

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Eugene Goldman, M.D., a/k/a Yevgeniy Goldman, M.D.
Docket No. A-15-36
Decision No. 2635
May 12, 2015

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

Eugene Goldman, M.D., a/k/a Yevgeniy Goldman, M.D. (Petitioner), appeals the December 9, 2014 decision of an Administrative Law Judge (ALJ). *Eugene Goldman, M.D.*, DAB CR3504 (2014) (ALJ Decision). The ALJ sustained the determination by the Inspector General (I.G.) to exclude Petitioner from all federal healthcare programs under section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1), based on his conviction of one felony count of conspiracy to receive kickbacks for Medicare referrals and four felony counts of receiving kickbacks for Medicare referrals. The ALJ determined that the I.G. properly excluded Petitioner and that the fifteen-year exclusion imposed by the I.G. fell within a reasonable range.

The Board affirms the ALJ Decision for the reasons discussed herein.

Legal Background

Section 1128(a)(1) of the Act requires the Secretary of Health and Human Services to exclude an individual from participation in all federal health care programs if that individual has been convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.¹ *See also* 42 C.F.R. § 1001.101. Five years is the minimum mandatory period of an exclusion under section 1128(a)(1). Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2). That period may be extended based on the application of the aggravating factors in 42 C.F.R. § 1001.102(b). Two aggravating factors are at issue in this case: “[t]he acts that resulted in the conviction, or similar acts, were committed over a period of one year or more” and “[t]he

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.

sentence imposed by the court included incarceration.” *Id.* §§ 1001.102(b)(2), (b)(5). If an exclusion period is extended based on the application of one or more aggravating factors, any applicable mitigating factors may then be applied to reduce the length of the exclusion period to no less than the mandatory minimum five years. *Id.* § 1001.102(c).

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 the exclusion longer than the mandatory minimum period is unreasonable. *Id.* §§ 1001.2007(a), 1005.2(a). Any party dissatisfied with the ALJ’s decision may appeal the decision to the Board. *Id.* § 1005.21. The Board will not consider any issue not raised in the parties’ briefs or any issue in the briefs that could have been raised before the ALJ but was not. *Id.* § 1005.21(e).

Case Background²

Petitioner, a physician licensed in Pennsylvania, had a medical practice in Philadelphia, Pennsylvania, and served as the Medical Director for Home Care Hospice, Inc. (HCH), a for-profit hospice provider that participated in the Medicare and Medicaid programs. I.G. Ex. 3, at 1, 2. Petitioner was charged in a six-count criminal indictment and, following a jury trial, was convicted of five counts: one felony count of conspiracy to receive kickbacks for referring patients to HCH, under 18 U.S.C. § 371 and 42 U.S.C. § 1320a-7b(b), and four felony counts of receiving kickbacks for referring patients to HCH, under 42 U.S.C. § 1320a-7b(b)(1)(A). I.G. Exs. 2, 3. On October 23, 2013, the United States District Court for the Eastern District of Pennsylvania entered judgment against Petitioner, sentencing him to 51 months of incarceration and ordering him to pay a fine of \$300,000 and an assessment of \$500. I.G. Ex. 2, at 1-2, 5-6.

By letter dated March 31, 2014, the I.G. notified Petitioner that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of fifteen years, under section 1128(a)(1) of the Act, effective twenty days from the date of the I.G.’s letter. I.G. Ex. 1, at 1. The letter also explained that the I.G. was imposing on Petitioner a term of exclusion of fifteen years, ten years longer than the minimum five years required under section 1128(c)(3)(B) of the Act, based on the presence of two aggravating factors: (1) the acts that resulted in Petitioner’s conviction, or similar acts, were committed over the period of one year or more; and (2) the sentence imposed by the court included incarceration. *Id.* at 1-2; *see also* 42 C.F.R. §§ 1001.102(b)(2), (5). The letter noted that “[t]he acts occurred from about December 2000 to about October 2008” and that the court sentenced Petitioner to 51 months of incarceration. I.G. Ex. 1, at 2.

² The factual information in this section, unless otherwise indicated, 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.

