Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

James Brian Joyner, M.D.
Docket No. A-18-64
Decision No. 2902
October 12, 2018

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

James Brian Joyner, M.D. (Petitioner) appeals a decision by an Administrative Law Judge (ALJ) upholding on the written record the Inspector General's (I.G.) exclusion of Petitioner from participation in all federal health care programs for a period of 13 years. *James Brian Joyner, M.D.*, DAB CR5071 (2018) (ALJ Decision). The ALJ concluded that the I.G. properly excluded Petitioner pursuant to section 1128(a)(4) of the Social Security Act (Act),[1] which, pursuant to section 1128(c)(3)(B), requires a minimum exclusion period of five years. The ALJ further concluded that a 13-year exclusion is not unreasonable based on one aggravating factor and the absence of any mitigating factors.

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

Legal Background

Section 1128(a)(4) of the Act provides that the Secretary of Health and Human Services "shall exclude" from participation in federal health care programs an individual who "has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance."

Section 1128(i) of the Act lists the circumstances under which an individual is considered to have been "convicted" of a criminal offense, including the following:

[1] The current version of the Act can be found at https://www.ssa.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 https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

> (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
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> * * *
>
> (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court[.]

When an exclusion is imposed under section 1128(a), section 1128(c)(3)(B) requires that the "minimum period of exclusion . . . be not less than five years[.]" That mandatory minimum period of exclusion may be extended based on the application of the aggravating factors found at section 1001.102(b), one of which is whether "[t]he sentence imposed by the court included incarceration." 42 C.F.R. § 1001.102(b)(5). If an exclusion period is extended based on the application of one or more aggravating factors, the I.G. may then apply any mitigating factors specified in section 1001.102(c) to reduce the length of the exclusion period to no less than the mandatory minimum five years.

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 an exclusion longer than the mandatory minimum period is unreasonable in light of any of the aggravating and mitigating factors specified in the regulations that apply to the case before the ALJ. *Id.* §§ 1001.2007(a), 1005.2(a). A party dissatisfied with the ALJ's decision may appeal it to the Board. *Id.* § 1005.21.

Case Background[2]

For several months in 2010, Petitioner was employed as a physician at Breakthrough Pain Therapy Center, located in Tennessee. I.G. Ex. 3, at 2. On October 7, 2014, a federal grand jury in the Eastern District of Tennessee issued an indictment charging Petitioner with conspiracy to distribute a quantity of oxycodone, morphine, oxymorphone and alprazolam by writing illegal prescriptions in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(C) (Count One), and with financial crimes in violation of 18 U.S.C. § 1956(h) (Count Two). ALJ Decision at 1; I.G. Ex. 2, at 1-3. On May 25, 2016, Petitioner entered into a plea agreement in which he agreed to enter a guilty plea to Count

[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.

One. ALJ Decision at 1 (citing I.G. Ex. 3, at 1). On November 18, 2016, a United States District Court Judge accepted Petitioner's guilty plea, entered a judgment of conviction on Count One, sentenced Petitioner to a 70-month term of incarceration, dismissed Count Two, and ordered Petitioner to pay a $100 assessment. *Id*. at 1-2; I.G. Ex. 4.

By letter dated June 30, 2017, the I.G. notified Petitioner that, pursuant to 42 U.S.C. § 1320a-7(a)(4) (Act § 1128(a)(4)), he was being excluded from Medicare, Medicaid, and all federal health care programs for a period of 15 years. ALJ Decision at 2 (citing I.G. Ex. 1). The I.G. stated that Petitioner was being excluded for 15 years based on "evidence of the following aggravating circumstances":

> 1. The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more. The acts occurred from about July 2009 to about December 2010.
>
> 2. The sentence imposed by the court included incarceration. The court sentenced you to serve 70 months of incarceration.

I.G. Ex. 1, at 2.

Petitioner requested a hearing before an ALJ. ALJ Decision at 2. On October 12, 2017, the ALJ held a prehearing conference with the parties. *Id*. On October 17, 2017, the ALJ issued an Order and Schedule for Filing Briefs and Documentary Evidence (Scheduling Order), which established a deadline of January 16, 2018, for Petitioner to "file his short-form brief and any documentary evidence, marked as an exhibit, in support of his arguments." Scheduling Order at 4. Petitioner was also instructed to "submit the testimony of [his] witnesses in advance, in the form of an affidavit or a written sworn declaration, along with [his] other submissions . . . ." *Id*.

