Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Mohamad Ahmad Bazzi
Docket No. A-18-108
Decision No. 2917
December 18, 2018

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Mohamad Ahmad Bazzi (Petitioner) appeals the June 28, 2018, decision of an Administrative Law Judge (ALJ) of the Departmental Appeals Board, Civil Remedies Division (CRD), *Mohamad Ahmad Bazzi*, DAB CR5128 (2018) (ALJ Decision), upholding the Inspector General's (I.G.) exclusion of Petitioner from participating in all federal health care programs for a period of eighteen years, pursuant to section 1128(a)(1) of the Social Security Act (Act).[1] The ALJ concluded that the I.G. properly excluded Petitioner and that the length of the exclusion was reasonable, based on the application of three aggravating factors and one mitigating factor.

For the reasons set out below, we affirm the ALJ's decision.

Legal Background

Section 1128(a)(1) mandates that the Secretary of Health and Human Services exclude from participation in all federal health care programs "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program." Subsection (c)(3)(B) provides that, for individuals excluded under (a)(1), "the minimum period of exclusion shall be not less than five years . . . ."

[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. Cross-reference tables for the Act and the United States Code can be found at http://uscode.house.gov/table3/1935_531.htm and https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

The implementing regulations list several "aggravating" factors that "may be considered to be . . . a basis for lengthening the period of [a mandatory] exclusion." 42 C.F.R. § 1001.102(b). In addition, "[o]nly if any of the aggravating factors . . . justifies an exclusion longer than 5 years, may mitigating factors be considered as a basis for reducing the period of exclusion to no less than 5 years." *Id*. § 1001.102(c). The only mitigating factors that may be considered are those specifically listed in the regulation. *Id*.

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 any period of exclusion longer than the mandatory minimum of five years is unreasonable. 42 C.F.R. §§ 1001.2007(a)(1), (2), 1005.2(a). The excluded individual may not collaterally attack "the basis for the underlying conviction" in an appeal "[w]hen the exclusion is based on the existence of a criminal conviction . . . ." *Id*. § 1001.2007(d). The ALJ will issue an initial decision and any party may appeal that decision to the Departmental Appeals Board (Board). *Id*. §§ 1005.20, 1005.21.

Case Background[2]

Petitioner was a licensed pharmacist and owner of Advanced Pharmacy Services (Advanced). ALJ Decision at 1. Petitioner was charged with and pled guilty to violating 18 U.S.C. §§ 1347 and 1956 (health care fraud and money laundering, respectively). *Id*. at 2. Beginning around January 2008 and continuing through around December 2013, Petitioner paid Medicare beneficiaries cash bribes and gave them controlled substances to induce them to present fraudulent prescriptions to Advanced. *Id.* He then billed Medicare for prescription medications that he never purchased or dispensed. *Id*.; I.G. Ex. 3, at 4. Petitioner then sent the proceeds from this scheme to an overseas bank account owned by a non-profit entity that he controlled. ALJ Decision at 2. Petitioner was sentenced to 32 months' incarceration. *Id*.; I.G. Ex. 4, at 2. Petitioner also was ordered to pay restitution in the amount of $3,493,088.28 to the Medicare Trust Fund. ALJ Decision at 2.

By letter dated August 31, 2017, the I.G. notified Petitioner that he was "being excluded from participation in any capacity in the Medicare, Medicaid, and all Federal health care programs . . . for a minimum period of 18 years" due to Petitioner's "conviction . . . of a criminal offense related to the delivery of an item or service under the Medicare or State health care program, including the performance of management or administrative services relating to the delivery of items or services, under any such program." I.G. Ex.

[2] The facts contained in this section derive from the ALJ Decision and the record and are presented to provide context for the discussion of the issues raised in this appeal. Nothing in this section is intended to replace, modify, or supplement the ALJ's findings of fact.