In his appeal to the ALJ, Petitioner disputed only the length of the fifteen-year term of exclusion. Request for Hearing (RFH). Because neither he nor the I.G. identified any witnesses or claimed that this case required an in-person hearing, the ALJ decided the case based on the written record alone. ALJ Decision at 2; *see also* ALJ's June 26, 2014 Order and Schedule for Filing Briefs and Documentary Evidence at 2 (informing the parties that either party may request an in-person hearing, but must provide the written direct testimony of any proposed witness in writing and under oath or affirmation, and that the ALJ will rule on any request to offer in-person testimony and will schedule the hearing if the ALJ determines one is necessary to receive testimony).

Before the ALJ, Petitioner argued that because the court's judgment of conviction referred to only one date, October 2008, the ALJ could not consider the duration of his crimes as an aggravating factor. ALJ Decision at 3; Petitioner's Brief at 7 (not paginated, but twelve pages in length). The ALJ rejected the argument, finding that because "the regulation directs [the ALJ] to consider 'the acts that resulted in the conviction, *or similar acts*,'" the ALJ "may look beyond the judgment in assessing this factor." ALJ Decision at 3; 42 C.F.R. § 1001.102(b)(2). The ALJ also stated that Petitioner misread the court's judgment, which stated that the offenses ended in October 2008, and that the counts on which Petitioner was convicted as set out in the indictment described conduct beginning in December 2000 and ending in October 2008. ALJ Decision at 3. Moreover, the ALJ found, Petitioner was "part of a conspiracy that lasted over ten years, 'from December 2000 until approximately July 2011'" and "[h]is personal involvement lasted from December 2000 until October 2008, significantly longer than the one-year threshold for aggravation." *Id.*, *citing* I.G. Ex. 3, at 3, 5, 6.

With respect to the second aggravating factor, the ALJ noted that the court sentenced Petitioner "to a substantial period of incarceration – 51 months – which underscores the seriousness of his crimes" and "which reflects the sentencing court's assessment of Petitioner's trustworthiness (or lack thereof)." ALJ Decision at 3. The ALJ found no mitigating factors (42 C.F.R. § 1001.102(c)) that offset the two aggravating factors. *Id.* at 4. The ALJ rejected Petitioner's suggestion that he was not nearly as culpable as his co-conspirators, noting that "[t]his is not a mitigating factor and does not justify any decrease in his period of exclusion." *Id.* The ALJ concluded that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid, and all federal health care programs and sustained as reasonable the fifteen-year period of exclusion. *Id.*

Petitioner requests review of the ALJ Decision by the Board.

Standard of Review

The standard of review on a disputed issue of law is whether the ALJ Decision is erroneous. 42 C.F.R. § 1005.21(h). The 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.

Id.; see also *Guidelines – Appellate Review of Decisions of Administrative Law Judges in Cases to Which Procedures in 42 C.F.R. Part 1005 Apply (Guidelines)*. The *Guidelines* are available at <http://www.hhs.gov/dab/divisions/appellate/guidelines/procedures.html>. Substantial evidence is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

Analysis

Petitioner does not dispute that he was convicted of violations of the anti-kickback law, or that he was sentenced to a period of incarceration for 51 months, or that his conviction requires a mandatory exclusion period of at least five years. Request for Review (RR) at 2, 3. He disputes only the ALJ’s determination that the length of the fifteen-year period of exclusion was reasonable. He makes two arguments: (1) that the ALJ was precluded from considering the length (as opposed to the bare fact) of his incarceration as an aggravating factor; and (2) that overall “tripling” the length of the mandatory five-year exclusion period was unreasonable in comparison to the periods imposed in other cases he views as similar or even more egregious. *Id.* at 7-11. He therefore asks that the “ten year enhancement above the mandatory period” be reduced or eliminated altogether. *Id.* at 1. For the reasons and bases set forth below, the Board concurs with the ALJ that the fifteen-year exclusion period is within a reasonable range.

