

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:)	DATE: July 31, 2009
)	
Breton Lee Morgan, M.D.,)	
Petitioner,)	Civil Remedies CR1913
)	App. Div. Docket No. A-09-74
)	
)	Decision No. 2264
- v. -)	
)	
The Inspector General.)	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Breton Lee Morgan, M.D. (Petitioner) appealed the March 3, 2009 decision of Administrative Law Judge (ALJ) Richard J. Smith to uphold the Inspector General's (I.G.) determination to exclude him from participating in Medicare, Medicaid, and all other federal health care programs for a minimum period of five years. Breton Lee Morgan, M.D., DAB CR1913 (2009) (ALJ Decision). The ALJ found that based upon Petitioner's felony conviction for obtaining controlled substances by fraud, the I.G. had a basis to exclude Petitioner for a period of five years under section 1128(a)(3) of the Social Security Act (Act), which mandates the exclusion of any individual who is convicted of a felony offense "relating to fraud, theft, embezzlement, or other financial misconduct" in connection with the delivery of a health care item or service. Petitioner contends that section 1123(a)(3) applies only to a criminal offense that involves "financial misconduct." Petitioner pled guilty to fraudulently obtaining free samples of hydrocodone from pharmaceutical representatives that were intended for his patients but

diverted for his personal use. However, Petitioner argues his conviction was not related to "financial misconduct" because he did not have any corrupt motive or receive any substantial pecuniary benefit. For the reasons discussed below, we affirm the ALJ Decision, although based on a slightly different rationale than the one relied upon by the ALJ.

Applicable Law

Section 1128(a)(3) of the Act,¹ entitled "Felony conviction relating to health care fraud," requires, in pertinent part, the exclusion from participation in any federal health care program (as defined in section 1128B(f)) of any individual who "has been convicted for an offense . . . under Federal or State law, in connection with the delivery of a health care item or service . . . consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct."² (Emphasis added). The regulation implementing section 1128(a)(3) is found at 42 C.F.R. § 1001.101(c)(1). The Act defines "convicted" to include, among other things, "when a judgment of conviction has been entered against the individual . . . by a Federal . . . court . . . [;]" or "when there has been a finding of guilt against the individual . . . by a Federal . . . court;" or "when a plea of guilty . . . by the individual has been accepted by a Federal . . . court." Sections 1128(i)(1)-(3) of the Act; 42 C.F.R. § 1001.2. The mandatory minimum period of exclusion for an individual

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, and the U.S.C.A. Popular Name Table for Acts of Congress.

² Section 1128(a)(3) applies only to felony convictions that occurred after August 21, 1996, the date of enactment of the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191. The final adjudication of guilt, judgment of conviction, and acceptance of guilty plea by the court in Petitioner's case occurred on March 12, 2007. I.G. Ex. 5.

subject to section 1128(a)(3) is five years. Section 1128(c)(3)(B) of the Act; 42 C.F.R. § 1001.102(a).

Case Background³

In a letter dated May 30, 2008, the I.G. informed Petitioner, a physician licensed in West Virginia, that he was being excluded from participation in federal health care programs for five years pursuant to section 1128(a)(3) of the Act. I.G. Ex. 1. The I.G. imposed the exclusion based on Petitioner's felony conviction in the United States District Court for the Southern District of West Virginia for a single count of obtaining a controlled substance by fraud in violation of 21 U.S.C. § 843(a)(3).⁴ See I.G. Exs. 1-5. Specifically, Petitioner pled guilty "based upon his act of obtaining free samples of hydrocodone [a Schedule III controlled substance] from pharmaceutical representatives for his own personal use by leading them to believe that the samples would be given to patients for their use." Petitioner's Answer Brief (P. Answer Br.) at 1; see also I.G. Exs. 2, at 29 (count 28 of the Indictment); 3; and 5; P. Ex. E, at 23, 27, 30.

