Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Angelo D. Calabrese, M.D.
Docket No. A-16-126
Decision No. 2744
October 27, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Angelo D. Calabrese, M.D. (Petitioner) appeals a decision by an Administrative Law Judge (ALJ) upholding on summary judgment his exclusion by the Inspector General (I.G.) from participation in all federal health care programs for a period of 10 years. *Angelo D. Calabrese, M.D.*, DAB No. CR4657 (2016) (ALJ Decision). The ALJ concluded that the I.G. was required to exclude Petitioner for at least five years pursuant to sections 1128(a)(1) and (a)(3) of the Social Security Act (Act).[1] The ALJ further concluded that a 10-year exclusion was not unreasonable based on the three aggravating factors on which the I.G. relied and the absence of any mitigating factors.

On appeal, Petitioner challenges the ALJ's conclusion that a 10-year exclusion is not unreasonable and argues that the ALJ erred in granting summary judgment without considering two exhibits Petitioner offered to show that the period of exclusion is unreasonable.

For the reasons set out below, we conclude that the 10-year period of exclusion is within a reasonable range and not unreasonable based on the three aggravating factors and the absence of mitigating factors, and that the ALJ did not err in granting summary judgment for the I.G. Accordingly, we affirm the ALJ's decision to uphold the exclusion imposed by the I.G.

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[1] The current version of the Social Security Act can be found at 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.

Legal Background

Section 1128(a) of the Act states in relevant part that the Secretary of the Department of Health and Human Services "shall exclude" any individual or entity from participation in federal health care programs based on a "conviction of program-related crimes" or a "felony conviction relating to health care fraud." Specifically, the Secretary may exclude "[a]ny individual or entity that 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" and "[a]ny individual of entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in paragraph (1)) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." Act § 1128(a)(1), (a)(3). When an exclusion is imposed under section 1128(a), section 1128(c)(3)(B) requires the "minimum period of exclusion . . . be not less than five years."[2]

The mandatory five-year minimum period of an exclusion under section 1128(a) may be extended based on the application of the aggravating factors in 42 C.F.R. § 1001.102(b). The three aggravating factors found by the I.G. in this case are: "[t]he acts that resulted in the conviction . . . were committed over a period of one year or more"; "[t]he sentence imposed by the court included incarceration"; and "the individual or entity . . . has been the subject of any other adverse action by any Federal, State or local government agency or board, . . . based on the same set of circumstances that serves as the basis for imposition of the exclusion." 42 C.F.R. § 1001.102(b)(2), (b)(5), (b)(9). If an exclusion

[2] Paragraph (G) of section 1128(c)(3) requires longer minimum exclusion periods if the individual has previously been convicted of one or more offenses for which an exclusion may be effected under section 1128(a). The I.G. did not rely on section 1128(c)(3)(G) in imposing the 10-year exclusion here and did not dispute Petitioner's assertion that he is a "first-time offender." Notice of Appeal (NA) at 6.

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. *Id.* § 1001.102(c).[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 an exclusion longer than the mandatory minimum period is unreasonable. *Id.* § 1005.21.

Case Background

Petitioner was a medical doctor licensed to practice medicine in the State of New Jersey. I.G. Ex. 3, at 1. Petitioner was charged in an information with accepting bribes for referring patient blood specimens to a Medicare-approved clinical blood laboratory from approximately September 2010 through April 2013, in violation of N.J.S.A. § 2C:21-10 and 18 U.S.C. § 1952(a)(3). *Id.* at 1-4. Petitioner pleaded guilty to the information. I.G. Ex. 4. On April 2, 2015, the U.S. District Court for the District of New Jersey found Petitioner guilty and sentenced him to 37 months in prison. I.G. Ex. 5. On May 18, 2015, the New Jersey State Board of Medical Examiners revoked Petitioner's medical license and assessed a civil penalty based on Petitioner's guilty plea in the U.S. District Court. I.G. Ex. 7.