On October 19, 2017, the I.G. issued an amended notice of exclusion. ALJ Decision at 2 (citing I.G. Ex. 5). Therein the I.G. stated that it was "remov[ing]" one of the two aggravating factors it previously relied on – that the acts resulting in conviction were committed over a period of one year or more – and reduced the exclusion period from 15 years to 13 years. I.G. Ex. 5.

The I.G. filed a pre-hearing brief and five proposed exhibits. ALJ Decision at 2. Petitioner filed a Motion for Continuance and Stay of Proceedings (Motion to Stay), arguing that, because Petitioner was appealing his criminal conviction, the conviction was not yet final and the exclusion was "in violation of the U.S. Supreme Court." *Id*. at 2, 3; Motion to Stay at 1. Petitioner also filed a Motion to Compel Discovery (Motion to

Compel), asking the ALJ to order the I.G. to produce the Drug Enforcement Agency's DOMEX report[3] on Petitioner and "[p]hysical copies of patient records where Petitioner was the prescribing Provider." ALJ Decision at 3-4; Motion to Compel at 1. Petitioner stated that "[t]hese sought documents demonstrate that the Petitioner is not required to be excluded and that any length of exclusion is unreasonable." Motion to Compel at 1 (Petitioner's emphasis). Petitioner also filed a pre-hearing brief, which included a list of proposed witnesses, but did not offer the written direct testimony of any of those witnesses.[4] ALJ Decision at 2, 3. The I.G. responded to Petitioner's motions and filed a reply brief. *Id*. at 2. Petitioner filed a sur-reply. *Id*.

ALJ Decision

On April 16, 2018, the ALJ issued a decision affirming the I.G.'s determination to exclude Petitioner from all federal healthcare programs for 13 years. The ALJ determined that an in-person hearing was not necessary because Petitioner did not submit written direct testimony for any of his proposed witnesses as directed by his Scheduling Order, and the I.G. – who did not propose to call any witnesses – did not ask to cross-examine any of Petitioner's witnesses. *Id*. at 3. The ALJ denied Petitioner's Motion to Stay because "[t]he regulations do not contemplate staying an exclusion while an appeal of the underlying conviction is pending." *Id*. The ALJ also denied Petitioner's Motion to Compel, writing in relevant part:

> Based on Petitioner's arguments, it appears that he is seeking documents generated in connection with the investigation into his criminal activities in order to undermine his conviction. However, Petitioner may not attack his conviction or the factual basis underlying that conviction before me. *See* 42 C.F.R. § 1001.2007(d); *Damon Jamuale Heath*, DAB CR4891 at 8 (2017) (providing a petitioner "may not re-litigate his conviction, including the facts underlying his conviction, in this forum."). The materials sought by Petitioner are therefore irrelevant to these proceedings.

Id. at 4.

[3] The ALJ stated that the "DOMEX" report (Document and Media Exploitation report) is created by the U.S. Department of Justice's National Drug Intelligence Center to analyze raw data from evidence procured in connection to law enforcement investigations at the request of investigators or prosecutors. ALJ Decision at 3 n.2.

[4] Petitioner did not file any exhibits and did not object to any of the I.G.'s exhibits. The ALJ admitted I.G. exhibits 1-5 into the record. ALJ Decision at 2.

The ALJ found that Petitioner was "convicted" of a criminal offense in accordance with sections 1128(i)(1) and (3) of the Act because the United States District Court for the Eastern District of Tennessee accepted Petitioner's plea of guilty to conspiracy to distribute a quantity of oxycodone, morphine, oxymorphone, and alprazolam by writing illegal prescriptions in violation of 21 U.S.C. §§ 841(a)(1) and 846, and entered a judgment of conviction on that plea. *Id*. at 5-6; I.G. Ex. 4. Rejecting Petitioner's argument that his conviction was not final for purposes of exclusion because his appeal of the conviction was pending, the ALJ noted that an individual is considered "convicted" for purposes of an exclusion if, as in Petitioner's case, a judgment of conviction has been entered, "regardless of whether there is an appeal pending." ALJ Decision at 6 (quoting Act § 1128(i)(1)).

