Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Zahid Imran, M.D.
Docket No. A-16-30
Decision No. 2680
March 11, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Zahid Imran, M.D. (Petitioner) appeals the November 25, 2015 decision by an Administrative Law Judge (ALJ) upholding the determination of the Inspector General (I.G.) to exclude Petitioner from participation in any federal health care program for 48 years. *Zahid Imran, M.D.*, DAB CR4465 (2015) (ALJ Decision). Petitioner argues that the ALJ erred in finding that the I.G.'s imposition of a 48-year exclusion was reasonable.

The ALJ concluded that the I.G. properly imposed a mandatory exclusion on the grounds that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare. The ALJ also found aggravating factors sufficient to sustain the I.G.'s imposition of a period of exclusion totaling 48 years, and no mitigating factors.

For the reasons discussed below, we affirm the ALJ Decision.

Legal Authority

Section 1128(a)(1) of the Social Security Act (Act) requires that any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under Medicare or any state health care program be excluded from participation in any federal health care program.[1]

Section 1128(c)(3)(B) of the Act further provides that this exclusion must be for a minimum period of five years.

[1] The current version of the Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact-toc.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. 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.

Section 1001.102(b) of Title 42 of the Code of Federal Regulations sets forth the factors which may be considered aggravating and the basis for lengthening the period of exclusion beyond the mandatory five years.

In reviewing whether "'[t]he length of exclusion is unreasonable,' 42 C.F.R. § 1001.2007(a)(1)(ii), the ALJ may not substitute his or her judgment for that of the I.G. or determine what period of exclusion would be 'better.'" *Richard E. Bohner*, DAB No. 2638, at 2 (2015) (citations omitted). "Instead, the ALJ's role is limited to considering whether the period of exclusion imposed by the I.G. was within a reasonable range, based on demonstrated criteria." *Id.*, citing *Craig Richard Wilder*, DAB No. 2416, at 8 (2011) ("the I.G. has 'broad discretion' in setting the length of an exclusion in a particular case, based on the I.G.'s 'vast experience' in implementing exclusions"); *see also* 57 Fed. Reg. 3298, 3321 (Jan. 29, 1992) (deference to I.G.'s "broad discretion" in setting the length of an exclusion "is appropriate, given the [I.G.'s] vast experience in implementing exclusions").

Standard of Review

The Board's standard of review on a disputed issue of fact is whether the ALJ decision is supported by substantial evidence in the record as a whole. The standard of review on a disputed issue of law is whether the ALJ decision is erroneous. 42 C.F.R. § 1005.21(h); *Guidelines – Appellate Review of Decisions of Administrative Law Judges in Cases to Which Procedures in 42 C.F.R. Part 1005 Apply* (*Guidelines*).[2]

Case Background[3]

Petitioner is a physician, formerly licensed in the State of Louisiana (Louisiana). Between 2005 and 2011, he owned, directed, and managed community mental health centers in Louisiana and Texas. I.G. Ex. 4, at 6; I.G. Ex. 5, at 5. Petitioner also served as medical director of one of the centers. *Id.*

On May 2, 2013, a grand jury for the Middle District of Louisiana indicted Petitioner on, among other crimes, one count of felony conspiracy to commit health care fraud. I.G. Ex. 4. The conspiracy, beginning in 2005 and continuing through October 2011, involved Petitioner and ten others committing health care fraud in violation of 18 U.S.C. § 1349 by admitting patients who did not qualify for partial hospitalization and admitting

[2] The *Guidelines* are available at http://www.hhs.gov/dab/divisions/appellate/guidelines/procedures.html.

[3] Background information is drawn from the ALJ Decision and the record before the ALJ and is not intended to substitute for her findings.

patients for whom partial hospitalization was not medically necessary. I.G. Ex. 5, at 6; P. Ex. 1, at 2. Petitioner also signed false statements claiming that he had provided treatment that he had not provided. I.G. Ex. 5, at 6. Petitioner falsified or caused to be falsified patient treatment notes, attendance and other records in order to submit false claims to the Medicare program. I.G. Ex. 4, at 10, 12.

