Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Hussein Awada, M.D.
Docket No. A-17-24
Decision No. 2788
April 28, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Hussein Awada, M.D. (Petitioner) appeals the November 15, 2016 decision of an Administrative Law Judge (ALJ). *Hussein Awada, M.D.*, DAB No. CR4736 (2016) (ALJ Decision). The ALJ sustained the determination by the Inspector General (I.G.) of the Department of Health and Human Services to exclude Petitioner from participation in all federal health care programs under sections 1128(a)(1) and (a)(4) of the Social Security Act (Act)[1] for 23 years based on his conviction of conspiracy to possess with intent to distribute controlled substances, in violation of 21 U.S.C. §§ 846, 84l(a)(l) and (b)(l)(C), and his conviction of health care fraud, aiding and abetting, in violation of 18 U.S.C. §§ 1347 and 2. Petitioner conceded that he must be excluded for at least five years but challenged the length of his exclusion. The ALJ determined that the length of the exclusion was within a reasonable range based on the existence of four aggravating factors and one mitigating factor.

For the reasons set out below, the Board affirms the ALJ Decision.

Legal background

The Secretary of the Department of Health and Human Services must exclude from participation in all federal health care programs an individual convicted of any of the types of crimes listed in section 1128(a) of the Act, including: 1) "a criminal offense related to the delivery of an item or service under [Medicare] or under any State health care program"; and 2) a felony criminal offense "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." Act § 1128(a)(1), (4); s*ee* 42 C.F.R. §§ 1001.101(a), (d). The Secretary has delegated the exclusion authority to the I.G.

[1] The current version of the Act can be found at www.ssa.gov/OP_Home/ssact/ssacttoc.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

The mandatory minimum length of an exclusion based on section 1128(a) is five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).[2] The I.G. may consider any of the factors listed in 42 C.F.R. § 1001.102(b) to be aggravating and a basis for lengthening the minimum exclusion period. Relevant in this case, the aggravating factors include:

- The acts resulting in the conviction, or similar acts, caused, or were intended to cause, a financial loss to a Government program or to one or more entities of $5,000 or more;
- The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more;
- The sentence imposed by the court included incarceration; and
- The individual was the subject of other adverse action by a state government agency or board, based on the same set of circumstances that served as the basis for imposition of the exclusion.

42 C.F.R. § 1001.102(b)(1), (2), (5), (9).

If the I.G. lengthens the exclusion period based on one or more aggravating factors, the I.G. may then consider the mitigating factors listed in section 1001.102(c)(1)-(3) (and only those factors) to reduce the period to no less than the mandatory minimum five years. 42 C.F.R. § 1001.102(c). The mitigating factors are:

- The individual was convicted of three or fewer misdemeanor offenses and the resulting financial loss to the program was less than $1,500;
- The 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; and
- The individual's cooperation with federal or state officials resulted in others being convicted or excluded, or additional cases being investigated or reports being issued identifying program vulnerabilities or weaknesses, or a civil money penalty being imposed.

Id.

[2] Section 1128(c)(3)(B) provides an exception relating to sole community practitioners that is inapplicable here. Section 1128(c)(3)(G) requires an exclusion of more than five years in circumstances not present here. The Office of Inspector General (OIG) published a final rule on January 12, 2017 amending the regulations relating to exclusion authorities effective February 13, 2017 (82 Fed. Reg. 4100). We refer to the 2015-2016 versions of the regulations in effect when Petitioner was convicted and the I.G. issued the determination on appeal.

An excluded individual may request a hearing before an ALJ, but only on the issues of whether the I.G. had a basis for the exclusion and whether the length of exclusion longer than the mandatory minimum period is unreasonable. *Id*. §§ 1001.2007(a)(1), 1005.2(a). Only if the adjudicator determines that the I.G. had a basis for the exclusion and that aggravating factors justified an exclusion of longer than five years, may the adjudicator consider mitigating factors in order to reduce the period of exclusion to no less than five years. *Id.* § 1001.102(c); *Stacey R. Gale*, DAB No. 1941, at 8 (2004), citing ALJ Decision, DAB CR1147 (2004). Petitioner bears the burden to prove any mitigating factor by a preponderance of the evidence. *Gale*, DAB No. 1941, at 9. A party dissatisfied with an ALJ decision may appeal it to the Board. 42 C.F.R. § 1005.21.

Case background[3]

Petitioner is a physician who was licensed to practice medicine and administer controlled substances in Michigan. ALJ Decision at 2; I.G. Ex. 5, at 7. From about December 2010 until February 2012, Petitioner conspired to distribute more than 80,000 prescriptions for controlled substances (primarily Oxycodone and Roxicodone) to individuals for whom the substances were not medically necessary. ALJ Decision at 1; I.G. Ex. 3, at 2-3, 13. At the same time, Petitioner fraudulently billed Medicare, Medicaid and Blue Cross Blue Shield over $2.3 million for health care services that he provided to patients who did not need the services or did not provide at all. *Id.*

Petitioner pled guilty in federal district court to one felony count of conspiracy to possess with intent to distribute controlled substances, in violation of 21 U.S.C. §§ 846, 84l(a)(l) and (b)(l)(C). I.G. Ex. 2, at 1; I.G. Ex. 3, at 1-3. Petitioner also pled guilty to one felony count of health care fraud, aiding and abetting, in violation of 18 U.S.C. §§ 1347 and 2. *Id.* The court entered judgment against Petitioner and sentenced Petitioner to 84 months imprisonment for each count, to be served concurrently, and ordered him to pay $2,348,000 in restitution ($848,000 to Blue Cross Blue Shield and $1,500,000 to the Medicare Trust Fund). I.G. Ex. 2 at 1, 2, 6. On March 16, 2016, the Michigan Department of Licensing and Regulatory Affairs (LARA) revoked Petitioner's license to practice medicine. I.G. Ex. 5.

