Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: December 31, 2008
Ioni D. Sisodia, M.D.,	
Petitioner,	Civil Remedies CR1850 App. Div. Docket No. A-09-7
- v. -	Decision No. 2224
Inspector General.	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Ioni D. Sisodia, M.D., (Petitioner), appearing pro se, appeals the September 30, 2008 decision by Administrative Law Judge (ALJ) Carolyn Cozad Hughes. Ioni Sisodia, DAB CR1850 (2008) (ALJ Decision). The ALJ Decision upheld the determination of the Inspector General (I.G.) to exclude Petitioner from participation in Medicare, Medicaid, and all federal health care programs for a period of five years.

For the reasons explained below, we conclude that the ALJ correctly determined that Petitioner was subject to exclusion from participation in Medicare, Medicaid, and all federal health care programs for a period of five years under section 1128(a)(1) of the Social Security Act (Act).[1]

[1] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding
(continued...)

Legal Background

Section 1128(a)(1) of the Act requires the Secretary of Health and Human Services (HHS) to exclude from participation in Medicare, Medicaid, and 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 title XVIII [Medicare] or under any State health care program." Section 1128(h) defines "State health care program" to include state Medicaid plans.

Section 1128(i) of the Act defines the term "convicted" as follows:

> For purposes of subsections (a) and (b), an individual or entity is considered to have been "convicted" of a criminal offense--
>
> > (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
> >
> > (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court; [or]
> >
> > (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court . . . .

Section 1128(c)(3)(B) of the Act states that "in the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years. . . ."

Implementing regulations at 42 C.F.R. Part 1001, Subpart B, address mandatory exclusions, including exclusions of an individual based on conviction 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

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[1](...continued)
United States Code chapter and section.

administrative services relating to the delivery of items or services under any such program." 42 C.F.R. § 1001.101(a).

The regulation at 42 C.F.R. § 1001.2007 sets forth the procedures governing appeals of I.G. exclusions of individuals and entities from participation in Medicare, Medicaid and all federal health care programs. Section 1001.2007 provides:

> (a)(1) . . . an individual or entity excluded under this Part may file a request for a hearing before an ALJ only on the issues of whether:
> (i) The basis for the imposition of the sanction exists, and
> (ii) The length of exclusion is unreasonable.
> (2) When the OIG imposes an exclusion under subpart B of this part for a period of 5 years, paragraph (a)(1)(ii) of this section will not apply.

Under subsection 1001.2007(d), when an I.G. "exclusion is based on the existence of a criminal conviction . . . the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds" in the appeal of the I.G. action.

Case Background[2]

Petitioner is a psychiatrist licensed in New York State. Petitioner pleaded guilty to a misdemeanor count of petit larceny in violation of section 155.25 of the New York State Penal Code. ALJ Decision at 1-2; I.G. Exs. 2, 8. The complaint alleged that Petitioner submitted "up-coded" claims to the New York State Medicaid program between 2000-2004. Id.; see also I.G. Ex. 4.

Petitioner agreed to pay $75,645.83 in restitution, fines and penalties in connection with the plea. I.G. Ex. 8. The court accepted Petitioner's plea and certified the petit larceny conviction. Id.

By letter dated March 31, 2008, the I.G. notified Petitioner that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs for five years, pursuant to section 1128(a)(1) of the Act. ALJ Decision at 1; March 31, 2008 I.G. Notice (attached to Petitioner's hearing request).

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[2] Our discussion of the case background is drawn from the ALJ Decision and the record and is not intended to substitute or amend any of the findings in the ALJ Decision.

On May 27, 2008, Petitioner appealed the I.G.'s exclusion by filing a request for an ALJ hearing. Following a prehearing conference with the parties and the submission of the parties' briefs and exhibits, the ALJ issued the decision upholding the I.G.'s action.[3]

The ALJ Decision

The ALJ made the following findings of fact/conclusions of law:

> A. Petitioner must be excluded for five years because she was convicted of a criminal offense related to the delivery of an item or service under a state health care program, within the meaning of section 1128(a)(1) of the Social Security Act.
>
> B. The statute mandates a five year mandatory minimum exclusion, and mitigating factors may not be considered to reduce that period of exclusion.