Petitioner filed a timely request for a hearing before the ALJ to challenge the exclusion. The parties subsequently agreed to forego an in-person hearing and have the matter decided on their written submissions. ALJ Decision at 2. There was no dispute between the parties about the facts underlying Petitioner's felony conviction for obtaining a controlled substance by fraud. Id. at 5. Petitioner's only contention before the ALJ was that he should not have been excluded because he was not convicted of a criminal offense involving "financial misconduct" within the meaning of section 1128(a)(3) of the Act. Id.; see also P. Answer Br. at 1. Petitioner argued:

³ The information presented in the background section and in our analysis is from the ALJ Decision and the record and is undisputed. This information should not be treated as new findings.

⁴ The statute at 21 U.S.C. § 843(a)(3) provides: "It shall be unlawful for any person knowingly or intentionally - (3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge."

The use of the word "other" in [section] 1128(a)(3) indicates that the various offenses described therein are limited to those involving financial misconduct. As a result, a finding of corrupt motive in order to achieve financial gain is necessary in order for an exclusion to be warranted. If this were not true, there would be no reason to have the word "other" in the statute.

P. Answer Br. at 2. The I.G. responded that "Petitioner was convicted for [sic] 'Obtaining a Schedule III Controlled Substance by Fraud,' in violation of 21 U.S.C. § 843(a)(3), an offense which on its face is a crime of fraud and therefore a crime that 'relates to fraud' for the purpose of exclusion under section 1128(a)(3)." I.G. Reply Br. at 2. The I.G. also argued that the interpretation urged by Petitioner is contrary to Congress's intent in enacting the exclusion statute and to prior Board decisions in section 1128(a)(3) cases. Id.

In a written decision dated March 3, 2009, the ALJ found that the I.G. had a basis for excluding Petitioner for a period of five years. In rejecting Petitioner's argument, the ALJ found that "any violation of 21 U.S.C. § 843(a)(3) must necessarily involve a fraudulent act as contemplated by the first alternative term in section 1128(a)(3) [i.e., a criminal offense consisting of a felony relating to fraud]." ALJ Decision at 5. The ALJ further found that "[t]o read that statute so as to limit its reach, as Petitioner argues, only to crimes of falseness, deceit, or dishonesty involving money would be unreasonable in light of [section 1128(a)(3)'s] clear purpose and goal" to protect federal funds and program beneficiaries from untrustworthy individuals and the deterrence of health care fraud. Id. at 6. Finally, the ALJ found that neither the Board nor other ALJ decisions have addressed the precise issue raised by Petitioner here and that none of the decisions cited by Petitioner support the "suggestion that the reach of section 1128(a)(3) is limited to crimes involving financial or monetary gain or loss." Id.

Standard of Review

The Board's standard of review with respect to a disputed issue of law is whether the ALJ's decision is erroneous. 42 C.F.R. § 1005.21(h).

Analysis

The issue before the Board is whether the ALJ erroneously concluded that Petitioner's conviction of a felony criminal offense of obtaining controlled substances by fraud constitutes a basis for the I.G. to impose an exclusion under section 1128(a)(3). Reiterating the same argument the ALJ rejected, Petitioner contends the ALJ "[D]ecision should be reversed, as [Petitioner] has not been convicted of a criminal offense involving 'financial misconduct' within the meaning of [section] 1128(a)(3) of the . . . Act." P. App. Br. at 1. Petitioner further contends that "[t]he ALJ's refusal to recognize the significance of the phrase 'other financial misconduct' reads the word 'other' out of the statute . . . [in violation of the] well established [maxim] that when construing a statute, effect should be given, if possible, to every word Congress used." Id. at 3 (citations omitted). Petitioner thus continues to maintain that "a finding of corrupt motive in order to achieve financial gain is necessary in order for an exclusion to be warranted" under section 1128(a)(3). Id. Petitioner also argues that past Board and ALJ decisions established that section 1128(a)(3) applies only when there is "substantial pecuniary gain." Id. at 4.

