Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Rehabilitation Center at Hollywood Hills, LLC
Docket No. A-19-107
Decision No. 2970
September 26, 2019

DECISION REMANDING CASE TO THE ADMINISTRATIVE LAW JUDGE

Rehabilitation Center at Hollywood Hills, LLC (Petitioner), a nursing facility, appeals an administrative law judge (ALJ) decision that sustained the Inspector General (I.G.) determination to exclude Petitioner from participation in Medicare, Medicaid, and all federal health care programs under section 1128(b)(5) of the Social Security Act (Act), based on Petitioner's suspension from the Florida Medicaid program. *Rehab. Ctr. at Hollywood Hills, LLC*, DAB CR5328 (2019) (ALJ Decision). The ALJ sustained the exclusion on the ground that Petitioner had not been reinstated to the Florida Medicaid program following the end of the one-year term of suspension provided in state law.

We conclude that the ALJ correctly determined that the I.G. was authorized to exclude Petitioner under section 1128(b)(5) of the Act, and accordingly affirm the ALJ Decision in part. However, as we explain below, we also find that further development and ALJ determination are needed on the issue of the length of time the I.G. exclusion is to be in effect and accordingly remand the case to the ALJ for such action. 42 C.F.R. § 1005.21(g).

Legal Background

Section 1128(b)(5) of the Act, 42 U.S.C. § 1320a-7(b)(5), permits the Secretary of Health and Human Services (Secretary) to exclude, from participation in all federal health care programs, "[a]ny individual or entity which has been suspended or excluded from participation, or otherwise sanctioned, under . . . (B) a State health care program, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity."[1] *See also* 42 C.F.R. § 1001.601(a)(1)(ii)

[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. Also, a cross-reference table for the Act and the United States Code can be found at https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

(implementing regulation authorizing the I.G. to exclude an individual or entity "suspended or excluded . . . under . . . [a] State health care program, for reasons bearing on the individual's or entity's professional competence, professional performance or financial integrity"). The Secretary has delegated the exclusion authority to the I.G.

Section 1128(c)(3)(E) of the Act states that the period of an exclusion under section 1128(b)(5) "shall not be less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered, or the individual or the entity is excluded or suspended from a Federal or State health care program." *See also* 42 C.F.R. § 1001.601(b)(1) (exclusion "will not be for a period of time less than the period during which the individual or entity is excluded or suspended from a Federal or State health care program"). An excluded entity's reinstatement in federal health care programs after the state exclusion period ends is not automatic; the entity must file, and the I.G. must approve, a request for reinstatement. 42 C.F.R. §§ 1001.3001-3004.

An excluded individual may request a hearing before an ALJ only on the issues of whether the "basis for the imposition of the sanction [i.e., the exclusion] exists" and, except for mandatory exclusions of five years or less, whether the "length of exclusion is unreasonable."[2] *Id.* § 1001.2007(a)(1). The regulations forbid collateral attacks on the state action underlying the exclusion, stating that 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," then "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." *Id.* § 1001.2007(d).

Any party dissatisfied with the ALJ's decision may appeal the decision to the Board. *Id.* § 1005.21(a).

Case Background

The parties do not dispute the material facts, which we take from the ALJ Decision (at pages 2-3) and the record.[3]

[2] As the Act mandates that the period of an exclusion based on a state suspension under section 1128(b)(5) "shall not be less than the period during which . . . the individual or the entity is excluded or suspended from a Federal or State health care program," an exclusion that is coterminous with the state suspension is not subject to challenge before an ALJ or the Board.

[3] We make no new findings of fact.

On September 14, 2017, the Florida Agency for Health Care Administration (AHCA), Florida's Medicaid agency, issued an "Immediate Suspension Final Order" (AHCA Order) suspending Petitioner from participation in the Florida Medicaid program as of the date of the order. I.G. Exhibit (Ex.) 3, at 2. The AHCA Order states that, based on a survey of Petitioner's facility on September 13, 2017, AHCA–

> determined that the practices and conditions at [Petitioner's] facility present (1) a threat to the health, safety, or welfare of the residents of the facility, (2) a threat to the health[,] safety, or welfare of a client, (3) an immediate serious danger to the public health, safety, or welfare, and (4) an immediate or direct threat to the health, safety, or welfare of the residents.

