Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Adel A. Kallini, MD
Docket No. A-19-10
Decision No. 2944
May 23, 2019

REMAND OF ADMINISTRATIVE LAW JUDGE DECISION

Adel A. Kallini, MD (Respondent) timely appeals the decision of an Administrative Law Judge (ALJ) upholding on summary judgment sanctions imposed on Respondent by the Inspector General (IG) in *Adel A. Kallini, MD*, DAB CR5192 (2018) (ALJ Decision). The sanctions include a civil money penalty (CMP) of $1,727,000, an assessment in lieu of damages of $3,263,132, and an exclusion of Respondent from participating in Medicare, Medicaid, and all federal health care programs for 20 years. The IG determined that Respondent had knowingly presented 1,727 Medicare claims that Respondent either knew or should have known were for services not provided as claimed or were false or fraudulent.

Respondent opposed the IG's motion for summary judgment and cross-moved for summary judgment on the grounds that he was acquitted of criminal fraud charges based on the same claims at issue here and that he was misled into the questionable arrangement by the erroneous advice of counsel on which he relied. The ALJ rejected this contention because he concluded that an advice-of-counsel defense could not apply where no specific intent to defraud or violate the law was required by the applicable law.

As we explain below, we agree with the ALJ that a criminal acquittal does not preclude imposition of administrative sanctions which are based on different legal elements and a different burden of proof. We conclude, however, that the ALJ's rejection of the advice-of-counsel defense was overbroad and requires reconsideration more specifically in the context of the facts of this case. In that regard, because this case is not derivative of a prior conviction (in which case the bar on collateral attack on the underlying basis of that conviction often narrows the potential disputes of fact), the record below was not fully developed to resolve disputes of fact which may bear on the application of the relevant legal standards. We also conclude that the ALJ prematurely found the sanctions not unreasonable despite determining that aggravating factors relied on by the IG could not be considered without a full hearing.

We therefore vacate the ALJ's grant of summary judgment and remand for further proceedings.

Applicable legal authority

The Civil Monetary Penalties Law (CMPL) authorizes the IG to impose a CMP, assessment, and/or exclusion on any person who --

> (1) **knowingly** presents or causes to be presented to an officer, employee, or agent of the United States, or any department or agency thereof, or of any State agency . . . a claim . . . that the Secretary determines–
> (A) is for a medical or other item or service that the **person knows or should know was not provided as claimed** . . . [or]
> (B) is for a medical or other item or service and the person **knows or should know the claim is false or fraudulent** . . . .

Social Security Act (Act) §§ 1128A(a)(l)(A)-(B) (emphasis added), 1128A(j)(2); *see also* 42 C.F.R. pt. 1003. "Knowingly" means that "a person, with respect to an act, has actual knowledge of the act, acts in deliberate ignorance of the act, or acts in reckless disregard of the act, and no proof of specific intent to defraud is required." 42 C.F.R. § 1003.110. "Should know" means that "a person, with respect to information . . . acts in deliberate ignorance of the truth or falsity of the information; or . . . acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required." Act § 1128A(i)(7); *see* 42 C.F.R. § 1003.110.

Applicable sanctions for violations of sections 1128A(a)(l)(A) or (B) include CMPs of "not more than $10,000 for each item or service . . . [and] an assessment of not more than 3 times the amount claimed for each such item or service in lieu of damages sustained by the United States or a State agency because of such claim." Act § 1128A(a); 42 C.F.R. §§ 1003.200(a), 1003.210(a)(l), (b). In addition, the IG may "exclude the person from participation in the Federal health care programs" and direct exclusion from State health care programs. Act § 1128A(a); 42 C.F.R. §§ 1003.200(a), 1003.210(a)(l), (b).

In determining the amount of any CMP or assessment and the duration of any exclusion, the IG must consider: (1) the nature of the claims and the circumstances under which they were presented; (2) the degree of culpability, history of prior offenses, and financial condition of the alleged violator; and (3) such other matters as justice may require. Act § 1128A(d); 42 C.F.R. §§ 1003.140, 1003.220.