A cardinal rule of statutory interpretation is that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers the statute's purposes. See e.g., General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581, 596 (2004); United Savings Ass'n v. Timbers of Inwood Forest Associates, 484 U.S. 365, 371 (1988). Thus, the meaning of a specific statutory directive is determined by reference to the language itself, the specific context in which that language is used, by purposes inferred from those directives or from the statute as a whole, and by the statute's overall structure. Robinson v. Shell Oil, 519 U.S. 337, 341 (1997) (citations omitted); Green v. Bock Laundry Machine Co., 490 U.S. 504, 528 (1990). As discussed below, consideration of those factors in this case leads us to conclude that Petitioner's narrow interpretation of section 1128(a)(3) is not compatible with the structure and context of the statutory language as a whole because it would, in effect, change the commonly accepted meaning of "fraud" to be limited only to those criminal offenses where the individual has a corrupt motive to effectuate a substantial pecuniary gain. Such a narrow interpretation of the statute is also not

consistent with the statutory purposes of protecting federal funds and program beneficiaries from untrustworthy individuals and deterring health care fraud.

Petitioner's felony conviction relates to fraud within the meaning of section 1128(a)(3).

We find no error in the ALJ's conclusion that Petitioner's conviction of obtaining controlled substances by fraud under 21 U.S.C. § 843(a)(3) was the "purest form of crimen falsi [and therefore] must necessarily involve a fraudulent act as contemplated by the first alternative term in section 1128(a)(3)'s second essential element." ALJ Decision at 5. Petitioner acknowledges underlying conduct related to fraud. P. Br. at 1. The clear and unequivocal language of section 1128(a)(3) applies to a felony conviction involving an offense relating to fraud. In this case, the criminal offense of fraud listed in section 1128(a)(3) squarely fits the crime for which Petitioner was convicted. As the ALJ correctly found, under the plain language of section 1128(a)(3), the conduct underlying Petitioner's criminal offense provides a basis for the I.G. to exclude him. ALJ Decision at 5-6.

The phrase "other financial misconduct" does not limit the meaning of the term "fraud" in section 1128(a)(3) to felonies involving financial misconduct.

Our inquiry would end here except that the meaning of the word "other" used in modifying the phrase "financial misconduct" is not clear on its face. The maxim that all words in a statute should be given meaning does not compel the interpretation urged by Petitioner if it is possible to construe the term "other" in section 1128(a)(3) so that it is not rendered superfluous. According to Petitioner, the word "other" would be rendered superfluous unless read to limit previously listed offenses to those related to "financial misconduct." Contrary to Petitioner's argument, however, we conclude that the phrase "other financial misconduct" used at the end of the series of specific criminal offenses separated by the disjunctive "or" can be read in a sensible way as referring to the specifically enumerated crimes "theft" and "embezzlement" that are financial in nature, rather than to all of the crimes listed. Thus, the word "other" can be given meaning without reading it as a limit on the term "fraud," which does not necessarily connote a financial crime.

This interpretation is consistent with the well-established principle that the use of the disjunctive "or" means that only one of the listed requirements in a series needs to be satisfied, not every one. See, e.g., Zorich v. Long Beach Fire and Ambulance Serv., 118 F.3d 682, 684 (9th Cir. 1997); United States v. O'Driscoll, 761 F.2d 589, 597-98 (10th Cir. 1985). A corollary of this principle is that use of the disjunctive "or" creates "mutually exclusive" conditions that can rule out mixing and matching of various items in a series. United States v. Williams, 326 F.3d 535, 541 (4th Cir. 2003). Thus, the term "fraud" in section 1128(a)(3) can reasonably be read as standing alone without reference to the last item in the series. The sentence structure similarly indicates that the word "other" is merely part of a general catchall phrase that does not modify the meaning of each of the previously enumerated specific criminal offenses such as fraud. See, e.g., Harrison v. PPG Industries, Inc., 446 U.S. 578, 589 (1980) ("the general language of the catchall phrase, 'any other final action,' must obviously give way to specific express provisions in the Act."). Thus, the structure and context of the statutory language support the conclusion that the terms "fraud, theft, embezzlement, breach of fiduciary responsibility" are reasonably read as alternative terms that are not modified or limited by the phrase "other financial misconduct."⁵

