Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Craig Richard Wilder
Docket No. A-11-94
Decision No. 2416
September 30, 2011

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Craig Richard Wilder, M.D. (Petitioner), a physician licensed to practice in California, appeals the May 24, 2011 decision of Administrative Law Judge Carolyn Cozad Hughes. *Craig Richard Wilder,* DAB CR2374 (2011) (ALJ Decision). The ALJ sustained the Inspector General's (I.G.) determination to exclude Petitioner from participation in Medicare, Medicaid, and all federal health care programs for a period of 35 years under section 1128(a)(1) of the Social Security Act (Act) based upon Petitioner's guilty plea in connection with his role in a conspiracy to defraud the California Medicaid program (which is known as "Medi-Cal").[1]

For the reasons discussed below, we conclude that section 1128(a)(1) of the Act mandates the exclusion of Petitioner. We also conclude that the 35-year exclusion imposed by the I.G. is not within a reasonable range and reduce it to a period of 18 years.

Applicable Legal Authority

Section 1128(a)(1) of the Act requires the Secretary of Health and Human Services to exclude from participation in Medicare, Medicaid, and all federal health care programs any individual who "has been convicted of a criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program." An exclusion imposed under section 1128(a) must be for a minimum period of five years. Act § 1128(c)(3)(B).

The regulation at 42 C.F.R. § 1001.102 charges the I.G. with exercising these exclusion authorities and specifies aggravating and mitigating factors that the I.G may consider in setting the period of the exclusion. Section 1001.102(b) lists the factors which "may be

[1] The current version of the Act can be found at http://www.socialsecurity.gov/OP Home.ssact/ssact.htm.

considered to be aggravating and a basis for lengthening the period of exclusion[.]" For exclusions imposed under section 1128(a)(1), the aggravating factors relevant to this case include:

- "The 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 entitities of $5,000 or more. (The entire amount of financial loss to such programs or entitities, including any amounts resulting from similar acts not adjudicated, will be considered reglardless of whether full or partial restititution has been made);

- The acts that resulted in the conviction, or similar acts, were committed overa period of one year or more;

- Whether the individual or entity was convicted of other offenses besides those forming the basis for the exclusion.

Id. Section 1001.102(c) lists three factors which may be considered mitigating and a basis for reducing the period of exclusion to no less than five years if any of the aggravating factors would otherwise justify an exclusion longer than five years. The mitigating factor relevant here is:

- The individual's or entity's cooperation with Federal or State officials resulted in . . . [o]thers being convicted or excluded from Medicare, Medicaid and all other Federal health care programs.

42 C.F.R. § 1001.102(c)(3).

The presence of an aggravating factor or factors, not offset by any mitigating factor or factors, justifies lengthening the mandatory period of exclusion.

Background[2]

Petitioner is a California physician who participated in a scheme to defraud the Medicare and Medi-Cal programs for a period of about two years. Specifically, Petitioner was one of 12-14 physicians who had a management agreement with Alla Chernov for her clinic in West Hollywood, California and other locations. I.G. Ex. 7, at 1. Ms. Chernov, one of the clinic owners, and her husband Boris Sokol allegedly

[2] The information in this section is drawn from the ALJ Decision and undisputed evidence in the record before the ALJ and is intended to provide a context for a discussion of the issues raised on appeal. Nothing in this section is intended to replace, modify, or supplement the ALJ's findings of fact or conclusions of law.

masterminded the fraudulent scheme by preying upon young, indebted physicians and older practitioners who practices were no longer flourishing. *Id*. at 2.

After Petitioner obtained multiple provider numbers from both the Medi-Cal and Medicare programs for multiple clinic locations under Ms. Chernov's direction, she billed Medi-Cal and Medicare in the names of Petitioner and other physicians in the scheme for numerous procedures, diagnostic tests, and physical therapy sessions. *Id*. at 2. The provider numbers obtained by Petitioner allowed him to obtain payments from Medi-Cal and Medicare that he was not entitled to receive. *Id*. As part of the scheme, Petitioner received approximately 20-25% of the fraudulently obtained payments, while Ms. Chernov and Mr. Sokol received approximately 70-75% of the proceeds. *Id*.

