes. *Id*. at 10, 13; I.G. Ex. 3; I.G. Ex. 4, at 1. By Amended Judgment signed by the sentencing judge on January 28, 2015, the court imposed on Petitioner a sentence that included incarceration for time already served[3] and eight months of home detention, and ordered Petitioner to pay CMS restitution of $216,139.32. I.G. Ex. 4, at 1, 2, 4, 5; I.G. Ex. 5, at 4.

By letter dated June 30, 2015, the I.G. notified Petitioner that she 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 ten years, pursuant to section 1128(a)(1) of the Act, due to her conviction of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. I.G. Ex. 1, at 1. 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 it was extending the minimum exclusion period of five years required under section 1128(c)(3)(B) by five years for a total of ten years based on the presence of three aggravating factors. *Id.* at 1-2; *see also* 42 C.F.R. § 1001.102(b)(1), (b)(2), and (b)(5).

Petitioner requested ALJ review.[4] Before the ALJ, Petitioner did not dispute that she was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program, or that her exclusion under section 1128(a)(1) of the Act mandates a minimum exclusion period of five years. She challenged only the lengthening of the exclusion period to ten years. ALJ Decision at 1; P. Br. to ALJ at 1-2. The ALJ said, "Petitioner asserts . . . that the evidence, when viewed in its entirety, either does not establish the presence of aggravating factors or shows that her crimes are far less significant than the I.G. alleges." ALJ Decision at 3. Petitioner essentially argued, the ALJ stated, that notwithstanding a conviction by guilty plea, the sentencing judge determined that Petitioner had played a minor role in the conspiracy scheme since her conduct was limited to destroying documents related to the conspiracy after learning that a criminal investigation was underway. She also asserted that she realized no personal gain from the scheme. *Id.*, citing P. Ex. at 1, 5-6; P. Br. to ALJ at 2-17.

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[3] Petitioner raises a dispute about this aspect of the sentence, which we will address in more detail later.

[4] The ALJ admitted into the record every exhibit offered by the parties and, since neither party offered any witness testimony, decided the case based on the written record without convening a hearing. *See* ALJ's Order and Schedule for Filing Briefs and Documentary Evidence at 2-3 (stating that each party "must reduce proposed witness direct testimony to writing" and submit it as a proposed exhibit, "accompanied by a motion to receive witness testimony that explains why the testimony is not cumulative," and that after considering any response by the opposing party, the ALJ will determine whether further proceedings are necessary).

The ALJ rejected Petitioner's arguments as unpersuasive. The ALJ wrote:

> The evidence offered by the I.G. overwhelmingly establishes the presence of three aggravating factors [in 42 C.F.R. § 1001.102(b)(1), (b)(2), (b)(5)].
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> * * *
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> [W]hile it may be true that Petitioner's role in the conspiracy was minor, she nonetheless was a participant in that conspiracy and by participating she participated in a scheme to defraud Medicare. That is made evident by her guilty plea. She explicitly pleaded guilty to involvement in a two-year conspiracy to defraud the program. She cannot now retract that plea and assert that she is actually not guilty of her admitted crime. *See* 42 C.F.R. § 1001.2007(d) (prohibiting collateral attack, on substantive or procedural grounds, of an underlying criminal conviction serving as the basis for the exclusion.).
>
> Moreover, the impact of her participation in that conspiracy was not, as she claims, de minimis. Destruction of documents in order to obstruct a criminal investigation is a serious crime. By her own admission Petitioner willfully impeded an investigation, obviously seeking to protect herself and others from the reach of the law. Furthermore, although the sentencing judge found Petitioner to be less culpable than others[,] she also clearly found that Petitioner's crimes were serious. That is reflected both in the amount of the restitution to CMS that Petitioner was sentenced to pay – more than $200,000 – and in the fact that Petitioner was sentenced to a fairly lengthy period of incarceration.