The ALJ also noted that, although 21 U.S.C. § 841(a)(1)[5] does not specifically state that a violation of that statute is a felony, "any offense not specifically classified in the section defining it is classified as a class C felony if the maximum term of imprisonment authorized is less than 25 years but at least ten years." *Id.* (citing 18 U.S.C. § 3559(a)(3)). Since Petitioner was convicted of an offense punishable under 21 U.S.C. § 841(b)(1)(C), which provides for a sentence of a term of imprisonment not more than 20 years, Petitioner was, the ALJ stated, convicted of a felony. *Id*. The ALJ also found that the "felony offense for which Petitioner was convicted was clearly related to the unlawful prescription of a controlled substance[,]" and that 42 C.F.R. § 1001.2007(d) prohibits a collateral attack on the conviction. *Id.* at 7.

The ALJ concluded that Petitioner must be excluded pursuant to section 1128(a)(4), and that the exclusion period of 13 years is not unreasonable based on the presence of one aggravating factor and in the absence of any mitigating factors. The ALJ stated:

> The severity of the aggravating factor and the absence of any mitigating factors support an increase in length of Petitioner's exclusion period beyond the five-year minimum. Petitioner was sentenced to 70 months of imprisonment, which represents a substantial period of incarceration and indicates the severity of the scheme in which Petitioner was involved. Indeed, the Board determined a nine-month period of incarceration was "relatively substantial," and sufficient to support an eight-year exclusion

[5] The statute states, "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally – (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance." 21 U.S.C. § 841(a)(1).

> period. *Jason Hollady, M.D.*, DAB No. 1855 at 12 (2002). Here, the length of Petitioner's incarceration was nearly eight times that imposed in *Hollady*. The imposition of a significant length of incarceration for Petitioner's conduct leads me to conclude the IG gave reasonable weight to this particular aggravating factor.
>
> Petitioner has not presented any evidence that would establish that the IG failed to consider any mitigating factor. Moreover, looking beyond the substantial length of the sentence imposed on Petitioner by the U.S. District Court, it is clear the circumstances of the case support the IG's determination that a longer period of exclusion beyond the five-year minimum was warranted. As he admitted in his guilty plea, Petitioner provided only nominal supervision to his staff, and minimal examinations of the patients to which he prescribed controlled substances including oxycodone and morphine. IG Ex. 3 at 2-3. Petitioner further conceded that his conduct did not meet the accepted course of professional practice, and that he prescribed these scheduled narcotics without legitimate medical purpose. *Id.* at 4. In short, the conduct to which Petitioner admitted in resolving the criminal case against him demonstrates that he put his community and his patients at grave risk for his own personal gain. Accordingly, I must conclude that the IG's determination to increase his exclusion period from five to 13 years was reasonable.

Id. at 9-10.

Standard of Review

Our standard of review of an exclusion imposed by the I.G. is established by regulation. We review a disputed issue of fact as to "whether the initial decision is supported by substantial evidence on the whole record." 42 C.F.R. § 1005.21(h). We review a disputed issue of law as to "whether the initial decision is erroneous." *Id*.

Analysis

The ALJ sustained the exclusion as imposed by the I.G. in accordance with section 1128(a)(4) of the Act based on Petitioner's conviction of a qualifying felony offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, a felony conviction for which section 1128(c)(3)(B) of the Act requires a mandatory minimum exclusion period of five years. The ALJ also determined

that extending the mandatory exclusion period to 13 years was not unreasonable based on the court's imposition of a sentence that included incarceration (42 C.F.R. § 1001.102(b)(5)) for 70 months, which the ALJ stated was a "substantial period," and in the absence of any of the mitigating factors in 42 C.F.R. § 1001.102(c).

Before the Board, Petitioner does not dispute that he pleaded guilty to a felony offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance; that in 2016 a federal district court accepted that plea and adjudged him guilty of that offense; and that the court's sentence included incarceration for 70 months. Rather, Petitioner reprises arguments the ALJ considered and rejected, and raises assertions of ALJ error. Petitioner's "Initial Brief of Issues" (P. Br. to the Board).[6] As we explain below, the arguments are meritless. Petitioner also raises for the first time an argument that, as we explain below, provides no basis for disturbing the ALJ Decision.

I. The ALJ did not err in denying Petitioner's Motion to Stay because Petitioner's conviction was final for purposes of exclusion regardless of whether Petitioner appealed the conviction.