Id. at 1. The Order adopts and incorporates the findings of an attached "Immediate Moratorium on Admissions," dated September 13, 2017, which, according to the AHCA Order, "form the factual basis for the determination of there being patient abuse or neglect." *Id*. The Immediate Moratorium describes a situation where eight residents suffered respiratory or cardiac distress during the early morning hours of September 13, 2017 and died following the failure of the air conditioning at the facility on September 10, 2017. *Id*. at 6. Petitioner reports that this occurred during "massive damage and power outages throughout the state" in the aftermath of Hurricane Irma. Petitioner's Notice of Appeal and Accompanying Brief (P. App. Br.) at (unnumbered) 1.

The I.G. notified Petitioner by letter dated October 31, 2018 that it was being excluded from all federal healthcare programs under section 1128(b)(5) of the Act because Petitioner had been "suspended, excluded or otherwise sanctioned" by AHCA "for reasons bearing on your professional competence, professional performance or financial integrity." I.G. Ex. 2, at 1. The notice also stated that the exclusion was effective 20 days from the date of the letter "and will remain in effect until you have been reinstated to the health care program which originally took the action against you." *Id*.

Petitioner requested an ALJ hearing. The I.G. filed a brief and four proposed exhibits, Petitioner filed a brief and five proposed exhibits, and the I.G. filed a reply brief and a fifth proposed exhibit. The ALJ admitted I.G.'s Exhibits 1-4 and Petitioner's Exhibits 1–5 into evidence and issued a decision on the written record.

ALJ Decision

The ALJ found the exclusion justified because "AHCA suspended Petitioner from participating in Florida's Medicaid program, a state health care program, and did so for reasons that plainly bore on Petitioner's professional competence and performance." ALJ Decision at 2. Citing the AHCA Order, the ALJ noted AHCA's findings that Petitioner's facility "presented a threat to the health, safety or welfare of its residents [and] a threat to

the health, safety or welfare of a client (a Medicaid recipient)"; "an immediate and serious danger to public health, safety, and welfare"; and "an immediate or direct threat to the health, safety, or welfare, of its residents." *Id*. (citing I.G. Ex. 3). The AHCA findings, the ALJ concluded, satisfied "the Act's requirement that a suspension of participation be related to an [entity's] professional competence or performance." *Id*. at 2-3; *see* Act § 1128(b)(5)(B).

The ALJ rejected Petitioner's principal argument, "that it is not 'presently suspended from the Florida Medicaid program'" because the Florida rule under which AHCA suspended Petitioner states that a suspension "is a ***one-year preclusion*** from furnishing" Medicaid services, meaning that "the term of [Petitioner's] suspension was for one year, running from September 17, 2017 until September 18, 2018." *Id*. at 3 (citing P. Informal Br. at 2, 5-10); P. App. Br. at 5 (citing Fla. Admin. Code Ann. r. 59G-9.070(3)(o), Petitioner's emphasis). The ALJ found that one year was "only the minimum period of time during which Petitioner is suspended from Medicaid participation," after which Petitioner merely "became eligible to *reapply for reinstatement*" (ALJ's emphasis), which "is not automatic under Florida law," and would then be required to "demonstrate that it has remedied the violations that are the basis for the suspension." ALJ Decision at 3 (citing Fla. Admin. Code Ann. r. 59G-9.070(6)(a)(2) (2017)). The ALJ concluded that under the Florida rule "[a] suspended entity remains suspended unless and until it is reinstated" and that "Petitioner remains suspended and it has not been reinstated to Florida's Medicaid program" because it "offered no proof that it applied for reinstatement [or] that it has been reinstated" and "cites to nothing showing that AHCA ever offered Petitioner automatic reinstatement after a year's suspension." *Id.* The ALJ also rejected Petitioner's argument that AHCA was judicially estopped from suspending Petitioner for more than one year, concluding that the state case cited by Petitioner precluding inconsistent positions by a litigant in multiple proceedings has no relevance since Petitioner did not show AHCA took any inconsistent positions. *Id*.

The ALJ also found that "[t]he length of the exclusion – coterminous with the suspension of Petitioner's Medicaid participation – is justified as a matter of law." *Id*. at 3 (citing Act § 1128(c)(3)(E) (exclusion period "shall not be less than the period during which . . . the entity is excluded or suspended from a Federal or State health care program").

