Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: June 28, 2007
Michael J. Rosen, M.D.,	
Petitioner,	Civil Remedies CR1566 App. Div. Docket No. A-07-74
	Decision No. 2096
- v. -	
Inspector General.	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Michael J. Rosen, M.D (Petitioner) appealed the February 22, 2007 decision by Administrative Law Judge (ALJ) Richard J. Smith upholding a decision by the Inspector General (I.G.) to exclude Petitioner from participating in federal health care programs because he was in default on his Health Education Assistance Loan (HEAL) debt. Michael J. Rosen, M.D, DAB No. CR1566 (2007) (ALJ Decision). Petitioner was excluded from July 20, 2006 until April 9, 2007, the date of the reinstatement of his eligibility to participate as a Medicare provider.[1]

[1] April 9, 2007 is the date of a letter from the I.G. to Petitioner notifying him that his reinstatement was effective with the date of the notice. The I.G. submitted this letter to the Board (I.G. Exhibit (Ex.) 17) with its brief responding to Petitioner's request for review, along with a February 5, 2007 letter from the I.G. to Petitioner requesting additional information regarding his request for reinstatement (I.G. Ex. 16). At the time of the ALJ Decision, Petitioner had reached an

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For the reasons explained below, we uphold the ALJ Decision. The ALJ correctly determined that there are no material facts in dispute, that the undisputed material facts fully support the I.G.'s position, and that the I.G. was authorized to exclude Petitioner. Moreover, many of Petitioner's legal arguments are outside the scope of our review.

The record in this case consists of Petitioner's exceptions and brief, the I.G.'s brief in opposition, and reply briefs that both parties submitted with the Board's consent. See 42 C.F.R. § 1005.21(c) (the Board "may permit the parties to file reply briefs"). Petitioner subsequently moved to file a surreply brief that he attached to his motion, and moved in the alternative for the Board to strike the I.G.'s reply brief. The regulations do not appear to contemplate the submission of more than one reply brief by each party, and Petitioner presented no compelling reason to submit a surreply. Nevertheless, we have examined Petitioner's surreply and determined that nothing in it would change our analysis.

Applicable law and regulation

The I.G. excluded Petitioner pursuant to section 1128(b)(14) of the Act (42 U.S.C. § 1320a-7). Section 1128(b)(14) of the Act in pertinent part provides:

> (b) PERMISSIVE EXCLUSION.—The Secretary [of the Department of Health and Human Services (HHS)] may exclude the following individuals and entities from participation in any Federal health care program . . .
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> * * *
>
> (14) DEFAULT ON HEALTH EDUCATION LOAN OR SCHOLARSHIP OBLIGATIONS.—Any individual who the Secretary determines is in default on repayments of scholarship obligations or loans in connection with

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[1](...continued)
agreement with the Department of Justice by which the HEAL debt was satisfied by Petitioner's payment of $44,570.47 on January 24, 2007 and by the HEAL program writing off the remainder of the debt. ALJ Decision at 13, citing I.G. Exs. 14, 15; Petitioner (P.) Ex. 9. Petitioner did not object to the I.G.'s submission of exhibits 16 and 17 before the Board (which were generated after issuance of the ALJ Decision), and we therefore admit them into the record.

> health professions education made or secured, in whole or in part, by the Secretary and with respect to whom the Secretary has taken all reasonable steps available to the Secretary to secure repayment of such obligations or loans, except that (A) the Secretary shall not exclude pursuant to this paragraph a physician who is the sole community physician or sole source of essential specialized services in a community if a State requests that the physician not be excluded, and (B) the Secretary shall take into account, in determining whether to exclude any other physician pursuant to this paragraph, access of beneficiaries to physician services for which payment may be made under title XVIII or XIX.

Congress enacted section 1128(b)(14) of the Act as part of the Medicare and Medicaid Patient and Program Protection Act of 1987, Public Law No. 100-93.

