Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: September 25, 2006
Marcia C. Smith, a/k/a Marcia Ellison Smith,	
Petitioner,	Civil Remedies CR1470 App. Div. Docket No. A-06-111
	Decision No. 2046
- v. -	
Inspector General.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Marcia C. Smith, a/k/a Marcia Ellison Smith (Petitioner), appealed the July 5, 2006 decision by Administrative Law Judge (ALJ) Keith W. Sickendick. Marcia C. Smith, a/k/a Marcia Ellison Smith, DAB No. CR1470 (2006) (ALJ Decision). The ALJ Decision affirmed the Inspector General's (I.G.'s) imposition on Petitioner of a 12-year exclusion from participation in Medicare, Medicaid, and all other federal health programs. The I.G. increased the five-year minimum exclusion required by section 1128(a)(1) of the Social Security Act (Act) based on a determination that there were three aggravating factors and no mitigating factors. Petitioner asks that the length of the exclusion be reduced, arguing that she established the existence of two mitigating factors permitted by the regulations at 42 C.F.R. § 1001.102. For the reasons explained below, we find no merit in Petitioner's arguments and affirm the ALJ Decision.

Background[1]

Petitioner was a licensed professional counselor in Texas. I.G. Ex. 2, at 3; I.G. Ex. 4, at 23. In 2004, she pleaded no contest to a felony charge of aggregate theft from Texas Medicaid of more than $20,000 but less than $100,000 during the period December 4, 1995 through December 17, 2000. ALJ Decision at 3 (Finding of Fact 1). The charge was based on an audit conducted by the Texas Department of Health and Human Services which found that Petitioner made a total of 1158 false claims totalling $61,445.02 for services that she had not provided. I.G. Ex. 2, at 3. The court sentence included confinement for 180 days in the county jail, a fine of $200, 10 years of supervision, and restitution of $61,000. Id. (Finding of Fact 2).

On August 31, 2005, the I.G. notified Petitioner that she was to be excluded for 12 years under section 1128(a)(1) of the Act.[2] ALJ Decision at 3 (Finding of Fact 6). Section 1128(a)(1) requires the mandatory exclusion of any "individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under Title XVIII [of the Act] or under any State health care program." The exclusion must be for a period of not less than five years. Section 1128(c)(3)(B) of the Act; 42 C.F.R. § 1001.102(a). The regulations provide a list of aggravating factors that may be considered as a basis for imposing a longer exclusion period. Based on a finding of three aggravating factors, the I.G. extended the exclusion period to 12 years. The ALJ found that this period was not unreasonable based upon these aggravating factors. ALJ Decision at 4 (Conclusions of Law 5, 6, 7, and 10). If the exclusion period has been lengthened beyond five years based on an aggravating factor, one of several listed mitigating factors, but no others, may be considered to reduce the exclusion period, but in no case below five years. 42 C.F.R. § 1001.102(c). Petitioner has the burden of proving the existence of any mitigating factors by a

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[1] The following background information is drawn from the ALJ Decision and the record before the ALJ and summarized here for the convenience of the reader, but should not be treated as new findings.

[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.

preponderance of the evidence. 42 C.F.R. § 1005.15(b)(1), (d). Before the ALJ, Petitioner argued that the mitigating factors in sections 1001.102(c)(2) and 1001.102(c)(3)(ii) were present in her case. Section 1001.102(c)(2) states:

> 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 . . . .

Section 1001.102(c)(3)(ii) states:

> The individual's or entity's cooperation with Federal or State officials resulted in–
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> * * * * *
>
> (ii) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses. . . .

The ALJ concluded that Petitioner failed to prove the existence of these mitigating factors. ALJ Decision at 4 (Conclusion of Law 8). Thus, there was no basis for the ALJ to consider reducing the exclusion period. On appeal, Petitioner argues that she proved the existence of these mitigating factors and that the period of exclusion should be reduced.

Petitioner also argues that the regulations are unconstitutional because they prevent the consideration of mitigating factors other than those specified in the regulations. P. Br. at 1-2. In response to that argument below, the ALJ stated: "I am bound by the Secretary's regulations and my jurisdiction is limited by regulation to the issues specified above and does not extend to constitutional challenges to the Act or the Secretary's regulations." ALJ Decision at 10. Since Petitioner does not dispute that the ALJ may not find a regulation unconstitutional but raises her argument before the Board only to preserve her right to raise it in any federal court appeal, we need not address this argument. P. Br. at 2.