Finally, the ALJ rejected, as collateral attacks on AHCA's suspension barred by section 1001.2007(d) of the regulations, Petitioner's arguments that the ALJ should "address the merits of the events that led to the suspension" by AHCA and that "there was no violation of any state or federal statutes" by Petitioner. *Id*. at 4. The ALJ found "no basis to examine the merits of the suspension here inasmuch as the [I.G.'s] exclusion authority derives from the administratively final suspension and not from the merits of the

allegations that form the basis for the suspension."[4] *Id*. at 5. The ALJ similarly rejected as collateral attacks arguments that the suspension was not final (i.e., court appeal still pending) or was invalid for being issued without a hearing. *Id*. at 4. The ALJ further found that "nothing in the Act or implementing regulations . . . suggests that an appeal in process of an administratively final state action stays or defeats the [I.G.'s] exclusion determination" and concluded that Petitioner's appeal of the suspension "neither stays the suspension nor does it vitiate the [I.G.'s] derivative exclusion authority." *Id*. at 4.

Standard of Review

"The standard of review on a disputed issue of fact is whether the initial decision [i.e., 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 initial decision is erroneous." 42 C.F.R. § 1005.21(h).

Analysis

Petitioner on appeal reasserts its chief argument raised below, that the one-year state suspension had ended by the time the I.G. issued the notice of exclusion on October 31, 2018 and thus the ALJ erred in sustaining the exclusion based on a finding that Petitioner remained suspended unless and until it applies for reinstatement and is reinstated into Florida's Medicaid program. The I.G. argues that it had authority to exclude Petitioner under section 1128(b)(5) because AHCA suspended Petitioner from the state Medicaid program "for reasons bearing on [Petitioner's] professional competence and performance," I.G. Br. at 2, and that the ALJ did not err in sustaining the I.G.'s exclusion because Petitioner "remains suspended by AHCA until such time as it returns to active status – a status which can only be achieved through" Petitioner's applying for reinstatement and a determination that the violations for which the suspension was imposed have been remedied. I.G. Br. at 10. The I.G. also argues that "the length of [the] exclusion – which is coterminous with [Petitioner's] suspension from the Florida Medicaid program – is reasonable as a matter of law" because Petitioner "remains suspended" for "fail[ure] to satisfy the conditions required for reinstatement," and such conditions must be met "for the suspension to be effectively lifted." *Id*. at 2, 8.

[4] For these reasons, the ALJ declined to incorporate by reference Petitioner's evidence in *Rehabilitation Center at Hollywood Hills*, DAB CR5232 (2019), which sustained the decision of the Center for Medicare & Medicaid Services to terminate Petitioner's participation in Medicare and impose civil money penalties in connection with the events underlying AHCA's suspension of Petitioner and the instant appeal. Before the Board Petitioner does not reference that case, which we do not address further.

In sum, as discussed below, we conclude that the ALJ correctly determined that section 1128(b)(5) of the Act authorized the exclusion based on AHCA's suspension of Petitioner and accordingly affirm that part of the ALJ Decision. We also conclude that the I.G. had authority to exclude Petitioner on October 31, 2018, after the date on which, Petitioner states, the state suspension expired. We also conclude, however, that the parties' arguments as we summarized in the previous paragraph raise what is in essence an issue about the length of time of the I.G.'s exclusion. The record below, as developed by the parties and on which the ALJ rendered his decision, leaves unanswered this question. We therefore find that a remand is appropriate to allow for further development on the issue before the ALJ rules on it. Lastly, we address Petitioner's remaining arguments, including its arguments disputing the validity of the state suspension. We determine that they provide no basis for overturning the exclusion.

1. The I.G. had authority under section 1128(b)(5) to exclude Petitioner based on AHCA's suspension of Petitioner from the Florida Medicaid program.

Section 1128(b)(5)(B) of the Act authorizes the exclusion of any individual or entity from participation in all federal health care programs if the individual or entity "has been suspended or excluded from participation, or otherwise sanctioned" under a state health care program, "for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity."

The ALJ found that, by order dated September 14, 2017, AHCA suspended Petitioner from participating in Florida's Medicare program "for reasons that plainly bore on Petitioner's professional competence and performance." ALJ Decision at 2; I.G. Ex. 3. The ALJ found "an obvious nexus between AHCA's findings that Petitioner's facility posed a threat to health, safety, and the welfare of its residents, among other things and the Act's requirement that a suspension of participation be related to [the entity's] professional competence or performance." ALJ Decision at 2-3.

