Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Aiman M. Hamdan, M.D.
Docket No. A-19-71
Decision No. 2955
July 18, 2019

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Aiman M. Hamdan, M.D. (Petitioner), appeals the March 12, 2019, decision of an Administrative Law Judge (ALJ) concluding that the Inspector General (IG) properly excluded Petitioner from participating in Medicare, Medicaid, and other federal health care programs for five years. *Aiman M. Hamdan*, DAB CR 5270 (2019) (ALJ Decision). The IG excluded Petitioner under section 1128(a)(1) of the Social Security Act (Act)[1] due to his conviction in a United States District Court for participating in a bribery scheme in violation of the Travel Act, 18 U.S.C. § 1952(a)(3), which violation, the IG stated, was "a criminal offense related to the delivery of an item or service under the Medicare or a State health care program." IG Exhibit (Ex.) 1, at 1. Petitioner asserts in his appeal that the ALJ erred in finding that his Travel Act conviction is related to the delivery of a healthcare item or service under Medicare or a State health care program. Petitioner's Brief Accompanying Notice of Appeal (P. Br.) at 6. For the reasons explained below, we affirm the ALJ Decision.

Legal Background

Section 1128(a)(1) of the Act provides that the Secretary of Health and Human Services "shall exclude" from participation in federal health care programs "[a]ny individual or entity that 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."

Section 1128(c)(3)(B) prescribes a "minimum period of exclusion . . . [of] not less than five years" for an exclusion imposed pursuant to section 1128(a). That mandatory minimum period of exclusion may be extended based on the application of the aggravating factors listed at 42 C.F.R. § 1001.102(b). Only if the IG extends the

[1] The current version of the Act can be found at https://www.ssa.gov/OP_Home/ssact/ssact-toc.htm. (Last visited July 18, 2019.) 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 https://www.ssa.gov/OP_Home/comp2/G-APP-H.html. (Last visited July 18, 2019.)

minimum period of exclusion based on the application of any of the regulatory aggravating factors may the IG consider any of the mitigating factors specified in section 1001.102(c) to reduce the period of exclusion to no less than the five-year mandatory minimum period. 42 C.F.R. § 1001.102(c).

An excluded individual may request a hearing before an ALJ. *Id*. §§ 1001.2007(a), 1005.2(a). The only issues before the ALJ on review are whether the IG had a basis for the exclusion and whether an exclusion longer than the mandatory minimum period is unreasonable in light of any of the regulatory aggravating and mitigating factors established in the case. *Id*. § 1001.2007(a). A party dissatisfied with the ALJ's decision may appeal to the Board. *Id*. § 1005.21.

Case Background[2]

Petitioner is a cardiologist, practicing in the State of New Jersey. ALJ Decision at 2 (citing IG Ex. 2, at 3) (indictment); *see also* IG Ex. 3, at 1 (superseding information). Petitioner accepted bribes from a clinical laboratory in return for referring and "causing to be referred" to that laboratory his patients' blood specimens; the laboratory then billed and was paid by Medicare and private insurance for testing the specimens.[3] ALJ Decision at 2-3 (citing IG Ex. 3, at 4-5); *see also* IG Ex. 3, at 4. Petitioner was indicted and ultimately pleaded guilty, under the superseding information, to one count of violating the Travel Act, that is, of using the mail in aid of racketeering enterprises, in

[2] We draw the factual information in this background section from the ALJ Decision and the record to provide context for the discussion of the issues raised on appeal. Nothing in this section is intended to replace, modify, or supplement the ALJ's findings of fact.

[3] The ALJ Decision noted that the indictment charged Petitioner, his wife (also an employee of the laboratory) and another physician with multiple counts of conspiracy to violate the Federal Anti-Kickback Statute; conspiracy to violate the Travel Act; conspiracy to defraud patients of honest services; use of the mail and facilities in interstate commerce and interstate travel to promote, carry on, and facilitate commercial bribery; and conspiracy to commit money laundering. ALJ Decision at 3 (citing IG Ex. 2). Petitioner suggests (P. Br. at 4) that he has been treated as if he pleaded guilty to the charges in the indictment whereas, as we note below, his guilty plea was actually to the sole count in the superseding information. We find no basis for Petitioner's suggestion. Although the ALJ cited the indictment in addition to the superseding information as part of the background facts, her decision, as is ours, was properly based on Dr. Hamdan's conviction for the sole count in the superseding information.

violation of 18 U.S.C. § 1952(a)(3) and 18 U.S.C. § 2. ALJ Decision at 3 (citing IG Exs. 3, 4).[4] A federal court entered a judgment of guilty on that count on March 28, 2018, and sentenced Petitioner to probation for a term of three years – with 600 hours of community service – and fined Petitioner $10,000. *Id* (citing IG Ex. 4, at 1-2, 5)

Petitioner timely requested ALJ review on October 3, 2018. *Id*. at 2. The ALJ instructed the parties to indicate in their briefs whether and why an in-person hearing was necessary; the IG responded that an in-person hearing was not necessary, and Petitioner made no response. *Id*. After also noting that neither party listed any witnesses and that an in-person hearing would serve no purpose, the ALJ decided the case on the written record.[5] *Id*.