On May 13, 2014, Petitioner entered into a plea agreement with the United States Attorney for the Middle District of Louisiana and the United States Department of Justice (together "DOJ"), admitting to the aforementioned single count of Medicare fraud. I.G. Ex. 5. Petitioner pled guilty at his arraignment to conspiracy to commit Medicare fraud. Each of Petitioner's ten co-defendants pled guilty to conspiracy or was found guilty after trial by jury. P. Ex. 1, at 7-8. As part of his plea agreement, Petitioner stipulated to certain facts about the fraud conspiracy, including the total dollar amount of the claims for Medicare payment he made during the conspiracy, and that the range of program loss under the United States Sentencing Guidelines was more than $50,000,000 but not more than $200,000,000. I.G. Ex. 5, at 6. The parties also stipulated that the District Court would establish the amount of the restitution Petitioner would be ordered to pay. *Id*. at 6, 7. Finally, Petitioner acknowledged that the U.S. Department of Health and Human Services would exclude him from participation in Medicare, Medicaid, and all federal health care programs as a result of his guilty plea. *Id*. at 8.

The United States Probation Office (U.S. Probation) generated a Presentence Investigation Report. P. Ex. 1. As part of that process, U.S. Probation calculated Petitioner's sentencing guidelines based in part on the stipulated calculation of loss ($50,000,000 to $200,000,000). *See* I.G. Ex. 5, at 7; P. Ex. 1, at 23-24. Upon investigation, U.S. Probation found that Petitioner was responsible for fraudulent Medicare claims totaling $138,606,200. P. Ex. 1, at 15. Consequently, U.S. Probation recommended that Petitioner pay $23,817,779 in restitution. *Id.* at 25.

On August 25, 2014, Petitioner was sentenced to 86 months in prison and ordered to pay $23,817,779 in restitution. I.G. Ex. 6.

By letter dated January 30, 2015, the I.G. notified Petitioner that, based on this conviction, he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for 48 years under sections 1128(a)(1) and 1128(c)(3) of the Act (which require the mandatory exclusion, for not less than five years, of any individual or entity convicted of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service). I.G. Ex. 1, at 1. Petitioner timely requested a hearing before an ALJ to challenge the I.G.'s determination.

ALJ Decision

On November 25, 2015, the ALJ issued a decision on the written record. The ALJ decided not to hold a hearing because she determined that an in-person hearing would serve no purpose because she excluded the only testimony Petitioner proposed. ALJ Decision at 3. The ALJ found that the 48-year exclusion period "falls within a reasonable range." *Id*. at 1. Before the ALJ, Petitioner conceded that he had been "convicted of an offense related to the delivery of an item or service under Medicare and is therefore subject to an exclusion of at least five years." *Id*. at 3. The sole question at issue before the ALJ was "whether the length of the exclusion in excess of five years is reasonable." *Id*. Petitioner, through counsel, contended that the Government had overstated the amount of loss; that there was no evidence that Petitioner had engaged in criminal activity during the relevant period; and that Petitioner had not been convicted of any offenses other than that to which he had pled guilty. *See* Petitioner's Request for ALJ Hearing. Petitioner argued that the 48-year exclusion period is grossly excessive, in part, because:

> [t]he only thing distinguishing this case from any other Medicare fraud case is the loss amount. The amount as alleged by the government, however, is merely fiction. The government should be required to prove this amount rather than rely on conclusory allegations set forth by a probation officer. To allow the government's figure to be accepted unchallenged would violate Dr. Imran's rights under the Due Process Clause of the Fifth Amendment to the United States Constitution.

Id. at 2.[4]

The ALJ concluded that the I.G. properly relied upon four of the nine aggravating factors listed in 42 C.F.R. § 1001.102(b) as the basis for lengthening the period of exclusion. ALJ Decision at 4. Title 42 C.F.R. § 1001.102, titled Length of Exclusion, provides in relevant part:

> (b) Any of the following factors may be considered to be aggravating and a basis for lengthening the period of exclusion—

[4] Petitioner's Request for ALJ Hearing, a two-page document, is not paginated. We reference the pages in numerical order.