1, at 1 (emphasis omitted). The I.G. further informed Petitioner that the length of the exclusion is greater than the minimum of five years because there was evidence of three aggravating factors: (1) "[t]he acts resulting in the conviction . . . caused . . . a financial loss to a government or program . . . of $50,000 or more"; (2) "[t]he acts that resulted in the conviction . . . were committed over a period of one year or more"; and (3) "[t]he sentence imposed by the court included incarceration." *Id.* at 2. The letter also noted that the I.G. "ha[d] taken into consideration" as a mitigating factor Petitioner's "cooperat[ion] with Federal or State officials." *Id*.

Petitioner then timely requested an ALJ hearing. Petitioner's Request for Hearing. Petitioner asserted that he was challenging the length of the exclusion (but not the I.G.'s basis for exclusion), arguing that the long period would hinder his ability to practice, provide for his family, and fulfill his restitution obligation and that he "gave significant assistance to both state and federal authorities in prosecuting other individuals who committed crimes." *Id*. at 1-2. The ALJ conducted a pre-hearing conference and thereafter issued an order summarizing the conference along with a schedule for filing briefs. Order and Schedule for Filing Briefs and Documentary Evidence (Order). The Order directed the parties to submit all documentary evidence with their briefs and to submit all witness testimony as written direct testimony in the form of an affidavit or declaration as exhibits submitted with their briefs. *Id*. at 6, § 7.c. Petitioner's deadline for submitting his brief and supporting exhibits was April 20, 2018. *Id*. at 7, § 8.b. On March 19, 2018, the CRD received Petitioner's Informal Brief with attached Petitioner's Brief in Support of Pending Exclusion (P. Br.). Petitioner argued that the "factors cited by the I.G. are not present in the instant matter to support an unreasonable 18 year exclusion period." P. Br. at 1. Petitioner further argued that an additional mitigating factor, i.e., "that the Petitioner had an alcohol dependency at the time of the alleged criminal activity," was present, but the I.G. was not aware of, and, therefore, did not consider, this factor. *Id*. at 4. Petitioner stated that he was "attending the 500 hours Residential Drug Abuse (RDAP) program as indicated by the Court" and that he was satisfactorily "completing the program." *Id*.

By letter dated March 23, 2018, at the direction of the ALJ, the assigned CRD attorney informed Petitioner that, although he referred to documents in his brief, the CRD had not received any proposed exhibits. The letter further informed Petitioner that, although he requested an in-person hearing, he did not submit any written direct testimony as the ALJ had ordered him to do. The letter also reminded Petitioner that he had until April 20, 2018, to submit any additional documents. On April 11, 2018, the CRD received another submission from Petitioner entitled "Exhibits and Documentary Evidence." Petitioner stated that he had several exhibits "but given space limitations at [the correctional institution], [he] has had to place them in storage until his release as a matter of federal regulations as to the safety and security of [the correctional institution.]" Exhibits and

Documentary Evidence. He further stated that, upon his release, he would submit copies of the documents and that "[t]he listed documentary evidence is crucial to the Petitioner's defense and he will be prejudiced in its absence." *Id*. Petitioner then provided a list of evidence and witness testimony he intended to submit—

> Documentary Evidence
>
> Exhibit 1 – AAA, etc.[3] All paper copies of the subject prescriptions.
> Exhibit 2 – Copies of all pharmacy benefit manager transactions, a copy of which shall be provided on a portable, external drive.
> Exhibit 3A & B & C: W-2 Forms for [H], [K] and [B].[4]
>
> Witnesses
>
> W-1 Mohamad [Ahmad] Bazzi Declaration
> W-2 Pharmacy Technician [K.] - Witness
> W-3 Pharmacist [H.] - Witness
> W-4 Pharmacy Technician [B.] - Witness

Id.

Accompanying this submission was "Witness Exhibit 1" (P. Ex. 1), a declaration from Petitioner. In this submission Petitioner declared, among other statements:

1. The total alleged subject fraudulent scheme [totaled] more than $3,493,000.00 in loss to Medicare, split by 3 (three) individuals for repayment.

2. It was alleged that I was involved in the scheme from January, 2008 until September, 2015.

3. There are numerous, and lengthy, periods of time where I was not working at the pharmacy site nor in the country.

* * * *

10. During this 3 (three) year period [2010-2013] [H.] signed and filled all prescriptions, except when Petitioner worked part time.

