



The I.G. excluded Petitioner for as long as his license to practice medicine remains revoked.

Petitioner disputes the ALJ's conclusions that the license revocation was for reasons bearing on Petitioner's professional competence and professional performance and that Petitioner's other arguments amount to collateral attacks on the Medical Board's Order that are prohibited by regulation. As we discuss below, the ALJ's legal conclusions are not erroneous, and all of Petitioner's remaining arguments on appeal are without merit because they constitute impermissible collateral attacks on the Medical Board's Order. We thus sustain the exclusion.

Applicable law

Section 1128(b)(4) of the Act states in relevant part:

(b) *Permissive Exclusion.*— The Secretary may exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):

\* \* \* \*

(4) License revocation or suspension.—Any individual or entity—

(A) whose license to provide health care has been revoked or suspended by any State licensing authority, or who otherwise lost such a license or the right to apply for or renew such a license, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity . . . .

Section 1128(c)(3)(E) of the Act mandates that any period of exclusion based on section 1128(b)(4) must not be less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered.

The regulations governing exclusions, at 42 C.F.R. § 1001.2007(d), limit the scope of an appeal of an exclusion as follows:

§ 1001.2007 Appeal of exclusions.

\* \* \* \*

(d) When the exclusion is based on the existence of a criminal conviction or a civil judgment imposing liability by Federal, State or local court, a determination by another Government agency, or any other prior determination where the facts were adjudicated and a final decision was made, 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 in this appeal.

#### Standard of Review

The regulations set the Board's standard of review in I.G. exclusion cases. The standard of review on a disputed factual issue is whether the initial decision is supported by substantial evidence on the whole record; the standard of review on a disputed issue of law is whether the initial decision is erroneous. 42 C.F.R. § 1005.21(h). An ALJ may "[u]pon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact . . . ." 42 C.F.R. § 1005.4(b)(12).

#### Case Background<sup>1</sup>

Petitioner operated a clinic for the treatment of male sexual dysfunction from which he dispensed injectable prescription medications. ALJ Decision at 1-2. On August 9, 2007, the Medical Board issued an Order revoking his license to practice medicine. Id. at 2-3; I.G. Ex. 3 (Order). The Order states that it was issued following the summary suspension of Petitioner's medical license on April 19, 2007. Id. The Medical Board issued the Order following a disciplinary proceeding convened on August 8, 2007 to address the proposed findings of a Medical Board ALJ on the summary suspension, which the Order incorporates. Id. The Order notes that the Medical Board had previously suspended Petitioner's medical license,

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<sup>1</sup> The information in this section is drawn from the ALJ Decision and the record and is not intended as new findings.

from August 25, 2006 to February 2007, for reasons involving conduct in another case. I.G. Ex. 3, at 2; ALJ Decision at 3.

In the Order, the Medical Board concluded that Petitioner had violated Arizona law "by practicing medicine while his license was suspended" and by "[v]iolating a formal order, probation, consent agreement or stipulation" of the Medical Board. I.G. Ex. 3, at 5, citing ARIZ. REV. STAT. § 32-1401(27)(a), (r) (elements of the definition of "unprofessional conduct"). The Medical Board also concluded in the Order that "the evidence of record supports the Board's summary suspension of [Petitioner's] medical license on April 19, 2007, to protect the public health, safety or welfare." I.G. Ex. 3, at 5. The Order contains Findings of Fact describing instances of Petitioner engaging in the practice of medicine during the two periods when his license was suspended and dispensing injectable prescription medications without a certificate to dispense medications. Id. at 2-5; ALJ Decision at 8-9.

On November 28, 2008, the I.G. notified Petitioner that, pursuant to section 1128(b)(4) of the Act, he was to be excluded from participation in Medicare, Medicaid, and all other federal health care programs until he should regain his license to practice medicine in the State of Arizona. Petitioner requested a hearing to challenge the I.G.'s decision. The ALJ convened a prehearing conference by telephone and issued an order on January 22, 2009 summarizing the conference and stating that he anticipated that the case could be resolved by summary disposition, and establishing a schedule for submission of the parties' briefs and documentary exhibits. ALJ Decision at 3-4.

