Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Ethan Edwin Bickelhaupt, M.D.
Docket No. A-12-104
Decision No. 2480
October 2, 2012

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Ethan Edwin Bickelhaupt, M.D. (Petitioner), appeals the June 18, 2012 decision of Administrative Law Judge (ALJ) Keith W. Sickendick. *Ethan Edwin Bickelhaupt, M.D.*, DAB CR2554 (2012) (ALJ Decision). In that decision, the ALJ upheld the Inspector General's (I.G.'s) decision to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs for a period of five years pursuant to section 1128(a)(4) of the Social Security Act (Act). Petitioner concedes that there is a basis for his exclusion and does not challenge the exclusion period. Instead, he questions the legality of section 1128(a)(4) and the I.G.'s notice of exclusion letter and objects to the ALJ's decision not to consider one of his exhibits. For the reasons stated below, we affirm the ALJ Decision.

Statutory and Regulatory Background

Section 1128(a)(4) of the Act requires the Secretary of Health and Human Services (Secretary) to exclude from participation in all federal health care programs any individual 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 exclusion that is mandatory under the Act. When an individual appeals his exclusion before an ALJ, if the exclusion is mandatory and is imposed for the statutory minimum five-year period, the individual may request a hearing only on whether the basis for imposing the exclusion exists. 42 C.F.R. § 1001.2007(a)(1), (2).

Case Background[1]

In 2010 Petitioner pled guilty in federal court to distributing a controlled substance outside the scope of professional practice and not for a legitimate medical purpose, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), and to obtaining a controlled substance by misrepresentation, fraud, deception, and subterfuge, in violation of 21 U.S.C. § 843(a)(3) and (d). I.G. Ex. 2, at 1-2; Ex. 4, at 1, 3. The court sentenced him to three years' probation. I.G. Ex. 2, at 3. The I.G. subsequently notified Petitioner that it was excluding him from participation in all federal health care programs for the minimum statutory period of five years. I.G. Ex. 1, at 1. The notice letter explained that Petitioner was being excluded pursuant to section 1128(a)(4) of the Act based on his felony convictions. *Id.*

Petitioner requested a hearing before an ALJ to challenge his exclusion. Both Petitioner and the I.G. moved for summary judgment. Petitioner conceded that his convictions provided a basis for excluding him pursuant to section 1128(a)(4) and did not question the length of his exclusion, but argued that excluding him would violate the Double Jeopardy and Equal Protection clauses of the Fifth Amendment and the Rehabilitation Act. Br. in Support of P's Cross-Motion for S.J. at 2, 24-50. He also contended that the notice letters he received from the I.G. regarding his exclusion were deficient and that through the notices the I.G. established new rules about the scope and effect of exclusions without following the requirements of the Administrative Procedure Act (APA). *Id.* at 11-24. In support of his motion for summary judgment, Petitioner submitted, *inter alia*, an affidavit from Dr. Daniel H. Angres (Angres Affidavit), a psychiatrist who treated him for substance abuse and subsequently got him a job working for the treatment program. *See* P. Ex. 2.

The I.G. asserted that Petitioner received proper notice of his exclusion and that the exclusion was appropriate under section 1128(a)(4). I.G.'s Resp. to P's Cross-Motion for S.J. at 2-5. In addition, the I.G. contended that the ALJ could not hear Petitioner's regulatory, constitutional, and statutory arguments, and that those arguments were meritless. *Id.* at 5-12. The I.G. also objected to the Angres Affidavit on the grounds that it was an improper attempt to offer expert testimony and did not contain any relevant information. I.G.'s Obj. to P. Ex. 2, at 1-2.

The ALJ sustained the I.G.'s relevancy objection to the Angres Affidavit and granted the I.G.'s motion for summary judgment. ALJ Decision at 3, 5. The ALJ concluded that Petitioner's convictions provided a basis for his exclusion under section 1128(a)(4) and that there was no issue about the reasonableness of the period of exclusion because the five-year period imposed was the minimum authorized under the Act. ALJ Decision at 5-

[1] Background information is drawn from the ALJ Decision and the record before the ALJ and is not intended to substitute for his findings.

