Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Gracia L. Mayard, M.D.
Docket No. A-16-124
Decision No. 2767
January 26, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Gracia L. Mayard, M.D. (Petitioner) appeals the June 28, 2016 decision by an Administrative Law Judge (ALJ), *Gracia L. Mayard, M.D.*, DAB CR4650 (2016). In that decision, the ALJ upheld on summary judgment a determination by the Inspector General (I.G.) of the Department of Health & Human Services (HHS) to exclude Petitioner from participation in federal health care programs for thirteen years pursuant to section 1128(a)(4) of the Social Security Act (Act) and I.G.'s regulations in 42 C.F.R. Part 1001. We find no error by the ALJ and thus affirm her decision.

Applicable Law

Section 1128(a) of the Act mandates the exclusion of individuals or entities who have been convicted of certain types of criminal offenses from participating in Medicare, Medicaid, and other federal health programs. 42 U.S.C. § 1320a-7(a). Of relevance here is section 1128(a)(4), which requires the I.G.[1] to exclude any individual convicted of a felony offense under federal or state law that occurred after August 21, 1996[2] and that relates "to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." *Id.* § 1320a-7(a)(4); *see also* 42 C.F.R. § 1001.101(d) (implementing the statute). The general purpose of a section 1128 exclusion is "to protect federal health care programs and the programs' beneficiaries and recipients from untrustworthy providers." *Susan Malady, R.N.*, DAB No. 1816, at 9 (2002).

[1] Section 1128 confers exclusion authority on the Secretary of HHS. Section 1128A of the Act permits the Secretary to delegate her section 1128 authority to the I.G., and the Secretary has done so. *See Rudra Sabarnam, et al.*, DAB No. 2139 (2007) (citing published delegations).

[2] August 21, 1996 is the date of Congress's enactment of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

When an exclusion is validly imposed under section 1128(a), the I.G. must (with irrelevant exceptions) exclude the individual for a period of "not less than five years[.]" 42 U.S.C. § 1320a-7(c)(3)(B); *see also* 42 C.F.R. § 1001.102(a). The I.G. may increase the exclusion period above the statutory minimum if certain aggravating factors, described in its regulations, are present. 42 C.F.R. § 1001.102(b). If one or more aggravating factors is established, then certain enumerated "mitigating factors" may "be considered as a basis for reducing the period of exclusion to no less than 5 years." *Id.* § 1001.102(c).

An excluded individual may request a hearing before an ALJ, but only on the issues of whether the "basis for" exclusion exists and whether "[t]he length of the exclusion is unreasonable." *Id.* § 1001.2007(a).

Upon the motion of either party, an administrative law judge may "decide [a] case[ ], in whole or in part, by summary judgment where there is no disputed issue of material fact[.]" *Id.* § 1005.4(b)(12).

A party dissatisfied with an administrative law judge's decision may appeal to the Board. *Id.* § 1005.21.

Case Background

In a letter dated December 31, 2015, the I.G. notified Petitioner that he was being excluded from federal health care programs for thirteen years based on his federal conviction for an offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. I.G. Ex. 1. The I.G. cited section 1128(a)(4) of the Act as the legal authority for the exclusion. *Id.* at 1. The I.G. also explained that the exclusion period was longer than the statutory minimum of five years because of the existence of two aggravating factors – first, that the "[t]he sentence imposed by the court [in Petitioner's criminal prosecution] included incarceration" (42 C.F.R. § 1001.102(b)(5)); and second, that Petitioner "ha[d] been the subject of . . . other adverse action[s]" by federal, state, or local government agencies or boards that were "based on the same set of circumstances that serve[d] as the basis for the imposition of the exclusion" (*id.* § 1001.102(b)(9)). *Id.* at 2.

Petitioner, acting pro se, requested an ALJ hearing to contest the exclusion, and the I.G. responded with a motion for summary judgment. In support of that motion, the I.G. proffered the following documentary evidence:

- Court records showing that Petitioner had pled guilty in a United States District Court in November 2014 to a charge of conspiring to distribute oxycodone (a controlled substance) in violation of 21 U.S.C. §§ 841(b)(1)(c) and 846 and was later sentenced for that offense to 54 months of incarceration (I.G. Exs. 3-5).

- A copy of a December 2014 determination, issued by the New York State Board for Professional Medical Conduct and titled "Surrender of License and Order," in which that board accepted the surrender of Petitioner's New York medical license upon his admission to a charge of "fraudulent practice," a charge that was based on the conduct supporting his criminal conviction (I.G. Ex. 2).

