Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Shaikh M. Hasan, M.D.
Docket No. A-15-56
Decision No. 2648
July 15, 2015

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Shaikh M. Hasan, M.D. (Petitioner) appeals the February 24, 2015 decision of an Administrative Law Judge (ALJ). *Shaikh M. Hasan, M.D.*, DAB CR3663 (2015) (ALJ Decision). The ALJ sustained the determination by the Inspector General (I.G.) to exclude Petitioner from all federal health care programs for five years under section 1128(a)(4) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(4),[1] based on his conviction of a felony offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The ALJ determined that the I.G. is authorized to exclude Petitioner and that the statute requires a minimum five-year exclusion period. The Board affirms the ALJ Decision for the reasons set out below.

Legal Background

Section 1128(a)(4) of the Act requires the Secretary of Health and Human Services (Secretary) to exclude an individual from participation in all federal health care programs if that individual has been 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." Section 1128(c)(3)(B) imposes a minimum exclusion period of five years for any mandatory exclusion imposed under section 1128(a) of the Act. The implementing regulations in 42 C.F.R. § 1001.101(d) mandate the exclusion of any individual who, or an entity that, has been convicted, under federal or state law, of a felony that occurred after August 21, 1996 relating to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance as defined under federal or state law. No exclusion imposed under

[1] The current version of the 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.

section 1001.101 will be for less than five years. 42 C.F.R. § 1001.102(a). With the exception of certain types of exclusions imposed pursuant to 42 C.F.R. § 1001.1301 (not applicable here), an exclusion imposed by the I.G. becomes effective twenty (20) days after the date of the I.G.'s notice of exclusion. *Id.* § 1001.2002(b), (d).

If, as in this case, the exclusion is mandatory and imposed for the statutory minimum five-year period, the individual may request a hearing before an ALJ only on whether the basis for imposing the exclusion exists, but not on whether the length of the exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(1), (2). Any party dissatisfied with the ALJ's decision may appeal the decision to the Board. *Id.* § 1005.21. The Board will not consider any issue not raised in the parties' briefs or any issue in the briefs that could have been raised before the ALJ but was not. *Id.* § 1005.21(e).

Case Background[2]

Petitioner is a physician who received a license to practice medicine in the State of New York in April 1995. I.G. Exhibit (I.G. Ex.) 2. In or about 2011, the Office of the Special Narcotics Prosecutor for the City of New York began investigating allegations that Petitioner was selling prescriptions for controlled substances out of his family medical practice in Brooklyn, New York. I.G. Ex. 3, at 1. The investigation revealed that Petitioner was prescribing highly addictive opioid painkillers, sometimes writing up to 100 prescriptions a day, for individuals he had never met or treated, relying on forms of identification presented by individuals to whom the identifications did not belong. *Id.* at 2. For instance, the investigation found that, between February 2010 and January 2012, Petitioner wrote over 30 prescriptions for 120 30-mg oxycodone pills for an individual who did not know Petitioner. *Id.* Petitioner sold the prescriptions to patients. *Id.*

On June 1, 2012, a grand jury of the Special Narcotics Courts of the City of New York returned an indictment charging Petitioner with 32 counts of Criminal Sale of a Prescription for a Controlled Substance, in violation of New York Penal Law § 220.65. I.G. Ex. 4. The indictment alleged that, on various dates between February 11, 2010 and April 18, 2012, Petitioner knowingly and unlawfully sold prescriptions for oxycodone (*id.*) "other than in good faith in the course of [his] professional practice" (*e.g.*, *id.* at 1). On June 5, 2012, Petitioner was arrested on those charges. I.G. Exs. 3, at 1; 5, at 1. On June 15, 2012, a superseding indictment charged Petitioner with nine additional counts, for a total of 41 counts of Criminal Sale of a Prescription for a Controlled Substance, in violation of New York Penal Law § 220.65. I.G. Exs. 5 and 6. Petitioner committed the alleged crimes between February 11, 2010 and April 24, 2012.

[2] The factual information in this section, unless otherwise indicated, 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.

I.G. Ex. 6. On October 10, 2013, Petitioner appeared in the Supreme Court of the State of New York, New York County and pleaded guilty to 41 counts as charged in the superseding indictment. I.G. Ex. 5, at 1-2. He was sentenced on November 13, 2013 to thirty days of imprisonment, five years of probation, and a six-month suspension of his driver's license, and ordered to pay $375 in various charges and assessments. I.G. Ex. 5, at 2-5.