[3] It is unclear what "AAA, etc." refers to and Petitioner has at no point provided an explanation. However, because he grouped this term with "copies of the subject prescriptions," we presume it relates to prescriptions.

[4] According to Petitioner, H., K., and B. were pharmacists or pharmacy technicians. Petitioner states that H. and K. worked together at his pharmacy. P. Ex. 1, at 1 (Decl. ¶¶ 9-11). Petitioner does not further identify B. *Id*.

11. Pharmacy Technician [K.] assisted [H.] every day. This technician is also incarcerated for the alleged scheme, 18 months after an initial plea offer of 60 months.

12. Mr. [K.] was filling all the prescriptions and typing all of the claims as the technician and business manager.

13. The Petitioner assisted the government in identifying the method used by [K.] and Dr. [L.].

14. The pharmacy technician was taking sample medication from [L.] and filling prescriptions as part of the scheme at Advanced Pharmacy Services.

15. [L.], the third person sharing restitution, is serving a 45 month sentence.

16. The extent of the scheme by [L.] and [K.] was never known by the Petitioner as stated in his testimony.

P. Ex. 1.

After considering Petitioner's and the I.G.'s submissions, the ALJ issued a decision finding that the I.G. had a basis for excluding Petitioner and that the length of the exclusion was not unreasonable. ALJ Decision at 1. The ALJ denied Petitioner's requests to convene a hearing and to delay the proceedings to allow Petitioner to submit the documents he had identified. *Id*. at 4. The ALJ recognized that 42 C.F.R.§ 1001.2007(d) prohibits a petitioner from collaterally attacking a final conviction in exclusion proceedings. *Id*. at 3. The ALJ then reasoned that "Petitioner's testimony appear[ed] intended to show that Petitioner did not participate fully in the scheme for which he was convicted" and supported the conclusion that Petitioner sought to offer testimony of the other witnesses solely "to corroborate Petitioner's version of the events that led to his conviction." *Id*. at 4. The ALJ then concluded that "Petitioner's own testimony, the testimony he seeks from other witnesses, and the documents he would offer relate entirely to issues that the regulations declare to be irrelevant as a matter of law." *Id*.

The ALJ then found (which Petitioner does not now challenge) that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare and, therefore, he must be excluded for at least five years. *Id*. at 4-5. The ALJ also found that the I.G. had proven the existence of three aggravating factors (which Petitioner also does not challenge before the Board), *id*. at 6-8, and that Petitioner had proven the existence of one mitigating factor, which the I.G. had considered in determining the length of Petitioner's exclusion, i.e., cooperation with federal officials, pursuant to 42 C.F.R. § 1001.102(c)(3), *id*. at 9-10. With respect to the additional

mitigating factor that Petitioner argued should be considered—pursuant to 42 C.F.R. § 1001.102(c)(2), his alcoholism at the time of the offense that reduced his culpability—the ALJ determined that the record did not support that the criminal court made findings that Petitioner had a substance abuse problem *at the time of the crime* or that his substance abuse reduced his culpability for the crime. *Id*. at 9. The ALJ concluded that the court's recommendation that Petitioner be placed in a drug treatment program alone was insufficient for Petitioner to meet the burden of proving this mitigating factor. *Id*. The ALJ then determined that the length of Petitioner's exclusion was not unreasonable given the severity of the applicable aggravating factors and the one applicable mitigating factor. *Id*. at 10-11.

Petitioner timely requested an extension of time to submit his appeal "of a minimum 180 days to obtain proper legal counseling and supporting documents." Request for an extension of time to file an appeal with reference to Decision No.: CR 5128. Petitioner stated that he would be released from the correctional institution to a "half-way house" on October 9, 2018. *Id*. The Board granted Petitioner a 30-day extension, the maximum extension allowed for by regulation. *See* 42 C.F.R. § 1005.21(a). Petitioner timely filed a Notice of Appeal and Initial Brief, identifying two points of disagreement with the ALJ's decision:

1. The Petitioner was precluded from introduction of evidence in violation of 42 C.F.R. 1001.2007(d).
2. The issued Order failed to acknowledge the . . . factors as set forth under 42 C.F.R. 1001.102(c).