> (1) The acts resulting in the conviction, or similar acts, that caused, or were intended to cause, a financial loss to the Government program or to one or more entities of $5,000 or more. (The entire amount of financial loss to such programs or entities, including any amounts resulting from similar acts not adjudicated, will be considered regardless of whether full or partial restitution has been made);
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> (2) The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more;
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> (5) The sentence imposed by the court included incarceration;
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> * * *
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> (9) Whether the individual or entity was 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 further noted that the presence of an aggravating factor or factors not offset by any mitigating factor or factors justifies lengthening the mandatory period of exclusion. *Id.*

The ALJ stated that her role is to "determine whether the exclusion period imposed by the I.G. falls within a reasonable range" based "on the aggravating and mitigating factors" identified at 42 C.F.R. § 1001.102. ALJ Decision at 6, citing *Jeremy Robinson*, DAB No. 1905, at 5 (2004). The ALJ defined a "reasonable range" as "a range of exclusion periods that is more limited than the full range authorized by statute . . . and that is tied to the circumstances of the individual case." *Id.* at 6, citing *Joseph M. Rukse, Jr., R.Ph.*, DAB No. 1851, at 11 (2002), *citing Gary Alan Katz, R.Ph.*, DAB No. 1842, at 8 n.4 (2002).

In rejecting Petitioner's arguments against the application of the aggravating factors, the ALJ reasoned that the restitution amount to which Petitioner stipulated, as part of his guilty plea, is a reasonable measure of Medicare losses in this case, and gave significant weight to the fact that the large amount of program loss in this case could be characterized as an "exceptionally aggravating factor." ALJ Decision at 4-5. The ALJ observed that Petitioner's criminal conduct over six years was six times longer than necessary to constitute an aggravating factor. *Id.* at 5. The ALJ further noted that Petitioner's 86-month prison term "underscore[d] the seriousness of his crime." *Id.* In addition, the ALJ considered that the Louisiana Department of Health and Hospitals excluded him from participation in its Medicaid program, and that Petitioner had

forfeited his Louisiana medical license. *Id.* at 5-6. The ALJ also noted that the I.G. may reasonably determine that periods of exclusion longer than the mandatory minimum are necessary, "not only to protect federal funds, but 'to [staunch] the increasing amount of health care fraud.'" *Id*. at 7, quoting *Jeremy Robinson*, DAB No. 1905, at 10 n.8 (2004). Finally, the ALJ noted that Petitioner did not argue the presence of any mitigating factors, and the ALJ found none in the record. *Id.* at 6.

As a result, the ALJ concluded that the I.G.'s determination to exclude Petitioner for 48 years fell within a reasonable range and that, because its duration is finite, it is not a permanent exclusion. The ALJ, however, recognized that "48 years is a substantial period of exclusion" and that such a lengthy period should be "limited to those posing a grave threat to program integrity[,]" but found that Petitioner posed such a threat because he "cost the Medicare program massive amounts of money over a long period of time." *Id.* at 7.

Analysis

On appeal to the Board, Petitioner asserts, as he asserted before the ALJ, that a 48-year exclusion is unreasonably long and is "effectively a lifetime exclusion." Petitioner's Br. at 3 (unnumbered).[5] Petitioner's argument on appeal to the Board may be summarized as follows: 1) the restitution Petitioner is ordered to make is the result of an inaccurate calculation of loss to the Medicare program and cannot be the basis for the application of the aggravating factor at 42 C.F.R. § 1001.102(b)(1), so that aggravating factor does not apply in this case, and 2) the 48-year exclusion is unreasonable. In addition, Petitioner asserts a Fifth Amendment violation because the ALJ declined to hold an evidentiary hearing where, Petitioner contends, he would have testified that only a fraction of his billings were erroneous. However, Petitioner did not dispute the ALJ's finding that there were no mitigating factors. Finally, Petitioner contends that Medicare providers are given no notice of the potential sanction for violating regulations, and that this Board's decisions are inconsistent, arbitrary and capricious. As discussed below, Petitioner's arguments have no merit.

1. *The ALJ did not err in relying on records of Petitioner's criminal proceeding as substantial evidence of the amount of financial loss to the Medicare program.*

Petitioner's plea agreement contains Petitioner's stipulation, or agreement, to certain facts, including the "forfeiture allegations contained in the Superseding Indictment." I.G. Ex. 5, at 1. Relevant to this case, Petitioner agreed to the following:

[5] The pages of Petitioner's five-page brief are not numbered.