Effective January 26, 2014, the State of New York, Office of the Medicaid Inspector General (OMIG) excluded Petitioner from participation in the Medicaid program based on his conviction. I.G. Ex. 9.[3] Subsequently, the State of New York, Department of Health, State Board for Professional Medical Conduct (BPMC) determined that Petitioner had engaged in professional misconduct, imposed a stayed suspension of his medical license, placed him under probation for five years, limited his license to practice medicine by barring him from issuing prescriptions for narcotics until such time as it could be determined that the restriction should be lifted, and ordered him to complete twelve hours of continuing medical education in the use of narcotics and pain management. I.G. Exs. 7; 8, at 4-6 and Petitioner's Exhibit (P. Ex.) 6, at 4-6. On review of BPMC's determination, the State of New York, Department of Health, Administrative Review Board for Professional Medical Conduct (ARB) upheld BPMC's determination that Petitioner committed professional misconduct, but modified the penalty to impose a stayed suspension of Petitioner's medical license for two years, prohibited Petitioner from prescribing controlled substances for one year, and placed Petitioner on probation for five years in accordance with the terms of ARB's decision. P. Ex. 9 (not paginated; *see* ARB decision pages 9-11).

By letter dated June 30, 2014, the I.G. notified Petitioner that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs, for five years, pursuant to section 1128(a)(4) of the Act, based on his conviction of a felony offense under New York law related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. I.G. Ex. 1, at 1. The I.G. based his decision to exclude Petitioner on his conviction of a crime of unlawful prescription of a controlled substance. *Id.; see* 42 U.S.C. § 1320a-7(a)(4); 42 C.F.R. § 1001.101(d)(1).

[3] As discussed later, OMIG excluded Petitioner from participation in the New York State Medicaid program earlier, effective September 19, 2012, based on his indictment. I.G. Ex. 10. OMIG's notice of exclusion, effective September 19, 2012, does not state how long the Petitioner would be excluded from the Medicaid program. *See id.* But OMIG later issued a second exclusion effective January 26, 2014, following Petitioner's conviction. I.G. Ex. 9. Presumably, OMIG's September 2012 exclusion remained in effect until OMIG issued its January 2014 exclusion.

On appeal, the ALJ determined that because Petitioner was "unquestionably" convicted of a felony related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance, he must be excluded from the program for at least five years. ALJ Decision at 2, *citing* Act § 1128(a)(4), (c)(3)(B).[4] The ALJ rejected Petitioner's argument that he was "duped by criminals and arguably entrapped by the police who reacted to information about [the] prescriptions" that he had written (Petitioner's Brief at 4) as an impermissible collateral attack on his conviction. ALJ Decision at 2-3, *citing*, *inter alia*, 42 C.F.R. § 1001.2007(d).[5]

The ALJ also found Petitioner's remaining arguments unavailing. The ALJ stated that, "even accepting Petitioner's highly questionable premise" that "his conduct did not affect any of his patients, nor has anyone suggested that he defrauded Medicare, Medicaid, or any other health care program[,]" "exclusion under section 1128(a)(4) does not require findings of patient harm or health care fraud." ALJ Decision at 3. Likewise, the ALJ stated, the impact of the exclusion, which, according to Petitioner, is that he effectively will not be able to practice medicine, is irrelevant and not a basis for overturning a mandatory exclusion. *Id.*

The ALJ also rejected Petitioner's suggestion that his exclusion be waived under 42 C.F.R. § 1001.1801(b) because he had provided medical care to a poor, underserved community. *Id.* The ALJ explained that section 1001.1801(b) authorizes the I.G. to grant (or deny) a state health care program's request that the exclusion be waived "'if the [excluded] individual . . . is the sole community physician or the sole source of essential specialized services in a community.'" *Id.* (quoting 42 C.F.R. § 1001.1801(b)). The ALJ did not expressly make a finding on whether, here, a state health care program made any such waiver request, but stated, "So a *state* health care official must present the request to the I.G." *Id.* (emphasis in original). The ALJ also noted that any decision on the waiver request is not subject to administrative or judicial review. *Id.*, *citing* 42 C.F.R. § 1001.1801(f) and Act § 1128(c)(3)(B).

Finally, the ALJ rejected Petitioner's plea for "credit" for the time he was excluded by OMIG from the Medicaid program from September 19, 2012, to make his exclusion from the federal health care programs retroactive to that date because, by law, the I.G.'s exclusion becomes effective twenty days after the date of the I.G.'s notice of exclusion. *Id.*, *citing* 42 C.F.R. § 1001.2002. The ALJ stated that she had "no authority to review the timing of the I.G.'s determination to impose the exclusion or to alter retroactively the

[4] The parties agreed that an in-person hearing was not necessary. ALJ Decision at 2.

