Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: January 8, 2007
Henry L. Gupton,	
Petitioner,	Civil Remedies CR1505 App. Div. Docket No. A-07-6
	Decision No. 2058
- v. -	
Inspector General.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

On October 17, 2006, Henry L. Gupton (Dr. Gupton or Petitioner) appealed the September 14, 2006 decision of Administrative Law Judge (ALJ) Keith W. Sickendick. Henry L. Gupton, DAB CR1505 (2006) (ALJ Decision). The ALJ upheld the Inspector General's (I.G.) mandatory five-year exclusion of Petitioner from participation in Medicare, Medicaid and all federal health care programs under section 1128(a)(1) of the Social Security Act (Act).[1] The exclusion was based on Dr. Gupton's conviction for a criminal offense related to the delivery of an item or service under a state health care program. Petitioner argued that he was not convicted within the meaning of the Act because his criminal

[1] 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.

record was expunged after he completed the requirements of a deferral program. We agree with the ALJ that the statutory definition of conviction is sufficiently broad to include the criminal proceedings related to Petitioner's offense. We therefore affirm the exclusion as imposed by the I.G. and upheld by the ALJ.

ALJ Decision and Issues on Appeal

The ALJ made the following four findings of fact:

> 1. The I.G. notified Petitioner by letter dated February 28, 2006, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Act based upon his conviction of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.
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> 2. On September 19, 2005, Petitioner appeared in the Criminal Court for Anderson County, Tennessee, and entered a plea of *nolo contendere* (no contest) to a charge of attempted TennCare [state health care] Fraud; the plea was accepted; the court ordered that further proceedings be deferred and that Petitioner be placed on supervised probation for 60 days on condition that he pay restitution of $3,851.40 and obey all laws; and the court ordered that at the end of the deferral period the charge of attempted TennCare Fraud be dismissed and the record expunged if Petitioner complied with the specified conditions. I.G. Ex. 2.
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> 3. On December 19, 2005, Judge Elledge of the Criminal Court for Anderson County, Tennessee, ordered that the charge be dismissed, *nunc pro tunc* (I.G. Ex. 4) and issued an order for expungement of records related to the criminal case against Petitioner (P. Ex. 4).
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> 4. Petitioner timely requested a hearing by letter dated March 13, 2006.

ALJ Decision at 2-3 (footnote omitted).

Petitioner excepts to the first finding of fact, but does not question the accuracy of the factual statement contained therein. Petitioner Br. at 2-3. Petitioner contests instead the statement in the finding that his exclusion was "based upon his conviction of a criminal offense," because he contends that he was not

convicted of any offense. Id. at 2, quoting first finding of fact. Since the factual finding merely states the basis which the I.G. provided for the exclusion in the notice to Petitioner, without making any conclusion as to whether the basis was well founded, we affirm this finding of fact without further discussion. We address below the legal question of whether the facts set out establish a "conviction" under the Act. Similarly, Petitioner challenges the second finding of fact but only to the extent that it "concludes that Petitioner Gupton was 'convicted' of any criminal offense on the basis that he was ordered to pay 'restitution of $3,851.40.'" Id. at 4. Again, the challenge is not to the accuracy of the factual statements but rather to their legal significance. We therefore address this contention in relation to the exceptions taken to the legal conclusions and summarily affirm this finding of fact as well.

The ALJ reached the following four conclusions of law:

> 1. Petitioner's request for hearing was timely and I have jurisdiction.
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> 2. Summary judgment is appropriate.
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> 3. Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Act.
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> 4. Petitioner was convicted of an offense related to the delivery of an item or service under Medicare or a state health program.
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> 5. There is a basis for Petitioner's exclusion pursuant to section 1128(a)(1) of the Act.

ALJ Decision at 3 (citation omitted).

Petitioner excepts to the last three conclusions of law. He alleges that they are erroneous because he was convicted of no crime since the charges against him were dismissed and his record expunged.[2] The outcome in this case thus turns on this single issue.

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[2] Although he excepts to the fourth conclusion of law, Petitioner does not argue that the offense involved was not "related to the delivery of an item or service under Medicare or a state health program," but rather only argues that he was not "convicted" of the offense.

Applicable Legal Authority

Section 1128(a)(1) of the Act provides that the Secretary shall exclude any individual from participation in any federal health care program (as defined in section 1128B(f)) who has been "convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program." Section 1128(i) specifically defines "conviction," for purposes of determining whether an exclusion applies, as meaning:

> (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
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> (2) when there has been a finding of guilt against the individual or entity by a Federal, state, or local court;
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> (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or
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> (4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years.