Indeed, if the Board were to adopt the narrow interpretation that Petitioner urges, then in effect we would be modifying the terms "fraud" and "breach of fiduciary responsibility" in a manner that would change their plain or otherwise commonly accepted meaning. The Board has previously been reluctant to "read into the exclusion provisions requirements that are not contained in the literal language of the law," Lyle Kai, R.Ph., DAB No. 1979, at 10 (2005), aff'd, Kai v. Leavitt, Civ. No. 05-00514 BMK (D. Haw. July 17, 2006), and we decline to do so here. As we have articulated, there is a reasonable

⁵ The I.G. also relies upon the "rule of the last antecedent," under which "a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows." I.G. Response Br. at 8-9, citing Barnhart v. Thomas, 540 U.S. 20, 26 (2003). Given the structure of this statute, this rule does not apply here, and we do not rely on it in reaching our decision.

and sensible reading of the word "other" that does not render it superfluous.

Our reading is further supported by the structure of the statute. Petitioner in essence reads section 1128(a)(3) as listing examples of criminal offenses that could be stated directly by referring to "financial misconduct, such as fraud, theft, embezzlement, or breach of fiduciary responsibility." The fact that financial misconduct is referred to only in a catchall phrase at the end of a sentence indicates that Congress did not intend to limit the scope of section 1128(a)(3) to encompass only crimes of financial misconduct.

The title of section 1128(a)(3) is similarly instructive. Although "it has long been established that the title of an Act 'cannot enlarge or confer powers,'" Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 19 n.14 (1981) (citations omitted), the title of a statute or section "can aid in resolving an ambiguity in the legislation's text." INS v. National Center for Immigrants' Rights, 502 U.S. 183, 189-90 (1991) (citations omitted). Section 1128(a)(3) is entitled "Felony conviction relating to health care fraud." Here, we squarely meet one of the purposes of section 1128(a)(3), deterrence of health care fraud. In Jeremy Robinson, DAB No. 1905 (2004), the Board stated:

When Congress added section 1128(a)(3) in 1996, it again focused upon the desired deterrent effect: "greater deterrence was needed to protect the Medicare program from providers who have been convicted of health care fraud felonies"

Jeremy Robinson at 3-4 (emphasis added), citing H.R. Rep. 496(I), 104th Cong., 2nd Sess. (1996), reprinted in 1996 U.S.C.C.A.N. 1865, 1886; Joann Fletcher Cash, DAB No. 1725, at 18, 15 (2000) (discussing trustworthiness and deterrence). The statute is not entitled "Felony convictions relating to financial misconduct." The title of section 1128(a)(3) is thus consistent with the conclusion that Congress intended the statute to relate to health care fraud felonies, and not be limited in its reach to only felonies involving financial misconduct.

**Our conclusion is consistent with the legislative history
and statutory purposes of section 1128(a)(3).**

Reading the word "other" to refer back to only some of the criminal offenses covered by the preceding list is also consistent with the legislative history of the statute. As the ALJ noted, the Board has previously found that the "exclusion remedy serves twin congressional purposes: the protection of federal funds and program beneficiaries from untrustworthy individuals and the deterrence of health care fraud." Jeremy Robinson at 3, citing S. Rep. No. 109, 100th Cong., 1st Sess. (1987), reprinted in 1987 U.S.C.C.A.N. 682, 686 ("clear and strong deterrent"); Joann Fletcher Cash at 18, 15 (discussing trustworthiness and deterrence).

Moreover, Petitioner cites nothing in the statutory language or the corresponding regulation to support his argument that a prior finding of a corrupt motive to achieve a substantial pecuniary gain is necessary before the I.G. may impose an exclusion under section 1128(a)(3).⁶ The legislative history provides no suggestion that Congress intended to limit the scope of section 1128(a)(3) to only those criminal offenses where an individual has demonstrated a corrupt motive or achieved a substantial pecuniary gain. Instead, the legislative history reveals that Congress intended the statute to be broadly applied to protect the program from individuals who are not trustworthy. See Kenneth M. Behr, DAB No. 1997, at 7 (2005) (addressing Congress's "intent that the mandatory exclusion authority be used broadly to protect the integrity of covered programs"); Napoleon S. Maminta, M.D., DAB No. 1135 (1990) (discussing the legislative history of section 1128(a) and its support for broad coverage).