Petitioner's appeal does not identify the specific findings of fact and conclusions of law in the ALJ Decision to which Petitioner excepts. Based on Petitioner's arguments, however, we conclude that Petitioner excepts to Conclusion of Law 8 ("Petitioner has not established by a preponderance of the evidence any of the mitigating factors that I am authorized to consider under 42 C.F.R. § 1001.102(c)") and Conclusion of Law 10

("Exclusion of Petitioner for an additional period of 7 years, a total minimum period of exclusion of 12 years, is not unreasonable based upon the three aggravating factors").[3]

Standard of review

Our standard of review of the ALJ Decision to uphold the I.G.'s exclusion 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).

Analysis

We address in turn below Petitioner's arguments regarding each of the two mitigating factors that Petitioner alleges existed in her case. Since we uphold the ALJ's conclusion that Petitioner failed to prove the existence of any mitigating factors, we uphold without further discussion the ALJ's conclusion that there was no basis for reducing the 12-year exclusion period, which the I.G. lengthened from the five-year minimum period based on the existence of three aggravating factors.

The ALJ properly concluded that Petitioner failed to prove the existence of the mitigating factor at section 1001.102(c)(2).

With respect to this mitigating factor, the ALJ found that "the evidence shows that Petitioner had mental, emotional, or physical conditions and that she had the conditions before and/or during the commission of the offense." ALJ Decision at 11. However, the ALJ found that the third element necessary to invoke the mitigating factor, a finding by the sentencing court that Petitioner was less culpable for her offense due to her medical conditions, was missing. The ALJ concluded that the regulation does not require that the sentencing court make explicit findings as to any of the elements, citing the Board's statement in a prior decision that "it is sufficient to review the sentencing record as a whole and determine whether it would be reasonable to infer from the entire record that the presiding judge had made the determinations required by the regulation as part of the sentencing process." Id. at 11, quoting Arthur C. Haspel,

[3] These conclusions of law are discussed in the Analysis section of the ALJ Decision under the heading identified as 2.d.

D.P.M., DAB No. 1929 (2004), at 4.[4] The ALJ found, however, that there was not only no explicit finding by the judge that Petitioner's medical conditions rendered her less culpable, but also no basis for inferring that the judge made such a finding. The ALJ stated:

> Based on my review of all the evidence including the transcript of the sentencing proceeding, there is no indication that Judge Krocker considered Petitioner less culpable due to any medical condition (mental, emotional or physical) despite the fact that such evidence was of record before the judge. Indeed, in closing argument on sentencing, Petitioner's attorney never mentioned Petitioner's health issues as a basis for deferred adjudication. I.G. Ex. 4, at 30 (Sentencing transcript at pages 51-53). Further in examining his client during the sentencing proceeding, Petitioner's counsel asked her whether she had been diagnosed as suffering from depression. Petitioner agreed she had the diagnosis but testified that it had not hurt her career in any fashion. While defendant's objections to the presentence report [list] her ailments (P. Ex. 3, at 9, 59-61) and she offers numerous excuses for why billing errors occurred, it is never specifically argued that she was less culpable due to her medical problems. Thus, while there is some evidence that Petitioner represented to investigators that her medical problems affected her oversight of her Medicaid billings, this was never argued to Judge Krocker as a reason to find Petitioner less culpable or the basis for a lesser sentence of deferred adjudication.

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[4] In context, the Board's holding in Haspel was actually somewhat narrower than the language quoted by the ALJ suggests because the preceding sentence tied the application of this language to "cases where the judge would not need to make an explicit finding for purposes of the sentencing proceeding itself." Haspel at 4. In those cases, the Board concluded, "it would be unreasonable to apply the regulation by requiring an explicit finding by the presiding judge . . . ." Id. The ALJ here did not expressly determine whether the sentencing judge was required to make an explicit finding as part of the sentencing proceeding that Petitioner's medical conditions reduced her culpability. However, the ALJ's analysis assumes the judge was not required to do so. Thus, even assuming the ALJ inaccurately read the Board's holding in Haspel, there was no prejudice to Petitioner.