Standard of review

We review an ALJ decision involving an I.G. exclusion 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

1. The ALJ did not err in finding that Petitioner was "convicted" as that term is used in section 1128(i) of the Act.

The ALJ found that Petitioner met the plain terms of the statutory definition of "conviction" here based on the court's

acceptance of Petitioner's plea of no contest and upon Petitioner's participation in an arrangement in which entry of a judgment was withheld. ALJ Decision at 6-7, relying on section 1128(i)(3) and (4) of the Act. Petitioner did not deny either the nature of his plea or the fact of its acceptance, nor did he deny that he entered an agreement with the prosecutor under which final adjudication and judgment was deferred. Petitioner pointed out below and again argues before us that the ultimate expungement of his record after completing the terms imposed by his plea agreement effectively negated the existence of any "conviction." The ALJ concluded that, to the contrary, the statute expressly states that an expungement of the judgment or other criminal record does not serve to negate the statutory effect of the conviction. Id. Further, the ALJ found no indication that Congress intended a subsequent expungement to negate the fact that a no contest plea was accepted, and noted that Petitioner cited no cases that supported his position. Id. Thus, the ALJ determined that the later expungement did not alter the finding that Petitioner was "convicted" within the meaning of the Act.

The Board has frequently addressed claims by petitioners that the I.G. lacked authority to exclude them because they should not be considered to have been "convicted" under the law of their state,[3] and has consistently rejected these arguments on the

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[3] Petitioner cites Tennessee Code Annotated §40-35-313(b) as providing that an expungement order has the effect of restoring "the person, in contemplation of the law, to the status the person occupied before such arrest or indictment or information." Petitioner Br. at 5. Notably, even the state courts recognize that this provision does not completely undo the consequences of the crime itself. Thus, the Supreme Court of Tennessee has explained as follows:

> Expungement returns the person to the position "occupied before such arrest or indictment or information." Tenn. Code Ann. § 40-35-313(b). Expungement does not return a person to the position occupied prior to committing the offense. Defendants obtaining expungement may have committed criminal acts resulting in lasting physical, emotional, or financial injuries to victims. In many cases, the injured victims cannot be returned to the status quo. Accordingly, the law would blind itself to reality if the law refused to recognize

(continued...)

ground that the federal statute governs the meaning of "convicted" in these cases. For example, as long ago as 1993, the Board reviewed an exclusion based on a conviction relating to patient abuse or neglect under section 1128(a)(2) of the Act which relies on the same definition of "conviction" under section 1128(i). Carolyn Westin, DAB No. 1381 (1993), aff'd sub nom Westin v. Shalala, 845 F. Supp. 1446 (D. Kan. 1994). Westin argued that she was not convicted of a crime when she pled nolo contendere, and "was placed on probation for one year, after which time the county court dismissed her plea 'nunc pro tunc'" and advised her that "this arrangement would result in expungement of her record as if no conviction had occurred." DAB No. 1381, at 4-5. The Board held that the federal definition, not the state law, governed, explaining as follows:

> . . . Congress has defined for the ALJ and this Board what "convicted" means for purposes of section 1128 and that definition is binding on us. Moreover, it is clear from the legislative history of this provision that Congress adopted such broad definitions to ensure that exclusions from federally funded health programs would not hinge on state criminal justice policies. The Committee Report recommending adoption of this definition expressly discussed first offender and deferred adjudication programs stating –
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> > These criminal dispositions may well represent rational criminal justice policy. The Committee is concerned, however, that individuals who have entered guilty or nolo pleas to criminal charges of defrauding the Medicaid program are not subject to the exclusion from either Medicare or Medicaid. These individuals have admitted that they engaged in criminal abuse against a Federal health program and, in the view of the Committee, they should be subject to exclusion.

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[3](...continued)
these criminal acts and accord them any legal significance whatsoever.

State v. Schindler, 986 S.W.2d 209, 211 (Tenn. 1999) (concluding the judge could properly consider information in presentencing report about prior crimes as evidence of prior bad acts even though the convictions were expunged).

> H.R. Rep. No. 727, 99th Cong., 2d Sess. 75, reprinted in 1986 U.S.C.C.A.N. 3607, 3665.

DAB No. 1381, at 6.