ALJ Decision at 3-4. The ALJ found that Petitioner's participation in the conspiracy, the resulting financial loss, and a sentence that included incarceration together amounted to "persuasive proof that Petitioner is not trustworthy." *Id.* at 4. The ALJ concluded that exclusion for ten years is "not unreasonable" in light of the three aggravating factors. *Id.*

The ALJ also found no evidence that Petitioner's alleged cooperation with prosecuting authorities led to the "conviction of others or other specific administrative actions" and, accordingly, Petitioner's assertion that "her cooperation should be considered in mitigation [was] irrelevant." *Id.*, citing 42 C.F.R. § 1001.102(c)(3). Lastly, the ALJ found evidence in the form of "statements from associates and other individuals attesting to [Petitioner's] character and her good works . . . irrelevant because they do not relate to any mitigating factor." *Id.*

Petitioner requests review of the ALJ Decision by the Board.

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. Substantial evidence is "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

Petitioner's position before the Board

Petitioner again disputes only the length of the exclusion period, asserting that a five-year extension of the required minimum five years is unreasonable. Petitioner's brief to the Board (P. Br.) at 8. Referring to the transcript of her Sentencing/Evidentiary Hearing, Petitioner asserts (*id.* at 3-9) that the District Court made determinations about her conduct that are evidence that "fairly detracts" from the weight of the evidence the ALJ relied on to uphold the ten-year exclusion and the Board must consider it (*id.* at 9-10). By "completely disregarding" such evidence (*id.* at 3), Petitioner asserts, the ALJ rendered a decision that is not supported by substantial evidence of record (*id.* at 3, 9-10).

Petitioner suggests, also, that the Board consider whether the ALJ Decision was "arbitrary and capricious" because it "directly contradict[s]" the District Court sentencing judge's findings as to a petitioner's "(lack of) culpability" and this enhanced exclusion case is an "atypical" one and the I.G. has not cited any "truly comparable" precedential authority to support enhancement of the mandatory minimum exclusion period. *Id.* at 10-11.

According to Petitioner, she did not even know that her "company" was being used to perpetrate fraud until March 2009, at which time she says the fraudulent activity ended. P. Br. at 3, 4 (citing I.G. Ex. 5, at 1 and P. Ex. 1, at 5, 6), 5. She maintains that she did not even become aware that the purported Medicare "billing errors" were actually "fictitious" until July 2009. *Id.* at 5. She asserts that she was not specifically found to have been responsible for any financial losses (*id.* at 3) and that her only wrongdoing was the destruction of 13 patient files in late 2009, after the activity ended (*id.* at 5-6).

As for the restitution, Petitioner asserts that she agreed to pay it "even though the District Judge had just found that she had no responsibility for the use of her clinics to commit fraud." *Id.* at 5. Her commitment to pay restitution, she says, is akin to a "taxpayer or contractor" agreeing to return "an overpayment by the Government without any implication of the taxpayer or contractor's commission of fraud." *Id.* According to Petitioner, her decision to assume personal responsibility for a loss for which she was not personally found criminally liable is indicative of trustworthiness, thereby distinguishing her case from the typical exclusion case in which restitution represents the amount of loss the excluded individual caused by a wrongful action to establish the presence of an aggravating factor. *Id.* at 4 (citing 42 C.F.R. § 1001.102(b)(2)), 5. Her trustworthiness is reinforced, she offers, by the letters from colleagues and associates attesting to her good character and good works. *Id.* at 6. According to Petitioner, despite the ALJ's determination that the letters were irrelevant because they do not relate to a mitigating factor (*see* 42 C.F.R. § 1001.102(c)), they nevertheless do show the District Court's finding that Petitioner's destruction of 13 patient files reflected "a singular lapse in judgment of an ordinarily very honest person" and thus are relevant to the extent they show the aberrational nature of her act. *Id.*