[3] 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.

By letter dated May 31, 2016, the I.G. notified Petitioner that he was excluded from participating in Medicare, Medicaid, and all federal health care programs for a minimum period of 23 years.[4] I.G. Ex. 1. The I.G. imposed the exclusion because Petitioner had been convicted of a felony crime related to the delivery of an item or service under Medicare or a state healthcare program and a felony crime related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. *Id*. The notice explained that the length of the exclusion took into account the amount of restitution ordered by the court, the duration of Petitioner's acts that resulted in his conviction, the sentence of incarceration imposed by the court, and the revocation of Petitioner's medical license. *Id.* at 2. The I.G. stated that Petitioner's cooperation with federal or state officials also had been taken into account as a mitigating factor. *Id*.

Petitioner timely requested an ALJ hearing, conceding that he must be excluded for a minimum period of five years but challenging the 23-year length of his exclusion. On review of the parties' briefs and exhibits,[5] the ALJ determined that Petitioner's 23-year exclusion fell within a reasonable range based on the "totality of the aggravating and mitigating factors." ALJ Decision at 6. The aggravating factors included: 1) $2.348 million in losses that resulted from Petitioner's criminal activities; 2) the 14-month duration of Petitioner's criminal activities; 3) the seven-year sentence of incarceration ordered by the court; and 4) the revocation of Petitioner's license to practice medicine. *Id.* at 3-5. The ALJ found one applicable mitigating factor, Petitioner's cooperation with law enforcement. *Id.* at 5. The ALJ rejected Petitioner's claim that his mental health condition qualified as a mitigating factor because, the ALJ determined, the federal criminal court found that Petitioner's narcissistic personality disorder and bipolar disorder did not "excuse" what he did and did not reduce his culpability. *Id.* at 6, citing P. Ex. 3, at 18.

Standard of review

The Board's standard of review for a disputed issue of fact is "whether the initial decision is supported by substantial evidence on the whole record." 42 C.F.R. § 1005.21(h). The Board's standard of review for a disputed issue of law is "whether the initial decision is erroneous." *Id*.

[4] The May 31, 2016 notice incorrectly stated that Petitioner's criminal conduct occurred from December 2010 to December 2012, rather than from December 2010 to February 2012, as stated in the plea agreement. The ALJ Decision corrected this error.

[5] The parties agreed that an in-person hearing was unnecessary.

Analysis

On appeal, as before the ALJ, Petitioner challenges only the length of the exclusion beyond the mandatory minimum of five years. The duration of a mandatory exclusion beyond the statutory five-year minimum is determined by evaluating the aggravating and mitigating factors set forth at 42 C.F.R. § 1001.102, as they apply in each particular case. *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491, at 5 (2012), *aff'd, Sheth v. Burwell*, No. 14-5179, 2015 WL 3372286 (D.C. Cir. May 7, 2015), citing *Craig Richard Wilder*, DAB No. 2416, at 11 (2011). "The evaluation does not rest on the specific number of aggravating or mitigating factors or any rigid formula for weighing those factors, but rather on a case-specific determination of the weight to be accorded each factor…." *Sheth*, DAB No. 2491, at 5, citing *Jeremy Robinson, D.C.*, DAB No. 1905, at 3 (2004), citing *Keith Michael Everman, D.C.*, DAB No. 1880, at 10 (2003).

The overarching purpose of the exclusion regulations "is remedial; that is, the regulations are designed to protect federal health care programs and beneficiaries from untrustworthy individuals." *Robert Kolbusz, M.D.*, DAB No. 2759, at 6 (2017) (citations omitted); *see also Narendra M. Patel, M.D.*, DAB No. 1736, at 25 (2000), *aff'd, Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003), *cert. denied*, 539 U.S. 959 (2003). Accordingly, in deciding whether an exclusion falls within a reasonable range, an ALJ must consider not just the number of aggravating factors that apply but "the quality of the circumstances" surrounding those factors in order to assess the risk the excluded individual poses to federal health care programs and beneficiaries. *Wilder*, DAB No. 2416, at 8, quoting *Joseph M. Rukse Jr., R.Ph.*, DAB No. 1851, at 11 (2002). Indeed, the Board has observed, "The aggravating and mitigating factors . . . were designed to evaluate" the "threat Petitioner poses to the Medicare program and its beneficiaries." *Sheth*, DAB No. 2491, at 16, citing *Robinson*, DAB No. 1905, at 8, 11, and *Joann Fletcher Cash*, DAB No. 1725, at 15-16, 18 (2000). Furthermore, the fact that an exclusion may have a "dramatic impact" on the excluded individual's employment opportunities does not "undercut a determination about the period of time needed to protect" federal programs and beneficiaries. *Cash* at 20-21.

An ALJ reviews the length of an exclusion de novo to determine whether it falls within a reasonable range. *Sheth*, DAB No. 2491, at 5, citing *Rukse,* DAB No. 1851, at 10-11, quoting *Gary Alan Katz, R.Ph.,* DAB No. 1842, at 8 n.4 (2002). An ALJ may not substitute her judgment for that of the I.G. or determine what period might be "better," however. *Wilder*, DAB No. 2416, at 8 (citations omitted); *See also Barry D. Garfinkel M.D.*, DAB No. 1572, at 6-7, 10-11 (1996), *aff'd, Garfinkel v. Shalala*, No. 3-96-604 (D. Minn. June 25, 1997). Rather, the ALJ's role reflects the deference owed the I.G. based on the I.G.'s "'vast' experience in implementing exclusions." *Wilder*, DAB No. 2416, at 8, quoting 57 *Fed. Reg*. 3298, 3321 (Jan. 29, 1992).

