

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Emmanuel Adebayo Ayodele
Docket No. A-14-119
Decision No. 2602
November 12, 2014

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

Emmanuel Adebayo Ayodele (Petitioner), appearing *pro se*, appeals the August 19, 2014 decision of an administrative law judge (ALJ). *Emmanuel Adebayo Ayodele, M.D.*, DAB CR3335 (2014).¹ The ALJ upheld the Inspector General's (I.G.'s) decision to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs for 20 years. Petitioner challenges the ALJ's determination that Petitioner is subject to exclusion and the ALJ's conclusion that the period of exclusion imposed by the I.G. was reasonable. For the reasons explained below, we affirm the ALJ Decision.

Applicable Law

Section 1128(a)(1) of the Social Security Act (Act)² requires the Secretary of Health and Human Services to exclude from participation in all federal health care programs any individual who "has been convicted of a criminal offense related to the delivery of an item or service under [Medicare] or under any State health care program." *See also* 42 C.F.R. § 1001.101(a). Under section 1128(i)(3) of the Act, an individual "is considered to have been 'convicted' of a criminal offense" for purposes of section 1128(a) when a guilty plea by the individual has been accepted by a federal, state, or local court.

¹ Petitioner spelled his first name in three different ways in the documents that he filed in this case. In his request for an ALJ hearing, Petitioner spelled his name "Emmanuel." Petitioner spelled his name "Emmanuel" on the certificate of service of his brief for the ALJ. In his request for review of the ALJ Decision, Petitioner spelled his name "Emmanuel" and "Emmanuel." There is no dispute that all three spellings represent the Petitioner. We use the same spelling used in the I.G.'s notice of exclusion to Petitioner and in the ALJ Decision.

² The current version of the Act is available at http://www.socialsecurity.gov/OP_Home/ssact/ssact-toc.htm. On this website, each section of the Act contains a reference to the corresponding chapter and section in the United States Code.

Section 1001.2007(d) of the regulations provides:

When the exclusion is based on the existence of a criminal conviction or a civil judgment imposing liability by Federal, State or local court, a determination by another Government agency, or any other prior determination where the facts were adjudicated and a final decision was made, the basis for the underlying conviction, civil judgment or determination is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal.

Section 1128(c)(3)(B) of the Act provides for a minimum exclusion period of five years, but the I.G. may lengthen the period if any specific aggravating factors are present. 42 C.F.R. § 1001.102(a), (b). If an exclusion period is extended based on application of one or more aggravating factors, any mitigating factor specified under section 1001.102(c) may then be used to reduce the length.

An individual excluded from Medicare, Medicaid and all federal health care programs by the I.G. may request a hearing before an ALJ, but only on the following two issues: (1) whether there is a basis for imposing the exclusion, and (2) whether the “length of exclusion is unreasonable.” 42 C.F.R. § 1001.2007(a)(1).

Factual Background³

In June 2012, Petitioner was indicted on criminal charges in the United States District Court for the Central District of California. I.G. Ex. 2. On May 28, 2013, Petitioner entered into a plea agreement admitting that he was guilty of violating 18 U.S.C. § 1347, Health Care Fraud. I.G. Ex. 3, at 6. Petitioner pleaded guilty to “participating in a scheme which enabled the owners and operators of durable medical equipment (DME) supply companies and others to defraud Medicare through the submission of false and fraudulent claims to Medicare for power wheelchairs and other DME.” I.G. Ex. 3, at 21. Specifically, Petitioner pleaded guilty to providing prescriptions and medical documents in exchange for illegal gratuities and gifts from the owners and operators of the DME companies knowing that the companies would use the prescriptions and medical documents to submit claims to Medicare for medically unnecessary power wheelchairs and other DME. *Id.* at 22.

³ The background information is drawn from the ALJ Decision and the record before him and is not intended to substitute for his findings.

On October 3, 2013, the United States District Court for the Central District of California accepted Petitioner's guilty plea and entered a judgment of "guilty as charged and convicted" of the offense of health care fraud under 18 U.S.C. § 1347. I.G. Ex. 4, at 1. The District Court sentenced Petitioner to a term of 37 months imprisonment and to pay restitution in the amount of \$6,335,949, an amount for which the court found he is jointly and severally liable with his coconspirators. *Id.*

By letter dated March 31, 2014, the I.G. notified Petitioner that he was excluded from participation in Medicare, Medicaid and all federal health care programs for a minimum period of 20 years based on his conviction and section 1128(a)(1) of the Act. I.G. Ex. 1. Petitioner appealed the exclusion by filing a request for an ALJ hearing.