> In total, during the course of the conspiracy [. . .] the Shifa facilities submitted claims to Medicare totaling approximately $258,582,075. A significant portion of these claims was fraudulent . . . .
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> * * *
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> The United States and the defendant stipulate, pursuant to Section 6B1.4 of the United States Sentencing Guidelines, the proper calculation of loss pursuant to 2B1.1 of the United States Sentencing Guidelines based on the defendant's participation in the conspiracy and scheme and artifice is more than $50,000,000 but not more than $200,000,000.

Id. at 6. Petitioner's agreement that his business billed more than $258 million during the fraud scheme, and that "[a] significant portion of these claims was fraudulent," without more, could establish the aggravating factor listed at 42 C.F.R. § 1001.102(b)(1), which requires proof only of "a financial loss to a Government program" of $5,000. *Id.* As the ALJ stated, "By any standard, 'a significant portion' of **$258 million** represents an exceptionally aggravating level of fraud." ALJ Decision at 5 (emphasis in original). However, we need not determine exactly how much money constitutes a "significant portion" of $258 million.

Petitioner also agreed to pay a to-be-determined dollar amount in restitution. Section 11 of his plea agreement states:

> The defendant and the Department of Justice agree, pursuant to Title 18, United States Code, Section 3663(a)(3), that the Court will order full restitution for the defendant's conduct, in an amount to be determined by the Court. The parties specifically agree that the court shall not be limited to the count of conviction in determining and ordering full restitution.

I.G. Ex. 5, at 7. As noted above, U.S. Probation conducted a presentence investigation and issued a 26-page report. In calculating Petitioner's sentencing guideline score, U.S. Probation determined that Petitioner was responsible for $138,606,200 in fraudulent claims. P. Ex. 1, at 15-17; 23-24. The sentencing court held Petitioner jointly and severally liable for $23,817,779 of that sum. I.G. Ex. 6, at 6. Thus, as the ALJ found, the evidence supports a finding that the amount of program loss was $23,817,779, since "[r]estitution has long been considered a reasonable measure of program losses." ALJ Decision at 4 (citations omitted). Moreover, the ALJ stated that $23,817,779 was likely a "conservative" amount, noting that DOJ and Petitioner stipulated that the amount of loss was more than $50,000,000 but not more than $200,000,000. *Id.* at 5.

Petitioner argues that there is no reliable evidence that the amount of loss is greater than $5,000 and that the ALJ's reliance on the amount of restitution determined by the court to establish the amount of program loss is not warranted on the facts of the case. Petitioner's Br. at 1. Petitioner also contends that 1) even if a "significant portion" of the claims submitted were fraudulent, as stipulated in the plea agreement, that does not mean that the vast majority of the paid claims were fraudulent; 2) there is no indication that the US Probation officer had "any medical knowledge to render an opinion regarding loss amount;" 3) reliance on the restitution amount determined using flawed methodology violates Petitioner's Fifth Amendment due process rights; and 4) Petitioner did not waive his right to contest the length of the exclusion on the ground that the methodology used to calculate the amount of restitution ordered by the court was flawed. *Id.* at 1-3.

First, Petitioner's distinction between the amount of claims submitted and the amount of claims paid makes no difference to our analysis. Under 42 C.F.R. § 1001.102(b)(1), the measure of program loss is either that which Petitioner's acts caused or "were intended to cause." Petitioner's focus on the ALJ's observation that Petitioner's restitution amounts to a mere 9% of the total amount of his centers' billings during the course of the fraud scheme ($23,817,779 of $258,582,075) is misplaced. Petitioner's Br. at 2, referring to ALJ Decision at 4. The amount of loss is shown by Petitioner's plea agreement and the sentencing order containing the amount of restitution he is ordered to repay Medicare, and has no relation to how many claims Petitioner may have submitted to Medicare outside of the fraudulent scheme.

Second, Petitioner provides no authority to support his argument that a person with medical knowledge is required to render an opinion regarding program loss. The evidence we have already cited concerning financial loss was part of the criminal proceeding and Petitioner's attempt to discredit it now amounts to a collateral attack on the underlying criminal conviction which the ALJ correctly rejected under 42 C.F.R. § 1001.2007(d) ("When the exclusion is based on the existence of a criminal conviction . . . or any other prior determination where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal."). ALJ Decision at 3. In light of the adjudicated facts concerning the financial impact, we see no reason that the ALJ would require medical opinions to rely on them.

