

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

James O. Boothe
Docket No. A-13-73
Decision No. 2530
August 21, 2013

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

James O. Boothe (Petitioner) appeals the May 1, 2013 decision by an Administrative Law Judge (ALJ) upholding the determination of the Inspector General (I.G.) to exclude Petitioner from participation in any federal health care program for five years. *James O. Boothe*, DAB CR2770 (2013) (ALJ Decision). The ALJ concluded that the I.G. properly imposed the exclusion on the ground that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid. For the reasons discussed below, we affirm the ALJ Decision.

Applicable Law

Section 1128(a)(1) of the Social Security Act (Act) requires that any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under Medicare or any state health care program be excluded from participation in any federal health care program.¹ Section 1128(c)(3)(B) of the Act further provides that this exclusion must be for a minimum period of five years.

Background²

Petitioner was the Chief Operating Officer and Executive Vice President of Sales at HealthFirst, PHSP, Inc. (HealthFirst), a New York-based Medicaid managed care organization. HealthFirst enrolled individuals into its Medicaid managed care insurance program pursuant to a contract with the New York State Department of Health (DOH), which administers New York's Medicaid program. Under that contract, HealthFirst was

¹ The current version of the Act can be found at http://www.socialsecurity.gov/OP_Home/ssactlssact.htm. 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 42 U.S.C.A. Ch. 7, Disp Table.

² Background information is drawn from the ALJ Decision and the record before the ALJ and is not intended to substitute for his findings.

required to have a marketing plan approved by the DOH and consistent with New York's marketing guidelines for managed care organizations. I.G. Ex. 10, at 70. Those guidelines prohibited HealthFirst from offering financial incentives to its marketing representatives for enrolling individuals in HealthFirst. *See id.* at 154. Despite submitting a marketing plan representing that it would comply with those guidelines, HealthFirst nevertheless compensated its marketing representatives based on the number of individuals that they enrolled.

On September 30, 2011, Petitioner pled guilty in state court to offering a false instrument for filing in the second degree. Specifically, Petitioner pled guilty to knowingly submitting to the DOH "the HealthFirst PHSP, Inc. 'May 2003 Medicaid Managed Care Marketing Plan', which falsely represented that HealthFirst PHSP, Inc.'s marketing representatives were being compensated in accordance with the Marketing Guidelines in the Medicaid Managed and Family Health Plus contracts." I.G. Ex. 3, at 8; I.G. Ex. 4, at 5.

By letter dated August 31, 2012, the I.G. notified Petitioner that, based on this conviction, he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years under section 1128(a)(1) of the Act. I.G. Ex. 1, at 1. Petitioner timely requested a hearing before an ALJ to challenge the I.G.'s determination.

Before the ALJ, Petitioner conceded that he was convicted of a criminal offense but argued that his offense was not "related to the delivery of an item or service" under Medicare or Medicaid, so there was no basis to exclude him. The ALJ disagreed and upheld the I.G.'s determination.

On appeal to the Board, Petitioner challenges the ALJ's conclusion that his offense was related to the delivery of an item or service under Medicaid. Petitioner also asserts that the ALJ erroneously sanctioned him for failing to file a supplemental brief on whether the rejection of a marketing plan would result in the rejection of a Medicaid contract under New York law.

Standard of Review

The standard of review on a disputed issue of law is whether the ALJ decision is erroneous. 42 C.F.R. § 1005.21(h). The standard of review on a disputed issue of fact is whether the ALJ decision is supported by substantial evidence in the record as a whole. *Id.* Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Under the substantial evidence standard, the reviewer must examine the

record as a whole and take into account whatever in the record fairly detracts from the weight of the evidence relied on in the decision below. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Analysis

1. The ALJ’s determination that Petitioner’s criminal offense was related to the delivery of an item or service under Medicaid is free from legal error and supported by substantial evidence.