Petitioner's view of section 1128(a)(3) is one that we find at odds with Congress's intent that the mandatory exclusion authority be used broadly to protect the integrity of covered programs and prevent the misuse of program funds. Under Petitioner's reading of the statute, an individual could be convicted of a crime relating to fraud yet not be subject to the reach of section 1128(a)(3) even though such conduct

⁶ The corresponding regulation at 42 C.F.R. § 1001.101(c), like the statute, contains no exception for the circumstances that Petitioner believes take his offense outside the scope of the exclusion authority.

would indicate an individual is not trustworthy. Petitioner does not deny or otherwise challenge the I.G.'s contention that he "falsely and fraudulently represent[ed] to pharmaceutical representatives that he would deliver free samples of prescription [pain] medications to patients, but instead kept the samples for his own use without ever delivering them to patients, [which] demonstrates his untrustworthiness and the risk he poses to Federal health care programs and beneficiaries." I.G. App. Response Br. at 12.

Prior Board and ALJ decisions do not support Petitioner's argument that section 1128(a)(3) requires a finding of corrupt motive to achieve substantial pecuniary gain.

As the ALJ correctly observed, the Board has not squarely addressed the issue raised by the Petitioner in this case. ALJ Decision at 6. The closest case on point cited by the I.G. is Andrew D. Goddard, DAB No. 2032, at 6 (2006), where the Board ruled: "Nothing in section 1128(a)(3) or the corresponding regulation requires that the health care item have 'significant' or 'substantial' monetary value." The Board further stated in Goddard:

There is also no requirement that the excluded person reap a profit from the misconduct. In addition, the statute and regulation contain no exceptions for felony offenses involving small or *de minimis* quantities of drugs, drugs that are not controlled substances, or drugs that are taken for purposes other than resale or abuse by the defendant.

Id. (emphasis added). Although Petitioner correctly points out that Goddard was addressing a different issue than the one raised here (i.e., whether a criminal offense was in connection with the delivery of a health care item or service), our analysis there is not inconsistent with our analysis here and supports our decision not to read into the statutory term "fraud" a limitation to financial crimes not expressly provided by Congress.

Petitioner cites to three ALJ decisions in which individuals were excluded under sections 1128(a)(3) or 1128(b)(1) of the Act for felonies involving fraudulent conduct that included a financial motive or elements. P. App. Br. at 3-4, citing Edward J. Levine, M.D., DAB CR735 (2006); Michael M. Bouer,

DAB CR345 (1994); and Leonard S. Dino, Ph., DAB CR260 (1993). Petitioner argues that the ALJ decision in Levine "best illustrated" Petitioner's proposition that "in the absence of financial misconduct, exclusion is not warranted" under section 1128(a)(3) because Dr. Levine was excluded on the basis that he had "realized substantial pecuniary gain" by selling and/or trading drug samples for profit. Id. Petitioner further contends that the ALJ decisions in Bouer and Dino "reveal that the scope of [section] 1128(a)(3) . . . is limited to situations in which the licensed professional has been convicted of felonies in which diverted drugs were sold, or in which the Petitioner had paid money to obtain drug samples."⁷ P. App. Br. at 4.