The implementing regulation at 42 C.F.R. § 1001.1501 delegates the Secretary's exclusion authority to the Office of the I.G. (OIG) and essentially repeats the substantive provisions of section 1128(b)(14) of the Act. The regulation provides:

> Default of health education loan or scholarship obligations.
>
> (a) *Circumstance for exclusion*. (1) Except as provided in paragraph (a)(4) of this section, the OIG may exclude any individual that the Public Health Service (PHS) determines is in default on repayments of scholarship obligations or loans in connection with health professions education made or secured in whole or in part by the Secretary.
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> (2) Before imposing an exclusion in accordance with paragraph (a)(1) of this section, the OIG must determine that PHS has taken all reasonable administrative steps to secure repayment of the loans or obligations. If PHS has offered a Medicare offset arrangement as required by section 1892 of the Act, the OIG will find that all reasonable steps have been taken.
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> (3) The OIG will take into account access of beneficiaries to physicians' services for which payment may be made under Medicare, Medicaid or other Federal health care programs in determining whether to impose an exclusion.

> (4) The OIG will not exclude a physician who is the sole community physician or the sole source of essential specialized services in a community if a State requests that the physician not be excluded.
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> (b) *Length of exclusion*. The individual will be excluded until such time as PHS notifies the OIG that the default has been cured or that there is no longer an outstanding debt. Upon such notice, the OIG will inform the individual of his or her right to apply for reinstatement.

42 C.F.R. § 1001.1501; 57 Fed. Reg. 3330 (Jan. 29, 1992), as amended at 64 Fed. Reg. 39,427 (July 22, 1999), 67 Fed. Reg. 11,935 (Mar. 18, 2002).

Standard of Review

Our standard of review of an ALJ decision involving the I.G.'s determination to impose an exclusion is set by regulation. We review to determine whether the decision is erroneous as to a disputed issue of law and, if there are disputed issues of fact, whether the findings on those issues are supported by substantial evidence on the whole record. 42 C.F.R. § 1005.21(h).

An ALJ may "[u]pon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact . . . ." 42 C.F.R. § 1005.4(b)(12). A requirement affording the opportunity for an oral hearing is not contravened by a summary judgment if there are no genuine issues of material fact. Travers v. Shalala, 20 F.3d 993, 998 (9th Cir. 1994). Thus, summary judgment is appropriate if the affected party either had conceded all of the material facts or proffered testimonial evidence only on facts which, even if proved, clearly would not make any substantive difference in the result. Big Bend Hospital Corp., DAB No. 1814 (2002), aff'd, Big Bend Hospital Corp. v. Thompson, No. P-02-CA-030 (W.D. Tex. Jan. 2, 2003).

Whether summary judgment is appropriate is a legal issue that we address de novo, viewing the proffered evidence in the light most favorable to the non-moving party. See, e.g., Crestview Parke Care Center, DAB No. 1836 (2002), aff'd in part, Crestview Parke Ctr. v. Thompson, 373 F.3d 743 (6th Cir. 2004); Timothy Wayne Hensley, DAB No. 2044 (2006).

The ALJ Decision

The ALJ made the following findings of fact and conclusions of law (FFCLs):

1. On September 28, 1985 Petitioner *pro se* Michael G. Rosen, M.D., obtained a loan from the HEAL program in the principal sum of $3000.00. I.G. Ex. 1.

2. On May 23, 1986 Petitioner obtained a loan from the HEAL program in the principal sum of $5000.00. I.G. Ex. 1.

3. On May 25, 1988 Petitioner obtained a loan from the HEAL program in the principal sum of $6395.00. I.G. Ex. 1.

4. On December 15, 1989 Petitioner obtained a loan from the HEAL program in the principal sum of $3750.00. I.G. Ex. 1.

5. On October 11, 1990 Petitioner obtained a loan from the HEAL program in the principal sum of $14,776.00. I.G. Ex. 1.

6. Petitioner consolidated those loans and the accrued interest on them on August 10, 1994 into a new loan from the HEAL program in the principal sum of $47,140.19. I.G. Ex. 1.

7. The HEAL loans described above in Findings 1-6 were loans made to Petitioner in connection with his health profession education and were secured by the Secretary. I.G. Exs. 1, 3.

8. On June 30, 2006 Petitioner was in default of his obligation to repay the HEAL loans described above, and had been in default since at least September 11, 1997. I.G. Exs. 2-9.

9. Petitioner's HEAL debt including accrued interest totaled $78,361.77 on July 20, 2006. I.G. Ex. 13, at 3.

10. By June 30, 2006, the Secretary had taken all reasonable and available steps to secure Petitioner's repayment of those HEAL loans. I.G. Exs. 4-9, 13.