Petitioner does not raise any argument about these ALJ findings. It does not dispute that it was suspended from Florida's Medicaid program for reasons bearing on its professional competence or professional performance. P. App. Br. at 1 (acknowledging that AHCA suspended it from the Florida Medicaid program "based upon allegations of deficient care in the aftermath of Hurricane Irma"). There is no dispute that the Florida Medicaid program, established pursuant to a state plan approved under title XIX of the Act, is a "state health care program" within the meaning of section 1128(h) of the Act for purposes of section 1128(b)(5) of the Act. Accordingly, the I.G. had authority to exclude Petitioner from all federal health care programs under section 1128(b)(5) based on AHCA's suspension of Petitioner, as the ALJ correctly determined. We affirm this part of the ALJ's decision.

2. *Accepting that the state suspension was for a one-year period that ended before October 31, 2018, the I.G. was not precluded from determining to exclude Petitioner under section 1128(b)(5) on October 31, 2018.*

Petitioner argued below, and continues to argue, that the exclusion should be reversed because the state suspension ended after one year by operation of state law and thus "the last day of the suspension was September 14, 2018, which has long since passed." P. App. Br. at 6; *see* P. Ex. 1 (AHCA Order dated September 14, 2017); I.G. Ex. 2 (Notice of Exclusion dated October 31, 2018); Fla. Admin. Code Ann. r. 59G-9.070(3)(o) (cited at P. App. Br. at 5 and ALJ Decision at 3) ("suspension" is "**a one-year preclusion** from furnishing, supervising a person who is furnishing, or causing a person to furnish goods or services that result in a claim for payment to the Medicaid program") (emphasis added).[5] Petitioner also writes, "The I.G. waited over a year to bring this action, after the underlying suspension was already served and over." P. App. Br. at 9. Petitioner's arguments may be understood to mean that, once the one-year suspension ended, the I.G. no longer had a legal basis to take the section 1128(b)(5) exclusion action.

The ALJ concluded that AHCA's suspension of Petitioner did not end after one year because, as is not disputed, AHCA had not reinstated Petitioner to the state Medicaid program. ALJ Decision at 3 ("Petitioner offered no proof that it applied for reinstatement nor did it offer proof that it has been reinstated."); P. App. Br. at 7 (acknowledging that Petitioner "has not sought to be reinstated in the Medicaid program"). We discuss in the next section why the Florida rule does not support the ALJ's finding (and the I.G.'s contention) that AHCA's suspension of Petitioner continued beyond the one-year term provided in the state rule. That the suspension may have ended under state law before the I.G. determined to exclude Petitioner, however, is not a basis to reverse the I.G.'s exclusion, because the Act places no such limits on the I.G.'s exclusion authority.

As the ALJ correctly determined, the I.G. has authority to exclude if, as here, the entity has been suspended from a state health care program for reasons bearing on the entity's professional competence or professional performance. Neither the exclusion statute nor the implementing regulations mandate *when* the I.G. may impose a section 1128(b)(5) exclusion as derivative of or based on a state action, such as suspension from the state health care program. That is, they do not by their terms require the I.G. to take such action while the underlying state action is in effect; they do not state that the I.G.'s authority to take such action ends once the state suspension ends. Nor do they prescribe that the time period an I.G. exclusion is to remain in effect must run with the duration of the state suspension and for no longer than that. (We will address this point in more detail below.) To the extent Petitioner's arguments about the expiration of the one-year

[5] https://www.flrules.org/gateway/RuleNo.asp?title=OVERSIGHT%20OF%20INTEGRITY&ID=59G-9.070 (viewed September 24, 2019).

suspension before the I.G. determined to exclude Petitioner by its October 31, 2018 notice may be understood as an assertion that the I.G.'s authority to exclude it under section 1128(b)(5) ended once the one-year state suspension period ended, we determine that the Act and regulations do not so limit the I.G.'s authority.[6] Petitioner has not cited any authority to support the contrary.

Petitioner's arguments about the expiration of the state suspension prior to the I.G.'s exclusion and the I.G.'s arguments, in contrast, about Petitioner remaining suspended under Florida law unless and until Petitioner is reinstated into the Florida Medicaid program more properly go to the *length* of the period of the I.G. exclusion, not the I.G.'s authority to exclude or when it may take that action. As we discuss next, further development and ALJ ruling are needed on this issue.

3. The record as to the duration of the exclusion the I.G. intended to impose is not sufficiently developed, and we remand the appeal to the ALJ to develop and rule on that issue.