[5] Petitioner's argument, as quoted in the ALJ Decision, is found on page 4 of his brief, not on page 1 as misnumbered in the brief. ALJ Decision at 2 n.2.

date the exclusion was imposed[]" (*id.*, citing *Kailash C. Singhvi*, DAB No. 2138, at 4-5 (2007)) or to reduce the length of the exclusion period (*id.*, citing Act § 1128(c)(3)(B) and 42 C.F.R. § 1001.2007(a)(2)).

Petitioner requests review of the ALJ Decision by the Board.

Standard of Review

The standard of review on a disputed issue of law is whether the ALJ Decision is erroneous. 42 C.F.R. § 1005.21(h). The standard of review on a disputed issue of fact is whether the ALJ Decision is supported by substantial evidence in the record as a whole. *Id.*; *see also Guidelines – Appellate Review of Decisions of Administrative Law Judges in Cases to Which Procedures in 42 C.F.R. Part 1005 Apply* (*Guidelines*). The *Guidelines* are available at http://www.hhs.gov/dab/divisions/appellate/guidelines/procedures.html.

Substantial evidence is "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

Analysis

Petitioner raises several arguments, the overarching argument – and the relief sought – being that the I.G. exclusion should be deemed to have started on the earlier date on which he was excluded from participation in the New York Medicaid program. Request for Review (RR) at 1-2.[6] For the reasons explained below, we uphold the ALJ Decision.

1. *Petitioner's arguments that amount to a collateral attack on the validity of the underlying conviction are unavailing.*

Petitioner repeatedly insists that he was not, as the ALJ stated, attempting to collaterally attack the validity of the underlying conviction. RR at 2-3; Reply Brief (Reply) at 2. He characterizes his argument as instead presenting a "painstaking recital of mitigating factors underlying the conviction which are part of every state and federal criminal case[.]" RR at 2-3. Further, he asserts that his claims are based on "uncontradicted,"

[6] Petitioner refers to September 14, 2012 as the effective date of OMIG's exclusion. RR at 2 ("The exclusion began on September 14, 2012 . . . ."). The notice of exclusion was dated September 14, 2012, but it specified that the exclusion would begin five days later (September 19, 2012). *See* I.G. Ex. 10, at 1. Petitioner consistently invokes the earlier of the two OMIG exclusion notices (i.e., exclusion effective September 19, 2012, based on his indictment), and not the January 21, 2014 notice of exclusion, based on his conviction, effective January 26, 2014 (I.G. Ex. 9), in support of his argument.

"reasonable" and "credible" evidence in the form of the determinations of BPMC and ARB, which "unanimously" agreed that he should be allowed to retain his medical license and "prescribe any narcotics except a controlled substance for 1 year . . . ." *Id.*

Despite Petitioner's insistence that he was not and is not collaterally attacking the validity of his conviction, his statements about the criminal case in essence amount to a recounting of his view of the underlying events that culminated in his conviction. *See, e.g.,* RR at 3 (asserting that it is "clear" that "criminals" "dupe[d]" him into writing the prescriptions that led to the criminal investigation; alleging that certain evidence was not considered in the criminal proceedings). Petitioner apparently believes that he was wrongly convicted or, at least, that the exclusions together amount to punishment more severe than is warranted under the circumstances of his case. *See, e.g., id.* at 7 (stating that his case is "different [from] that of any other doctor in New York"). But, as the ALJ rightly noted, if, as here, the exclusion was based on a criminal conviction, the basis for the underlying conviction is, by regulation, not reviewable. ALJ Decision at 2-3, *citing* 42 C.F.R. § 1001.2007(d). Therefore, all of Petitioner's contentions about the events leading to and evidence adduced in the criminal case, as well as those about the fairness of the resulting conviction, have no relevance in these proceedings. We therefore agree with the ALJ that Petitioner's statements about the events leading up to his conviction amount to a collateral attack on the validity of the conviction.

2. *The presence, or not, of mitigating factors is irrelevant in a mandatory exclusion imposed for the minimum required five-year period.*

Petitioner asserts that his case presents mitigating factors, such as the fact that he provided medical care to a poor and underserved community, which should be considered to decide whether the requested relief – adjustment of the effective date of the I.G.'s exclusion coterminous with the effective date of OMIG's exclusion, September 19, 2012 – should be granted. RR at 4. Petitioner also points to BPMC's and ARB's determination that he should be permitted to continue practicing medicine (*id.* at 4) as somehow relevant to the Board's review of this appeal. *See id.* at 7 (arguing that his case is unique "based on the unanimous decisions" of the BPMC and ARB, which "must be given substantial deference and credit.").

