Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: May 27, 2009
Johnnelle Johnson Bing,	
Petitioner,	Civil Remedies CR1938 App. Div. Docket No. A-09-86
	Decision No. 2251
- v. -	
Inspector General.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Johnnelle Johnson Bing (Petitioner) appeals the April 3, 2009 decision by Administrative Law Judge (ALJ) Richard J. Smith granting the Inspector General's (I.G.) motion for summary disposition and upholding Petitioner's exclusion from federal health care programs for five years pursuant to section 1128(a)(1) of the Social Security Act (Act). Johnnelle Johnson Bing, DAB CR1938 (2009) (ALJ Decision).

Petitioner, who is pro se, filed a one-page appeal that raises limited objections to the ALJ Decision.[1] We conclude that the ALJ correctly determined that Petitioner was subject to a five-

[1] It appears that Petitioner did not serve a copy of her appeal on the I.G.

year exclusion under section 1128(a)(1) and that the relief Petitioner seeks is not within the ALJ's or our authority to grant. Accordingly, we affirm the ALJ Decision.

Legal Background

Section 1128(a)(1) of the Act (42 U.S.C. § 1320a-7(a)(1)) requires the Secretary of Health and Human Services to exclude from participation in Medicare, Medicaid, and all federal health care programs any individual who "has been convicted of a criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program." An exclusion imposed under section 1128(a) shall be for a minimum period of five years. Section 1128(c)(3)(B).[2]

Standard of Review

Our standard of review of an ALJ Decision upholding an exclusion imposed by the I.G. is set by regulation. We review to determine whether the decision is erroneous as to a disputed issue of law and whether the decision is supported by substantial evidence in the record as a whole as to any disputed issues of fact. 42 C.F.R. § 1005.21(h). In this case, the ALJ determined that there are no disputed issues of material fact and granted the I.G.'s motion for summary disposition, as is authorized by 42 C.F.R. § 1005.4(b)(12). Petitioner has not challenged the ALJ's determination that there are no disputed issues of material fact.

Analysis

Petitioner does not dispute on appeal the ALJ's findings that in June and July 2007, respectively, Petitioner entered, and the court accepted and entered judgment on, guilty pleas to two misdemeanor criminal offenses involving knowing and willful destruction, alteration, or falsification of health records and

[2] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.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, and the U.S.C.A. Popular Name Table for Acts of Congress.

theft by taking. ALJ Decision at 2, 4. These offenses involved Petitioner's acceptance of Medicaid payments for perinatal and pregnancy-related services that Petitioner had not provided. Id. at 5-6. With respect to her Alford plea, Petitioner argued before the ALJ that "[n]o guilty plea was made." P. Br. at 1. However, the ALJ correctly concluded that an Alford plea is a guilty plea. ALJ Decision at 7, citing North Carolina v. Alford, 400 U.S. 25, 37 (1980). Petitioner does not dispute that conclusion on appeal. Nor does she dispute the ALJ's determination, which is legally correct, that for the purposes of section 1128(a)(1) of the Act the court's acceptance of her Alford plea constitutes a conviction of a criminal offense. ALJ Decision at 4, 6; see Michael S. Rudman, M.D., DAB No. 2171, at 6-8 (2008) (an Alford plea is considered a conviction for the purposes of sections 1128(a)), aff'd, Rudman v. Leavitt, 578 F.Supp.2d 812, 815 (D.Md. 2008). Petitioner also does not dispute that her second guilty plea, which was not an Alford plea, constitutes a conviction for purposes of the exclusion statute. I.G. Exs. 3, 4, 7. She also does not dispute the ALJ's conclusion that the criminal offenses of which she was convicted were related to the delivery of a health care item or service under the Medicaid program. ALJ Decision at 5-6. Finally, Petitioner does not dispute on appeal the ALJ's conclusion that the five-year period of exclusion was reasonable as a matter of law, since five years is the minimum period established by section 1128(c)(3)(B) of the Act. Id. at 4. Thus, Petitioner does not dispute that there was a basis for the five-year exclusion that the I.G. imposed.

