

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Dike H. Ajiri
Docket No. A-17-99
Decision No. 2821
September 26, 2017

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

Dike H. Ajiri (Petitioner) appeals a decision by an Administrative Law Judge (ALJ) upholding on the written record Petitioner’s exclusion by the Inspector General (I.G.) from participation in all federal health care programs for a period of 13 years. *Dike H. Ajiri*, DAB CR4854 (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 13-year exclusion is not unreasonable based on the three aggravating factors on which the I.G. relied and the absence of any mitigating factors.

On appeal, Petitioner requests that we remand the case to the ALJ for consideration of new evidence.

For the reasons set out below, we decline to remand the case, and affirm the ALJ’s decision.

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.”

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.

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[.]

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) to reduce the length of the exclusion period to no less than the mandatory minimum five years, including the following mitigating factor claimed by Petitioner in this appeal:

- (3) The individual’s or entity's cooperation with Federal or State officials resulted in—
 - (i) Others being convicted or excluded from Medicare, Medicaid and all other Federal health care programs,
 - (ii) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or
 - (iii) The imposition against anyone of a civil money penalty or assessment under part 1003 of this chapter.

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. 82 Fed. Reg. 4100, 4103, 4112 (Jan. 12, 2017). The ALJ properly applied the earlier version in effect when Petitioner was excluded.

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.

The Board may remand the matter back to the ALJ for consideration of additional evidence if a party demonstrates that the additional evidence is relevant and material and that there were reasonable grounds for the failure to adduce such evidence at the ALJ hearing. 42 C.F.R. § 1005.21(f).

Case Background⁴

Petitioner was the chief executive officer of Mobile Doctors, a company that arranged physician home visits to patients in several states. I.G. Ex. 4, at 2. On December 12, 2013, a federal grand jury in the Northern District of Illinois issued an indictment charging Petitioner with 11 counts of health care fraud, in violation of 18 U.S.C. § 1347, between approximately 2007 and August 2013. I.G. Ex. 3. In October 2015, Petitioner entered into a plea agreement in which he agreed to enter a guilty plea to one count of the indictment. I.G. Ex. 4. In the plea agreement, Petitioner agreed to a forfeiture of \$300,000, and that the restitution owed to Medicare and the Railroad Retirement Board was \$1,854,000. *Id.* at 10-11. On May 18, 2016, a United States District Judge sentenced Petitioner to a 15-month term of incarceration. I.G. Ex. 5, at 2. The judge ordered Petitioner to pay the full amount of restitution, in addition to a \$100 assessment and the forfeiture of \$300,000. *Id.* at 6-10.

By letter dated September 30, 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 13 years. I.G. Ex. 1. The I.G. stated that Petitioner's period of exclusion was greater than the five-year minimum because their records contain "evidence of the following aggravating circumstances":

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.

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 to one or more entities of \$5,000 or more. . . . The court ordered you to pay a forfeiture amount of \$300,000 and a restitution of approximately \$1,854,000.
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 2007 to about August 2013.
3. The sentence imposed by the court included incarceration. The court sentenced you to serve 15 months of incarceration.

I.G. Ex. 1, at 1-3.

Petitioner timely requested a hearing before an ALJ. Notably, in his Request for Hearing and subsequent briefs, Petitioner did not argue that cooperation with Federal officials should be considered as a mitigating factor. On May 19, 2017, the ALJ issued a decision based on the written record. The ALJ concluded that the 13-year exclusion is appropriate, writing in relevant part:

In this case, I concluded after de novo review that a basis for exclusion exists and that the evidence and admissions of Petitioner establish the three aggravating factors that the I.G. relied on to impose the 13-year exclusion. Petitioner has not established that the I.G. failed to consider any mitigating factor established by the regulations or that the I.G. considered an aggravating factor established by the regulation that did not exist in this case. No basis exists for me to reassess the period of exclusion in this case. Accordingly, I conclude that the 13-year exclusion falls within a reasonable range and is not unreasonable considering the existence of three aggravating factors and the absence of any mitigating factors.

