Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: December 31, 2008
Emem Dominic Ukpong,	
Petitioner,	Civil Remedies CR1857 App. Div. Docket No. A-09-21
- v. -	Decision No. 2220
Inspector General.	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Emem Dominic Ukpong (Petitioner) filed a notice of appeal and brief on December 2, 2008 challenging the October 29, 2008 decision of Administrative Law Judge (ALJ) Steven T. Kessel sustaining the determination of the Office of the Inspector General (I.G.) to exclude Petitioner from participating in Medicare and other federally funded health care programs for ten years. Emem Dominic Ukpong, DAB CR1857 (2008)(ALJ Decision). As explained below, we summarily affirm the ALJ Decision.

Petitioner first challenges the ALJ's ruling admitting I.G.'s exhibits 1 (except the admission of pages 1-2) through 5. The challenged exhibits include her conditions of probation (I.G. Ex. 1, at 3-6), indictment (I.G. Ex. 1, at 7-8), exclusion notice papers (I.G. Ex. 2), copies of two checks from Petitioner to Texas Medicaid totaling over $125,000 (I.G. Ex. 3), a case summary and criminal investigative report of the state Medicaid

Fraud Control Unit (MFCU) (I.G. Ex. 4), and a record of contact between an I.G. agent and a state prosecutor (I.G. Ex. 5).[1]

Petitioner does not question the authenticity of any of these exhibits. Instead, she argues the exhibits are "not credible evidence" because they contain information not identical to the four corners of what she refers to as the "plea agreement," i.e., I.G. Exhibit 1, at 1-2. Petitioner (P.) Br. at 3. She argued before the ALJ that this was "the only document that can be used as a basis for this action." P. ALJ Br. at 1-2. The ALJ thus erred, she says, by relying on the indictment, the MFCU report, and the restitution checks "due to the document's conflict with the plea document." P. Br. at 3.[2]

Petitioner cites no authority for the proposition that the ALJ may not consider any evidence relating to the nature or consequences of an offense to which a petitioner pled guilty outside the four corners of the court record of plea acceptance. On the contrary, the Board has previously recognized that an ALJ may rely on evidence extrinsic to the court record of the conviction in determining the nature and circumstances of the underlying offense.

> In fact, in a prior case, the Board rejected the petitioner's argument that a victim's statement should not be admissible because it went beyond the allegations in the specific charges to which he had pled. Bruce Lindberg, D.C., DAB No. 1386, at 3 (1993) (on appeal from ALJ decision on remand) (Lindberg II). The Board held that such use of extrinsic evidence does not constitute "creat[ing] a new set of offenses," but rather filling in the circumstances surrounding the events which formed the basis for the offense of which Petitioner was convicted. Id. Applying the reasoning of Lindberg II to the facts here, we find no blanket requirement that all the elements of section 1128(a)(2) must be established on the face of the charges of which

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[1] The ALJ did not rely on I.G. Ex. 5. ALJ Decision at 5, n.3. The document was offered to undercut Petitioner's claim of substantial cooperation as a mitigating factor which she does not raise on appeal. ALJ Decision at 5, n.3.

[2] The ALJ also noted that I.G. exhibits 1, 3 and 4 are part of the official criminal record and admissible even under federal evidence rules. ALJ Decision at 2; 42 C.F.R. Part 1005.

> an individual is convicted or by some kind of documentation in the criminal record.

Narendra M. Patel, M.D., DAB No. 1736 (2000), aff'd sub nom, Patel v. Thompson, No. 400-CV-277-HLM (N.D. Ga. 2002), aff'd, 319 F.3d 1317 (11th Cir. 2003), cert. denied, 539 U.S. 959 (2003). We thus find no error in the ALJ's use of documents other than the "plea agreement" in determining that the offense to which Petitioner pled guilty involved delivery of a health care item or service under a state health program, specifically false billing of the Texas Medicaid program for motorized wheelchairs not supplied as claimed. ALJ Decision at 2.

Petitioner also contends that the underlying facts which gave rise to a conviction are not properly at issue in an exclusion appeal, citing Travers v. Sullivan, 801 F.Supp. 394, 403 (E.D. Wash. 1992), aff'd sub nom Travers v. Shalala, 20 F.3d 993 (9th Cir. 1994). P. Br. at 5. She suggests that this decision implies that the ALJ should not have looked at the surrounding circumstances of her plea in determining either whether the crime fit the mandatory exclusion criteria under section 1128(a)(1) of the Social Security Act or whether the aggravating circumstances cited by the I.G. in setting the exclusion period were present. P. Br. at 5-6.

Petitioner mistakes the import of Travers. Travers involved a mandatory exclusion for the minimum five-year period. The petitioner there sought to collaterally attack the factual basis for his state-court conviction. The court held that due process did not require that the reviewing entity "scrutinize the validity of the underlying conviction; rather, it is to review the validity of the exclusion." 801 F.Supp. at 403. The ALJ here has not sought to readjudicate the validity of the conviction but merely considered all evidence relevant to whether the conviction met the requirements for a mandatory exclusion. Nothing in Travers precluded the ALJ's consideration of that evidence.

Since the present case involved a longer-than-minimum exclusion period, the ALJ also had to evaluate whether the evidence supported the aggravating factors found by the I.G. and whether the 10-year period was reasonable. The I.G. relied on two aggravating factors: (1) acts by Petitioner resulting in the conviction or similar acts caused a loss of $5,000 or more to the Medicaid program (42 C.F.R. § 1001.102(b)(1)) and (2) Petitioner's crimes extended over more than one year (42 C.F.R. § 1001.102(b)(2)).

Regarding the first factor, the ALJ indicated that Petitioner "was charged with, and pled guilty to, theft from the Texas Medicaid program in an amount between $100,000 and $200,000," and paid more than $125,000 in restitution. ALJ Decision at 4. Petitioner argues that the plea document does not set out the connection to the Medicaid program and that, although the indictment cited $100,000-$200,000, she pled guilty only to theft of $20,000-$100,000. P. Br. at 5. We have already explained that the ALJ was not limited to the plea document in determining the nature of the theft of which Petitioner was convicted. Petitioner is correct, however, that she was not convicted of theft greater than $100,000. This misstatement by the ALJ is harmless, however. Even $20,000 in loss is four times greater than the amount required to constitute an aggravating factor. Furthermore, contrary to Petitioner's position, her repayment of over $125,000 in restitution prior to the acceptance of her plea is documented in the record. I.G. Ex. 3. Petitioner's own request for hearing below listed as a "fact" that she "received 5 years probation and $125,800 in restitution, that has been paid." Request for Hearing at 2. This constitutes evidence that either the acts of which she was convicted, or similar acts, resulted in a loss to the Medicaid program that was very substantial. Petitioner did not dispute on appeal that her acts extended more than one year as the ALJ found.

We therefore agree with the ALJ that the I.G. documented two aggravating factors which together support ten years as a reasonable period of exclusion.

/s/
Judith A. Ballard

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member