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

Gregory J. Salko, M.D.
Docket No. A-12-21
Decision No. 2437
January 23, 2012

# FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

We affirm the October 5, 2011 decision of Administrative Law Judge (ALJ) Steven T. Kessel sustaining the exclusion of Gregory J. Salko, M.D. (Petitioner) from participating in federal health care programs for five years under section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a–7(a)(1)).[1] *Gregory J. Salko, M.D.*, DAB CR2443 (2011) (ALJ Decision). Section 1128(a)(1) requires the Secretary of the Department of Health and Human Services to exclude from participation in federal health care programs "[a]ny individual or entity that 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." The minimum period of an exclusion under section 1128(a)(1) is five years. Act § 1128(c)(3)(B).

The Inspector General (I.G.), on behalf of the Secretary, excluded Petitioner under section 1128(a)(1) based on his having pled guilty to a misdemeanor offense of making a false statement or representation of a material fact for use in determining rights to any benefit or payment under a federal health care program, a federal criminal offense under section 1128B(a)(2)(ii) of the Act (42 U.S.C. § 1320a-7b(a)(2)(ii)). Petitioner's offense related to his having made an entry in a patient's medical record in which he falsely represented that he had examined the patient and made false statements about the patient's medical condition. ALJ Decision at 2; I.G. Ex. 3, at 1-2. The ALJ concluded that Petitioner "was convicted of a criminal offense as is described at section 1128(a)(1) of the Act, and, therefore, the I.G. must exclude him" and that his exclusion for the mandatory minimum period was reasonable as a matter of law. ALJ Decision at 2-4. Petitioner timely appealed the ALJ Decision to the Board.

Petitioner argues that the I.G. should have excluded him for a shorter period of time under a different section of the Act, and that his exclusion under section 1128(a) was precluded by the earlier decision of the Centers for Medicare & Medicaid Services

[1] The current version of the Social Security Act with citations to the U.S. Code is at http://www.ssa.gov/OP_Home/ssact/ssact.htm.

(CMS) to revoke his Medicare billing privileges for one year. The ALJ considered and rejected both of these arguments, and for the reasons explained below, we sustain the ALJ Decision.

With his appeal, Petitioner submitted copies of the exhibits he submitted to the ALJ, who designated them jointly as Petitioner's Exhibit 1. Petitioner also submitted, in addition to his appeal brief prepared by counsel, his one-page "personal statement" in which he argues that his exclusion was unfair and appears to attack the validity of his criminal conviction. This personal statement is unsworn, and is in the nature of an argument properly considered part of the appeal brief rather than a proffer of testimonial or other evidence. In any event, as explained below, the arguments in the personal statement provide no ground for reversing the exclusion. *See* 42 C.F.R. § 1001.2007(a) (issue in exclusion for minimum period limited to whether the basis for the exclusion sanction exists), and 1001.2007(d) (individual excluded on the basis of a criminal conviction "may not collaterally attack it either on substantive or procedural grounds" in the ALJ appeal).[2]

## Standard of review

The Board's 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*.

## Discussion

### A. The I.G. was required to exclude Petitioner under section 1128(a)(1) of the Act, and to do so for a minimum of five years.

Since five years is the minimum period for an exclusion under section 1128(a)(1) of the Act, the only issue before the ALJ in this case was whether the I.G. had a basis for excluding Petitioner under that statutory provision. The I.G. has a basis where a petitioner is convicted of a criminal offense "related to the delivery of an item or service" under the Medicare program. Petitioner here does not specifically dispute the ALJ's conclusion that he was convicted of a criminal offense related to the delivery of an item or service under the Medicare program and that his offense is covered by the mandatory

[2] The I.G. proposes to introduce a new exhibit, a copy of the notice of proposed exclusion to Petitioner, dated November 19, 2009, which the I.G. described as "additional evidence of the extensive notice and opportunities for challenge provided" to Petitioner. I.G. Br. at 9 n.6.; I.G. Ex. 6. The I.G. did not demonstrate that there were reasonable grounds for the failure to produce the notice before the ALJ, and it is not material to our decision. Accordingly, we do not admit the proposed exhibit to the record. 42 C.F.R. § 1005.21(f). However, we note that Petitioner does not dispute that he received the notice of proposed exclusion.

exclusion provisions of section 1128(a)(1).[3] ALJ Decision at 2-3. Instead, Petitioner argues that the "permissive exclusion" statute at section 1128(b) of the Act was more applicable to his offense because "there was no delivery of an item or service to an existing Medicare patient, nor a claim for payment made to Medicare." P. App. at 1.