The Board has repeatedly held that an offense is “related to” the delivery of an item or service under a covered program if there is a common sense connection or nexus between the offense and the delivery of an item or service under the program. *See, e.g., James Randall Benham*, DAB No. 2042, at 5 (2006); *Lyle Kai, R.Ph.*, DAB No. 1979, at 5 (2005), *aff’d*, *Kai v. Leavitt*, No. 05-00514 BMK (D. Haw. July 17, 2006). Here, the ALJ correctly concluded that there is a “clear and non-attenuated” nexus between “Petitioner’s criminal offense and the delivery of program-related health care items and services.” ALJ Decision at 9.

It is undisputed that HealthFirst’s contract with the DOH required HealthFirst to have a marketing plan consistent with New York’s marketing guidelines, and that HealthFirst violated those guidelines by compensating its marketing representatives based on the number of individuals they enrolled in HealthFirst. It is also undisputed that HealthFirst’s contract with the DOH provided several possible sanctions for violating the marketing guidelines, including prohibiting HealthFirst from conducting any marketing activities, suspending new enrollments, and terminating the contract. I.G. Ex. 10, at 71. As the ALJ observed, each of these sanctions would have the effect of restricting HealthFirst’s ability to deliver items and services to Medicaid beneficiaries. ALJ Decision at 8. Thus, Petitioner’s criminal offense – submitting a marketing plan to the DOH that falsely represented that HealthFirst was compensating its marketing representatives in accordance with the marketing guidelines – permitted HealthFirst to “obtain new enrollees, provide *unhindered* health care items and services to Medicaid beneficiaries, and to continue to bill Medicaid for those items and services.” *Id.* at 9 (emphasis in original). In other words, Petitioner’s offense allowed HealthFirst to continue to participate in the Medicaid program and to deliver items and services to program beneficiaries, despite the fact that it was in violation of its Medicaid contract with the DOH.

In addition, the regulation implementing section 1128(a)(1) requires the I.G. to exclude an individual “convicted of a criminal offense related to the delivery of an item or service under Medicare or a State health care program, *including the performance of management or administrative services relating to the delivery of items or services under any such program.*” 42 C.F.R. § 1001.101(a) (emphasis added). HealthFirst is a business

that delivers health care-related items and services. In his role as Chief Operating Officer and Executive Vice President of Sales of that business, Petitioner submitted HealthFirst's marketing plan to the DOH. His offense thus constituted the performance of management services relating to the delivery of items or services under a state health care program within the meaning of the regulation.

Petitioner argues that nothing in the record establishes that his conviction actually led to a sanction that impacted the delivery of an item or service under a covered program. Petitioner Brief (Pet. Br.) in Support of Appeal at 13. Petitioner misinterprets the necessary link between a criminal offense and the delivery of an item or service under a covered program. An offense may be "related to" the delivery of an item or service even if the offense did not directly involve the delivery of items or services. *See Salvacion Lee, M.D.*, DAB No. 1850 (2002); *Berton Siegel, D.O.*, DAB No. 1467 (1994). In addition, the offense need not have actually harmed the program in any way. *Neil R. Hirsch, M.D.*, DAB No. 1550, at 22-23 (1995), *aff'd, Hirsch v. Shalala*, No. 96-4008 (C.D. Ill. Nov. 4, 1996); *Paul D. Scollo, D.P.M.*, DAB No. 1498, at 9-11 (1994).

Petitioner also contends that, although the manner in which HealthFirst compensated its marketing representatives violated the marketing guidelines, its compensation structure "did not impact HealthFirst's Medicare or Medicaid beneficiaries, and certainly did not impact such beneficiaries' receipt of an item or service under such programs." Pet. Br. in Support of Appeal at 14. He further emphasizes that shortly after he submitted the marketing plan that led to his conviction, the marketing guidelines and HealthFirst's contracts with the DOH were amended to allow marketing representatives to receive bonuses based on their enrollment productivity. *Id.* According to Petitioner, with this change "New York State specifically endorsed the compensation of marketing representatives based upon productivity as a practice that does *not* impact the delivery of an item or service under New York's health care program." *Id.*