Standard of Review

The standard of review for the Board on a disputed issue of law is whether the ALJ decision is erroneous. The standard of review on a disputed issue of fact is whether the ALJ decision is supported by substantial evidence on the whole record. 42 C.F.R. § 1005.21(h).

Analysis

1. We sustain the ALJ's conclusion that the I.G. had a basis to exclude Petitioner under section 1128(a)(1) of the Act.

As noted, section 1128(a)(1) of the Act provides that an individual convicted of a crime related to the delivery of an item or service under Medicare or any state health care program must be excluded from participation in any federal health care program. The ALJ determined that the "evidence offered by the I.G. proves conclusively that Petitioner was convicted of a crime as is described in section 1128(a)(1)." ALJ Decision at 2. Specifically, the ALJ found that the indictment and plea agreement filed in the United States District Court for the Central District of California show that "Petitioner pled guilty to the federal crime of health care fraud," which involved Petitioner's "writing fraudulent prescriptions for [DME] to be used as documentation for false Medicare reimbursement claims." *Id.* citing I.G. Exs. 2, at 2-3; 3. "Subsequently," the ALJ explained, the "United States District Court entered a judgment of conviction against Petitioner based on his plea." *Id.* citing I.G. Ex. 4.

The ALJ reasoned that "Petitioner's conviction plainly relates to the delivery of Medicare items or services." *Id.* "Fraud directed against the Medicare program based on the filing of false reimbursement claims or the generation of documentation to support such claims," the ALJ added, "is precisely what is aimed at by section 1128(a)(1)." *Id.*

On appeal, Petitioner does not dispute that the type of crime underlying his plea and the district court's judgment related to the delivery of health care items under Medicare, and the Board has long recognized that the submission of false claims under Medicare or Medicaid falls within the ambit of section 1128(a)(1). *See, e.g., Juan De Leon, Jr.*, DAB No 2533 (2013); *Jack W. Greene*, DAB No. 1078 (1989), *aff'd*, *Green v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990). Instead, Petitioner contends, as he did before the ALJ, that he was falsely accused of engaging in a conspiracy to defraud Medicare, and he denies violating the federal health care fraud statute. He asserts that he did not have a chance to defend himself, that his attorney did not adequately defend him, and that the plea agreement was improperly obtained. Similar to his request to present in-person testimony to the ALJ, Petitioner also requests an in-person hearing before the Board to establish his innocence and to show that counsel did not adequately defend him. Petitioner further states that the district court's judgment was "not affirmed and confirmed" by the Ninth Circuit Court of Appeals and the Supreme Court. P. Br. at 4. "Before that time comes," Petitioner contends, "the decision of the [ALJ] has no legal effect and should be void" *Id.* at 2. Petitioner asserts that to sustain the ALJ Decision would pose "[s]erious constitutional questions." *Id.*

The ALJ accurately explained that this is not the appropriate forum to hear Petitioner's arguments or in-person testimony about his innocence or the proceedings leading to his conviction and the ALJ correctly rejected Petitioner's arguments as impermissible collateral attacks on Petitioner's conviction. ALJ Decision at 2-3.⁴ In an exclusion appeal, an individual excluded from program participation based on a criminal conviction by a federal court may not collaterally attack the basis for the underlying conviction on substantive or procedural grounds. 42 C.F.R. § 1001.2007(d). The prohibition on collateral attacks recognizes that it is "the fact of the conviction which causes the exclusion. The law does not permit the Secretary to look behind the conviction" to address the underlying issue of guilt. *Peter J. Edmonson*, DAB No. 1330, at 4 (1992). Similarly, the Board has concluded that a petitioner's contention that he was coerced to enter into a plea agreement constitutes such a collateral attack on the basis of the exclusion that may not be reviewed by the ALJ or the Board. *Emmanuel Uko Akpan*, DAB No. 2330, at 8 (2010), *appeal filed* 3:10-cv-02421-P (N.D. Cal.)

