Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Juan de Leon, Jr.
Docket No. A-13-85
Decision No. 2533
September 16, 2013

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Petitioner Juan de Leon, Jr., owner of a supplier of durable medical equipment (DME) who was sentenced to 10 years in prison for convictions for health care fraud, conspiracy to commit health care fraud, and identity theft, appeals the May 22, 2013 decision of an Administrative Law Judge (ALJ) sustaining Petitioner's exclusion from participation in Medicare, Medicaid, and all federal health care programs. *Juan DeLeon, Jr.*, DAB CR2793 (2013) (ALJ Decision). The Inspector General (I.G.) excluded Petitioner for 20 years based upon his convictions under section 1128(a)(1) of the Social Security Act (Act). On appeal, Petitioner argues that he should not have been criminally convicted and that the length of the exclusion should be reduced based on the mitigating factor of his cooperation with federal authorities.

For the reasons discussed below, we sustain the I.G.'s exclusion of Petitioner for 20 years. We also sustain the ALJ's determinations that the I.G. properly accounted for Petitioner's cooperation by reducing the exclusion from the 25 years originally imposed, that Petitioner has not demonstrated his cooperation warrants any further reduction, and that the 20-year exclusion is within a reasonable range. The applicable regulations bar Petitioner's collateral attack on his criminal convictions.

Applicable Legal Authority

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a–7(a)(1), requires the Secretary of Health and Human Services to exclude from participation in Medicare, Medicaid, and all federal health care programs any individual who "has been convicted of a criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program [e.g., Medicaid]." An exclusion imposed under section 1128(a) must be for a minimum period of five years. Act § 1128(c)(3)(B).[1]

[1] The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

The regulation at 42 C.F.R. § 1001.102 specifies aggravating and mitigating factors the I.G. may consider in setting the period of the exclusion. Section 1001.102(b) lists the factors that "may be considered to be aggravating and a basis for lengthening the period of exclusion[.]" For exclusions imposed under section 1128(a)(1), the aggravating factors relevant to this case include:

> (1) The acts resulting in the conviction, or similar acts, that caused, or were intended to cause, a financial loss to a Government program or to one or more entities of $5,000 or more. (The entire amount of financial loss to such programs or entities, including any amounts resulting from similar acts not adjudicated, will be considered regardless of whether full or partial restitution has been made);
>
> (2) The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more;
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> * * *
>
> (5) The sentence imposed by the court included incarceration . . . .

42 C.F.R. § 1001.102(b). If the I.G. applied any of the aggravating factors to increase the period of exclusion beyond five years, section 1001.102(c) lists three mitigating factors that may be considered and provide a basis for reducing the period of exclusion to no less than five years. The mitigating factor relevant here is:

> (3) The individual's or entity's cooperation with Federal or State officials resulted in—
>
> (i) Others being convicted or excluded from Medicare, Medicaid and all other Federal health care programs,
>
> (ii) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or
>
> (iii) The imposition against anyone of a civil money penalty or assessment under part 1003 of this chapter.

Section 1001.102(c).

An excluded individual may request a hearing before an ALJ, but only on the issues of whether the I.G. had a basis for the exclusion and whether "[t]he length of exclusion is unreasonable." 42 C.F.R. §§ 1001.2007(a), 1005.2(a). If the exclusion is based on the existence of a criminal conviction by a federal, state or local court, "the basis for the underlying conviction . . . is not reviewable and the individual or entity may not

collaterally attack it either on substantive or procedural grounds in this appeal." 42 C.F.R. § 1001.2007(d). Any party dissatisfied with the ALJ's decision may appeal to the Board. 42 C.F.R. § 1005.21.

Background

Petitioner owned and managed United DME, Inc., a Texas DME supplier that sold power wheelchairs, diabetic supplies, and incontinence supplies. On September 29, 2011, Petitioner was convicted in federal district court of health care fraud, conspiracy to commit health care fraud, and aggravated identity theft, in connection with the provision of items for which Medicare and Medicaid reimbursement was claimed, during the period July 2008 through April 2010. Petitioner was sentenced to 10 years imprisonment and ordered to pay $750,000 in restitution to federal and state health care programs. ALJ Decision at 1-2. These facts from the ALJ Decision are undisputed.

The I.G. excluded Petitioner for 25 years based on the convictions and application of the three aggravating factors noted above, by notice dated July 31, 2012, and Petitioner timely requested an ALJ hearing. *Id*. The I.G. then reduced the length of Petitioner's exclusion to 20 years, by notice dated December 5, 2012, "[o]n the basis of new information about [his] substantial cooperation[.]" I.G. Ex. 2. The ALJ denied Petitioner's requests for the production of documents because they sought documents that were intended to collaterally attack his criminal conviction, were irrelevant and immaterial, or were otherwise protected from discovery by regulation. Order Denying P. Motion to Compel Discovery (Feb. 20, 2013). The ALJ denied Petitioner's request for an in-person hearing on the grounds that the testimony Petitioner would present also served only to collaterally attack his criminal conviction and duplicated materials already in the record. ALJ Decision at 3.