Petitioner also raises disputes specific to the aggravating factor in section 1001.102(b)(5) (incarceration). She asserts that the ALJ misstated that she "was sentenced to a fairly lengthy period of incarceration" and for "time served in prison from the date of her arrest until the date of her sentencing." *Id.*, quoting ALJ Decision at 3, 4. Petitioner maintains that she was "arrested out-of-district, spent a weekend in jail (May 9-12, 2014) while her family arranged bond, then waived removal and voluntarily appeared in the Middle District of Florida, where she remained free and worked in her profession without incident while her case was adjudicated." *Id.* Petitioner readily admits that the judge ordered her to home detention (*id.* at 7 n.1), but says that the judge called home detention a "non-incarcerative sanction," noting the lack of any "blemish" on Petitioner's "record." *Id.* at 7, quoting P. Ex. 1, at 5 and 10. That, Petitioner asserts, is indicative of the judge's belief that the act of destroying documents was aberrational behavior (*id.* at 7) that warranted a sanction equivalent to "'Obstruction of a Healthcare Investigation' (18 U.S.C. § 1518)," which Petitioner says is what the judge determined Petitioner "actually *did*" (*id.* at 9) (emphasis in original).

Analysis

The Board determines that the ALJ Decision is supported by substantial evidence of record and is free of legal error. For the reasons explained below, the Board agrees with the ALJ that the ten-year exclusion period is within a reasonable range.

1. Petitioner cannot collaterally attack the felony conviction for conspiracy.

The overarching theme of Petitioner's arguments is that, despite her felony convictions – by a guilty plea – for conspiracies to commit health care fraud and money laundering, her personal knowledge of the fraudulent activity came late, and her personal role in the scheme was minimal in scope and duration. Her wrongdoing, she maintains, was limited to destroying some patient files, an isolated incident out of character. She further maintains that she "agreed" to pay restitution and that this shows that she is not the untrustworthy person the convictions portray her to be.

Petitioner does not attack the underlying felony convictions, based on her guilty plea, for conspiracies to commit health care fraud and money laundering. Nevertheless, in her attempt to have the exclusion period reduced, Petitioner makes a collateral attack on the convictions by citing extraneous facts – such as findings made for sentencing purposes and testimonies about her character – that she claims prove that her role in the conspiracies was smaller than stated in the indictment and that she is trustworthy. Petitioner sought to have the ALJ look behind the conviction, and is now urging the Board to do the same.

By regulation, a petitioner is prohibited from collaterally attacking the underlying conviction on which the exclusion is based. Section 1001.2007(d) provides:

> When the exclusion is based on the existence of a criminal conviction or a civil judgment imposing liability by Federal, State or local court, a determination by another Government agency, or any other prior determination where the facts were adjudicated and a final decision was made, 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.

The facts bearing on the criminal case were adjudicated, and a final decision, i.e., convictions for conspiracies to commit health care fraud and money laundering, made. Regardless of what Petitioner believes or now asserts was her personal role in the conspiracy, and whatever the sentencing judge determined was appropriate punishment for Petitioner by applying the sentencing guidelines, it is the judgment on the criminal charges, not findings made for sentencing purposes, that forms the basis for the exclusion. As the Board said, "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.'" *Michael D. Miran, Esta Miran, & Michael D. Miran, Ph.D. Psychologist P.C.*, DAB No. 2469, at 4 (2012), quoting *Peter*

J. Edmonson, DAB No. 1330, at 4 (1992). (Emphasis added.) Petitioner's arguments are a collateral attack on the convictions, and we reject them consistent with the regulatory mandate.

