Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Robert Hadley Gross
Docket No. A-17-60
Decision No. 2807
July 28, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Robert Hadley Gross (Petitioner) appeals a decision by an Administrative Law Judge (ALJ) upholding on the written record his exclusion by the Inspector General (I.G.) from participation in all federal health care programs for a period of 28 years. *Robert Hadley Gross*, DAB CR4784 (2017) (ALJ Decision). The ALJ concluded that the I.G. properly excluded Petitioner pursuant to section 1128(a)(1) of the Social Security Act (Act), which, pursuant to section 1128(c)(3)(B), requires a minimum exclusion period of five years.[1] The ALJ further concluded that a 28-year exclusion is not unreasonable based on the four aggravating factors on which the I.G. relied and the absence of any mitigating factors.

On appeal, Petitioner does not dispute the ALJ's conclusion that the I.G. was required to exclude him for a minimum of five years under the statute the I.G. cited. Petitioner also does not dispute the ALJ's conclusion that the four aggravating factors found by the I.G. were present in his case and that there were no mitigating factors. Petitioner challenges only the ALJ's conclusion that a 28-year exclusion is not unreasonable. Petitioner asserts that the I.G. failed to explain what Petitioner characterizes as a "departure from the agency's own precedents" in imposing an exclusion of this length and that federal case law holds that this failure renders the exclusion arbitrary and capricious. Appeal of Administrative Law Judge Decision (P. Br.) at 2-3. Petitioner argues, in particular, that the I.G. excluded another individual for significantly less time under the same statutory authority used here and based on the same four aggravating factors – which Petitioner claims were more egregious in the other individual's case – and no mitigating factors. Petitioner also compares his exclusion to two cases which he says "present such abhorrent conduct that a 7 and 8 year period of exclusion is unjustifiable by either precedent or fundamental principles of justice and equity." P. Br. at 8.

[1] The current version of the Act can be found at https://www.ssa.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.

For the reasons set out below, we conclude that the 28-year period of exclusion is within a reasonable range based on the four aggravating factors at issue and the absence of mitigating factors. Contrary to what Petitioner argues, comparisons with other exclusion cases are not controlling and are of limited utility in an appeal of the imposition of a particular exclusion. Moreover, the cases cited by Petitioner do not demonstrate that the length of his exclusion is a departure from precedent. Accordingly, we affirm the ALJ's decision to uphold the exclusion imposed by the I.G. here.

Legal Background

Section 1128(a)(1) of the Act provides that the Secretary of Health and Human Services "shall exclude" from participation in federal health care programs an individual who has been convicted, under federal or state law, "of a criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program."

When an exclusion is imposed under section 1128(a), section 1128(c)(3)(B) requires that the "minimum period of exclusion . . . be not less than five years[.]"[2] That mandatory minimum period of exclusion may be extended based on the application of the aggravating factors in 42 C.F.R. § 1001.102(b), including the following aggravating factors found by the I.G. in this case:

> (1) 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. . . . ;[3]
>
> (2) The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more;
>
> * * *
>
> (5) The sentence imposed by the court included incarceration;

[2] Paragraph (G) of section 1128(c)(3) requires an exclusion of more than five years in circumstances not present here.

[3] Section 1001.102(b)(1) was amended, effective February 13, 2017, to increase the amount of loss from $5,000 to $50,000. ALJ Decision at 7 n.5, citing 82 Fed. Reg. 4100, 4103, 4112 (Jan. 12, 2017). The ALJ properly applied the earlier version in effect when Petitioner was excluded.

* * *

(9) Whether the individual . . . 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.

If an exclusion period is extended based on the application of one or more aggravating factors, the I.G. may then apply any mitigating factors specified in section 1001.102(c)(1)-(3) to reduce the length of the exclusion period to no less than the mandatory minimum five years. 42 C.F.R. § 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 an exclusion longer than the mandatory minimum period is unreasonable in light of any of the aggravating and mitigating factors specified in the regulations that apply to the case before the ALJ. *Id.* §§ 1001.2007(a), 1005.2(a). A party dissatisfied with the ALJ's decision may appeal it to the Board. *Id.* § 1005.21.