Third, as we discussed above, Petitioner claims that the ALJ's exclusion of his testimony, and the testimony of other unidentified persons, because it was irrelevant to the question of program loss, and her determination not to hold a hearing, violated his Fifth Amendment due process rights. We find no error in the ALJ's determinations about Petitioner's proffered evidence and hearing request, and therefore find no basis for a due process claim. The regulations in 42 C.F.R. § 1005.1 *et seq.*, grant the ALJ broad authority to conduct evidentiary hearings. The ALJ directed the parties before her to indicate whether an in-person hearing would be necessary and, if so, to --

> describe the testimony that [the party] wishes to present and provide the name of any witnesses and a summary of each witness's proposed testimony. I specifically directed the parties to explain why the testimony would be relevant.

ALJ Decision at 2. Petitioner proffered his own testimony as well as that of unidentified other persons with medical expertise who "'would testify . . . that the vast majority of the submitted and paid claims were legitimate and covered under the Medicare program.'" *Id.* at 3, quoting Petitioner's brief to the ALJ at 5. The ALJ found that Petitioner's proffer failed to comply with her order to identify witnesses and to summarize and explain the relevance of their evidence. Furthermore, the ALJ found Petitioner's proffered evidence irrelevant to any issue properly before her. The ALJ explained that a hearing was not required because --

> during the criminal proceedings, Petitioner was afforded an opportunity to challenge the amount of program loss. Instead, he conceded the significant program losses.

ALJ Decision at 5. Petitioner had conceded the amount of restitution he owed as part of his plea and sentencing. I.G. Ex. 5, at 7; I.G. Ex. 6, at 5. In her decision, the ALJ recognized that an order of restitution may suffice to show the amount of program loss when considering the presence of an aggravating factor for the length of exclusion. ALJ Decision at 4, citing *Juan de Leon, Jr.*, DAB No. 2533, at 5 (2013); *Jason Hollady, M.D.*, DAB No. 1855 (2002); *see also Craig Richard Wilder*, DAB No. 2416, at 9 (2011). Although Petitioner suggests that he was hampered in challenging the restitution award in the criminal proceeding because of the terms of the plea agreement (Petitioner's Br. at 2), his choice to waive that opportunity does not entitle him to challenge it in the present proceeding. Petitioner's allegation that his due process rights were violated constitutes little more than a prohibited collateral attack on his criminal conviction.

The Board has consistently held that neither the Board nor an ALJ may "[f]ind invalid or refuse to follow Federal statutes or regulations" on constitutional grounds. *Ethan Edwin Bickelhaupt, M.D.*, DAB No. 2480, at 3 (2012), *aff'd, Bickelhaupt v. Sebelius*, No. 12 C 9598 (N.D. Ill. May 29, 2014); citing 42 C.F.R. § 1005.4(c)(1); *see also Kenneth M. Behr*, DAB No. 1997, at 10 (2005); *Keith Michael Everman, D.C.*, DAB No. 1880, at 12 (2003). The ALJ's decision to exclude the proffered evidence and decline to hold a hearing was governed by the regulations and by the statutory scope of appeal for mandatory exclusions. To the extent Petitioner argues that Federal statutes or regulations result in a constitutional violation, such a claim is not cognizable before us.

Fourth, we agree that we apply a substantial evidence standard in reviewing the ALJ Decision but we disagree with Petitioner's claim that the ALJ did not have substantial evidence in the record to uphold the I.G.'s exclusion. Petitioner's Br. at 4. Petitioner does not, and cannot, dispute that he was subject to mandatory exclusion. Further, he does not dispute the presence of aggravating factors or the absence of mitigating factors. He claims that the calculation of the restitution amount was flawed, but he does not contend that the total amount of loss is *less* than the $5,000 threshold for aggravation. Petitioner has not shown any reason that the ALJ was required to disregard the evidence from the criminal case establishing a program loss attributable to Petitioner of at least $23,817,779.

We conclude that substantial evidence supports the ALJ's findings and that Petitioner has not shown procedural error in the denial of an in-person hearing.

2. The ALJ did not err in applying the aggravating factor at 42 C.F.R. § 1001.102(b)(1) when considering the reasonableness of the length of Petitioner's exclusion.