On February 8, 2008, Petitioner was charged in a seven-count felony indictment in California state court for his role in the scheme to defraud federal and state health care programs over a two-year period from January 1, 2003 through December 31, 2004. I.G. Ex. 4. On April 4, 2008, Petitioner pled guilty to one count of felony health benefits fraud, two counts of felony grand theft, and one count of felony failure to file a California tax return. I.G. Exs. 2 and 7. As part of the plea agreement, Petitioner agreed to cooperate with the law enforcement officials investigating and prosecuting criminal activities involving other physicians and clinic owners related to the scheme to defraud. I.G. Ex. 2, at 4-7. The Court delayed sentencing for one year so that Petitioner could meet the terms of his probation and the Court could evaluate the value of his cooperation. I.G. Ex. 2, at 2, 4. Based on his successful completion of probation, the plea agreement allowed Petitioner to ask the Court to reduce his felony convictions to misdemeanors. I.G. Ex. 2, at 1-2, 4.

A California Deputy Attorney General informed the I.G. in a letter that "primarily as a result of" Petitioner's cooperation, law enforcement officials obtained convictions against seven individuals who were "Owners and Doctors involved with Alla Chernov and her various medical facilities, who thereafter reimbursed Med-Cal and/or Medicare for a large portion of these false billings. . . ." I.G. Ex. 7, at 3. On June 5, 2009, the California state court reduced each of Petitioner's felony convictions to misdemeanor offenses, placed him on summary probation for 36 months, and ordered him to pay $4,002,312.14 in restitution to the Medicare and Medi-Cal programs, which is the amount listed in his plea agreement. I.G. Ex. 2, at 2; I.G. Ex. 3 ,at 3; I.G. Ex. 5, at 1.

In a letter dated June 30, 2010, the I.G. advised Petitioner that, because of his convictions, he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of 35 years under section 1128(a)(1)

of the Act. I.G. Ex. 1. The June 30 letter stated that the I.G. determined to impose an exclusion longer than the five-year minimum period based on the presence of three aggravating factors and that Petitioner's cooperation with law enforcement officials had been considered as a mitigating factor. *Id.* at 2.

Petitioner timely appealed the I.G.'s exclusion determination and the length of the exclusion imposed. Both the I.G. and Petitioner submitted briefs and documentary exhibits. The I.G. moved for summary disposition based on the written record seeking an affirmance of the exclusion imposed and the length of the 35-year exclusion.

ALJ Decision

The ALJ issued a decision in which she concluded that the I.G. was required to exclude Petitioner under section 1128(a)(1) and that the 35-year period of exclusion was reasonable. ALJ Decision at 3, 4-6. Specifically, the ALJ concluded that Petitioner must be excluded for at least five years because he was convicted of a criminal offense related to the delivery of an item or service under the Medicare and Medi-Cal programs within the meaning of section 1128(a)(1) of the Act. *Id*. at 3. She rejected Petitioner's argument that section 1128(a)(1) applies only to felony criminal convictions. *Id*.

She also found that the I.G. had established the presence of three aggravating factors as set forth in his notice letter: 1) the acts resulting in the conviction, or similar acts, caused a government program or another entity financial losses of $5,000 or more; 2) the acts that resulted in the conviction, or similar acts, were committed over a period of one year or more; and 3) the individual was convicted of other offenses besides those forming the basis for his exclusion. ALJ Decision at 4-6, *citing* 42 C.F.R. § 1001.102(b). In addition, the ALJ found that one mitigating factor was present based on Petitioner's "extraordinary" cooperation with law enforcement officials resulting in the conviction of seven individuals who participated in the conspiracy. ALJ Decision at 6.

Despite Petitioner's extraordinary cooperation, the ALJ concluded "the three aggravating factors show that Petitioner poses a significant threat to program integrity and justifies a significant period of exclusion." *Id*. at 5. The ALJ explained that Petitioner was part of an "enormous fraud" involving "a dozen or so" physicians as well as two clinic owners. *Id*. She also found it significant that Petitioner's participation in the fraudulent scheme "lasted for two years, and cost the Medicare and Medi-Cal programs millions of dollars." *Id*. The ALJ specifically found that "the substantial program loss more than justifies a significant increase in the period of exclusion." *Id*. at 4. The ALJ ultimately concluded that, based on the totality of the aggravating and mitigating factors, the 35-year exclusion fell within a reasonable range. *Id*. at 7.