ALJ Decision at 12.

On appeal, Petitioner argues that, contrary to what the ALJ concluded, the record supports an inference that the judge found that Petitioner's medical conditions reduced her culpability for the offense of which she was convicted. Petitioner bases her argument on the fact that her response to the pre-sentencing report and the Medicaid investigator's report were before the judge. The ALJ rejected the notion that the mere presence of these documents in the record was enough to support an inference that Petitioner's medical conditions reduced her culpability, at least absent any argument to this effect before the judge. We agree. According to Petitioner, her response to the pre-sentencing report makes that argument in writing by listing several illnesses, referring to an attached doctor's summary of Petitioner's medical history, and stating generally, with respect to all of the information in the response, "the Defendant respectfully requests the court to consider the evidence presented herein when passing sentence." To the extent that this general request refers to the information regarding Petitioner's medical conditions, it is unclear what Petitioner wished the court to conclude from that information. Petitioner could have intended to imply, for example, that her health would deteriorate if she were incarcerated due to the lack of proper medical care, rather than that her medical conditions reduced her culpability for the offense of which she was convicted. This case stands in clear contrast to Haspel, where the Board's conclusion that an inference was warranted that the judge found the petitioner's culpability reduced by his drug addiction was based in important part on extensive testimony at the sentencing proceeding concerning the impact of the drug addiction on the petitioner at the time he committed the offenses. See Haspel at 5.

Petitioner also points to the statements in the Medicaid investigator's report to the effect that Petitioner or her defense counsel had cited illness as a reason why her recordkeeping was poor and why there were inadequate or missing patient files and other records. P. Br. at 6-7, citing P. Ex. 4, at 1-2. However, Petitioner's statements addressed only why her records were incomplete. They were not allegations of reduced culpability for the offense then being investigated and of which she was ultimately convicted – failure to provide the services for which she billed. Furthermore, Petitioner has not met her burden of showing that she relied on these statements, made in the course of the investigation, at the sentencing proceeding.

Petitioner also argues that the ALJ erred in relying on the fact that at the sentencing hearing, Petitioner's defense counsel "did

not focus on reduced culpability due to illness . . . ." P. Br. at 7. Petitioner takes the position that her defense counsel's "trial strategy" was to focus his examination on "those issues that remained inadequately addressed in the documentary evidence already in the record . . ." since "there was no need to rehash" areas already adequately addressed in the pre-sentencing material reviewed by the judge. Id. at 8. As indicated above, however, Petitioner has identified nothing in the materials before the judge indicating that Petitioner was arguing that her medical conditions reduced her culpability.

Moreover, there is no basis for Petitioner's assertion that "the limited scope of the questioning was in direct response to a statement by the trial judge" at the beginning of counsel's examination of Petitioner. P. Br. at 8. The judge stated that it was unnecessary for Petitioner to elicit information about Petitioner's family and children because this information was in the pre-sentencing report. I.G. Ex. 4, at 20. Clearly, the judge was not referring to information in the pre-sentencing report about Petitioner's medical conditions. In any event, the judge also stated, "I'm more than happy to hear anything you want me to hear . . . ." Id. Petitioner also notes that the judge stated that the pre-sentencing report was "very thorough" when she later declined Petitioner's counsel's tender of "the witnesses present in the courtroom for any question from the court or the State." P. Br. at 8, citing I.G. Ex. 4, at 29. Nothing in the judge's statement indicates that the judge was referring to the medical information in the pre-sentencing report. Neither is there any evidence that the witnesses would have addressed the issue of reduced culpability due to medical reasons. Finally, as the ALJ noted, Petitioner's attorney asked her if her diagnosed depression "hurt [her] in any way or hurt [her] career in any fashion," to which she replied "No, it has not." I.G. Ex. 4, at 29. The cited colloquy shows that Petitioner's counsel did not feel constrained from addressing Petitioner's medical conditions and undermines Petitioner's argument that it is reasonable to infer from the proceedings that the court determined that Petitioner's medical conditions reduced her culpability. Accordingly, the ALJ reasonably relied on the absence of any argument before the judge that Petitioner's culpability was reduced by her medical conditions in concluding that no inference was warranted that the court made a determination to that effect.

