Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Christopher Switlyk
Docket No. A-14-93
Decision No. 2600
November 5, 2014

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Christopher Switlyk (Petitioner) appeals the June 2, 2014 decision by an Administrative Law Judge (ALJ) upholding the determination of the Inspector General (I.G.) to exclude Petitioner from all federal health care programs for a period of 20 years. *Christopher Switlyk*, DAB CR3250 (2014) (ALJ Decision). The ALJ concluded that Petitioner's exclusion is required by section 1128(a)(4) of the Social Security Act (Act) and that a 20-year exclusion is reasonable. For the reasons discussed below, we affirm the ALJ Decision.

Legal Background

Section 1128(a)(4) of the Act requires the Secretary of Health and Human Services to exclude from participation in all federal health care programs any individual convicted of a felony criminal offense under federal or state law that occurred after August 21, 1996 and that relates "to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance."[1]

Section 1128(c)(3)(B) of the Act provides for a minimum exclusion period of five years, but the I.G. may lengthen the exclusion period if specific aggravating factors are present. 42 C.F.R. § 1001.102(b). One aggravating factor is at issue here: the "sentence imposed by the court included incarceration." *Id.* § 1001.102(b)(5). If an aggravating factor is established, certain enumerated mitigating factors may be considered to reduce the exclusion to a period of not less than five years. *Id.* § 1001.102(c). The mitigating factors relevant here are:

[1] The current version of the Social Security 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.

- The record in the criminal proceedings . . . demonstrates that the court determined that the individual had a mental, emotional or physical condition before or during the commission of the offense that reduced the individual's culpability; or

- The individual'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 [42 C.F.R. Part 1003].

Id. § 1001.102(c)(2), (3).

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 is unreasonable. 42 C.F.R. §§ 1001.2007(a), 1005.2(a). Any party dissatisfied with the ALJ's decision may appeal to the Board. *Id.* § 1005.21.

Factual Background[2]

Petitioner is a pharmacist. In 2010 Petitioner and several other individuals were charged in a nine-count federal indictment with engaging in a large-scale conspiracy to sell controlled substances, mainly Oxycodone, unlawfully through a pharmacy that Petitioner owned and operated in Tampa, Florida. I.G. Ex. 2. In 2012 Petitioner pled guilty to one count of conspiracy to traffic in controlled substances (Count One) and to two counts of engaging in monetary transactions using funds derived from the conspiracy (Counts Five and Six). I.G. Ex. 3. As part of his plea agreement, Petitioner admitted that, in collaboration with his coconspirators, he caused the "issuance of prescriptions for, and the dispensing of, controlled substances . . . based on prescriptions that had not been issued for a legitimate medical purpose and not in the usual course of professional practice." *Id.* at 22. He also admitted to "caus[ing] and allow[ing] many bottles of Oxycodone to be distributed and sold out of [his pharmacy] to individuals without any prescriptions whatsoever" and to "produc[ing] or caus[ing] to be produced forged prescriptions and false pharmacy profiles" in order to make the distributions appear legitimate. *Id.* at 23. The court sentenced Petitioner to 108 months (9 years) of imprisonment on each count, with the terms to run concurrently. I.G. Ex. 4, at 3.

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

The I.G. subsequently notified Petitioner that it was excluding him from participation in all federal health care programs for a period of 20 years pursuant to section 1128(a)(4) of the Act. I.G. Ex. 1, at 1. The notice letter explained that Petitioner's period of exclusion was longer than the five-year statutory minimum period because the court had sentenced Petitioner to 108 months' incarceration. *Id.*

Petitioner appealed the exclusion by filing a request for an ALJ hearing. The ALJ determined that an in-person hearing was unnecessary and issued a decision based on the written record. ALJ Decision at 2. The ALJ determined that the I.G. was required to exclude Petitioner because Petitioner's conviction for conspiring to traffic in controlled substances "falls precisely within the ambit of section 1128(a)(4)." *Id.* at 3. The ALJ further concluded that Petitioner's 20-year term of exclusion was "amply justified" in light of his prison sentence. *Id.* In reaching this conclusion, the ALJ rejected Petitioner's argument that the length of the exclusion should be reduced because, according to Petitioner, he cooperated extensively with prosecuting officials and suffers from psychological problems that reduced his culpability, so the mitigating factors at section 1001.102(c)(2) and (3) apply. *Id.* at 6.

Petitioner then appealed the ALJ Decision to the Board.

Standard of Review

The standard of review on a disputed issue of law is whether the decision is erroneous. The standard of review on a disputed issue of fact is whether the decision is supported by substantial evidence on the record as a whole. 42 C.F.R. § 1005.21(h).

