Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Kamron Hakhamimi, M.D.
Docket No. A-11-71
Decision No. 2408
August 25, 2011

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Kamron Hakhamimi, M.D. (Petitioner) appeals the April 6, 2011 decision of Administrative Law Judge (ALJ) Steven T. Kessel sustaining the exclusion of Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for a period of 12 years, *Kamron Hakhamimi, M.D.*, DAB CR2348 (2011). The Inspector General (I.G.) excluded Petitioner pursuant to section 1128(a)(2) of the Social Security Act (Act) after Petitioner was convicted of two criminal charges that had been filed against him under California law.

Petitioner admits that he was "convicted" within the meaning of section 1128(a)(2) but disputes the ALJ's conclusions that the criminal offenses of which he was convicted related to abuse of a patient and that they were committed in connection with the delivery of a health care item or service. Petitioner also disputes the ALJ's conclusion that a 12-year exclusion is reasonable in length. As we discuss below, Petitioner's arguments on appeal are without merit. We thus sustain the exclusion.

Legal Background

Section 1128(a)(2) of the Act requires the Secretary of the Department of Health and Human Services to exclude any individual who "has been convicted, under Federal or State Law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service." *See also* 42 C.F.R. § 1001.101(b).

Mandatory exclusions under section 1128(a)(2) must be for a minimum period of not less than five years. Section 1128(c)(3)(B) of the Act; *see also* 42 C.F.R. § 1001.102(a). The I.G. has discretion to set a longer period and has adopted regulations which provide that "any of the following factors may be considered to be aggravating and a basis for lengthening the period of exclusion," then listing various potentially aggravating factors to be considered in determining whether to lengthen the exclusion period. 42 C.F.R. § 1001.102(b). The regulations also list various potential mitigating factors which may be considered as a basis for reducing the period of exclusion to no less than five years "[o]nly if any of the aggravating factors . . . justifies an exclusion longer than 5 years[.]"

42 C.F.R. § 1001.102(c). The regulations identify the relevant factors but do not specify the weight to be assigned to each. The I.G. determines the weight based on the particular evidence in an individual case.

Standard of Review

The regulations set out the Board's standard of review in I.G. exclusion cases. The standard of review on a disputed factual issue is whether the initial 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).

Case Background[1]

The Medical Board of California issued a Physician's and Surgeon's Certificate to Petitioner in 2001. I.G. Ex. 9, at 1. On August 13, 2008, Petitioner entered a plea of no contest to two criminal charges that had been filed against him: violation of section 729(a) of the Business and Professions Code of the State of California and violation of section 242 of the Penal Code of the State of California. ALJ Decision at 2. The count involving the violation of section 729(a) of the Business and Professions Code stated that on or about May 3, 2006 through May 4, 2006, Petitioner "did willfully and unlawfully engage in an act of sexual intercourse, sodomy, oral copulation, and sexual contact with a patient and client, to wit: ANITA K." P. Ex. 1, at 1. The count involving the violation of section 242 of the Penal Code stated that on or about May 4, 2006 Petitioner "did willfully and unlawfully use force upon the person of ANITA K." P. Ex. 1, at 3. The court suspended the imposition of sentencing for 36 months and granted Petitioner's Petition for Expungement on September 22, 2010. *See* I.G. Ex. 5, at 1; P. Ex. 3, at 2.

The Medical Board of California issued a Decision and Order on December 4, 2008, effective January 5, 2009, adopting a Stipulated Settlement and Disciplinary Order ("Stipulated Settlement") which revoked Petitioner's Physician's and Surgeon's Certificate, but stayed the revocation and placed Petitioner on probation for seven years. I.G. Ex. 9, at 1, 5. The Stipulated Settlement states in part: "Respondent admits the truth of each and every charge and allegation in the Fourth Cause for Discipline in the First Amended Accusation No. 06-2006-177606 and admits that he is subject to disciplinary action for violation of sections 726 and 729 of Business and Professions Code." *Id.* at 3-4 (¶ 8). The Fourth Cause for Discipline (Conviction of Crimes) appears in the "First Amended Accusation," which is Exhibit A to the Stipulated Settlement. The Fourth Cause for Discipline states in relevant part:

[1] The information in this section is drawn from the undisputed facts in the ALJ Decision and the record and is not intended as new findings.

> Respondent is subject to disciplinary action under sections 2236(a)(d) and 490 of the Code, and California Code of Regulations, Title 16, section 1360, in that he was convicted of violating section 729(a) of the Code (Sexual Exploitation of a Patient), as well as section 242 of the California Penal Code (Battery), both misdemeanors involving facts set forth in paragraphs 12A through 17 above.