In this case, Petitioner does not dispute the existence of the four aggravating factors recognized by the I.G. and the ALJ. P. Br. at 24. Petitioner argues, however, that the ALJ erred by failing to consider Petitioner's mental conditions as a mitigating factor under 42 C.F.R. § 1001.102(c)(2) and by failing to give proper weight to Petitioner's "extensive and valuable cooperation" with law enforcement. *Id.* at 1, 2-3, 12. Furthermore, Petitioner asserts, the ALJ's analysis of the aggravating factors did not "take into account all of the relevant circumstances." *Id.* at 3. As a result, Petitioner argues, the ALJ's analysis "lacks the qualitative assessment needed to determine the proper weight that should be accorded to these considerations." *Id.* When "appropriate consideration is given the mitigating factors derived from" his "cooperation and reduced culpability," Petitioner argues, the "exclusion of 23 years is unreasonable." *Id.* at 24.

Where, as here, at least one aggravating factor among those enumerated in 42 C.F.R. § 1001.102(b)(1)-(9) exists, the regulations authorize the I.G. to lengthen the exclusion period to a period longer than the mandatory minimum. *Farzana Begum, M.D.*, DAB No. 2726, at 6, citing 42 C.F.R. § 1001.102(b) ("Any of the following factors may be considered to be aggravating and a basis for lengthening the period of exclusion"). The regulations also authorize an ALJ to consider specified mitigating factors, which include whether the record demonstrates a mental, emotional or physical condition before or during the offense that reduced an individual's culpability and whether the individual's cooperation (if any) with federal or state officials led to specified results, but the regulations expressly provide that the mitigating factors may be considered "[o]nly if any of the aggravating factors set forth in paragraph (b) of this section justifies an exclusion longer than 5 years . . . ." 42 C.F.R. § 1001.102(c). "Accordingly, facts and arguments about the circumstances surrounding" an individual's mental or emotional condition or cooperation with law enforcement, "even if true or undisputed, are irrelevant for the purposes of considering an extension of the exclusion period based on the existence of aggravating factor(s)." *Begum* at 6-7. "The existence of aggravating factors" the Board has explained, "is a foundational inquiry that should be considered first since any discussion about proof of mitigating factors is appropriate only if," as in this case, the I.G. increased the mandatory minimum exclusion period based on the existence of one or more aggravating factor(s). *Id.* at 7, citing 42 C.F.R. § 1001.102(c). Consequently, Petitioner's arguments concerning his mental conditions and his cooperation with law enforcement are appropriate for consideration, "but only within the context of the alleged mitigating factors and, ultimately, a determination of whether" the 23-year exclusion period "is within a reasonable range." *Id.* Accordingly, below we first address the aggravating factors that apply to Petitioner's exclusion. Following that discussion, we address Petitioner's arguments that relate to the mitigating factors.

1. *The ALJ's evaluation of the four aggravating factors is supported by substantial evidence and free of legal error.*

    a. 42 C.F.R. § 1001.102(b)(1) – Financial Loss

The Board has long acknowledged that restitution is a measure of program loss. *See, e.g., Sheth*, DAB No. 2491, at 10, citing *Wilder*, DAB No. 2416, at 9. In this case, the sentencing court ordered Petitioner to pay more than $2.3 million in restitution to the federal government and Blue Cross Blue Shield, $1.5 million of which was for losses incurred by the Medicare Trust Fund. I.G. Ex. 2, at 6. This total amount is more than 460 times larger than the $5,000 threshold amount required to extend the minimum exclusion period based on financial loss.

As stated above, and the ALJ explained, the regulations recognize that the amount of program loss caused by an individual's criminal actions "reflects, in part, the seriousness of the individual's crime and thus the level of threat [that individual] poses to program integrity." ALJ Decision at 4. Consequently, the Board has previously held that "it is entirely reasonable to consider a program loss amount substantially larger than the $5,000 threshold … an 'exceptional aggravating factor' to be accorded significant weight." *Laura Leyva*, DAB No. 2704, at 9-10 (2016) (appeal pending), citing *Sheth*, DAB No. 2491, at 7, citing *Robinson*, DAB No. 1905, at 12, and *Donald A. Burstein, PhD.*, DAB No. 1865, at 12 (2003). The millions of dollars in losses that Petitioner's actions caused here, we agree with the ALJ, "underscores the importance of excluding the unscrupulous" and merits a substantial increase in the length of his exclusion beyond the minimum period. ALJ Decision at 4.

Petitioner acknowledges that the acts that resulted in his conviction "caused significantly more than $5,000 in financial loss to Medicare…." P. Br. at 25. He argues, however, that the ALJ did not properly take into account his repayment of over $2.3 million in restitution to the federal government and Blue Cross Blue Shield. The ALJ "overlook[ed] the fact that restitution was a term of [Petitioner's] plea agreement." *Id.* at 26. While Petitioner "could have persisted in fighting the criminal charges," he agreed to resolve them, "forfeit[ing] substantial amounts of real property, personal property and cash" and taking steps "to ensure full repayment…." *Id.* at 26-27. "Moreover," Petitioner argues, he agreed at the time that he entered into the plea agreement "that the amount of restitution would be established by the court at sentencing, which to some extent, was the equivalent of signing a blank check." *Id.* at 26.