Analysis

On appeal, Petitioner does not dispute that his conviction for conspiracy to traffic in controlled substances (Count One) provides a basis for his exclusion. Nor does he dispute that because his sentence for Count One included incarceration, the aggravating factor at section 1001.102(b)(5) applies. Nonetheless, he argues that the 20-year period of exclusion imposed by the I.G. is unreasonable. Petitioner contends that his period of incarceration should be given less weight because outside factors led him to receive a longer sentence than his offense justified. He also appears to renew his contention that the mitigating factors at section 1001.102(c)(2) and (3) apply and provide a basis for reducing his exclusion.

It is well-settled that in determining whether the I.G.'s proposed period of exclusion is unreasonable, an ALJ's – and the Board's – role is limited to considering whether the period of exclusion the I.G. imposed was "within a reasonable range, based on demonstrated criteria." 57 Fed. Reg. 3298, 3321 (Jan. 29, 1992); *see also, e.g., Craig Richard Wilder, M.D.*, DAB No. 2416, at 8 (2011); *Joann Fletcher Cash*, DAB No. 1725,

at 18 (2000). In determining whether a period of exclusion is within a reasonable range, an ALJ may not substitute his judgment for that of the I.G. or determine what period of exclusion would be "better." *Wilder* at 8. The preamble to 42 C.F.R. Part 1001 indicates that 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. 57 Fed. Reg. at 3321. The preamble also states that the aggravating and mitigating factors do not "have specific values; rather, these factors must be evaluated based on the circumstances of a particular case." *Id.* at 3314.

Here, we conclude, in light of the circumstances surrounding the applicable aggravating factor and the absence of any mitigating factors, that a 20-year term of exclusion is within a reasonable range.

1. Petitioner's 20-year exclusion is within a reasonable range based on his 108-month sentence of incarceration.

The I.G. extended Petitioner's period of exclusion from 5 to 20 years after determining that the aggravating factor in section 1001.102(b)(5) applies, based on the undisputed fact that Petitioner was sentenced to 108 months' incarceration for Count One. We agree with the ALJ that this is a "very lengthy prison sentence" which "evidences that Petitioner is a highly untrustworthy individual" and thus justifies the imposition of a 20-year exclusion. ALJ Decision at 4. The Board has recognized that it is "well-established that section 1128 exclusions are remedial in nature, rather than punitive, and are intended to protect federally funded health care programs from untrustworthy individuals." *Donald A. Burstein, Ph.D.*, DAB No. 1865, at 12 (2003), citing *Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003), cert. denied, 123 S.Ct. 2652 (2005); *Mannocchio v. Kusserow*, 961 F.2d 1539, 1543 (11th Cir. 1992). The Board has also recognized that incarceration reflects a court's evaluation of the seriousness of an offense. *Cash* at 17. The court's decision to sentence Petitioner to 108 months' incarceration demonstrates that his crime was very serious and that he is a highly untrustworthy individual from whom the federal health care programs and their beneficiaries must be protected for an extended period.

Petitioner asserts that ineffective assistance and illegal actions by the attorneys who represented him in his criminal case led to his 108-month sentence, and that, had it not been for the attorneys, his sentence would have been significantly shorter. However, the issue under section 1001.102(b)(5) is "the sentence imposed," so arguments about what sentence a court may have imposed if Petitioner had been better represented are irrelevant.

Petitioner also contends that his sentence is likely to be significantly reduced on appeal. As the ALJ recognized, at best, Petitioner has established only that "his sentence *may be* reduced and not that it *will be* reduced." ALJ Decision at 4 (emphasis in original). Petitioner's speculation about a potential reduction to his criminal sentence does not provide a basis for reducing his term of exclusion. Moreover, as the ALJ noted, in the event that Petitioner's criminal sentence is shortened, he may move to reopen this decision and revise the exclusion period in light of the change. *Id.* at 2; *see Mark B. Kabins, M.D.*, Ruling No. 2012-1 (Oct. 14, 2011); *Henry L. Gupton*, Ruling No. 2007-1 (Mar. 14, 2007).

2. Petitioner failed to establish that the mitigating factors at section 1001.102(c)(2) and (3) apply and justify reducing his exclusion.

In upholding the 20-year exclusion period, the ALJ correctly rejected Petitioner's argument that his exclusion should be reduced based on the mitigating factors found at section 1001.102(c)(2) and (3). Petitioner had the burden to prove the existence of any mitigating factors by a preponderance of the evidence. *See* 42 C.F.R. §§ 1001.2007(c); 1005.15(c), (d) (addressing the burdens of proof and persuasion); Form Informal Br. of Pet. at III.C. (instructing Petitioner to explain whether he believes any mitigating factors exist, and if so, why). Petitioner failed to meet this burden.