ALJ Decision at 7.

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

In his appeal brief, Petitioner's sole argument is that the Board should remand the case back to the ALJ for consideration of new evidence. Specifically, Petitioner argues that his cooperation with Federal officials should be considered a mitigating factor when determining the period of exclusion. P. App. Br. at 1-2. Petitioner states that in February 2017, he was contacted by "an AUSA in southeast Michigan in the 6th circuit" and agreed to testify at the April 2017 trial of a physician. *Id.* at 2. Petitioner states that his "testimony was not needed but a conviction was reached..." *Id.* Petitioner did not submit new exhibits with his appeal brief to support his argument.

The Board may remand a case for consideration of new evidence if the petitioning party shows: (1) that the additional evidence is "relevant and material;" and (2) that it had "reasonable grounds" for failing to submit that evidence at the ALJ hearing stage. 42 C.F.R. § 1005.21(f). Petitioner has not made either showing, despite having been advised of the need to do so.⁵

First, Petitioner has failed to show that material evidence exists to support his claims. He did not provide exhibits to support the assertions in his appeal brief, nor did he identify what evidence he intends to submit to the ALJ for consideration on remand. Second, even if Petitioner had proffered material evidence for consideration regarding his cooperation with Federal officials, he did not show how any such evidence would be relevant to this proceeding. To constitute a mitigating factor, the regulations provide that a conviction must have been the result of Petitioner's cooperation. *See* 42 C.F.R. § 1001.102(c). By his own admission, however, Petitioner's "testimony was not needed" for the physician's conviction. P. App. Br. at 2. On its face, Petitioner's claimed cooperation with Federal officials would not rise to the level of a mitigating factor as established by section 1001.102(c). We therefore decline Petitioner's request to remand this case to the ALJ.

⁵ Petitioner was advised of the requirements for the submission of new evidence in the Board's August 9, 2017, acknowledgment letter. The letter instructed Petitioner that if he submitted new evidence, he should state why the evidence is relevant and material and explain why it was not presented to the ALJ. That letter also referred Petitioner to a pertinent passage in the Board's appellate review guidelines (a copy of which was enclosed with the letter), which advises a party that the Board "may remand the case to the ALJ for consideration of" evidence not previously submitted to the ALJ if that party "demonstrates to the satisfaction of the Board that [the newly submitted] evidence is relevant and material and that there were reasonable grounds for the failure to present the evidence to the ALJ." *See Guidelines – Appellate Review of Decisions of Administrative Law Judges in Cases to Which Procedures in 42 C.F.R. Part 1005 Apply*, "Completion of the Review Process," ¶ (b), available at <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/procedures/index.html>.

Moreover, the cooperation issue Petitioner raises in his appeal constitutes a new issue that we are barred from considering. The regulation at 42 C.F.R. § 1005.21(e) provides that the Board “will not consider any issue not raised in the parties’ briefs, nor any issue in the briefs that could have been raised before the ALJ but was not.” Petitioner argues that he did not raise the issue of cooperation to the ALJ because final briefs were due before the April 2017 trial date in the physician’s case. P. App. Br. at 2. We find Petitioner’s argument unpersuasive. Petitioner agreed to provide his testimony in February 2017. *Id.* Petitioner therefore could have raised the issue of his cooperation in his March 1, 2017, Response Brief, or in his March 18, 2017, Amended Response Brief. Furthermore, Petitioner could have raised the issue at any time prior to the issuance of the ALJ Decision on May 19, 2017, a month after the trial date. The failure of Petitioner to introduce this issue for the ALJ’s consideration precludes him from now arguing the issue before the Board.

Conclusion

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

_____/s/
Constance B. Tobias

_____/s/
Sheila Ann Hegy

_____/s/
Leslie A. Sussan
Presiding Board Member