11. On June 30, 2006, the I.G. notified Petitioner that he was to be excluded from participation in Medicare, Medicaid, and all other federal health care programs until his HEAL debt "has been completely satisfied," based on the authority

> set out in sections 1128(b)(14) and 1892 of the Act. I.G. Ex. 10.
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> 12. On July 10, 2006, Petitioner perfected his appeal from the I.G.'s action by filing a *pro se* hearing request.
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> 13. Because Petitioner was in default on repayments of the HEAL loans described above in Findings 1-9, and because the Secretary had taken all reasonable and available steps to secure Petitioner's repayment of those HEAL loans, the I.G. was authorized to exclude Petitioner from Medicare, Medicaid, and all other federal health care programs. Sections 1128(b)(14) of the Act; 42 C.F.R. § 1001.1501(a).
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> 14. The I.G.'s exclusion of Petitioner until such time as PHS notifies the OIG that Petitioner's default has been cured or that there is no longer an outstanding debt is the mandatory minimum established by 42 C.F.R. § 1001.1501(b), and is therefore reasonable as a matter of law.
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> 15. There are no disputed issues of material fact and summary affirmance is appropriate in this matter. *Tanya A. Chuoke, R.N.*, DAB No. 1721 (2000); *accord, Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

ALJ Decision at 5-6.

The ALJ determined that the I.G. had proven the "two essential elements" necessary to support an exclusion based on section 1128(b)(14) of the Act: that Petitioner, as of the date of his exclusion, was in default on repayments of scholarship obligations or loans in connection with health professions education made or secured, in whole or in part, by the Secretary, and that the Secretary had taken all reasonable and available steps to secure repayment from Petitioner. ALJ Decision at 6-7. The ALJ noted that Petitioner had conceded that he had defaulted on his HEAL loan, and that the record additionally showed that by September 1997 Petitioner had defaulted on his obligation to repay his HEAL loan, that on September 11, 1997 the unpaid principal and interest were reduced to a state-court default judgment of approximately $57,000 plus interest until satisfied, and that the state-court judgment was assigned to the Secretary and the United States on October 1, 1997 and registered in the United States District Court for the District of Arizona in November 2005. Id. at 2, 7, citing I.G. Exs. 1-9, I.G. Ex. 13, at 3. As of July 20, 2006, Petitioner's total debt was $78,361.77, and Petitioner had made payments totaling only approximately $6,473.53. Id. at 2. The ALJ noted that between

December 2, 1997 and March 6, 2006, the Secretary wrote five letters demanding that Petitioner pay his debt or reach a payment agreement, in what the ALJ described as "correspondence over nearly eight years in a fruitless effort to collect that judgment in a meaningful way." Id. at 7, citing I.G. Exs. 4-7, 9. These efforts, the ALJ found, included offering Petitioner the opportunity to have repayments offset against reimbursement due him for providing services under Medicare and Medicaid. Id. citing I.G. Ex. 9, at 1.

Analysis

Petitioner disputes FFCLs 6 – 11 and 13 – 15, as well as much of the supporting rationale in the ALJ's discussion of the case. P. RR at 8-13. Essentially, Petitioner argues that the loan in question was not a HEAL loan, that he was not in default on the loan, and that the Secretary failed to take all reasonable steps to secure repayment of the loan prior to excluding him. Petitioner also argues that the ALJ's decision to grant summary disposition was erroneous because Petitioner had raised disputed issues of material fact that the ALJ failed to construe in Petitioner's favor and because the I.G. failed to show that the Secretary properly exercised his discretion in determining to exclude Petitioner. In addition to the arguments discussed in this decision, Petitioner made various other arguments in his briefs before us that were comprehensively addressed without error in the ALJ Decision and which require no further clarifying analysis from us.

We address each of Petitioner's major arguments below.

> The ALJ correctly concluded that the I.G. had a basis to exclude Petitioner for the period in question and that the I.G. was entitled to summary disposition.

