Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Robert Seung-Bok Lee
Docket No. A-15-17
Decision No. 2614
January 7, 2015

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Robert Seung-Bok Lee (Petitioner) appeals the October 17, 2014 decision of an administrative law judge (ALJ) sustaining Petitioner's exclusion from all federal health care programs for 13 years. *Robert Seung-Bok Lee*, DAB CR3421 (2014) (ALJ Decision). The Inspector General of the Department of Health and Human Services (I.G.) excluded Petitioner under section 1128(a)(1) of the Social Security Act[1] (Act) based on his conviction in a New Hampshire state court for the crime of felony theft. The ALJ concluded that this was a criminal offense related to the delivery of a health care item or service under Medicare or a state health care program within the meaning of the Act and that the conviction therefore provided a basis for the exclusion. The ALJ further concluded that the 13-year exclusion period imposed by the I.G. was reasonable based on three aggravating factors and no mitigating factors. On appeal, Petitioner does not dispute that there is a basis for the exclusion but argues that the ALJ erred in concluding that a 13-year exclusion is reasonable.

For the reasons set forth below, we affirm the ALJ Decision.

Legal Background

Section 1128(a)(1) of the Act requires the Secretary of the Department of Health and Human Services to exclude from participation in Medicare, Medicaid, and all federal health care programs any individual who "has been convicted of a criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program." The Secretary has delegated her exclusion authority to the I.G. *See* 42 C.F.R. § 1001.101(b).

[1] The current version of the Social Security Act can be found at http://www.ssa.gov/OP_Home/ssact/ssact-toc.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

Five years is the minimum period of an exclusion under section 1128(a)(1). Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2). That period may be lengthened based on application of the aggravating factors in 42 C.F.R. § 1001.102(b). If an exclusion period is extended based on application of one or more aggravating factors, any applicable mitigating factors may then be used to reduce the period to no less than five years. Section 1001.102(c). "Only the…factors" listed in section 1001.102(c)(1)-(3) "may be considered mitigating[.]" *Id.*

The aggravating factors at issue in this case are:

> (1) The acts resulting in the conviction, or similar acts, that caused, or were intended to cause, a financial loss to a Government program or to one or more entities of $5,000 or more. (The entire amount of financial loss to such programs or entities, including any amounts resulting from similar acts not adjudicated, will be considered regardless of whether full or partial restitution has been made);
>
> (2) The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more;
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> *******
>
> (5) The sentence imposed by the court included incarceration[.][2]

Section 1001.102(b)(1), (2), (5).

Section 1001.2001(a) provides that--

> if the OIG [Office of Inspector General] proposes to exclude an individual or entity..., it will send written notice of its intent, the basis for the proposed exclusion and the potential effect of an exclusion. Within 30 days of receipt of notice, which will be deemed to be 5 days after the date on the notice, the individual or entity may submit documentary evidence and written argument concerning whether the exclusion is warranted and any related issues.

42 C.F.R. § 1001.2001(a). "If the OIG determines that exclusion is warranted, it will send a written notice of this decision to the affected individual or entity," and the "exclusion will be effective 20 days from the date of the notice." 42 C.F.R. § 1001.2002(a), (b).

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[2] "Incarceration" is defined as "imprisonment or any type of confinement with or without supervised release, including, but not limited to, community confinement, house arrest, and home detention." 42 C.F.R. § 1001.2(d).

An excluded individual may request a hearing before an ALJ, but only on the issues of whether the I.G. had a basis for the exclusion and whether the length of the exclusion is unreasonable. 42 C.F.R. §§ 1001.2007(a), 1005.2(a). Any party dissatisfied with the ALJ's decision may appeal to the Board. Section 1005.21(a).