Where, as here, a mandatory minimum five-year I.G. exclusion is being imposed, the presence, or not, of any mitigating factors is irrelevant. *See* 42 C.F.R. §§ 1001.102(a) (a mandatory exclusion requires a minimum exclusion period of five years) and 1001.2007(a)(2) (where an appeal arises from a mandatory exclusion for the minimum five-year period, the reasonableness of the exclusion period is not an appealable issue). A discussion about mitigating factors is appropriate only if an exclusion period longer than the mandatory minimum period was imposed based on the presence of one or more

aggravating factor(s) in 42 C.F.R. § 1001.102(b). Furthermore, only the mitigating factors specifically listed in section 1001.102(c) may be considered for possible reduction of the exclusion period to no less than the mandatory minimum period, none of which Petitioner identifies as applicable here. *Id.* § 1001.102(c). In this case, however, the applicability or not of any mitigating factor is not, and cannot be, at issue because Petitioner was excluded only for the mandatory minimum period.

Because mitigating factors are thus not at issue here, we need not analyze in any detail Petitioner's arguments concerning what he asserts are his case-specific mitigating factors. We observe, however, that what Petitioner cites as mitigating factors (e.g., that he provided medical care to a poor and underserved population and that the BPMC and ARB made "overwhelming findings of 'warranted leniency'" (RR at 4)) are not cognizable mitigating factors under section 1001.102(c).

Petitioner also argues that his case does not present evidence of harm to individuals caused by or related to the misconduct that resulted in his conviction. Petitioner repeatedly states that no patient, agency or health care provider complained about him. *See, e.g.*, RR at 3; Reply at 2. His argument reasonably may be understood to mean that the absence of negative evidence, i.e., evidence that possibly could be considered an aggravating factor under section 1001.102(b), itself is or should be considered a mitigating factor. *See* 42 C.F.R. § 1001.102(b)(3) (an aggravating factor is that the acts that resulted in conviction had a significant adverse physical, mental or financial impact on one or more program beneficiaries or other individuals). But the I.G. did not apply any aggravating factor to increase the exclusion period longer than the mandatory minimum five-year period. Therefore, no mitigating factor – even if this were cognizable as such under the regulation – can be considered. And, in any case, as we said in *Eugene Goldman, M.D., a/k/a Yevgeniy Goldman, M.D.*, DAB No. 2635, at 10 (2015), "the absence of an aggravating factor is not itself a mitigating factor."

3. Petitioner's arguments in support of an earlier effective date of the I.G.'s exclusion are unavailing because no such remedy is allowable.

Petitioner seeks an adjustment of the effective date of the I.G.'s exclusion to coincide with the effective date of the OMIG's earlier exclusion, that is, September 19, 2012. In pursuit of that end, Petitioner first contends that OMIG's exclusion and the I.G.'s exclusion are, for all intents and purposes, the same. According to Petitioner, the I.G.'s exclusion period should be deemed to run concurrently with the date of OMIG's September 14, 2012 exclusion because OMIG's exclusion "clearly caused" the I.G.'s exclusion and has "the same effect and similar consequences as the [I.G.'s exclusion] notice of June 30, 2014." RR at 5. The I.G.'s exclusion and OMIG's exclusion, he further notes, had the "same effect" in that they both "terminate[d] [his] participation in

all Federal Medicare programs." Reply at 1; RR at 5. Petitioner quotes OMIG's September 14, 2012 exclusion notice, which states, "[a]n exclusion from HHS will prohibit you from being reinstated into New York State Medicaid programs until you are reinstated into the Medicare Program[,]" asserting that this language is "clear[] evidence" that the intent and effect of both exclusions are the same. RR at 5, *quoting* I.G. Ex. 10, at 2. He further points out that OMIG's exclusion notice referred to federal law, Patient Protection and Affordable Care Act (ACA), Pub. L. 111-148, as an indication that the exclusions share similarities. *See, e.g.*, *id.* at 1; I.G. Ex. 10, at 1, ¶ 3 (OMIG's exclusion notice, citing the ACA and stating in part that Petitioner is prohibited from participating in Medicaid). Therefore, he argues, "[t]he time of the [I.G.'s] exclusion cannot be extended beyond the 5 years of the original notice [of OMIG's exclusion effective September 19, 2012]." RR at 5.