We reject these arguments. The applicable regulation expressly provides, "The entire amount of financial loss to such programs or entities … will be considered *regardless of whether full or partial restitution has been made ….*" 42 C.F.R. § 1001.102(b)(1) (emphasis added). Thus, the fact that Petitioner made full restitution pursuant to a term of his plea agreement is not a basis for giving little or no weight to this aggravating factor. Petitioner appears to argue that his agreement to pay restitution (as opposed to fighting the criminal charges) somehow lessens the seriousness of the financial loss to the federal government and to the insurer and that the aggravating factor regarding financial loss, therefore, should be given less weight when analyzing whether the 23-year exclusion is unreasonable. However, we see no basis in the regulation for accepting such an argument. Financial loss, as measured in this instance by the amount of the restitution, remains the same regardless of whether the restitution is part of a plea agreement or is imposed by the court following a trial and is part of the court's sentence in either event. If Petitioner is arguing that his decision to agree to pay restitution should have been considered by the ALJ in her evaluation of mitigating factors under section 1001.102, that argument is baseless as well. Only the mitigating factors identified in section 1001.102(c) may be considered and applied to reduce a period of exclusion. Petitioner's decision to enter into a plea agreement and alleged efforts to ensure that restitution was made in full do not fall within the ambit of any of those mitigating factors.

b. 42 C.F.R. § 1001.102(b)(2) – Duration of Criminal Conduct

The criminal acts that led to Petitioner's conviction were committed over a period of approximately 14 months. I.G. Ex. 3, at 2. Specifically, from about December 2010 until February 2012, Petitioner worked with another individual to distribute more than 80,000 prescriptions for controlled substances, primarily Oxycodone and Roxicodone, to patients for whom the substances were not medically necessary. *Id.* at 2-3. During the same period, Petitioner fraudulently billed Medicare, Medicaid and Blue Cross Blue Shield for over $2.3 million in health care services that were either provided to those patients without any medical need or not provided at all. *Id.* at 2; I.G. Ex. 2, at 6.

Petitioner acknowledges that the duration of his criminal activities satisfies the one-year threshold for applying the aggravating factor under section 1001.102(b)(2). Petitioner argues, however, that the duration of his wrongful acts – "only two months longer" than the threshold period – "does not warrant any significant extension of the minimum exclusion period." P. Br. at 27.

We disagree. The aggravating factor that takes into account the duration of an individual's criminal activities reflects the Secretary's recognition that an individual whose lapse in integrity occurs over a period of one or more years poses a far greater threat to federal health care programs and beneficiaries than an individual "whose lapse in integrity is short-lived." *Burstein*, DAB No. 1865, at 8. Here, Petitioner's extensive

and systematic engagement in felonious conduct for more than a year demonstrates that he did not suffer a minimal lapse in judgment. Rather, the duration of his intentional criminal actions posed a significant threat to program integrity and risk to program beneficiaries. According to the Assistant U.S. Attorney at Petitioner's sentencing hearing:

> He contributed to the opiate [epidemic] … in a very large way…. He did that as a doctor with a license, who, of all people, should have known the impact his prescribing was having on a broader community. As he did it, he had over 100 patients who he abused in order to use their information to defraud Medicare and Blue Cross. And by abuse, I mean he subjected them to invasive and unnecessary tests including x-rays on a monthly basis just to make his records look good in the hopes that he wouldn't get caught.

P. Ex. 3, at 13-14.[6] The circumstances relating to the duration of Petitioner's felonious acts evidences a substantial lack of trustworthiness. Therefore, we conclude that the ALJ could reasonably assign significant weight to this factor.

Petitioner further argues that the ALJ erred in stating that the Board had "sustained significant increases in the period of exclusion based on wrongful acts that were committed for even just 'slightly more' than the one-year minimum standard." P. Br. at 27-28, citing ALJ Decision at 4, citing *Robinson*, DAB No. 1905, at 12, citing *Burstein*, DAB No. 1865, at 12. In *Robinson*, the criminal acts occurred over a three-year period, significantly longer than the one-year minimum. In *Burstein*, Petitioner states, the Board "explicitly noted that the weight given to the [aggravating factor in section 1001.102(b)(2)] should reflect that the 14-month duration—the same duration as in this case—was only 'slightly more' than the threshold required by the regulation." P. Br. at 28.

The ALJ did not err. In *Robinson*, the Board reversed an ALJ decision that had reduced an exclusion period. In doing so, the Board discussed the importance of weighing all of the regulatory factors (something it found the ALJ had not done) and in that context cited *Burstein* where the Board "accorded weight sufficient to sustain a 15-year exclusion"

[6] Petitioner argues that the ALJ improperly relied on the Assistant U.S. Attorney's statements because the statements are not evidence. P. Br. at 28. The ALJ is entitled to rely on the entire criminal record, not just record evidence, when considering the circumstances relating to the aggravating factors. That record here included the sentencing transcript, and the ALJ was entitled to rely on it. Indeed, Petitioner relies on the same transcript for his case. *See* P. Br. at 18-20. Moreover, the regulations governing exclusion proceedings make clear that ALJs have the authority to determine the admissibility of evidence and, except for certain types of evidence not at issue here, ALJs are not "bound by the Federal Rules of Evidence." 42 C.F.R. § 1005.17(a), (b). Because the Assistant U.S. Attorney's statements were made in court in the context of Petitioner's sentencing proceedings, the ALJ could reasonably conclude that the statements reliably described Petitioner's criminal misconduct.

even though the Petitioner's acts in that case were committed over "'slightly more' than the one-year minimum standard." *Robinson*, DAB No. 1905, at 12, citing *Burstein*, DAB No. 1865, at 12. The Board cited *Burstein* as support for according "weight sufficient, with the remaining factors, to support the [15-year] exclusion imposed" in *Robinson*, where the period of criminal conduct lasted approximately three times the one-year minimum period established by the regulations." *Id*. Thus, *Robinson* stands for the propositions, applicable here, that the circumstances surrounding all of the factors must be weighed and the mere fact that the criminal conduct does not significantly exceed the regulatory standard is not alone a basis for reducing an exclusion. Rather, the ALJ must consider the circumstances surrounding the conduct as well as the duration and consider that along with the circumstances surrounding all of the other applicable aggravating factors. The ALJ did that here. She concluded that the circumstances associated with this aggravating factor in Petitioner's case (subjecting approximately 100 patients to unnecessary and sometimes invasive procedures) support a significant increase in the period of exclusion.