Case Background[4]

Petitioner was a physician licensed in Texas who was engaged in the practice of psychiatry. I.G. Ex. 4. In October 2014, a federal grand jury in the Northern District of Texas issued an indictment charging Petitioner with 52 counts of health care fraud against the Medicare and Texas Medicaid programs, in violation of 18 U.S.C. § 1347, between approximately January 2009 and June 20, 2014. ALJ Decision at 4, citing I.G. Ex. 2. In July 2015, Petitioner entered into a plea agreement in which he agreed to enter a guilty plea to one count of the indictment and agreed that the restitution owed to the United States was $1,832,869.21. *Id.*, citing I.G. Ex. 3, at 10. In December 2015, a United States District Judge sentenced Petitioner to a 71-month term of incarceration. *Id.*, citing I.G. Ex. 3, at 2. The judge imposed a fine of $100,000 and ordered Petitioner to pay the full amount of restitution. *Id.*, citing I.G. Ex. 3, at 3, 5.

In January 2016, the Texas Medical Board ordered Petitioner's Texas medical license suspended indefinitely based on his December 2015 conviction of a felony in United States District Court. *Id.* at 7, citing I.G. Ex. 4.

[4] 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 April 29, 2016, the I.G. notified Petitioner that, pursuant to section 1128(a)(1) of the Act, he was being excluded from Medicare, Medicaid, and all federal health care programs for a minimum period of 28 years. *Id*. at 1-2, citing I.G. Ex. 1. The I.G. stated that Petitioner's period of exclusion was greater than the five-year minimum "because our records contain evidence of the following circumstances":

> 1. The acts resulting in the conviction, or similar acts, that caused, or were intended to cause, a financial loss to a Government program or one or more entities of $5,000 or more. . . . The court ordered you to pay restitution of approximately $1,832.800.
> 2. The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more. The acts occurred from about January 2009 to about June 2014.
> 3. The sentence imposed by the court included incarceration. The court sentenced you to 71 months of incarceration.
> 4. The individual or entity was convicted of other offenses besides those which formed the basis for exclusion, or has been the subject of any other adverse action by any Federal, State, or local government agency or board, if the adverse action is based on the same set of circumstances that serves as the basis for imposition of the exclusion. The Texas Medical Board suspended your medical license.

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

Petitioner timely requested a hearing before an ALJ. The ALJ admitted all of the parties' exhibits into the record, and the parties agreed that an in-person hearing was not necessary. ALJ Decision at 2-3. The ALJ made two numbered findings of fact and conclusions of law:

> 1. Petitioner was convicted of an offense related to the delivery of a health care item or service under both the Medicare and the Texas Medicaid programs, which is an offense pursuant to section 1128(a)(1) of the Act that subjects him to a mandatory exclusion from all federal health care programs for a minimum of five years.
>
> * * *
>
> 2. A 28-year minimum exclusion is not unreasonable based on the presence of four aggravating factors and no mitigating factors.

Id. at 3, 6. The ALJ explained the basis for her second finding of fact and conclusion of law as follows:

> The 28-year period of Petitioner's exclusion is not unreasonable based on the four aggravating factors present in this case. The amount of loss caused by Petitioner's criminal conduct is very substantial, and is more than 360 times higher than the current threshold $5,000 amount of loss necessary to trigger consideration of this aggravating factor. In addition, Petitioner's criminal activity lasted for more than four years, he was sentenced to a period of 71 months of incarceration, and his medical license was indefinitely suspended based on the same facts underlying his conviction. While Petitioner discusses other cases involving individuals excluded by the IG, he does not cite any individuals who have been excluded under circumstances similar to his own. Petitioner committed a very serious crime, and he was punished with a lengthy sentence of incarceration and ordered to pay restitution amounting to nearly $2 million to repay the government programs from which he stole. Petitioner engaged in his scheme for more than four years, and he was later indefinitely suspended from practicing medicine by his state's medical board. Unlike the cases offered by Petitioner in his brief, there are *no* mitigating factors to weigh against the *four* significant aggravating factors.

Id. at 8-9 (emphasis in original); *see also id*. at 6 ("While Petitioner disputes the application of aggravating factors and the imposition of a 28-year exclusion, he does so by broadly discussing various exclusion cases but does not specifically argue that the IG improperly applied each of the aggravating factors to his case.").

Standard of Review

Our standard of review of an exclusion imposed by the I.G. is established by regulation. We review a disputed issue of fact as to "whether the initial decision is supported by substantial evidence on the whole record." 42 C.F.R. § 1005.21(h). We review a disputed issue of law as to "whether the initial decision is erroneous." *Id.*