Petitioner argues that he was not in default on a HEAL loan, one of the two prerequisites for an exclusion under section 1128(b)(14) of the Act, because the August 10, 1994 loan on which the I.G. determined that Petitioner had defaulted was not a HEAL loan, but a consolidation loan that paid off and satisfied his earlier five HEAL loans. Petitioner cites the loan document, titled "Promissory Note – Consolidation Loan." I.G. Ex. 1. Directly above those words, however, the document also states "HEALTH EDUCATION ASSISTANCE LOAN [i.e., HEAL] PROGRAM," and it further states that Petitioner, by signing the promissory note, understood his rights and responsibilities "regarding the HEAL loan under this Promissory Note." Id. The note also references 42 C.F.R. Part 60, which sets forth regulations for the HEAL

program. Further, section 1128(b)(14) does not limit the Secretary's exclusion authority to defaults on HEAL loans, but applies it to "loans in connection with health professions education" that are made or secured, in whole or in part, by the Secretary. As this loan consolidated five previous HEAL loans that were made to finance Petitioner's medical education and was secured by the Secretary, it was clearly made "in connection with" Petitioner's education in the health professions. I.G. Ex. 1 (August 10, 1994 loan/promissory note); I.G. Ex. 3 (assignment of judgment).

Petitioner next argues that he was not in default on the August 10, 1994 loan. Although Petitioner conceded before the ALJ that he had defaulted on that loan, he qualifies his concession by arguing that he was no longer in default when the I.G. excluded him because he had made payments on the loan pursuant to a repayment agreement. ALJ Decision at 6-7, citing P. Mot. Rev. at 2.[2] The ALJ found that record exhibits related to Petitioner's payment history showed that beginning in May 1998 Petitioner paid the sum of $6,473.53 towards his debt, most of it in post-dated fifty-dollar monthly increments. ALJ Decision at 9, citing P. Exs. 1, 2; I.G. Ex. 13. As evidence of a repayment agreement, Petitioner points to language in receipts for the payments, from March 2000 through August 2004, stating "[r]emember, your next payment of $50 is due in our office on [date]. Payments received on time will protect your agreement." P. Ex. 2. In a letter of January 2005, however, HHS declined to accept further $50 monthly payments, on the ground that they were insufficient to pay off the interest on his loan, which was accruing at that time at approximately $345 per month, and returned to Petitioner $450 worth of post-dated $50 checks that he had submitted for the year 2005.[3] P. Ex. 3.

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[2] Under the terms of the August 10, 1994 loan/promissory note, the Department had the discretion to declare Petitioner in default for failure to "make payments when due," and did consider him in default as of November 28, 1997. I.G. Exs. 1, 4, 5.

[3] The ALJ noted that an adjustable interest rate brought the monthly interest accrual to a low of $104.08 in October 2002, and acknowledged that Petitioner had paid $1,433.53 in November 1998 and $1,040.00 in early 2005, but also found that at no time did Petitioner's payments substantially offset or slow the accrual of interest on his debt, which by July 20, 2006 had exceeded his payments by $21,628.49. The ALJ also noted that in

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Significantly, however, Petitioner does not allege that there was ever an actual written agreement between him and HHS (or any collection agency or other party to the loan) allowing Petitioner to cure his default by making payments at the rate of $50 per month and obliging HHS to view him as no longer being in default. To the extent that Petitioner was attempting to establish before the ALJ that an agreement had been reached that cured his default, it was clearly his burden to proffer evidence of such an agreement. Petitioner, however, cited only the language in the payment receipts, which the I.G. characterizes as "boilerplate." I.G. Opposition to P. RR at 10. The ALJ moreover granted the I.G. an extension of time to research the existence of a repayment agreement with the U.S. Attorney's Office for the District of Arizona, where Petitioner resides, and the I.G. reported that it could find no record of any agreement concerning repayment of Petitioner's HEAL obligation, other than the promissory note on which Petitioner was found to be in default.[4] I.G. Reply Br. at 2, n.2; ALJ Decision at 2. In the absence of a bilateral, written agreement with HHS, the ALJ could reasonably determine that the alleged repayment plan did not and could not cure Petitioner's default on his HEAL obligation. This is especially true since it seems unlikely that the Secretary would have consented in such an agreement to accept as a cure for default monthly payments too low to have ever satisfied Petitioner's debt or to even have kept pace with the monthly accrual of interest. Moreover, even if Petitioner had been able to establish that an actual repayment agreement existed (which he had not), HHS clearly terminated it in January 2005, when it declined to accept further $50 monthly payments because they were insufficient to pay off the interest on his loan. P. Ex. 3. Thus, this Department had the discretion to view Petitioner as remaining in default, even though for a time it may have accepted monthly payments of $50 that did not keep pace with the accrual

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[3](...continued)
July 2006 Petitioner's total debt was larger than it had been when reduced to judgment in 1997. ALJ Decision at 9, citing I.G. Exs. 2, 13.

