Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Olandis Moore
Docket No. A-19-76
Decision No. 2963
August 1, 2019

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Olandis Moore (Petitioner) has appealed the March 28, 2019 decision of the Administrative Law Judge (ALJ), *Olandis Moore*, DAB CR5278 (ALJ Decision). The ALJ sustained a decision by the Inspector General (I.G.) to exclude Petitioner from participating in federal health care programs for five years under section 1128(a)(1) of Social Security Act (Act).[1] For the reasons discussed below, we affirm the ALJ Decision.

Legal Background

Section 1128(a)(1) of the Act requires the I.G. to exclude an individual from participating in any "Federal health care program" (as defined in section 1128B(f))[2] if that individual "has been *convicted* of a criminal offense related to the delivery of an item or service under [Medicare] or under any State health care program" (italics added). *Accord* 42 C.F.R. § 1001.101(a). For purposes of section 1128(a), a person "is considered to have been 'convicted' of a criminal offense" when (among other circumstances) he "has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld." Act § 1128(i)(4). A "mandatory" exclusion imposed under section 1128(a) must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

[1] The current version of the Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact-toc.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Cross-reference tables for the Act and the United States Code can be found at http://uscode.house.gov/table3/1935_531.htm and https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

[2] Section 1128B(f) of the Act defines "Federal health care program" to mean "(1) any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government" (other than federal employee health insurance); and "(2) any State health care program, as defined in section 1128(h)" of the Act.

A person excluded by the I.G. under section 1128 may request a hearing before an ALJ, but only on the issues of: (1) whether a "basis for" the exclusion exists; and (2) whether the length of the exclusion is unreasonable. 42 C.F.R. §§ 1001.2007(a)(1)-(2) and 1005.2(a). If the I.G. imposed a mandatory minimum five-year exclusion, then the exclusion's length is reasonable as a matter of law, and the excluded person may request a hearing only on the issue of whether the I.G. had a basis for exclusion under section 1128(a). *Id.* § 1001.2007(a)(2); *Robert C. Hartnett*, DAB No. 2740, at 2 (2016).

A party dissatisfied with an ALJ's decision concerning an exclusion may appeal that decision to the Departmental Appeals Board (Board). 42 C.F.R. § 1005.21(a).

Case Background

On September 28, 2018, the I.G. notified Petitioner that he was being excluded from federal health care programs under section 1128(a)(1) because of a criminal conviction in an Arkansas state court. I.G. Ex. 1. Petitioner then requested a hearing before the ALJ, who, in a pre-hearing order, instructed the parties to file, at minimum, "short-form" briefs stating their positions on the legality of the challenged exclusion and the necessity for an in-person hearing as well as the name of any witness whose testimony it proposed to proffer and a description of the expected testimony. *See* Dec. 18, 2018 Order and Schedule for Filing Briefs and Documentary Evidence at 3-4. The ALJ also directed the parties to submit any proposed witness testimony in the form of a declaration or affidavit. *Id.* at 4.

In support of the exclusion, the I.G. proffered Arkansas judicial records, including a "Felony Information," "Plea Statement," "Sentencing Order," and "Order to Dismiss and Seal." I.G. Exs. 3-6. On their face these records show that:

- On June 27, 2018, Petitioner pled guilty in the Circuit Court of Pulaski County, Arkansas to a single misdemeanor count of Medicaid fraud, a violation of Ark. Ann. Code § 5-55-111;

- On July 5, 2018, the Circuit Court, without finding guilt or entering a "judgment of guilt," and with Petitioner's consent, deferred further proceedings and fined Petitioner $1,000 pursuant to Ark. Ann. Code § 16-93-301 *et seq.*, which authorizes a court to withhold "adjudication of guilt" for a first-time offender who enters a guilty plea, and later to dismiss and seal the records of the offender's criminal case under certain conditions[3]; and

[3] For a description of the Arkansas first offender law, see *Eagle v. Morgan*, 88 F.3d 620 (8th Cir. 1996) and *Lynn v. State*, 2012 Ark. 6, 2012 WL 205881 (Jan. 12, 2012).

- On August 23, 2018, the Pulaski County Circuit Court, pursuant to Ark. Ann. Code § 16-93-301 *et seq.*, dismissed the criminal case against Petitioner and "expunged and sealed" the records of that case. *See* I.G. Exs. 3-6.