Any person as to whom the IG seeks to impose any of these sanctions is entitled to request a hearing before an ALJ and, if not satisfied with the ALJ's decision, to seek review by the Departmental Appeals Board. Act § 1128A(c)(2), (e); 42 C.F.R. §§ 1003.1500(b), 1003.1540; 42 C.F.R. pt. 1005. In CMP hearings, the IG bears the burden of persuasion by the preponderance of the evidence on all issues except affirmative defenses and mitigating circumstances as to which the burden lies with the respondent. 42 C.F.R. § 1005.15(b), (d). The ALJ in this case determined to use the same allocation of burdens in relation to the proposed exclusion. ALJ Decision at 4 (citing 42 C.F.R. § 1005.15(c) (with exceptions not applicable here, the ALJ determines the allocation of the burden of proof in exclusion cases)).

An ALJ may decide a case without an oral hearing where both parties waive appearance or by summary judgment if there is no disputed issue of material fact. 42 C.F.R. §§ 1005.15(a), 1005.6(b)(5), 1005.4(b)(12).

ALJ Decision

The ALJ made the following five findings of fact and conclusions of laws:

> 1. Respondent's request for hearing was timely and I have jurisdiction. [ALJ Decision at 5]
> 2. Summary judgment is appropriate. [*Id*.]
> 3. From between about June 2013 and February 2014, Respondent caused to be presented to Medicare 1,727 claims with his NPI [National Provider Identifier, a ten-digit number assigned for use with transactions requiring identification by NPI], claims that Respondent knew were false claims because he knew he did not provide or supervise the nerve conduction studies for which the claims were filed.[1] [*Id*. at 6]
> 4. Respondent committed 1,727 violations of section 1128A(a)(l)(A) and (B), one violation for each false claim he filed with Medicare, receiving $1,087,710.69 in reimbursement from Medicare for those false claims. [*Id*.]
> 5. A CMP of $1,727,000, an assessment in lieu of damages in the amount of $3,263,132.07, and exclusion of Respondent for a minimum of 20 years are reasonable sanctions. [*Id*. at 14]

[1] The ALJ noted that the record does not make clear who actually submitted the claims but found it sufficient that they were submitted "pursuant to the contract by one or more of the parties to the contract or at their direction." ALJ Decision at 9 n.4.

It is undisputed that the claims at issue were for studies performed prior to Respondent's involvement by an entity called Bioscan which had been purchased by two individuals named Leonard Austin and Gregory Sylvestri. *Id*. at 8-9. Respondent was introduced to them by Mark McWilliams, an attorney who was at the time representing Respondent in tax-related matters. *Id*. Bioscan apparently had no valid NPI under which to submit the existing claims. A contract was executed to govern the submission of the claims and distribution of the proceeds. *Id*. (citing I.G. Ex. 13).

For purposes of summary judgment, the ALJ accepted as true Respondent's assertions that "McWilliams advised Respondent that the arrangement among Respondent, Austin, and Sylvestri was legal"; that Respondent trusted and acted on McWilliams's advice in entering the arrangement; and that "Respondent was duped into the arrangement by McWilliams." *Id*. at 12 (citing R. Br. before the ALJ at 1, 2, 12). He also accepted Respondent's "representation that he was acquitted [at the criminal trial] based on evidence that he acted in good faith reliance upon the advice of his attorney McWilliams." *Id*.

The ALJ, however, concluded that the advice-of-counsel defense was not available in cases under section 1128A(a)(l)(A) or (B) of the Act as a matter of law on the ground that no specific intent to defraud Medicare is required in such cases. *Id*. at 13. The ALJ also pointed out that enrollment in Medicare involves giving assurances that the provider is "aware of and abides by all applicable statutes, regulations, and program instructions of the Medicare program." *Id*. (citing 42 C.F.R. § 424.510(d)(3); *Heckler v. Comm. Health Servs. of Crawford Cnty. Inc.*, 467 U.S. 51, 64 (1984); *Proteam Healthcare, Inc.*, DAB No. 2658, at 11-12 (2015); *Realhab, Inc.*, DAB No. 2542, at 17 (2013)).

The ALJ therefore granted the IG's motion for summary judgment and denied Respondent's motion. ALJ Decision at 5-6. The ALJ also upheld on summary judgment the reasonableness of all the sanctions proposed by the IG. *Id*. at 6.