⁴ The ALJ rejected Petitioner's request to present in-person testimony not only because Petitioner sought to collaterally attack his conviction with the testimony but also because the ALJ had ordered the parties to reduce any proposed testimony to written declaration or affidavit form, and Petitioner had failed to comply with that directive. ALJ Decision at 2.

Here, the October 3, 2013 district court's entry of judgment based on Petitioner's guilty plea plainly establishes that Petitioner was convicted of the crime of federal health care fraud. I.G. Ex. 4, at 1. Specifically, the judgment states that the plea agreement satisfied the court that there was "a factual basis" for Petitioner's conviction and that the court had "adjudged the defendant guilty as charged and convicted. . . ." *Id.* Accordingly, the ALJ did not err in concluding that there was a factual basis for Petitioner's exclusion and that he did not have the authority to decide whether the conviction's entry was flawed.

With respect to Petitioner's argument that he should not be excluded because his conviction was not sustained by a United States Court of Appeal or the Supreme Court, section 1128(i)(1) of the Act states that for the purposes of section 1128(a), an individual is considered to have been "convicted" of a criminal offense if a judgment of conviction has been entered against the individual, "regardless of whether there is an appeal pending" The Act also provides that an individual has been convicted when a court has accepted that individual's guilty plea. Act § 1128(i)(3). Petitioner does not dispute that his plea was accepted and judgment entered against him. Moreover, the regulations provide that an individual "will be reinstated" into participation in federal health care programs retroactive to the effective date of exclusion if the exclusion is based on a conviction that is reversed or vacated on appeal. 42 C.F.R. § 1001.3005(a)(1). There would be no need for this provision if exclusion could be stayed pending a federal court appeal. *Michael D. Miran*, DAB No. 2469, at 4-5 (2012).

With respect to Petitioner's argument that his exclusion would pose constitutional problems, both the ALJ and the Board are bound by the unambiguous applicable statute and regulations and have no authority to find section 1128(a)(1) and the implementing regulations to be unconstitutional. We do note that federal courts have repeatedly upheld the constitutionality of the exclusion statute and regulations as serving the remedial purpose of protecting federal health care programs from untrustworthy providers. *See, e.g., Gupton v. Leavitt*, 575 F. Supp.2d 874 (E.D. Tenn. 2008); *Kahn v. Inspector General of U.S. Dept. of Health and Human Services*, 848 F.Supp. 432 (S.D.N.Y. 1994).

Accordingly, we conclude the ALJ did not err in determining that Petitioner's collateral attacks on his conviction may not serve as a basis to reverse the exclusion, and we deny Petitioner's request for a hearing in this forum to contest his conviction.

2. We sustain the ALJ's conclusion that the 20-year exclusion imposed by the I.G. falls within a reasonable range.

As noted, the length of a mandatory exclusion beyond the statutory five-year minimum is determined by evaluating the evidence of aggravating and mitigating factors listed in 42 C.F.R. §§ 1001.102(b) and (c). "The evaluation does not rest on the specific number of aggravating or mitigating factors or any rigid formula for weighing those factors, but rather on a case-specific determination of the weight to be accorded each factor based on

a qualitative assessment of the circumstances surrounding the factors in that case.” *Sushil Aniruddh Sheth*, M.D., DAB No. 2491, at 5 (2012)(citations omitted). The I.G. “has ‘broad discretion’ in setting the length of exclusion in a particular case, based on [his] ‘vast experience’ implementing exclusions.” *Craig Richard Wilder*, DAB No. 2416, at 8 (2011) (citing 57 Fed. Reg. 3298, 3321 (Jan. 29, 1992)).

The ALJ reviews the length of an exclusion de novo to determine whether it falls within a reasonable range. DAB No. 2491, at 5. An ALJ may not substitute his or her judgment for that of the I.G. or determine a “better” exclusion period. *Paul D. Goldenheim, M.D.*, DAB No. 2268, at 21 (2009), *aff’d sub nom. Friedman v. Sebelius*, 755 F.Supp.2d 98 (D.D.C. 2010), *rev’d and remanded*, 686 F.3d 813 (D.C. Cir. 2012) (for further consideration of length of exclusion), *reh’g denied*, 1:09-cv-02028-ESH (Nov. 29, 2012).