It is important to note initially that ALJ decisions, while possibly instructive in some situations, are not binding on the Board. None of the three cited ALJ decisions, however, supports Petitioner's argument. The mere fact that individuals have been excluded where the facts showed a financial motive or element does not mean that an individual cannot be excluded under section 1128(a)(3) without the presence of such a motive or element. Petitioner's reliance on Bouer is also misplaced because in that case the mere act of misrepresentation was found to be sufficient to establish that the petitioner's conduct was "related to fraud" within the meaning of the statute. Although a felony conviction of an offense related to financial misconduct certainly would be sufficient to come within the ambit of section 1128(a)(3), there is no language in any of these ALJ decisions that supports Petitioner's narrow interpretation of the statute that such conduct is a necessary predicate. Instead, we agree with the ALJ's conclusion in this case that prior Board and ALJ decisions do not suggest that the scope of section 1128(a)(3) is limited to circumstances where the conduct

⁷ Bouer and Dino were decided in 1994 and 1993, respectively, under a prior version of section 1128(b)(1) of the Act, which applied to an individual "convicted . . . of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." In 1996, Congress enacted the current version of section 1128(a)(3) and amended section 1128(b)(1), among other things, to encompass a misdemeanor conviction involving the previously listed categories of criminal offenses relating to fraud. See Public Law No. 104-191.

underlying the felony conviction showed financial gain. See ALJ Decision at 6, and cases cited therein.

Petitioner's felony conviction involved a financial component or pecuniary gain.

Finally, the I.G. contends that, even if the Board were to accept Petitioner's narrow interpretation of section 1128(a)(3), "the exclusion should still be upheld because there is arguably a financial component to the fraud he committed."⁸ I.G. App. Response Br. at 13. The only evidence Petitioner cites to support his assertion that his criminal conviction did not involve financial misconduct is the sentencing judge's oblique statement during the plea colloquy that "[i]t does not seem that he did this for any sort of financial benefit." P. Ex. E, at 24. This solitary statement is insufficient to support a conclusion that Petitioner received no financial benefit from his criminal conduct. The judge's statement does not constitute a finding that Petitioner's conduct did not have a financial component. Rather, the judge's statement appears to be speculation about Petitioner's motive, which we have already determined is not relevant here. It is also logical to assume from the inconclusive language "does not seem" that the judge did not rule out that Petitioner received a financial benefit even if that was, in fact, not his motive. We also note the judge's statement that Petitioner "abused his opportunity to obtain these sample drugs for a period of years. This was certainly not a one-time or short-duration event. Rather, he continued this for a long time." Id. at 27.

⁸ Petitioner argues that the I.G. "presumably waived" the argument that there is a financial component to the underlying his criminal offense because it was "not been raised through the course of these proceedings." P. Reply Br. at 1. Petitioner does not cite to any legal authority to support his argument. The regulation at 42 C.F.R. § 1005.21 provides: "The DAB will not consider any issue not raised in the parties' briefs, nor any issue that could have been raised before the ALJ but was not." However, this regulation does not preclude the Board from considering a party's response to an issue raised by the opponent on appeal. Because Petitioner raised this issue on appeal, the I.G. is entitled to respond, and the Board can consider that response.

Regardless of what the sentencing judge meant, we agree with the I.G. that the undisputed facts in this case demonstrate that Petitioner received a financial benefit from his misconduct because he did not have to pay for the hydrocodone pills over an extended period of time. The drug samples certainly had a financial value to both the pharmaceutical manufacturer and to Petitioner. Similarly, he deprived his patients in rural West Virginia of the opportunity to receive free pharmaceutical samples, thereby causing his patients to pay for pain drugs they needed for legitimate medical treatment.⁹ Thus, the facts indicate Petitioner derived some unquantifiable measure of pecuniary value by illegally diverting the controlled substances over an extended period of time to feed his addiction. Petitioner has not cited to any commonly accepted definition of "financial misconduct" that would exclude the circumstances herein. At the very least, Petitioner cannot reasonably maintain that his criminal conduct in fact resulted in no financial benefit (or pecuniary gain), even if it was not the motive for his crime.

Conclusion

For the reasons explained above, we uphold the ALJ Decision and affirm and adopt each of the ALJ's findings of fact and conclusions of law.

_____/s/_____
Judith A. Ballard

_____/s/_____
Sheila Ann Hegy

_____/s/_____
Stephen M. Godek
Presiding Board Member

⁹ Petitioner's conduct also appears to constitute a breach of the trust inherent in the physician-patient relationship that may constitute a breach of fiduciary responsibility within the meaning of section 1128(a)(3).