Moreover, Petitioner's attempt to portray herself as a trustworthy person whose only blemish is the destruction of records, purported to be a single incidence of lapse in judgment, is specious as a matter of fact and disregards undisputed evidence that shows her to be untrustworthy. By pleading guilty to the charges in the indictment, Petitioner admitted that she personally participated in a scheme to defraud Medicare, concealed the criminal activity, diverted the proceeds obtained through fraud for personal gain, and helped enrich co-conspirators for their role in perpetuating the fraud. *See* I.G. Ex. 2; I.G. Ex. 4, at 1. Petitioner, who was President, Secretary, Director, Registered Agent, and Administrator of American Rehab, and had signature authority over the company bank account (I.G. Ex. 2, at 9), played a critical role in perpetuating and concealing the fraud since she personally controlled the company operations, records, and finances. She personally benefitted from the scheme. Of over $2.5 million in claims made between October 2007 and March 2009 by American Rehab – the company Petitioner personally controlled – Medicare paid American Rehab over $1 million. *Id.* at 10. In addition, it is important to point out that the court ordered restitution to restore the victim (the Medicare program) to its state prior to commission of the crimes. *See* I.G. Ex. 4, at 5. Restitution in this case was not voluntary as Petitioner suggests by her statements to the effect that she "agreed" to pay restitution. Petitioner's statements do not accurately reflect the dynamic between a criminal defendant and a sentencing court. Moreover, we cannot ignore the evidence that Petitioner does indeed bear personal responsibility for such loss because, according to the indictment, she and her co-conspirators jointly caused that loss and she herself benefitted from the scheme. I.G. Ex. 2, at 9-13. We also agree with the ALJ that the act of destroying patient files, to which Petitioner readily admits (P. Ex. 5, at 1), implicates her untrustworthiness inasmuch as the purpose of and motive behind that act was to obstruct a criminal investigation and to shield herself and others from the reach of the law. ALJ Decision at 3.

As for Petitioner's assertion that the "letters of colleagues and associates" offered to the District Court to aid in sentencing are relevant to show trustworthiness (P. Br. at 6), Petitioner did not submit the letters to the ALJ. She submitted only the sentencing memorandum (prepared by Petitioner's attorney, who represents Petitioner in the I.G. proceedings) that includes excerpts from the letters (P. Ex. 5, at 3-9), and portions of the transcript of the District Court sentencing hearing during which a few individuals stated their opinions on Petitioner's "altruistic" nature and her trustworthiness, and belief that

Petitioner was not involved in the fraud (e.g., P. Ex. 4, at 14, 15, 27).[5] Aside from the fact that the letters are not part of the record on which we must base our decision, they are irrelevant because the mitigating factors ALJs and the Board may consider are limited to those listed in the regulations, and character references are not among them. 42 C.F.R. § 1001.102(c); *Baldwin Ihenacho*, DAB No. 2667, at 8 (2015) ("The ALJ correctly concluded that the alleged character references are irrelevant because the regulations do not provide for consideration of character as a mitigating factor. ALJs (and the Board) are limited to considering the mitigating factors set forth in the regulations . . . at section 1001.102(c).").

2. *Petitioner has not shown that a ten-year exclusion is outside a reasonable range, and we find the ALJ's analysis on the reasonableness issue supported by substantial evidence of record and free of error.*

The I.G. extended the mandatory minimum five-year exclusion period by five years based on three 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; and (3) the court sentenced Petitioner to incarceration. I.G. Ex. 1, at 1-2; 42 C.F.R. § 1001.102(b)(1), (b)(2), and (b)(5). The ALJ weighed the three aggravating factors and concluded that the factors in concert supported an extension of the mandatory minimum exclusion period by five years, with no evidence of mitigating factor(s) to offset the extension. ALJ Decision at 3, 4. For the reasons discussed below, we agree that a ten-year exclusion is within a reasonable range and uphold the ALJ Decision.

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

It is undisputed that Petitioner owes CMS $216,139.32 in restitution. I.G. Ex. 4, at 5; I.G. Ex. 5, at 4. The amount of the restitution is considered a reasonable valuation of financial losses of the program. *See, e.g., Miran* at 5; *Juan de Leon, Jr.*, DAB No. 2533, at 5 (2013); *Craig Richard Wilder*, DAB No. 2416, at 9 (2011). The record therefore establishes program loss of at least $5,000, the amount that triggers the applicability of the aggravating factor in section 1001.102(b)(1).