Here, the ALJ concluded that the I.G. established proof of the following aggravating factors to support Petitioner’s 20-year exclusion:

- Petitioner’s crime caused government programs to suffer \$5000 or more in losses. 42 C.F.R. § 1001.102(b)(1). In fact, the losses caused by Petitioner’s fraud were enormous. He was ordered, along with his coconspirators, to pay restitution to the Medicare program totaling \$6,335,949. I.G. Ex. 4, at 1.
- Petitioner committed the crime resulting in his conviction over a period of more than one year. 42 C.F.R. § 1001.102(b)(2). Petitioner pled guilty to committing fraud against Medicare for a period of about four years, from June 2006 to June 2010. I.G. Ex. 3, at 6, 21.
- Petitioner was sentenced to a term of incarceration for his crime. 42 C.F.R. § 1001.102(b)(5). Petitioner was sentenced to a term of 37 months’ imprisonment. I.G. Ex. 4, at 1.

ALJ Decision at 3-4. According to the ALJ, the evidence cited “is strong support for the reasonableness of an exclusion of at least 20 years.” *Id.* at 4. The ALJ observed that the evidence showed Petitioner was “engaged in a concerted, thoroughly calculated, and extensive conspiracy to defraud Medicare.” *Id.* Moreover, the ALJ concluded, the magnitude of the crime “is made evident by the amount of restitution that he is sentenced to pay, more than \$6 million.” *Id.*

Responding to Petitioner's challenge to the length of the exclusion based on his alleged innocence of the underlying crime, the ALJ stated that the evidence showed Petitioner was "manifestly untrustworthy."⁵ *Id.* The ALJ also noted that Petitioner did not support his assertion with any "any affirmative proof that the evidence of aggravation is invalid." *Id.* The ALJ additionally determined that Petitioner did not offer any evidence that related to the mitigating factors contained in section 1001.102 of the regulations. On appeal to the Board, Petitioner again argues that the exclusion period is not reasonable because he is innocent. He further states that he has "been a loyal Medi-Cal/Medicare provider," that he "had good medical treatment with no litigation" for over 20 years of practice "until this wheel chair problem came up." P. "Open Letter" at 10. He asserts that he has been "been faithful, caring and prudent about medical costs and . . . never thought of acquiring government money illegally." *Id.*

We agree with the ALJ that the 20-year exclusion period is appropriate in light of the circumstances related to the three aggravating factors: Petitioner was sentenced to a term of incarceration of more than three years; Petitioner committed the crime resulting in his conviction over the course of four years; and the government's \$6,335,949 loss relating to the crime was more than 1,000 times the minimum amount to be considered an aggravating factor. Furthermore, Petitioner's contention that he is innocent of the crime for which he was convicted does not provide a basis for reducing the exclusion period. As discussed above, Petitioner's contention that he is not guilty of the crime for which he was convicted is not material to the limited issue presented (whether Petitioner *was convicted* of a crime relating to the delivery of an item or service under Medicare) and may not be addressed by the ALJ or the Board. Finally, Petitioner's characterizations of his medical practice and participation in Medicare and Medi-Cal do not relate to any of the mitigating factors contained in section 1001.102(c), and Petitioner has not submitted evidence that any of the mitigating factors that may be considered apply in this appeal.

Accordingly, we sustain the ALJ's conclusion that the 20-year exclusion period imposed on Petitioner by the I.G. falls within a reasonable range.

⁵ The ALJ also stated that Petitioner's "claim of innocence is extraordinarily disingenuous," because he "openly agreed to his guilt . . . when he thought it was in his self-interest to do so" and now "proclaims his innocence when he sees it in his self-interest to change his tune." ALJ Decision at 4, citing I.G. Ex. 3. The ALJ's comment may be seen as an assessment of the credibility of Petitioner's claim that he is innocent. As explained above and by the ALJ in denying Petitioner's request to testify in person, however, the credibility of Petitioner's claim of innocence is not relevant in these proceedings. Consequently, any assessment of the Petitioner's credibility by the ALJ would be inappropriate but would merely constitute harmless error.

Conclusion

Based on the preceding analysis, we affirm the ALJ Decision.

_____/s/
Judith A. Ballard

_____/s/
Constance B. Tobias

_____/s/
Leslie A. Sussan
Presiding Board Member