Instead, Petitioner raises the following issues. First, she disputes the ALJ's characterization of her conduct as a "scheme," and asserts that this description was based on "16 incorrect charts out of over 6000" and that the ALJ reviewed her case with a negative bias. She asserts that her business operated for 14 years, employed 11 people, and saw an average of 50 patients a week. She argues that a Georgia State Legislator asked "for an exception for us, being the sole provider of this service in Richmond County."

We find no merit in Petitioner's arguments. Petitioner cites no evidence to support her claim of bias. The ALJ Decision states that from July 2002 through March 2005, "Petitioner engaged in a scheme in which she submitted fraudulent claims to the Georgia Medicaid program, obtaining payments in the amount of approximately $618,352, for perinatal and pregnancy-related

services that were not provided." Id. at 1. This summary statement of the nature of the offense as well as its duration and cost reflect record information contained in one of two indictments entered against Petitioner by grand juries in two Georgia counties charging her with a total of three felony offenses. I.G. Exs. 3, 4. The ALJ's statement thus reasonably characterizes Petitioner's actions as a "scheme" and does not demonstrate bias. To the extent that Petitioner is challenging the basis for the conviction underlying her exclusion, it is well-settled that such collateral attacks are not permitted in exclusion proceedings. 42 C.F.R. § 1001.2007(d); Lyle Kai, R.Ph., DAB No. 1979 (2005), aff'd Kai v. Leavitt, Civ. No. 05-00514 BMK (D. Haw. July 17, 2006).

The letter from the Georgia State legislator stating that Petitioner is "the only one who is serving our community in this way [connecting indigent women with prenatal services]," P. Ex. 1, provides no basis to reverse the exclusion or lessen its duration. The circumstance asserted by the legislator, assuming it is true, is not a mitigating factor under the regulations governing this exclusion. 42 C.F.R. § 1001.102(c)(1)-(3). In any event, mitigating factors are relevant only if there are aggravating factors justifying an exclusion longer than the minimum five years. 42 C.F.R. § 1001.102(c). Since the I.G. here imposed the minimum five-year exclusion, the ALJ correctly concluded that the legislator's letter was not relevant to his determination.

Petitioner also requests that "someone else review my appeal" and "[i]f this is not possible," requests that her exclusion begin on January 31, 2005, which she says is the date that restrictions imposed by the State of Georgia began. The Board is reviewing her appeal as provided in 42 C.F.R. § 1005.21. However, we have no authority to alter the effective date of her exclusion.

The notice of exclusion from the I.G. is dated September 30, 2008, and states that the exclusion would be effective 20 days from that date. I.G. Ex. 1, at 1. This is consistent with the law. Section 1128(c)(1) of the Act provides that an exclusion under section 1128(a) "shall be effective at such time and upon such reasonable notice to the public and to the individual or entity excluded as may be specified in regulations," and the regulations state that an exclusion "will be effective 20 days from the date of the notice" of the exclusion. 42 C.F.R.

§ 1001.2002(b). Accordingly, as the Board has consistently held, neither the Act nor the regulations authorizes the ALJ or the Board to adjust the beginning date of an exclusion. See, e.g., Kailash C. Singhvi, M.D., DAB No. 2138, at 4-5 (2007). Thus, whether the State imposed restrictions against Petitioner beginning January 31, 2005 is irrelevant here. However, we note that the record nowhere indicates that this was the effective date of any action taken against her by the State, and her convictions, which were the bases for the exclusion, did not occur until over two years after that date. We also note that Petitioner did not make this request before the ALJ, and the regulations state that we will not consider any issue that could have been raised before the ALJ but was not. 42 C.F.R. § 1005.21(e).

Conclusion

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

/s/
Stephen M. Godek

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member