Standard of Review

The regulations set the Board's standard of review in I.G. exclusion cases. The standard of review on a disputed factual issue 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 initial decision is erroneous. 42 C.F.R. § 1005.21(h); *see also Barry D. Garfinkel, M.D.*, DAB No. 1572, at 5 (1996) (recognizing that under the regulation "[w]e have a limited role in reviewing ALJ decisions in exclusion cases"), *aff'd*, *Garfinkel v. Shalala*, No. 3-96-604 (D. Minn. June 25, 1997).

Analysis

Petitioner timely appealed the ALJ Decision to the Board.[3] On appeal, Petitioner contends, as he did before the ALJ, that section 1128(a)(1) does not mandate his exclusion because he was ultimately convicted of misdemeanor rather than felony criminal offenses. Request for Review (RR) at 1. Petitioner further contends that the I.G.'s website directs that a misdemeanor conviction shall be viewed as a basis to impose a "permissive" exclusion having a mandatory minimum exclusion period of only three years. RR at 1; *see, e.g.*, 42 U.S.C. § 1320a-7(b)(1); 42 C.F.R. §§ 1001.201(a) and (b)(1). Petitioner also contends that documents submitted by the I.G. "would prove to be inadmissible in a federal court." RR at 2. Regarding the length of the exclusion, Petitioner argues that the ALJ Decision "was over-reaching and excessive by equating the same weight to a misdemeanor conviction and to a felony" conviction. *Id*. at 1. Petitioner argues that the ALJ erred by considering $4 million in restitution because the amount of the restitution was entered without his knowledge or the presence of his attorney and he did not receive all the money from his criminal conduct. *Id*. at 2. Petitioner argues that he "was charged and convicted for the four month period that [he] worked in this office[,] not the two years as specified in the [ALJ] decision." *Id*. at 2. Finally, Petitioner argues that the ALJ disregarded his level of cooperation. *Id*. at 1.

We address each of these arguments below.

[3] On June 26, 2011, Petitioner timely filed a notice of appeal of the ALJ Decision, as well as an accompanying brief. Petitioner subsequently filed an amended brief, which the I.G. received on August 2, 2011. The I.G. moved to strike Petitioner's amended brief on the ground that the applicable regulations do not allow amendments of appeals or additional briefing by either party absent permission from the Board, citing the regulations at 42 C.F.R. §§ 1005.21(a) and (c) that require a petitioner to file an appeal and accompanying brief within 30 days of the ALJ decision, which may be extended for a period not to exceed 30 days if good cause is shown. Although the I.G. is correct, we find there is no material difference between Petitioner's initial appeal and accompanying brief and his amended brief. Accordingly, we deny the motion to strike and permit the amended brief.

A. The ALJ Decision sustaining Petitioner's exclusion under section 1128(a)(1) of the Act is based on substantial evidence and is not erroneous.

Section 1128(a)(1) of the Act requires Petitioner's exclusion because: (1) he was convicted of criminal offenses (health benefits fraud and grand theft from Medicare and Medi-Cal); and (2) those offenses relate to the delivery of an item or service under

Medicare or a state health care program (Medi-Cal). I.G. Ex. 2, at 1-2; I.G. Ex. 4, at 2-4. Thus, as the ALJ correctly found, the I.G.'s exclusion of Petitioner is mandated by law. Act, § 1128(a)(1); *see also* 42 C.F.R. § 1001.101(a).