The Board understands Petitioner's underlying point to be that staggered exclusions with effective dates that begin in 2012 (OMIG) and in 2014 (I.G.) effectively amount to a significant restriction on his ability to participate in health care programs for a period longer than the five years imposed by the I.G. *See, e.g.*, Reply at 1 (stating that the result of the I.G.'s exclusion is "an extra 1 year and 9 month suspension of Medicare treatment and payment").

Petitioner is correct that the two exclusions overlap in some respects. The State of New York, through OMIG, excluded Petitioner from participation in the state's Medicaid program, which receives federal monies. The I.G.'s exclusion prohibited Petitioner from participation in any capacity not only in Medicare, but in Medicaid, and all federal health care programs as defined in section 1128B(f) of the Act. The I.G.'s exclusion has significant implications on Petitioner's ability to return to participation in the New York State Medicaid program because, as OMIG informed Petitioner, exclusion by the I.G. will bar Petitioner from reinstatement into the New York State Medicaid program. But overlap between the two exclusions in terms of their effect on Petitioner's ability to participate in health care programs does not mean that the exclusions themselves are the same or should be treated as such for the purposes of assignment of effective dates. Each exclusion was imposed in accordance with distinct applicable federal or state authorities which govern the scope, starting date and duration of each exclusion. More to the point, Petitioner cites no authority for the proposition that the imposition of both state and federal exclusions arising from the same underlying misconduct somehow alters when the federal, or I.G., exclusion takes effect. As discussed elsewhere herein, by regulation, section 1001.2002(b), the I.G.'s exclusion is effective 20 days from the date of the I.G.'s notice of exclusion.

We find that the ALJ correctly determined that she had no authority to review the timing of the I.G.'s determination to impose an exclusion or to change the starting date of the exclusion. ALJ Decision at 3, *citing Kailash C. Singhvi, M.D.*, DAB No. 2138, at 4-5 (2007).[7] *Singhvi* is but one of many decisions in which the Board held that an ALJ has no discretionary authority to adjust the effective date of an I.G.'s exclusion, which is set by regulation, section 1001.2002(b). *See, e.g.*, *Thomas Edward Musial*, DAB No. 1991, at 4-5 (2005); *Douglas Schram, R.Ph.*, DAB No. 1372, at 11 (1992); *David D. DeFries, D.C.*, DAB No. 1317, at 6 (1992); *Richard G. Phillips, D.P.M.*, DAB No. 1279, at 4 (1991); and *Samuel W. Chang, M.D.*, DAB No. 1198, at 9-10 (1990). As Petitioner himself seems to acknowledge, 42 C.F.R. § 1005.4(c)(1) provides that the ALJ cannot refuse to follow the federal regulations. *See* RR at 6. Moreover, ALJs cannot "[e]njoin any act of the Secretary [of Health and Human Services]" or her delegate. 42 C.F.R. § 1005.4(c)(4). Petitioner is mistaken in his view that it is "patent" that Board authority is not similarly limited. RR at 7. On the contrary, "[t]he limitations on the ALJ's authority in section 1005.4(c)(1) and (4) also apply to the Board in its review of the ALJ Decision." *Ethan Edwin Bickelhaupt, M.D.*, DAB No. 2480, at 3 (2012), *aff'd, Bickelhaupt v. Sebelius*, No. 12 C 9598 (N.D. Ill. May 29, 2014). The Board held, too, in *Musial*, at 4, and *Schram*, at 11, that the Board, like the ALJ, lacked authority to adjust the effective date of an exclusion.

Petitioner argues that the ALJ's reliance on *Singhvi* is "misplaced" and suggests that the ALJ misunderstood his contention. RR at 3, 4. He points out that his case is different from *Singhvi* because *Singhvi* presented none of the mitigating factors present in his case. *Id.* at 3-4. *Singhvi* is also distinguishable, Petitioner asserts, because Dr. Singhvi, who had surrendered his medical license in 2001 after his conviction on August 27, 2001 for health care fraud, payment of kickbacks, and conspiracy, had argued that the I.G.'s December 29, 2006 decision to exclude him for five years effective January 18, 2007 was untimely due to the length of time between his conviction and the I.G.'s exclusion. *Id.* at 4; *Singhvi* at 2-4. Petitioner states that, unlike Dr. Singhvi, he is not asserting that there was an unreasonable delay in the I.G.'s decision to exclude him; he is instead stating that he is due "credit" for the time that he has been excluded as a result of OMIG's decision, a point Petitioner states the ALJ did not address. RR at 4.