Id. at 21 (First Amended Accusation ¶ 18). The clause "involving facts set forth in paragraphs 12A through 17 above" refers, in part, to facts set out in subparagraphs A-E of the First Cause for Discipline (Sexual Abuse/Exploitation of a Patient) in paragraph 12 of the First Amended Accusation. *Id.* at 18-19. The clause also refers to facts set out in the First Cause for Discipline in paragraphs 13 through 15 of the First Amended Accusation. These paragraphs describe the properties and reported side effects of the drugs Ativan, Restoril and Trazodone. (The Second and Third Causes for Discipline, in paragraphs 16 and 17 of the First Amended Accusation, respectively, refer generally to the facts in paragraphs 12 through 15.) Paragraph 12 reads as follows:

> Respondent is subject to disciplinary action for sexual abuse/exploitation, misconduct and/or relations with a patient in violation of sections 726 and 729 of the Code. The circumstances are as follows:
>
> A. Respondent and patient A.K. [footnote omitted] ("patient' or "A.K.") met on an Internet dating site on or about late April or early May 2006, and the two agreed to meet in person on or about May 3, 2006. After their meeting, Respondent set an appointment for A.K. to be seen as a patient by himself at a medical care facility later that same date, on or about May 3, 2006.
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> B. On May 3, 2006, Respondent took a history, conducted a physical examination and ordered lab tests for the patient. Respondent also performed a pap smear on patient on or about May 3, 2006, even though Respondent was not an OB/GYN and despite his having access to information which indicated that patient had a previous pap smear which was performed approximately six months earlier, on or about November 14, 2005.
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> C. On May 3, 2006, Respondent also prescribed three drugs (Ativan, Restoril, and Trazadone) for the patient, although Respondent had access to all of patient's medical records, which did not show that patient required said drugs and which showed that patient had never taken these drugs before.
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> D. Respondent and patient subsequently met for dinner on the evening of May 3, 2006, and the two later returned to Respondent's home. Once at Respondent's residence, the patient began to feel the effects of the medication and

accepted Respondent's offer to sleep in his bed. Patient had no recollection of any other events occurring after falling asleep until waking the following morning, when she learned from Respondent himself that the two had engaged in sexual intercourse.

E. The patient states that she could not remember participating in sexual intercourse with Respondent and has no present recall of whether or not she consented to the sexual intercourse with Respondent.

I.G. Ex. 9, at 18-19.

By letter dated January 27, 2009, the State of California Department of Health Care Services advised Petitioner that he was prohibited from participating in the Medi-Cal program for an indefinite period of time, effective twenty days from the date of the letter. I.G. Ex. 8, at 1. The letter stated that this "suspension" was based on Petitioner's August 15, 2008 misdemeanor conviction in the Los Angeles County Superior Court for violation of Business and Profession Code section 729, subdivision (a), and Penal Code section 242, "a crime involving abuse of a patient." *Id.*

By letter dated June 30, 2010, the I.G. notified Petitioner that, effective 20 days from the date of the letter, he was being excluded from participation in Medicare, Medicaid, and all federal health care programs "for a minimum period of 12 years" pursuant to section 1128(a) of the Act.[2] I.G. Ex. 1, at 1. The letter continued: "This exclusion is due to your conviction as defined in section 1128(i) (42 U.S.C. § 1320a-7(i)), in the Superior Court of California, County of Los Angeles, of a criminal offense related to the neglect or abuse of patients, in connection with the delivery of a health care item or service. . . ." *Id.* The letter further stated that the period of exclusion was greater than the five-year minimum because there was evidence of the following circumstances:

1. The action that resulted in the conviction was premeditated, was part of a continuing pattern of behavior, or consisted of non-consensual sexual acts. You were convicted of willfully and unlawfully engaging in an act of sexual intercourse, sodomy, oral copulation, and sexual contact with a patient and client.
2. The individual or entity was convicted of other offenses besides those which formed the basis for exclusion, or has been the subject of any other adverse action by any Federal, State, or local government agency or board, if the adverse action is based on the same set of circumstances that serves as the

[2] In response to the Board's question, the I.G. explained that Petitioner could request reinstatement in these programs after 12 years. Transcript of 7/12/11 oral argument (OA Tr.) at 4-5.

> basis for imposition of the exclusion. The California Department of Health Care Services suspended you from participation in the Medi-Cal program.

I.G. Ex. 1, at 1-2.

Pursuant to 42 C.F.R. Part 1005, Petitioner timely requested a hearing on the exclusion imposed by the I.G.

The ALJ Decision

The ALJ made two numbered Findings of Fact and Conclusions of Law:

1. The I.G. is mandated to exclude Petitioner pursuant to section 1128(a)(2) of the Act.
2. An exclusion of 12 years is reasonable.

ALJ Decision at 2, 4.

In his discussion of the first numbered conclusion, the ALJ concluded that the three elements of section 1128(a)(2) are present in this case. First, the ALJ concluded that Petitioner was convicted of a crime since a plea of no contest is a conviction within the meaning of section 1128 of the Act and is not vitiated by a subsequent expungement after completion of sentence. ALJ Decision at 3. Second, the ALJ concluded that "Petitioner's crimes explicitly related to abuse of a patient." *Id.* The ALJ continued: "Among other things, Petitioner was convicted of willfully using force against a patient. That is 'abuse' under any definition of the term. So also is willfully and unlawfully engaging in a sexual act with a patient, because such an act is an abuse of a relationship of trust." *Id.* Third, the ALJ concluded that Petitioner's crimes were committed in connection with the delivery of a health care item or service. The ALJ stated: "That nexus is evident from the crimes of which Petitioner was convicted. Delivery of health care items or services to A.K. [the victim] was a necessary element of these crimes. Petitioner could not have been charged with, or convicted of, these crimes but for his doctor-patient relationship with A.K." *Id.*

In his discussion of the second numbered conclusion, the ALJ concluded that the I.G. had established the existence of two aggravating factors: the abuse "consisted of non-consensual sexual acts," and Petitioner "was the subject of other adverse action by a State Board that was based on the same circumstances that are the basis for Petitioner's exclusion." ALJ Decision at 4, citing 42 C.F.R. §§ 1001.102(b)(4) and 1001.102(b)(9). The ALJ also concluded that "the evidence relating to these factors establishes Petitioner

to be highly untrustworthy to provide care" and that an exclusion of 12 years was therefore reasonable. ALJ Decision at 5.