Petitioner's argument is baseless. The Board has repeatedly confirmed that section 1128(a)(1) covers offenses "related to" the delivery of an item or service under a covered program and does not require that an offense result in the actual delivery of an item or service. ALJ Decision at 2-3; *Timothy Wayne Hensley*, DAB No. 2044, at 6 (2006) (citations omitted). The ALJ here concluded that Petitioner's crime "is intimately related to the delivery of health care under the Medicare program" and that filing a claim "is not a prerequisite for committing a program-related crime under section 1128(a)(1) of the Act." ALJ Decision at 2-3. Petitioner does not dispute these conclusions. Moreover, the facts clearly support the ALJ's conclusion that Petitioner's offense was related to the delivery of an item or service under Medicare. As the ALJ found, Petitioner, through his guilty plea, "admitted that he made his misrepresentation for the purpose of determining rights to a benefit or a payment under the Medicare program," and "the care that Petitioner alleged that he provided to a Medicare beneficiary was the essence of Petitioner's crime." *Id*. Petitioner does not dispute those findings, which were based on the record of Petitioner's criminal case. I.G. Exs. 2-5. Indeed, Petitioner essentially admits that the offense was "related to the delivery" of an item or service, as required for an exclusion under section 1128(a)(1), by asserting that his offense was committed "in connection with the delivery of a health care item or service" as used in the permissive exclusion provision. P. App. at 4, quoting Act § 1128(b)(1)(A)(i); s*ee Mark B. Kabins, M.D.*, DAB No. 2410, at 9 (2011) (citations omitted) (the Board "has previously rejected a claim that the use of 'related to' in some parts of the exclusion statute and 'in connection with' in other parts should mean the terms are to be interpreted differently" and had "concluded that 'Congress intended no difference' in meaning between the two phrases."). Section 1128(a)(1), moreover, unlike some other provisions of section 1128, contains no requirement that a covered offense involve submission of a claim for reimbursement. *Compare* Act § 1128(a)(3), (b)(6) (authorizing exclusions for submission of such false claims and Medicare program fraud).

There was thus no error in the ALJ's determination that Petitioner was convicted of an offense related to the delivery of an item or service under the Medicare program as described at section 1128(a)(1) of the Act, requiring the Secretary to exclude him. ALJ Decision at 2.

[3] The I.G. states in his brief that Petitioner "does not appeal the ALJ's finding that his conviction was related to the delivery of an item or service under Medicare." I.G. Br. at 5. Petitioner did not request an opportunity to submit a reply brief to dispute this characterization of his position.

B. The permissive exclusion provision of section 1128(b) of the Act does not apply where, as here, there is a basis for a mandatory exclusion under section 1128(a).

Petitioner argues that he should have been excluded under the permissive exclusion provision applicable to misdemeanor offenses at section 1128(b)(1)(A) of the Act instead of under the mandatory exclusion provision at section 1128(a)(1). Section 1128(b)(1)(A) authorizes the exclusion of anyone convicted "of a criminal offense consisting of a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct . . . in connection with the delivery of a health care item or service." The Act sets the length of a permissive exclusion under section 1128(b)(1) at three years but permits the Secretary to impose a shorter (or longer) period in the presence of mitigating or aggravating circumstances specified in the regulations. Act § 1128(c)(3)(D).

Petitioner asserts that the language of section 1128(b)(1) "indicates Congress's clear intention" that it, and not section 1128(a), was meant to apply to misdemeanor offenses such as his. P. App. at 4. He argues that his exclusion under section 1128(a) violates that intent, renders section 1128(b)(1) "superfluous," and is contrary to "the well-established [maxim] of statutory interpretation which can be generalized as the '*specific governs the general*.'" *Id*. at 2, 4 (emphasis in original).

As the ALJ noted, the argument that an offense arguably covered by the permissive exclusion statute cannot be the basis of a mandatory exclusion under section 1128(a) "has been addressed and rejected" on many occasions. ALJ Decision at 3. As the Board has observed, if an offense falls under the mandatory exclusion statute, "courts have repeatedly held that the I.G. is then required to impose a mandatory exclusion even if an individual's conduct also falls within the scope of a permissive exclusion provision." *Timothy Wayne Hensley* at 15, citing *Dan Anderson*, DAB CR855 (2002), *aff'd, Anderson v. Thompson*, 311 F.Supp.2d 1121 (D. Kansas 2004); *Travers v. Sullivan*, 791 F.Supp. 1471 (E.D. Wash. 1992); and *Greene v. Sullivan*, 731 F.Supp. 835 (E.D. Tenn. 1990).