Petitioner's "Initial Brief" (P. Br. to the Board) at 1.[5] We address Petitioner's exceptions below.

Standard of Review

"The standard of review on a disputed issue of fact is whether the [ALJ] decision is supported by substantial evidence on the whole record. The standard of review on a disputed issue of law is whether the [ALJ] decision is erroneous." 42 C.F.R. § 1005.21(h).

[5] Petitioner's four-page Brief to the Board is not numbered, but we cite to the relevant pages for clarity.

Analysis

To begin with, we note that Petitioner does not challenge before the Board, the statutory basis for his exclusion, the three aggravating factors considered by the I.G. in extending the length of the exclusion beyond the five-year minimum, or the I.G.'s consideration of the mitigating factor of cooperation with government officials. Petitioner's appeal is limited to the two exceptions relating to the handling of evidence and the additional asserted mitigating factor.

Thus, Petitioner challenges the ALJ's determination that certain evidence Petitioner sought to have admitted was irrelevant and, therefore, would not be admitted into the record. P. Br. to the Board. Petitioner asserts that the evidence would have supported a mitigating factor, presumably the mitigating factor listed at 42 C.F.R. § 1001.102(c)(2), and, therefore, should have been admitted. *Id*. at 1-2. Petitioner also identifies additional evidence, for the first time before the Board, which he asserts supports the existence of that additional mitigating factor and should be considered. *Id*. at 3. As we discuss below, Petitioner's arguments are unavailing.

A. The ALJ did not err in excluding the evidence Petitioner identified.

Petitioner asserts that the ALJ erred in excluding the evidence he sought to submit, claiming the evidence supported the application of a second mitigating factor. P. Br. to the Board at 1. Petitioner identified several documents that, he says, he intended to submit to the ALJ. He indicated that he wanted to testify and call three witnesses. Exhibits and Documentary Evidence. He did not submit the actual documents or the written witness testimony (other than his own declaration), however, because he asserted that, due to his incarceration, he was unable to access the documents. *Id*. He also requested that the ALJ "issue an order compelling the witnesses to provide such declarations." *Id*. The ALJ, though, noted that Petitioner's own declaration "avers facts that tend to contradict the factual basis recited in his plea agreement," whereas a petitioner in exclusion proceedings "may not collaterally attack the conviction or civil judgment underlying the exclusion." ALJ Decision at 3 (citing 42 C.F.R. § 1001.2007(d)). The ALJ reasoned that, based on Petitioner's declaration as well as the nature of the documents he had identified, the apparent purpose of the evidence Petitioner sought to have admitted was to challenge the facts underlying the conviction on which his exclusion was based. *Id*. at 4. Therefore, the ALJ concluded, the documents and testimony Petitioner identified were "irrelevant as a matter of law." *Id*.

We find no error in the ALJ's exclusion of Petitioner's proposed evidence. As the ALJ correctly noted, the regulations for exclusion proceedings prohibit review of "the basis for the underlying conviction, civil judgment or determination," which led to the exclusion. 42 C.F.R. § 1001.2007(d). Petitioner argues before the Board that "[t]he

purpose was plain, to establish the presence of mitigating factors." P. Br. to the Board at 2. But Petitioner never alleged before the ALJ that the evidence he sought to submit would support the existence of any mitigating factor, and the only purpose discernable from the descriptions he did offer was indeed to challenge the facts underlying his conviction.