Before the Board, Petitioner takes exception to both of the ALJ's numbered Findings of Fact and Conclusions of Law.

Analysis

I. The ALJ's conclusion that the requirements for exclusion in section 1128(a)(2) were met is supported by substantial evidence and is free of legal error.

A. The ALJ did not err in concluding that Petitioner's conviction was related to the abuse of a patient.

Petitioner argues that the ALJ erred in concluding that the crimes of which he was convicted related to abuse of a patient. In particular, Petitioner disputes the ALJ's conclusion that Petitioner's "conviction of 'willfully and unlawfully' engaging in sexual relations with a patient is 'abuse' under any definition of the term." Written Brief in Support of Notice of Appeal (NA) at 18, quoting ALJ Decision at 3. According to Petitioner, "[s]exual relations with a patient is inappropriate and unlawful, but there is absolutely no reliable and substantial evidence that the sexual contact was unwanted." NA at 18. Further, according to Petitioner, "the 'force' encompassed in [his] battery conviction is directly related to the fact that a patient, by law, cannot consent to sex with his / her physician[.]" *Id.* at 20.

The ALJ addressed this argument as follows:

> Petitioner contends that the force that he used against A.K. was not abusive because it constituted only a technical violation of law based on his physician-patient relationship with A.K. That argument is unpersuasive. Sexual relations between a physician and his or her patient are unlawful in California because of the implicit coercion involved in such relationships. Whether coercion involves physical force, or simply misuse of a relationship of trust, it is abuse because it involves the use of power against a victim to obtain results that might otherwise be unobtainable.

ALJ Decision at 3. Petitioner offers no explanation why he considers the ALJ's view of what constituted abuse erroneous. Instead, Petitioner quotes with approval a statement in a publication by the Council on Ethical and Judicial Affairs of the American Medical Association that "the relative position of the patient within the professional relationship is such that it is difficult for the patient to give meaningful consent to . . . sexual contact or

sexual relations." NA at 20, quoting I.G.'s brief below (quoting *Sexual Misconduct in the Practice of Medicine*, 266 JAMA 2741, 2742 (1991)). Contrary to what Petitioner suggests, this statement supports the ALJ's conclusion that there is abuse anytime a physician engages in sexual activity with a patient.

Indeed, at the oral argument in this case, Petitioner's counsel stated: "[W]e believe that . . . . there is a good argument for the Inspector General to state . . . not only that there was a conviction, but that the conviction deals with abuse of a patient, because I think that read broadly and fairly, I think read broadly, the second element, abuse of a patient, is met by a conviction for sex with a patient." OA Tr. at 29.

Accordingly, we conclude that the ALJ did not err in concluding that the second element of section 1128(a)(2) was met here.

B. The ALJ did not err in concluding that Petitioner's abuse of a patient was in connection with the delivery of a health care item or service.

Petitioner argues that the ALJ read the third element of section 1128(a)(2) – that the abuse of a patient to which the conviction was related was "in connection with the delivery of a health care item or service" – as requiring only a doctor-patient relationship between Petitioner and the victim and that this reading is erroneous. Petitioner further argues that, assuming his crimes were related to abuse of a patient, there is no factual basis for concluding that the abuse was "in connection with the delivery of a health care item or service" even under a correct reading of the third element of section 1128(a)(2). As we discuss below, these arguments have no merit.

1. The doctor-patient relationship is sufficient to establish that Petitioner's abuse of a patient was in connection with the delivery of a health care item or service.

As indicated above, Petitioner reads the ALJ Decision as holding that the existence of a doctor-patient relationship is all that is required to establish that his abuse of A.K. was "in connection with the delivery of a health care item or service."[3] According to Petitioner, this interpretation of section 1128(a)(2) would make the third element of section 1128(a)(2) "unnecessary" because the doctor-patient relationship "had to exist" in order to meet the second element. OA Tr. at 7.

[3] Although Petitioner argues that the ALJ relied solely on the doctor-patient relationship to establish the third element, that is not clear since the ALJ does discuss at pages 5-7 of his decision some of the other evidence we discuss below. In any event, the Board has de novo record review.

Petitioner seems to be arguing that section 1128(a)(2) cannot reasonably be read as allowing the two elements – patient abuse and "in connection with the delivery of a health care item or service" – to be met based on the same fact, here, the existence of a patient-doctor relationship. Petitioner cites nothing in the language or history of the statute or implementing regulations to support this conclusion. Nor does he cite any rule of construction that would require this reading. The mere fact that an element of one of the crimes of which Petitioner was convicted – the doctor-patient relationship – corresponds to both elements of section 1128(a)(2) does not make either element of this statutory provision redundant. Thus, the ALJ reasonably concluded that the third as well as the second element of section 1128(a)(2) was established by Petitioner's conviction.