The Board also has rejected the argument that sections 1128(a)(1) and 1128(b) "should be interpreted such that any individual or entity convicted of a misdemeanor is subject to the permissive, rather than the mandatory, exclusion provisions." *Lorna Fay Gardner*, DAB No. 1733, at 5 (2000). The petitioner in *Gardner* was excluded under section 1128(a)(1) based on her misdemeanor conviction for making false statements in Medicare claims, a federal criminal offense under 42 U.S.C. § 1320a-7b(a)(1)(ii) (Act § 1128B(a)(1)(ii)). The Board held there that the Act "draws a distinction between felony and misdemeanor offenses only for fraud committed in connection with the delivery of a health care item or service in a health program other than Medicare or State

health care programs." *Id*. (emphasis in original). The Board discussed how the legislative history of these provisions demonstrates that Congress intentionally drew a distinction between program-related and nonprogram-related offenses. *Id.* at 5-7. In *Tamara Brown*, DAB No. 2195 (2008), the Board noted that the permissive exclusion provision on which Petitioner relies "does not apply where . . . the misdemeanor involves 'program-related crimes' such as those "related to the delivery of an item or service" in the Medicare or Medicaid programs" described in section 1128(a)(1). DAB No. 2195, at 7.

Thus, "when an individual is convicted of a 'program related' misdemeanor involving the delivery of an item or service," the mandatory exclusion statute applies, and the minimum period of exclusion is five years, as set forth under the plain language of section 1128(c)(3)(B). *Id*., citing *Gardner*.

Petitioner has identified no error in these holdings. The court case he cites in arguing that his exclusion under section 1128(a)(1) "would render the permissive exclusion section of the statute superfluous and disregard Congress's intent as evidenced by the language in the statute," *United States v. Aguilar*, 21 F.3d 1475 (9th Cir. 1994), does not address section 1128 of the Act and did not involve an exclusion from Medicare or other federal health care programs. P. App. at 4.

There was thus no error in the ALJ's conclusion that the I.G. was required to impose a mandatory rather than a permissive exclusion on Petitioner.

C. CMS's revocation of Petitioner's Medicare billing privileges under other authority does not bar the I.G. from excluding him under section 1128(a)(1), and there is no due process violation.

Petitioner argues that his exclusion by the I.G. was barred by the earlier determination of CMS to revoke Petitioner's Medicare billing privileges for a period of one year. CMS revoked Petitioner's billing privileges effective September 7, 2007 based on the suspension or surrender of his state medical license and his failure to timely report the same to CMS as required by the Medicare enrollment regulations at 42 C.F.R. Part 424. P. Ex. 1, at 3-4 (CMS Notice of Revocation of Medicare Billing Privileges, July 23, 2009), citing 42 C.F.R. §§ 424.535(a)(1), 424.516(d)(1)(ii). CMS reduced the period of revocation from three years to one year upon reconsideration. P. Ex. 1, at 1-2 (Medicare Hearing Officer Reconsideration Decision, Mar. 2, 2010). Petitioner argues that CMS's revocation determination "has preclusive effect on the IG's determination" and that the I.G.'s "decision fifteen months after CMS' administrative finding runs contrary to the well established principles of Res Judicata and Collateral Estoppel which apply in this case." P. App. at 4.

Petitioner's argument provides no basis for the Board to reverse the ALJ Decision. The Board has recognized that "[w]e have a limited role in reviewing ALJ decisions in exclusion cases." *Barry D. Garfinkel, M.D.*, DAB No. 1572, at 5 (1996), *aff'd*, *Garfinkel v. Shalala*, No. 3-96-604 (D. Minn. June 25, 1997). In this case, where the I.G. excluded Petitioner under section 1128(a)(1) for the mandatory minimum period and there are no material facts in dispute, our review is limited to considering whether the ALJ's determination that there is a basis for the exclusion is legally correct. 42 C.F.R. §§ 1001.2007(a)(l), 1005.21(h). The only issue before the ALJ was whether Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicare or any state health care program. Having concluded that there was a basis to exclude Petitioner under section 1128(a)(1), the ALJ was bound to uphold the exclusion. CMS's separate decision under other authority to revoke Petitioner's billing privileges has no bearing on that limited issue. Petitioner points to no provision of the Act or the applicable regulations, and we are aware of none, that authorizes the ALJ or the Board to ignore the clear requirement of section 1128(a)(1) that an individual convicted of an offense described therein be excluded from federal health care programs, based on a CMS determination regarding the individual's Medicare billing privileges.