The regulation at 42 C.F.R. § 1001.102(b)(1) allows the I.G. to consider as an aggravating factor an act resulting in conviction that caused a financial loss to the Medicare program of $5,000 or more. The preamble to the final exclusion regulations implementing the Medicare and Medicaid Patient and Program Protection Act of 1987 states that "[a]n aggravating factor is one that does not automatically exist in every case, but when it does exist, justifies a longer period of exclusion." 57 Fed. Reg. at 3313. Although Petitioner disputes the total amount of loss Petitioner's fraud scheme caused Medicare, as noted, Petitioner did not dispute before the ALJ that his actions caused the program to lose at least $5,000.

Petitioner has argued that the "only thing distinguishing this case from any other Medicare fraud case is the loss amount." Petitioner's Request for ALJ Hearing; *see also* Petitioner's Br. at 3. This is incorrect. The very large financial losses to the program certainly constituted important evidence of aggravation, as the ALJ noted, and were entitled to significant weight. ALJ Decision at 4-5, and Board decisions cited therein. However, the ALJ also relied on other aggravating factors which the Petitioner does not challenge, and which we discuss further below.

Hence, we do not agree that the ALJ somehow gave improper weight to the financial loss. We next consider the Petitioner's challenges to the reasonableness of the 48-year period of exclusion.

3. The ALJ did not err in concluding that the length of the exclusion imposed here was within a reasonable range.

As federal courts and the Board have noted, section 1128's remedial purpose is to protect the federal health care programs from untrustworthy individuals. *Bohner*, DAB No. 2638 at 19, citing *Friedman et al. v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012); *Narendra M. Patel, M.D.*, DAB No. 1736, at 25 (2000), *aff'd*, *Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003). As Petitioner acknowledges, the ALJ reviews the length of exclusion *de novo* under 42 C.F.R. § 1005.20(b) ("The ALJ may affirm, increase or reduce the penalties, assessment or exclusion proposed or imposed by the IG, or reverse the imposition of the exclusion."). Petitioner's Br. at 4, citing Board decisions in *Rukse*, DAB No. 1851 (2002), and *Katz*, DAB No. 1842 (2002). The Board has long held, however, that the regulations governing review of whether an exclusion is unreasonable in length are premised on deference to the I.G.'s experience in implementing exclusions, and therefore an exclusion's time period should only be altered if it falls outside of a reasonable range of exclusions which could be imposed. *Joann Fletcher Cash*, DAB No. 1725, at 16-17 (2000), citing 57 Fed. Reg. 3298, 3321 (1992) (preamble to final regulations).

Petitioner nevertheless argues that ALJs are released from the obligation "to defer greatly to the I.G.'s determination of the length of an enhanced exclusion when there are no material questions as to the existence of aggravating or mitigating factors." Petitioner's Br. at 4, citing *Ollie Futrell*, DAB CR2901, at 9-10 (2013), and *Keith Nisonoff*, DAB CR2927 (2013) in support. In the first case, an ALJ suggested, in pertinent part, that the "settled line of authority" requiring such deference somehow "appeared to have been modified by the Board's decision in *Craig Richard Wilder, M.D.*, DAB No. 2416 (2011)." *Futrell* at 9-10. The ALJ went on to speculate that, if that rule has been abandoned, ALJ might have the authority to lengthen as well as to shorten the term proposed by the I.G. *Id*. The Board declined review of the ALJ's decision in *Futrell*, but in declining review, stated that the Board's "determination should not be read as affirming the ALJ's analysis, in dicta, of what he view[ed] as 'modified' Board precedent on the issue of the reasonableness of the length of an exclusion." *Ollie Futrell*, DAB No. 2540 (2013). The Board has never adopted the ALJ's view that the *Wilder* decision reflected any change in the Board's jurisprudence concerning appropriate deference to the I.G. as part of reviewing the reasonableness of the length of exclusions. In any case, the ALJ in the present matter has not sought to lengthen the exclusion period beyond that imposed by the I.G.

The same ALJ later commented in a footnote in the second case as follows:

> As I have argued most recently in *Ollie Futrell*, DAB CR2901, at 9-10 (2013), the Board's recent decisions in *Craig Richard Wilder*, DAB No. 2416 (2011), *Vinod Chandrashekhar Patwardhan, M.D.*, DAB No. 2454 (2012), and *Sushil Anniruddh Sheth*, DAB No. 2491 (2012) release the Administrative Law Judge from any obligation to defer greatly to the I.G.'s determination of the length of an enhanced exclusion when there are no material questions as to the existence of aggravating or mitigating factors.