The rationale for the different meanings of "conviction" for state criminal law versus federal exclusion law purposes follows from the distinct goals involved. The goals of criminal law generally involve punishment and rehabilitation of the offender, possibly deterrence of future misconduct by the same or other persons, and various public policy goals.[4] Exclusions imposed by the I.G., by contrast, are civil sanctions, designed to protect the beneficiaries of health care programs and the federal fisc, and are thus remedial in nature rather than primarily punitive or deterrent. See, e.g., Patel v. Thompson, 319 F.3d 1317 (11th Cir. 2003), cert. den. 539 U.S. 959 and Manocchio v. Kusserow, 961 F.2d 1539, 1543 (11th Cir. 1992); Dr. Darren James, D.P.M., DAB No. 1828 (2002). In the effort to protect both beneficiaries and funds, Congress could logically conclude that it was better to exclude providers whose involvement in the criminal system raised serious concerns about their integrity and

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[4] For example, in discussing the balancing of punishment, rehabilitation and deterrence in a state health care fraud case, the Tennessee Court of Criminal Appeals held that --

> it is reasonable to conclude that a denial of pretrial diversion may reflect the appropriate seriousness of the defendant's criminal conduct and the particular need to deter others who are similarly situated and are tempted to violate the law to a similar extent. Health care providers are often respected members of the community for whom highly favorable pretrial investigative reports and background checks would normally be expected. It is difficult to quarrel with the thinking of the prosecutor, inherent in his denial, that to say such a person, including the defendant, will be entitled to pretrial diversion in a case of such extensive, planned criminal conduct occurring in a government program which has experienced increasing provider fraud is not the best message to send to other health care providers participating in the program.

State v. Carr, 861 S.W.2d 850, 859 (Tenn. Crim. Ct. App. 1993).

trustworthiness, even if they were not subjected to criminal sanctions for reasons of state policy. In proceedings at the state level, the state's law about the effect of an expunged conviction may control. In these proceedings, however, the federal definition of "conviction" must apply to the question of whether a statutory basis of exclusion exists.

Given how well established the principle is that the term "conviction" under the Act extends to diverted, deferred and expunged convictions regardless of whether state law treats such actions as a conviction, we might have declined review of the ALJ Decision. We did not do so because Petitioner presented what the ALJ characterized as "a creative bit of statutory interpretation," to which we now turn. ALJ Decision at 6.

Petitioner's statutory interpretation argument begins from the assumption that each subsection of the definition of "conviction" constitutes a "singular, mutually exclusive" definition of the term. Petitioner based this assertion on the use of the disjunctive "or" between the subsections of section 1128(i) of the Act. Petitioner Br. at 6. The four subsections are repeated below for convenience in following the argument, with the portions to which Petitioner cites for support highlighted in bold:

> (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, **regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged**;
>
> (2) when there has been a finding of guilt against the individual or entity by a Federal, state, or local court;
>
> (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; **or**
>
> (4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

Petitioner notes that only subsection (1) refers to expungement of conviction or other criminal record. Petitioner Br. at 6. Subsection (1) cannot apply, however, according to Petitioner, because he "has not been subjected to any 'judgment of

conviction,' as contemplated by" subsection (1). Id. Petitioner further observes that none of the other subsections address the effect to be given to an expungement such as occurred in Petitioner's case. Petitioner argues that Congress expressly chose to include the language about expungement only in the case of entry of judgment of conviction, and must be assumed to have acted deliberately in omitting that language from the other subsections. Id. at 7-8. Hence, a no contest plea or alternative arrangement which is subsequently subject to expungement cannot constitute a "conviction," according to Petitioner's reasoning.

Petitioner contends that the text is unambiguous in this regard and cites to Hamdan v. Rumsfeld, ___ U.S. ___, 126 S.Ct. 2749, at 2765 (2006) for the proposition that a "negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." Petitioner also relies on Burlington Northern & Santa Fe R.R. v. White, ___ U.S. ___, 126 S.Ct. 2405 (2006). Petitioner Br. at 9. The Court in Burlington considered two provisions in title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2 and 2000e-3, the former defining "unlawful employment practice" for purposes of prohibiting discrimination and the latter defining the same term for purposes of prohibiting retaliation. The first definition expressly listed "compensation, terms, conditions, or privileges of employment," while the second did not so specify the area of prohibited discrimination. The Court concluded in that case that the use of different words should be construed as intentional choice by Congress and given effect. 126 S.Ct. at 2412-13. Based on these sources, Petitioner concludes that "the plain language . . . precludes exclusion where, as here, there was a no contest plea or the participant entered into a state court judicial diversion program when all records relating to the arrest, prosecution and other matters, have been expunged by lawful order of the state court." Petitioner Br. at 10.