1. *The ALJ did not err in considering the length of incarceration in weighing the aggravating factors.*

Petitioner acknowledges that his sentence of incarceration is an aggravating factor, but asserts that the ALJ erred in giving “improper weight” to the length of incarceration – 51 months – in determining the reasonableness of the exclusion period. RR at 7-8. Moreover, the ALJ had no basis, Petitioner asserts, for concluding that the period of incarceration was based on his “perceived untrustworthiness” inasmuch as the period of incarceration was based upon the application of the United States Sentencing Guidelines and was not “commentary upon [Petitioner’s] character or untrustworthiness.” *Id.*, quoting *Anderson v. Thompson*, 311 F.Supp.2d 1121, 1130 (D. Kan. 2004) (“Plaintiff correctly notes that the length of his sentence is determined by application of the United States Sentencing Guidelines, and cannot be interpreted as the sentencing court’s view of

his character or untrustworthiness.”).³ Petitioner asserts that, because the ALJ erroneously considered the length of incarceration and then drew improper conclusions about Petitioner’s trustworthiness based on the length of incarceration, the ALJ’s “analysis of this aggravating factor must be rejected . . .” and, “[w]hen the length of [his] incarceration is removed from the analysis, a 15 year exclusion is patently unreasonable.” *Id.* at 8.

We do not read the ALJ’s comments on the length of incarceration as reflecting any misunderstanding about the role of the Sentencing Guidelines. The ALJ stated, “The criminal court sentenced Petitioner to a substantial period of incarceration – 51 months – which underscores the seriousness of his crimes.” ALJ Decision at 3. The ALJ also wrote, “Fifty-one months is a substantial period of incarceration, which reflects the sentencing court’s assessment of Petitioner’s trustworthiness (or lack thereof).” *Id.* We read these two statements together to mean that the ALJ recognized that the length of the sentence, which the Board agrees is a significant period, is, as Petitioner writes, “a reflection of the *charges*” (RR at 7 (*italics in original*)) based on the *criminal court’s determination as to the appropriate sentence*, including any period of incarceration, within the range and factors applicable under the guidelines. To that extent, as the ALJ recognized, too, the period of incarceration reflects *the sentencing judge’s* “assessment of Petitioner’s untrustworthiness.” *Id.* It was the sentencing judge who was authorized to apply, and did apply, the guidelines to determine the nature and duration of appropriate punishment for the crimes with which Petitioner was convicted. The sentencing judge determined that 51 months of incarceration would be appropriate. While the sentencing judge was not directly assessing untrustworthiness for purposes of exclusion from federal health care programs, the ALJ’s comment essentially reflects that the factors, including the nature of the crime, that contribute to the selection of a criminal sentence under the guidelines are reasonable proxy markers for untrustworthiness in the context of deciding how much weight to give the aggravating factor for incarceration.

While the aggravating factor in section 1001.102(b)(5) states only that “[t]he sentence imposed by the court included incarceration” without mentioning the length of the sentence expressly, nothing in that section precludes consideration of the period of incarceration imposed by the sentencing court in weighing how the imposition of incarceration relates to the reasonableness of a particular exclusion period. Petitioner

³ Petitioner incorrectly states that the quoted language from *Anderson* is found at 311 F.Supp.2d at 1127. RR at 7-8. It is found in 311 F.Supp.2d at 1130. The plaintiff in *Anderson*, similar to Petitioner here, was convicted of violating the Medicare anti-kickback law. The I.G. excluded Anderson from participation in Medicare, Medicaid, and all other federal healthcare programs under the mandatory exclusion provision of 42 U.S.C. § 1320a-7(a)(1), for fifteen years, based on three aggravating factors, two of which were the same two aggravating factors the I.G. considered in excluding Petitioner here. Also, like Petitioner, Anderson was sentenced to a 51-month prison term. The ALJ upheld the exclusion period as within a reasonable range. *Dan Anderson*, DAB CR855 (2002). On April 29, 2002, the Board declined review of the ALJ’s decision in DAB CR855, making the ALJ’s decision the final decision of the Secretary of Health and Human Services, which the court later upheld.

points to no applicable authority to the contrary. Any period of incarceration can support an increase of the period of exclusion. *Stacy Ann Battle, DDS*, DAB No. 1843, at 7 (2002) (even a four-month period in a halfway house, followed by four months of home confinement, supports lengthening of the exclusion period beyond the mandatory minimum to ten years). It does not follow that the length of the sentence is irrelevant to the reasonableness of the period of exclusion. On the contrary, the Board has repeatedly pointed to long periods of incarceration as relevant to determining the reasonableness of an exclusion period. *See, e.g., 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).