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[4] The Travel Act, 18 U.S.C. § 1952, provides, in relevant part:

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to –
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> * * *
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform –
> (A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both . . . .
>
> * * * *
>
> Title 18, United States Code § 2 provides:
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The charging document, the superseding information, describes Petitioner's violation as follows: "Aiman Hamdan knowingly and intentionally used and caused to be used the mail and any facility in interstate commerce with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, that is, commercial bribery, contrary to N.J.S.A. § 2C:21-10 and Title 18, United States Code, Section 1952(a)(3) and, thereafter, did perform and attempt to perform acts to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of such unlawful activity . . . ." IG Ex. 3, at 4. The Judgment In A Criminal Case reflects that the court adjudicated Petitioner guilty based on his guilty plea to the single count in the information of racketeering by accepting bribes in violation of Title 18, United States Code, Section 1952(a)(3) and Section 2. IG Ex. 4, at 1.

[5] The ALJ rejected Petitioner's request for oral argument because "Petitioner does not explain why oral argument would facilitate my resolving this very straightforward case . . . [and] oral argument would add nothing but undue delay to these proceedings." ALJ Decision at 2. Petitioner renews its request for oral argument here, asserting that it "will facilitate the Appellate Division's consideration of the complex arguments of statutory interpretation raised therein as well as . . . its decision making." Notice of Appeal at 1. We do not find the statutory arguments Petitioner makes complex, and oral argument would not otherwise facilitate our decision making. Accordingly, we deny Petitioner's request for oral argument.

Standard of Review

Pursuant to 42 C.F.R. § 1005.21(h), "[t]he standard of review on a disputed issue of fact is whether the initial decision is supported by substantial evidence on the whole record. The standard of review on a disputed issue of law is whether the initial decision is erroneous."

Analysis

A. The ALJ correctly concluded that Petitioner's criminal offense on its face was directly related to "delivery of a health care item or service."

There is no dispute that section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), mandates a minimum five-year exclusion for "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under [Medicare] or under any State health care program." *See* Act § 1128(c)(3)(B) (five-year minimum for exclusion under section 1128(a)(1)). Petitioner was excluded for the minimum five-year period based on his federal court conviction of a Travel Act violation, a criminal offense. Accordingly, the only issue before the Board is whether the ALJ properly concluded that Petitioner's Travel Act violation was "a criminal offense related to the delivery of an item or service under [Medicare] or under any State health care program." Applying the law to the facts surrounding Petitioner's conviction, we uphold the ALJ's conclusion.

Petitioner does not dispute on appeal any of the ALJ findings of fact stated above. Instead, Petitioner makes here essentially the same legal arguments he made before the ALJ. Petitioner's principal argument is that the crime of which he was convicted does not qualify as "a criminal offense related to the delivery of an item or service" under the Medicare or a State health care program under section 1128(a)(1) because, Petitioner asserts, "no relation exists between the 'delivery of an item or service' under Medicare and the criminal conviction to which [he] pleaded guilty." P. Br. at 18. Petitioner makes this claim even though he does not deny: 1) that his Travel Act conviction was based on his acceptance of bribes from a clinical laboratory for referring his patients' blood specimens to that laboratory for testing; and 2) that the laboratory billed Medicare and private insurers for testing his patients' specimens. Petitioner also acknowledges that his criminal offense "was committed during the course of his business practicing medicine." *Id*. Yet, Petitioner says these facts are "simply not enough" to find that his conviction was related to the delivery of a health care item or service since "[h]ealth care professionals are, by definition, in the business of delivering health care items and services [and that] [a]ny offense committed by such professionals within their duties could be considered *related* to delivery or to have the potential to affect delivery." *Id*. (Emphasis in original.)

We find no merit in this argument. Petitioner committed a very specific criminal offense, participating in a bribery scheme utilizing the mail in interstate commerce in contravention of N.J.S.A. § 2C:21-10 and Title 18, United States Code, Section 1952(a)(3). Petitioner committed bribery in connection with the **delivery of medical services** to his patients – drawing blood specimens and **delivering those specimens** to the clinical laboratory that paid him the bribe, which laboratory, in turn, billed Medicare and private insurers for the testing. For these reasons, we agree with the ALJ that "Petitioner's guilty plea, on its face, establishes that his crime is directly related to the delivery of health care items and services under Medicare." ALJ Decision at 4.