As quoted above, Petitioner's declaration repeatedly refers to an "alleged" scheme in which Petitioner was supposedly involved for three years, but then asserts that he was not working at the pharmacy or was out of the country for "numerous, and lengthy, periods of time." P. Ex. 1, at 1 (Decl. ¶¶ 1-3). Petitioner also states in his declaration that one of the individuals he identified as a witness was responsible for "filling all the prescriptions and typing all of the claims as the technician and business manager." *Id*. at 2 (Decl. ¶ 12). He implies generally that other individuals, including two of the witnesses he intended to call, were (equally or more) responsible for the fraudulent scheme that led to his conviction. *See id*. The descriptions of the documents that Petitioner sought to present, such as copies of prescriptions involved in the scheme and tax records of individuals he points to as responsible, reinforce the impression that his focus was on collaterally attacking the basis for his conviction. In short, the ALJ reasonably concluded that Petitioner, in his evidentiary requests, merely sought to assign blame to other individuals for the conduct for which he was convicted and challenge the facts underlying his conviction.

Even now before the Board, Petitioner fails to explain *how* the evidence he identified before the ALJ would prove the existence of any mitigating factor. As we have discussed, contrary to Petitioner's arguments, the only "plain" purpose the evidence would appear to serve, based on Petitioner's own statements in his declaration as well as the nature of evidence Petitioner identified, would be to attack the facts underlying his conviction. This purpose, the ALJ correctly concluded, would be improper and, therefore, the evidence was "irrelevant as a matter of law." ALJ Decision at 4.

Before the Board, Petitioner contends that "[t]he Inspector General, let alone this Board, does NOT have the authority to reduce any sentence nor vacate any criminal conviction," and, therefore, "[t]he presentation of such evidence to this Board . . . does not have the intent to attack any criminal action." P. Br. to the Board at 1. Petitioner further states that, "[a]t the time of this administrative action the Petitioner's ability to collaterally attack his criminal conviction, under the 28 U.S.C. 2255 Motion process has expired, as a matter of law." *Id*. at 2. Petitioner, however, misunderstands the regulatory prohibition on review of collateral attacks in exclusion proceedings. It is not relevant that neither the Board nor the I.G. has jurisdiction to overturn a conviction or reduce a sentence imposed in U.S. District Court or that the conviction may no longer be subject to challenge before a court that would have jurisdiction. A collateral attack on a prior conviction in

administrative exclusion proceedings refers to an attempt to challenge the facts underlying the conviction for the purpose of challenging the *exclusion*. In other words, what the regulations prohibit is not an attack on the conviction but any attempt to defend against the exclusion derived from the conviction by denying or minimizing the crime itself. *See* 42 C.F.R. § 1001.2007(d). The Board has regularly held that such collateral challenges to underlying criminal convictions are impermissible. *See, e.g., Laura Leyva*, DAB No. 2704, at 7 (2016) ("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 . . ., it is the judgment on the criminal charges . . . that forms the basis for the exclusion."), *aff'd, Leyva v. Price*, No. 8:16-cv-1986 (M.D. Fla. Apr. 24, 2017); *Juan de Leon, Jr.*, DAB No. 2533, at 4 (2013) (affirming ALJ's conclusion that he could not consider petitioner's allegations of exonerating evidence). Therefore, Petitioner's argument that he could not have intended to challenge his conviction for purposes of his exclusion because the Board and the I.G. cannot overturn his conviction or reduce his sentence is unpersuasive.

Petitioner cites to the Board's decision in *Peter J. Edmonson*, DAB No. 1330, at 4 (1992), to support his argument that the evidence he sought to admit was not for the purpose of challenging his criminal conviction. P. Br. to the Board at 2. However, he does not explain how *Edmonson* supports his argument, and the basis for his reliance on that decision is unclear. In *Edmonson*, the Board stated:

> It is the fact of the conviction which causes the exclusion. The law does not permit the Secretary to look behind the conviction. Instead, Congress intended the Secretary to exclude potentially untrustworthy individuals or entities based on criminal convictions. This provides protection for federally funded programs and their beneficiaries and recipients, without expending program resources to duplicate existing criminal processes.
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> ****
>
> While Petitioner argued that he was innocent of the charges upon which the conviction was based, he did not deny the fact that he was convicted of an offense to which section 1128(a)(2) applied. Thus, the ALJ did not err when he concluded that the administrative exclusion proceeding could not be used to collaterally attack the state criminal conviction.