2. *Other evidence of record supports the ALJ's conclusion that Petitioner's abuse of a patient was in connection with the delivery of a health care item or service.*

We further conclude that other evidence of record establishes the third element of section 1128(a)(2) and that, contrary to what Petitioner argues, it is not error to rely on that evidence. The Board has previously held that the "words 'in connection with' in section 1128(a)(2) require only a minimal nexus between the abuse and the delivery of a health care service." *Bruce Lindberg, D.C.*, DAB No. 1386, at 8 (1993). In *Lindberg*, the Board determined that the requisite nexus could be established by the fact that the petitioner's treatment of a patient in a clinical setting "had enabled him to perpetrate the abuse of which he was convicted," which "occurred in Petitioner's automobile, after a social visit [by the patient] at Petitioner's home." *Id.* In other words, "Petitioner had exploited the relationship he had developed with [the patient] in the clinical setting for the purpose of perpetrating the abuse at a later date outside of the clinical setting." *Id.*[4] As we explain below, the nexus required to establish the third element of section 1128(a)(2) existed here because Petitioner's delivery of health care services to A.K. in a clinical setting enabled him to commit the criminal acts related to patient abuse.

Petitioner admitted that he delivered health care services to A.K. when he "treated her as a walk-in patient [at the Kaiser Permanente clinic where he then worked], ordered

[4] According to Petitioner, the Board and ALJ decisions to which both he and the I.G. cite all involve "sexual touching . . . in the course of clinic visits or . . . [representations by the petitioner to the patient] that treatments with sex [were] for a medical purpose[.]" OA Tr. at 8. It is unclear whether Petitioner intended to argue that these are the only situations in which sexual abuse of a patient can be found to be in connection with the delivery of a health care item or service. Petitioner points to nothing in the cited decisions that would support such a limited view of the scope of section 1128(a)(2). Moreover, the California case cited by Petitioner as holding that "unless the patients were induced to have sex as part of the treatment then there cannot be a cause of action for malpractice or negligent medical care based upon having sex with a patient" (OA Tr. at 8) has no bearing on the proper construction of section 1128(a)(2), which is not governed by state or common law.

laboratory results, and prescribed indicated medications for her complaints." P. Ex. 4 (Declaration of Kamron Hakhamimi, M.D., dated 12/6/10) at 2. The I.G. takes the position that these services led to Petitioner's conviction of crimes related to patient abuse, explaining the manner in which this occurred as follows:

> When A.K. came to see Appellant [Petitioner] as a patient, Appellant prescribed three medically unnecessary sedative and hypnotic drugs, which ultimately led to her falling asleep in Appellant's bed and allowed Appellant to engage in sexual intercourse with her. I.G. Ex. 9 at 19; see ALJ Dec. at 5-6. Appellant admitted in cross-examination that he knew the impairing side effects of the drugs he prescribed to A.K., yet he still engaged in sexual activity with her the same day he prescribed the drugs. See Tr. 15-20. In the Medical Board Order, Appellant admitted to having sex with A.K. after he prescribed her sedating and hypnotic medications and while she was under the effect of the medications. I.G. Ex. 9, at 19-20; ALJ Dec. at 6. Therefore, Appellant's medical treatment of A.K. and prescription of sedative and hypnotic drugs to A.K. led to his sexual exploitation and battery of A.K. and provides additional support for the ALJ's conclusion that Appellant's conviction was in connection with the delivery of a health care item or service.

Inspector General's Brief in Opposition to Appellant's Appeal (I.G. Br.), dated 6/3/11, at 18; *see also* Informal Brief of the Inspector General, dated 10/14/10, at 3-4; Inspector General's Reply Brief, dated 11/24/10, at 3-4.

Petitioner argues, however, that the I.G. impermissibly relied on the "Medical Board Order," i.e., the Stipulated Settlement, as evidence that Petitioner "admitted to having sex with A.K. after he prescribed her sedating and hypnotic medications and while she was under the effect of the medications." According to Petitioner, it is clear from the face of the Stipulated Settlement that he admitted only the facts necessary to support the Fourth Cause for Discipline, i.e., that he "had been convicted of violating section 729(a) of the Code (Sexual Exploitation of a Patient), as well as section 242 of the California Penal Code (Battery). . . ." NA at 9, citing I.G. Ex. 9, at 21; *see also* OA Tr. at 11. Although the Fourth Cause for Discipline goes on to describe those offenses as "misdemeanors involving facts set forth in paragraphs 12A through 17 above," Petitioner takes the position, as he did before the ALJ, that this phrase "only shows that the criminal conviction was related to or 'involved' the allegations in the [preceding causes for discipline], in order to put the convictions into context" and "does not qualify as a stipulated admission that those facts are true and accurate." NA at 9-10; *see also* OA Tr.

at 11.[5] Petitioner argues that if, as the ALJ found, it were the case that "the word 'involving' plainly means that the facts stated at Paragraphs 12A-17 are incorporated into the Fourth Cause" (ALJ Decision at 6), "then there would have been no reason for Petitioner / Appellant to admit the Fourth Cause for Discipline only, rather than the entire Accusation[.]" NA at 10. Petitioner argues further that the Reservation clause in the Stipulated Settlement precludes reliance on any admissions in that document for purposes of determining whether the elements of section 1128(a)(2) were met. *See id.*, citing I.G. Ex. 9, at 4 (containing paragraph captioned "Reservation" stating "The admissions made by Respondent herein are only for the purposes of this proceeding, or any other proceedings in which the Board or other professional licensing agency is involved, and shall not be admissible in any other criminal or civil proceeding."); *see also* OA Tr. at 13.