Petitioner does not dispute the ALJ's finding that he was "convicted" of a criminal offense within the meaning of section 1128(a)(1). Petitioner pled guilty to one count of health benefits fraud and two counts of grand theft relating to his submission of false claims to Medicare and Medi-Cal and subsequent receipt of funds from these fraudulently submitted claims. I.G. Ex. 2; *see also* I.G. Exs. 3 and 4. Petitioner also does not dispute the ALJ's finding that Petitioner's conviction, on its face, "establishes that he was convicted of health benefits fraud and theft, because he 'made fraudulent claims for payment of a healthcare benefit' and 'did unlawfully take money' from the Medicare and Medi-Cal programs." ALJ Decision at 3. Petitioner does not dispute that his conviction involved an offense related to the delivery of an item or service under the federal health care programs. In any event, false billing for items or services has been repeatedly held to be an offense related to the delivery of an item or service within the meaning of section 1128(a)(1). *See Kahn v. Inspector General of U.S. Dept. of Health and Human Services*, 848 F.Supp. 432, at 436 (S.D.N.Y. 1994); *Green v. Sullivan*, 731 F.Supp. 835, 838 (E.D. Tenn. 1990). The nature of Petitioner's criminal offense establishes the required nexus or common sense connection between Petitioner's convictions and the delivery of items or services under the federal health care programs. *See, e.g., Berton Siegel, D.O.*, DAB No. 1467 (1994).

Petitioner contends that the ALJ erred in concluding that the mandatory exclusion provision of section 1128(a)(1) of the Act was applicable because his ultimate convictions were for misdemeanor rather than felony criminal offenses.[4] RR at 1. We disagree. In *Lorna Fay Gardner*, DAB No. 1733, at 5 (2000), the Board rejected a similar argument, stating that "section 1128(a)(1) "does not draw a distinction by degree of offense." Nothing in the language of section 1128(a)(1) requires Petitioner's conviction to be for a felony rather than a misdemeanor in order to warrant a five-year exclusion. *Tanya A. Chuoke*, DAB No. 1721, at 14 (2000). Indeed, the text of section 1128(a)(1) plainly applies to all "criminal offenses" related to federal health care

[4] Petitioner's related contention that the ALJ "attempted to prove that misdemeanors should have the same weight as felonies" is simply incorrect. App. Br. at 1. The ALJ made no such attempt because section 1128(a)(1) does not differentiate between the degree of criminal offense.

programs and makes no distinction between misdemeanor and felony convictions. Consequently, the plain language of the statute is inconsistent with Petitioner's proposed interpretation. Thus, the ALJ correctly concluded that the "section mandates exclusion based on *any* level of criminal conviction." ALJ Decision at 3 (emphasis in original).

Petitioner also argues that a permissive exclusion, presumably under section 1128(b)(1) of the Act, 42 U.S.C. § 1320a-7(b)(1), would be more appropriate here than a mandatory exclusion under section 1128(a)(1).[5] *See also* 42 C.F.R. § 1001.102(a)(1). However, section 1128(b)(1) applies only to crimes that are not related to Federal or state health care programs or to crimes "other than those specifically described in subsection (a)(1) of [section 1128]." Act § 1128(b)(1). The Board has previously held that "the Act expressly provides for mandatory five-year minimum periods of exclusion *whenever* an individual has been convicted 'of a criminal offense related to the delivery of an item or service' under specific programs, including Medicaid, without any requirement that the offense be a felony." *Tanya A. Chuoke*, DAB No. 1721, at 14 (italics in original). Once a conviction is determined to be within the scope of section 1128(a)(1), the I.G. is required by the Act to impose a mandatory exclusion. *Lorna Fay Gardner*, DAB No. 1733, at 6. Because section 1128(a)(1) of the Act mandates that the Secretary of Health and Human Services exclude an individual who has been convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program, the ALJ correctly concluded that Petitioner must be excluded from program participation.

Petitioner also contends that the ALJ Decision was based on criminal charges that he was neither charged with nor convicted of. RR at 2. However, Petitioner does not point to anything in the ALJ Decision to support this contention. In fact, the ALJ Decision is based entirely on Petitioner's plea agreement as well as the sentencing and conviction documents describing the counts to which he pled guilty.