Respondent timely appealed to the Board.[2]

Arguments of the parties

On appeal, Respondent does not dispute any of the facts which the ALJ found to be undisputed or accepted for purposes of summary judgment concerning the claims submitted. R. Br. at 11-12. Respondent's exceptions to the ALJ's decision instead

[2] We note that Respondent filed a number of documents with its brief marked as exhibits. The Board's acknowledgment ordered Respondent to explain whether these exhibits were in the record before the ALJ and, if not, why they were submitted belatedly. Respondent filed a statement that all the exhibits were already in the record and provided a chart matching up the exhibit numbers. The IG stated no objection. Since the new "exhibits" are merely duplicative, we need not and do not admit the copies and all citations in the decision are to the exhibits in the record before the ALJ.

largely arise from his acquittal which he contends resulted from acceptance of his argument that he relied in good faith on the advice of counsel that his arrangement to allow use of his provider number by third parties was "legal." *Id*. at 14-21. Respondent thus insists that his good faith reliance on the advice of counsel should preclude his exclusion and other sanctions for the same conduct. Alternatively, Respondent argues that the sanctions imposed were unreasonable. *Id*. at 21-28.

The IG argued on appeal that, even though Respondent argued that he did not know the claims being submitted were "'legally' false," Respondent knew that he did not provide or supervise the relevant services and therefore knew or should have known that the claims were false. IG Br. at 11 and n.1. Further, the IG contended that the ALJ was correct that Respondent's advice-of-counsel defense "failed as a matter of law," pointing to cases under the False Claims Act, 31 U.S.C. § 3729 et seq., as "instructive" as to the defense in the CMPL context. *Id*. at 18 and n.2 (citations omitted).

Analysis

1. *Respondent's acquittal of criminal fraud charges does not preclude administrative sanctions.*

The bare fact of his criminal acquittal cannot establish that Respondent did not violate sections 1128A(a)(l)(A) or (B) of the Act or that his asserted good faith reliance on the advice of counsel is a defense in this exclusion action. This is so for multiple reasons.

First, the acquittal was a jury verdict with no indication as to the reason the jury did not find the Respondent guilty. Respondent argues that the only reason must be his advice-of-counsel argument because no other defense was offered. Transcript of Oral Argument (Tr.)) at 33-35. However, it is also possible that the jury simply concluded that some element of the criminal offense was not established beyond a reasonable doubt or that some material testimony was not found sufficiently credible.

Second, the elements of the criminal charges of which he was acquitted are not identical to the components of either section 1128(a)(1)(A) or (B), especially as to the necessary intent. The indictment charged two counts: conspiracy to commit health care fraud and wire fraud (18 U.S.C. § 1349) and falsification of records in a federal investigation (18 U.S.C. § 1519). IG Ex. 2. The underlying offense of health care fraud requires "a scheme or artifice" meant --

> (1) to defraud any health care benefit program; or
> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits, items, or services . . .

18 U.S.C. § 1347(a). The crime does not require actual knowledge or intent to violate the law, *id.* § 1347(b), but does require that the participant act "knowingly and willfully." *Id.* § 1347(a).

Third, the criminal standard of proof beyond a reasonable doubt is obviously far more demanding than the preponderance-of-the evidence standard in these administrative proceedings. Indeed, in these proceedings, Respondent (not the government) bears the burden of proving that the preponderance of the evidence supports his asserted affirmative defense. 42 C.F.R. § 1005.15(b); ALJ Decision at 4.

Fourth, different evidence is presented in the administrative as opposed to the criminal forum. For one example, McWilliams did not testify in Respondent's criminal trial, whereas the record before the ALJ includes a lengthy deposition of McWilliams (and also of Respondent) from the later civil litigation between Respondent and McWilliams. IG Ex. 6. Furthermore, the parties have an opportunity in administrative litigation to provide new testimonial and documentary evidence.