Any factual distinction between Petitioner's case and Dr. Singhvi's case is of no material consequence. Dr. Singhvi's central point of dispute was that the gap in time between his criminal conviction and the I.G.'s exclusion effectively resulted in his being excluded for over ten years, much longer than the five years the I.G. had imposed. *See Singhvi* at 3. Petitioner's argument is not entirely dissimilar from Dr. Singhvi's in that Petitioner, too,

[7] *Kailash C. Singhvi, M.D.*, DAB No. 2138 (2007), *aff'd, Singhvi v. Inspector General, Dept. of Health & Human Servs.*, No. CV-08-0659 (SJF) (E.D.N.Y. Sept. 21, 2009).

is asserting that the timing of the start of his exclusion effectively results in a significant restriction in the ability to participate in health care programs for a period longer than the actual period of exclusion imposed by the I.G. At bottom, Petitioner is seeking, as Dr. Singhvi sought, a ruling assigning an earlier effective date of the I.G.'s exclusion that would permit him to resume full participation in health care programs as soon as possible. It is true that Petitioner points to the earlier start of his state exclusion rather than to the time elapsed since his conviction as the cause of the federal exclusion having a greater impact than had it begun on an earlier date. Petitioner does not, however, provide any legal authority for altering the starting date of a federal exclusion based on either circumstance.

The central holding in *Singhvi*, at 5, that "the ALJ and this Board do not have the authority to review the I.G.'s decision on when to impose the exclusion . . ., and may not grant Petitioner [Dr. Singhvi] the essentially equitable relief he seeks[,]" is applicable here. Here, the ALJ expressly denied Petitioner's request for "credit" for the time he was excluded from the Medicaid program, rightly stating that "[a]s a matter of law, an [I.G.] exclusion becomes effective 20 days after the date of the I.G.'s notice of exclusion." ALJ Decision at 3, *citing* 42 C.F.R. § 1001.2002. In accordance with section 1001.2002(b), and as stated in the I.G.'s June 30, 2014 notice of exclusion, we conclude that the ALJ correctly upheld the effective date of Petitioner's exclusion as 20 days after June 30, 2014. I.G. Ex. 1, at 1.

Petitioner further relies on *Connell v. Sec'y of Health & Human Servs.*, slip op., 2007 WL 1266575 (S.D. Ill. April 30, 2007),[8] which, like *Singhvi*, addressed the assertion that there was a delay between the underlying criminal conviction and the I.G.'s exclusion. Petitioner argues that the ALJ erred in not considering his "arguments for 'reasonableness and prejudice'" consistent with *Connell*. Reply at 2.

The *Connell* court remanded the case to the Secretary for specific action – to make factual determinations about whether the alleged delay between Mr. Connell's conviction and subsequent exclusion was reasonable. However, as Petitioner himself repeatedly insists, his case "is not a case of unreasonable delay." RR at 5. Petitioner could not then reasonably assert that the ALJ erred in not considering his "arguments for 'reasonableness and prejudice'" in accordance with *Connell* when his case and *Connell*

[8] In *Connell*, the U.S. District Court for the Southern District of Illinois, adopting a magistrate judge's report and recommendation, reversed *Jeffrey Knute Connell*, DAB No. 1971 (2005), in which the Board declined to review and summarily upheld the ALJ's decision in *Jeffrey Knute Connell*, DAB CR1271 (2005), and remanded the case to the Secretary to make "factual findings about whether the delay between Connell's conviction and his exclusion was reasonable . . . ." *Connell*, 2007 WL 1266575, at *2.

differ on the basic underlying argument. Petitioner's assertion of ALJ error of omission is all the more untenable because nowhere in his submissions below did he cite *Connell*. We need not further discuss *Connell* here.[9]

Petitioner also relies on *Samuel W. Chang, M.D.*, DAB CR74 (1990), *reversed in part, Samuel W. Chang, M.D.*, DAB No. 1198 (1990). He writes:

> A perfect example of the fact that a state exclusion letter, [such] as [that] [Petitioner] received [i.e., OMIG's September 14, 2012 exclusion notice,] begins the 5 year period of mandatory exclusion is found in *Samuel V. Chang*, M.D., DAB CR 1198 (1990). On May 18, 1989, the I.G. sent Dr. Chang a letter informing him he was being excluded from participating in the Medicare program and any state health care program based on his state Court conviction (At p.4). The Court found that the exclusion from state and federal programs, as in the case herein, triggers the beginning of the 5 year exclusion. [Petitioner's] initial exclusion [by OMIG] which had immediate and final impact on all state and federal programs should be commenced, as in *Chang*, supra., 5 days from September 14, 2012 . . . . This is not a case seeking a retroactive finding or a finding based on unreasonable delay.