Finally, Petitioner argues that the I.G. did not conduct an investigation in this case. RR at 2; *see also* Petitioner's Appellate (P. App.) Ex. 1 (fraud investigation report, indicating allegations of false billing against Ms. Chernov and another physician were initially referred to the I.G. in 2003). This argument is without merit. Whether or not the I.G. conducted an investigation in 2003 involving another physician is irrelevant here. The I.G. excluded Petitioner based on *his conviction* of a crime that relates to the delivery of

[5] Petitioner argues that the I.G.'s "website directs that a misdemeanor conviction shall be viewed as a 'permissive exclusion.'" RR at 1. This is incorrect. The I.G. website simply lists the types exclusions and their corresponding minimum time periods.

an item or service under the federal health care programs, and as such, the ALJ's conclusion sustaining the I.G.'s exclusion pursuant to section 1128(a)(1) of the Act was not erroneous.

B. An exclusion of 35 years is not within a reasonable range in view of the significance of the mitigating factor when compared to the three aggravating factors.

In reviewing whether "[t]he length of exclusion is unreasonable," 42 C.F.R. § 1001.2007(a)(1)(ii), the ALJ may not substitute his judgment for that of the I.G. or determine what period of exclusion would be "better." *Paul D. Goldenheim, M.D., et al.*, DAB No. 2268, at 21 (2009), *aff'd sub nom. Friedman v. Sebelius*, 755 F.Supp.2d 98 (D.D.C. 2010); *see also Barry D. Garfinkel M.D.*, DAB No. 1572, at 6-7, 10-11 (ALJ's role "was not to determine what period of exclusion would be 'better' but whether the period imposed by the I.G. was within a reasonable range). Instead, the ALJ's role is limited to considering whether the period of exclusion imposed by the I.G. was within a reasonable range, based on demonstrated criteria. *Id.*; *see also* 57 Fed. Reg. 3298, 3321 (Jan. 29, 1992). The preamble to 42 C.F.R. Part 1001 indicates that the I.G. has "broad discretion" in setting the length of an exclusion in a particular case, based on the I.G.'s "vast experience" in implementing exclusions. 57 Fed. Reg. at 3321. As the preamble further states:

> We do not intend for the aggravating and mitigating factors to have specific values; rather, these factors must be evaluated based on the circumstances of a particular case. For example, in one case many aggravating factors may exist, but the subject's cooperation . . . may be so significant that it is appropriate to give that one mitigating factor more weight than all of the aggravating.

Id. at 3314. Thus, "it is not the number of aggravating factors that is determinative rather, it is the quality of the circumstances, whether aggravating or mitigating, which is controlling in analyzing these factors." *Joseph M. Ruske, Jr. R.Ph.*, No. DAB No. 1851, at 11 (2002), *citing Barry D. Garfinkel, M.D.*, DAB No. 1572.

For the reasons discussed below, we conclude that the ALJ's determination that there are three aggravating factors and one mitigating factor is supported by substantial evidence in the record. However, because of Petitioner's significant and extensive cooperation with law enforcement officials, a 35-year exclusion is not within a reasonable range, and we reduce it to 18 years.

1. The ALJ's determination that there are three aggravating factors and one mitigating factor is supported by substantial evidence in the record.

Financial loss to government programs

Regarding the first aggravating factor at issue, the California State Court ordered Petitioner to pay $4,002,312.14 in restitution to the Medicare and Medi-Cal programs, which is the amount of restitution contained in Petitioner's plea agreement that was attributed to the four crimes he pleaded guilty to. I.G. Ex. 2, at 2; I.G. Ex. 3, at 3; I.G. Ex. 5, at 1. The ALJ correctly concluded that restitution has long been considered a reasonable measure of program loss and that Petitioner's crimes caused losses to the federal health care programs that greatly exceeded the $5,000 threshold for constituting an aggravating factor under 42 C.F.R. § 1001.102(b)(1). ALJ Decision at 4 (citation omitted).

As he did before the ALJ, Petitioner contends that the amount of the restitution contained in his plea agreement "was entered without knowledge or presence of [him]self or [his] attorney and includes money that [he] never received."[6] RR at 2. He also contends that "[n]o restitution hearing took place in Los Angeles County Superior Court during [his] misdemeanor conviction." *Id*. This argument is without merit because the regulations prohibit Petitioner from collaterally attacking the court's finding or the factual basis underlying his conviction in this proceeding. 42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000). While it may be true that Petitioner did not receive all of the proceeds related to the fraudulent scheme in which he participated or may have been unaware of the actions of his confederates, the ALJ correctly concluded that "it neither eliminates nor even diminishes the amount of program financial loss attributable to Petitioner's own crimes." ALJ Decision at 4. Indeed, the regulation does not say that an individual or entity has to benefit from the program loss, only that the offense "caused" or "intended to cause" the loss. Section 1001.102(b)(1).