Edmonson at 4-5. *Edmonson*, therefore, supports the ALJ's conclusion that evidence that would serve to challenge the facts underlying Petitioner's conviction would not be relevant to the issues presented in the exclusion proceeding.

Finally, Petitioner argues that the "decision to preclude such evidence is a violation of the Petitioner's due process rights." P. Br. to the Board at 2. The ALJ was required by regulation to "exclude irrelevant or immaterial evidence." 42 C.F.R. § 1005.17(c). As discussed above, the evidence Petitioner sought to admit was irrelevant to the issues before the ALJ because it appeared intended only to attack the facts underlying his conviction. We see no lack of due process in the exclusion of irrelevant evidence. Therefore, this argument, too, is unavailing.

In sum, the ALJ did not err in excluding the evidence Petitioner sought to admit because the evidence appeared intended only to challenge the facts underlying his conviction, which the regulation at 42 C.F.R. § 1001.2007(d) prohibits.

B. Substantial evidence supports the ALJ's finding that Petitioner failed to prove the mitigating factor at 42 C.F.R. § 1001.102(c)(2).

Petitioner's next argument appears to challenge the ALJ's finding that Petitioner had not established the mitigating factor under 42 C.F.R. § 1001.102(c)(2). P. Br. to the Board at 3-4. That regulation requires that "[t]he record in the criminal proceedings . . . 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." 42 C.F.R. § 1001.102(c)(2). Petitioner asserted before the ALJ that he "had an alcohol dependency at the time of the alleged criminal activity" and, therefore, the mitigating factor applied and should be considered in determining the length of his exclusion. P. Br. at 4. In support of this assertion, Petitioner cited to the "Judgment in a Criminal Case" (I.G. Ex. 4) and his attendance at the drug abuse program "as indicated by the Court." *Id*. Petitioner asserted that this mitigating factor "was not known to the I.G. nor this Board and should be considered to reduce the period of exclusion." *Id*. The ALJ found that Petitioner had failed to establish the existence of this mitigating factor because the evidence did not support that the sentencing court found that Petitioner had a substance abuse problem specifically *at the time of the commission of the offense that reduced his culpability*. ALJ Decision at 9. The Judgment to which Petitioner referred included the court's recommendation that Petitioner be placed "at a facility with the Residential Drug Abuse Program," I.G. Ex. 4, at 2, which the ALJ found was evidence only that Petitioner had a substance abuse problem at the time of sentencing, ALJ Decision at 9. Therefore, the ALJ found, the evidence was insufficient to establish the mitigating factor at 42 C.F.R. § 1001.102(c)(2). *Id*. Substantial evidence supports this finding.

Petitioner bore the burden of establishing the mitigating factor. *See Andrew Lewis Barrett*, DAB No. 2887, at 8 (2018). To do so, Petitioner had to prove not only that he had a substance abuse problem, but also that the sentencing court made a finding that Petitioner had a substance abuse problem before or during the commission of the crime

and that the condition reduced his culpability. 42 C.F.R. § 1001.102(c)(2); *Begum v. Hargan*, 2017 WL 5624388 (N.D. Ill. 2017), *affirming Farzana Begum, M.D.*, DAB No. 2726 (2016). While the sentencing court need not make explicit findings that a substance abuse problem existed at the time of the offense and reduced culpability, the administrative adjudicator must nevertheless be able to infer clearly from the evidence of the proceedings that the sentencing court made the requisite determination. *Russell Mark Posner*, DAB No. 2033, at 9 (2006).

In *Posner*, the petitioner asserted before the ALJ that the court's lenity in sentencing, a doctor's evaluation concluding that the petitioner had a drug dependency, along with the court's recommendation for a residential drug program placement were sufficient to establish the mitigating factor. DAB No. 2033, at 9-10. The ALJ did not agree, and the Board upheld that determination. *Id*. at 12. The Board in *Posner* discussed its prior decision in *Arthur C. Haspel, D.P.M.*, DAB No. 1929 (2004), in which –

> [t]he Board explained that in cases where the sentencing judge would not be required as part of the sentencing process to make a finding about whether addiction was present at the time of the crime, the regulation should not be read so narrowly as to be inapplicable absent an explicit finding by the judge. Instead, the Board engaged in case-specific analysis of whether sufficient evidence supported an inference that the sentencing judge made the necessary determination . . . .