The Board notes, furthermore, that the record contains evidence of the circumstances of the crime for which Petitioner was convicted which indeed demonstrate Petitioner’s untrustworthiness. The charging document underlying Petitioner’s conviction for violation of the federal anti-kickback law states that Petitioner knowingly and willfully conspired with others in furtherance of receiving, and Petitioner did receive, remuneration, including kickbacks, in return for referring Medicare and Medicaid patients to HCH which then billed the program(s) for payment. I.G. Ex. 3 (indictment). To conceal the fact that kickbacks were being paid, Petitioner and his co-conspirators entered into a written contract to create a false appearance that the payments HCH was making to Petitioner were for services Petitioner rendered to HCH in his capacity as HCH’s Medical Director. The contract for HCH’s remuneration to Petitioner was structured in such a way as to conceal the scheme by which Petitioner made patient referrals in exchange for kickback payments to Petitioner. *Id.* at 6. The underlying acts that resulted in Petitioner’s conviction, like those in the *Shoemaker*⁴ and *Anderson* cases discussed below, were acts that violate the public’s trust in the program.

Shoemaker does not aid Petitioner’s cause, despite his claim that it undercuts the ALJ’s use of the sentence to assess trustworthiness. RR at 8, *citing Shoemaker* at 7-8 (quoting *Jeremy Robinson*, DAB No. 1905, at 10 (2004)). In *Shoemaker*, the Board wrote, “As the ALJ observed here, the Board has long recognized that a petitioner’s trustworthiness is ‘the touchstone for evaluating an exclusion.’” *Shoemaker* at 8, *quoting Raymond Lamont Shoemaker*, DAB CR2993, at 12 (2013). In fact, the importance of the length of

⁴ Mr. Shoemaker was convicted of, among other crimes, healthcare fraud (kickback, bribe, or rebate) in violation of 42 U.S.C. § 1320a-7b. *Shoemaker*, DAB No. 2560, at 2. We reversed the ALJ’s extension of Mr. Shoemaker’s exclusion from ten years to twelve years and reinstated the ten-year exclusion as originally imposed by the I.G. as a reasonable period of exclusion. *Id.* at 1, 9.

incarceration as one reflection of the seriousness of the underlying actions that demonstrate untrustworthiness is reiterated in *Shoemaker*. See *Shoemaker* at 8 (noting “the high degree of untrustworthiness reflected in the length of Petitioner’s term of incarceration”).

It is true, as Petitioner states, that the *Anderson* court stated, “Plaintiff correctly notes that the length of his sentence is determined by the application of the United States Sentencing Guidelines, and cannot be interpreted as the sentencing court’s view of his character and untrustworthiness.” *Anderson*, 311 F.Supp.2d at 1130. The context of the statement makes clear, however, that even for the *Anderson* court, the sum total of the aggravating factors – including incarceration, acts occurring over a period of a year or more and a loss of more than \$1,500 to the Medicare program – sufficiently supported the fifteen-year exclusion period. *Id.* at 1130-1131.

The *Anderson* court reasoned –

If any one aggravating factor justifies an exclusion of longer than five years, then the presence of three aggravating factors surely justifies a longer exclusion. Here, one aggravating factor is that Plaintiff’s sentence included a period of incarceration. Plaintiff correctly notes that the length of his sentence is determined by application of the United States Sentencing Guidelines, and cannot be interpreted as the sentencing court’s view of his character or untrustworthiness. But, he received a sentence including incarceration, which is an aggravating factor. The other two aggravating factors here further justify the fifteen-year exclusion imposed. . . .

Id. at 1130. In the next paragraph, the court went on to state –

As the ALJ aptly expressed, Plaintiff is an untrustworthy individual, as evidenced by his being a primary participant in a bribery scheme that lasted over ten years resulting in a loss to the Medicare program of \$65,716. Plaintiff’s illegal actions were recurrent and deliberate, not random and impulsive. . . . Fifteen years is a reasonable period of exclusion, based on the nature, length and effect of Plaintiff’s acts.