[4] Petitioner's eventual settlement agreement that resulted in the reinstatement of his eligibility to participate in federal health care programs was with the U.S. Attorney's Office for the District of Arizona. I.G. Ex. 15. This agreement had apparently not been reached at the time that the I.G. searched for the repayment agreement that Petitioner alleged had been in place. I.G. Reply Br. at 2-3, n.2; I.G. Ex. 14.

of interest much less bring his outstanding balance to the level where it would have been if he had made his original loan payments when due. Given Petitioner's failure to allege, much less establish, the existence of any written agreement providing that payments of $50 per month cured his default, the ALJ reasonably concluded that Petitioner remained in default, and had been in default since September 11, 1997. FFCL 8. Even if Petitioner had been able to establish that his payments somehow affected his default status, he clearly was again in default at the time of his exclusion, since the record contains no evidence or specific proffers of evidence that he made any further payments after his $50 checks were returned.

Petitioner appears to base his argument that his payments cured his default on regulations at 34 C.F.R. Part 682 governing the Federal Family Education Loan programs. He extensively quotes portions of Part 682 setting minimum annual loan repayments at $600 (i.e., $50 per month) and providing that a defaulted loan may be rehabilitated through a year's worth of voluntary monthly payments that are reasonable and affordable based upon the borrower's total financial circumstances. 34 C.F.R. §§ 682.209, 682.405. Part 682, however, does not apply to the loan on which Petitioner defaulted. The only HEAL loans to which Part 682 applies are loans consolidating HEAL loans "if the application for the Consolidation loan was received on or after November 13, 1997," whereas the loan on which Petitioner defaulted was made on August 10, 1994. 34 C.F.R. § 682.100(a)(4). The provisions of Part 682 of 34 C.F.R. that Petitioner cites thus do not apply, and his submission of $50 monthly payments could not serve to "rehabilitate" his default under those regulations.

To defeat an appropriately pled motion for summary judgment, the non-moving party cannot prevail by mere denials, but must come forward with proffers of evidence to establish specific facts material to the dispute, thus showing that there is a genuine issue for hearing. See, e.g., White Lake Family Medicine, P.C., DAB No. 1951, at 12 (2004), citing Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322-25 (1986). Petitioner failed to submit or proffer evidence of a bilateral, written repayment agreement with HHS in effect prior to his exclusion that expressly cured his default on his HEAL loan, or to even allege the existence of such an agreement, and thus failed to demonstrate that there was any genuine dispute about whether he was in default on the loan that needed to be resolved in a hearing. The ALJ's determination that Petitioner was in default on his HEAL loan at the time that the I.G. excluded him was based

on the undisputed material facts and was not erroneous as a matter of law.

Petitioner next disputes the ALJ's determination that the Secretary took "all reasonable steps available" to secure Petitioner's repayment of his HEAL debt before excluding Petitioner, the second of two prerequisites for an exclusion under section 1128(b)(14) of the Act. FFCL 10; ALJ Decision at 7-9. The ALJ based his determination in part on his finding that the Secretary had on March 6, 2006 sent Petitioner a letter demanding repayment and stating that an alternative to submitting a repayment proposal along with a good-faith payment was for Petitioner to "**establish an offset agreement with your carrier/provider**" and advising how to arrange to have Medicare and Medicaid claim reimbursements forwarded to the Department of Justice. ALJ Decision at 7, citing I.G. Ex. 9, at 1 (emphasis in original). The ALJ deemed this offer of an offset agreement "conclusive proof" that the Secretary had taken all reasonable steps. ALJ Decision at 9. The ALJ cited 42 C.F.R. § 1001.1501(a)(2), which states that "[i]f PHS has offered a Medicare offset arrangement as required by section 1892 of the Act, the OIG will find that all reasonable steps have been taken."[5] The ALJ also concluded that Petitioner's failure to respond to four earlier letters from the Secretary demanding that Petitioner pay his debt or reach a repayment agreement dating back to December 2, 1997 (when the total amount of Petitioner's debt was $57,574), demonstrated that the Secretary had taken all reasonable and available steps towards collection of Petitioner's debt. Id. at 7-8, citing I.G. Exs. 4-7. The ALJ further concluded that the Secretary had acted reasonably in declining to accept Petitioner's payments of $50 per month. Id. at 9-10.