The I.G.'s October 31, 2018 notice imposing the exclusion states that Petitioner would remain excluded "until you have been reinstated to the health care program which originally took the action against you." I.G. Ex. 2, at 1. The I.G. thus did not state that the exclusion would remain in effect as long the state "suspension" remained in effect, or otherwise define a specific period of time Petitioner would remain excluded. The I.G. instead imposed an exclusion to remain in effect so long as Petitioner is not reinstated into the state Medicaid program.

[6] The Board has held, primarily in cases of mandatory exclusions under section 1128(a), that the ALJ and the Board do not have authority to review the *timing* of the I.G.'s imposition of an exclusion action. The Board thus determined that the I.G. was not precluded from taking an exclusion based on the amount of time that had passed since the precipitating event, such as a criminal conviction. *See Kailash C. Singhvi, M.D.*, DAB No. 2138, at 5-7 (2007) ("[T]he ALJ and this Board do not have the authority to review the I.G.'s decision on when to impose the exclusion (including the decision to exclude Petitioner some eight months after he was sentenced [to time served]), and may not grant Petitioner the essentially equitable relief he seeks."), *aff'd*, *Singhvi v. Inspector Gen. Dep't of Health & Human Servs.*, No. CV-08-0659 (SJF) (E.D. N.Y. Sept. 21, 2009). The Board has also rejected the argument that the I.G.'s exclusion should be ordered to take effect earlier, to run coterminous with the effective date of an earlier state exclusion, where both the state and I.G. exclusions were based on the same state felony conviction. *See Shaikh M. Hasan, M.D.*, DAB No. 2648, at 9 (2015) (holding that "the ALJ correctly determined that she had no authority to review the timing of the I.G.'s determination to impose an exclusion or to change the starting date of the exclusion."), *aff'd*, *Hasan v. Sec'y of Health & Human Servs.*, No. 1-15-CN-04687 (E.D. N.Y. Jul. 12, 2017). The regulation in 42 C.F.R. § 1001.2002(b) sets the effective date of an exclusion as 20 days from the date of the written notice of the I.G.'s exclusion determination, and the date on which Petitioner's section 1128(b)(5) exclusion takes effect is governed by that regulation.

Section 1128(c)(3)(E) of the Act and 42 C.F.R. § 1001.601(b)(1) do not limit the duration of a section 1128(b)(5) exclusion only to the duration of the state action (here, suspension) on which the exclusion is based, or for any other defined period of time. Rather, they merely mandate that the exclusion must be in place *for at least as long as* the state suspension is in effect, that is, not less than the duration of the state suspension. They do not state that the exclusion must continue until the excluded entity is reinstated into the state health care program from which it was suspended. If a state suspension were to end by operation of state law without the entity being reinstated into the state health care program, the I.G. exclusion authorities that govern this appeal do not by their terms preclude the I.G. from imposing an exclusion that continues until the excluded entity is reinstated into the state health care program, as the I.G. did in this case.

Here, however, the I.G. has been less than clear and consistent as to the duration of the exclusion imposed on Petitioner. While its exclusion notice stated that Petitioner will remain excluded until it is reinstated into the state Medicaid program, before the ALJ, the I.G. appeared to characterize the exclusion as being for the minimum period permitted by law, that is, the duration of the state suspension. Before the ALJ, the I.G. argued that "if [the ALJ] finds that the I.G. had a basis to exclude Petitioner, he must uphold the period of exclusion imposed," which would be correct had the I.G. imposed the exclusion to remain in effect only for the minimum permissible period, limited to the state suspension period. I.G. ALJ Br. at 6; *see also* I.G. ALJ Reply Br. at 4 ("Where the I.G. is authorized to impose an exclusion pursuant to section 1128(b)(5), as in the present case, that exclusion is reasonable as a matter of law if it is concurrent with the period of exclusion imposed by State authorities."). On appeal, the I.G. notes that the exclusion notice provides that Petitioner would remain excluded until it was reinstated, but also, as before the ALJ, asserts that the exclusion period is the minimum permitted by the Act: "coterminous with [Petitioner's] suspension from the Florida Medicaid program" and thus "reasonable as a matter of law." I.G. Br. at 2; *see also id*. at 6 (exclusion "coterminous with the suspension of [Petitioner's] Medicaid participation").

The ALJ Decision adopted the I.G.'s statements that the exclusion is for the minimum permissible period, stating that the exclusion is "coterminous with Petitioner's suspension from Florida's Medicaid program" and "coterminous with the suspension of Petitioner's Medicaid participation." ALJ Decision at 2, 3.