Id. at 1130-1131. Thus, the court determined *Anderson*’s untrustworthiness was shown by the nature, length, and consequences of his criminal activity. The *Anderson* court’s decision is not directly binding on us in this case, which arises in a different state. We agree that the length of incarceration for a federal crime is determined by the Sentencing Guidelines rather than entirely within the discretion of the sentencing judge. Nevertheless, the establishment of different benchmark ranges for different crimes and provision for various departures from those benchmarks, as well as the degree of discretion retained by the judge, means that length of incarceration is not necessarily

unconnected to the elements contributing to untrustworthiness. *See generally United States v. Booker*, 543 U.S. 220 (2005) (holding that federal sentencing guidelines may not constitutionally be made mandatory on judges).

We conclude that the ALJ's consideration of the long period of incarceration in determining how much weight to give the aggravating factor of a sentence including incarceration was not improper.

2. *Petitioner has not otherwise demonstrated that the 15-year exclusion was outside of a reasonable range.*

The Board has stated that, when determining whether an exclusion period “falls within a reasonable range, the ALJ must weigh the aggravating and mitigating factors” and “must evaluate the quality of the circumstances surrounding these factors.” *Jeremy Robinson, D.C.*, DAB No. 1905, at 11 (2004) (citing *Keith Michael Everman, D.C.*, DAB No. 1880, at 10 (2003)). No rigid formula applies to determine how the aggravating factors should be weighed. Rather, a case-specific determination of the weight to be accorded each factor, based on a qualitative assessment of the circumstances surrounding the factors in each case, is made. *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491, at 5 (2012).

It is undisputed that Petitioner's criminal acts, like those of Anderson, continued for a significant period of time, multiple times the duration required to trigger a possible increase of the mandatory minimum period. Petitioner was a “part of a conspiracy that lasted over ten years, ‘from December 2000 until approximately July 2011’” and “[h]is personal involvement lasted from December 2000 until October 2008, significantly longer than the one-year threshold for aggravation.” ALJ Decision at 3, *citing* I.G. Ex. 3, at 3, 5, 6. As the Board stated in *Vinod Chandrashekhhar Patwardhan, M.D.*, DAB No. 2454, at 7 (2012) (quoting *Donald A. Burstein, Ph.D.*, DAB No. 1865, at 8 (2003)), the purpose of this aggravating factor “is to distinguish between petitioners whose lapse in integrity is short-lived from those who evidence a lack of such integrity over a longer period” Petitioner's personal involvement in crimes that continued for nearly eight years amply demonstrates Petitioner's untrustworthiness. This factor alone would support an increase in the exclusion period well beyond the mandatory minimum. And, as we discussed in the prior section, this factor does not stand alone but in combination with a lengthy incarceration.

Furthermore, Petitioner has not identified a single mitigating factor listed in the regulation to counter these two aggravating factors (and does not deny that the regulation restricts the factors to those listed in the regulation). As the ALJ noted, and Petitioner himself acknowledges, the regulation allows for only three mitigating factors that may be considered as a basis for reducing the period of exclusion to no less than the mandatory minimum:

- (1) the excluded individual or entity was convicted of three or fewer misdemeanor offenses and the resulting financial loss to the program was less than \$1,500;
- (2) the record in the criminal proceedings shows that the excluded individual had a mental, physical, or emotional condition that reduced his or her culpability; and
- (3) the excluded individual's or entity's cooperation with federal or state officials resulted in others being convicted or excluded, or additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or a civil money penalty or assessment being imposed.

See 42 C.F.R. § 1001.102(c); RR at 5; ALJ Decision at 4. The ALJ found that the first mitigating factor did not apply to reduce the exclusion period given Petitioner's felony conviction, and Petitioner did not claim that the second and third mitigating factors applied to his case. ALJ Decision at 4. Petitioner does not dispute the ALJ's finding that none of the mitigating factors may be applied to reduce the exclusion period in this case.