Petitioner argues that the March 6, 2006 letter was proof only that the Secretary had offered to offset the debt against federal reimbursement due Petitioner, and that "all reasonable steps"

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[5] Section 1892 of the Act (42 U.S.C. § 1395ccc), "Offset of payments to individuals to collect past-due obligations arising from breach of scholarship and loan contract," requires the Secretary to immediately exclude an individual who owes a past-due obligation to the United States by reason of a breach of a contract entered into under the HEAL program (among other loan programs), and who refuses to enter into an agreement to satisfy his obligation through deductions from amounts otherwise payable to him under Medicare. As we discuss later, the Secretary cited section 1892 as a basis for the exclusion, in addition to section 1128(b)(14).

would have included renegotiating a repayment agreement after HHS terminated the agreement that Petitioner claimed was in effect. Petitioner, however, has not furnished any basis for the Board to ignore the unambiguous instruction in section 1001.1501(a)(2) that an offer of an offset agreement constitutes all "reasonable steps," and has not otherwise demonstrated that the regulation does not apply here. Based on the regulation, we conclude that there was no error in the ALJ's determination that the Secretary had taken all reasonable steps available to secure payment of Petitioner's debt prior to excluding Petitioner.

We also conclude that Petitioner's failure to respond to four earlier letters from the Secretary further demonstrates that the Secretary had taken all reasonable steps.[6]

The ALJ correctly declined to consider issues related to the Secretary's exercise of discretion to exclude Petitioner.

Petitioner argues extensively that his exclusion was improper because the Secretary failed to demonstrate that he exercised his discretion in subjecting Petitioner to a permissive exclusion. Petitioner argues that because section 1128(b)(14) merely authorizes but does not require the Secretary to exclude individuals covered by the statute, the Secretary cannot automatically exclude every covered individual but must in each case articulate his reasons for a determination that the particular circumstances warrant the individual's exclusion. Petitioner argues that the Secretary has failed to show how, or that, he made such a determination here, and that this failure constituted an abuse of the discretion that the permissive exclusion statute vests in the Secretary. Petitioner argues that the exclusion was thus arbitrary and deprived him of what he characterizes as his "constitutionally protected liberty

[6] Petitioner cites the payments he made from 1998 through 2004 as responses to the Secretary's correspondence. The ALJ's finding that Petitioner failed to respond to any of the Secretary's correspondence prior to his exclusion was reasonable, given that Petitioner's payments were not literally a response to the particular demands in the Secretary's letters, and that the payments were in any event insignificant given the size of Petitioner's debt. Moreover, the Secretary's March 6, 2006 letter offering an offset arrangement stated, "**You must submit in writing a Repayment Proposal along with a Good Faith Payment to the DOJ.**" I.G. Ex. 9, at 1 (emphasis in original). Petitioner provided no evidence that he replied to this letter prior to receiving notice of his exclusion, over three months later.

interest" in participating in federal health care programs in violation of his right to due process. P. RR at 24.

This argument provides no basis to overturn the ALJ Decision. The evidence that the Secretary or his delegate exercised the Department's discretion is the notice of exclusion where the I.G. Reviewing Official stated that Petitioner was being excluded for failure to repay his HEAL loan or enter into an agreement to repay his debt. I.G. Ex. 10. The Official specifically stated, "pursuant to the authority contained in section 1128(b)(14) of the Act, [Petitioner was] . . . being excluded from participation in the Medicare, Medicaid, and **all** Federal health care programs as defined in section 1128B(f) of the Act." Id. (emphasis in original). This is a determination that is specific to Petitioner's case. The notice does not have to reveal how the Secretary made that determination in order to constitute a lawful determination. Moreover, the statute and regulations afford Petitioner the right to challenge the exclusion determination administratively before an ALJ and the Board. In authorizing review, however, the regulations effectively preclude an individual excluded under section 1128(b) from challenging the Secretary's exercise of discretion in determining to exclude him. First, an excluded person may request an ALJ hearing –

> only on the issues of whether:
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> (i) The basis for the imposition of the sanction exists, and
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> (ii) The length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1) (emphasis added).