Dr. Hamdan avers that he did not provide unnecessary medical services or services that did not meet recognized standards of care and that he himself "did not submit Medicare claims with inflated or false charges." P. Br. at 18. We accept for purposes of our decision that these averments are true, but they are irrelevant. Section 1128(a)(1) does not require a showing that the health care items or services delivered were unnecessary or that they did not meet accepted standards of care; nor, does this statute require a showing of fraudulent conduct toward Medicare. Nonetheless, as the ALJ noted, the Board has recognized that making referrals in exchange for bribes is a crime that "facilitate[s] or increase[s] the risk of false, fraudulent, or otherwise improper billing of Medicare." ALJ Decision at 3 (citing *Kimbrell Colburn*, DAB No. 2683 at 5 (2016) (describing such crimes as "intimately related to the delivery of a healthcare item or service"). In addition, under the New Jersey bribery statute Dr. Hamdan violated, and which constituted the "unlawful activity" necessary for conviction under the Travel Act, a physician is subject to a duty "to act disinterestedly," or, in other words, a duty of fidelity. *See* N.J.S.A. § 2C:21-10(a)(3). Thus, as the ALJ noted, "a physician commits a crime if he accepts any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject." ALJ Decision at 4. Dr. Hamdan's acceptance of a bribe from a clinical laboratory in return for referring his patients' blood samples to the laboratory violated the professional duty of fidelity he owed his patients when delivering health care services to them.

B. Even if Petitioner's offense were not directly related to the delivery of health care items or service under Medicare, we would still find a violation of section 1128(a)(1) based on a "nexus" or "common sense connection" between Petitioner's offense and the delivery of an item or service under Medicare.

Even if we had not concluded that the relationship of Petitioner's offense to the delivery of a health care item or service was direct, we would have found a violation of section 1128(a)(1). The Board has consistently held that an offense is related to the delivery of an item or service under Medicare or a state health care program if "there is a 'common sense connection or nexus'" between the conduct giving rise to the offense and the

delivery of an item or service under a covered program. *E.g., Kimbrell Colburn* at 5 (quoting *James O. Boothe*, DAB No. 2530, at 3 (2013)); *see also Lyle Kai, R.Ph.*, DAB No. 1979, at 5 (2005) (inquiry is whether there is "some nexus or common sense connection"), *aff'd sub nom. Kai v. Levitt*, No. 05-00514BMK (D. Haw. July 17, 2006). The Board has also held that the nature of the criminal offense may establish the required nexus and that an ALJ may look to the facts underlying the conviction when determining whether the nexus exists. *E.g., Kai* at 5; *Craig Richard Wilder*, DAB No. 2416, at 6 (2011); *Berton Siegel, D.O.*, DAB No. 1467, at 6-7 (1994).

Petitioner does not dispute this well-established precedent but argues that the Board's "nexus" or "common sense connection" analysis is broader than Congress intended when it enacted section 1128(a)(1). *See* P. Br. at 6-12. We find no basis for this argument. The court decisions Petitioner cites only address principles of construction generally, not the Secretary's interpretation of the IG exclusion statutes specifically. Courts that have addressed the Secretary's "nexus" or "common sense connection" analysis have upheld it. *See, e.g., Kai*; *see also Friedman v. Sebelius*, 686 F.3d 813 at 819-24 (D.C. Cir. 2012) (accepting Secretary's "nexus" or "common sense connection" interpretation of phrase "misdemeanor relating to fraud" in appeal of section 1128(b)(1)(A) exclusion of corporate executives convicted of federal crime of misdemeanor misbranding under the federal Food, Drug, and Cosmetic Act),[6] *rev'g and remanding on other grounds Friedman v. Sebelius*, 755 F. Supp. 2d 98 (D. D.C. 2010); *accord, W. Scott Harkonen, M.D. v. Sebelius*, No. 3:13-cv-0071, 2013 WL 5734918 (N.D. Cal. Oct. 22, 2013) (upholding the Secretary's analysis in a section 1128(a)(3) exclusion and citing Supreme Court decisions holding that "the phrases 'in connection with,' 'in relation to,' or 'related to' are generally interpreted expansively") (citations omitted).