With regard to the mitigating factor at section 1001.102(c)(2), the ALJ reasonably determined that, even if Petitioner suffers from psychological problems, Petitioner failed to show that the court determined these problems reduced his culpability for his offense, as section 1001.102(c)(2) requires. ALJ Decision at 6; *see Patel v. Shalala*, 17 F. Supp. 2d 662, 667 (W.D. Ky. 1998) (noting that section 1001.102(c)(2) "clearly requires a court finding of lessened culpability"). Nothing in the court records that Petitioner submitted establishes that the court concluded Petitioner was less culpable for his offense because of psychological problems. Petitioner submitted excerpts of the transcript of his sentencing hearing that show his attorney argued that the court should impose a lesser sentence than that suggested by the federal sentencing guidelines based on Petitioner's "diminished capacity." P. Ex. 3C-A, at 2, 3-5, 12. However, neither the excerpts nor anything else in the record clearly shows that the court in fact imposed a lesser sentence because it determined that Petitioner suffered from psychological problems that reduced his culpability.[3] Indeed, in the motion to vacate his sentence that Petitioner filed with the court (and submitted as an exhibit to the ALJ), Petitioner argued that his attorney

[3] The excerpts indicate that when Petitioner's attorney presented the diminished capacity argument, the court recognized Petitioner had a "very difficult upbringing," which had a "very profound impact . . . on him down the road," as well as other "independent issues" unrelated to his upbringing, but also observed that Petitioner is "very bright . . . very good with numbers and . . . science too." P. Ex. 3C-A, at 12.

provided ineffective assistance by failing to have a psychiatrist whom Petitioner had seen while the criminal charges were pending testify at the sentencing hearing to support the diminished capacity argument. P. Ex. 3B-A/5D-1, at 34, 37-38, 41. The fact that Petitioner made such an assertion implies that the court did not grant the request for a lesser sentence, and thus that the court did not determine that psychological problems reduced Petitioner's culpability, as is required for section 1001.102(c)(2) to apply.

In support of his argument that section 1001.102(c)(2) applies, Petitioner also submitted to the ALJ documents showing that the court recommended he participate in a residential drug treatment program and excerpts of psychological evaluations and letters from psychiatrists who examined him. P. Ex. 3B-C/3C-A(11)/5D-4, at 1-2; P. Ex. 3C-A(1); P. Ex. 3C-A(7); P. Ex. 3C-A(8). Neither set of documents fulfills the requirements of section 1001.102(c)(2). The court's recommendation that Petitioner receive drug treatment does not establish that the court determined Petitioner was less culpable due to drug addiction. The documentation from the psychiatrists (who saw Petitioner after he was charged), while pertinent to establishing whether Petitioner suffered from psychological problems at the time he committed his offenses, is not evidence that the court determined Petitioner suffered from psychological problems that reduced his criminal culpability. Thus, the ALJ correctly concluded that Petitioner failed to establish that section 1001.102(c)(2) applies and provides a basis for reducing the exclusion.

With regard to the mitigating factor at section 1001.102(c)(3), we agree with the ALJ that, even if Petitioner cooperated with authorities, that is not sufficient to meet his burden to show that the factor applies. ALJ Decision at 6. Petitioner provided no evidence that his cooperation resulted in any of the outcomes identified in the subsection. As set out above, in order for an individual's cooperation with federal or state officials to constitute a mitigating factor under section 1001.102(c)(3), the cooperation must have resulted in: (1) others being convicted or excluded from the federal health care programs; (2) additional cases being investigated or reports being issued identifying program vulnerabilities or weaknesses; or (3) the imposition against anyone of a civil monetary penalty or assessment under 42 C.F.R. Part 1003. In support of his contention that section 1001.102(c)(3) applies, Petitioner submitted to the ALJ lists he created that purportedly detail pending cases in which he "will potentially testify," information he has regarding others' illegal activities, and his cooperative efforts to date. P. Ex. 3B-B/5D-3/3C-B. These lists do not establish that Petitioner's cooperation resulted in any of the outcomes listed in section 1001.102(c)(3). Accordingly, Petitioner failed to show that the mitigating factor applies.

In light of Petitioner's lengthy sentence of incarceration and his failure to establish that any of the mitigating factors in section 1001.102(c) apply, we conclude that a 20-year term of exclusion is within a reasonable range.

Conclusion

Based on the foregoing analysis, we affirm the ALJ Decision.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member