In addition to the just-mentioned judicial records, the I.G. submitted a copy of a reasonable-cause affidavit reciting facts underlying the charge of Medicaid fraud. I.G. Ex. 2. The affidavit, signed by an investigator with the Arkansas Medicaid Fraud Control Unit, states that Petitioner, a certified nursing assistant, billed a Medicaid waiver program for "Attendant Care" services he rendered to a hospital inpatient even though that program prohibited payment for services rendered to inpatients of hospitals, nursing homes, and other institutions. *Id.*

In his brief to the ALJ,[4] Petitioner did not deny that he had pled guilty to Medicaid fraud in June 2018. Nor did he dispute that the Pulaski County Circuit Court had disposed of his criminal case under a state law that permitted the court to withhold adjudication of guilt for a first-time offender. Petitioner also did not dispute that he had been "convicted" of Medicaid fraud within the exclusion statute's definition of that term or argue that the offense of conviction did not fall within the scope of section 1128(a)(1).

Instead, Petitioner contended that the exclusion was improper because he "never served any prison time." Pet.'s ALJ Br. at 1. He also stated that he "was not convicted of an offence for which exclusion is required" because no probation or parole was imposed by the sentencing court. *Id.* at 1. In addition, Petitioner suggested that the exclusion should be overturned because the record of his Medicaid fraud prosecution had been expunged. *Id.* at 2 (stating that there were "no docketed entries of any court sentencing or conviction for which the Petitioner can be excluded"). Petitioner did not identify any proposed witness, submit any declaration or affidavit, or state that a hearing was necessary.

Because neither party filed an affidavit or declaration ("written direct testimony"), the ALJ proceeded to decide the case based on the parties' briefs and documentary evidence. He held that "[t]he evidence offered by the IG, and not rebutted by Petitioner, unequivocally proves that Petitioner was convicted of a crime falling within the reach of section 1128(a)(1)," finding that his offense was "more than related to the delivery of a Medicaid item or service" in that it "directly victimized Medicaid based on fraudulent services." ALJ Decision at 2. In response to the points raised by Petitioner, the ALJ stated that the I.G.'s "authority to exclude [him] flow[ed] from his conviction of a crime and not from the sentence" imposed for the crime. *Id.* The ALJ also held that the expungement of Petitioner's criminal court record under the "deferred adjudication" arrangement did not deprive the I.G. of exclusion authority because Petitioner's

[4] The brief is dated March 19, 2019, but Petitioner did not file it with the Civil Remedies Division until March 28, 2019.

participation in that arrangement constituted a conviction for purposes of the exclusion statute. *Id.* at 3. Finally, the ALJ held that there "is no issue of whether the length of the exclusion imposed by the IG – a minimum of five years – is reasonable inasmuch as the IG excluded Petitioner for the minimum mandatory exclusion period." *Id.* at 1-2. Based largely on these holdings, the ALJ sustained the five-year exclusion of Petitioner from federal health programs.

Petitioner then appealed the ALJ's decision to the Board, using the short-form brief template that the ALJ had instructed him to use at the pre-hearing stage of the case.

Standard of Review

The I.G.'s regulations govern the standard and scope of Board review. Those regulations provide that the Board will review an ALJ's decision to determine if it is supported by substantial evidence and free of legal error. 42 C.F.R. § 1005.21(h). The regulations also state that the Board "will not consider . . . any issue in the [appeal] briefs that could have been raised before the ALJ but was not." *Id.* § 1005.21(e).

Analysis

Because the I.G. imposed a mandatory minimum five-year exclusion, the only issue before the ALJ was whether a basis existed for the exclusion under section 1128(a)(1). Two conditions must exist in order to exclude an individual under that provision. *See Delores L. Knight*, DAB No. 2945, at 9 (2019). First, Petitioner must have been "convicted of a criminal offense." Act § 1128(a)(1). Second, the offense of conviction must be "related to the delivery of an item or service under title XVIII [the Medicare program] or under any State health care program" (such as a state Medicaid program).[5] *Id.*

Petitioner concedes that the first condition – having been "convicted" of a criminal offense – was met. App. Br. at 1. Moreover, the record confirms that the condition was met. As noted, for purposes of the exclusion statute, a person "is considered to have been 'convicted of a criminal offense' if he "entered into participation in a first offender, deferred adjudication or other program or arrangement where judgment of conviction has been withheld." Act § 1128(i)(4). The judicial records submitted by the I.G. show that, after pleading guilty to the misdemeanor crime of Medicaid fraud, Petitioner consented to an arrangement, available for first offenders, under which the court deferred further

[5] Section 1128(h) defines the term "State health care program" to include "a State plan approved under title XIX" of the Social Security Act – that is, a state's federally approved Medicaid program. *Tamara Brown*, DAB No. 2195, at 6-7 (2008).