Second, the regulations restrict the administrative review of the I.G.'s decision to impose a permissive exclusion, stating that the ALJ does not have the authority to (among other things) –

> (5) Review the exercise of discretion by the OIG to exclude an individual or entity under section 1128(b) of the Act . . . [or]
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> (6) Set a period of exclusion at zero, or reduce a period of exclusion to zero, in any case where the ALJ finds that an individual or entity committed an act described in section 1128(b) of the Act . . . .

42 C.F.R. § 1005.4(c)(5),(6). Thus, once the ALJ concludes that the I.G. is legally authorized to impose an exclusion, the ALJ does not have the authority to consider the separate question of whether the Secretary should exercise any discretion afforded to him under the law not to impose the exclusion. See, e.g., Keith

Michael Everman, D.C., DAB No. 1880, at 6-7 (2003). The issues before the ALJ were whether there is a basis for the exclusion and whether the length of the exclusion is reasonable. The ALJ correctly concluded that once he determined that there was a legal and factual basis for Petitioner's exclusion, he was "without jurisdiction to evaluate on any basis whatsoever the propriety of the I.G.'s exercise of discretion in deciding to proceed with imposition of the exclusion." ALJ Decision at 11. The only authority that Petitioner cites as expressly permitting the Board to review the I.G.'s exercise of discretion in imposing a permissive exclusion is an obsolete Board decision that predates the regulations and provides no basis for us to ignore the clear language limiting the scope of our review.[7] See Vincent Baratta, M.D., DAB No. 1172 (1990). Even if this Board (or the ALJ) had the authority to review the Secretary's exercise of discretion afforded by statute and regulations (which clearly we do not), nothing Petitioner has argued before us would indicate that the discretion was not properly exercised.

A basis for an exclusion under section 1128(b)(14) exists when an individual has defaulted on loans in connection with health professions education made or secured by the Secretary, and the Secretary has taken all reasonable steps available to secure repayment. As we discussed above, under the terms of the applicable regulations delineating the scope of the ALJ's review, the ALJ's determinations that the I.G. had established a basis to exclude Petitioner and that there was no genuine dispute of material fact requiring a hearing were not erroneous. Additionally, as the period of Petitioner's exclusion was, as the ALJ concluded, the minimum period established by 42 C.F.R.

[7] Having concluded he had no authority to consider the extent to which the Secretary had exercised his discretion, the ALJ did not address Petitioner's argument that the Secretary had not shown that he had taken into account the potential impact of Petitioner's exclusion on the access of beneficiaries to physician services under Medicare and Medicaid. Section 1128(b)(14)(B) of the Act. Neither the statute nor the regulations require the Secretary to make such a showing either in his notice of exclusion or before the ALJ. Nor has Petitioner proffered evidence that his exclusion would substantially impact access of beneficiaries to Medicare and Medicaid services.

§ 1001.1501(b), it was therefore reasonable as a matter of law.[8] FFCL 14.

The ALJ was not required to afford Petitioner a hearing under section 1892 of the Act.

Petitioner also argues that he was entitled to a hearing under section 1892 of the Act, which was cited in the I.G.'s June 30, 2006 notice of exclusion as a basis for Petitioner's exclusion, along with section 1128(b)(14). P. RR at 1, 10; I.G. Ex. 10. As we noted above, section 1892 of the Act requires the exclusion of any individual who owes a past-due HEAL obligation and refuses to enter into a Medicare offset agreement. The ALJ did not address Petitioner's exclusion under section 1892 on the grounds that reliance on that provision was unnecessary in light of the ALJ's having sustained the exclusion under section 1128(b)(14), the fact that the I.G. had not relied on section 1892 before him, and the existence of prior ALJ decisions suggesting that ALJs are without authority to review exclusions under section 1892.