Even assuming that the Board could reverse an exclusion by resort to the preclusion doctrines Petitioner cites, we would decline to do so because those doctrines do not apply here. Collateral estoppel, also termed "issue preclusion," is defined as "[t]he binding effect of a judgment as to **matters actually litigated and determined** in one action on later controversies between the parties involving a different claim from that on which the original judgment was based" and "[a] doctrine barring a party from relitigating an **issue determined** against that party in an earlier action, even if the second action differs significantly from the first one." Black's Law Dictionary (9th ed. 2009) (emphasis added). Res judicata, or "claim preclusion," is "[a]n **issue that has been definitively settled** by judicial decision" and "[a]n affirmative defense barring the same parties from litigating a second lawsuit on the same claim" with "three essential elements" comprising "(1) an earlier **decision on the issue**, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties." *Id*. (emphasis added). One of the cases Petitioner cites in support of his preclusion claims similarly provides three conditions for "according preclusive effect to unreviewed agency determinations . . . (1) that the administrative agency act in a judicial capacity, (2) that the agency resolve disputed issues of fact properly before it, and (3) that the parties have an adequate opportunity to litigate." *Miller v. County of Santa Cruz*, 39 F.3d 1030, at 1032-33 (9th Cir. 1994), *cert. denied*, 515 U.S. 1160 (1995), citing *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966).[4]

[4] We have reviewed the other cases Petitioner cites and conclude that they have no bearing on the circumstances of this case or on application of the exclusion requirements in section 1128 of the Act.

Neither doctrine applies here. In sustaining the revocation of Petitioner's billing privileges under 42 C.F.R. Part 424, CMS did not address the only issue before the ALJ in the exclusion proceeding under section 1128(a) of the Act, whether Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare. CMS made its revocation determination under entirely separate authority involving entirely different elements. The CMS revocation determination did not even address or note the fact of Petitioner's criminal conviction. P. Ex. 1, at 1-4, 8-16. None of the elements essential to an exclusion under section 1128(a)(1) were adjudicated in the CMS revocation process. While Petitioner calls CMS's revocation a "fully litigated administrative decision," in actuality, that decision did not litigate any of the issues relevant to an exclusion based on a program-related criminal conviction in section 1128(a)(1) of the Act, as required for collateral estoppel or res judicata even arguably to apply. P. App. at 3. The two distinct actions moreover impose different remedies; the revocation impacted only Petitioner's ability to bill the Medicare program for physician services, whereas the exclusion totally bars his participation in all federal health care programs. *See* 73 Fed. Reg. 36,448, 36,454 (June 27, 2008) (final rule establishing the process for appealing the revocation of billing privileges) ("[u]nlike OIG exclusions which apply government-wide and which generally last for 5 years or longer, the re-enrollment bar only applies to those billing the Medicare program.").

In connection with his claims of preclusion, Petitioner also asserts that his exclusion "violates the Petitioner's due process rights as it is an arbitrary taking of his property interest in the [Medicare] contract." P. App. at 2. The Board has previously rejected this argument, noting that courts that have considered the issue "have almost without exception" concluded that a physician or other health care practitioner or entity does not have a protected property interest in continuing eligibility for Medicare participation or reimbursement. *Robert F. Tzeng, M.D.*, DAB No. 2169, at 13-14 n.16 (2008) (citations omitted); s*ee also Erickson v. United States ex. rel. Dept. of Health and Human Serv.*, 67 F.3d 858, 862 (9th Cir. 1995) (concluding after review of relevant case law that ophthalmologist and practice excluded under section 1128(a)(1) based on criminal conviction "do not possess a property interest in continued participation in Medicare, Medicaid, or the federally-funded state health care programs" and received adequate due process with respect to any protectable liberty interest in part because petitioner had been convicted in a court of law).

We thus agree with the ALJ that CMS's revocation of Petitioner's Medicare billing privileges did not preclude his exclusion under section 1128(a)(1) of the Act or affect the length of the exclusion, which is mandated by statute to be at least five years. *See* ALJ Decision at 4 ("the fact that CMS may have exercised discretion not to revoke Petitioner's enrollment for a period of time greater than one year is of no significance here").

**Conclusion**

For the reasons discussed, we sustain the ALJ Decision upholding the I.G.'s imposition of a five-year exclusion under section 1128(a)(1) of the Act.

/s/
Judith A. Ballard

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member