This lack of clarity over the duration of the exclusion – until Petitioner is reinstated into the state Medicaid program (as in the I.G.'s notice of exclusion), versus the duration of the state suspension (as in the ALJ Decision and the I.G.'s briefing) – would be immaterial if, as the ALJ found, "under Florida law . . . [a] suspended entity remains suspended unless and until it is reinstated." ALJ Decision at 3 (also finding that "the one-year term of suspension imposed against Petitioner is not self-limiting [but] defines

only the minimum period of time during which Petitioner is suspended from Medicaid participation"). The Florida rule the parties discuss in their briefs, however, does not support the ALJ's determination that the state suspension continues until Petitioner is reinstated.

As the ALJ acknowledged, the Florida rule states that "'Suspension' is a ***one-year preclusion*** from furnishing" Medicaid services. Fla. Admin. Code Ann. r. 59G-9.070(3)(o); ALJ Decision at 3. Notwithstanding that language, the ALJ found that one year is only the minimum term of a suspension under the rule, and continues unless and until reinstatement. The ALJ relied solely on another provision of the rule, which provides that a suspended entity must: (l) apply for reinstatement; and (2) demonstrate that it has remedied the violations that are the basis for the suspension. *Id.*; Fla. Admin. Code r. 59G-9.070(6)(a). The ALJ cited no other legal authority as showing that one year was the minimum period of Petitioner's suspension from the Florida Medicaid program, or that the suspension continues beyond one year until Petitioner is reinstated into the program.

The cited provision of the Florida rule governing reinstatement does not support the ALJ's findings and contains other language that undermine them. That provision begins, "[F]or purposes of this rule a 'suspension' precludes participation ***for one year, or such shorter period of time*** as is set forth in this rule." Fla. Admin. Code r. 59G-9.070(6)(a) (emphasis added). The rule then states that "[t]o resume participation ***following the suspension period***, a written request must be submitted to [AHCA] seeking to be reinstated in the Medicaid program." *Id*. at (6)(a)(1). This language supports that a suspension from the state Medicaid program ends after one year (or earlier if a shorter period is imposed), upon which the entity may apply to be reinstated.

The conclusion that Petitioner's suspension did not continue after one year is consistent with AHCA's representations in Petitioner's appeal of the AHCA Order in state court. As Petitioner notes, AHCA there stated "[t]he suspension is for a one (1) year period from the date" of the AHCA Order, that the AHCA Order "is narrowly tailored to be fair in that it simply suspends [Petitioner's] participation in the Medicaid program for one (1) year," and that the AHCA Order "does not terminate anything, it merely suspends participation in the Florida Medicaid program for one year." P. Ex. 4, at 13, 17, 39; P. App. Br. at 6-7. We do not view these statements by AHCA during litigation as controlling our analysis; however, they support our determination that the state suspension does not continue indefinitely until AHCA reinstates Petitioner to the state Medicaid program. We see nothing in the Florida rule, nor has the I.G. or the ALJ identified any legal authority, that would support a contrary conclusion.

Additionally, the fact that Petitioner, as it states, "has not sought to be reinstated to the Medicaid program" following the suspension does not mean it remains suspended after the end of the one-year suspension period provided in the Florida rule. P. App. Br. at 7. As the Board stated in an early appeal of an exclusion under section 1128(b)(4) of the Act (based on state suspension of pharmacy license for reasons bearing on professional competence, professional performance, or financial integrity), "[f]ailure to regain a license is not the same as suspension of a license." *Walter J. Mikolinski, Jr.*, DAB No. 1156, at 19 (1990).[7] The Board noted that "the reasons [p]etitioner may fail to regain his license might not be related to his professional competence, professional performance, or financial integrity." *Id*.

Thus, the fact that Petitioner has not been reinstated or sought reinstatement to the Florida Medicaid program does not require that the I.G. exclusion continue beyond the end of the one-year suspension period provided in state law, or that the exclusion be of essentially indefinite duration in the event Petitioner does not seek reinstatement. Act § 1128(c)(3)(E); 42 C.F.R. § 1001.601(b)(1).