Petitioner instead points to a number of factual circumstances that he says were shown to be involved in his case to support his claim that the length of exclusion is unreasonable. He first cites the absence of any evidence that his referrals were "medically inappropriate" inasmuch as the conduct underlying his conviction did not involve the treatment of patients, or of any evidence that he was "involved in any way with HCH's submission of false claims [to] or overbilling" of Medicare or any other federal healthcare program. RR at 3; *see also id.* at 9 ("Critically, there are no allegations that any of [Petitioner's] actions causing [*sic*] any harm to any patient."). He goes on to state that there have been no allegations or evidence that Petitioner caused a loss to the government or any other entity, or engaged in any kind of false claims activity or Medicare fraud. *Id.* at 9. He states that he has no prior history of criminal, civil, or administrative sanction or other adverse action, and no restitution was sought or ordered in the criminal proceedings that resulted in his exclusion. *Id.*

Petitioner also suggests that the absence of evidence of aggravating factors, other than the two on which I.G. relied to set the exclusion period, is or should be considered to decide the reasonableness of the exclusion period. Thus, the claims that there was no harm to beneficiaries and no loss to the program amount to denials that two aggravating factors

set out in 42 C.F.R. §§ 1001.102(b)(3) and (b)(7) apply to Petitioner's case.⁵ The I.G. cited only two aggravating factors for excluding Petitioner for fifteen years: the acts that resulted in Petitioner's conviction, or similar acts, were committed over a period of one year or more (section 1001.102(b)(2)); and the sentence imposed by the court included incarceration (section 1001.102(b)(5)). I.G. Ex. 1, at 2. The absence of evidence on certain aggravating factors does not negate the presence of aggravating factors that *are* shown by the evidence. *See Shoemaker* at 9 (where the I.G. did not rely on an aggravating factor in section 1001.102(b) in setting the period of exclusion, the absence of evidence on the aggravating factor is irrelevant in deciding the reasonableness of the exclusion period).

For the same reason, Petitioner's statements that there have been no allegations or evidence that Petitioner caused a loss to the government or any other entity, or engaged in any kind of false claims activity or Medicare fraud; that he has no prior history of criminal, civil, or administrative sanction or other adverse action; and that no restitution was sought or ordered in the criminal proceedings that resulted in his exclusion, which he states should be considered as "potential factors" (RR at 9), offer no grounds for relief. By these statements Petitioner appears to be alluding to the aggravating factors set out in 42 C.F.R. §§ 1001.102(b)(1), (6), (8), (9), asserting, again, that his case presents no evidence of those aggravating factors. While Petitioner uses the term "potential factors," in substance his argument is that the absence of evidence of such aggravating factors should be considered to reduce the exclusion period. The argument is unavailing because, again, the absence of an aggravating factor is not in itself a mitigating factor.⁶

Petitioner further represents that he is "an exceptional physician with a commendable reputation in the community" (RR at 2) as evidenced by "ample testimony at sentencing and elsewhere" (*id.* at 9). Again, however, such representations cannot affect the outcome because none of the enumerated mitigating factors permit the consideration of Petitioner's qualifications, or skill or ability as a physician, or his standing in the medical community, or his reputation among the patients he served, to reduce the exclusion period.

⁵ These provisions enhance the exclusion period where "[t]he acts that resulted in the conviction, or similar acts, had a significant adverse physical, mental, or financial impact on one or more program beneficiaries or other individuals" (section 1001.102(b)(3)) or because "[t]he [excluded] individual or entity has at any time been overpaid a total of \$1,500 or more by Medicare, Medicaid or any other Federal health care programs as a result of *intentional* improper billings" (section 1001.102(b)(7) (*italics in original*)). We also note Petitioner's further claim that he was not specifically found to have been "involved in any way with HCH's submission of false claims or overbilling" (RR at 3) is specious as a matter of fact. While the I.G. did not rely on the aggravating factor in section 1001.102(b)(7) in setting the period of exclusion, it is undisputed that Petitioner was found guilty of conspiring to take and accepting kickbacks for Medicare referrals. These acts were related to the program that paid for the referral services that were the subject of the kickbacks.

⁶ We note that whether restitution was sought or ordered is not itself an aggravating or mitigating factor. 42 C.F.R. § 1001.102(b), (c).