It is undoubtedly a common principle of statutory construction that the plain language, if unambiguous, controls. It is indeed a common canon of construction that Congress should be presumed to act intentionally in its choice to use different words in otherwise parallel sections of a statute. We do not, however, agree with Petitioner that either concept applies to produce the interpretation he propounds.

Petitioner's proposed reading of section 1128(i) is hardly compelled by the plain language. The plain language provides that a person is "convicted" for purposes of an exclusion whenever s/he has had a judgment of conviction entered against

him/her or has been found guilty in court or has had a court accept a plea of guilty or nolo contendere or has entered into any program deferring or withholding judgment. As the ALJ found, Petitioner here has had a plea of nolo contendere accepted by a court, satisfying the plain language of subsection (3) and has also entered into an arrangement whereby judgment was deferred or withheld, satisfying the plain language of subsection (4). ALJ Decision at 6-7.

Petitioner's argument might, at best, create some ambiguity about the scope of those subsections which do not expressly address the situation of expungement. The logic of the argument would follow only if the same clause would be expected to appear in the other three subsections, absent an intention that expungement of records negate the existence of a conviction. It is entirely reasonable, however, to read the section as in essence specifying that conviction is to be understood very broadly as including even situations where the judgment has been expunged, where a finding of guilt or a plea of guilty or no contest has been accepted by a court (that is, even where no judgment of conviction has been entered so that they are not already covered by subsection (1)), and where a diversion arrangement of some kind permits the person to avoid entry of judgment against them. In other words, the four subsections provide four extensions of the meaning of the term "conviction" beyond what might otherwise be considered its ordinary scope. The expungement provision would logically be called for only to make clear that a final judgment will still constitute conviction for federal exclusion purposes even if expunged for state law purposes. The three other provisions deal with cases where no judgment may even have been entered so there is no need to specifically address what would happen if the criminal records were expunged. The statute simply treats the person as convicted for federal exclusion purposes even if the state considers the offender not to be convicted of a crime where the judgment is expunged, or the person pled no contest (without admitting guilt), or admitted guilt (without entry of a judgment of conviction), or participated in an alternative arrangement resulting in no judgment of conviction.

That this reading is the preferable, if not the only plausible, interpretation of section 1128(i) is made evident by the legislative history of the provision which the Board has discussed in prior decisions. For example, Carolyn Westin's plea of nolo contendere, like that of Petitioner, was accepted but dismissed nunc pro tunc after a period of probation, and she similarly challenged the ALJ's determination that she was "convicted" for purposes of the Act, especially given that the

state court told her that her record would be expunged "as if no conviction had occurred." DAB No. 1381, at 5. The Board nevertheless upheld the ALJ's conclusion that Westin satisfied subsections 3 and 4. DAB No. 1381, at 6; see also Mark K. Mileski, DAB No. 1945 (2004). The legislative history provided further context for the addition of the definition of "conviction" in the following committee report discussion:

> According to the Office of the Inspector General, about 10 percent of the criminal dispositions of cases of criminal abuse against Medicare or Medicaid cannot be the basis for an exclusion under current law. In FY 1985, of 447 criminal dispositions obtained by the State Medicaid fraud control units, 49 convictions were found to be outside the scope of section 1128(a); accordingly, there was no Federal exclusion from Medicare or Medicaid in these cases.
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> The principal criminal dispositions to which the exclusion remedy does not apply are the 'first offender' or 'deferred adjudication' dispositions. It is the Committee's understanding that States are increasingly opting to dispose of criminal cases through such programs, where judgment of conviction is withheld. The Committee is informed that State first offender or deferred adjudication programs typically consist of a procedure whereby an individual pleads guilty or nolo contendere to criminal charges, but the court withholds the actual entry of a judgment of conviction against them and instead imposes certain conditions of probation, such as community service or a given number of months of good behavior. If the individual successfully complies with these terms, the case is dismissed entirely without a judgment of conviction ever being entered.