Petitioner asserts that the district court in *Kabins v. Sebelius*, No. 2:11-cv-01742, 2012 WL 4498295 (D. Nev. Sept. 28, 2012) "[s]oundly [r]ejected" the Secretary's "common sense" approach to interpreting the mandatory exclusion statute. P. Br. at 22-23. Petitioner mischaracterizes the *Kabins* decision, and the case is also easily distinguishable. The IG excluded Dr. Kabins under section 1128(a)(3) based on his conviction for misprision of felony. Dr. Kabins had a relationship with a consultant and an attorney under which the attorney received referrals of potential personal injury clients and Dr. Kabins received potential patient referrals. Dr. Kabins' misprision of felony conviction was based on Dr. Kabins' having assisted the attorney in assessing a potential lawsuit by one of Dr. Kabins' former patients without revealing the attorney's potential

[6] The court concluded that the IG had authority to exclude the corporate officers under section 1128(b)(1) and upheld the Secretary's analysis of the statute but found that the Secretary had failed to adequately explain its basis for the length of the exclusion – twelve years – and, accordingly, reversed the district court judgment and remanded the matter to the district court for further consideration of that issue. 686 F.3d at 828.

conflict of interest. The court reversed the Secretary's decision upholding the exclusion. The court stated, "While the phrase 'in connection with the delivery of a health care item or service' may be broad, it cannot reasonably be stretched to embrace the conviction here." 2012 WL 4498295, at *3. While dicta suggests that the court questioned whether the Secretary's "common sense nexus" analysis might be too amorphous and increase the risk of selective enforcement, the court concluded that deciding this issue was "not essential to [its] decision." *Id*. Thus, contrary to Petitioner's suggestion, *Kabins* did not overturn the Secretary's analytical approach to exclusion cases. Instead, the court based its reversal on its conclusion that the specific crime of which Dr. Kabins was convicted, and the facts regarding his criminal conduct, had nothing to do with fraud in connection with delivery of health care but, instead, with the attorneys' failure to provide proper legal services to a former patient of Dr. Kabins long after Dr. Kabins had finished providing medical services to the patient. *Id*. Here, as discussed, Petitioner's crime on its face, as well as Petitioner's conduct, were directly related to his delivery of medical services in a health care program, Medicare, and, in addition, violated Petitioner's duty of fidelity to this patients.

Moreover, Petitioner acknowledges that a legislative purpose of the IG Exclusion statutes is to protect the Medicare program and other federal health care programs from fraud. P. Br. at 11-12. Here, Petitioner, a physician, accepted bribes for the referral of his patients' blood samples to a laboratory that then billed Medicare and private insurers for testing those samples. As discussed above, the Board has recognized that this is precisely the type of criminal conduct that facilitates or increases the risk of Medicare fraud or otherwise improper billing. *Colburn* at 5-6.

C. The ALJ properly concluded that whether an offense is "related to delivery of an item or service under Medicare . . ." is not determined by the elements of the criminal offense.

Petitioner argues that in analyzing whether his offense was "related to delivery of an item or service under" Medicare, the IG and the ALJ were not allowed to look at the facts underlying his conviction but, instead, could only look to the elements of the Travel Act offense. P. Br. at 12-15. The ALJ properly rejected this argument as inconsistent with long-standing Board precedent holding that exclusion authority under section 1128 is not limited "to the bare elements of the offense on which the individual was convicted." ALJ Decision at 4 (citing *Narendra M. Patel, M.D.*, DAB No. 1736, at 7 (2000), *aff'd, Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003); *Timothy Wayne Hensley*, DAB No. 2044 (2006); *Scott D. Augustine*, DAB No. 2043 (2006); *Kai*, DAB No. 1979, at 5; *Berton Siegel*, DAB No. 1467, at 5; *Carolyn Westin*, DAB No. 1381 (1993), *aff'd, Westin v. Shalala*, 845 F. Supp. 1446 (D. Kan. 1994)).

Petitioner does not directly challenge this precedent or try to distinguish his case. Instead, he argues that Congress intended to limit the inquiry under section 1128(a)(1) to the elements of the crime for which an individual or entity is convicted, comparing the "offense related to" language in section 1128(a)(1) with the "conviction . . . *in connection with*" language in section 1128(b)(2). P. Br. at 13 (emphasis by Petitioner). Section 1128(b)(2) permits the IG to exclude "[a]ny individual or entity that has been convicted, under Federal or State law, in connection with the interference with or obstruction of any investigation or audit related to [certain offenses or use of funds received from a federal health care program] . . . ." 42 U.S.C. § 1320a-7(b)(2). Petitioner suggests that this difference in language shows that Congress intended a fact-based inquiry for section 1128(b)(2) but an elements inquiry for section 1128(a)(1). Petitioner cites no legislative history or other[7] applicable authority to support this argument, and reading such intent into a distinction between similarly broad phrases is undercut by the fact that the title of section 1128(b)(2) is "Conviction *Relating to* Obstruction of An Investigation or Audit." (Emphasis added) *See also* sections 1128(b)(1) (providing for exclusion for a "Conviction *Relating to* Fraud") and 1128(b)(3) (providing for exclusion for a "Misdemeanor Conviction *Relating to* Controlled Substance"). (Emphasis added.) Indeed, the D.C. Circuit in *Friedman v. Sebelius* rejected the very argument Petitioner is making, holding that Congress's "use of the phrases 'relating to' and 'in connection with' . . . does not imply 'relating to' must denote a non-factual, generic relationship." 686 F.3d at 822-23.