As the ALJ said, and we agree, there is evidence of "the financial impact of her crime" committed in conspiracy with others. ALJ Decision at 4. That "financial impact," or loss to the program, is measured by the amount of the restitution. Moreover, it is entirely

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[5] Presumably that is why the ALJ referred to the character references using the more general term "statements" to account for both the excerpts from the letters and testimony given during the sentencing hearing. Evidently the letters were submitted to the District Court as attachments to the sentencing memorandum. *See* P. Ex. 5, at 3.

reasonable to consider a program loss amount substantially larger than the $5,000 threshold – which, here, is over 40 times the threshold amount – an "exceptional aggravating factor" to be accorded significant weight. *See Sushil Aniruddh Sheth, M.D.*, DAB No. 2491, at 7 (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 *Jeremy Robinson* at 12, and *Donald A. Burstein, Ph.D.*, DAB No. 1865, at 12 (2003).[6]

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

Petitioner attempts to minimize the duration of her part in the scheme to less than a year by asserting that she did not learn that her company was being used to perpetrate Medicare fraud until very late in the events leading up to the conviction. Whether or not that is true, the indictment specifically charged Petitioner with committing the crimes of conspiracy to commit health care fraud and conspiracy to commit money laundering "[b]eginning in or around June 2007 and continuing through in or around November 2009." I.G. Ex. 2, at 11, 13. By pleading guilty to the charges as stated in the indictment (P. Ex. 5, at 1), Petitioner admitted to participating in conspiracies that lasted for more than two years, well over the one-year threshold to support the existence of the aggravating factor in 42 C.F.R. § 1001.102(b)(2). As the Board stated in *Vinod Chandrashekhar Patwardhan, M.D.*, DAB No. 2454, at 7 (2012) (quoting *Donald A. Burstein*, *Ph.D.* at 8), 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 . . . ." The indictment containing the charges to which Petitioner pled guilty is evidence of her participation in a conspiracy to defraud Medicare that lasted for over two years. We conclude that this amply demonstrates more than a short-lived lapse in integrity.

c. Sentence included incarceration

Petitioner states that the ALJ Decision includes misstatements about the "lengthy period of incarceration" (ALJ Decision at 4). Petitioner acknowledges that she spent "a weekend in jail" and that the sentencing judge ordered Petitioner to confinement at home for eight months. P. Br. at 6-7. However, Petitioner notes that the sentencing judge

[6] We note, moreover, that Medicare paid American Rehab over $1 million for over $2.5 million in claims made between October 2007 and March 2009. I.G. Ex. 2, at 10. 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[.]" 42 C.F.R. § 1001.102(b)(1). The Board has said that "[t]he only reasonable meaning of this directive is that the amount of any restitution made will not be used to offset the amount of financial loss used in considering this aggravating factor." *Robert Seung-Bok Lee*, DAB No. 2614, at 6 (2015). *See also Paul W. Williams, Jr. & Grand Coteau Prescription*, DAB No. 1785, at 3 (2001) (citing the quoted regulatory language in rejecting the argument that the magnitude of the theft is irrelevant if the government succeeds in recovering the loss). What is relevant here is that there is indeed program loss. And, the amount of program loss is significantly higher than the amount of the restitution, which is significantly higher than the $5,000 threshold amount for triggering the aggravating factor.

characterized home detention as a "non-incarcerative sanction" and asserts that the judge's choice of home detention rather than sentencing her to prison confinement reflects the judge's belief that Petitioner's offense was of a "relatively *less* serious nature." *Id.* at 7 (emphasis in original).