Based on the written record, the ALJ concluded that "[t]here is a basis for the I.G. to exclude Petitioner pursuant to section 1128(a)(1) of the Act" because he was convicted of a criminal offense "related to the delivery of an item or service under Medicare," and that "the exclusion of Petitioner for 20 years is within a reasonable range" based on application of three aggravating factors and the one mitigating factor of cooperation, which the ALJ concluded did not justify further reduction of the exclusionary period beyond the five-year reduction the I.G. previously granted. *Id*. at 5-10.

Standard of Review

The standard of review on a disputed factual issue is whether the ALJ decision is supported by substantial evidence on the whole record; the standard of review on a disputed issue of law is whether the ALJ decision is erroneous. 42 C.F.R. § 1005.21(h).

Analysis

I. The ALJ's determination that the I.G. had a basis to exclude Petitioner under section 1128(a)(1) is based on substantial evidence and is not erroneous.

Petitioner does not dispute that he was convicted of criminal offenses related to the delivery of an item or service under Medicare or a state health care program, which required the I.G. to exclude him under section 1128(a)(1) of the Act. The undisputed record evidence demonstrates that Petitioner was convicted of health care fraud, conspiracy to commit health care fraud, and identity theft in connection with the submission of hundreds of thousands of dollars in false and fraudulent Medicare and Medicaid claims for power wheelchairs and diabetic supplies. I.G. Exs. 3, 4. Accordingly, the ALJ did not err in concluding that the I.G. was required to exclude Petitioner for a minimum of five years under section 1128(a)(1) of the Act based on his conviction of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner does, as he did before the ALJ, question the validity of his criminal convictions. P. Request for Review of ALJ Decision (RR) at 1-2; ALJ Decision at 3, 6. Petitioner alleges that exonerating information showing he "had nothing to do with" the criminal acts was not presented to the jury and asserts that his exclusion relies "heavily on my conviction[,] as opposed to the truth." RR at 2. Petitioner, however, identifies no error in the ALJ's conclusion that "[u]nder the regulations" he was "unable to consider collateral attacks on Petitioner's underlying conviction." ALJ Decision at 6, citing 42 C.F.R. § 1001.2007(d). The ALJ properly applied the law. Petitioner's collateral attacks do not provide any basis to disturb the ALJ's determination that the I.G. was required by section 1128(a)(1) of the Act to exclude Petitioner based on his criminal convictions, for a minimum of five years.[2]

II. The ALJ's determination that a 20-year exclusion is within a reasonable range is based on substantial evidence and is not erroneous.

Because there was a legal basis for Petitioner's exclusion under section 1128(a)(1), the only other issue is whether "[t]he length of exclusion is unreasonable." 42 C.F.R. § 1001.2007(a)(1)(ii). It is well-settled that the ALJ's role in making that determination is limited to considering whether the period of exclusion the I.G. imposed was "within a

[2] If Petitioner's criminal conviction is overturned, the exclusion regulations state that an excluded individual "will be reinstated into Medicare, Medicaid and other Federal health care programs retroactive to the effective date of the exclusion when such exclusion is based on . . . [a] conviction that is reversed or vacated on appeal[.]" 42 C.F.R. § 1001.3005(a)(1).

reasonable range, based on demonstrated criteria." *Craig Richard Wilder, M.D.*, DAB No. 2416, at 8 (2011); *Joann Fletcher Cash*, DAB No. 1725, at 17 (2000), quoting 57 Fed. Reg. 3298, 3321 (Jan. 29, 1992). In determining whether a period of exclusion is within a reasonable range the ALJ may not substitute his judgment for that of the I.G. or determine what period of exclusion would be "better." *Wilder* at 8. The preamble to 42 C.F.R. Part 1001 indicates that the I.G. has "broad discretion" in setting the length of an exclusion in a particular case, based on the I.G.'s "vast experience" in implementing exclusions. 57 Fed. Reg. at 3321. We find no basis to reverse the ALJ's determination that the 20-year exclusion, 15 years beyond the mandatory statutory minimum, was within a reasonable range in light of the presence of three aggravating factors and one mitigating factor specified in the regulation. ALJ Decision at 6-10.

Petitioner neither disputes the existence of the three applicable aggravating factors nor argues that the ALJ erred in analyzing them in affirming the length of the exclusion as within a reasonable range when considered along with the one mitigating factor (other than to the extent such arguments are inherent in Petitioner's collateral attack on his criminal convictions, which we may not consider). Petitioner does argue that his cooperation was greater than the I.G. recognized. As we discuss below, the ALJ correctly analyzed the aggravating and mitigating factors, and Petitioner has not shown that his cooperation warranted any further reduction of his exclusion or that the ALJ's determination that a 20-year exclusion was within a reasonable range was either unsupported by substantial evidence or legally erroneous.