By letter dated November 30, 2015, the I.G. notified Petitioner that, based on his conviction, he was being excluded pursuant to sections 1128(a)(1) and (a)(3) of the Act. I.G. Ex. 2, at 1. The letter stated the exclusion was being increased from the minimum period of five years to 10 years based on the following circumstances: "The court

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[3] Section 1001.102(c) states:

> . . . . Only the following factors may be considered mitigating—
> (1) The individual or entity was convicted of 3 or fewer misdemeanor offenses, and the entire amount of financial loss (both actual loss and intended loss) to Medicare or any other Federal, State or local governmental health care program due to the acts that resulted in the conviction, and similar acts, is less than $1,500;
> (2) The record in the criminal proceedings, including sentencing documents, 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
> (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.

sentenced you to 37 months of incarceration"; "The acts [that resulted in the conviction] occurred from around September 2010 through around April 2013"; [4] and "You lost your license to practice as a medical doctor in the State of New Jersey." *Id*. at 1-2. Petitioner timely requested a hearing before an ALJ. ALJ Decision at 2, 4. The I.G. filed a motion for summary judgment and I.G. Exhibits 1 through 7. Petitioner filed a brief in opposition along with Petitioner Exhibits 1 and 2. The ALJ admitted I.G. Exhibits 1 through 7, to which Petitioner did not object. The ALJ declined to admit either of Petitioner's exhibits, which he described as "affidavits from colleagues who attest to [Petitioner's] general character and trustworthiness." *Id*. at 2. The ALJ stated that these exhibits "are not evidence of any of the mitigating factors" set out in section 1001.102(c) and are therefore "not relevant to any issue I may decide[.]" *Id*., citing 42 C.F.R. § 1005.17(c) ("The ALJ must exclude irrelevant or immaterial evidence.").

The ALJ found that summary judgment was appropriate because there are no genuine disputes as to any material facts in the case. ALJ Decision at 4. The ALJ rejected Petitioner's assertion that a hearing is required to permit fact finding regarding Petitioner's trustworthiness, concluding that—

> whether or not Petitioner is trustworthy or untrustworthy is neither an aggravating nor a mitigating factor that affects my determination as to whether or not the period of exclusion proposed by the I.G. is unreasonable, and any fact issues related to Petitioner's trustworthiness are simply not material and not a bar to summary judgment.

Id. at 4-5. The ALJ concluded that "Petitioner's exclusion is required by sections 1128(a)(1) and (a)(3) of the Act" and that, "[p]ursuant to section 1128(c)(3)(B) of the Act, the minimum period of exclusion under section 1128(a) is five years." *Id.* at 5-6. The ALJ further concluded that the three aggravating factors found by the I.G. are present, that Petitioner had not proven any mitigating factors established by regulation, and that "a ten-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." *Id*. at 6, 9.

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[4] The ALJ Decision inaccurately described the I.G.'s statement regarding its consideration of this factor. ALJ Decision at 6-7. The I.G. considered, as its notice states, that Petitioner committed his criminal acts from about September 2010 through around April 2013, not "2006 through April 2013" as the ALJ Decision states. The period stated by the I.G. is consistent with the period stated in the District Court information and judgment, although the plea agreement is consistent with the period stated by the ALJ. *Compare* I.G. Exs. 3, at 3 and 5, at 1 *with* I.G. Ex. 4, at 1. This discrepancy has no effect on our decision. The period stated by the I.G. in its notice is more than double the length of time required to support the aggravating factor in 42 C.F.R. § 1001.102(b)(2), one of three relied upon the I.G. to increase the mandatory minimum exclusion period to 10 years and by the ALJ in finding that period not unreasonable.

Standard of Review

The Board's standard of review in I.G. exclusion cases is set by regulation. The standard of review on a disputed factual issue is whether the ALJ decision is supported by substantial evidence on the whole record. The standard of review on a disputed issue of law is whether the initial decision is erroneous. 42 C.F.R. § 1005.21(h). The regulations also provide that an ALJ may "[u]pon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact[.]" 42 C.F.R. § 1005.4(b)(12). Whether summary judgment is appropriate is a legal issue the Board addresses de novo, viewing the proffered evidence in the light most favorable to the non-moving party. *See, e.g.*, *Raymond Lamont Shoemaker*, DAB No. 2560, at 4 (2014).