[7] Petitioner cites the "holding" in *Travers v. Shalala*, 20 F.3d 993, 998 (9th Cir. 1994) that "it is not necessary or proper for the Inspector General to delve into the facts surrounding the conviction." P. Br. at 15. That statement was not a "holding," and, read in proper context, does not help Petitioner. The issue in *Travers* (unlike here) was whether the deferred adjudication in Travers' state court criminal proceeding was a "conviction" for purposes of the exclusion statute. The district court held, and the Ninth Circuit affirmed, that the deferred adjudication was a "conviction" as defined in section 1128(i)(3) of the Act, for a program-related crime within the meaning of section 1128(a)(1) of the Act, one of the Act's mandatory exclusion provisions. Accordingly, the courts held, the IG was required to exclude Travers for at least five years. The Ninth Circuit, quoting the district court, made the statement Petitioner cites when rejecting Travers' argument (not made by Petitioner here) that the administrative proceedings should have included a hearing to consider "evidence" Travers alleged would have led a "neutral and detached fact finder" to not exclude him. 20 F.3d at 998. The Ninth Circuit stated that while the IG correctly "looked to the substance of the state proceedings and the nature of Travers' crime as charged" to determine whether there was a conviction requiring exclusion under section 1128(a)(1), "[o]nce [the IG] found that the . . . state court's disposition of the charge amounted to a conviction of a program-related offense, the [IG] had no choice but to impose the mandatory 5–year exclusion under [section 1128(a)(1)]." *Id.* Absent any discretion as to whether to exclude, the court concluded, it was not necessary or proper for the IG to engage in the fact-finding surrounding his conviction that Travers sought.

D. The Board has no authority to decide the Constitutional issues raised by Petitioner.

Petitioner states that "[i]f any doubt remains regarding the propriety of extending section 1128(a)(1) to encompass Dr. Hamdan's conviction, the [Board] should resolve such doubt in Dr. Hamdan's favor because to do otherwise would raise serious constitutional concerns." P. Br. at 24 (capitalization and bolding omitted). Dr. Hamdan argues that his exclusion violates the double jeopardy and due process clauses of the Fifth Amendment. *Id*. at 24-28. We have concluded that there is no doubt that section 1128(a)(1) encompasses Dr. Hamdan's conviction, and that it does so without any extension. As explained above, the IG was authorized to exclude Dr. Hamdan under section 1128(a)(1) based on well-settled law; the IG did not need to and did not extend the coverage of section 1128(a)(1) as Petitioner suggests. Moreover, the Board has no authority to decide the constitutional questions raised by Petitioner. The regulations governing this proceeding expressly prohibit the ALJ and Board "from finding invalid or refusing to follow Federal statutes or regulations or secretarial delegations of authority." *Donna Rogers*, DAB No. 2381, at 5 (2011) (citing and explaining 42 C.F.R. § 1005.4(c)(1)). We also note that courts have rejected such constitutional challenges to the IG's section 1128 exclusion authority. *See*, *e.g.*, *Manocchio v. Kusserow*, 961 F.2d 1539, 1543 (11th Cir. 1992) (holding double jeopardy clause did not apply to physician's exclusion because exclusions are remedial, not punitive); *Greene v. Sulliv*an, 731 F. Supp. 838, 840 (E.D. Tenn. 1990) (rejecting excluded pharmacist's double jeopardy and due process arguments); *Parrino v. Price*, 869 F.3d 392, 397-98 (6th Cir. 2017) (excluded pharmacist had no protected property or liberty interest in continuing to participate in federal health care programs); *Erickson v. United States ex rel. Dep't of Health & Human Servs*., 67 F.3d 858, 862-63 (9th Cir. 1995) (excluded health care providers had no protected property interest in continuing to participate in the Medicare program and received adequate due process).

Conclusion

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

/s/
Christopher S. Randolph

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member