Petitioner also cites several Board and ALJ decisions involving exclusions that Petitioner believes are exemplars of cases involving extraordinarily egregious misconduct. RR at 9-10. He asserts that his case is “miles apart from” and “stands in stark contrast to” the exemplar cases that he states involved “controlled substances, sexual abuse, abuse of disabled persons, theft of Medicare funds, or false claims.” *Id.* at 10. He writes that, in contrast to the acts committed by individuals in the exemplar cases, his “actions simply do not come close to the level of misconduct warranting a 15-year exclusion period.” *Id.* at 9.

The Board has made it clear that the assessment of aggravating factors (and mitigating factors, if any), is first and foremost case-specific. Every case involves a complex interaction of diverse circumstances and regulatory factors with varying weights. For this very reason case comparisons, while sometimes informative for the ALJ’s or the Board’s decision-making in a given case, are of limited value and ultimately are not dispositive on the question of reasonableness of an exclusion period in a given case. *See, e.g., Sheth*, DAB No. 2491, at 6. For any cited exemplar to be meaningfully informative to our decision-making on the reasonableness question, a petitioner should do more than offer a brief parenthetical summary and aver that the exemplar is in extreme contrast to the circumstances of his case. But Petitioner has done not much more than that here.

Moreover, because the reasonableness question ultimately turns on an analysis of the circumstances of each case, the relative strength of any argument based on case comparisons could be affected in part by any specific commonalities or differences between the case under review and cited exemplar case(s). Only one of the five cited cases concerns conspiracy to accept kickbacks (and it is an ALJ decision not appealed to the Board), and Petitioner does not address how specifically that case stands in stark contrast to his case other than to state that the individual in that case was excluded for ten years even though she caused Medicare to lose almost \$1 million. RR at 10. Based on Petitioner’s summaries, the remaining cases involve actions that are sufficiently dissimilar from the actions for which Petitioner was convicted for various reasons (e.g., one cited case involved a pediatric dentist who was convicted of sexually abusing his daughters, *see id.*) such that the case comparisons lend little support to Petitioner’s cause. The cited cases also appear to be dissimilar in other ways, e.g., in terms of the aggravating factor(s) relied upon to set the exclusion period. In the Board’s view, those cases are more revealing about the nature and extent of the conduct of those individuals than they are informative on an evaluation of whether the fifteen-year period of exclusion here should be reduced.

Finally, although Petitioner notes that the record below “consisted only of [Petitioner’s] Indictment, the Judgment of Conviction, and the [I.G.] Notice of Exclusion” (RR at 2), Petitioner did not specifically request an in-person hearing before the ALJ and does not

now seek a remand to provide testimony.⁷ It was Petitioner’s decision to offer neither exhibits nor testimony before the ALJ and not to object to the three exhibits submitted by the I.G. Petitioner does not claim to have any additional evidence material to the issue of reasonableness of the exclusion period not previously presented to the ALJ, much less offer reasonable grounds for the failure to present the evidence earlier. 42 C.F.R. § 1005.21(f); *Guidelines*. We therefore ascribe no significance to the fact that the record is not larger and conclude that both the ALJ and the Board properly decide this matter based on the record as the parties developed it.

Having considered the record and the ALJ Decision, we conclude that the ALJ properly considered the two aggravating factors on which the I.G. relied to exclude Petitioner for fifteen years and weighed the surrounding circumstances appropriately. We conclude that the period imposed lies within a reasonable range and serves a remedial, rather than punitive, purpose, i.e., to “protect federally-funded health care programs from untrustworthy individuals.” *See Burstein*, DAB No. 1865, at 12, citing *Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003), *cert. denied*, 123 S.Ct. 2652 (2005).

Conclusion

Based upon the foregoing reasons and bases, the Board upholds the ALJ Decision, which determined that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid, and all federal health care programs for fifteen years.

_____/s/
Constance B. Tobias

_____/s/
Leslie A. Sussan

_____/s/
Susan S. Yim
Presiding Board Member

⁷ He indicated only that he would not be personally available for a hearing until after the end of his prison term should an in-person hearing be scheduled. *See* RFH (“At the present time I am still incarcerated with an appeal pending. If I need to attend personally for a hearing, I would like to postpone the hearing upon my release.”).