We agree with the ALJ that the Fourth Cause for Discipline on its face incorporates the facts in paragraphs 12 through 17 of the Stipulated Settlement. Otherwise, the language "misdemeanors involving facts set forth in paragraphs 12A through 17 above" appears to have no purpose. On the contrary, Petitioner's counsel stated during oral argument that the phrase "misdemeanors involving facts set forth in paragraphs 12(a) through 17 above" is a "reference" and "means that it involved the circumstances, in general, . . . of . . . this accusation, the sex with patients circumstances." OA Tr. at 11 (also stating that "it sets forth the history of the crime."). We see no meaningful distinction between a "reference" to such "circumstances" and an incorporation by reference of the facts set forth in the specified paragraphs. Even if Petitioner's admission did not take the form of a formal stipulation of facts, this does not preclude finding the phrase at issue an admission to the facts set forth in the other Causes for Discipline.[6] Moreover, that Petitioner chose to admit to the Fourth Cause for Discipline only and not the other Causes for Discipline (*see* I.G. Ex. 9, at 2-3 (Stipulated Settlement ¶ 8)) is not, in our view, a basis for ignoring the plain language of the Fourth Cause for Discipline referring to those facts as the facts underlying that Cause.

We reject Petitioner's argument that the Reservation clause prohibits the federal government from relying on the facts incorporated by reference in the Fourth Cause for Discipline. These facts were part of the basis for a settlement of a State matter to which

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[5] Petitioner also notes that "even the facts alleged there [in the First Cause for Discipline] don't state when the patient took the drug, what drug she took, it merely states that , , , 'Once at Respondent's residence the patient began to feel the effects of the medication,' doesn't specify what[.]" OA Tr. at 10. However, it is clear in context that "the medication" refers to one or more of the drugs Petitioner prescribed for A.K. earlier that day. It is immaterial which of the drugs prescribed by Petitioner A.K. took since, as discussed below, the potential adverse side effects of each of the drugs were similar.

[6] Petitioner's counsel cited to no legal authority for his assertion that similar language in other settlements was not interpreted in this way "by the State of California[.]" OA Tr. at 10.

the federal government was not a party and, therefore, cannot bind the federal government.

In any event, we conclude that there is other evidence in the record sufficient to establish that Petitioner's abuse of A.K. was "in connection with the delivery of a health care item or service." Petitioner stated in his written direct testimony in the proceedings before the ALJ that, on May 3, 2006, he prescribed for A.K. "a two-week supply of Trazodone 100 mg, Restoril 30 mg, and Ativan 1.0 mg" for her "complain[ts] about fatigue, insomnia and anxiety," and that he "instructed her to take the Trazadone 100 mg at night as needed for insomnia, the Restoril 30 mg at night as needed for severe insomnia, when the Trazadone did not work, and two half-tablets of Ativan 1.0 mg per day, as needed for anxiety." P. Ex. 4 (Declaration of Kamron Hakhamimi, M.D.) at 2. On cross-examination, Petitioner testified that he was aware when he prescribed the Ativan that adverse reactions included sedation, fatigue, weakness, unsteadiness, drowsiness, amnesia, memory impairment, confusion, disorientation, and disinhibition. Transcript of Hearing (H Tr.) at 15-16. Petitioner also gave similar testimony about Restoril. *See id.* 18-19 (Petitioner was aware when he prescribed Restoril that adverse reactions included confusion, fatigue, nervousness, weakness, confusion, amnesia, drowsiness, dizziness, light-headedness, difficulty with coordination).[7] Petitioner also stated in his written direct testimony that on the evening of May 3, 2006, he met A.K. "for a pre-arranged date" and had dinner with her, after which they returned to his home and engaged in sexual activity "in the early morning hours." P. Ex. 4, at 2.

Although Petitioner's Declaration states that at the time he and A.K. engaged in sexual activity, he "had no knowledge as to whether A.K. had taken any of the medications [he] prescribed earlier in the day" (P. Ex. 4, at 2), Petitioner does not state that he knew that she had not taken any of the three medications.[8] In addition, Petitioner admitted at the hearing that he had an expectation that if A.K. became anxious at a certain time, she would take the prescribed dose of Ativan, 0.5 milligrams. H Tr. at 29-30. Inasmuch as A.K. had complained to Petitioner that day of insomnia and anxiety, it is reasonable to infer that Petitioner knew or should have known that evening that A.K. might have filled all the prescriptions and taken one or more of the medications prescribed. It is also reasonable to infer that Petitioner knew or should have known around the time they

[7] Petitioner did not testify about the adverse reactions of Trazadone.