Analysis

On appeal, Petitioner reprises his argument below that the I.G.'s decision to exclude him for 28 years "was arbitrary and capricious because it failed to explain its departure from the Agency's own precedents." P. Br. at 2. As Petitioner acknowledges, however, this is not an appropriate issue for the Board. "Instead," Petitioner states, "the DAB's role is limited to considering whether the period of exclusion imposed by the IG was within a reasonable range, based on demonstrated criteria." P. Br. at 2, citing *Paul D. Goldenheim, M.D., et al.*, DAB No. 2268, at 21 (2009), *rev'd and remanded, Friedman, et al. v. Sebelius*, 686 F.3d 813 (D.C. Cir. 2012) (upholding the legal basis for the

exclusion but remanding for further consideration of the length of exclusion). Moreover, Petitioner acknowledges throughout his appeal brief that the "demonstrated criteria" are the aggravating factors in section § 1001.102(b) and (where applicable) the mitigating factors in section 1001.103(c). *See generally* P. Br. at 2-9. As the ALJ found, and Petitioner does not dispute, there are four aggravating factors here and no mitigating factors. P. Br. at 1. Furthermore, Petitioner raises no specific dispute about the ALJ's evaluation of the aggravating factors in his case.

The foregoing notwithstanding, Petitioner argues that *Friedman* requires reversal of the ALJ Decision because the 28-year exclusion, Petitioner claims, departed from the I.G.'s own precedent without a reasoned explanation. *Id*. at 2-3. For this proposition, Petitioner mistakenly relies on and overstates the decision to remand in *Friedman*. That case involved a permissive exclusion based on a conviction for drug misbranding under the "responsible corporate officer doctrine," not a mandatory exclusion based on a fraud conviction as in Petitioner's case. 686 F.3d at 818-19. The *Friedman* court upheld the exclusion but remanded for further consideration and explanation of the length of the exclusion because the discussion of the length of the exclusion in the Board decision being reviewed cited only mandatory exclusion cases. *Id.* at 827-28. The court noted that mandatory exclusions carry a longer mandatory minimum exclusion period than permissive exclusions (five years versus three years) and that the cases cited by the Secretary involved factors – felony convictions and Medicare fraud resulting in incarceration – not present in *Friedman*. *Id*. The court concluded, "Simply pointing to prior cases with the same bottom line but arising under a different law and involving materially different facts does not provide a reasoned explanation for the agency's apparent departure from precedent." *Id*. at 828. The court made it clear that, in remanding, it was not suggesting that the 12-year exclusion period imposed on the appellant in that case was not justifiable. *Id*. Notably, the court also did not overturn the Board's holding that "[c]omparisons with other cases are not controlling and of limited utility given that aggravating and mitigating factors 'must be evaluated based on the circumstances of a particular case' . . . which can vary widely." *Goldenheim*, DAB No. 2268, at 29 (citing 57 Fed. Reg. 3298, 3314 (Jan. 29, 1992)). The Board continues to apply that holding. *See, e.g.*, *Baldwin Ihenacho*, DAB No. 2667, at 9 (2015).

Petitioner also mistakenly relies on *Friedman* because Petitioner identifies no departure from precedent in his case. Petitioner does not dispute the ALJ's finding that the cases Petitioner cited before her (*see* Nov. 14, 2016 Informal Brief of Petitioner) did not involve circumstances similar to his case. ALJ Decision at 8-9. Petitioner does not even mention these cases on appeal. Instead, Petitioner discusses three different exclusion cases as alleged "precedent" from which the I.G. departed in setting the length of his exclusion.

We begin by noting that all of the new decisions Petitioner cites for comparison with the length of his exclusion are ALJ decisions, not Board decisions: *Seth Yoser, M.D.*, DAB CR2400 (2011); *Charles S. Krin, D.O.*, DAB CR2485 (2012); and *Norman C. Barber, D.D.S.*, DAB CR123 (1991). ALJ decisions are not precedential and do not bind other ALJs or the Board. *Melissa Michelle Phalora*, DAB No. 2772, at 14 (2017); *Zahid Imran, M.D.*, DAB No. 2680, at 12 (2016). Thus, the new ALJ decisions Petitioner cites do not qualify as "precedent" for purposes of his argument that his 28-year exclusion is a departure from precedent. We also note that the regulations prohibit the Board from considering on appeal issues not raised in a party's brief before the ALJ. 42 C.F.R. § 1005.21(e). Thus, to the extent the new cases cited by Petitioner involve "new issues," Petitioner has not properly raised them in this proceeding.