6. The ALJ further determined that that the notices of exclusion the I.G. sent to Petitioner complied with the regulatory requirements and that in any event Petitioner was not prejudiced by a defect in the notices. *Id.* at 6. Finally, the ALJ concluded that he did not have jurisdiction to consider Petitioner's challenges to the lawfulness of the Act and the regulations. *Id.*
Petitioner timely appealed the ALJ's decision to the Board.

Standard of Review

The standard of review on a disputed issue of law is whether the decision is erroneous. The standard of review on a disputed issue of fact is whether the decision is supported by substantial evidence on the record as a whole. 42 C.F.R. § 1005.21(h). The Board will not disturb an ALJ's otherwise appropriate ruling on the admission or exclusion of evidence for any error unless the failure to do so appears to be inconsistent with substantial justice. *Id.* § 1005.23.

Analysis

1. The ALJ did not err in refusing to entertain Petitioner's challenges to section 1128(a)(4) and the I.G.'s actions, and in any event those challenges are meritless.

On appeal, Petitioner does not challenge the ALJ's conclusion that his felony convictions provided a basis for his exclusion under section 1128(a)(4) and that his five-year period of exclusion is the minimum period mandated under the Act. Petitioner also concedes that the ALJ lacked authority to rule on the lawfulness or constitutionality of section 1128(a)(4) and the propriety of the I.G.'s actions under the APA, but he argues that he has "preserved those issues for appeal" and so he re-raises them before the Board. RR at 2.

The ALJ correctly noted that an ALJ does not have the authority to "[f]ind invalid or refuse to follow Federal statutes or regulations." ALJ Decision at 6, citing 42 C.F.R. § 1005.4(c)(1). An ALJ also cannot "[e]njoin any act of the Secretary" or her delegate. 42 C.F.R. § 1005.4(c)(4). The 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. *See Kenneth M. Behr*, DAB No. 1997, at 10 (2005); *Keith Michael Everman, D.C.*, DAB No. 1880, at 12 (2003). Furthermore, as we briefly explain below, Petitioner's arguments are meritless.

Petitioner contests his exclusion on Double Jeopardy grounds, but courts and the Board have repeatedly held that exclusions under section 1128 are civil and remedial, not criminal and punitive. *See, e.g., Lisa Alice Gantt*, DAB No. 2065, at 4 (2007), and cases cited therein; *Behr*, DAB No. 1997, at 10; *Joann Fletcher Cash*, DAB No. 1725 (2000). Petitioner's attempts to distinguish those decisions are unpersuasive. He focuses mainly

on a House committee report that explains the committee proposed to add section 1128(a)(4) to the Act because it "felt that greater deterrence was needed to protect the Medicare program from providers who have been convicted of health care, [sic] fraud felonies and felonies relating to controlled substances." H. Rep. No. 496(I), 104th Cong., 2d Sess. (1996), *reprinted in* 1996 U.S.C.C.A.N. 1865, 1883. Petitioner maintains that this "clearly reveals" section 1128(a)(4) was added to deter, and quotes *United States v. Hudson*, 522 U.S. 93, 105 (1997), for the proposition that deterrence is a "traditional goal of criminal punishment." RR at 15. The reference to "deterrence" in the legislative history of section 1128(a)(4) does not demonstrate a punitive intent in light of the overall remedial purpose and context of the exclusion provision. Indeed, in *Manocchio v. Kusserow*, the Eleventh Circuit rejected a similar argument regarding section 1128(a)(1) that also was based on a legislative history reference to "deterrence." The Court reasoned that "the legislative history, taken as a whole, demonstrates that the primary goal of the legislation is to protect present and future Medicare beneficiaries from the abusers of these programs. Therefore, since the legislative intent of the exclusionary period is to protect the public, the sanction is remedial, not punitive." 961 F.2d 1539, 1542 (11th Cir. 1992). The same reasoning applies equally to section 1128(a)(4).

Petitioner's Equal Protection challenge is also easily disposed of. He contends that section 1128(a)(4) excludes individuals whose crimes had no connection with any federal health care program, and so does not rationally advance the governmental purpose of protecting federal health care programs and their beneficiaries from fraud and abuse. RR at 32-33. Petitioner is correct that section 1128(a)(4) does not require a link between an excluded individual's felony controlled substance conviction and the provision of federal health care services. But it is logical to infer that a provider with such a conviction is untrustworthy. Thus, excluding providers with those convictions is a rational means of protecting federal health care programs and beneficiaries. *See, e.g., Susan Malady, R.N.*, DAB No. 1816, at 9 (2002) (noting that the "purpose of section 1128 is to protect federal health care programs and the programs' beneficiaries and recipients from untrustworthy providers," and that a provider convicted of a crime described in section 1128(a) is "presumed by Congress to be untrustworthy"); *Cash*, DAB No. 1725, at 10 (same). Moreover, controlled substances may be prescribed or otherwise used as health care items, and the crimes covered by section 1128(a)(4) may result in the diversion of those substances from their intended medical use. So there is a rational relationship between the exclusion and the government's protective goal.