[8] Indeed, in briefing before the ALJ and the Board, Petitioner appeared to admit that A.K. had taken Ativan before she went out to dinner with Petitioner. *See* Rebuttal Brief of Petitioner, dated 12/10/10, at 3, and NA at 12 (both stating that "After taking Ativan, A.K. was able to drive to Petitioner's home" prior to going out to dinner with him); *see also* P. Br. at 13 (stating that Petitioner "had no knowledge that she took any medication while on their date") (emphasis added).

engaged in sexual activity that A.K. was experiencing one or more of the potential impairing side effects of Ativan and/or Restoril which he admitted can occur. This inference is supported by the testimony of the I.G.'s expert witness, Dr. Rosen. Dr. Rosen testified that "when prescribing tranquilizing and soporific medications, the prescribing physician must assume the patient has, in fact, taken the medications." I.G. Ex. 10 (Declaration of Norman J. Rosen, M.D.) at 5. Dr. Rosen further testified that Petitioner "should have known that after following his prescribing orders, A.K. necessarily would be under the influence of the drugs he prescribed for her and . . . should have know[n] that A.K. would have an altered consciousness as a result of the known effects of the drugs." *Id.*

Neither the reasonable inferences from the admissions in Petitioner's written direct testimony nor Dr. Rosen's testimony are undercut by Petitioner's testimony on cross-examination that he had no expectation when he prescribed the Ativan that A.K. would have any type of side effects other than relief of anxiety because 0.5 milligrams was the lowest dose possible. *See* H Tr. at 28-30. Dr. Rosen testified that even at a dose of 0.5 milligrams, "it makes a big difference whether a person had been taking tranquilizers previously and had gotten adjusted to using tranquilizers." H Tr. at 47. According to Dr. Rosen, "one person will take a certain dose and not get very tranquilized. Another person could get pretty loopy from it." *Id.* at 47-48. Dr. Rosen also testified that there is "a big variation" in how long the effects would last, depending on "how sensitive" the person is to the medicine. *Id.* at 48 (also noting that Ativan "has a half-life of something like eight . . . or ten hours").[9] Although Petitioner did not address the factors that determine whether and to what degree a particular individual experiences any of the potential side effects to which he admitted, as a physician he was presumably aware of those factors (including the effect of taking Restoril as well as Ativan).

Accordingly, the record contains sufficient evidence, even without considering the Stipulated Settlement, to support the conclusion that the third element of section 1128(a)(2) was met here. Moreover, as we discussed above, the criminal conviction alone is sufficient to establish the basis for an exclusion under section 1128(a)(2).

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[9] Petitioner's expert witness testified in relevant part that "to a reasonable medical probability," neither 30 milligrams of Restoril (the prescribed dosage) nor 1 milligram of Ativan (the full prescribed dosage for one day) would be "expected to have the amnestic effect that A.K. claims." P. Ex. 5 (Declaration of Mace Beckson, M.D.) at 3; *see also* P. Ex. 4, at 3, and H Tr. at 24-25 (similar testimony by Petitioner). It is immaterial whether the prescribed dosages of these drugs would likely cause amnesia. Regardless of whether the drugs rendered A.K. unable to remember consenting to, or even engaging in, sexual activity with Petitioner, other potential side effects of the drugs (to which Petitioner admitted) could have rendered her incapable of giving such consent. Dr. Beckson also testified that Restoril "is a 'hypnotic,' meaning that it induces sleep, and would not put A.K. in a suggestible state." *Id.* Dr. Beckson did not explain how A.K. could have given her consent to the sexual activity while she was in or on the verge of a drug-induced sleep.

II. The ALJ's conclusion that a 12-year exclusion is reasonable is supported by substantial evidence and is free of legal error.

Petitioner argues that the ALJ erred in concluding that a 12-year exclusion was reasonable. In particular, Petitioner argues that the ALJ: (1) erred in concluding that the aggravating factor in 42 C.F.R. § 1001.102(b)(4) was present in this case, (2) gave undue weight to the aggravating factor in section 1001.102(b)(9), and (3) failed to consider the mitigating factor in section 1001.102(c)(1). Petitioner also disputes on other grounds the ALJ's conclusion that a 12-year exclusion was reasonable. We explain below why we conclude that Petitioner's arguments have no merit.

A. The ALJ did not err in concluding that the aggravating factor in 42 C.F.R. § 1001.102(b)(4) was present in this case.

Petitioner argues that the ALJ erred in finding an aggravating factor under section 1001.102(b)(4), which states in relevant part: "In convictions involving patient abuse or neglect, the action that resulted in the conviction . . . consisted of non-consensual sexual acts[.]" The ALJ found that the "sexual relations that Petitioner had with A.K. were non-consensual" on two grounds, stating as follows:

> First, they were non-consensual as a matter of law. Petitioner pled guilty to unlawfully using force on the person of A.K. That force consisted of abuse of the doctor-patient relationship. Under California law, sex between a physician and his or her patient is non-consensual because of the abuse of authority implicit in such relationship.
>
> Second, the sex between Petitioner and A.K. was non-consensual because Petitioner took advantage of his doctor-patient relationship with A.K. to supply her with medications that, in combination, had a sedating effect on her, and then had sexual intercourse with her when she was under the effect of these drugs.