In any event, the new cases Petitioner cites, like the ones he cited in the ALJ proceeding, bear no similarity to Petitioner's case. Petitioner asserts that the material facts and aggravating factors in *Seth Yoser, M.D.*, who was excluded for 15 years,[5] are "similar in nature" (P. Br. at 5), but they are not. With respect to the aggravating factor at section 1001.102(b)(1), Petitioner acknowledges that the financial loss to the government or other entities addressed by that factor can be measured by the amount of restitution the convicting court ordered the defendant to pay. *See* P. Br. at 7 (discussing the financial loss factor and comparing the amount he paid in restitution to the amount paid by Dr. Yoser). Petitioner also acknowledges that the Board and courts have considered financial loss "'an exceptional aggravating factor.'" *Id*., *quoting Jeremy Robinson*, DAB No. 1905, at 11 (2004), and citing *Donald A. Burstein, Ph.D.*, DAB No. 1865, at 12 (2003) and *Friedman*, 686 F.3d 813.

As Petitioner does not dispute, the court that convicted him of Medicare and Medicaid fraud ordered him to pay restitution of $1,832,869.21 (as well as a fine of $100,000). ALJ Decision at 4-5, citing I.G. Ex. 3, at 3, 5. Petitioner claims Dr. Yoser paid restitution of $1.6 million (P. Br. at 7), which Petitioner characterizes as an "inconsequential and insignificant" difference from the larger amount he paid. However, as the I.G. pointed out, Petitioner misstates the amount of restitution paid by Dr. Yoser. S*ee* The Inspector General's Brief In Opposition To Appellant's Appeal at 7. Although the court that convicted Dr. Yoser originally ordered him to pay approximately $1.6 million, the court vacated that order and instead ordered him to pay $400,000 in restitution. This is a very substantial difference from the amount of restitution paid by Petitioner. As the ALJ found, and Petitioner does not dispute, the program loss which Petitioner admits he caused was more than 360 times the minimum program loss needed to trigger the factor

[5] *See Seth Yoser, M.D.* at 1.

in 42 C.F.R. § 1001.102(b)(1). ALJ Decision at 6-7. The financial loss caused by Dr. Yoser, by comparison, was 80 times the minimum. Both financial losses are substantial, but the loss caused by Petitioner's criminal conduct was clearly far greater than that caused by Dr. Yoser's.

The same distinctions hold with respect to the aggravating factors addressing incarceration, 42 C.F.R. § 1001.102(b)(5), and the duration of criminal conduct, *id.* § 1001.102(b)(2). Petitioner's period of incarceration exceeded Dr. Yoser's by over two years (71 months compared to 42 months), and Petitioner's criminal conduct lasted approximately five years and five months while Dr. Yoser's lasted approximately four years.

In addition to not being precedent since they were never appealed to and upheld by the Board, the *Krin* and *Barber* cases are also inapposite. Both cases involved exclusions under different sections of the exclusion statutes than those at issue here. The I.G. excluded Krin under the permissive exclusion authority in section 1128(b)(4) of the Act (exclusion based on revocation or suspension of health care license) and Barber under the mandatory exclusion authority in section 1128(a)(2) of the Act (exclusion based on crime relating to abuse of patients in connection with delivery of a health care item or service). *See Charles S. Krin, D.O.* at 4; *Norman C. Barber, D.D.S.* at 17. The reasonableness of the length of the exclusion was not at issue in *Krin* since the statute required exclusion for at least the period of the license revocation or suspension. DAB CR2485, at 6. In *Barber*, factors different from those at issue here were considered in determining the reasonableness of the eight-year exclusion.[6] We also reject Petitioner's attempt to minimize the seriousness of the threat he poses to the Medicare and Medicaid programs and their beneficiaries (threats the exclusion regulations are designed to deter) by claiming that his actions, unlike the patient assaults underlying the exclusions in *Krin* and *Barber*, did not harm his patients. *See* P. Br. at 8 ("Dr. Gross' violation was false billing, no harm was done to his patients, everyone received competent medical care, and all the money was recovered."). Petitioner engaged in fraudulent billing that cost these government health care programs more than $1.8 million, and he engaged in this fraud for more than five years. Fraud not only threatens the fiscal integrity of the Medicare and Medicaid programs; it harms beneficiaries of the Medicare and Medicaid programs by wasting resources that could otherwise be used to provide them with needed services. The mere fact that the $1.8 million was ultimately "recovered" pursuant to the restitution order, as Petitioner asserts (P. Br. at 8), does not lessen in any respect the serious threat posed by Petitioner's fraud. *See, e.g., Hussein Awada, M.D.*, DAB No. 2788, at 8 (2017) (holding that § 1001.102(b)(1) requires consideration of whole financial loss "regardless of whether full or partial restitution has been made[,]" and repayment is not a mitigating factor).

[6] The decision indicates that proposed regulations specifically applicable to cases under section1128(a)(2) had not been adopted at the time of that decision. DAB CR123, at 21 and n.8.

Conclusion

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

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Sheila Ann Hegy
Presiding Board Member