While acknowledging that she spent a weekend in jail and was sentenced to eight months of home confinement, Petitioner challenges the ALJ's characterization of her incarceration as "a fairly lengthy period of incarceration." P. Br. at 6. Petitioner also suggests we should consider the sentencing judge's characterization of the home detention as a "non-incarcerative sanction." *Id.* at 6-7. However, we need not decide whether the ALJ's characterization of the length of Petitioner's incarceration is accurate, and how the sentencing judge characterized the home confinement is immaterial. We are bound by the definition of incarceration in the applicable regulation, which expressly defines that term to include home detention. 42 C.F.R. § 1001.2 ("Incarceration" means "imprisonment or any type of confinement with or without supervised release, including, but not limited to, community confinement, house arrest and home detention."). *See also Stacy Ann Battle, D.D.S., and Stacy Ann Battle, D.D.S., P.C.*, DAB No. 1843, at 7 (2002) (rejecting the argument that petitioner's sentence, which included placement in a halfway house, did not include incarceration in the "traditional" sense, since "incarceration" as defined in section 1001.2 "is, on its face, broad enough to include placement in a halfway house which by nature is more intrusive than placement for detention in one's own home"); *Brenda Mills, M.D., a/k/a Brenda Kluttz,* DAB CR1461, at 4 (2006) (six months of home confinement establishes incarceration), *aff'd*, DAB No. 2061 (2007). Moreover, section 1001.102(b)(5) states only that "[t]he sentence imposed by the court included incarceration"; it says nothing about the minimum duration of incarceration, let alone that the incarceration must be in a prison facility. Thus, our conclusion that the ALJ did not err in concluding that the additional five years of exclusion is within a reasonable range is based on the fact that Petitioner was sentenced to "incarceration" within the meaning of the regulation (regardless of how the length of incarceration is characterized) and the presence of the two other aggravating factors and none of the mitigating factors specified in the regulations.

Although Petitioner focuses heavily on the incarceration issue, our conclusion to uphold the ALJ on the issue of the reasonableness of the exclusion period, as indicated above, is not based on the "incarceration" aggravating factor alone, but on that factor accompanied by two other aggravating factors. Given that the restitution amount is over 40 times the threshold amount for applying the aggravating factor in section 1001.102(b)(1), this alone may be considered an "exceptional aggravating factor" that could have supported an extension of the exclusion period to ten years. *See Sheth* at 7. If, as here, the presence of the aggravating factor in section 1001.102(b)(1) alone would support an extension of the exclusion period by five years, then the presence of two more aggravating factors surely supports the reasonableness of the extension, at least absent any mitigating factors which, as we discuss below, is the case here.

3. *Petitioner does not challenge the ALJ's determination that Petitioner had shown no mitigating factors.*

Petitioner does not allege before the Board the presence of any of the mitigating factors specified in section 1001.102(c), which are the only mitigating factors ALJs and the Board may consider. Apparently Petitioner argued below that the mitigating factor of cooperation with Federal or State officials (*see* 42 C.F.R. § 1001.102(c)(3)) applied because the ALJ determined that in the absence of proof that Petitioner's alleged cooperation with the prosecuting authorities led to the "conviction of others or to other specific administrative actions," there was no basis for mitigation to offset the effect of the aggravating factors. ALJ Decision at 4, citing 42 C.F.R. § 1001.102(c)(3); P. Br. to ALJ at 11-13. Petitioner does not allege factual or legal error with regard to this determination, and we therefore summarily affirm it. Since Petitioner has not identified any mitigating factor recognized by section 1001.102(c) that is applicable to her case, and we agree with the ALJ that three aggravating factors are present, we conclude that the five years added to the mandatory minimum exclusion period of five-years is within a reasonable range.

Conclusion

The ALJ considered the three aggravating factors on which the I.G. relied to exclude Petitioner for ten years and weighed those factors under the circumstances of this case appropriately. The period of exclusion imposed by the I.G. and upheld by the ALJ on de novo review 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