A. The ALJ's analysis of the aggravating and mitigating factors is supported by substantial evidence and is not erroneous.

First, there is no dispute that Petitioner's crimes resulted in a loss to federal and state programs of $750,000, based on the amount of restitution Petitioner was ordered to pay to federal and state health care programs. I.G. Ex. 4, at 4; I.G. Ex. 3, at 6 (indictment describing the submission to Medicare and Medicaid of "hundreds of thousands of dollars in false and fraudulent claims for power wheelchairs"); *see Wilder* at 9 ("restitution has long been considered a reasonable measure of program loss"). The Board has characterized program loss amounts substantially greater than the $5,000 statutory threshold "as an 'exceptional aggravating factor' entitled to significant weight." *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491, at 7 (2012), citing *Jeremy Robinson*, DAB No. 1905, at 12 (2004), and *Donald A. Burstein, Ph.D.*, DAB No. 1865, at 12 (2003). As the ALJ noted, the government loss in this case is some 150 times the $5,000 threshold for the loss to be considered aggravating. ALJ Decision at 7. Petitioner alleges no error, and we find none, in the ALJ's conclusion that the extent of the loss here "must be afforded such substantial weight as to support a significant increase to the reasonable range of exclusion periods that the I.G. may impose." *Id*.

Second, Petitioner does not challenge the fact that his criminal acts extended over nearly 20 months, from July 2008 through April 2010, a period well beyond the one-year threshold after which the duration becomes grounds for increasing a period of mandatory exclusion. I.G. Ex. 3, at 5, 8. The Board has said that the purpose of this aggravating factor "is to distinguish between petitioners whose lapse in integrity is short-lived from those who evidence a lack of such integrity over a longer period . . . ." *Burstein* at 8 (addressing acts over a 14-month period); ALJ Decision at 8.

Third, and perhaps most significantly, Petitioner was sentenced to a prison term of ten years. Such a substantial period of incarceration would, on its own, justify the I.G. in increasing an exclusion significantly in excess of the five-year mandatory minimum. As the ALJ noted, the Board once characterized a nine-month incarceration, which included a period of work release, as relatively substantial. ALJ Decision at 8, citing *Jason Hollady, M.D.*, DAB No. 1855, at 12 (2002). We concur with the ALJ that "[a] prison sentence of 10 years for a financial crime demonstrates the severity of the fraudulent billing scheme in which Petitioner was involved." *Id.*

As to the mitigating factor of cooperation, the I.G. during the pendency of the ALJ proceeding reduced Petitioner's exclusion by 20 percent, or five years, based on Petitioner's participation in three months of "consensual monitoring" that resulted in another individual's conviction. I.G. Resp. at 10; ALJ Decision at 9, citing I.G. Br. at 12 and I.G. Exs. 2, 5, at 2-3. The ALJ found that Petitioner's cooperation "may recoup a small amount of the trustworthiness he lost by participating in the billing scheme" that led to his conviction but also pointed out that Petitioner's cooperation "came after the fraudulent billing scheme had been stopped and the government incurred a massive loss." ALJ Decision at 10; *see Burstein* at 12 (explaining that the intent of exclusions under section 1128 is "to protect federally-funded health care programs from untrustworthy individuals").

Petitioner does not argue that the I.G. failed to give sufficient weight to the undisputed facts regarding Petitioner's cooperation – participating in consensual monitoring – that the I.G. did consider in setting the period of exclusion. We conclude the ALJ did not err in determining that the I.G. appropriately considered these undisputed facts when determining Petitioner's period of exclusion. ALJ Decision at 9-10.

B. Petitioner has not established that the extent of his cooperation was greater than what the I.G. determined.

Cooperation may be considered a mitigating factor only if it was "significant" and "resulted in . . . others being convicted or excluded[,] . . . [a]dditional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or . . . [t]he imposition against anyone

of a civil money penalty or assessment . . . ." 57 Fed. Reg. at 3,315; 42 C.F.R. § 1001.102(c)(3). The Board has long recognized that a petitioner bears the burden of showing the presence of any mitigating factor and the "responsibility to locate and present evidence to substantiate the existence of any alleged mitigating factor in her case." *Stacey R. Gale*, DAB No. 1941, at 9 (2004). Moreover, it is "entirely Petitioner's burden to demonstrate that . . . cooperation with a state or federal official resulted in additional cases being investigated." *Id*. The I.G., conversely, does not have the responsibility to substantiate that any cooperation by a petitioner did not have the results required by the regulation. *Id*.