Posner at 10. In *Haspel*, the Board had reasoned that the evidence of record, including "Petitioner's own statement to the judge, . . . the unrebutted testimony of his single witness, and the argument to the court from his attorney," supported "the impact of Petitioner's addiction to drugs on his life both before and during the commission of the offenses." *Id*. (quoting *Haspel* at 4). The Board then noted that the court had sentenced Haspel "to only three months of home confinement and five years of supervised release and imposed no fine whatsoever" when "the maximum sentence was five years on each of the two counts, a fine of $250,000, and a term of supervised release of at least two years up to life." *Id*. at 11 (quoting *Haspel* at 5). The Board concluded that, based on this evidence and the extent of the reduction in sentence, it was unreasonable to infer that the court had *not* made a finding that Haspel had an addiction at the time of the offense that reduced his culpability. *Haspel* at 5. Considering this evidence that the Board had found to be sufficient in *Haspel* as "'replete with details' of that petitioner's 'impaired and confused mental state' at the time of his offenses," the ALJ in *Posner* weighed the evidence Posner had presented and determined "that the evidence adduced by [Posner] did not compare in weight, relevance, reliability, or persuasiveness to the evidence which the Board described in Haspel . . . ." *Id*. at 11 (quoting ALJ's decision in *Posner* at 21-24, *Haspel* at 4).

The sentencing record that was before the ALJ in the instant case is far less persuasive than even the record determined to be insufficient in *Posner* to establish that the court made the requisite findings. The record contains the charging information, the plea agreement, the judgment, and the joint motion for a downward departure in the sentencing guidelines based on Petitioner's cooperation with law enforcement. I.G. Exs. 2-5. The record, however, lacks any evidence that directly supports, or from which an adjudicator could infer, that *the court found* that Petitioner had a substance abuse problem before or during the time he committed the offenses and the resulting condition lessened his culpability for the conduct, unlike *Haspel* in which the transcript from the court proceedings supported just such an inference. Before the ALJ, the only evidence Petitioner referenced in support of his argument was the sentencing court's recommendation that he be placed in a residential treatment program. P. Br. at 4; I.G. Ex. 4, at 2. As the ALJ found, though, this evidence did not support the required elements for the mitigating factor to apply. ALJ Decision at 9. That is, nothing in the recommendation for drug treatment demonstrated that the court determined that Petitioner had a substance abuse problem *before or during the time he committed the offense* or that the resulting condition reduced Petitioner's culpability. *See Christopher Switlyk*, DAB No. 2600, at 6 (2014) ("The court's recommendation that Petitioner receive drug treatment does not establish that the court determined Petitioner was less culpable due to drug addiction."). Moreover, the fact that Petitioner did receive such treatment during his incarceration is also insufficient to establish the applicability of the mitigating factor. *See James Brian Joyner, M.D.*, DAB No. 2902, at 10 (2018) (stating that the mere fact of having received treatment for an alcohol problem is insufficient to support the application of 42 C.F.R. § 1001.102(c)(2)). Petitioner has not pointed to any other evidence in the record before the ALJ or in the excluded evidence that he proffered below that supports, either directly or by inference, that the sentencing court made the requisite findings.

On appeal to the Board, Petitioner now claims that the "[t]he criminal record is replete with evidence of a present substance abuse problem at the time of the alleged offense commission" and seeks to produce additional evidence from the criminal record that he believes supports his argument that the mitigating factor applies. P. Br. to the Board at 3. Petitioner asserts that he "has the right to submit such evidence and, under separate cover, shall produce evidence that the substance abuse was present at the time of the alleged criminal activity." *Id*. Petitioner describes the "evidence" as including "numerous interviews with Court staff and during such interviews, as most readily noted in the PSR (pre-sentence report), the culpability of the Petitioner was duly noted by the federal government, through its employees, that the substance abuse was present at the time of the commission of the alleged offense." *Id*. Petitioner also specifically identifies "the Department of Justice Residential Drug and Alcohol treatment admission report" as well as a report allegedly prepared by "clinicians from the US Public Health Service