Petitioner focuses on the wrong misconduct, ignoring his role in the offense. His conviction did not stem directly from HealthFirst's compensation structure for its marketing representatives. Instead, his conviction was based on his submission of a marketing plan that falsely stated that the representatives were being compensated in accordance with the marketing guidelines. If, rather than falsely asserting that HealthFirst was in compliance with those guidelines, Petitioner had disclosed to the DOH that HealthFirst was violating the guidelines, that disclosure could have jeopardized HealthFirst's ability to participate in New York's Medicaid program. Accordingly, as discussed above, Petitioner's offense helped ensure that HealthFirst continued delivering items and services to Medicaid beneficiaries and receiving payment from Medicaid for those items and services. This is sufficient to establish the requisite nexus between Petitioner's offense and the delivery of an item or service under a covered program.

In concluding that Petitioner's offense related to the delivery of an item or service under Medicaid, the ALJ also noted that Petitioner was censured by the New York Office of the Medicaid Inspector General (OMIG) as a result of his conviction. ALJ Decision at 9-10. Petitioner argued before the ALJ and continues to argue before the Board that the fact that the OMIG initially excluded him from participation in Medicaid but later reduced its sanction to a censure undermines the conclusion that he should be excluded by the I.G. under section 1128(a)(1). *See* Pet. Br. in Support of Appeal at 18. Petitioner says that the OMIG's action meant that his "ability to participate in a State health care program was . . . unhindered by his conviction." *Id.* He appears to assert that the OMIG's decision not to exclude him shows that his conviction was not related to the delivery of an item or service under Medicaid.

As an initial matter, the action that the OMIG decided to take against Petitioner as a result of his conviction is not relevant. The I.G.'s authority to exclude Petitioner from participation in any federal health care program is governed by federal law, not state laws that authorize the OMIG to regulate Petitioner's participation in New York State's Medicaid program. The predicate for an I.G. exclusion is the conviction itself, not any penalty or remedy the state might impose for its purposes based on that conviction. In any event, we agree with the ALJ that the OMIG's action is consistent with the I.G.'s conclusion that Petitioner is subject to exclusion under section 1128(a)(1) of the Act and 42 C.F.R. § 1001.101(a). *See* ALJ Decision at 10.

Petitioner was initially excluded by the OMIG on the ground that he was convicted of a crime that "relate[d] to or result[ed] from . . . participation in the performance of management or administrative services relating to furnishing medical care, services or supplies . . ." N.Y. Comp. Codes R. & Regs. tit. 18, § 515.7(b)(2); *see* Pet. Ex. 2, at 1; Pet. Suppl. Br. in Opp. to Exclusion at 15-16. As the ALJ pointed out, although the OMIG later reduced its sanction to a censure, it has the authority to impose a less severe sanction only where it is already "authorized to exclude a person" under the regulation. ALJ Decision at 9, citing N.Y. Comp. Codes R. & Regs. tit. 18, § 515.7(f). Accordingly, the OMIG's decision to reduce Petitioner's sanction does not mean it changed its mind that Petitioner's criminal offense related to or resulted from his "participation in the performance of management or administrative services relating to furnishing medical care, services or supplies." To the contrary, the OMIG needed to conclude that such a link existed to impose *any* sanction on Petitioner. Moreover, as the ALJ noted, the language in the applicable New York regulation is "strikingly similar" to the language in 42 C.F.R. § 1001.101(a), which provides that an exclusion may be based on a conviction of a criminal offense involving "the performance of management or administrative services relating to the delivery of items or services" under Medicare or a state health program. ALJ Decision at 10. Thus, the OMIG's censure of Petitioner on the ground that he was convicted of a criminal offense under the applicable New York regulation buttresses, rather than undermines, the conclusion that Petitioner's offense was related to the delivery of an item or service under Medicaid.

