

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

Enitan Osagie Isiwele  
Docket No. A-11-70  
Decision No. 2405  
August 15, 2011

**REMAND OF  
ADMINISTRATIVE LAW JUDGE DECISION**

Enitan Osagie Isiwele (Petitioner), a former supplier of durable medical equipment who was convicted of health care fraud and conspiracy to defraud the United States and sentenced to 97 months imprisonment, appealed the March 11, 2011 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes. The ALJ sustained his exclusion from participating in Medicare, Medicaid, and all other federal health care programs for a period of 17 years. *Enitan Osagie Isiwele*, DAB CR2339 (2011) (ALJ Decision).

On June 2, 2011, a federal district court reduced Petitioner's sentence to 78 months. The Inspector General (I.G.) then reduced the period of exclusion to 15 years and moved that the Board dismiss the appeal as moot or remand the case to the ALJ. Petitioner opposed the I.G.'s motion. For the reasons discussed below, we deny the motion to dismiss the appeal, and we remand the case to the ALJ to determine whether the revised period of exclusion is reasonable, given the federal court's reduction of the period of imprisonment.

**Applicable law**

The Social Security Act (Act) requires the Secretary of Health and Human Services to exclude from participation in Medicare, Medicaid, and all federal health care programs, for a minimum of five years, any individual who "has been convicted of a criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program." Act § 1128(a)(1), (c)(3)(B).<sup>1</sup> Among several specified factors that "may be considered to be aggravating and a basis for lengthening the period of exclusion" beyond five years is "[t]he sentence imposed by the court included incarceration." 42 C.F.R. § 1001.102(b). An excluded individual may request a hearing

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<sup>1</sup> The current version of the Social Security Act, with citations to the U.S. Code, can be found at [http://www.socialsecurity.gov/OP\\_Home/ssact/ssact.htm](http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm).

before an ALJ, but only on the issues of whether there is a basis for the exclusion and whether the length of exclusion the I.G. imposed beyond the mandatory five-year minimum is unreasonable, and may appeal the ALJ's decision to the Board. 42 C.F.R. §§ 1001.2007(a), 1005.21.

### **Background**

Pursuant to section 1128(a)(1) of the Act, the I.G. excluded Petitioner for 17 years based on his March 19, 2009 conviction in federal court on sixteen counts of healthcare fraud and one count of conspiracy to pay illegal remunerations, in violation of 18 U.S.C. §§ 1347 and 371, respectively. ALJ Decision at 3-4, citing I.G. Exs. 2, 4. Petitioner was sentenced to 97 months imprisonment and ordered to pay \$201,397.34 in restitution to the Centers for Medicare & Medicaid Services (CMS). *Id.* at 5, citing I.G. Ex. 3. The convictions were incident to Petitioner having billed Medicare for power wheelchairs sold to individuals who did not qualify for them under Medicare rules, during a time when CMS had reduced its scrutiny of claims for durable medical equipment in areas affected by hurricanes Rita and Katrina. *Id.* at 3.

The ALJ concluded that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program within the meaning of section 1128(a)(1), which required his exclusion for at least five years. *Id.* The ALJ found the 17-year period of exclusion reasonable based on the financial loss to Medicare, the duration of crime, and the length of the period of imprisonment. *Id.* at 5, citing 42 C.F.R. § 1001.102(b) (aggravating factors).<sup>2</sup>

On March 7, 2011, the U.S. Court of Appeals for the Fifth Circuit affirmed Petitioner's conviction but vacated his sentence and remanded the case to the district court for resentencing. P. Appeal Ex. 1 (*U.S. v Isiwele*, 635 F.3d 196 (5<sup>th</sup> Cir. 2011)). The Board then granted the I.G.'s request to stay Petitioner's appeal before the Board pending the resentencing. On June 2, 2011, the U.S. District Court for the Eastern District of Texas sentenced Petitioner to 78 months imprisonment. I.G. Att. A (*U.S. v Isiwele*, Amended Judgment, 1:08CR00163-00). By amended notice dated June 15, 2011, the I.G. reduced Petitioner's exclusion from 17 years to 15 years. I.G. Att. B.