In addition, we note, simply meeting the threshold for an aggravating factor is a clear indication of untrustworthiness. In this case, furthermore, the duration of Petitioner's conduct was only one of four aggravating factors on which the ALJ relied in concluding that a 23-year period of exclusion was within a reasonable range, even taking into account the one mitigating factor proved by Petitioner. If Petitioner is arguing that his exclusion should be reduced based on comparing the duration of his conduct with Burstein's (both around 14 months), that argument is also baseless. First, that argument reflects Petitioner's misreading of the Board decisions in *Robinson* and *Burstein* that we discussed above. We also note that while the Board has acknowledged that case comparisons can inform whether a period of exclusion falls within a reasonable range, the Board has repeatedly stated that the assessment of aggravating and mitigating factors "is first and foremost case-specific." *Eugene Goldman, M.D., a/k/a Yevgeniy Goldman*, DAB No. 2635, at 10 (2015). Each case involves the "interaction of diverse circumstances and regulatory factors with varying weights." *Id.* Hence, "case comparisons are of limited value and are not controlling on the issue of whether an exclusion period is reasonable." *Sheth*, DAB No. 2491, at 5 (citations omitted).

Petitioner also contends that in assessing the circumstances relating to the duration of his criminal activity, the ALJ should have considered Petitioner's mental and emotional condition. Petitioner also argues that the ALJ should have taken into account letters from Petitioner's patients, which evidence that Petitioner provided "exemplary and compassionate" care during the same time period that he engaged in extensive felonious conduct. P. Br. at 29.

We disagree. Petitioner argues in effect that the high regard in which he was held by some of his patients constituted a mitigating factor. Whether an excluded individual may have been viewed favorably by some of his patients, however, does not qualify as one of the mitigating factors that the I.G., the ALJ, or the Board may consider. Furthermore, as the regulation provides and we discuss below, the ALJ properly evaluated whether Petitioner's mental conditions before and during the period of his criminal acts qualified as a mitigating factor under section 1001.102(c) after assessing the four aggravating factors conceded by Petitioner. The regulations did not permit the ALJ to consider diluting the aggravating factors, which seems to be what Petitioner is suggesting, by considering other circumstances that, even if they constituted one of the mitigating factors specified in the regulations (and here they did not), can only be considered after aggravating factors have been applied.

c. 42 C.F.R. § 1001.102(b)(5) – Incarceration

The regulations provide that any period of incarceration ordered by a court may be considered an aggravating factor for extending the minimum exclusion period. In this case, the court sentenced Petitioner to 84 months of incarceration. The ALJ determined that this was "a very substantial period of incarceration – seven years." ALJ Decision at 5, citing I.G. Ex. 3, at 2. The ALJ also stated, "the Board has repeatedly held that long periods of incarceration are relevant in determining whether a period of exclusion is reasonable." ALJ Decision at 5, citing *Goldman*, DAB No. 2635, at 6. "Generally," the ALJ observed, "the longer the jail time, the longer the exclusion, because a lengthy sentence evidences a more serious offense." ALJ Decision at 5, citing *Robinson*, DAB No. 1905, citing *Jason Hollady, M.D.*, DAB No. 1855 at 12 (2002), where the Board characterized the nine-month incarceration as "relatively substantial"); *Stacy Ann Battle, D.D.S.*, DAB No. 1843 (2002) (finding that four months in a halfway house, followed by four months home confinement justified lengthening the period of exclusion); and *Brenda Mills, M.D.*, DAB CR146l, *aff'd* DAB No. 2061 (2007) (finding that six months home confinement justified increase in length of exclusion).

A lengthy jail sentence may justify lengthening the mandatory minimum exclusion period because "the selection of a criminal sentence" may be considered a "reasonable proxy … for untrustworthiness in the context of deciding how much weight to give the aggravating factor for incarceration." *Goldman*, DAB No. 2635, at 5; *see also Raymond Lamont Shoemaker*, DAB No. 2560, at 8 (2014) ("In light of the high degree of untrustworthiness reflected in the length of Petitioner's term of incarceration [of 55 months], a five year extension of the mandatory minimum five-year exclusion based on this factor alone would not be unreasonable."); *Frank R. Pennington, M.D.*, DAB No. 1786, at 8 (2001) ("The ALJ did not err in considering the fact and length of the incarceration as an

appropriate measure of the relative severity of the offense."), *aff'd, Pennington v. Thompson*, 249 F.Supp.2d 931 (W.D. Tenn. 2003). Thus, the Board recently held, an "ALJ was entitled to accord significant weight to the fact that [a] Petitioner was incarcerated for seven years since … the Board has found an incarceration period of less than one year 'relatively substantial.'" *Kolbusz*, DAB No. 2759, at 10, citing *Robinson*, DAB No. 1905, at 12.

Here, we agree with the ALJ that the seven-year sentence of incarceration was "a very substantial period," meriting significant weight. We find unpersuasive Petitioner's argument that the ALJ gave too much weight to this aggravating factor by failing to recognize that the court substantially reduced the recommended incarceration period in Petitioner's case. Petitioner asserts that the ALJ focused on the length of Petitioner's sentence of incarceration but should have considered the sentencing "court's decision to halve the recommended maximum sentence." P. Br. at 30. Petitioner points out that the prosecution recommended a 20 percent downward departure from the sentencing guidelines because Petitioner cooperated with law enforcement. In addition, Petitioner states, the court's sentence "was over four years less than the government's recommendation" based on Petitioner's "cooperation with federal law enforcement … his attempt to rehabilitate himself, his effort to seek treatment for the diagnosed mental disorders, and his acceptance of responsibility." P. Br. at 29, 31. The fact that the criminal court sentenced Petitioner to seven years of jail time even after taking into account his cooperation, efforts to rehabilitate himself and willingness to seek treatment for his mental conditions, reflects the gravity of his criminal conduct and lends additional support to the ALJ's determination that a significant extension of the minimum exclusion period was appropriate in this case. Furthermore, as discussed below, the I.G. and the ALJ separately took into account Petitioner's cooperation with law enforcement as a mitigating factor in determining and assessing the length of the 23-year exclusion.

d. 42 C.F.R. § 1001.102(b)(9) – Other Adverse Actions

The ALJ determined that the I.G. had established the existence of the aggravating factor at section 1001.102(b)(9), finding that LARA "revoked Petitioner's license to practice medicine" based on "the circumstances underlying [the] exclusion." ALJ Decision at 5, citing I.G. Exs. 4, 5. Petitioner concedes that his license was revoked, but argues that the ALJ did not conduct a qualitative assessment of the circumstances relevant to this factor. Specifically, Petitioner asserts that the ALJ should have considered that LARA could have imposed worse sanctions on Petitioner. P. Br. at 31-33.