Petitioner requested that the ALJ stay the exclusion proceedings because, according to Petitioner, the underlying criminal conviction on which the exclusion is based is not "final" until after the completion of the appeal of the criminal conviction, and, therefore, there is no conviction for purposes of exclusion from participation in health care programs. Motion to Stay at 1. The ALJ denied Petitioner's motion, stating that, although Petitioner may appeal his criminal conviction, Petitioner was "convicted" under sections 1128(i)(1) and (i)(3) because Petitioner pleaded guilty, the court accepted the plea, and the court then entered judgment of conviction against Petitioner. ALJ Decision at 3. Under section 1128(i)(1), the ALJ stated, Petitioner is considered "convicted" "regardless of whether there is an appeal pending." *Id*. at 3, 5-6. Accordingly, the ALJ stated, the regulations governing exclusion "do not contemplate staying an exclusion while an appeal of the underlying conviction is pending." *Id.* at 3.

Before the Board, Petitioner asserts that the ALJ erred in relying on section 1128's definition of "convicted" "predat[ing]" *U.S. v. Frady*, 456 U.S. 152 (1982) (cited in Petitioner's Motion to Stay) in which the U.S. Supreme Court set out the "common definition of conviction" to be applied by all courts and in administrative proceedings. P. Br. to the Board at 3-4. According to Petitioner, in *Frady*, the Supreme Court "set as case law that a defendant is not considered convicted, as a matter of settled law, until all challenges have been exhausted." *Id.* at 4.

[6] The Board granted Petitioner's request for an opportunity to reply to the I.G.'s brief in response to Petitioner's "Initial Brief of Issues." Petitioner has not filed a reply brief and has not asked for more time to do so.

The ALJ did not err in denying Petitioner's Motion to Stay pending the outcome of his appeal of his conviction. The ALJ correctly applied the applicable law on exclusions, including section 1128(i) of the Act, which defines the term "convicted" for purposes of mandatory exclusion under section 1128(a) and expressly states that where a judgment of conviction has been entered against the individual by a Federal court, the individual is "convicted" "regardless of whether there is an appeal pending." The ALJ correctly found that Petitioner was "convicted" of a qualifying crime for purposes of exclusion under section 1128(a)(4) of the Act because Petitioner pleaded guilty to conspiracy to distribute a quantity of certain controlled substances by writing illegal prescriptions and the court accepted that plea.[7] ALJ Decision at 5-7. Although Petitioner accuses the ALJ of "establish[ing] a standard of 'conviction' which is illegal when compared to the Supreme Court of the United States's definition . . .," P. Br. to the Board at 3, the ALJ did not "establish a standard" but, rather, applied the exclusion statute's definition of "conviction." The ALJ properly applied the definition in the exclusion statute since an ALJ has no authority to "[f]ind invalid or refuse to follow Federal statutes or regulations . . . ." 42 C.F.R. § 1005.4(c)(1); *see also Lena Lasher, aka Lena Contang, aka Lena Congtang*, DAB No. 2800, at 2 (2017). Moreover, 42 C.F.R. § 1001.3005(a)(1) provides that an individual will be reinstated into participation in federal healthcare programs retroactive to the effective date of exclusion if the exclusion was based on a conviction that is later reversed or vacated on appeal. As the Board has found, "there would be no need for" this regulatory provision "if exclusion could be stayed pending a federal court appeal." *Emannuel Adebayo Ayodele*, DAB No. 2602, at 5 (2014) (citing *Michael D. Miran*, DAB No. 2469, at 4-5 (2012)). In any event, Petitioner misreads *Frady*. *Frady*, an appeal of a criminal conviction, not an appeal of an exclusion based on a criminal conviction, involved issues wholly unrelated to the statutes and regulations that govern I.G. exclusions. Moreover, that case did not even present to the Supreme Court the issue of how to define "conviction" for purposes of the case before it, much less the issue of whether there was a common definition that should be applied to all cases.

II. The ALJ did not err or abuse his discretion in denying Petitioner's Motion to Compel the production of documents that were irrelevant.

Petitioner argued before the ALJ that the DOMEX report "would show that he wrote prescriptions in the suggested dosage range, while the patient records would show that he wrote no prescription for more than 30 days." ALJ Decision at 3-4 (citing P. Br. at 7). The ALJ stated that Petitioner was seeking the DOMEX report to "undermine" his underlying criminal conviction, and the documents were thus "irrelevant to these

[7] As noted, the ALJ found that the crime that is the basis for excluding Petitioner is a felony crime. ALJ Decision at 6. Petitioner does not dispute that he pleaded guilty to and was convicted of a felony.

proceedings." *Id*. at 4 (citing 42 C.F.R. § 1001.2007(d), which prohibits collateral attack on the underlying conviction, and 42 C.F.R. § 1005.7(e)(2)(i), which states that the ALJ "may . . . deny a motion for an order compelling discovery if the ALJ finds that the discovery sought . . . [i]s irrelevant").