RR at 5 (internal citations to the record omitted). Petitioner cites the Board's decision number for *Chang*, 1198, but refers to "DAB CR," which, along with the context of Petitioner's statement, suggests that Petitioner intended to refer instead to the ALJ's decision in *Chang* (DAB CR74 (1990)) that was appealed to the Board. As relevant here, the ALJ found that the I.G.'s notice of exclusion of Dr. Chang under section 1128(a)(1) of the Act for a mandatory minimum five years, which was issued some 17 months after the I.G. was notified of Dr. Chang's criminal conviction, was not timely and reasonable notice, contrary to sections 1128(c) and 1128(f)(1) of the Act and 42 C.F.R. § 1000.123, which required "reasonable notice and an opportunity for a timely hearing." *Chang*, DAB CR74, at 9. The ALJ effectively determined that no more than "[o]ne year from notification of a conviction is a reasonable period to effect an exclusion." *Id.* at 10. Accordingly, the ALJ determined that the effective date of the I.G.'s exclusion would be

[9] We observe that, in remanding the case, the *Connell* court expressly noted that the issue of whether the delay between Mr. Connell's conviction and his exclusion was reasonable was "presented in the administrative proceedings." *Connell*, 2007 WL 1266575, at *2. By contrast, Petitioner asserts that the "sole issue" before the ALJ was whether the starting date of his exclusion violated his constitutional due process rights (RR at 1), an argument expressly rejected by the court in *Connell*. *Connell*, 2007 WL 1266575, at *1. Nowhere did Petitioner assert that the I.G. unreasonably delayed in imposing an exclusion after Petitioner's conviction. In our view, Petitioner could have raised below that argument in reliance on *Connell* as an alternate basis for the relief sought, but did not. Therefore, the Board is not required to consider it and discusses it only to the extent necessary to appropriately respond to the assertion of ALJ error. *See* 42 C.F.R. § 1005.21(e); *Guidelines* (section headed "Completion of the Review Process," ¶ (a)).

November 12, 1988, one year after November 12, 1987, the date on which the I.G. was notified by the State of Maryland of Dr. Chang's conviction. *Id.* at 4 (finding of fact and conclusion of law no. 8) and 10; *see also id.* at 5 (finding of fact and conclusion of law no. 19). The ALJ found, also, that the exclusion from participation in Medicare and Medicaid programs was effective beginning November 22, 1988. *See id.* at 5 (findings of fact and conclusions of law nos. 20, 21).

On review, the Board modified the ALJ's decision in part, by reversing parts of the ALJ's decision that revised the effective dates as legally erroneous. *Chang*, DAB No. 1198, at 17 (stating that the ALJ's findings of fact and conclusions of law nos. 19, 20, and 21 addressing the ALJ's bases for revising the effective dates were reversed or deleted). The Board concluded that the ALJ erred as a matter of law in changing the effective date of Dr. Chang's five-year exclusion to November 12, 1988, and upheld Dr. Chang's exclusion effective 20 days from the date of the I.G.'s notice, May 18, 1989. *Id.*[10] As the Board stated:

> The question here is not one of the "length" of the suspension. The suspension from Medicare is the mandatory minimum in the statute of five years. The ALJ cannot decrease the time, nor can he decide when it is to begin. . . . The ALJ has no power to change either the length of the exclusion or its beginning date.

Id. at 9-10.

Petitioner contends that the effective date of the "federal" (I.G.) exclusion is or should be coterminous with the date of the "state" (OMIG) exclusion in reliance on the ALJ's decision in *Chang*. But, because the Board reversed that part of the ALJ's decision that ordered adjustment of the effective date of the I.G.'s exclusion – the only part that arguably supports Petitioner's cause – as legally erroneous, that part of the ALJ's decision is not authority on which Petitioner can rely. The Board's decision in *Chang*, together with the Board's decisions in *Singhvi* and others cited earlier, stand for a fundamental point – there is no authority to adjust the effective date of I.G.'s exclusion, which was set based on 42 C.F.R. § 1001.2002. That is precisely the result Petitioner wants to achieve, but the law does not allow it.