ALJ Decision at 5. Petitioner asserts that the crime of battery of which Petitioner was convicted under section 242 of the California Penal Code "simply means willful, unlawful touching involving force." OA Tr. at 28; *see also id.* at 51. Petitioner states that the sexual contact between him and A.K. met these criteria because "any willful sexual contact [with a patient], as occurred here, is an unlawful, willful touching [and] [s]exual contact involves force[.]" *Id.* Petitioner asserts, however, that "that does not mean that there was no consent" by A.K. *Id.* Petitioner also argues that although section 729(a) of the California Business and Professions Code, the other crime of which Petitioner was convicted, makes it unlawful for a doctor to have sexual relations with a patient, this "doesn't mean that it's against the will of the patient." *Id.* at 45, 50.

According to Petitioner, underlying section 729(a) is –

> the idea that there is an inequality of power between a patient and physician and therefore the patient can never really give her full and complete consent. But it's not like rape or forcible sex. . . that would require sex against the patient's will at the time. It's just that she can't completely consent, as a matter of law.

Id. at 46.

We conclude that the actions that resulted in Petitioner's conviction under section 729(a) of the California Business and Professions Act involved non-consensual sexual acts within the meaning of section 1001.102(b)(4). [10] Petitioner does not dispute the ALJ's conclusion that Petitioner's sexual acts with A.K. were non-consensual as a matter of law. The plain language of the regulation does not draw the distinction Petitioner makes between sexual acts that are non-consensual as a matter of law and sexual acts that are non-consensual in "common understanding" (OA Tr. at 45). Furthermore, Petitioner cites no authority for his assertion that section 1001.102(b)(4) does "not speak to the . . . inequality in the relationship" that is "the motivation for" the California statute making it a crime for a physician to engage in sexual activity with a patient. *Id.* at 47. Had the regulation been intended to exempt convictions involving statutes such as California's, presumably the regulation would include express language to that effect. Thus, even if Petitioner had shown that his sexual acts with A.K. were consensual in "common understanding" (and we find no such showing), the fact that they were non-consensual as a matter of California law is a sufficient basis for concluding that the aggravating factor in section 1001.102(b)(4) is present here.

In any event, as indicated in the preceding section of this decision, there is substantial evidence in the record to support the ALJ's factual findings that "Petitioner took advantage of his doctor-patient relationship with A.K. to supply her with medications that, in combination, had a sedating effect on her, and then had sexual intercourse with her when she was under the effect of these drugs" (ALJ Decision at 5). We agree with the ALJ's conclusion that these facts are an independent basis for concluding that the aggravating factor in section 1001.102(b)(4) is present here.

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[10] It is unclear whether the ALJ intended to rely as well on Petitioner's conviction of battery under section 242 of the California Penal Code in determining that this aggravating factor was present. We need not determine whether such reliance would be justified since Petitioner's conviction under section 729(a) of the California Business and Professions Act is sufficient to establish the existence of this aggravating factor.

B. The ALJ did not err in concluding that the aggravating factor in 42 C.F.R. § 1001.102(b)(9) was a basis for lengthening the period of exclusion.

Petitioner argues that the ALJ gave undue weight to the aggravating factor under section 1001.102(b)(9), which states:

> Whether the individual or entity has been convicted of other offenses besides those which formed the basis for the exclusion, or has been the subject of any other adverse action by any Federal, State or local government agency or board, if the adverse action is based on the same set of circumstances that serves as the basis for imposition of the exclusion.

The ALJ stated that "[t]he additional adverse action identified by the I.G. consists of a disciplinary action brought against Petitioner by the Medical Board of California" that "was resolved by a Stipulated Settlement and Disciplinary Order in which Petitioner stipulated to some of the allegations against him." ALJ Decision at 5. The ALJ concluded that this aggravating factor had been established and relied on it in finding that a 12-year period of exclusion was reasonable. *See id.*

Petitioner acknowledges that this aggravating factor is present in this case but takes the position that it does not justify increasing the length of the exclusion. *See* NA at 7. Petitioner argues specifically that it "appears contrary to the interests of justice to allow the Decision by the Medical Board, which was based solely on Petitioner['s] ...conviction, to be bootstrapped upon the criminal conviction itself, as an aggravating factor in this proceeding." *Id.* at 8.

Contrary to what Petitioner argues, reliance on the aggravating factor in section 1001.102(b)(9) to increase the exclusion period above the mandatory minimum is not "bootstrapping." As the Board has previously stated, and Petitioner appears to recognize, section 1001.102(b)(9) "expressly recognizes that this aggravating factor may be considered precisely where the adverse action from the state government agency is based on the same set of circumstances that served as the basis for the imposition of the federal exclusion." *Brij Mittal, M.D.*, DAB No. 1894, at 5 (2003). Further, this section contemplates "that the fact of additional adverse action beyond the conviction could be considered as additional evidence of the seriousness of the underlying conduct." *Narendra M. Patel, M.D.*, DAB No. 1736, at 29 (2000), *aff'd, Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003).

Accordingly, we conclude that the ALJ did not err in concluding that the aggravating factor in section 1001.102(b)(9) was a basis for lengthening the period of exclusion.