Analysis

On appeal, Petitioner does not dispute that the I.G. was required to exclude him for a minimum of five years, that the three aggravating factors found by the I.G. were present here, and that there were no mitigating factors. Petitioner nevertheless takes the position that the ALJ erred by "dismissing the . . . prospective testimony" in the two affidavits submitted by Petitioner[5] and deciding the case on summary judgment. NA at 7, 10. Petitioner argues that the Act does not require that an exclusion be extended beyond the mandatory five-year minimum where aggravating factors are present. NA at 6-7. Petitioner further argues that the ALJ erred in concluding that the presence of aggravating factors and the absence of mitigating factors alone were sufficient to find the exclusion period reasonable. NA at 7-9. According to Petitioner—

> [N]o matter how many aggravating factors—and how few mitigating factors—are present, the presence or absence of those factors does not end the inquiry. The exclusion *still* has to be reasonable, and reasonableness cannot be determined solely on the basis of the statutory aggravating and mitigating

[5] Petitioner also submitted below a "certification" signed by the attorney who represented him before the ALJ and represents him before the Board. In the "certification," the attorney states that he has known Petitioner for over 20 years (during which period Petitioner was the attorney's personal physician) and makes certain representations of alleged "fact" about Petitioner's criminal case. In his briefs below and here, Petitioner cites to this "certification" as if it, rather than the court documents from Petitioner's case, established the facts regarding his criminal conviction. The I.G. objected that the certification "explain[s] the facts of this case in a manner that minimizes [Petitioner's] wrongdoing," and objected to Petitioner's reliance on the certification as "an improper collateral attack" on Petitioner's conviction. I.G. Reply to Petitioner's Brief at 2, citing 42 C.F.R. § 1001.2007(d). Before the ALJ, Petitioner did not submit the "certification" as evidence as he did the affidavits from two doctors that the ALJ discussed but declined to admit, and the ALJ Decision does not refer to the "certification." While the "certification" is part of the administrative record in the sense that it was filed in the ALJ and Board proceedings, it is not part of the evidentiary record since it was neither offered nor admitted as evidence. Moreover, the facts relating to Petitioner's criminal conviction are established by the documents from the federal court record in his criminal case which the I.G. submitted and the ALJ accepted as evidence. *See* ALJ Decision at 2 (admitting without objection I.G. Exhibits 1 through 7).

> factors. It must take stock of something else. And here, [Petitioner] has two witnesses who are willing to testify as to other factors informing the reasonableness of this exclusion.

NA at 10 (emphasis in original).[6] Petitioner states that the two witnesses "wished to testify as to [Petitioner's] good character; to the aberrant nature of his conduct; and to the consequently unreasonable nature of the proposed exclusion." NA at 8. Petitioner further states that, in light of the I.G.'s repeated references to Petitioner's "supposed untrustworthiness as support for the reasonableness of the extended exclusion, [Petitioner] regarded [the two witnesses' testimony] not only as being probative of reasonableness but as also as a fair and proper rebuttal." *Id.*

Petitioner's arguments have no merit. "[G]eneral 'trustworthiness'" is not "an independent basis, i.e., independent from the specified aggravating and mitigating factors, for determining whether the period of an exclusion is unreasonable." *Mohamed Basel Aswad, M.D.*, DAB No. 2741, at 11 (2016), citing *Sushil Aniruddh Sheth, M.D.,* DAB No. 2491 (2012). In *Sheth*, the Board stated in relevant part:

> The duration of a mandatory exclusion beyond the statutory five-year minimum is determined by evaluating the aggravating factors and mitigating factors set forth at 42 C.F.R. §§ 1001.102(b) and (c). . . . The evaluation does not rest on the specific number of aggravating or mitigating factors or any rigid formula for weighing those factors, but rather on a case-specific determination of the weight to be accorded each factor based on a qualitative assessment of the circumstances surrounding the factors in that case. . . . The protective purpose of the exclusion statutes is an overarching consideration when assessing the factors: "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).

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[6] Petitioner identifies this as "the *Abassi* rule," stating that, in *Dr. Abdul Abassi*, DAB CR390 (1995), "this body . . . state[d]": "The mere presence of an aggravating factor does not mean that an exclusion of any particular length beyond the five years is reasonable." NA at 7. To quote *Abassi* (an ALJ decision) accurately, the ALJ wrote: "[T]he presence of these factors [referring to two aggravating factors] does not mean that an exclusion of any particular length in excess of five years is reasonable." DAB CR390 at 8-9. Nothing in this language indicates that factors other than the aggravating and any mitigating factors specified in the regulation should be taken into account in determining whether the length of an exclusion is unreasonable. In any case, as the Board has previously stated, "ALJ decisions have no precedential weight and so are useful only to the extent their reasoning is on point and persuasive." *John M. Shimko, D.P.M.*, DAB No. 2689, at 5 (2016).