Petitioner also argues that the fact that the judge imposed a much lighter sentence than the 20 years in prison authorized by Texas law warrants an inference that the judge determined that Petitioner's medical conditions reduced her culpability. See P.

Br. at 9. However, for the reasons already stated, Petitioner has not carried her burden of proving that the lighter sentence was due, even in part, to a finding of reduced culpability. Indeed, the judge explicitly stated a different rationale for not sentencing Petitioner to an extended period of incarceration, i.e., that Petitioner had "done a lot of good things for a lot of people." I.G. Ex. 4, at 31. Moreover, the judge also stated that she "really didn't buy the no contest aspect of [Petitioner's] defense[.]" Id. This statement in the context of the sentencing proceeding indicates that the judge considered Petitioner more, not less, culpable than her no contest plea would suggest.

Thus, there is substantial evidence in the record to support the ALJ's conclusion that Petitioner failed to establish the existence of the mitigating factor at section 1001.102(c)(2) and her conclusion is legally correct.

The ALJ properly concluded that Petitioner failed to prove the existence of the mitigating factor at section 1001.102(c)(3)(ii).

With respect to this mitigating factor, the ALJ found that Petitioner had cooperated with state officials by "submitt[ing] to interviews by state investigators and turn[ing] over her Medicaid patient files for review" and that this resulted in the investigation of additional Medicaid claims submitted by Petitioner as well as in the issuance of two reports relating to the investigation of Petitioner. ALJ Decision at 12. The ALJ concluded, however, that this was not the type of cooperation contemplated by the regulation. Citing Stacey R. Gale, DAB No. 1941 (2004), the ALJ stated:

> [W]hat the regulation contemplates is a target giving information which results in the opening of a new case against another potential offender, or leads to reports being issued other than investigative reports about the target's own case. My reading of the language of the regulation is consistent with such a requirement. Thus, while it is apparent that Petitioner did cooperate in the investigation of her own case, Petitioner's was not the kind of cooperation required to establish a mitigating factor under 42 C.F.R. § 1001.102(c)(3). Petitioner provided information that expanded the investigation of her and the evidence does not show that any new case was opened against her or another. Further it is clear that the reports Petitioner points to in this case were reports documenting her misconduct and

> not reports identifying "program weakness or vulnerabilities" as specified in the regulation.

ALJ Decision at 13-14.

On appeal, Petitioner asserts that her "cooperation with authorities . . . is exactly [the] type of cooperation that is contemplated by the regulation . . ." P. Br. at 12. Petitioner continues:

> As stated in Stacey R. Gale, "the subsequent investigation does not have to prove that the information was well-founded or to result in any remedy or punishment, [but] it does at a minimum have to provide the official with a sufficient basis in his or her discretion to take further steps to begin an investigation of a new case." Here, not only did Petitioner's cooperation serve as a sufficient basis to investigate further cases, but the investigation went further and resulted in a greater amount of restitution and a larger recoupment by the State of fraudulently obtained money.

Id.[5]

Gale is not dispositive here since, as the ALJ Decision notes, the Board "did not specifically address whether it is sufficient for the target of an investigation to give information against itself that leads to an expanded or even a new investigation . . . ." ALJ Decision at 13. The Board in Gale nevertheless described the regulation as "designed to authorize mitigation for significant or valuable cooperation that yielded positive results for the state or federal government in the form of a **new case** actually being opened for investigation . . . ." Gale at 11 (emphasis added). Moreover, the Board noted that the preamble to the regulation rejected comments "suggesting that cooperation itself should be considered mitigating, regardless of whether **another** individual or entity was sanctioned . . . ." Gale at 12 (emphasis added). Thus, the Board read the regulation as contemplating a situation where the target of the original investigation (i.e., the person who later claims that the

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[5] Contrary to what Petitioner alleges, the expanded investigation of the existing case against her did not result in any increase in the amount of the restitution. See I.G. Ex. 4, at 22, 31.

mitigating factor applies) gives information that results in investigation of a new target or targets.