In his decision, the ALJ determined that the I.G.'s evidence "conclusively" established the "essential elements" necessary to support an exclusion under section 1128(b)(4)(A). Id. at 7-8. The ALJ cited the Medical Board's conclusion that Petitioner had engaged in unprofessional conduct by practicing medicine while his license was suspended as "clearly show[ing] that the revocation of Petitioner's license was for reasons bearing on his professional competence and professional performance." Id. The ALJ also cited the Medical Board's "concern that the public be protected from Petitioner" as "conclusively" making that showing. Id. at 8, citing I.G. Ex. 3, at 5.

The ALJ rejected Petitioner's contrary arguments, finding that Petitioner "attempts to explain further the circumstances underlying the Medical Board's action and disputes the specific

findings of the Medical Board." Id. Those arguments, the ALJ concluded, amounted to collateral attacks on the Medical Board's action prohibited by 42 C.F.R. § 1001.2007(d). Id. The ALJ rejected Petitioner's argument that "unprofessional conduct" did not bear on his professional competence or performance, reciting some of the Findings of Fact from the Medical Board's Order describing instances of Petitioner's conduct during the two periods when his license was suspended. Id. at 8-9. The ALJ also concluded that the length of the exclusion was reasonable as a matter of law because it was for the period mandated by section 1128(c)(3)(E) of the Act. Id. at 10. Finally, the ALJ concluded that because the material facts were "undisputed, clear, and unambiguous," they supported summary disposition as a matter of law. Id. at 10-11.

In his appeal of the ALJ Decision, Petitioner disputes the following Findings of Fact and Conclusions of Law (FFCLs) by the ALJ:

3. On August 9, 2007, following the disciplinary proceeding described above in Findings 1 and 2, the Arizona Medical Board made the following Conclusions of Law: (1) Petitioner violated ARIZ. REV. STAT. § 32-1401(27)(a), specifically ARIZ. REV. STAT. § 32-3202(A), by practicing medicine while his license was suspended; (2) Petitioner violated the provisions of ARIZ. REV. STAT. § 32-1401(27)(r) ("[v]iolating a formal order, probation, consent agreement or stipulation issued or entered into by the board or its executive director under this chapter."); and (3) the evidence of record "supported the Board's summary suspension of Petitioner's medical license on April 19, 2007, to protect the public health, safety or welfare. ARIZ. REV. STAT. § 32-1451(D)." I.G. Ex. 3, at 5.

4. On August 9, 2007, the Arizona Medical Board entered an Order revoking Petitioner's license to practice medicine in Arizona, for reasons bearing on his professional competence and professional performance. I.G. Ex. 3, at 5-6.

7. Because Petitioner's license to practice medicine in Arizona was revoked for reasons bearing on his professional competence and professional performance, as set out in Findings 1-4 above, a basis exists for

the I.G.'s exercise of his discretionary authority, pursuant to section 1128(b)(4)(A) of the Act, to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs.

9. There are no remaining disputed issues of material fact and summary disposition is appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

Id. at 6-7.

Analysis

1. The ALJ correctly determined that the Medical Board revoked Petitioner's medical license for reasons bearing on his professional competence and professional performance.

The Arizona Medical Board concluded that Petitioner, by practicing medicine while his license was suspended, violated two statutory provisions that are each independent definitions of "unprofessional conduct" under Arizona law governing the practice of medicine. I.G. Ex. 3; ARIZ. REV. STAT. § 32-1401(27)(a), (r).<sup>2</sup>

Petitioner states that he "does not contest" that the disciplinary proceeding that the Medical Board convened on August 8, 2007, which resulted in the Order revoking his license on August 9, 2007, "concerned Petitioner's professional competence and performance." Request for Review (RR) at 1, citing ALJ Decision at 6 (ALJ's FFCL No. 2). However, he

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<sup>2</sup> Arizona Revised Statute section 32-1401(27) defines "unprofessional conduct" as including:

(a) Violating any federal or state laws, rules or regulations applicable to the practice of medicine.

\* \* \* \*

(r) Violating a formal order, probation, consent agreement or stipulation issued or entered into by the board or its executive director under this chapter.

challenges the ALJ's conclusion his license was revoked for reasons bearing on his professional competence and professional performance within the meaning of section 1128(b)(4).<sup>3</sup> Petitioner also contends that the revocation did not relate to his professional competence or performance because "none of the 29 findings [in the Medical Board's Order] infer that I practiced medicine at all while my license was suspended." RR at 3. Although Petitioner claims to dispute that the revocation of his license was for reasons bearing on his professional competence or performance within the meaning of section 1128(b)(4) (RR at 2), he does not specifically deny that the Medical Board's conclusions, if valid, would authorize an exclusion under that statute. Thus, he is really making a collateral attack on the Medical Board's conclusions which, as we discuss in the next section, is not permitted in these proceedings. But, even assuming that Petitioner's real dispute is whether the revocation was for reasons bearing on his professional competence and performance, we find no error in the ALJ's conclusion that it was.