We reject this argument. Under section 1001.102(b)(9), the salient question is whether Petitioner was the subject of any other adverse action based on the same set of circumstances that served as the basis for Petitioner's exclusion, not what particular type of action LARA *could have* taken against Petitioner. Furthermore, as the ALJ recognized, the revocation of Petitioner's license to practice medicine was itself a severe sanction demonstrating, among other things, that Petitioner was not trustworthy. *See* ALJ Decision at 6.

Thus, the ALJ did not err in concluding that the four aggravating factors discussed above, taken together, warranted a very substantial extension of the minimum five-year period of exclusion.

2. *The ALJ's evaluation of the mitigating factor at 42 C.F.R. §1001.102(c)(3) is supported by substantial evidence and free of legal error.*

On review of an I.G. determination to exclude an individual from participation in all federal health care programs, the petitioner bears the burden to prove the presence of any mitigating factor by a preponderance of the evidence. *Begum* at 7-8; *Arthur C. Haspel, D.P.M.*, DAB No. 1929, at 5 (2004). To prove the existence of the factor at 42 C.F.R. §1001.102(c)(3), a petitioner must demonstrate that: 1) the petitioner cooperated with state or federal officials; and 2) the cooperation "resulted in" others being convicted or excluded, or additional cases being investigated or reports about program vulnerabilities or weaknesses being issued, or a civil money penalty or assessment being imposed. By requiring an individual's cooperation with federal or state officials to be sufficiently valuable to produce one or more of the specified outcomes, the rule is crafted not "to reward individuals who may have provided evasive, speculative, unfounded or even spurious information that proved to be so useless that the government official was unable even to open a new case for investigation." *Gale*, DAB No. 1941, at 11. Instead, "the regulation is designed to authorize mitigation for significant or valuable cooperation that yielded positive results for the state or federal government …." *Id.* Moreover, the Board has observed that there "are compelling reasons in support of placing the burden on the individual being excluded." *Id.* at 18. With respect to the mitigating factor at section 1001.102(c)(3), the excluded "individual, not the I.G., has the personal knowledge of the full extent of the cooperation that took place, including the substance of the information and evidence provided, the names and positions of officials who received the information, the dates and times of the contacts, and the content of any agreements of cooperation with prosecutors." *Id.*

Here, the ALJ stated, the parties agreed that Petitioner cooperated with law enforcement and that his cooperation qualified as a mitigating factor. ALJ Decision at 5. Referencing the transcript of the sentencing proceedings, the ALJ noted that the court "gave [Petitioner] 'significant credit' for [his] cooperation." *Id.* Even so, the ALJ

observed, the court imposed what was still a lengthy prison sentence – seven years – reflecting "the seriousness of his offenses." *Id.* "By the same token," the ALJ stated, "Petitioner's cooperation with law enforcement [is] a mitigating factor, which justifies decreasing" the exclusion period. *Id.* "However," the ALJ continued, Petitioner's cooperation was "already reflected in the 23-year exclusion, which would have been substantially longer had Petitioner not cooperated." *Id.*

We note that the ALJ Decision does not state that Petitioner's cooperation resulted in any of the enumerated results required by the regulation to establish the factor. Nevertheless, the transcript of the sentencing proceedings indicates that Petitioner's cooperation with law enforcement "either led to or [at the time of the sentencing was] leading to a conviction." P. Ex. 3, at 11. We conclude that the ALJ reasonably could have considered this sufficient to establish that Petitioner's cooperation led to another individual being convicted or an additional case being investigated – positive results sufficiently valuable for his cooperation to qualify as a mitigating factor.

Petitioner contends that the ALJ "failed to give appropriate weight" to Petitioner's cooperation with law enforcement. P. Br. at 21; P. Reply at 7. Petitioner argues that his "full and valuable cooperation" was recognized by the U.S. Attorney's decision to move for a 20 percent downward departure in the sentencing guidelines, and the sentencing court "varied downward even further … because [Petitioner] had both cooperated and undertaken treatment." P. Br. at 22, citing P. Ex. 3, at 15, 20. According to Petitioner, the ALJ's discussion of the mitigation based on his cooperation is confusing, and "[n]othing in the notice" of Petitioner's exclusion "indicated that the IG balanced the aggravating factor of 84 months incarceration and the mitigating factor of cooperation in the manner suggested by the ALJ." *Id.* at 23. Petitioner further argues that the Board rejected an ALJ's "similar presupposition" in *Wilder,* leading the Board to reduce the exclusion period in that case by almost half. P. Br. at 23.

Petitioner's reliance on the *Wilder* decision is misplaced. In *Wilder*, the Board found the 35-year period of exclusion unreasonable and reduced it to 18 years based on the petitioner's "extraordinary cooperation" with government officials. *Wilder*, DAB No. 2416, at 4, 13. Specifically, Wilder's cooperation led to felony convictions of seven other participants in a conspiracy to defraud Medicare and the California Medicaid program and led to the government's attempt to recover more than $30 million in multiple cases. *Id.* at 3. Recognizing the value of Wilder's cooperation, the criminal court ultimately reduced each of his felony convictions to misdemeanors, limited his incarceration sentence to summary probation for 36 months, and ordered him to pay $4 million in restitution. *Id.* The "depth and breadth of [Wilder's] cooperation with law enforcement officials," the Board concluded, "when weighed against the three aggravating factors, merit[ed] reduction of this exclusion to 18 years." *Id.* at 13.