ALJ Decision at 2-3.

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 on the whole record. Id.

Analysis

In this case, Petitioner does not dispute the ALJ's finding that Petitioner was "convicted" of a criminal offense within the meaning of the Act. Further, Petitioner does not dispute the ALJ's finding that the criminal conviction related to the delivery of an item or service under a State health care program since the criminal charge for which Petitioner was found guilty involved billing under the New York State Medicaid Program. Indeed, in Petitioner's brief submitted in the ALJ proceedings, Petitioner acknowledged that she had been convicted of a crime related to the delivery of services under a federal or state

[3] On June 27, 2008, the ALJ issued an order summarizing the prehearing conference and scheduling the submission of the parties' briefs and evidence. The order stated that either party may request an in-person hearing as part of its written submission. Neither party made such a request.

health care program and that "the exclusion and length of exclusion are mandatory." P. Br. at 1. Accordingly, the ALJ properly determined that the elements necessary to support an exclusion based on section 1128(a)(1) of the Act are present. See, e.g., Thelma Walley, DAB No. 1367 (1992).

Further, as noted above, the plain language of section 1128(c)(3)(B) of the Act requires the duration of Petitioner's exclusion to be no less than five years. Under 42 C.F.R. § 1001.2007(a)(2), the question of whether the length of a mandatory five-year exclusion is reasonable is not an issue that an ALJ may consider. Accordingly, we find that the ALJ made no error in concluding that the reasonableness of the duration of the penalty was not an issue before her and that mitigating factors could not be considered to reduce the length of the exclusion. ALJ Decision at 3.

Petitioner argues that 42 C.F.R. Part 1005 authorizes the Centers for Medicare & Medicaid Services (CMS) or the I.G. either to exclude an individual's participation in Medicare, Medicaid and other federally funded health care programs *or* to impose civil money penalties (CMPs) on the individual, but not both. Petitioner argues that in her case, both an exclusion and a CMP were imposed since her "case was unconditionally discharged" from the City Court of Kingston and she already paid $75,645 in criminal and civil penalties to "the Medicaid Dept." Petitioner Request for Review (RR) at 1.

Petitioner's understanding of the law and the underlying history of this matter is mistaken. Part 1005 merely recognizes that some appeals may involve the I.G.'s imposition of CMPs, and other appeals may involve the I.G.'s imposition of exclusions. 42 C.F.R. §§ 1005.1, 1005.2(a)-(b). These appeal regulations do not preclude the I.G. from imposing both a CMP and an exclusion against an individual when so authorized under the Act. See, e.g., section 1128A of the Act; Rudra Sabaratnam and Robert I. Bourseau, DAB No. 2139, at 8 (2007).

Further, neither the I.G. nor CMS (nor the Secretary of HHS through any other delegation) imposed a CMP against Petitioner. Rather, Petitioner entered a plea of guilty and paid $75,645.83 in fines and restitution, in part applied towards the State criminal findings ($36,576.84) and in part to the State "Medicaid Fund for civil findings" ($39,068.99), in the New York State case of People of the State of New York v. Ioni Sisodia, Kingston City Court, Dkt. No. 07-56074 (2007). I.G. Ex. 8, at 4. The only penalty imposed against Petitioner by the I.G. pursuant to the

federal statute and regulations was the mandatory five-year exclusion from participation.