As the record on which the ALJ rendered his decision is not sufficiently developed on the duration of the I.G.'s exclusion, we remand the appeal for the ALJ to further develop the record by ordering the parties to submit briefs on the issue or by other means as the ALJ determines appropriate, to determine the duration of the exclusion that the I.G. imposed, and to then review that period of exclusion as provided in the regulations. 42 C.F.R. § 1001.2007(a)(1)(ii) (excluded entity may seek ALJ review of whether "[t]he length of the exclusion is unreasonable").

[7] The exclusion in *Mikolinski* was issued before section 1128 was amended in 1996 to add current section 1128(c)(3)(E) setting the minimum period of exclusion under sections 1128(b)(4) and 1128(b)(5) as the duration of the state suspension or exclusion (or license revocation); instead, the I.G. was to impose a reasonable period of exclusion. (Pub. L. No. 104-191, § 212 (Aug. 21, 1996)). The ALJ in *Mikolinski* reversed the I.G.'s imposition of an exclusion that would remain in effect until the petitioner, a pharmacist, obtained a valid state pharmacy license, finding that period unreasonable given that the petitioner was not practicing pharmacy but sought to operate a nursing home in another state. The Board reversed the ALJ's imposition of different exclusion periods for the petitioner's different health care professions and remanded the appeal. None of these other aspects detracts from the principle for which we cite *Mikolinski*.

4. Petitioner's other arguments provide no basis to reverse the ALJ Decision or the exclusion.

As before the ALJ, Petitioner again assails the validity of AHCA's action, arguing that it and its staff "performed competently and professionally, caring for their residents in the wake of an unprecedented natural disaster" and committed "no violation of any state or federal statute." P. App. Br. at 9-10. Petitioner argues that the appeal "should be remanded" for the ALJ to consider Petitioner's evidence supporting this claim, which the ALJ refused to do based on the conclusion that Petitioner's argument was an impermissible collateral attack on the state suspension barred by section 1001.2007(d) of the regulations. *Id*. at 11; ALJ Decision at 4.

The ALJ did not err. Section 1001.2007(d) bars collateral attacks on the proceedings, judgments, and actions underlying derivative exclusions. As the Board has explained, "an I.G. exclusion under section 1128(b)(5), like many of the exclusions under section 1128, is a derivative action. These exclusions are derivative because the I.G.'s authority to exclude is based on the fact that another administrative or judicial body took a certain type of action against the excluded individual." *Sirri A. Nomo-Ongolo, M.D.*, DAB No. 2840, at 9 (2017) (citing *George Iturralde*, DAB No. 1374, at 7 (1992)), *rev'd on other grounds*, *Nomo-Ongolo v. Sec'y of the U.S. Dep't of Health & Human Servs.*, No. 18-523 (DSD/HB) (D. Minn. Nov. 27, 2018), 2018 WL 6181370.[8] Where an I.G. exclusion is derivative, "the fairness of a state's process in taking action against a petitioner is irrelevant . . . ." *Id.* The Act neither requires nor otherwise permits the I.G. to assess on its own the validity of the state action underlying an exclusion under section 1128(b)(5) or to otherwise look behind the state authority's factual determinations, and limits the I.G.'s discretion to determining that the state findings constitute "reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity."

[8] The court found that the record of the state administrative proceeding, in which Nomo-Ongolo dropped her challenge to the state Medicaid termination by agreement with the state agency, contained no findings of fact to establish the required nexus between the state action and Nomo-Ongolo's financial integrity, as required to support an exclusion under section 1128(b)(5) for reasons bearing on the individual's financial integrity. Here, as noted, Petitioner attacks the validity of the findings in the AHCA Order, a prohibited collateral attack, but does not dispute that those findings, on their face, constitute reasons bearing on professional performance or competence.

Moreover, "[e]ven 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."[9] *Marvin L. Gibbs, Jr., M.D.*, DAB No. 2279, at 8 (2009) (citing *John W. Foderick, M.D.*, DAB No. 1125 (1990)). A petitioner who "believes there are serious flaws" in the state's action on which the exclusion is based thus "must challenge it 'in the appropriate forum.'" *Id.* at 10 (citing *Leonard Friedman, M.D.*, DAB No. 1281 (1991), *appeal dismissed as moot, Freidman v. Shalala*, 46 F.3d 115 (1st Cir. 1995)).

Petitioner also argues that its exclusion "is not proper as the underlying action is not final" because AHCA did not convene a hearing until after issuing the AHCA Order, and "[t]he results of that hearing are still being litigated" in Florida courts, meaning that "if this exclusion is implemented now, it is possible that it would be based upon a suspension that was overturned[,] [which] would not be proper." P. App. Br. at 9.