- Correspondence from the New York Office of the Medicaid Inspector General (NYOMIG) notifying Petitioner of that state agency's determinations in August 2013 (after his federal indictment) and September 2015 (after judgment of conviction was entered in the federal prosecution) to exclude him from the New York Medicaid program (I.G. Exs. 7-9).

In his response to the I.G.'s summary judgment motion, Petitioner submitted written argument, copies of relevant laws, and prison medical records. He also completed and submitted the ALJ's "Informal Brief" (essentially a questionnaire designed to elicit his legal positions in the case). In that document, Petitioner conceded that he had been convicted of a felony offense that subjected him to exclusion under section 1128(a)(4). *See* Informal Brief of Petitioner, §§ I, II (attached to Petitioner's June 7, 2016 submission). However, Petitioner disagreed that the I.G. had identified valid aggravating factors. *Id.* § III. Alternatively, Petitioner alleged what he believed to be two mitigating factors: first, his stated willingness to give the federal government his "cooperation" in combating Medicare fraud; and second, his claim that serious medical problems "had affected [his] judgment before [and] during [the] period of legal misconduct." *Id.* §§ III, IV, V. Petitioner asked for an in-person hearing and named five individuals who, he said, would testify about his "chronic and complicated illnesses" and about his "offer for cooperation with the government." *Id.* § IV.

The ALJ determined that there were no disputes of material fact – and hence no need for a hearing – noting that "[t]he expected testimony that Petitioner and his witnesses would provide concerning his medical conditions and his offer to cooperate with the government is irrelevant to my decision, as such testimony does not relate to any of the elements for an exclusion under [section 1128(a)(4)] or any of the aggravating or mitigating factors listed in 42 C.F.R. § l00l.l02(b), (c)." ALJ Decision at 3-4. The ALJ then concluded that section 1128(a)(4) mandates Petitioner's exclusion from federal health care programs, finding that he had been convicted for the type of criminal offense described in that section – namely, a "felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." *Id.* at 4-5. The ALJ also concluded that the I.G. had established the existence of the aggravating factors in section 1001.102(b)(5) and 1001.102(b)(9). *Id.*

Next, the ALJ considered whether there was evidence of any mitigating factor. Construing Petitioner's assertions about his health problems as a request to apply the mitigating factor in section 1001.102(c)(2), the ALJ denied the request, finding Petitioner had not proffered evidence of a determination by the court in his criminal case that those problems diminished his culpability for the offense of conviction. ALJ Decision at 7. As for Petitioner's offer of cooperation to the federal government, the ALJ held:

> Cooperation is only considered a mitigating factor when it results in others being convicted or excluded, additional cases being investigated, or a civil money penalty imposed." 42 C.F.R. § 1001.102(c)(3). "A unilateral promise of future cooperation with the government, more than a year after sentencing for a criminal offense, does not meet the specified criteria in 42 C.F.R. § 1001.102(c)(3). Petitioner has not submitted evidence of past cooperation as listed in section 1001.102(c)(3), such as a government motion for a downward departure of his sentence or for a reduction in sentence based on substantial assistance. *See, e.g.*, Fed. R. Crim. P. 35. Therefore, Petitioner's offer of future cooperation with the government is not a basis to reduce the 13-year period of exclusion.

Id. Finally, the ALJ concluded that a thirteen-year exclusion was "warranted based on the presence of two aggravating and no mitigating factors." *Id.* at 6. Based on the foregoing analysis and conclusions, the ALJ granted the motion for summary judgment and sustained the I.G.'s exclusion determination.

Petitioner then initiated this appeal. Along with written argument, Petitioner submitted five documents that he had not submitted to the ALJ. Four were filed as "attachments" to his request for an extension of time to file the appeal. Those four documents are: a June 4, 2015 "pre-sentence memorandum" prepared by Petitioner's criminal defense lawyer and addressed to the United States District Judge who presided over his criminal case; and three letters from individuals attesting to Petitioner's good works and character. The fifth newly-submitted document, labeled "Exhibit One" and submitted with Petitioner's notice of appeal, purports to be a one-page excerpt from the government's pre-sentence memorandum in his criminal case.