C. The ALJ's failure to consider the mitigating factor in 42 C.F.R. § 1001.102(c)(1) was harmless error.

In his initial brief filed with the ALJ, Petitioner identified the mitigating factor in section 1001.102(c)(1) as present in this case. Informal Brief of Petitioner, dated 11/16/10, at 9. That section states:

> The individual or entity was convicted of 3 or fewer misdemeanor offenses, and the entire amount of financial loss (both actual loss and intended loss) to Medicare or any other Federal, State or local governmental health care program due to the acts that resulted in the conviction, and similar acts, is less than $1,500[.]

It is undisputed that Petitioner was convicted of only two misdemeanor offenses and that the acts that resulted in the conviction caused no financial loss to any governmental health care program, or at least none was asserted. Petitioner argues that this mitigating factor, which "was inexplicably not addressed by the ALJ in his Decision," should reduce the length of the period of exclusion. NA at 8; *see also* OA Tr. at 14.

Before the ALJ and the Board, the I.G. stated that it considered this mitigating factor but gave it no weight in determining the length of the exclusion. *See* The Inspector General's Reply Brief, dated 11/24/10, at 10; OA Tr. at 23, 38-39. According to the I.G., "the fact that there are fewer than three misdemeanors doesn't change the existence of the seriousness of" Petitioner's crimes. OA Tr. at 39. In addition, the I.G. states, "the fact that there was zero restitution or zero harm to the federal programs in terms of a monetary value" "is not relevant here" because the conviction "relates to patient abuse" and "does not involve a financial crime against the federal health care program[.]" *Id.* at 24, 39. Petitioner responds that some weight should be given to this mitigating factor, stating that because the two misdemeanors of which he was convicted "don't involve financial loss to the Government, then allowing him to participate in federally funded programs does not endanger the public." *Id.* at 53.

We conclude that the ALJ's failure to address this mitigating factor constitutes harmless error. Although the factor on its face applied here, the fact that the acts that resulted in Petitioner's conviction involved no financial loss to a federal or state health care program is simply irrelevant in light of the fact that Petitioner's conviction related to a matter that bore no relationship to the payments made by federal and state health care programs. Contrary to what Petitioner argues, it does not follow from the fact that there was no financial loss to health care programs that Petitioner does not pose a danger to the beneficiaries of such programs. Indeed, the fact that section 1128(a)(2) of the Act requires a minimum period of exclusion of five years based on a conviction relating to abuse of a patient in connection with the delivery of a health care item or service shows

that Congress considered an individual with such a conviction a danger to the beneficiaries of federal or state health care programs regardless of whether the conviction involved a financial loss to the programs. The two aggravating factors discussed above showed that the danger was so great as to warrant a longer period of exclusion. The absence of any financial loss does not diminish that danger.

D. Petitioner's other arguments regarding the length of the period of exclusion have no merit.

Petitioner argues that the mitigating factor in section 1001.102(c)(1) "should be considered along with all the other unique circumstances of this one-time only occurrence." OA Tr. at 41. Petitioner points out that the crimes of which he was convicted "did not involve a patient in a federally funded program" or "sex induced . . . under the guise of treatment." OA Tr. at 14; *see also id.* at 40. Petitioner also points out that the California Medical Board put him on probation but never suspended him from the practice of medicine and that his criminal conviction was expunged. NA at 7-8, 22; OA Tr. at 41. However, section 1001.102(c) states that only the factors it lists may be considered mitigating. The facts Petitioner alleges fail to qualify as mitigating factors entitled to consideration under the regulation.

Petitioner also asserts that he was not a "danger to the program" because he was merely convicted of a "strict liability crime for having sex with a patient" with whom he had a prior "social relationship." OA Tr. at 40. This argument ignores the evidence in the record we discussed above in connection with our determination that the ALJ did not err in concluding that Petitioner's conviction was related to abuse of a patient in connection with the delivery of a health care item or service and that it involved non-consensual sexual acts. This evidence shows "that Petitioner took advantage of his professional position for personal gratification," and we agree with the ALJ that this fact "renders [Petitioner] manifestly untrustworthy to provide care to program beneficiaries and recipients of program funds." ALJ Decision at 7.

Finally, Petitioner argues that a 12-year exclusion is unreasonable because the I.G. imposed a shorter period of exclusion in more egregious cases. Petitioner cites to several ALJ decisions in support of his argument. *See* NA at 5, 7. As the Board has previously noted, however, "[c]omparisons with other cases are not controlling and [are] of limited utility given that aggravating and mitigating factors 'must be evaluated based on the circumstances of a particular case' (57 Fed. Reg. at 3314), which can vary widely." *Paul D. Goldenheim, M.D., Howard R. Udell, Michael Friedman,* DAB No. 2268, at 29 (2009), *aff'd, Friedman v. Sebelius*, 755 F.Supp.2d 98 (D.D.C. 2010). Moreover, Petitioner's characterization of the circumstances involved in the cited cases as more

egregious than the circumstances of his case is predicated on a view of the facts of his case which we have found is not supported by the record.

Conclusion

Based on the foregoing, we sustain the ALJ's decision upholding the I.G.'s imposition of a 12-year exclusion based on section 1128(a)(2) of the Act.

/s/
Stephen M. Godek

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member