1986 U.S.C.C.A.N. 3607, at 3665. Clearly, Congress understood the definition to reach the situation described where no judgment of conviction is entered. This is consistent with congressional intent, recognized by the Board in prior cases, that the mandatory exclusion provisions be read broadly to effectuate their goal of maintaining the integrity of the programs. See, e.g., Kenneth M. Behr, DAB No. 1997, at 7-8 (2005), and cases cited therein. Hence, even if we saw ambiguity in the provisions on which Petitioner relies to contest the fact of his "conviction," we would read the statute in the manner most consistent with its intended policy purposes.

The committee report also explains the intention as to expungement as follows:

> With respect to convictions that are 'expunged,' the **Committee intends to include all instances of conviction which are removed from the criminal record of an individual** for any reason other than the vacating of the conviction itself, e.g., a conviction which is vacated on appeal.

1986 U.S.C.C.A.N. 3607, at 3665 (emphasis added). This clear expression of congressional intent further undermines the plausibility of Petitioner's assertion that, by the mention of expungement in subsection (1), Congress meant to imply that all other forms of conviction could be negated by expungement.

We conclude that the ALJ correctly determined that the I.G. had the authority to exclude Petitioner based on his conviction within the meaning of the Act.

2. The Act does not permit collateral attack on conviction by claims of innocence or appeals to equity.

Petitioner offers considerable detail on the circumstances surrounding the indictment against him and the ultimate disposition of the criminal case. The essential claim he makes is that he was coerced into providing Ritalin to a former patient and family members as a result of credible threats to his safety which he had reported to the law enforcement authorities. P. Ex. 5, at 2. He provides evidence that the prosecutors verified this information and considered it in agreeing to the arrangement in the plea bargain based on this situation. P. Ex. 6, at 2-3.

This argument is at its core one of equity, i.e., that it is simply unfair under the circumstances for Petitioner to be excluded because his nolo contendere plea did not reflect real culpability where he acted under coercion. The ALJ is not empowered to alter federal law based on general notions of equity or fairness. See 42 C.F.R. §§ 1005.4(c)(1); 1001.2007(a). Similar arguments have been rejected in numerous cases, including Westin, in which the Board explained as follows:

> [W]e have held that an ALJ is not required to determine the "guilt or innocence" of a party as to the conduct on which the state action is based before affirming a petitioner's exclusion by the I.G. Behrooz Bassim, M.D., DAB 1333 at 9-10 (1992). Our conclusion is consistent with the legislative history and purpose of

> those sections of the Act authorizing derivative exclusions. There would be no point in relying on these actions if they could be reopened and relitigated during the exclusion proceedings.
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> Consequently, all of Petitioner's arguments about her intentions or understandings when she pled nolo contendere, and her claim that she is innocent of any wrongdoing unless the I.G proves her guilty, are irrelevant. As we stated in Peter J. Edmonson, DAB 1330 (1992),
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> > It is the fact of the conviction which causes the exclusion. The law does not permit the Secretary to look behind the conviction. Instead, Congress intended the Secretary to exclude potentially untrustworthy individuals or entities based on criminal convictions. This provides protection for federally funded programs and their beneficiaries and recipients, without expending program resources to duplicate existing criminal processes.
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> Edmonson at 4.

DAB No. 1381, at 9-10 (emphasis in original); 42 C.F.R. § 1001.2007(d)(forbidding collateral attacks on state convictions on any substantive or procedural grounds). We conclude that the ALJ was not required to adjudicate the circumstances of the offense and conviction or Petitioner's degree of culpability, but instead was required to uphold the mandatory minimum exclusion once he found that I.G. had a basis to impose the exclusion under the Act.

Petitioner also contends that the exclusion period is "over-reaching" by the I.G., because he is "now subject to a five year, career devastating exclusion based upon prescriptions totaling $427.44 from which no agency maintains that Dr. Gupton unlawfully or wrongfully benefitted or profited." Petitioner Br. at 11. Further, Petitioner argues that the ALJ and I.G. were wrong to rely on the larger amount of restitution ordered by the court ($3,851.40) to justify a five-year exclusion. Id.

These contentions are also in essence pleas for equity on the grounds that the length of the exclusion is excessive based on the particular circumstances which Petitioner asserts about the offense. The contentions have no merit, however, because the length of the exclusion imposed by the I.G. is the minimum mandated by the statute. Section 1128(a) of the Act. The I.G.,

the ALJ and the Board all lack discretion to reduce the exclusion below the statutory minimum.

Conclusion

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

/s/
Judith A. Ballard

/s/
Donald F. Garrett

/s/
Leslie A. Sussan
Presiding Board Member