Standard of Review

"Whether summary judgment is appropriate is a legal issue the Board addresses de novo." *Kimbrell Colburn*, DAB No. 2683, at 4 (2016) (internal quotation marks omitted); *see also* 42 C.F.R. § 1005.21(h) (stating that the Board reviews an administrative law judge's decision to determine whether it is "erroneous" as to any disputed issue of law). "Summary judgment is appropriate when the record shows there

is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Kimbrell Colburn* at 4. In deciding whether there is a genuine dispute of material fact, we view proffered evidence in the light most favorable to the non-moving party. *Id.*

Discussion[3]

Petitioner does not challenge most of the ALJ's legal conclusions. In particular, he does not challenge her conclusions that he is subject to a mandatory exclusion under section 1128(a)(4) based on his federal conviction for conspiracy to distribute oxycodone; or that two aggravating factors (as described in sections 1001.102(b)(5) and (b)(9)) are present; or that his offer to cooperate with the federal government in its effort to prevent Medicare fraud is not a mitigating factor. Those conclusions are, in any event, correct for the reasons given by the ALJ. Furthermore, there are no disputes of material fact that preclude summary judgment on the underlying issues. We therefore affirm the ALJ's uncontested legal conclusions without further discussion.

Petitioner's only apparent disagreements are with the ALJ's conclusions that he had failed to demonstrate the existence of the mitigating factor in section 1001.102(c)(2) and that a thirteen-year exclusion is reasonable. We address these disagreements below along with Petitioner's submission of evidence that he did not submit to the ALJ.

1. *The ALJ properly concluded that the mitigating factor in 42 C.F.R. § 1001.102(c)(2) did not exist.*

Section 1001.102(c)(2) provides that the following circumstance is a mitigating factor that may reduce the length of an exclusion exceeding the five-year statutory minimum:

> The record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional or physical condition before or during the commission of the offense that reduced the individual's culpability.

[3] Petitioner indicated in his notice of appeal that he wished to make arguments in person before the Board in Washington, D.C. In its September 14, 2016 letter to the parties acknowledging receipt of the appeal, the Board advised Petitioner that if a request for oral argument is granted, the Presiding Board Member generally conducts the proceeding by telephone conference rather than in person. The Board further advised Petitioner that, if he wished to provide oral argument by telephone, he "should specifically identify the issues" he intended to raise and "explain how they are relevant and material in a submission filed within 15 days of his receipt of the I.G.'s response." Petitioner did not respond to the Board's request for a statement of issues for oral argument, and the Board has determined that oral argument would not facilitate its decision-making.

The ALJ correctly held that she could not find this mitigating factor to exist in the absence of evidence that the court in Petitioner's criminal case had made the reduced-culpability determination described in the regulation. *See Christopher Switlyk*, DAB No. 2600 (2014).[4] There was no such evidence before the ALJ. Only the I.G. submitted records from Petitioner's criminal proceeding; none of those records shows that the court made the required determination. *See* I.G. Exs. 3-5. Although Petitioner alleged longstanding health problems that spanned the period of his criminal conduct, Petitioner did not tell the ALJ that the court had made an explicit or implicit determination that those problems had reduced his culpability for the offense of conviction. In short, Petitioner did not raise a genuine issue for hearing concerning the existence of the mitigating factor in section 1001.102(c)(2). The ALJ therefore properly granted summary judgment to the I.G. on that issue.

2. *Petitioner is not entitled to consideration of his newly submitted evidence.*

In his appeal brief, Petitioner suggests that he now has evidence that the court in his criminal case made the determination described in section 1001.102(c)(2). Pet's Appeal Br. at 1. He points to his "Exhibit One," the one-page excerpt from the government's pre-sentencing memorandum, a document he did not proffer to the ALJ. *Id.* That document, he says, shows that the United States Probation Office took his poor health into account in recommending a sentence of incarceration and that the recommended sentence fell below the 70-87 months called for the United States Sentencing Guidelines (which are advisory). *Id.* Petitioner further asserts that the government asked the court for a 60-month sentence and that the sentencing judge ultimately "decided on his free will to reduce sentence further down to 54 months[,] an extra bonus reduction, based on the positive report of the . . . Probation Officer." *Id.*

The I.G. objects to the admission or any consideration of Exhibit One (and to Petitioner's other newly submitted evidence, which we discuss later). *See* I.G. Response Br. at 11-12. The objection is well-founded. The Board has held that, in general, it "decides I.G. exclusion appeals based on the record developed" before the ALJ. *Farzana Begum, M.D.*, DAB No. 2726, at18 n.10 (2016). Section 1005.21(f) of the I.G.'s regulations states:

[4] In *Christopher Switlyk*, the excluded physician contended that he was entitled to application of the mitigating factor in section 1001.102(c)(2) because of psychological problems that reduced his culpability. DAB No. 2600, at 3, 5 (2014). The Board rejected that contention because the physician had failed to show that the court had made the required reduced-culpability determination. *Id.* at 5 (further stating that the existence of this mitigating factor had not been established because the record of his criminal case did not "clearly show[ ] that the court in fact imposed a lesser sentence because it determined that [the physician] suffered from psychological problems that reduced his culpability"). In addition, the Board held that the court's recommendation that the physician receive drug treatment "[did] not establish that the court [had] determined [that] [the physician] was less culpable due to drug addiction." *Id.* at 6.