The other arguments raised by Petitioner are based on similarly false premises. He asserts that his crimes were solely the result of his disease of addiction, and so his exclusion violates the Rehabilitation Act. RR at 36-37. To the contrary, his exclusion is based on his felony controlled substance convictions, which are not synonymous with drug addiction. As a district court explained in rejecting a nearly identical argument, while it might be true that the "possession of controlled substances by a person with drug dependence is part and parcel of the disability," it does not follow that "illegal

prescription writing is a behavior that cannot be separated from the underlying disability of drug dependence." *Scheidler v. Secretary of Health & Human Servs.*, No. 1:04CV404SSBTSH, 2006 WL 689107, at *4 (S.D. Ohio Feb. 2, 2006) (magistrate report & recommendation).

In addition, Petitioner argues that the attachment to the notice of exclusion letter he received from the I.G. explained the impact of his exclusion more broadly than is provided for in the regulations. He maintains that the I.G. needed, but failed, to follow the procedural requirements of the APA before applying the language in the attachment regarding the scope and effect of an exclusion. He further asserts that he was prejudiced by the text of the attachment because the addiction treatment program that had employed him mistakenly terminated his employment based on the letter. According to Petitioner, his employment did not conflict with his exclusion because the program for which he worked did not receive any federal funding. RR at 5-10.

In support of his argument, Petitioner relies on 5 U.S.C. § 552(a)(1)(E), which provides in relevant part that a person may not be "adversely affected by" a matter that is not published in the *Federal Register* as required "[e]xcept to the extent that a person has actual and timely notice of the terms thereof." However, as the I.G. pointed out before the ALJ, the information in the attachment is based on a bulletin that *was* published in the *Federal Register*. *See* 64 Fed. Reg. 52,791 (Sept. 30, 1999). Moreover, Petitioner does not dispute that he received timely and actual notice of the I.G.'s interpretation of the effect of his exclusion. Nor does he point to any language in the notice that specifically indicated that his employment in a capacity for which no federal funds were claimed would violate the terms of the exclusion. It appears that Petitioner's real complaint is with the treatment program's counsel, who apparently misread the notice letter to mean that his employment could not continue. *See* RR at 9.

2. The ALJ did not err in refusing to consider the Angres Affidavit.

Petitioner also argues that the ALJ should have considered the Angres Affidavit because, he says, it was relevant to his APA and Double Jeopardy arguments. RR at 4. He asserts that Dr. Angres's testimony establishes that the treatment program terminated Petitioner's employment based on the program's interpretation of the notice of exclusion letter from the I.G. *Id.* He also maintains that Dr. Angres's discussion of addiction and assertion that Petitioner never defrauded a health care program or harmed a Federal or state health care beneficiary demonstrates that his exclusion serves a punitive rather than remedial purpose. *Id.* at 5.

We find no error in the ALJ's decision to exclude the Angres Affidavit, and certainly no error that offends substantial justice. Petitioner's evidentiary challenge is inconsistent with his concession that the ALJ's reviewing authority was limited by regulation. An ALJ "must exclude irrelevant or immaterial evidence," 42 C.F.R. § 1005.17(c), and the

ALJ correctly refused to admit the affidavit on the ground that it was "not relevant to any issue [he could] decide." ALJ Decision at 3. The affidavit *is* relevant to Petitioner's other arguments, which he arguably needed to raise at the administrative level to preserve them for federal court. But the effect of the ALJ's ruling here was merely to exclude the affidavit from the "record for the decision" by the ALJ and the Board. 42 C.F.R. § 1005.18(b). As the ALJ indicated, because the affidavit was a proffered exhibit, it is still part of the administrative record for purposes of any court review. ALJ Decision at 3.

Conclusion

For the foregoing reasons, we affirm the ALJ Decision.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member