Length of criminal conduct

The ALJ also found that a second aggravating factor existed under section 1001.102(b)(1) based on the fact that Petitioner's conviction and similar acts were committed over a period of two years. ALJ Decision at 5, *citing* I.G. Ex. 4, at 2-3. On appeal, Petitioner

[6] Before us on appeal, Petitioner submitted a facsimile transmission dated July 19, 2006 to support his contention that he was not responsible for the entire restitution amount. P. App. Ex. 2. The context of this facsimile is unclear. It appears to be a list of debts that Petitioner has not explained. Nor is it clear whether all of Petitioner's illegal activities had been fully investigated at the time. In any event, Petitioner did not submit this document to the ALJ, nor has he alleged that there were reasonable grounds for his failure to do so. Although we accept this exhibit into the record, we find that it does not have any probative value and, therefore, do not address it further in this decision.

contends that he "was charged and convicted for the four month period that I worked in this office[,] not the two years as specified in the [ALJ] decision." RR at 2. This argument is without merit. It appears from our review of the record that Petitioner did not challenge before the ALJ the length of his criminal conduct. Under the regulation at 42 C.F.R. § 1005.21(e), the Board "will not consider any issue not raised in the parties' briefs, nor any issue in the briefs that could have been raised before the ALJ but was not." Petitioner has not proffered any reason why he did not raise or could not have raised this issue before the ALJ.

In any event, the ALJ correctly found that the acts resulting in Petitioner's conviction and similar acts were committed over a period of two years. ALJ Decision at 5. The criminal indictment against Petitioner states that his criminal acts began around January 1, 2003 and continued through December 31, 2004, a period of two years. I.G. Ex. 4, at 2-3. The alleged duration of Petitioner's criminal fraudulent acts was not modified in his plea agreement. I.G. Ex. 2. In addition, Petitioner is precluded under section 1001.2007(d) from collaterally attacking the factual basis for his convictions, as previously discussed. Moreover, Petitioner offered no support for his contention that he was convicted for conduct that spanned only a four-month period. The ALJ and the I.G. were entitled to rely on these court documents in determining the length of Petitioner's criminal conduct in this matter.

Finally, Petitioner claims that the I.G.'s "reports" (presumably, the I.G.'s exhibits), upon which the I.G. and ALJ relied in determining that Petitioner's acts were committed over a period of two years, would not be admissible in federal court. This argument is also without merit. Petitioner does not explain why he believes these documents would be inadmissible in federal court. Regardless of whether they would be admissible in federal court, this is an administrative proceeding, and the Federal Rules of Evidence do not apply here. 42 C.F.R. § 1005.17(b). The documents relied upon by the ALJ were relevant and material to the issues before her and, therefore, were properly admitted under the applicable regulation. 42 C.F.R. § 1005.17(c).

Conviction for other criminal offenses

Finally, the ALJ found that Petitioner's conviction for failing to file State income tax returns for 2003-2005 and a resulting order to pay $353,804.59 to the California Franchise Tax Board constituted a third aggravating factor. ALJ Decision at 5. Petitioner does not challenge this ALJ finding on appeal.

Mitigating factor

The ALJ found that Petitioner's cooperation with law enforcement officials constituted a mitigating factor under 42 C.F.R. § 1001.102(c)(3). ALJ Decision at 6. Specifically, the ALJ noted that as part of his plea agreement, Petitioner was required to "'fully cooperate

with law enforcement officials in their investigation and prosecution of health care fraud, unlawful remuneration, and any other criminal activities of which he has knowledge . . . .'" ALJ Decision at 6, *quoting* I.G. Ex. 2, at 4. The ALJ also recognized that "his level of cooperation went well beyond that required by his plea agreement, and that his cooperation led to multiple criminal convictions." ALJ Decision at 6. The ALJ found that the "parties agree that Petitioner cooperated with law enforcement and, indeed, his level of cooperation has been extraordinary and led to the conviction of seven of his confederates so far." *Id*.