> If any party demonstrates to the satisfaction of the DAB that additional evidence not presented at such [ALJ] hearing is relevant and material and that there were reasonable grounds for the failure to adduce such evidence at such hearing, the DAB may remand the matter to the ALJ for consideration of such additional evidence.

42 C.F.R. § 1005.21(f). Thus, if a party proffers additional evidence on appeal, as Petitioner has done, the Board may remand the case for the ALJ to consider that evidence – but only if that party shows: (1) that the additional evidence is "relevant and material"; and (2) that it had "reasonable grounds" for failing to submit that evidence at the ALJ hearing stage.

Petitioner has not made either showing, despite having been advised of the need to do so.[5] Petitioner does not explain why Exhibit One was not submitted to the ALJ in the first instance or otherwise claim that he faced obstacles in acquiring his criminal case files. Nor has he demonstrated that Exhibit One is "relevant and material" to determining the existence of the mitigating factor in section 1001.102(c)(2). As noted, that regulation requires evidence of a *judicial determination*, made on the record of the individual's criminal proceeding, that a "mental, emotional or physical condition before or during the commission of the offense . . . reduced the individual's culpability." Exhibit One does not reflect, or refer to, any such judicial determination; it merely expresses or reflects the *prosecution's and Probation Office's pre-sentencing* views about whether (or the extent to which) Petitioner's health problems merited a term of incarceration below the guidelines range.[6]

As noted, Petitioner's newly submitted evidence in this appeal includes his lawyer's pre-sentencing memorandum and three letters attesting to his good character. Petitioner does not allege any grounds, much less "reasonable" ones, for his failure to submit these materials to the ALJ. Nor does he indicate how they are relevant and material to any

[5] The Board's September 14, 2016 acknowledgment letter instructed Petitioner that if he "submit[ted] new evidence, he should state why the evidence is relevant and material and explain why it was not presented to the ALJ." That letter also referred Petitioner to a pertinent passage in the Board's appellate review guidelines (a copy of which was enclosed with the letter), which advises a party that the Board "may remand the case to the ALJ for consideration of" evidence not previously submitted to the ALJ if that party "demonstrates to the satisfaction of the Board that [the newly submitted] evidence is relevant and material and that there were reasonable grounds for the failure to present the evidence to the ALJ." *See Guidelines – Appellate Review of Decisions of Administrative Law Judges in Cases to Which Procedures in 42 C.F.R. Part 1005 Apply*, "Completion of the Review Process," ¶ (b), available at https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/procedures/index.html.

[6] On its face, Exhibit One shows only that the Probation Office took his health problems into account in recommending a prison sentence below the guidelines range. While Petitioner received a term of incarceration roughly in line with the Probation Office's recommendation, we have no evidence showing what factors actually motivated the court's sentencing decision. Even if Petitioner's health problems were a factor in that decision, it does not necessarily follow that the court made the determination called for by section 1001.102(c)(2).

issue affecting the legality of the exclusion, such as the existence of aggravating or mitigating factors or the reasonableness of the exclusion's length.

We conclude, for the reasons just stated, that Petitioner's newly submitted evidence is inadmissible and therefore decline to remand this case to the ALJ for consideration of that evidence. *See Mark B. Kabins, M.D.*, DAB Ruling 2012-1, at 3 (2011) (declining to admit newly submitted evidence because it was not "relevant or material to the issue of whether the I.G. was authorized to exclude" the physician).

3. *A thirteen-year exclusion is reasonable based on the two aggravating factors in this case.*

An individual subject to exclusion may contend that its length (to the extent it exceeds the statutory minimum) is "unreasonable" given the aggravating and any mitigating factors found to be present. 42 C.F.R. § 1001.2007(a)(1). The Board has explained how that contention should be evaluated on appeal:

> . . . [A]n ALJ's – and the Board's – role is limited to considering whether the period of exclusion the I.G. imposed was within a reasonable range, based on demonstrated criteria. In determining whether a period of exclusion is within a reasonable range, an ALJ may not substitute his judgment for that of the I.G. or determine what period of exclusion would be "better." The preamble to 42 C.F.R. Part 1001 indicates that the I.G. has "broad discretion" in setting the length of an exclusion in a particular case, based on the I.G.'s "vast experience" in implementing exclusions. The preamble also states that the aggravating and mitigating factors do not "have specific values; rather, these factors must be evaluated based on the circumstances of a particular case."