Fifth, it is well-established that administrative enforcement in federal health care programs does not serve the same goals and purposes as criminal prosecution being focused on the protection of program resources and beneficiaries rather than on punishment of wrongdoers. *See, e.g.*, *Andrew Louis Barrett*, DAB No. 2887, at 6 (2018), (and cases cited therein); *see also Gupton v. Leavitt*, 575 F. Supp. 2d 874, 882 (E.D. Ill. 2008), (rejecting Eighth Amendment challenge because exclusion is remedial in nature), *aff'g Henry L. Gupton*, DAB No. 2058 (2007).

For all these reasons, it does not follow, either logically or legally, that Respondent's acquittal of criminal fraud implies that he did not submit claims he knew or should have known were not provided as claimed, or false or fraudulent. Determining that Respondent may be subject to sanctions under the CMPL based on a record developed before the ALJ does not, contrary to Respondent's assertion, involve any "blatant disregard of a verdict rendered by a competent jury." R. Br. at 22. We note, however, that in a permissive exclusion appeal such as this, the IG has the burden of proving the factual underpinnings on which the exclusion is based rather than simply relying on a criminal conviction.[3] We consider next whether summary judgment as a matter of law was appropriately granted based on the record here.

[3] By contrast, as the regulations provide and Board has repeatedly held, in challenging an exclusion or sanction based on, or derivative of, a prior criminal conviction, the respondent is precluded from collaterally attacking the factual or procedural elements of the underlying offense. 42 C.F.R. § 1001.2007(d) ("When the exclusion is based on the existence of a criminal conviction . . . , the basis for the underlying conviction, civil judgment or determination is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds . . . ."); *see, e.g., Valentine Okonkwo*, DAB No. 2832, at 3-4 (2017).

2. *Whether advice-of-counsel defense applies depends on analyzing all relevant facts.*

a. An advice-of-counsel defense is not inapplicable as a matter of law in the CMPL context.

The ALJ concluded that an advice-of-counsel defense is available only where a statute requires proof of an element of specific intent, and that therefore no such defense applies in CMPL cases which require only general intent. ALJ Decision at 12-13. The ALJ cited no direct authority for this conclusion, relying instead on various commentators and treatises discussing criminal case law or other administrative contexts. *Id*. (citations omitted).[4] Indeed, the parties have not identified anything in the statute or regulation, or the legislative or regulatory history, expressly addressing the question of whether, and if so how, the defense may apply in CMPL cases, and we have not found any authority on point. In addition, this appears to be a question of first impression before the Board.

The IG does not insist, in briefing on appeal or at oral argument, that an advice-of-counsel defense is precluded in cases arising under the CMPL as a matter of law. IG Br. at 19 n.4; Tr. at 21-23. Nevertheless, the IG contends that the ALJ correctly held that such a defense is unavailable as a matter of law to Respondent on the grounds that Respondent had actual knowledge that he did not perform the services at issue. *Id*.

The False Claims Act, like the CMPL, does not require "specific intent," that is, an intent to violate the law or to deceive, as opposed to a general intent to do the action(s) that constituted the violation. IG Br. at 6. The IG points out that the Board has recognized the similarities between the intent provisions of the two laws. IG Br. at 18 n.2 (citing *Karim Maghareh, Ph.D. & BestCare Lab. Servs., LLC*, DAB No. 2919, at 16 n.10 (2018) (citing in turn *Michael D. Dinkel*, DAB No. 2445, at 5 n.5 (2012)), *appeal filed*, *Maghareh v. Azar*, No. 4:19-cv-00238 (S.D. Tex. Jan. 22, 2019)). As the IG states, "the knowledge requirement in the False Claims Act," as with the CMPL, "does not require 'specific intent' but instead incorporates the intent standards of 'actual knowledge,' 'deliberate ignorance[]' and 'reckless disregard.'" *Id*. (quoting *UMC Elecs. Co. v. United States*, 43 Fed. Cl. 776, 793 n.15 (Fed. Cl. 1999)).