proceedings, withheld a judgment of conviction, and sentenced him to a $1,000 fine. I.G. Exs. 5-6. Petitioner was therefore "convicted" of Medicaid fraud on that basis, as the ALJ found. *See Michael S. Rudman, M.D.*, DAB No. 2171, at 6-7 (2008) (affirming the ALJ's finding that the appellant had been convicted when he was sentenced under a deferred adjudication arrangement whereby judgment of conviction was withheld), *aff'd*, *Rudman v. Leavitt*, 578 F. Supp.2d 812 (D. Md. 2008); *Leon Brown, M.D.*, DAB No. 1208, at 2 (1990) (holding that the defendant was convicted within the meaning of the exclusion statute because a court record showed that he "specifically agreed to an arrangement whereby the judge stayed entry of judgment and placed [him] on probation").

Turning to section 1128(a)(1)'s second element, Petitioner states that he "emphatically disagrees" that the offense of conviction was related to the "delivery of an item or service" under Medicare or Medicaid. App. Br. at 2. Substantial evidence supports the ALJ's finding that the offense was indeed related to such delivery. The judicial records and reasonable-cause affidavit proffered by the I.G. show that Petitioner pled guilty to "purposely" making, or causing to be made, a "false statement or representation of a material fact" in an "application" for payment or benefits under the Arkansas Medicaid program. I.G. Exs. 2-5. In other words, Petitioner pled guilty to an offense that involved the filing of a false Medicaid claim or claims. Filing a false claim for payment under Medicaid, or facilitating such a filing, is "related to the delivery of an item or service" under the program because a false claim is a "representation" that the billing health care provider "has delivered a covered item or service to a program beneficiary." *Kimbrell Colburn*, DAB No. 2683, at 5-6 (2016) (citing cases). The Board has repeatedly held that "false billing" for health care items and services satisfies the related-to-the-delivery element of section 1128(a)(1). *Craig Richard Wilder*, DAB No. 2416, at 6 (2011); *see also Rosa Velia Serrano*, DAB No. 2923, at 6-8 (2019) (finding that a conviction for making, or causing to be made, false statements or misrepresentations of material fact in order enable a person to receive an unauthorized Medicaid payment or benefit was related to the delivery of an item or service under Medicaid); *Michael Travers, M.D.*, DAB No. 1237 (1991) (upholding an exclusion based on a conviction for filing false Medicaid claims), *aff'd*, *Travers v. Shalala*, 20 F.3d 993, 998 (9th Cir. 1994) (noting that the legislative history of section 1128 "makes it absolutely clear" that filing a false or fraudulent claim is "exactly" the kind of conduct that "Congress sought to discourage").

Petitioner suggests that his offense was not related to the delivery of Medicaid services because he (allegedly) repaid Medicaid funds received "in error." App. Br. at 2. But repayment to Medicaid only confirms the existence of a relationship between the offense and the delivery of services under Medicaid. Moreover, an offense may be related to the delivery of an item or service under a covered program (such as Medicaid) even if the offense did not financially harm the program. *James O. Boothe*, DAB No. 2530, at 4 (2013).

Petitioner makes various other points unrelated to the ALJ's findings under section 1128(a)(1). For example, he asserts that his prosecution for Medicaid fraud was "unjustified" in that he lacked the requisite knowledge or criminal intent for that offense. App. Br. at 2-3 (asserting that "[t]here was absolutely no fraudulent intent involved in taking the monies in error," and that it was "not in my awareness that I should not have been paid during the hospitalization of the patient"). Petitioner further asserts that he was poorly represented by his lawyer in the criminal case. App. Br. at 2, 5. In addition, Petitioner submits that ex-colleagues would testify that he is a caring and dependable nursing assistant.[6] *Id.* at 3-4.