Nisonoff, at 8 n. 1. *Nisonoff* was not appealed to the Board. It has been long settled that ALJ decisions are not precedential and are not binding authority on the Board or other ALJs. *Green Oaks Health & Rehab. Ctr.*, DAB No. 2567, at 9 (2014); *Lopatcong Ctr.*, DAB No. 2443, at 12 (2012). We find nothing in these passing comments in ALJ decisions that supports Petitioner's claims that Board jurisprudence is in any way "arbitrary and capricious." Petitioner's Br. at 4.

In the present case, the ALJ described the magnitude of the harm to Medicare as "staggering," amounting to "thousands of times greater than the $5,000 threshold for aggravation." ALJ Decision at 5. She observed that "[i]f even a small percentage of program participants were capable of this level of fraud, the Medicare program could not long survive[,]" and she cited the Board's characterization of amounts substantially greater than the statutory standard as an "exceptionally aggravating factor." *Id.* Further, the ALJ recognized that the sentencing court was likely conservative in setting the restitution amount, in view of the fact that Petitioner had "stipulated 'that the proper calculation of loss . . . based on the defendant's participation in the conspiracy . . . is more than $50,000,000 but not more than $200,000,000.'" *Id.*, citing P. Ex. 1, at 23-24. This, she concluded, not only justifies but "compels a period of exclusion" far longer than the five-year-minimum. *Id.*, citing *Jeremy Robinson*, DAB No. 1905 (2004), and *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003).

Beyond the dollar amounts at issue, the ALJ relied on undisputed evidence of three other aggravating factors. Specifically, Petitioner's conspiracy not only exceeded one year but approached seven years in duration, constituting a clear aggravating factor under section 1001.102(b)(2). Moreover, Petitioner was not only sentenced to incarceration, but the term of 86 months (more than seven years) was, as the ALJ opined, "significant jail time," which "underscores the seriousness of his crime." ALJ Decision at 5, citing 42 C.F.R. § 1001.102(b)(5). Finally, Petitioner was subject to two additional adverse actions based on the same facts that underlie this exclusion, an aggravating factor under section 1001.102(b)(9). Thus, it is clear that, on multiple bases, Petitioner's conduct was extreme based on the specific factors that the regulations require to be considered. And Petitioner has pointed to no mitigating factor that might offset their severity.

The period of exclusion, while lengthy, is thus tied to the circumstances of the individual case and is not prohibited by the exclusion authorities. Petitioner has not demonstrated that the 48-year exclusion was not within a reasonable range.

4. Petitioner did not lack notice of the potential for a lengthy exclusion.

Petitioner also argues that exclusion for 48 years is "tantamount to a lifetime exclusion," and that he had no notice that he could be excluded for so long a period because the regulations provide for a 10-year mandatory exclusion for a second offense, and a permanent ban only after the third offense.[6] *Id.* Hence, he reasons, he could not have expected an exclusion of more than 10 years for a first offense. *Id.*

We find that Petitioner had sufficient notice of his exposure to a lengthy period of exclusion from federal health care programs because his plea agreement, the I.G.'s notice, and the regulations themselves informed him of such. In addition, Petitioner's contention that DAB decisions are inconsistent and of dubious precedential value also lacks merit.

In Section 13 of the plea agreement, Petitioner agreed to the following:

> The defendant understands and acknowledges that as a result of his guilty plea, the defendant will be excluded from Medicare, Medicaid, and all Federal health care programs.

I.G. Ex. 5, at 8. Petitioner was represented by legal counsel at the time he entered into the plea agreement. *Id.* at 9. In addition, Petitioner was represented by counsel before the ALJ. Petitioner's Request for ALJ Hearing. The regulations at 42 C.F.R. § 1001.102 are available to the public and provide constructive, if not actual, notice to providers.