Sheth at 5. *Sheth* further states that "[t]he aggravating and mitigating factors . . . were designed to evaluate" the "threat Petitioner poses to the Medicare program and its beneficiaries." *Sheth* at 16, citing *Jeremy Robinson*, DAB No. 1905 (2004) and *Joann Fletcher Cash*, DAB No. 1725 (2000). Accordingly, as the Board stated in *Robinson*, the "aggravating and mitigating factors reflect the degree or level of the provider's untrustworthiness." *Robinson* at 11 (citing *Cash* at 18).

In addition, the Board has held that "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." *Eugene Goldman, M.D., a/k/a Yevgeniy Goldman, M.D.*, DAB No. 2635, at 10 (2015); *see also Laura Leyva*, DAB No. 2704, at 9 (2016) (the regulations do not provide for consideration of character as a mitigating factor); *Baldwin Ihenacho*, DAB No. 2667, at 8 (2015) ("character references are irrelevant because the regulations do not provide for consideration of character as a mitigating factor"). Thus, the ALJ did not err in excluding as irrelevant the affidavits from Petitioner's professional colleagues that Petitioner claims show he is trustworthy. We also note that although the affidavits discuss Petitioner's trustworthiness in general terms, they do not specifically discuss his trustworthiness as it relates to protecting the Medicare program and its beneficiaries, which is what the applicable regulations, including the aggravating and mitigating factors, address. This is a noteworthy omission in light of the fact that the criminal offense to which Petitioner pled guilty involved the acceptance of bribes to refer patient blood specimens to a laboratory that submitted claims to Medicare as well as private insurers. *See* I.G. Ex. 3, at 3-4; I.G. Ex. 4.

Accordingly, there were no material facts in dispute, and the ALJ did not err in deciding the case on summary judgment.

Petitioner argues further that the ALJ erred in upholding the 10-year exclusion imposed by the I.G. as "not unreasonable." Petitioner states: "[D]efining the word 'reasonable' as meaning 'not unreasonable' and the phrase 'not unreasonable' as meaning 'reasonable' is circular reasoning that creates an impermissibly vague standard that, in turn, reposes too much discretion in the ALJ and by extension, strips the petitioner of important due process rights." NA at 8. Petitioner's argument ignores 42 C.F.R. § 1001.2007(a)(1), which identifies one of the only two issues that may be decided by an ALJ as whether "[t]he length of exclusion is unreasonable." Moreover, the preamble to the final regulations expressly states that the language of section 1001.2007(a)(2) reflects the "broad discretion" vested in the I.G. to determine the length of exclusion. 57 Fed. Reg. 3298, 3321 (1992). The preamble also states: "So long as the amount of the time chosen by the [I.G.] is within a reasonable range, based on demonstrated criteria, the ALJ has no authority to change it[.]" *Id*. The ALJ's decision to uphold the 10-year exclusion as within a reasonable range and not unreasonable is based on and fully consistent with the

regulatory standard. Accordingly, Petitioner's "due process argument amounts to a direct attack on the constitutionality of the regulation which we have no authority to resolve." *Robert Seung-Bok Lee*, DAB No. 2614, at 9 (2015), citing *Keith Michael Everman*, DAB No. 1880, at 12 (2003).

Petitioner makes no other argument in support of his position that the ALJ erred in concluding that a 10-year exclusion was within a reasonable range and not unreasonable, and we find no error in that conclusion. As *Sheth* indicates, in determining whether a period of exclusion falls within a reasonable range, an ALJ determines the weight to be accorded to each aggravating and mitigating factor, taking into consideration the circumstances relevant to each factor. Here, the acts that resulted in Petitioner's conviction occurred over a period of approximately two and a half years, more than double the length of time required to constitute an aggravating factor under section 1001.102(b)(2). In addition, the sentence imposed by the court included incarceration for 37 months, a substantial amount of time considering that incarceration of any length would constitute an aggravating factor under section 1001.102(b)(5). In addition, the State board's revocation of Petitioner's license to practice law based on the same facts to which he pleaded guilty in District Court constituted an aggravating factor under section 1001.102(b)(9). In light of the circumstances of the first two aggravating factors, the ALJ could reasonably accord them significant weight and conclude that those factors, together with the third aggravating factor, demonstrate that a 10-year exclusion is not unreasonable.

Accordingly, we conclude that the ALJ did not err in granting summary judgment for the I.G.

Conclusion

For the foregoing reasons, we affirm the ALJ's decision upholding the 10-year exclusion imposed by the I.G.

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Susan S. Yim
Presiding Board Member