Before the Board, Petitioner maintains that the DOMEX report would prove that he "was not a danger to the public as defined under 42 U.S.C. § 1320a-7(a)(2)," and "show that his prescription ordering patterns were not evidence of patient abuse." P. Br. to the Board at 2. He also argues that the report would prove that his behavior "did not endanger the health and safety of patients." *Id*. According to Petitioner, in denying his Motion to Compel, the ALJ erroneously "create[d]" and "enforce[d]" a "waiver" of Petitioner's right to a decision rendered on a "complete" evidentiary record when Petitioner had not "waive[d]" that right. *Id.*

The statutory basis on which Petitioner is being excluded is 42 U.S.C. § 1320a-7(a)(4) (Act § 1128(a)(4)), conviction "of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." I.G. Ex. 1. The ALJ correctly upheld the exclusion based on section 1128(a)(4). Thus, the basis for mandatory exclusion set out in 42 U.S.C. § 1320a-7(a)(2) (Act § 1128(a)(2)) (conviction related to patient neglect or abuse) has no place in Petitioner's case, and it is irrelevant whether Petitioner was "not a danger to the public" or that "his prescription ordering patterns were not evidence of patient abuse." P. Br. to the Board at 2.

Petitioner also states, "An aggregating factor includes that the behavior of [Petitioner] did not endanger the health and safety of patients. The [DOMEX] report sought supports this aggregating factor." *Id*. Petitioner seems to be asserting that had the DOMEX report been included in the record below for ALJ consideration, it would have supported a mitigating factor to reduce the length of the 13-year exclusion period.[8] However, the only mitigating factors that may be considered in determining whether an exclusion period is unreasonable are those set out in sections 1001.102(c)(1)-(3). *Baldwin Ihenacho*, DAB No. 2667, at 8 (2015) ("ALJs (and the Board) are limited to considering the mitigating factors set forth in the regulations . . . at section 1001.102(c)."). Whether or not Petitioner posed a danger to the health and safety of patients is not one of the mitigating factors listed in section 1001.102(c) and, thus, is immaterial to the ALJ's decision that 13 years was not an unreasonable exclusion period.

[8] Alternatively, Petitioner may be alluding to the fact that 42 C.F.R. § 1001.102(b)(3) refers to "significant adverse impact on one or more program beneficiaries or other individuals" as an aggravating factor" and arguing, in essence, that the absence of such an aggravating factor is a mitigating factor. However, we would reject that suggestion for the same reason, that the only mitigating factors that may be considered are those listed in section 1001.102(c).

Petitioner also states that the ALJ denied him "the opportunity to secure documents of [his] alcohol abuse treatment," which Petitioner claims is an "aggregating factor," and that he requested records from the Federal Bureau of Prisons Residential Drug and Alcohol Program to support his claim. P. Br. to the Board at 3. Although Petitioner states "aggregating factor" (presumably meaning "mitigating factor") and refers to section 1001.101 (which addresses neither aggravating nor mitigating factors), Petitioner's statement concerning his alcohol abuse treatment seems to be a reference to section 1001.102(c)(2), which provides that a mitigating factor may be found when "[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[.]" If Petitioner is arguing that this mitigating factor applies here simply because he had an alcohol problem for which he received treatment, the regulation's plain language does not support such an argument. Petitioner points to no evidence in the record, nor do we find any, indicating that the court determined he had a condition (alcohol abuse or any other condition) that reduced his culpability for the felony of which he was convicted. *See Gracia L. Mayard, M.D.*, DAB No. 2767, at 5-6 (2017) ("The ALJ correctly held that she could not find [the] mitigating factor [in section 1001.102(c)(2)] to exist in the absence of evidence that the court in Petitioner's criminal case had made the reduced-culpability determination described in the regulation." (emphasis in original)).

In summary, we find no error or abuse of discretion in the ALJ's rejection of Petitioner's Motion to Compel.