Factual Background[3]

On August 5, 2013, Petitioner pled guilty in the Merrimack County Superior Court, State of New Hampshire, to one count of Theft by Deception, a Class A felony, in violation of N.H. Rev. Stat. Ann. § 637:4. The charge was based on Petitioner's receipt of payments from Medicaid for Employed Adults with Disabilities (MEAD) program, a part of the New Hampshire Medicaid Program. The payments were made for personal care services that Petitioner, who had complete paralysis in his lower limbs and limited use of his upper extremities, falsely claimed he was receiving after he moved to Maryland from New Hampshire. Over a period of more than eight years, Petitioner wrongfully received a total of $150,000. The court sentenced Petitioner to incarceration for a maximum of four years and a minimum of two years. The court also ordered Petitioner to pay $150,000 in restitution to the New Hampshire State Attorney General's office. ALJ Decision at 1-2, 4.

By letter dated February 28, 2014, the I.G. notified Petitioner that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 13 years. I.G. Ex. 1.[4] The letter explained that the exclusion was based on Petitioner's "conviction as defined in section1128(i) [of the Act]… of a criminal offense related to the delivery of an item or service under the Medicare or a State health care program…." *Id*. at 1. The letter also explained that the period of exclusion was greater than the five-year minimum term required under section 1128(c)(3)(B) of the Act based on the aggravating factors in section 1001.102(b)(1), (2), and (5). *Id*. Specifically, the letter stated that the I.G.'s records contain evidence of the following circumstances: the court ordered Petitioner to pay $150,000 in restitution; the acts that resulted in the conviction occurred from about May 2003 to about September 2011; and the court sentenced Petitioner to not more than four years and not less than two years incarceration. *Id*. at 1-2.

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

[4] A copy of a letter dated December 15, 2013 notifying Petitioner of the I.G.'s intent to exclude him for a period of 13 years is in the record at I.G. Exhibit 4. As discussed later, Petitioner contends he did not receive this letter.

The ALJ Decision

Petitioner requested a hearing before an ALJ to challenge the I.G.'s imposition of a 13-year exclusion. Since neither party requested an in-person hearing, the ALJ based his decision "on the written record of the parties' briefs and documentary evidence." ALJ Decision at 2. The ALJ sustained "the I.G.'s exclusion of Petitioner for 13 years, effective March 20, 2014" (*id*. at 9) based on the following numbered Findings of Fact and Conclusions of Law (FFCL):

1. A basis exists for the I.G. to exclude Petitioner pursuant to section 1128(a)(1) of the Act.
2. The exclusion of Petitioner for 13 years is within a reasonable range.
   a. The acts resulting in Petitioner's conviction caused, or were intended to cause, a loss to a government program of $5,000 or more.
   b. The acts resulting in Petitioner's conviction occurred over a period of one year or more.
   c. The court's sentencing of Petitioner included incarceration.
   d. Petitioner has presented no mitigating factors that I can legally accept to justify reduction of the exclusionary period.

ALJ Decision at 4-8.

In his discussion of FFCL 2.a., the ALJ found that there was a loss of $150,000 to a government program and that this was an exceptional aggravating factor because the amount was 30 times greater than the $5,000 minimum. *Id*. at 6.

In his discussion of FFCL 2.b., the ALJ found that for approximately eight years, Petitioner prepared and submitted weekly timesheets for personal services that were never provided to him, and that the length of his conduct showed a "prolonged lack of integrity" that supported the 13-year exclusion. *Id*. at 7.

In his discussion of FFCL 2.c., the ALJ found that Petitioner's sentence of incarceration for two to four years "demonstrates the severity of the fraudulent scheme Petitioner directed" and that this aggravating factor thus "bears substantial weight[.]" *Id.* at 7.

In his discussion of FFCL 2.d., the ALJ stated that Petitioner "acknowledges that none of the identified mitigating factors listed in 42 C.F.R. § 1001.102(c) apply in his case." *Id*. at 8.

Standard of Review

Our standard of review of an exclusion imposed by the I.G. is established by regulation. We review a disputed issue of fact as to "whether the initial decision is supported by substantial evidence on the whole record." 42 C.F.R. § 1005.21(h). We review a disputed issue of law as to "whether the initial decision is erroneous." 42 C.F.R. § 1005.21(h).