2. A 35-year exclusion is not within a reasonable range given Petitioner's significant cooperation with investigating and prosecuting officials. An 18-year exclusion is reasonable under the facts of this case.

The duration of a mandatory exclusion beyond five years is determined by evaluating the aggravating factors and mitigating factors set forth at 42 C.F.R. §§ 1001.102(b) and (c). The evaluation does not rest on the specific number of aggravating or mitigating factors, but rather on circumstances presented by these factors. The Board has previously recognized that "[i]t is well-established that section 1128 exclusions are remedial in nature, rather than punitive, and are intended to protect federally-funded health care programs from untrustworthy individuals." *Donald A. Burstein, Ph.D.*, DAB No. 1865, at 12 (2003) , *citing Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003), *cert. denied*, 123 S.Ct. 2652 (2005); *Mannocchio v. Kusserow*, 961 F.2d 1539, 1543 (11th Cir. 1992).

Here, the ALJ determined that three aggravating factors justified substantially increasing the period of Petitioner's exclusion beyond the five-year mandatory minimum period to 35 years: the financial loss to health care programs (approximately $4 million); the duration of his criminal conduct (two years); and his conviction for offenses besides those which formed the basis for the exclusion (failure to file California tax returns for three years). ALJ Decision at 4-5. The ALJ concluded that these three aggravating factors "show that Petitioner poses a significant threat to program integrity and justifies a significant period of exclusion." *Id*. at 5. In particular, the ALJ found "that the substantial program loss more than justifies a significant increase in the period of exclusion." *Id*. at 4. We do not disagree that a significant increase beyond the mandatory five-year period is appropriate based on these aggravating factors.

The ALJ also found that one mitigating factor was present based on Petitioner's "extraordinary" cooperation with state law enforcement officials resulting in the conviction of seven individuals who participated in the "massive scheme to defraud." *Id*. at 6. Nonetheless, the ALJ upheld the full 35-year exclusion on the grounds that "[t]he period of exclusion would have been substantially longer had [Petitioner] not cooperated." *Id*. at 6-7. The ALJ does not cite or rely on any documentary evidence

submitted by the I.G. to support her statement. For example, the I.G. notice letter does not state that the 35-year period of exclusion had been reduced from some longer period due to Petitioner's cooperation. Instead, the ALJ merely cited to a statement made by the I.G. in his Motion To Respond to Petitioner's Witness Declarations.[7] *Id*. at 6.

In any case, our role is not to review the I.G.'s decision-making process, but to assess de novo whether the length of the exclusion imposed falls within a reasonable range in light of the evidence as to the offense and the regulatory aggravating and mitigating factors under the circumstances of this case. *Joseph M. Ruske, Jr. R.Ph*., DAB No. 1851, at 11, *quoting Gary Alan Katz, R.Ph.*, DAB No. 1842, at 8 n.4 (2002). While the reasonableness of the length of exclusion in any one case depends on individualized facts and circumstances, we find it difficult to see, in light of the range of past exclusion periods, how an exclusion of substantially more than 35 years could be justified as within a reasonable range based on a $4.25 million restitution award as an aggravating factor. Yet, according to the I.G., the 35-year exclusion imposed here reflects consideration of the very significant and productive cooperation of Petitioner as a mitigating factor, implying that a longer exclusion period was originally contemplated.

The Board has seen appeals of I.G. exclusion cases involving court-ordered restitution in amounts above $1 million and even up to $19 million. In those cases, the I.G. imposed exclusions ranging from the mandatory minimum of five years up to 15 years. *See Mark B. Kabins, M.D.*, DAB No. 2410 (2011) (5-year exclusion imposed where amount of restitution ordered was $3.5 million); *Paul D. Goldenheim, M.D., et al.*, DAB No. 2268 (I.G. reduced 20-year exclusions of three individuals to 15 years based on their cooperation with law enforcement officials where amount of personal "disgorgement" ordered was $7.5 million, $8 million, and $19 million); *Kailash C. Singhvi, M.D.*, DAB No. 2138 (2007) (five-year exclusion imposed based on cooperation where there was $1.6 million in program loss over a 16 year period); *Donald A. Burstein, Ph.D.*, DAB No. 1865 (proposed 15-year exclusion on appeal revised to 10 years based on cooperation where there was $1.7 million in program loss).