(employees of DHHS) [who] reviewed the PSR and concluded that the treatment is necessary AND the substance abuse was present at the time of the alleged criminal activity." *Id*. However, Petitioner nowhere explains how this evidence would demonstrate that *the sentencing court determined* that Petitioner had a substance abuse problem before or during the time of the offense that reduced his culpability. As we have recognized, while the sentencing court's findings need not be explicit, the evidence must at least be sufficient to give rise to an inference that the sentencing court indeed made the requisite determinations. Petitioner emphasizes that these proposed documents demonstrate that he had such a problem at the time of the commission of the crime, but he does not identify how these documents speak to what the *sentencing court* might have found. Therefore, they are irrelevant to prove the existence of this mitigating factor.

In any case, Petitioner could have identified these documents before the ALJ and could have argued as to their relevance in proving the application of the mitigating factor at that level, but he did not.[6] The regulations preclude the Board from considering an issue that could have been raised before the ALJ but was not. 42 C.F.R. § 1005.21(e); *see Posner* at 12 (concluding that petitioner waived his argument that a change in the sentencing range demonstrated lenity by failing to raise the argument before the ALJ "when the existence of this mitigating factor was clearly at issue"). Therefore, Petitioner has waived any argument that these documents supported the applicability of the mitigating factor.

In sum, Petitioner has not identified any evidence of record that supports the conclusion that the sentencing judge made the findings required for the application of the mitigating factor at 42 C.F.R. § 1001.102(c)(2).

[6] Petitioner repeated to us the argument he made to the ALJ that he was unable to submit the evidence he had identified because he was incarcerated and lacked access. P. Br. to the Board at 4. That situation does not explain, however, why he could not have identified these documents to the ALJ as he did the others he sought to present. Moreover, by letter dated October 8, 2018, Petitioner informed the Board that, the following day he would be released from incarceration to a residential reentry center where he expected to remain for three or four weeks. In the letter, Petitioner provided the addresses of the residential reentry center and his home. The I.G. filed its response to Petitioner's appeal on October 17, and mailed it to the addresses Petitioner had provided in his letter to the Board. Pursuant to the Board's acknowledgment letter, Petitioner had ten days from the date of the I.G.'s response within which to request permission to file a reply brief. Petitioner did not seek to file a reply and did not seek to submit any document since his release from incarceration.

C. The ALJ did not err in upholding the I.G.'s 18-year exclusion as not unreasonable.

Petitioner also briefly asserts that "[t]he [I.G.] cited the presence of the aggravating factors, yet failed to support its assertion of an 18 year exclusion, quantitatively" and "just merely threw the proverbial dart at the wall and concluded that an 18 year exclusion was appropriate and then challenged the Petitioner his right to submit evidence of mitigating factors which would have countermanded the 18 year exclusionary period as suggested by the [I.G.]." P. Br. to the Board at 2.

The Board has noted that the preamble to 42 C.F.R. Part 1001 makes clear 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.'" *Baldwin Ihenacho*, DAB No. 2667, at 9 (2015) (quoting *Raymond Lamont Shoemaker*, DAB No. 2560, at 7 (2014) (quoting 57 Fed. Reg. 3298, 3314 (Jan. 29, 1992))). Therefore, the lack of numerical valuations for each aggravating and mitigating factor applied does not render the period of exclusion unreasonable. The ALJ determined that the 18-year exclusion falls within a reasonable range given the gravity of the aggravating factors, which she determined "demonstrate that Petitioner manifests a high degree of untrustworthiness," and the one mitigating factor of Petitioner's cooperation with law enforcement. ALJ Decision at 10-11. Petitioner has not presented any valid argument to challenge this determination.

Conclusion

For the reasons explained above, we affirm the ALJ Decision affirming the I.G.'s exclusion of Petitioner from participating in federal health programs for a period of 18 years, pursuant to section 1128(a)(1) of the Act.

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member