As the ALJ concluded, this argument essentially questions the validity of AHCA's action and is thus an impermissible collateral attack on the AHCA Order and the state Medicaid suspension. As the ALJ further concluded, "nothing in the Act or implementing regulations . . . suggests that an appeal in process of an administratively final state action stays or defeats the [I.G.'s] exclusion determination" and thus Petitioner's appeal of the suspension "neither stays the suspension nor does it vitiate the [I.G.'s] derivative exclusion authority." ALJ Decision at 4.

The ALJ did not err. Neither section 1128(b)(5) nor the regulations require that the entity the I.G. seeks to exclude exhaust the available appeals of the state action before the I.G. may proceed with the exclusion. Section 1128(b)(5)(B), the provision under which the I.G. excluded Petitioner, requires only that the entity be "suspended or excluded from participation, or otherwise sanctioned, under . . . a State health care program" (for reasons bearing on the entity's professional competence, professional performance, or financial integrity); the implementing regulation similarly contains no requirement that the state action not be subject to further review by the state or a court or that the excluded entity have exhausted any appeal it is entitled to pursue.

This conclusion is consistent with the preamble to the final rule implementing the I.G. exclusion regulations at 42 C.F.R. Part 1001. In response to a comment that exclusions "should not be imposed in cases where a license is lost until the practitioner has the opportunity for judicial review of the underlying action which caused the loss of license,"

[9] Section 1128(b)(4) permits exclusion based on the revocation or suspension of, or other limitation on, an individual's or entity's state license to provide health care services as specified in the statute, and, similar to the language in section 1128(b)(5), for reasons related to the individual's or entity's professional competence, professional performance, or financial integrity.

the I.G. disagreed and stated that the regulations, which as noted above do not require exhaustion of state appeals, "are consistent with statutory authority," which also contain no such requirement. 57 Fed. Reg. 3298, 3305 (Jan. 29, 1992). The preamble then states:

> Often, judicial review occurs a substantial period of time after the original action. Since an independent body has made a determination regarding this practitioner, we believe it is preferable to give controlling weight to the derivative body's conclusions and exclude the practitioner, to protect the program and beneficiaries, consistent with the purposes of the exclusion authorities.

Id. The regulations, moreover, contemplate the possibility that a state action supporting a derivative exclusion may be reversed, providing that an exclusion "will be withdrawn and an individual or entity 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— . . . (2) An action by another agency, such as a State agency or licensing board, that is reversed or vacated on appeal; . . . ." 42 C.F.R. § 1001.3005(a)(2).

Thus, Petitioner's state court appeal of its suspension from the Florida Medicaid program, which was still ongoing as of the filing of Petitioner's appeal of the ALJ Decision, is not grounds to reverse or otherwise delay the I.G.'s exclusion of Petitioner.

Petitioner's argument that AHCA did not convene a hearing before issuing the AHCA Order also does not warrant reversing the exclusion. In *Nomo-Ongolo*, the Board pointed out that the appeal, like those in *Iturralde*, DAB No. 1374, *Olufemi Okonuren, M.D.*, DAB No. 1319 (1992) and *Judy Pederson Rogers and William Ernest Rogers*, DAB No. 2009 (2006), *aff'd*, *Rogers v. U.S. Dep't of Health & Human Servs.*, No. 06-cv-115-PB (D.N.H. Feb. 26, 2007), all exclusions under section 1128(b)(5), "involved state program actions to suspend or exclude the individual's participation based on allegations or investigative findings that the excluded individual denied and that were not adjudicated in a hearing on appeal of the state program's action." *Nomo-Ongolo* at 9. The Board rejected the arguments that the petitioners were denied due process in the absence of state hearings as impermissible collateral attacks, because, as discussed above, these exclusions are derivative, and based on the fact that the state administrative or judicial body took a specified action against the entity or individual being excluded. Petitioner's report that AHCA did not afford it a hearing prior to issuing the AHCA Order suspending Petitioner's Medicaid participation does not bar the I.G.'s exclusion of Petitioner based on the AHCA Order.

Conclusion

The ALJ correctly determined that the I.G. had authority to exclude Petitioner under section 1128(b)(5) of the Act and we accordingly affirm the ALJ Decision in part. We remand the appeal to the ALJ to determine the duration of the exclusion period the I.G. imposed, and to review that period of exclusion.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Susan S. Yim
Presiding Board Member