We agree with the ALJ that the multiple aggravating factors present in this case, combined with their severity, establish that Petitioner has been and remains a threat to the integrity of federally-financed health care programs. By any standard, the criminal conduct for which Petitioner was convicted is serious. Petitioner's crimes were committed as part of a massive scheme to defraud the Medi-Cal and Medicare programs, and the crimes resulted in an enormous sum of money being fraudulently obtained from those programs by Petitioner and his cohorts.

[7] The I.G. stated in its pleading that "Petitioner's exclusion would have been longer but for his cooperation and the resulting convictions." I.G.'s Motion To Respond to Petitioner's Witness Declarations at 2. The I.G. also did not cite to any evidence in its pleading to support its argument.

The evidence as to the mitigating factor, however, is compelling. Petitioner's cooperation with California law enforcement officials was so important that the sentencing court reduced all offenses from felonies to misdemeanors and reduced his period of summary probation from five years to three. I.G. Ex. 3. The I.G. does not dispute the ALJ's finding that Petitioner's activities on behalf of law enforcement were "extraordinary." Indeed, the California Deputy Attorney General who prosecuted the case against Petitioner informed the I.G. in a letter that "the actions of Dr. Wilder in cooperating in the past and continuing to cooperate in current prosecutions against Alla Chernov and Boris Sokol [the alleged masterminds of the fraudulent scheme] with The People and testifying against the Owners and Doctors involved [in the criminal conduct] were the primary reasons why we were able to stop the Medi-Cal and Medicare fraud in this case and obtain significant reimbursements for the State of California and the Federal Government for significant Medi-Cal and Medicare losses in these cases . . . ." I.G. Ex. 7 at 3 (emphasis in original). The Deputy Attorney General also told the I.G. in his letter that – "[o]btaining cooperation from defendants such as Dr. Wilder is a key ingredient to this office being successful in our efforts to abate Medi-Cal and Medicare fraud in this State." *Id*. at 4. The I.G. also does not dispute Petitioner's statement that his "cooperation is responsible for DHHS[']s attempt to recover more than 30 million dollars in multiple cases" involving the other individuals who participated in the fraudulent scheme, which is more than seven times the loss caused by Petitioner's criminal involvement. Petitioner's Informal Brief to the ALJ at 3. The undisputed facts support a determination that Petitioner's cooperation with investigating and prosecuting authorities was extensive and that he engaged in some cooperative acts which put him at risk. The nature and extent of Petitioner's extensive cooperation has a bearing on Petitioner's general trustworthiness and thus on the length of the exclusion necessary to achieve the Act's remedial purpose. *See, e.g., Donald A. Burstein, Ph.D.*, DAB No. 1865, at 13. In evaluating the trustworthiness of Petitioner, it is reasonable to infer that Petitioner's extraordinary cooperation demonstrates that he is not so untrustworthy such that the three aggravating factors present in this case establish that a 35-year exclusion is reasonable to satisfy the remedial purposes of the Act.

Accordingly, we conclude that the depth and breadth of Petitioner's cooperation with law enforcement officials resulting in the arrest and/or conviction of seven participants in the fraudulent scheme and in the recovery of a large amount of program funds, when weighed against the three aggravating factors, merits reduction of this exclusion to 18 years. An 18-year exclusion period is within a reasonable range especially in light of our experience with the length of exclusions imposed in the cases we have previously discussed. We, therefore, reverse the ALJ's determination that 35 years is within a reasonable range and conclude instead that 18 years is a reasonable period of exclusion under the circumstances of this case.

Conclusion

We conclude that section 1128(a)(1) of the Act mandates the exclusion of Petitioner from Medicare, Medicaid, and all federal health care programs. The 35-year exclusion imposed by the I.G. is not within a reasonable range and is reduced to a period of 18 years.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Stephen M. Godek
Presiding Board Member