Christopher Switlyk at 3-4 (citations omitted); *see also Laura Leyva*, DAB No. 2704, at 2 (2016) (stating that an administrative law judge or the Board must "weigh the aggravating and [any] mitigating factors" and "evaluate the quality of the circumstances surrounding those factors" (internal quotation marks omitted)).

In this case, there are two aggravating factors, one of which is Petitioner's 54-month sentence of incarceration. A substantial prison term, as this one is, justifies an exclusion considerably longer than the statutory minimum, as the sentence is "an unmistakable reflection of the District Court's assessment of Petitioner's untrustworthiness." *Raymond Lamont Shoemaker*, DAB No. 2560, at 8 (2014) (internal quotation marks omitted); *see also Juan De Leon, Jr.*, DAB No. 2533, at 6 (2013) (noting that "a substantial period of incarceration would, on its own, justify the I.G. in increasing an exclusion significantly in excess" of the mandatory minimum and noting that the Board "once characterized a nine-month incarceration, which included a period of work release, as relatively substantial").

The adverse actions taken against Petitioner by the New York medical licensing board and the New York Medicaid program are additional evidence of Petitioner's untrustworthiness and the seriousness of his criminal offense. *Narendra M. Patel, M.D.*, DAB No. 1736, at 29 (2000) (noting that "the fact of additional adverse action beyond the conviction could be considered as additional evidence of the seriousness of the underlying conduct"), *aff'd, Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003); *Fereydoon Abir, M.D.*, DAB No. 1764, at 8 (2001) (stating that "a determination by a state regulatory body that the conduct in question was not only criminal but was a basis for exclusion from the Medicaid program has a bearing on trustworthiness").

Petitioner contends that the thirteen-year exclusion is excessive, but he cites no valid grounds for reducing it. For example, Petitioner suggests that his criminal culpability was diminished by the fact that he felt "threatened" by others to take improper actions (writing oxycodone prescriptions for persons he had not examined in exchange for cash). *See* Notice of Appeal at 2-3. That suggestion, in addition to being unsubstantiated, is irrelevant because it is not the basis for, or related to, any established mitigating factor. In deciding whether to reduce an exclusion period exceeding the statutory minimum, we are precluded by the I.G.'s regulations from considering any circumstances other the mitigating factors specified in those regulations. *Robert Seung-Bok Lee*, DAB No. 2614, at 9 (2015).

Petitioner alleges that his criminal conduct never posed an actual threat to federal programs because he never accepted their financial benefits. Notice of Appeal at 3. This allegation too is irrelevant, and for the same reason: it bears no relation to any aggravating or mitigating factor. It is important to note that an exclusion does not punish or provide redress for past harm or past threats of harm to federal programs; rather, an exclusion is imposed to protect the programs and their beneficiaries from future misconduct. *Narendra M. Patel, M.D.*, DAB No. 1736, at 25 (noting that an exclusion under section 1128 is a "future-oriented and remedial form of relief, rather than a backward-looking consequence for a past act"). In enacting section 1128(a), Congress determined that a person convicted of an offense described in that section "is, by virtue of that misconduct, a threat to federal programs and must therefore be excluded in order to preserve their integrity (fiscal and otherwise) and ensure the safety and well-being of program beneficiaries." *Andrew D. Goddard*, DAB No. 2032, at 6 (2006).

Finally, Petitioner contends that a five-year exclusion would be consistent with proposed or actual reforms to the criminal justice system. Pet.'s Appeal Br. at 2-3. However, criminal justice policy is irrelevant here. As our statements in the previous paragraph imply, the Secretary's exclusion authority is "civil and remedial rather than criminal and punitive, pointing to its goals in protecting the funds of Federal health care programs and the programs' beneficiaries and recipients from untrustworthy providers." *Joann Fletcher Cash*, DAB No. 1725, at 10 (2000) (internal quotation marks omitted).

Based on the presence of two aggravating factors (one of which merits a substantial increase in the exclusion period) and the absence of any mitigating factor applicable to Petitioner's case – and recognizing the I.G.'s broad discretion in setting the length of an exclusion – we agree with the ALJ that the exclusion period chosen by the I.G. was within a reasonable range.

Conclusion

We affirm the ALJ's decision to sustain the thirteen-year exclusion imposed on Petitioner by the I.G.

/s/
Christopher S. Randolph

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member