It is true that the regulations do not spell out precise additions to the minimum mandatory exclusion periods for all possible factual scenarios under each aggravating factor (or offsetting mitigating factor). The Board has long recognized that, in formulating and applying these factors, the I.G. was "faced with the difficult task of developing standards

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[6] The regulations in 42 C.F.R. § 1001.102 state, in pertinent part:

(d) In the case of an exclusion under this subpart, based on a conviction occurring on or after August 5, 1997, an exclusion will be—

(1) For not less than 10 years if the individual has been convicted on one other occasion of one or more offenses for which an exclusion may be effected under section 1128(a) of the Act (The aggravating and mitigating factors in paragraphs (b) and (c) of this section can be used to impose a period of time in excess of the 10-year mandatory exclusion); or

(2) Permanent if the individual has been convicted on two or more other occasions of one or more offenses for which an exclusion may be effected under section 1128(a) of the Act.

for predicting future human behavior" in order to assess when an untrustworthy provider might again be trusted to participate in Medicare. *Joanne Fletcher Cash*, DAB No. 1725, at 15-16 (2000). The Board pointed out that the I.G. selected factors that are "predominantly quantifiable" making their application "reasonably comparable," but that Congress chose not to require any formula but to repose discretion to extend exclusions beyond the minimum mandatory periods (though not below them). *Id.*

Furthermore, the fact that repeat offenders are subject to **minimum** exclusions of 10 years up to lifetime in no way implies that an initial offender with severe aggravating factors could not expect to face an actual exclusion of more than 10 years.

We understand that 48 years is a long time and a return to practice may be unlikely for this Petitioner. As the ALJ notes, however, this Board has clarified that a period of exclusion for a finite term is not equivalent to a lifetime ban. ALJ Decision at 6, citing *Jeremy Robinson*, DAB No. 1905 (2004). Petitioner's age is not relevant to the question of the reasonableness of the period of exclusion because it is not a mitigating factor.

We conclude that Petitioner was provided ample notice prior to his exclusion that conduct that so exceeded the minimum triggers for so many aggravating factors could well result, as it has, in a very lengthy exclusion.

5. The ALJ Decision does not reflect unfair bias or prejudice against Petitioner.

In his brief, Petitioner alleges that the ALJ Decision reflects the ALJ's "personal bias" against him, which Petitioner believes influenced the ALJ's decision to uphold the 48-year period of exclusion as reasonable. Specifically, Petitioner charges the ALJ with "name-calling" and seeking to "make an example" of Petitioner and "implicitly blaming him for systemic ills in the healthcare field." Petitioner's Br. at 5 (unnumbered).
In *Edward J. Petrus, Jr., M.D., and The Eye Center of Austin*, DAB No. 1264, at 23-26 (1991), *aff'd, Petrus v. Inspector General*, 966 F.2d 675 (5th Cir. 1992), the Board described the standard for disqualifying a judge on a charge of bias. There, the Board noted that the Supreme Court has held that the "alleged bias and prejudice, to be disqualifying, must stem from an extrajudicial source and result in an opinion on the merits on some other basis than what the judge learned from his participation in the case . . . ." *Id.* at 23 (citations omitted); *see also St. Anthony Hosp.*, DAB No. 1728, at 84 (2000), *aff'd*, 309 F.3d 680 (10th Cir. 2002); *Laurelwood Care Ctr.*, DAB No. 2229, at 22-23 (2009). The Board has also held that it is not evidence of bias that the ALJ's view of the record was not in accordance with a petitioner's views. *See Meadow Wood Nursing Home*, DAB No. 1841, at 10 (2002), *aff'd, Meadow Wood Nursing Home v. HHS*, 364 F.3d 786 (6th Cir. 2004) ("[W]eighing of testimony and evidence in the record is the essential task of an ALJ and can hardly be viewed as a demonstration of bias toward the party that does not prevail on the merits, however disappointed.").

We have reviewed the ALJ's decision and find no evidence of personal bias. The ALJ described Petitioner as "a cunning and successful fraudster." ALJ Decision at 7. There is no evidence that this description arises from personal animus. In view of Petitioner's conviction for involvement in a complex, lengthy and lucrative fraud scheme, the ALJ's choice of words may be less than flattering, but we cannot find it either inaccurate or unfair. In any event, they amount to *dicta,* since the ALJ separately spelled out the factual basis and legal reasoning underpinning her conclusions. We find no extrajudicial source of information resulting in a decision not based upon information the ALJ learned from the record before her. Accordingly, this contention by the Petitioner is baseless and provides no reason for the Board to disturb the ALJ's decision.

Conclusion

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

/s/
Leslie A. Sussan

/s/
Susan S. Yim

/s/
Christopher S. Randolph
Presiding Board Member