Petitioner further asserts that the ALJ relied on excluded evidence to conclude that his offense was related to the delivery of an item or service under Medicaid. Pet. Br. in Support of Appeal at 15-18. Specifically, Petitioner contests the ALJ's citation to portions of the parties' briefs that relied on exhibits the ALJ later excluded as irrelevant and untimely filed. Those exhibits established that the DOH sanctioned HealthFirst by suspending its marketing activities for several months. The ALJ determined that this suspension resulted from Petitioner's offense and so lent additional support to the conclusion that there was a nexus between the offense and the delivery of an item or service under Medicaid. ALJ Decision at 9. Petitioner concedes that he admitted to the suspension in his own briefs, but argues that without the excluded exhibits there is no evidence that the suspension stemmed from his offense as opposed to other misconduct by HealthFirst and its employees. (Petitioner was indicted as part of a broader investigation of HealthFirst.) As our discussion above indicates, the ALJ's conclusion that there was a nexus between Petitioner's offense and the delivery of an item or service under Medicaid is amply supported by the fact that HealthFirst's contract with the DOH authorized suspension and other sanctions that *could have* restricted HealthFirst's ability to deliver items and services to Medicaid beneficiaries and by Petitioner's role in submitting the marketing plan containing the false representation. Accordingly, we need not address whether there were any errors in the ALJ's analysis related to the actual suspension of HealthFirst's marketing activities.

2. Any error committed by the ALJ in denying Petitioner the opportunity to file a supplemental reply brief is harmless.

Petitioner challenges the ALJ's decision to sanction him for failing to file a supplemental brief. Pet. Br. in Support of Appeal at 19-20; *see* ALJ Decision at 4-5. After the normal briefing process was complete, the ALJ ordered the parties to file simultaneous supplemental briefs on whether the rejection of a marketing plan would result in the rejection of a Medicaid contract under New York law. Ruling & Order at 3. Petitioner objected to the ALJ's order, asserting that the submission of simultaneous briefs impermissibly shifted the parties' respective burdens of proof. *See* Feb. 6, 2013 email. The ALJ refused to modify his order but stated that either party could request an opportunity to file a reply brief if it believed a reply was necessary. *Id.*

In his submission to the ALJ, Petitioner "respectfully decline[d]" the ALJ's "request" to submit a supplemental brief but requested the opportunity to submit a reply to any supplemental brief filed by the I.G. Pet. Resp. to Suppl. Briefing at 1st-2nd p. (unnumbered). "In the alternative," Petitioner also briefly addressed the question posed by the ALJ, asserting that the rejection of a marketing plan would not result in the termination of a Medicaid contract but instead in a lesser sanction. *Id.* at 2nd p. Relying on his authority to sanction a party for failing to comply with an order (42 C.F.R. § 1005.14(a)), the ALJ denied Petitioner's request to submit a reply to the I.G.'s supplemental brief on the ground that Petitioner "abandoned the right to request the

opportunity to reply” by not filing a supplemental brief. ALJ Decision at 5. The ALJ also concluded that allowing Petitioner to file a reply brief would reward his “contumacious conduct and directly undermine this tribunal’s authority to regulate the course of this proceeding.” *Id.*

Petitioner argues that he responded to the ALJ’s order for supplemental briefing and, after first stating that he declined to submit a supplemental brief, went on to answer the question posed, so the ALJ did not have a basis for sanctioning him. Pet. Br. in Support of Appeal at 20. However, Petitioner does not explain how he was harmed by losing the opportunity to file a reply, and we find no harm. Even assuming Petitioner’s submission adequately addressed the legal question posed by the ALJ, we conclude that an answer to that question is not necessary to determine whether Petitioner’s offense was related to the delivery of an item or service under a covered program. Therefore, the denial of an opportunity to reply to the I.G.’s supplemental brief can have no material effect on our determination, discussed above, that his offense was so related. The regulations governing these proceedings provide that the ALJ and the Board “at every stage of the proceeding will disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.” 42 C.F.R. § 1005.23. Accordingly, we need not determine whether the ALJ’s ruling was correct.

Conclusion

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

_____/s/
Leslie A. Sussan

_____/s/
Constance B. Tobias

_____/s/
Sheila Ann Hegy
Presiding Board Member