Petitioner did not make these points before the ALJ or show that he could not have done so. We are therefore barred from considering them. 42 C.F.R. § 1005.21(e); *Dike H. Ajiri*, DAB No. 2821, at 6 (2017). We note, however, that the governing regulations provide that when an exclusion is based on a criminal conviction (as it is here), the "basis for" the conviction (here, Petitioner's entry into a first-offender or deferred adjudication arrangement after pleading guilty to Medicaid fraud) "is not reviewable, and the individual . . . may not collaterally attack it either on substantive or procedural grounds" in the administrative appeal of the exclusion. 42 C.F.R. § 1001.2007(d). Based on that rule, and on related statutory analysis, the Board has consistently refused to entertain claims that a conviction supporting an exclusion is invalid or that the excluded person was in fact innocent of the offense of conviction. *Lyle Kai, R.Ph.*, DAB No. 1979, at 8 (2005) (emphasizing that all that is required to impose an exclusion is proof that a person was in fact convicted of a program-related offense, and that facts which might show innocence of the offense to which the defendant pled no-contest could not be relied upon to overturn the challenged exclusion), *aff'd, Kai v. Leavitt*, No. 1:05-CV-00514 (D. Haw. July 17, 2006); *Henry L. Gupton*, DAB No. 2058, at 12-13 (2007) (holding that the appellant's claim that he was innocent of the offense of conviction was "irrelevant" in reviewing the legality of the exclusion), *aff'd, Henry L. Gupton v. Leavitt*, 575 F. Supp.2d 874 (E.D. Ill. 2008); *Robert C. Hartnett* at 11 (stating that section 1128(a)(1) "does not permit [an individual] to admit his guilt to the charge as alleged in his criminal proceeding and then attempt to relitigate the facts of the charge in the exclusion proceeding").

[6] Petitioner also states that he should not have been sentenced to a "lengthy unsustainable probation of five (5) years." App. Br. at 2. If this statement refers to his criminal sentence, it is irrelevant for the reason stated by the ALJ – namely, that the I.G.'s exclusion authority depends on the fact of a conviction, not the sentence imposed for the offense of conviction. Furthermore, the available records show that the Arkansas Circuit Court did not sentence Petitioner to probation and imposed only a fine. I.G. Ex. 5, at 4. To the extent Petitioner may have meant the five-year exclusion period, that is, as explained earlier, the mandatory minimum period for an exclusion under the applicable provisions.

We also note that ALJs and Board must follow applicable federal statutes and regulations. 42 C.F.R. § 1005.4(c)(1); *Kenneth Schrager*, DAB No. 2366, at 6 (2011). Under those laws, a minimum five-year exclusion *must* be imposed on a person who has been convicted of a program-related offense (as Petitioner was). Act § 1128(a)(1); 42 C.F.R. § 1001.101(a). Neither an ALJ nor the Board may overturn a lawful mandatory exclusion, or reduce it below the statutory five-year minimum, based on character references, evidence of future employability, or other alleged mitigating factors. *Ioni D. Sisodia, M.D.*, DAB No. 2224, at 7 (2008).

Finally, we consider Petitioner's apparent request that a hearing be held. Petitioner indicates in his appeal brief that an in-person hearing is necessary to decide his case, and that he "could present a more comprehendible and credible" argument at such a hearing. Appeal Br. at 3. Petitioner also identifies two persons he says would testify about his character and competence as a certified nursing assistant. *Id.* at 3-4.

In general, Board review is based on the record developed before the ALJ. *Gracia L. Mayard, M.D.*, DAB No. 2767, at 6 (2017). A party has no right to "appear personally before the [Board]" to present argument, and any in-person evidentiary hearing (to receive witness testimony) must be conducted by the ALJ, who is also authorized to decide a case *without* an in-person hearing if the party who requested it elects to waive his appearance and submit only documentary evidence and written argument. 42 C.F.R. §§ 1005.6(b)(5), 1005.15, 1005.21(d). If a party proffers additional evidence on appeal from the ALJ's decision, the Board may remand the case to the ALJ to consider that evidence – but only if the party shows: (1) that the additional evidence is "relevant and material"; and (2) that he had "reasonable grounds" for failing to submit the evidence to the ALJ. *Id.* § 1005.21(f).

Petitioner is not entitled to further proceedings under these rules. In his brief to the ALJ, Petitioner did not identify any proposed witness or state that an in-person hearing was necessary. Although he told that the ALJ that he "reserve[d] the right to have" an in-person hearing "at a later date," Petitioner had no right to make such a reservation, and he does not claim now that the ALJ erred in deciding the case based on the parties' written submissions. Petitioner also does not meet the regulatory conditions for remanding the case to the ALJ because his proffered testimony is not "relevant and material" (none of it calls into question whether the statutory elements for exclusion are present) and because he cites no "reasonable grounds" for not submitting it to the ALJ.

Conclusion

Because the ALJ properly concluded that Petitioner was convicted of a criminal offense related the delivery of a service under the Arkansas Medicaid program, we affirm the ALJ's decision to sustain the I.G.'s five-year exclusion of Petitioner from federal health programs pursuant to section 1128(a)(1) of the Act.

/s/
Sheila Ann Hegy

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member