Analysis

On appeal, Petitioner does not dispute that none of the mitigating factors listed in section 1001.102(c) apply in his case. Instead, Petitioner argues primarily that the ALJ erred in "refus[ing] to consider…extenuating circumstances" in "determining how much weight, if any, to give to the three identified aggravating factors[.]" P. Appellate Br. at 8-9. According to Petitioner, since section 1001.102(b) "states that the IG and ALJ 'may consider' certain factors as aggravating, then in order to determine how much weight, if any, he 'may' wish to give to the aggravating factors in question, the IG (and later the ALJ) in fairness must consider all of the factual circumstances that pertain to that factor." *Id*. at 10.

Petitioner argues specifically that, in determining how much weight to give the aggravating factor in section 1001.102(b)(1), the ALJ should have considered that Petitioner made "full restitution of the $150,000…even before the IG became involved in this matter[.]" *Id*. at 9. Petitioner acknowledges that section 1001.102(b)(1) "states that the entire loss will be considered regardless of whether restitution has been made" but maintains that this section "DOES NOT instruct the IG or the ALJ to ignore whether restitution has been made in deciding what weight to give" this aggravating factor. *Id*., n.5 (emphasis in original). In addition, Petitioner says, in determining the weight to give the aggravating factor in section 1001.102(b)(2), the ALJ should have taken into account that "throughout the eight year period, Petitioner was eligible to receive approximately $150,000 in comparable benefits from the Maryland Medicaid Program" so that "the net loss to the Government over that eight year period was in effect zero in that Maryland Medicaid never paid to Petitioner any of the $150,000 in benefits it would have owed if Petitioner had only applied for benefits in Maryland." *Id*. Finally, Petitioner says, in determining how much weight to give the aggravating factor in section 1001.102(b)(5), the ALJ should have considered that "the actual sentence imposed called for home confinement only and thus Petitioner has not served even one day in a New Hampshire jail." *Id*.

The Board has stated that when determining whether an exclusion period "falls within a reasonable range, the ALJ must weigh the aggravating and mitigating factors" and "must evaluate the quality of the circumstances surrounding these factors." *Jeremy Robinson*, DAB No. 1905, at 11 (2004) (citing *Keith Michael Everman, D.C.*, DAB No. 1880, at 10

(2003)). As explained below, we conclude that the ALJ committed no error in evaluating the quality of the circumstances surrounding the three aggravating factors at issue here to determine their weight.

Petitioner misreads the language in section 1001.102(b)(1) which states that the "entire amount of financial loss…will be considered regardless of whether full or partial restitution has been made[.]" The only reasonable meaning of this directive is that the amount of any restitution made will not be used to offset the amount of financial loss used in considering this aggravating factor. Petitioner's reading would render superfluous the words "entire amount of" preceding "financial loss." *See Paul W. Williams, Jr. and Grand Coteau Prescription*, DAB No. 1785, at 3 (2001) (citing the quoted language in rejecting petitioner's argument that the magnitude of the theft becomes irrelevant if the government succeeds in obtaining recovery after discovering its loss). Thus, the ALJ properly accorded this aggravating factor significant weight based on the full amount of restitution ordered by the court. *See e.g., Jeremy Robinson* at 12 (characterizing court order for restitution in amount substantially greater than the statutory standard as "an exceptional aggravating factor" entitled to significant weight, quoting *Donald A. Burstein, Ph.D.*, DAB No. 1865, at 12 (2003)).

Petitioner's assertion that, over the eight years at issue, the net loss to government programs was zero because Petitioner could have received payments from the Maryland Medicaid program in the same amount as he improperly received from the New Hampshire Medicaid program arguably relates to the aggravating factor in section 1001.102(b)(1), not the aggravating factor in section 1001.102(b)(2) as Petitioner argues. In any event, this assertion ignores the fact that the New Hampshire Medicaid program (which is "a Government program") suffered a loss of $150,000 as a result of Petitioner's actions. This assertion also is based on the wholly unsubstantiated premise that Petitioner could have received comparable payments from Maryland. Even if he could have received such payments, moreover, that would not undercut the conclusion that Petitioner's choice to instead affirmatively deceive the New Hampshire program over a period of eight years evidences a lack of integrity. Thus, we agree with the ALJ that the fact that Petitioner continued his theft by deception for such a prolonged period supports the reasonableness of the 13-year exclusion period. *See e.g., Vinod Chandrashekhar Patwardhan, M.D.*, DAB No. 2454, at 7 (2012) (where length of petitioner's scheme was three times the amount of time required to increase the exclusion period, it demonstrated petitioner's "ongoing lack of integrity" and supported "a substantial increase" in the exclusion period).