The ALJ's decision was not legally erroneous. Neither section 1892 nor the regulation implementing it (42 C.F.R. § 405.380) provide a process for review of exclusions thereunder. Moreover, neither the regulations at Part 1005 authorizing ALJs to review exclusions brought by the I.G. nor the provisions at 42 C.F.R. § 402.19 (making Part 1005 applicable to some exclusions brought by either the I.G. or the Centers for Medicare & Medicaid Services) mentions exclusions under section 1892.

Petitioner also argues that he was entitled to a hearing prior to his exclusion, and that his exclusion prior to a hearing violated

[8] The regulation provides that "[t]he individual will be excluded until such time as PHS notifies the OIG that the default has been cured or that there is no longer an outstanding debt. Upon such notice, the OIG will inform the individual of his or her right to apply for reinstatement." As noted, Petitioner here was reinstated effective April 9, 2007, following his satisfaction of a settlement agreement and his application for reinstatement. Petitioner disputes this FFCL on the ground that the exclusion should have been lifted when he negotiated the settlement agreement that resulted in his reinstatement, rather than continuing until his reinstatement. P. RR. at 13. He provides no authority for that argument. Petitioner does not ultimately dispute the principle, implicit in this FFCL, that an exclusion for the minimum period provided in the statute is reasonable as a matter of law.

his right to due process. Petitioner did not raise that argument before the ALJ, and we are barred from considering it. 42 C.F.R. § 1005.21(e) ("[t]he DAB will not consider . . . any issue in the briefs that could have been raised before the ALJ but was not"). Had Petitioner done so, however, the statute and regulations would have compelled the ALJ to reject that argument, because no statute or regulation provides for a hearing before an exclusion under section 1128(b)(14). See section 1128(f) of the Act (opportunity for a hearing for "any individual or entity that is excluded (or directed to be excluded) from participation under this section" (emphasis added)); 42 C.F.R. § 1001.2002 (exclusion effective 20 days from the date of the notice of exclusion).[9]

Petitioner's other arguments provide no basis to overturn the ALJ Decision.

Petition makes a number of other arguments, which the ALJ comprehensively addressed in his decision. We find no error in the ALJ's conclusions concerning those arguments, which we summarily affirm.[10]

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[9] The legislative history of section 1128(f) states that the individual or entity excluded under section 1128 "would be entitled to reasonable notice and opportunity for a hearing by the Secretary after the notice of exclusion," and describes section 1128(f) as providing "post-termination hearing requirements." S. Rep. No. 100-109, at 12; 1987 U.S.C.C.A.N. 682, at 693 (emphasis added). The preambles to the proposed and final regulations implementing the ALJ hearing process confirm that the right to a hearing attaches after an exclusion, with certain exceptions not applicable here, and cite court decisions establishing that a post-exclusion hearing satisfies the requirements of due process. 55 Fed. Reg. 12,205, at 12,210-11 (Apr. 2, 1990), and cases cited therein; 57 Fed. Reg. 3298, 3310 (Jan. 29, 1992).

[10] We agree with the ALJ that the constitutional issues raised by Petitioner are beyond the scope of the ALJ's review. Petitioner's constitutional arguments would require us to ignore the unambiguous requirements of applicable regulations limiting the scope of our review, and thus effectively invalidate the regulations with respect to his case. Neither the ALJs nor the Board have the authority to declare the Secretary's regulations invalid. Meadow Wood Nursing Home, DAB No. 1841, at 31 (2002), aff'd Meadow Wood Nursing Home v. HHS, 364 F.3d 786 (6th Cir. 2004); Sentinel Medical Laboratories, Inc., DAB No. 1762, at 9-10

(continued...)

Conclusion

Based on the preceding analysis, we sustain the ALJ Decision. In doing so, we affirm and adopt each of the numbered FFCLs.

/s/
Judith A. Ballard

/s/
Sheila Ann Hegy

/s/
Donald F. Garrett
Presiding Board Member

[10](...continued)
(2001), aff'd, Teitelbaum v. Health Care Financing Admin., No. 01-70236 (9th Cir. Mar. 15, 2002). Petitioner's constitutional arguments are thus outside the scope of our review and are more suited to federal court.