Here, in stark contrast, Petitioner has not met his burden to prove that the extent of his cooperation and the results it produced were "extraordinary." For example, Petitioner has not shown whether and how his cooperation led to a comparable number of convictions or any other significant result for law enforcement recognized in the regulations. Petitioner, not the I.G., has the personal knowledge of the full extent to which his cooperation would be useful to assign greater weight to this mitigating factor. *Cf. Gale*, DAB No. 1941, at 18-19. It was Petitioner's burden to present any such evidence.

With respect to Petitioner's argument that the notice of exclusion does not indicate that the I.G. balanced the aggravating factor of incarceration against the mitigating factor of cooperation, the I.G. was not required to do so. Petitioner suggests that the fact that the criminal court judge considered his cooperation in determining the length of Petitioner's incarceration requires the I.G. (and the ALJ on appeal) to apply cooperation to offset the aggravating factor regarding incarceration, but that is not what the exclusion regulations require. As stated earlier, the aggravating factors (one of which is incarceration) and the mitigating factors (one of which is cooperation) are separate considerations, and the mitigating factors are considered only after the aggravating factors have been weighed. The I.G.'s notice to Petitioner described all four of the aggravating factors and the mitigating factor on which the I.G. relied, in totality, to determine the 23-year period of Petitioner's exclusion. As in other cases, the I.G.'s determination involved consideration of "a complex interaction of diverse circumstances and regulatory factors with varying weights." *Goldman*, DAB No. 2635, at 11. In turn, the ALJ properly exercised her authority to review the length of Petitioner's exclusion de novo by considering the circumstances relating to each aggravating factor and the mitigating factor. That she considered the mitigating factor of Petitioner's level of cooperation relative to the weight of Petitioner's sentence of incarceration is precisely the type of "qualitative assessment" that should underlie an evaluation of whether an exclusion period falls into a reasonable range.

Accordingly, we reject Petitioner's argument that the ALJ did not give sufficient weight to Petitioner's cooperation with law enforcement.

3. *Petitioner has not proven the alleged mitigating factor at 42 C.F.R. § 1001.102(c)(2).*

Where a petitioner alleges the existence of the factor at 42 C.F.R. §1001.102(c)(2), the petitioner must demonstrate that the record in the criminal proceedings evidences that the court determined: 1) that the individual had a mental, emotional or physical condition before or during the commission of the offense; and 2) that the court concluded that the mental or physical condition reduced the individual's culpability. *Begum* at 9 (stating

that the "relevant inquiry" is whether a petitioner has proven that the sentencing court determined that the mental disorder reduced petitioner's culpability), citing *Patel v. Shalala*, 17 F. Supp. 2d 662, 667 (W.D. Ky. 1998) (*affirming Sharad Patel, M.D.*, Dkt. No. A-97-50 (1997), declining review of ALJ Decision CR447 (1996)).

Here, we conclude that it is not reasonable to infer that the sentence reflected any finding of reduced culpability due to Petitioner's mental condition. To support the allegation that his bipolar and narcissistic behavior disorders existed and constituted a mitigating factor under section 1001.102(c)(2), Petitioner proffered the transcript of his sentencing proceedings as well as the reports from a psychologist and psychiatrist that he submitted to the court in advance of the sentencing proceedings. P. Exs. 3, 4, 5. On review of the sentencing record, the ALJ recognized that Petitioner "suffers from a narcissistic personality disorder and bipolar disorder." ALJ Decision at 6. The ALJ further stated, however, that the sentencing court "explicitly found that Petitioner's mental health issues do *not* excuse what he did, 'which is very serious.'" ALJ Decision at 6, citing P. Ex. 3 at 18 (emphasis in ALJ Decision). "Because the court found that his mental condition did not reduce his culpability," the ALJ concluded, "this is not a mitigating factor." ALJ Decision at 6.

Petitioner argues that the ALJ erred "by relying exclusively on the district court's comment" that Petitioner's mental condition did not "excuse what he did." P. Br. at 13. Whether the court was using the word "excuse" according to the legal definition of the term (an affirmative defense to a criminal charge) or in a colloquial sense, Petitioner contends, "there is still a crucial distinction between excusing an individual's criminal actions and reducing that person's culpability." P. Br. at 15. Furthermore, Petitioner asserts that under the Board's holding in *Arthur C. Haspel*, D.P.M., DAB No. 1929 (2004), the "decisive question" is "whether it would be reasonable to infer from the entire record that the presiding judge had made the determinations required by the regulation as part of the sentencing process." P. Reply at 2, citing *Haspel*, DAB No. 1929, at 3-4; *see also* P. Br. at 17-18. In this case, Petitioner argues, the court made numerous relevant statements "from which the court's determination of reduced culpability can be reasonably inferred." P. Reply at 2; P. Br. at 16-21, citing P. Exs. 3, 4, 5.