[4] The only case the ALJ cited was *United States v. McClatchey*, 217 F.3d 823 (10th Cir. 2000), in which the Court of Appeals reversed a lower court decision to set aside a jury conviction under section 1128B(b)(2)(A) of the Act (Medicare anti-kickback provisions). ALJ Decision at 12. The ALJ correctly noted that the appellate court rejected the application of the advice of counsel defense (*id*. at 13), but the court did not find that the defense was unavailable as a matter of law. 217 F.3d 823, at 829-31. Rather, the court concluded that sufficient evidence was presented to the jury to support a reasonable conclusion that the defendant possessed the requisite intent under the anti-kickback law and that the defendant and co-conspirators directed the attorneys about what to include in the negotiated arrangements, not the other way around. *Id*.

Yet, in cases arising under the False Claims Act, courts have recognized that advice of counsel, relied on in good faith and meeting the other factual prerequisites, "may contradict any suggestion that a contractor 'knowingly' submitted a false claim, or did so with deliberate ignorance or reckless disregard." *United States v. Newport News Shipbuilding, Inc.*, 276 F. Supp. 2d 539, 565 (E.D. Va. 2003).[5] Notably, in finding summary judgment inappropriate, the court also pointed out that content of the advice received "is obviously material to the reliance issue," as is determining whether all relevant information was disclosed, and thus should be the subject of factual inquiry at trial. *Id*. at 566. The Fourth Circuit upheld a jury verdict of conviction despite the defendant's claim of advice of counsel, finding that the evidence provided a factual basis for the jury to have concluded that the defendant had "shopped" for a favorable opinion and ignored unfavorable ones from various attorneys. *U.S. ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 381 (4th Cir. 2015). Thus, the court explained that –

> [A] defendant may avoid liability under the FCA if it can show that it acted in good faith on the advice of counsel. *Cf. United States v. Painter*, 314 F.2d 939, 943 (4th Cir. 1963) (holding, in a case involving fraud, that "[i]f in good faith reliance upon legal advice given him by a lawyer to whom he has made full disclosure of the facts, one engages in a course of conduct later found to be illegal, the trier of fact may in appropriate circumstances conclude the conduct was innocent because 'the guilty mind' was absent"). However, "consultation with a lawyer confers no automatic immunity from the legal consequences of conscious fraud." *Id*. at 943. Rather, to establish the advice-of-counsel defense, the defendant must show the "(a) full disclosure of all pertinent facts to [counsel], and (b) good faith reliance on [counsel's] advice." *United States v. Butler*, 211 F.3d 826, 833 (4th Cir. 2000) (internal quotation marks omitted).

[5] The court goes on to make clear that finding the defense available under a statute that requires only general intent does not imply that a particular defendant has met the prerequisites which is, rather, a matter for "factual inquiry at trial." *Id*. at 565-66 ("Clearly, if a contractor seeks the advice of counsel in good faith, provides full and accurate information, receives advice which can be reasonably relied upon, and, in turn, faithfully follows that advice, it cannot be said that the defendant "knowingly" submitted false information or acted with deliberate ignorance or reckless disregard of its falsity, even if that advice turns out in fact to be false. Yet, evidence of reliance on the advice of counsel and outside experts does not necessarily bar a fact-finder from finding that the contractor acted with reckless disregard; the contractor might have acted recklessly in relying on the advice because, for example, the advice may be shown to be patently unreasonable and thus not worthy of reliance or because the contractors' compliance with that advice was recklessly incomplete.").

Id.; *see also United States ex rel. Cairns v. D.S. Medical, L.L.C.*, No. 1:12CV00004 AGF, 2017 WL 3887850, at *3 (E.D. Mo. Aug. 31, 2017) (defense available under FCA but must prove full disclosure and good faith reliance); *United States ex rel. DeCesare v. Americare In Home Nursing*, 757 F. Supp. 2d 573, 586 (E.D. Va. 2010) (relator's FCA complaint survives dismissal despite stating defendant consulted counsel before entering arrangement because that does not establish defense absent evidence of full disclosure).

We therefore conclude that the ALJ erred in concluding that the defense is unavailable as a matter of law. We conclude that Respondent's claim of reliance on advice of counsel required evaluation in light of the facts and circumstances surrounding the arrangement generating the claims at issue and Respondent's conduct and state of knowledge relating to them.