Petitioner's argument that the ALJ should have given less weight to the aggravating factor under section 1001.102(b)(5) because "the actual sentence imposed called for home confinement only" erroneously suggests that this was the "sentence imposed by the court" within the meaning of that section. Although the court noted on the sentencing document that "it will not object to immediate administrative home confinement if deemed appropriate by the department of corrections," the sentencing document is titled "State Prison Sentence" and states: "The defendant is sentenced to the New Hampshire State Prison for not more than four (4) year(s), nor less than two year(s)." I.G. Ex. 3, at 2-3; ALJ Decision at 7 (finding that the court "sentenced Petitioner to two to four years in prison" although Petitioner's sentence "is being served as 'immediate home confinement'."). Thus, the ALJ did not err in concluding that "this aggravating factor bears substantial weight" because "a sentence of two to four years …demonstrates the severity of the fraudulent scheme Petitioner directed." ALJ Decision at 7; *Dr. Frank R. Pennington, M.D.*, DAB No. 1786, at 8 (2001) ("the fact and length of the incarceration [are] an appropriate measure of the relative severity of the offense"). Although the Board has noted that home detention, which falls within the definition of "incarceration" in section 1001.2(d), is a "less severe form of incarceration," that would have a bearing on the weight of this aggravating factor only if home detention were the sentence imposed by the court. *See Vinod Chandrashekhar Patwardhan, M.D.* at 7.

Accordingly, we conclude that the ALJ properly accorded significant weight to each of the aggravating factors at issue here.

Petitioner also reprises his argument before the ALJ that he was deprived of due process because he did not receive the I.G.'s notice of intent to exclude and therefore "never had the opportunity to submit any information about this matter to the IG before the IG" notified Petitioner of his exclusion by letter dated February 28, 2014. P. Appellate Br. at 3; *see also id*. at 4-5; ALJ Decision at 8, quoting P. Br. at 6.

The ALJ stated that he had no authority to consider Petitioner's constitutional challenges, but nevertheless opined: "The administrative remedies provided by 42 U.S.C. § 1320a(f)(1) provide all the due process the constitution requires, and a hearing prior to an individual's exclusion is not required by law."[5] ALJ Decision at 8. The ALJ further stated that, even presuming Petitioner did not receive the I.G.'s notice of intent to exclude (which the ALJ noted was mailed to Petitioner at the same address as the February 28, 2014 exclusion notice)--

[5] It appears that the ALJ intended to cite instead to section 1128A of the Act, codified as 42 U.S.C. § 1320a-7a, instead of 42 U.S.C. § 1320a(f)(1).

> Petitioner has not been prejudiced as he has received the opportunity to review the proposed evidence against him and to respond to the I.G.'s arguments in this proceeding. Petitioner has received the opportunity to present mitigating evidence, and he has not presented evidence relating to any of the mitigating factors listed in 42 C.F.R. § 1001.102(c), which the I.G. could consider as a basis to reduce the length of Petitioner's exclusion.

Id.

Petitioner takes issue with the ALJ's conclusion that he was not prejudiced by the alleged lack of receipt of the I.G.'s notice of intent to exclude. Petitioner points to the following statement in the ALJ Decision: "I do not have the authority to alter the length of the exclusion, as long as the time chosen is based upon demonstrated criteria and within a reasonable range." P. Appellate Br. at 8, quoting ALJ Decision at 5-6. According to Petitioner, this statement shows that the "administrative procedures followed by the ALJ did not allow the ALJ to decide de novo whether a thirteen year exclusion was the same result that the ALJ would have reached if he were deciding in the first instance what length of exclusion was just." *Id*. at 8.