We disagree. Regardless of whether the ALJ misconstrued the court's statement that Petitioner's mental health condition did not "excuse" what he did, we find that the sentencing record does not give rise to a reasonable inference that the court determined that Petitioner's mental conditions reduced his culpability. We note that in *Haspel*, the "record [was] replete with details of the multiple negative effects of [Petitioner's drug] addiction on his life and of his resulting impaired and confused mental state at the time he was committing the two offenses with which he was charged." *Haspel*, DAB No. 1929, at 4. As well, Haspel's drug addiction was the "primary focus" of the petitioner's statement to the judge, the unrebutted testimony of his single witness, and his attorney's

arguments, and the record detailed "the extensive and time-consuming efforts Petitioner took to rehabilitate himself from that addiction after his arrest." *Id.* Moreover, the Board observed, the sentencing "judge initially advised Petitioner that the maximum sentence was five years" of incarceration for "each of the two counts, a fine of up to $250,000, and a term of supervised release of at least two years up to life." *Id.* at 4-5. However, the Board determined, the judge "clearly found that Petitioner was entitled to leniency since he sentenced him to only three months of home confinement and five years of supervised release and imposed no fine whatsoever." *Id.* at 5. While it was possible that the judge considered factors in addition to Petitioner's addiction "in setting such a lenient sentence," the Board concluded it was "not reasonable to infer from this record as a whole that the judge did not determine that Petitioner's addiction reduced his culpability" for the crimes. *Id*.

Here, in contrast, the transcript of the sentencing proceedings does not suggest that the court found Petitioner's mental disorders caused him to be in an impaired and confused mental state during the 14-month period of his criminal conduct. Nor were Petitioner's mental disorders the focus of his statement to the court. Much to the contrary, Petitioner's statement focused on his accountability for his criminal actions and his remorse:

> Your Honor, I would like to tell you that I am deeply ashamed for my actions and there was no excuse for them. I assume full and complete responsibility for my actions. I deeply regret the shame I have brought to my family…. Knowing I will be apart from my children for as long as my sentence runs, this will haunt me for the rest of my life. I apologize to all the patients who I may have caused harm and who I have hurt by these actions.

P. Ex. 3, at 16. While Petitioner went on to state that he was "grateful" to his wife and probation officer for "pushing" him to seek treatment and that he would continue treatment, Petitioner did not suggest that his mental condition before or at the time of his criminal conduct diminished his blameworthiness. *Id.*

Furthermore, the sentencing transcript shows that the court reduced the recommended period of incarceration for the crimes for which Petitioner was convicted based on his cooperation with law enforcement and his agreement to continue to receive treatment. After acknowledging the Assistant U.S. Attorney's motion for a downward departure in the sentence based on Petitioner's cooperation with law enforcement, the court noted: "Probation actually recommends a little bit lighter sentence …. based on the evaluation of [Petitioner's] attempt to rehabilitate, his willingness to cooperate, to seek treatment, and to move forward and put this behind him, his acceptance of responsibility and the like." *Id.* at 17. Taking these factors into account, the court then said that even if the Assistant

U.S. Attorney had not submitted a motion, the court would "vary downward based on the steps that [Petitioner] has taken since his arrest. He has cooperated, he has undertaken treatment." *Id.* at 20. Thus while the court took into account Petitioner's willingness to seek treatment for his mental condition in reducing his term of incarceration, it did so in the context of Petitioner's overall willingness to "move forward;" the sentencing record does not reflect an implicit finding by the court that the condition reduced his culpability for his conduct before or at the time of that conduct.

The court in fact expressly resisted drawing any conclusion about the impact Petitioner's mental condition had on his criminal conduct, stating that it was not possible to determine what influenced Petitioner to engage in such systematic fraud and distribution of controlled substances. In "this case," the court stated, "it's really kind of hard to figure out what got [Petitioner] started on this."[7] *Id.* at 18. Later, the court remarked, "…why did he go off this way? It's really hard to say."[8] *Id.* at 19.

Appellant further argues that the terms of the sentence imposed by the court shows "the role played by" his mental condition. P. Br. at 20. The sentencing provisions include an instruction that Petitioner be continued on his medication "or whatever other medication" the psychiatrist "feels is necessary and appropriate." P. Ex. 3, at 22. The court also instructed that Petitioner "participate in a program approved by the probation department for mental health counseling if necessary" and undergo "a psychological or psychiatric evaluation as directed by the probation officer if necessary." *Id.* at 23.

These instructions confirm that the court found that Petitioner suffered from bipolar disorder; they do *not* indicate, however, that the court found the disorders reduced Petitioner's culpability for defrauding multiple health insurance programs and distributing thousands of medically unnecessary controlled substances. *Cf. Rukse,* DAB No. 1851, at 8-9 (2002) ("a provision in a sentencing order establishes only that the sentencing judge recognized that the offender was currently suffering from substance abuse; it does not establish, in and of itself, that the judge found the offender's culpability to be reduced as a result of a condition that existed at the time of the offense").

[7] The sentencing court also considered the government's theory that "it was greed in addition to what Dr. H. [a psychologist] evaluates as grandiosity and bipolar disorder" that caused Petitioner to commit the felonious acts for which he was convicted. *Id*.

[8] Not only did the sentencing court not conclude that Petitioner's mental condition reduced his culpability, but the court observed that mental health problems were common among criminal defendants, stating: "On the other hand, I see a lot of defendants with mental health issues. It seems to be a *component* of a lot of criminal activity[.]" *Id*. at 18 (italics added).

Thus, we conclude that Petitioner has not proven that the court made an explicit finding that Petitioner's mental conditions reduced his culpability or that such a finding can reasonably be inferred from the record. Petitioner's mental conditions therefore cannot be considered a mitigating factor for reducing his exclusion period under 42 C.F.R. § 1001.102(c)(2).

Conclusion

For the reasons stated above, we conclude that the ALJ Decision is supported by substantial evidence in the whole record and free from legal error. The ALJ properly determined that Petitioner's exclusion from all federal healthcare programs for 23 years falls within a reasonable range based on the circumstances relating to four aggravating factors and one mitigating factor. We further conclude that Petitioner has failed to prove the existence of the mitigating factor at 42 C.F.R. § 1001.102(c)(2). Accordingly, we affirm the ALJ Decision.

/s/
Sheila Ann Hegy

/s/
Constance B. Tobias

/s/
Christopher S. Randolph
Presiding Board Member