While the ALJ also referenced the factual prerequisites for the defense (ALJ Decision at 12), it is not clear whether he fully considered whether Respondent could meet those prerequisites (viewing the evidence in the light most favorable to Respondent and drawing all reasonable inferences in his favor as he was required to do on summary judgment), in light of his ultimate conclusion that the defense was not legally available under the CMPL. Given that the legal issue is one of first impression, that the underlying facts are not settled by any prior conviction, that the record contains extensive testimonial evidence from prior civil and criminal trials, and that the process employed by the ALJ did not require submission of all witness testimony and documentary evidence prior to summary judgment motions, we determine that the matter is not amenable to summary judgment de novo on appeal. We therefore remand the case to the ALJ for further development.

b. On remand, the ALJ should develop the factual record and determine whether the defense is supported.

The ALJ stated that the advice-of-counsel defense "does not apply absent a showing that the alleged perpetrator acted reasonably and in good faith in seeking legal advice about whether future conduct was lawful, made full disclosure to the lawyer of all relevant facts, relied reasonably and in good faith upon the advice, and the attorney was acting as counsel and not a participant in the criminal scheme." ALJ Decision at 12. Respondent has not disputed this statement of the law on appeal.[6] He asserts that it was met. The IG acknowledges that the ALJ "did not specifically reach" whether "sufficient facts to establish advice of counsel were present," but asserts that they were not. IG Br. at 20.

[6] Since the parties accepted this formulation, we do not disturb it, but we note that the participation of the attorney in the underlying scheme might, in some circumstances, not disallow the defense if the party asserting it was unaware of the attorney's dual role and otherwise relied reasonably on the attorney's advice.

The factual preconditions the ALJ identified for substantiating the defense are disputed in the record. Among the questions raised on the record as it now stands which the ALJ may need to address to resolve the factual prerequisites for the advice-of-counsel defense are:

- Whether Respondent was in fact "duped" into understanding that claims could lawfully be submitted to Medicare using his NPI even though he had not ordered, supervised, provided or interpreted the tests (a finding the ALJ made only for purposes of summary judgment). In this regard, for example, McWilliams in his deposition asserts that he understood Austin and Sylvestri to be seeking a doctor to "read" the test results and that he was not familiar with Medicare and did not represent Respondent regarding Medicare issues prior to the investigation that led to these charges. IG Ex. 6, at 106, 110-12, 119-21, 245. Respondent, however, continues to assert that he was "deceived into the business venture by McWilliams." R. Br. at 24.
- Whether, even if he understood McWilliams to be providing legal advice that Medicare law permitted the arrangement, Respondent could rely on it "reasonably and in good faith" in light of Respondent's assertion that he believed McWilliams to have Medicare expertise (I.G. Ex. 5, at 101), McWilliams' denial of such expertise (I.G. Ex. 6, at 110-11), and Respondent's constructive knowledge of Medicare's requirements along with his long experience as a Medicare supplier;
- Whether, as Respondent claims, he willingly disclosed to the government investigator that he did not treat patients at the address the investigator named as the location at which the tests were performed (R. Br. at 12) and whether this evidences a lack of awareness that the claims submitted for such tests were inconsistent with his Medicare obligations.
- What significance to attribute to the inconsistency that both parties observe existed between the explicit terms of the written contract and the actual dealings among the persons involved. *See, e.g.*, I.G. Ex. 13 (agreement for Kallini to do billing for Bioscan); R. Br. at 5 (parties understood actual arrangement "[d]espite the literal terms of the written contract"); Tr. at 8 (Kallini counsel arguing that "[a]ll parties understood" how arrangement would operate "despite the explicit terms" of the contract), 24-26 (I.G. counsel arguing that contract "simply doesn't reflect the arrangement as it was carried out); I.G. Ex. 3, at 97–99 (actual practice of Kallini providing NPI to Bioscan for use with its claims), 159–61 (Sylvestri testifying that contract was to document arrangement to "run the Medicare number" although billing practices changed from contractual terms).
- Whether McWilliams acted as Respondent's counsel in the dealings with Austin and Sylvestri or was a participant in the arrangement himself (including, for example, whether his retention of part of the proceeds from Respondent's share constituted participation or merely payment for services previously rendered to Respondent (*see, e.g.*, IG Ex. 6, at 122-24)).