Before the ALJ, Petitioner alleged only that "together with the F.B.I. I exposed individuals in wrongdoing" and that "over 6" DME suppliers were prosecuted "by no coincidence given my extensive cooperation with the authorities." P. Request for Hearing at 1; P. Br. at 3. Petitioner has not on appeal repeated those allegations. In any event, the allegations before the ALJ failed to identify the individuals or entities Petitioner alleges were sanctioned as a result of his cooperation. Before the ALJ, the I.G. submitted the declaration of a special agent with the I.G.'s office describing Petitioner's participation in recording conversations with an individual who later pleaded guilty to one count of conspiracy to defraud, and the I.G. "acknowledged . . . that Petitioner's participation in consensual monitoring later resulted in another individual's conviction." I.G. Br. at 12, citing I.G. Ex. 5, at 2-3 (declaration of special agent). However, the I.G. took this information into account and reduced Petitioner's exclusion by five years to 20 years. Petitioner has not pointed to any evidence of record supporting the vague claim of more extensive cooperation he makes here.

We sustain the ALJ's finding that Petitioner did not provide any evidence that compels a further reduction in the length of the exclusion period due to the mitigating factor of cooperation than the five-year reduction already granted by the I.G. ALJ Decision at 9-10. We further sustain the ALJ's conclusion that the 20-year period of exclusion is within a reasonable range. *Id*. at 6-10.

C. The ALJ did not err in denying Petitioner's motion to compel discovery.

Petitioner also argues the ALJ erred in denying his discovery requests. Petitioner sought documents comprising transcripts or reports of interviews by I.G. agents and investigators; a criminal history check on Petitioner and his co-conspirator, billing statements and patient files, emails, checks from United DME to the U.S. Department of the Treasury, transcripts of trial testimony of an I.G. special agent and an F.B.I. agent, the prosecution referral made by an I.G. agent, and the report of the F.B.I. agent. The I.G. objected to Petitioner's requests on the grounds that the documents sought were irrelevant or immaterial (i.e., they sought documents to collaterally attack Petitioner's conviction or documents not relied on by the I.G.), were protected from discovery, or were documents the I.G. did not possess or was unaware of. I.G. Resp. to Discovery Request.

The ALJ denied Petitioner's requests on the grounds the I.G. cited and also because Petitioner sought reports or statements of persons the I.G. would not call as witnesses that are protected from discovery by 42 C.F.R. § 1005.7(d) (protecting from disclosure "interview reports or statements obtained by any party, or on behalf of any party, of persons who will not be called as witnesses by that party . . .).[3] Order Denying P. Motion to Compel Discovery.

Petitioner does not explain how the ALJ improperly denied his discovery requests and we find no legal error in the ALJ's denial of them. On appeal, Petitioner seeks discovery in support of both his collateral attack on the validity of his criminal conviction and his claims of mitigating cooperation beyond what the I.G. recognized. RR. Discovery geared towards collaterally attacking a conviction that is the basis for an exclusion under section 1128(a)(1) of the Act is properly denied as seeking materials that are immaterial and irrelevant to the appeal. 42 C.F.R. §§ 1005.7(a) (party may request production of documents "relevant and material to the issues before the ALJ"); 1001.2007(d) (barring collateral attacks).

As to the issue of cooperation, Petitioner asserts that files maintained by the F.B.I. and the I.G. will reflect the extent of his cooperation, particularly the files maintained by the F.B.I. RR at 1. Petitioner before the ALJ did not seek F.B.I. files related to his cooperation, but rather transcripts of an F.B.I. agent's testimony at Petitioner's criminal trial and a report prepared by the F.B.I. agent in connection with Petitioner's criminal trial. The ALJ properly denied that request because the regulations authorize requests for production of documents only from parties to a hearing. 42 C.F.R. § 1005.7(a) (party may make a request for production of documents "to another party"). To the extent Petitioner now seeks materials beyond what he sought before the ALJ, the regulations do not provide for discovery before the Board. In addition, Petitioner did not allege before the ALJ any specific acts of cooperation sufficient to carry his burden of establishing a mitigating factor to show that the extent of that cooperation compelled a further reduction in the length of his exclusion. Nor does he allege here any such specific acts. Accordingly, we conclude that the ALJ did not err in denying Petitioner's discovery requests.[4]

[3] Petitioner before the ALJ requested to present two witnesses, himself and the I.G. P. Br. at 4. He cites no error in the ALJ's determination that the testimony Petitioner sought to present served only to collaterally attack his conviction and was not relevant to the issues before the ALJ. ALJ Decision at 3.

[4] Petitioner also has not identified any specific evidence going to the extent of his cooperation that was not presented before the ALJ that might warrant our considering whether a remand would be authorized under 42 C.F.R. § 1005.21(f).

Conclusion

For the reasons discussed, we affirm the ALJ Decision.

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Stephen M. Godek
Presiding Board Member