That reading is consistent with the language and context of the regulation. Section 1001.102(c)(3)(ii) refers to the investigation of "[a]dditional cases." Petitioner would have us view each additional Medicaid claim filed by Petitioner that was investigated as a result of her cooperation as an "additional case." However, the investigation of such additional Medicaid claims was simply an expanded investigation of the existing case against Petitioner.

In addition, sections 1001.102(c)(3)(i) and (iii) refer to cooperation that results in "**[o]thers** being convicted or excluded . . ." and the "imposition against **anyone**" of a civil money penalty (emphasis added). These provisions clearly apply to persons other than the target of the original investigation.[6] It is logical to read the intervening provision at section 1001.102(c)(3)(ii) as also applying to persons other than the target of the original investigation. Read in this manner, each part of section 1001.102(c)(3) identifies a different way in which the cooperation of the original target may affect another target or potential target in order to qualify as a mitigating factor.

Moreover, to read section 1001.102(c)(3)(ii) otherwise would expand its scope to cover virtually all situations in which an original target cooperates with the investigating authorities by turning over additional Medicaid files, since the result of such cooperation is likely to be the expansion of the investigation to additional claims. This would be contrary to the suggestion in the preamble to the final rule that the mitigating factor at section 1001.102(c)(3) should be viewed narrowly (i.e., that it is designed to accommodate "only significant cooperation"). See 57 Fed. Reg. 3298, 3315 (1992).

Petitioner also argues that, contrary to what the ALJ found, the reports in question "go much further than merely documenting Petitioner's misconduct" and constitute reports identifying program vulnerabilities and weaknesses within the meaning of

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[6] The word "anyone," although not restrictive per se, cannot reasonably be read in the context of this regulation to include the original target because it would make the imposition of an additional sanction on the excluded person a basis for reducing the length of his or her exclusion.

section 1001.102(c)(3)(ii). P. Br. at 14. According to Petitioner,

> [b]oth of these reports give an account in detail of various methods by which the Medicaid system may be defrauded, that is, identifying program vulnerabilities or weaknesses. . . . Indeed, both these reports detail specifics of how an ongoing scheme to defraud Medicaid had occurred and exposed areas of the Medicaid program that were susceptible to fraud, including diagnostic codes used for billing Medicaid patients, billing at an individual rate rather than group rate, and issuing single Medicaid cards identifying multiple beneficiaries.

Id. This argument is not persuasive. The documents on which Petitioner relies are an undated Memorandum of Interview regarding interviews with Petitioner on 1/24/01 and 2/27/01, prepared by Sgt. Inv. John McGuire, and a 3/28/02 Criminal Investigative Report prepared by Sgt. Johnny W. Kirtley. See ALJ Decision at 12, citing P. Exs. 4 and 5. These documents are not reports "issued" by a law enforcement agency identifying program vulnerabilities or weaknesses but are simply documents generated in the course of the investigation of a particular case and used only to prosecute the target of that investigation. Although the crime under investigation in this case might have exploited vulnerabilities or weaknesses in the Medicare program, these documents were not intended to identify such vulnerabilities and weaknesses – and do not do so – but set forth evidence gathered in a particular case. Treating these documents as reports within the meaning of the regulation would greatly expand the scope of the regulation, contrary to the suggestion in the regulatory history that the scope of section 1001.102(c)(3) is narrow. Moreover, as discussed above, it is logical to read all the parts of section 1001.102(c)(3) to refer to cooperation that affects persons other than the target of the original investigation.

Thus, there is substantial evidence in the record to support the ALJ's conclusion that Petitioner failed to establish the existence of the mitigating factor at section 1001.102(c)(3)(ii).

Conclusion

For the reasons explained above, we conclude that Petitioner failed to establish the existence of the mitigating factors at sections 1001.102(c)(2) and 1001.102(c)(3)(ii) and that Petitioner therefore demonstrated no basis for reducing the 12-

year exclusion period. We therefore affirm and adopt all of the Findings of Fact and Conclusions of Law in the ALJ Decision.

/s/
Judith A. Ballard

/s/
Donald F. Garrett

/s/
Sheila Ann Hegy
Presiding Board Member