[10] Section 1001.123 as then in effect provided that the exclusion will be effective beginning 15 days from the date of the I.G.'s notice of exclusion. The I.G. added five days to allow for receipt of the notice by mail. The Board stated that Dr. Chang's exclusion, therefore, would be effective 20 days from May 18, 1989, the date of the exclusion notice. *Chang*, DAB No. 1198, at 2 n.1.

Lastly, Petitioner's own statements suggest awareness that the remedy he seeks is essentially one of equity. *See* RR at 7 (he "implore[s] the [Board] to ad[o]pt, what [he] would argue, is the only fair and equitable decision"). There is no question that Petitioner was convicted of a felony relating to the sale of prescriptions for a controlled substance. The I.G. lawfully imposed a mandatory minimum exclusion period of five years, to take effect on a date as prescribed by the regulations. To the extent the arguments may be considered a plea for equitable relief, Petitioner cites no authority that would permit the Board to grant such relief.

4. Petitioner has not been deprived of due process under the applicable authorities and raises certain due process arguments over which the Board has no authority.

Petitioner asserts that a "common sense analysis of the ALJ's finding indicates that [Petitioner's] due process rights were violated[]" because "[t]he ALJ basically [found] that under the CFR statutes cited no one is entitled to any relief once convicted of a crime." RR at 5. Petitioner writes, "[I]f there is no way that a 5 year exclusion can be adjusted in any way, there is no process at all . . . ." *Id.* at 6. Petitioner goes on to assert that the "extra one year and nine month exclusion that the ALJ says is mandatory punishes [him] on two occasions for the same conduct." *Id.* There is, as he says, a "clear analogy" between this punishment and "double jeopardy law." *Id.* Finally, Petitioner suggests that excluding him for an extra one year and nine months violates his liberty and property rights under the Fourteenth Amendment to the U.S. Constitution. *See id.*; Reply at 4.

Petitioner's arguments are without merit. First, we note that the scope of appeal rights in I.G. exclusion cases are set by the statute and regulations cited earlier. The Board does not have the authority to find the applicable law on exclusions invalid on constitutional grounds. *See, e.g.*, *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); *Susan Malady, R.N.*, DAB No. 1816 (2002).

Second, Petitioner has been afforded the full extent of administrative review process available to him. He availed himself of his right to ALJ review of the I.G.'s exclusion and to appeal the ALJ Decision to the Board. Petitioner does not point to any procedural irregularity below or argue that an applicable procedural requirement has not been complied with in the Board proceedings. In the case of mandatory exclusions, the focus of the administrative appeal is on whether the I.G. has demonstrated that the exclusion was authorized as a matter of fact and law. The fact that Petitioner has failed to articulate any basis to challenge the I.G.'s authority to impose a mandatory exclusion here does not mean that the opportunity to do so was meaningless.

As for the analogy to the prohibition of double jeopardy, Petitioner fails to show that the concept has any bearing on an I.G. exclusion appeal. Moreover, the courts and the Board have held that exclusions under section 1128 are civil and remedial sanctions, not criminal and punitive sanctions. *See, e.g.*, *Bickelhaupt*, DAB No. 2480, at 3-4, and cases cited therein. Thus, an I.G. exclusion does not subject a petitioner to double jeopardy. The Board has also noted that the courts have found providers have no constitutionally protected property interest in being allowed to continue participating in Medicare and Medicaid programs. *See, e.g., Connell*, 2007 WL 1266575, at *1; *Gregory J. Salko, M.D.*, DAB No. 2437, at 7 (2012) (citing *Erickson v. United States ex. rel. Dept. of Health and Human Servs.*, 67 F.3d 858, 862 (9th Cir. 1995)), *aff'd*, *Salko v. Sebelius*, No. 3:12CV515, 2013 WL 618779 (M.D. Pa. Feb. 19, 2013); *Robert F. Tzeng, M.D.*, DAB No. 2169, at 13 n.16 (2008) (citations to cases omitted here).

The ALJ did not find that a petitioner who is convicted of a crime is entitled to no relief at all. The ALJ found that the applicable law authorizes, and indeed requires, the I.G. to exclude Petitioner from program participation based on his conviction for a required minimum period of five years, which the ALJ was not empowered to reduce or to adjust the date on which the exclusion starts. ALJ Decision at 2-3. The ALJ was correct.

Conclusion

The Board upholds the ALJ Decision, which determined that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years and that the period of exclusion must be for a minimum of five years, effective 20 days from the date of the I.G.'s exclusion notice.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Susan S. Yim
Presiding Board Member