We need not decide here whether, as Petitioner contends, the ALJ had less latitude to reduce the length of the proposed exclusion imposed by the I.G. than the I.G. would have had to reduce the length of the exclusion based on a response to the notice of intent to exclude. The "information" Petitioner says he would have provided to the I.G. includes the three extenuating circumstances discussed above. P. Appellate Br. at 4. As our discussion above indicates, the regulations expressly precluded the I.G. and the ALJ from determining that Petitioner's repayment of $150,000 in restitution reduced the weight of the aggravating factor in section 1001.102(b)(1). In addition, Petitioner's claim that the net loss to the government programs was zero is without merit and therefore could not be a basis for reducing the weight of that aggravating factor (or the aggravating factor in section 1001.102(b)(2), to which it appears unrelated). Further, neither the I.G. nor the ALJ could reduce the weight of the aggravating factor under section 1001.102(b)(5) based on the fact that department of corrections permitted Petitioner to serve his sentence in home confinement.

Petitioner also says he would have informed the I.G. that: "Petitioner cooperated with the Medicaid investigators and admitted his wrongdoing, saving the Government the time and expense of a trial and preparation for a trial"; and "Petitioner's adult life has been marked by his extensive history of service to others, including countless hours of volunteer services." P. Appellate Br. at 4. In response to Petitioner's argument below regarding his record of community service and aid to others, the ALJ stated:

> [T]he I.G. may only consider the specific mitigating factors outlined at 42 C.F.R. § 1001.102(c) as a basis for reducing Petitioner's period of exclusion. I cannot reduce the I.G.'s period of exclusion based upon equitable considerations, such as for a person's good character. *See Donna Rogers*, DAB No. 2381, at 6 (2011).

ALJ Decision at 8. Petitioner did not allege before the ALJ that he cooperated with Medicaid investigators; accordingly, we are precluded by regulation from considering this allegation on appeal. 42 C.F.R. § 1005.21(e) ("The DAB will not consider…any issue in the briefs that could have been raised before the ALJ but was not."). In any event, Petitioner does not allege that this is a mitigating factor under section 1001.102(c).[6]

Accordingly, we find no error in the ALJ's conclusion that Petitioner was not prejudiced by the alleged lack of receipt of the I.G.'s notice of intent to exclude.

Petitioner nevertheless argues, as he did before the ALJ, that limiting the mitigating factors that may be considered to those specified in section 1001.102(c) itself violates his due process rights. He further argues that the ALJ erred in concluding that he could not consider Petitioner's constitutional arguments. P. Appellate Br. at 4, citing ALJ Decision at 8-9. However, the regulations governing this matter expressly preclude the ALJ (and hence the Board in its review of the ALJ decision) from finding "invalid or refusing to follow Federal statutes or regulations or secretarial delegations of authority." 42 C.F.R. § 1005.4(c)(1). Section 1001.102(c) states that "only" the mitigating factors listed in section 1001.102(c)(1)-(3) "may be considered mitigating[.]" Thus, the regulation on its face precludes consideration of any other factors in determining whether to reduce an exclusion period of more than five years. Since the ALJ did not err in interpreting and applying this regulation, Petitioner's due process argument amounts to a direct attack on the constitutionality of the regulation which we have no authority to resolve. *See Keith Michael Everman* at 12.

[6] Under section 1001.102(c)(3), the individual's "cooperation with Federal or State officials" is a mitigating factor if it "resulted in—(i) Others being convicted or excluded from Medicare, Medicaid and all other Federal health care programs, (ii) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or (iii) The imposition against anyone of a civil money penalty or assessment under part 1003 of this chapter." Petitioner does not allege that his cooperation had any of these results.

Conclusion

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

/s/
Stephen M. Godek

/s/
Leslie A. Sussan

/s/
Judith A. Ballard
Presiding Board Member