The Medical Board's Order indicates that not only did Petitioner practice medicine during the suspension of his license that ended in February 2007, but he also continued to practice medicine after the Medical Board summarily suspended his license again on April 19, 2007. I.G. Ex. 3, at 2-5; ALJ Decision at 3. The record contains undisputed evidence that Petitioner engaged in unprofessional conduct by repeatedly disregarding the orders of the State agency charged with governing the profession of medicine. These facts reasonably demonstrate that the revocation of his medical license was indeed for reasons bearing on his professional competence or performance. See, e.g., Wayne E. Imber, M.D., DAB No. 1740 (2000); Eric Kranz, M.D., DAB No. 1286 (1991) (exclusions under 1128(b)(4) based on revocation or surrender of medical license for unprofessional conduct under state law).

Additionally, as the ALJ noted, the Medical Board in revoking Petitioner's license concluded that "the evidence of record supports the [Medical] Board's summary suspension of

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<sup>3</sup> Petitioner also contends that the evidence before the Medical Board did not support a determination that he engaged in "professional misconduct." RR at 2, 3, 8-10. As we discuss below, this argument collaterally attacks the Medical Board's action and is not a ground for reversing the exclusion.

[Petitioner's] medical license on April 19, 2007 to protect the public health, safety or welfare." I.G. Ex. 3, at 5, cited at ALJ Decision at 8. The Medical Board cited section 32-1451(D) of the Arizona Revised Statutes, which provides that if the Medical Board finds "that the public health, safety or welfare imperatively requires emergency action," it may "order a summary suspension of a license pending proceedings for revocation or other action." See ALJ Decision at 2-3, n.2. The ALJ could thus reasonably conclude that the State's suspension of a medical license for "concern that the public be protected" shows that the suspension and subsequent revocation were for reasons bearing on professional competence and professional performance. Id. at 8.

2. Petitioner's arguments are collateral attacks on the revocation of his license that by regulation provide no basis to challenge the exclusion.

The exclusion regulations prohibit collateral attacks on a state agency's revocation or suspension of a license to practice medicine. 42 C.F.R. § 1001.2007(d). Even before section 1001.2007(d) took effect in 1992, the Board held that the exclusion statute never intended that the party being excluded under section 1128(b)(4) could mount a collateral attack on the state procedure. John W. Foderick, M.D., DAB No. 1125 (1990).

Although Petitioner repeatedly asserts that he is not collaterally attacking, or attempting to relitigate, the Medical Board's revocation of his license, this is not correct. See, e.g., RR at 5, 10, 18. Petitioner specifically contends that there is no evidence in the Medical Board's Order to support its conclusions, and that if evidence before the Medical Board had been included in the Order, the allegation of professional misconduct would have been dismissed. Id. at 2. This clearly constitutes a collateral attack.

That Petitioner's arguments constitute collateral attacks is also readily apparent from his objections to the ALJ's FFCL No. 3. FFCL No. 3, quoted above, essentially repeats, verbatim, three Conclusions of Law of the Medical Board stating that Petitioner violated Arizona law by practicing medicine while his license was suspended and by violating "a formal order, probation, consent agreement or stipulation" of the Medical Board, and that the evidence of record supported the summary suspension of Petitioner's medical license on April 19, 2007 "to protect the public health, safety or welfare." I.G. Ex. 3, at



5. Petitioner states that he "strongly contests all 3 points" under FFCL No. 3. RR at 2. Yet, he does not suggest that the Order does not contain the language the ALJ cited or was misquoted by the ALJ. Instead, Petitioner insists, throughout his request for review, that the Medical Board's Findings of Fact do not support its Conclusions that Petitioner violated State law and that those Findings are not supported by the evidence as Petitioner views it.