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<sup>2</sup> The regulation specifies mitigating factors that may be considered as the basis for reducing, to no less than five years, an exclusion longer than five years imposed based on the existence of aggravating factors. 42 C.F.R. § 1001.102(c). In this case, the parties agreed that no mitigating factors offset the aggravating factors. ALJ Decision at 5; I.G. Br. at 5; P. Br. at 4.

## Analysis

### Dismissal of the appeal as moot is not appropriate.

The I.G. states that by regulation the Board's role in this appeal is "to review the decision of the ALJ in order to determine whether the initial decision was supported by substantial evidence in the record as a whole and was not erroneous as a matter of law." I.G. Motion to Dismiss at 3, citing 42 C.F.R. § 1005.21(h). The I.G. accordingly requests that we dismiss Petitioner's appeal as moot "because both the length of exclusion and an aggravating factor relied upon by the ALJ to uphold that period of exclusion" – the length of period of imprisonment – "have changed subsequent to the ALJ's decision." I.G. Motion to Dismiss at 3. Petitioner opposes the I.G.'s motion to dismiss, and states in his opposition that he continues to contest the reasonableness of the length of the exclusion period. P. Motion to Strike the I.G.'s Motion to Dismiss at 2.

Petitioner's appeal and arguments before the ALJ make clear that he contests any increase in his exclusion beyond the mandatory five year minimum imposed by section 1128 of the Act. We thus do not agree that the reduction in the period of exclusion from 17 to 15 years renders Petitioner's appeal moot. *See, e.g., Black's Law Dictionary* (9<sup>th</sup> ed. 2009) ("moot case" is *inter alia* "a matter in which a controversy no longer exists"). Dismissing the appeal would let stand as the Secretary's final decision an ALJ decision that does not address Petitioner's contention that the 15-year exclusion the I.G. imposed subsequent to the ALJ Decision is unreasonable. Thus, dismissal is not appropriate, and we deny the I.G.'s motion to dismiss Petitioner's appeal as moot.

### Remand to the ALJ is appropriate.

As the I.G. correctly notes, one role of the ALJ in an exclusion appeal is to determine whether the length of the exclusion imposed by the I.G. is reasonable in light of any applicable aggravating and mitigating factors specified in the regulations. I.G. Motion to Dismiss at 2; 42 C.F.R. §§ 1001.102, 1001.2007. In the instant case, one of three aggravating factors the I.G. applied and the ALJ considered in sustaining the 17-year exclusion was that Petitioner had been sentenced to 97 months of imprisonment. The ALJ considered this to be "a significant period of incarceration" of "more than eight years" that "underscores the seriousness of his crimes." ALJ Decision at 5; I.G. Ex. 1 (Notice of Exclusion, Aug. 31, 2010). The ALJ has not had the opportunity to consider whether Petitioner's new sentence of 78 months, or less than seven years, is "aggravating and a basis for lengthening the period of exclusion" to 15 years, i.e., whether that period of exclusion is reasonable. *See* I.G. Motion to Dismiss at 2 (stating that the I.G. considered the reduced 78-month period of imprisonment in determining to reduce Petitioner's exclusion to 15 years).

The regulations authorize us to remand any exclusion to the ALJ, and, more specifically, to remand a case for consideration of additional evidence not presented at the ALJ

hearing, if such evidence is relevant and material and there were reasonable grounds for not presenting it before the ALJ. 42 C.F.R. § 1005.22(f), (g). We accordingly remand the appeal to the ALJ to review the reasonableness of the 15-year period of exclusion imposed by the I.G. in light of the district court's decision, subsequent to the ALJ hearing, to reduce Petitioner's sentence of imprisonment from 97 to 78 months.

**Conclusion**

For the reasons stated above, we remand the appeal to the ALJ to review the reasonableness of the 15-year period of exclusion imposed by the I.G. in light of Petitioner's 78-month sentence of imprisonment. We deny the I.G.'s motion to dismiss the appeal.

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/s/  
Sheila Ann Hegy

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/s/  
Leslie A. Sussan

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/s/  
Stephen M. Godek  
Presiding Board Member