III. The ALJ did not err in issuing a decision on the written record.

The ALJ determined that an in-person hearing was not necessary because Petitioner failed to submit written direct testimony of his proposed witnesses, and the I.G. (who did not propose to call any witnesses) did not ask to cross-examine any witness Petitioner proposed to call. ALJ Decision at 3. Petitioner argues that the ALJ "prematurely entered a ruling in this matter without the benefit of a hearing" while Petitioner was in the process of obtaining witness statements and "accumulating a psychological treatment record for alcohol abuse treatment which would have provided a clear aggregating factor." P. Br. to the Board at 1. Petitioner asserts that in doing so the ALJ "create[d] and enforce[d]" a "waiver" of his right to a hearing. *Id.*

An excluded petitioner is entitled to a hearing on the record pursuant to 42 C.F.R. § 1005.15. At least 15 days prior to the hearing, the ALJ must order the parties to "exchange witness lists, copies of prior written statements of proposed witnesses and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony . . . [.]" *Id.* § 1005.8(a).

Shortly after Petitioner filed a request for hearing, Petitioner was provided a copy of the Civil Remedies Division Procedures (CRDP), which states in part:

> The ALJ may determine that an oral hearing is unnecessary and not in the overall interest of judicial economy if the parties do not identify any proposed witnesses, do not offer the written direct testimony of any witnesses when ordered to do so, or do not request an opportunity to cross-examine a witness whose written direct testimony has been offered. Under these circumstances, the ALJ may decide the case based on the written record.

CRDP § 19(d).[9] The CRDP further provides that "[a]n ALJ may order that the written direct examination of a proposed witness be filed as a proposed exhibit with the party's prehearing exchange." CRDP § 16(b); *see also* 42 C.F.R. § 1005.16(b) (permitting the ALJ to admit testimony in the form of a written statement). The Board has previously observed that the federal courts "have allowed, and even strongly encouraged, written direct testimony in a variety of proceedings. Since it is offered under oath, [written direct testimony] is generally no less credible in most instances than oral testimony in the hearing room, as long as the witness is subject to cross-examination." *Pacific Regency Arvin*, DAB No. 1823, at 7-8 (2002) (citing *Kuntz v. Sea Eagle*, 199 F.R.D. 665 (D. Haw. 2001)). Moreover, the Board has found that, where neither party seeks to cross-examine any witness for whom the opposing party has submitted written direct testimony, the ALJ's decision to forego an in-person hearing does not generally pose a due process concern. *Lasher* at 4; *Igor Mitreski, M.D.*, DAB No. 2665, at 7 (2015).

Also, the ALJ's Scheduling Order instructed Petitioner that he must submit his pre-hearing brief and all relevant documentary evidence in support of his arguments no later than January 16, 2018. Scheduling Order at 4. The ALJ also instructed Petitioner that he must "submit the testimony of [his] witnesses in advance, in the form of an affidavit or a written sworn declaration, along with [his] other submissions." *Id*. In his pre-hearing brief, Petitioner indicated that he had testimony that he wished to offer at an in-person hearing. P. Br. at 4. Petitioner stated that the "[p]repared testimony will include, or rather show an absen[c]e of, no record of complaints or wrongdoing by Petitioner." *Id*. Petitioner provided a list of witnesses with his pre-hearing brief, but did not provide the written direct testimony of any witness as directed.

[9] The ALJ's Scheduling Order instructed that if a party objects "to any provision of the Civil Remedies Division Procedures, it must file a written objection within ten (10) days from receipt of this Order." Scheduling Order at 5. There is nothing in the record indicating that Petitioner objected to any provision of the CRDP.

We find no error in the ALJ's issuance of a decision based on the written record without holding an in-person hearing after the ALJ provided clear notice that he would do so if a hearing is not necessary. In this case, a hearing was not necessary because neither Petitioner nor the I.G. offered any written direct testimony and, accordingly, there was no witness for a party to request to cross-examine. As for Petitioner's argument that the ALJ wrongly "enforce[d]" a "waiver" of his right to a hearing while he was obtaining a "psychological treatment record for alcohol abuse treatment which would have provided a clear aggregating [sic] factor" (P. Br. to the Board at 1), we have already explained that evidence of such treatment could not be considered a mitigating factor since it is not one of the mitigating factors set out in section 1001.102(c).

Conclusion

For the reasons stated above, we affirm the ALJ Decision.

/s/
Sheila Ann Hegy

/s/
Constance B. Tobias

/s/
Susan S. Yim
Presiding Board Member