For example, Petitioner asserts, as noted above, that "none of the 29 findings [in the Medical Board's Order] infer that I practiced medicine at all while my license was suspended," and he further asserts that he "did not violate" Arizona law "by practicing medicine on a suspended license . . . ." RR at 3, 18. He also attempts to explain away or deny some of the examples of his conduct that the Medical Board cited in its Findings of Fact. See, e.g., RR at 8-9, 15-17. Petitioner makes other arguments that we do not summarize here, as they, too, merely allege errors in the Medical Board's Order and also misrepresent the substance of that Order.

Petitioner's efforts to deny the validity of or show error in the Medical Board's Order revoking his license are clearly collateral attacks on that Order. See, e.g., Black's Law Dictionary (8<sup>th</sup> ed. 2004) (collateral attack is "an attack on a judgment in a proceeding other than a direct appeal"). As such they are explicitly barred by section 1001.2007(d) and provide no basis for the ALJ or this Board to reverse the exclusion.<sup>4</sup>

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<sup>4</sup> We do not accept Petitioner's claim that the ALJ's characterization of his arguments as collateral attacks raises a disputed issue of material fact. RR at 3-5. The ALJ's characterization was correct; whether it is a factual or legal matter is thus neither material nor relevant. Petitioner challenges the ALJ's statement that "Petitioner concedes" that findings in the Medical Board's Order "may demonstrate" that he engaged in professional misconduct. ALJ Decision at 8. This point, even if true, is not material. The question is not whether Petitioner "concedes" that the findings of the Medical Board demonstrate professional misconduct, but whether the Medical Board's Order revoking his license falls within the scope of section 1128(b)(4). For the reasons already addressed, the ALJ correctly determined that it did.

A petitioner who believes there are serious flaws in the state's action must challenge it "in the appropriate forum." Leonard Friedman, M.D., DAB No. 1281 (1991). The appropriate means for Petitioner to have challenged the Medical Board's Order were stated in the Order itself: by timely filing a petition for a rehearing or review, which, the Order indicates, is a prerequisite for further appealing the Order to State court. I.G. Ex. 3, at 6. Proceedings before this Department's ALJs, and this Board, are not appropriate forums for relitigating determinations of the Arizona Medical Board or reweighing evidence that the Medical Board considered, which is clearly the relief that Petitioner seeks.

3. We decline to accept into the evidentiary record exhibits that Petitioner submitted with his appeal of the ALJ Decision.

With his appeal, Petitioner submitted six exhibits, which he identified as his exhibits 14 through 19, that were not part of the record before the ALJ. The regulations governing Board review of ALJ decisions in I.G. exclusion cases state:

(f) If any party demonstrates to the satisfaction of the DAB that additional evidence not presented at such [ALJ] hearing is relevant and material and that there were reasonable grounds for the failure to adduce such evidence at such hearing, the DAB may remand the matter to the ALJ for consideration of such additional evidence.

45 C.F.R. § 1005.21(f). Petitioner has not shown that his proffer of exhibits with his appeal meets any of the requirements in this regulation.

The additional exhibits are not relevant or material because they are all offered in support of Petitioner's impermissible collateral attack on the Medical Board's Order revoking Petitioner's medical license. Moreover, the ALJ rejected the additional exhibits when Petitioner submitted them with his initial request for a hearing, and Petitioner thereafter declined to resubmit them when the ALJ subsequently offered him that opportunity. The ALJ's "Order and Schedule for Filing briefs and Documentary Evidence," dated January 22, 2009, cautioned Petitioner that the materials he submitted with his hearing request would not become part of that evidentiary record unless and until proffered and admitted in compliance with the

ALJ's Order. Petitioner subsequently submitted his exhibits 1 through 13, which the ALJ admitted, but did not submit his exhibits 14 through 19. Petitioner has not shown any reasonable grounds for his failure to have resubmitted exhibits 14 through 19. In any event, as we noted above, none of these exhibits are relevant and material. Indeed, these documents are only used to support Petitioner's collateral attack on the Medical Board's Order. We therefore decline to remand the appeal pursuant to section 1005.21(f) or to accept the exhibits into the evidentiary record, although we retain them in the administrative case file.

Conclusion

We sustain the ALJ Decision in full.

\_\_\_\_\_/s/\_\_\_\_\_  
Sheila Ann Hegy

\_\_\_\_\_/s/\_\_\_\_\_  
Constance B. Tobias

\_\_\_\_\_/s/\_\_\_\_\_  
Stephen M. Godek  
Presiding Board Member