- What the material facts establish as to the two aggravating factors which the ALJ stated would require a trial (ALJ Decision at 17).

In addition, the ALJ should determine and provide for whatever additional record development may be needed to ensure a sound basis to resolve the material issues.

In short, the ALJ should consider on remand if the credible evidence on the record as a whole indicates that Respondent acted reasonably and in good faith in seeking McWilliams's advice about the lawfulness of all the proposed activities (including whether he reasonably relied on McWilliams's statement as establishing the permissibility under Medicare law of submitting these claims with his NPI) and that he actually relied on such advice (particularly given that the written contract prepared by McWilliams does not appear to correspond to the way the arrangements were actually conducted). The ALJ may also consider and resolve any other disputes of material fact he determines necessary to resolve the applicability of the defense.

We turn next to the issues relating to whether the sanctions imposed were unreasonable.

3. *On remand, the ALJ should consider the reasonableness of the sanctions proposed by the IG after applying the relevant factors to the facts as found.*

The ALJ correctly recited the criteria to be considered in evaluating whether the sanctions imposed by the IG are reasonable in magnitude, as follows:

> Section 1128A(d) of the Act requires consideration of the following factors in determining the amount of the CMP or assessment and the duration of an exclusion:
>
> 1. Nature of claims and circumstances of their presentation;
> 2. Culpability, history of prior offenses, and financial condition of the person presenting the claims; and
> 3. Other matters as justice may require.
>
> In determining the amount of any penalty, assessment, or period of exclusion, the Secretary has required by 42 C.F.R. § 1003.140(a) the consideration of certain factors summarized as follows:
>
> 1. Nature and circumstances of the violations;
> 2. Degree of culpability;
> 3. History of prior offenses;
> 4. Other wrongful conduct; and
> 5. Such other matters as justice may require.

ALJ Decision at 14. The ALJ also recognized that the regulations specify a number of aggravating and mitigating factors to be taken into account. *Id.* at 15 (citing 42 C.F.R. §§ 1003.140(c)(l)-(3), 1003.220).

The ALJ noted that the IG based the proposed sanctions on finding no mitigating factors and the following aggravating factors:

> • The false claims totaled $3,133,700, and the amount paid by Medicare on the false claims totaled $1,087,710.69;
> • Respondent was culpable because he attempted to conceal his conduct from investigators and he used the proceeds of the scheme to pay his federal tax debt; and
> • Respondent engaged in other wrongful conduct because the contractual arrangement amounted to an unlawful kickback agreement in violation of section 1128B(b)(l) of the Act (42 U.S.C. § 1320a-7b(b)(l)), and the money received by Respondent was an overpayment that he did not return to Medicare.

Id. at 17 (citing IG Ex. 1, at 3-4). The ALJ stated that determining "[w]hether or not Respondent was actively concealing the scheme and how he actually spent the ill-gotten gain would require a trial" and "[w]hether or not Respondent's conduct amounted to an unlawful kickback scheme would require a trial." *Id*.

The ALJ rejected Respondent's arguments that mitigating factors existed, that he was misled into the scheme, and that any culpability was low. *Id*. at 18 (citing R. Br. before the ALJ, at 17-26). The ALJ concluded that, even accepting facts asserted as true and drawing all favorable inferences for Respondent for purposes of summary judgment, the proposed $1,727,000 CMP is "entirely reasonable," because it is lower than the potential maximum per-claim amount and because of Respondent's culpability and the "notable absence of any significantly mitigating evidence." *Id*. The ALJ also stated that the assessment of triple the improper claims total, i.e., $3,263,132.07 is reasonable, without further explanation. *Id*. Finally, the ALJ stated that the undisputed facts "related to Respondent's involvement in this scheme reflect that he is not trustworthy" to the point that a permanent exclusion "would have been supportable," and commented favorably that, given Respondent's age in his 70s, "a 20-year exclusion will likely have the effect of permanent exclusion." *Id*. at 19.