Petitioner also argues, as she did in the ALJ proceedings, that at the time she pleaded guilty to the misdemeanor offense of petit larceny, she did not fully understand the collateral consequences of the plea.[4] Specifically, Petitioner states, she was "told by Counsel that only Direct Medicaid billing would be affected and that Indirect Institutional billing would continue." RR at 2. In support of this argument Petitioner submits the transcript of her sentencing in the New York State proceedings, a copy of which appears in the record of the ALJ proceedings at I.G. Exhibit 8. Specifically, Petitioner cites the following statement by a representative of the Office of the Attorney General Medicaid Fraud Control Unit:

> Dr. Sisodia also understands that she will be prohibited from participating directly in the Medicaid program and she will also at the time of sentence be prohibited from participating in the Medicaid program by working for any agency which includes her salary in any type of cost report and receives remuneration from the Medicaid program.

I.G. Ex. 8, at 4. She indicates that further clarification was needed about what a "cost report" is. RR at 2.

The cited statement from the transcript of the Kingston City Court proceedings itself indicates that the conviction would affect more than Petitioner's ability to bill directly for her services. Moreover, the transcript shows that Petitioner's counsel stated that the issue of what the reference to a "cost report" means with respect to Petitioner's work was "going to be determined at a later time, [b]ut [Petitioner] will continue working as she is." I.G. Ex. 8, at 5-6. Petitioner asked the court for "added protection for [her]self . . . that through institution there will be billing or company billing that it would be allowed." Id. at 7. In response, the court stated,

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[4] Petitioner's brief in the ALJ proceedings stated that while her failure to understand all of the collateral consequences of her plea "might not be germane directly to this appeal," it nevertheless "might provide the basis for a motion to set aside the plea." P. Br. at 2. We note that any motion to set aside the plea is properly directed to the state court that entered that plea, however, not to this Board or to the court that will review this administrative decision to exclude Petitioner on the basis of her plea.

"that's going to be between you and your employer, they're going to have to do the best they can." Id. at 8. Thus, the transcript does not establish that Petitioner was assured by either counsel or the court that "Indirect Institutional billing would continue," as she asserts.

In any event, it is well-established that "once accepted by a state court, a plea constitutes a 'conviction' supporting exclusion under the Act, regardless of whether the individual excluded was advised of all of the possible consequences of his or her plea." Tamara Brown, DAB No. 2195, at 10 (2008), citing Douglas Schram, R.Ph., DAB No. 1372, at 11 (1992); Charles W. Wheeler and Joan K. Todd, DAB No. 1123, at 9 (1990), aff'd, Wheeler v. Sullivan, No. 2:90-0266 (S.D. W.Va. Sept. 26, 1991) (stating that since the record showed that the court accepted the excluded individual's guilty plea, the exclusion must be upheld regardless of whether the plea was "knowingly and willfully made"). Further, Petitioner's argument is essentially a collateral attack on the propriety of the conviction, which neither the I.G. nor the ALJ may consider in the case of a mandatory exclusion based on a criminal conviction. 42 C.F.R. § 1001.2007(d); Paul R. Scollo, D.P.M., DAB No. 1498 (1994); Peter Edmondson, DAB No. 1330 (1992); Charles W. Wheeler.

Finally, Petitioner asks the Board to consider a "hardship motion." RR at 2. Specifically, Petitioner requests the Board to overturn the exclusion or exempt Petitioner's work in the Veterans Health Administration system since it is a place of need based on the following grounds:

- Petitioner is in debt and needs to recover financially;
- Petitioner has lost her home of 35 years to foreclosure;
- Petitioner has a mentally disabled son for whom she is financially responsible and whose medical care is very expensive; and
- Petitioner has been unable to work due to a fractured spine sustained in a 2006 car accident.
- Petitioner has high standards and a reputation for providing quality services, as shown by reference letters.

Petitioner's request is essentially a plea for equity. As the Board has consistently held, the "I.G., the ALJ and the Board all lack discretion to reduce the exclusion below the statutory minimum." Henry L. Gupton, DAB No. 2058 (2007), aff'd, Gupton v. Leavitt, 575 F.Supp.2d 874 (E.D. Tenn. 2008).

Conclusion

For the reasons stated above, the ALJ Decision is affirmed.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member