It is difficult to reconcile some of the ALJ's statements and conclusions about culpability and trustworthiness and about the absence of any elements tending to mitigate with his findings for purposes of summary judgment including that Respondent was "duped" into involving himself in the scheme. Moreover, it is difficult to see how the ALJ determined,

"accepting facts asserted as true and drawing all favorable inferences for Respondent," *id.* at 18, that the sanctions proposed were all supported and reasonable despite concluding that two of the three aggravating factors cited by the IG in support of the sanctions could not be evaluated without a trial.

On appeal, Respondent presses his contention that, even if his defense of good faith reliance on the advice of counsel does not preclude finding him in violation of the CMPL, his seeking legal advice nevertheless should be considered in mitigation of his culpability, at least as part of the relevant "nature and circumstances," offsetting the uncontested number of claims and period of time involved. R. Br. at 23; R. Reply Br. at 7. He further contends that he was "simply gullible, not culpable," making the "incredibly high monetary sanctions" and effectively "permanent exclusion" unjust. R. Br. at 24.

Respondent points out that he received only about 30% of the proceeds, but he also acknowledges that his share was used to pay his federal civil tax debt and that he has not returned the funds (asserting that he cannot do so because he is "severely in debt"). R. Br. at 25, and n.4. Moreover, Respondent contends that the ALJ should have taken into account his inability to pay the large CMP and assessment, given his age and lack of employment or prospects.[7] *Id.* at 2.

Respondent further argues that the ALJ erroneously treated as "other wrongful conduct" the same acts on which liability was based (referring to the ALJ treating the fact "that Respondent engaged with others to file false claims and receive remuneration from Medicare" as an aggravating factor in itself. ALJ Decision at 17.). R. Br. at 25. Finally, Respondent asserts that the ALJ erred in finding him "untrustworthy" despite accepting that he was duped into participation while ignoring that Respondent practiced medicine "for over forty (40) years with no other issues with investigators from any agency on any level." *Id.* at 27.[8]

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[7] Respondent acknowledged at oral argument that he had not provided financial documentation to substantiate inability to pay prior to the issuance of summary judgment but stated that he could provide such documents to the ALJ if given the opportunity. Tr at 35. He contends that he has not yet had that opportunity because the parties had only submitted cross-motions for summary judgment, making the ALJ's conclusion premature. R. Br. at 22. The IG asserts that Respondent should only be permitted to submit documentation of financial condition to the ALJ, despite not having provided it to the IG prior to the appeal, upon a showing of "extraordinary circumstances." IG Br. at 26, n.7 (quoting 81 Fed. Reg. 88,334, 88,338 (Dec. 7, 2016)). The ALJ should decide in the first instance whether to permit submission of any such documentation on remand.

[8] Respondent also seeks to challenge the IG's "decision to exercise its authority" to sanction him as arbitrary. R. Br. at 27 (citing *Kabins v. Sebelius*, 2012 WL 4498295, No. 2:11-cv-01742-JCM-RJJ, *3 (D. Nev. 2012)). Respondent quotes dicta from *Kabins* to the effect that "variable application of the exclusion sanction could be viewed as either arbitrary or . . . lending itself to arbitrary and certainly selective enforcement." *Id.* (quoting *Kabins* at *3). The court's comments relating to the scope of health care delivery under a different, mandatory exclusion provision have no relevance here. In any case, the regulations expressly state that an ALJ does not have the authority to review "the exercise of discretion by the [IG] to exclude an individual or entity under section 1128(b) of the Act or under part 1003 of this chapter," which also deprives this Board of the authority to do so on

On remand, the ALJ may consider all relevant evidence concerning the reasonableness of the sanctions imposed here.

Conclusion

For the reasons explained above, we remand this matter to the ALJ for further proceedings consistent with this decision.

/s/
Christopher S. Randolph

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member

review of the ALJ's decision. 42 C.F.R. § 1005.4(c)(5). Respondent further considers arbitrary the imposition on him of sanctions that he contends are more severe than those imposed on others who were convicted in court whereas he was acquitted, and reserves for potential court review a claim that this disparity is unconstitutional. R. Br. at 27-28; R. Reply Br. at 10-11 (citations of Board cases omitted). As the Board has stated, the wide range of circumstances and factors involved in determining the reasonableness of sanctions in particular cases makes comparisons "not controlling and of limited utility." *Maghareh*, DAB No. 2919, at 28-29.