

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Valentine Okonkwo
Docket No. A-17-112
Decision No. 2832
November 17, 2017

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

Petitioner Valentine Okonkwo appeals the August 2, 2017 decision of an administrative law judge (ALJ) upholding Petitioner’s exclusion from Medicare, Medicaid, and all other federal health care programs for a period of 40 years under section 1128(a)(4) of the Social Security Act (Act).¹ *Valentine Okonkwo*, DAB CR4900 (ALJ Decision). The Inspector General (I.G.) of the Department of Health and Human Services excluded Petitioner based on his felony convictions for eleven counts of prescription drug fraud. On appeal, Petitioner argues that the I.G.’s exclusion constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Petitioner seeks reduction of the duration of the exclusion, reversal, or remand by the Board “to court.” Notice of Appeal (NA) at 2.

For the reasons explained below, we find Petitioner’s arguments are without merit and, therefore, sustain the ALJ Decision.

Statutory and Regulatory Background

The Act authorizes the Secretary of the Department of Health and Human Services (Secretary) to exclude any individual or entity from participation in all federal health care programs that “has been convicted for an offense. . . consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.” Act § 1128(a)(4); *see also* 42 C.F.R. § 1001.401(a) (authorizing the I.G. to impose exclusions under Act § 1128(a)(4)). Section 1128(c)(3)(B) of the Act provides that the minimum period of exclusion generally shall not be less than 5 years.

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.

The period of exclusion may be extended based upon the application of aggravating factors listed in 42 C.F.R. § 1001.102(b). If the exclusion period is extended based on application of one or more aggravating factors, mitigating factors may then be applied to reduce the length of the exclusion period. 42 C.F.R. § 1001.102(c). The aggravating factors applicable here are as follows:

(2) The acts that resulted in the conviction . . . were committed over a period of one year or more;

* * *

(5) The sentence imposed by the court included incarceration.

In hearings before an ALJ on exclusion under section 1128(a), the issues are whether there is a basis for the exclusion and whether the length of the exclusion is unreasonable. 42 C.F.R. § 1001.2007(a).

Standard of Review

Our standard of review of an exclusion imposed by the I.G. is established by regulation. We review a disputed issue of fact as to “whether the initial decision is supported by substantial evidence on the whole record.” 42 C.F.R. § 1005.21(h). We review a disputed issue of law as to “whether the initial decision is erroneous.” *Id.*

Case Background²

Petitioner, a pharmacist, was convicted in the United States District Court for the Middle District of Florida for 11 felony counts of conspiracy to distribute Oxycodone illegally, and for illegal distribution of Oxycodone. The I.G. excluded Petitioner from all federal health programs based on this conviction. Before the ALJ, Petitioner did not dispute the fact of his conviction but argued that it was based on false evidence and that he had appealed his conviction. ALJ Decision at 1-2. The I.G. imposed a 40-year exclusion (35 years longer than the mandatory minimum) based on two aggravating factors: 1) the duration of the conspiracy and illegal opioid distribution scheme (three years) and 2) the lengthy period of incarceration (more than 24 years) imposed by the sentencing court. ALJ Decision at 2-3. Petitioner presented no mitigating evidence. *Id.* The ALJ reasoned that the circumstances surrounding the two aggravating factors demonstrated that

² Factual information in this section is drawn from the ALJ Decision and undisputed facts in the record before the ALJ and is not intended to add to or modify the ALJ’s findings.

Petitioner was “extraordinarily untrustworthy,” and that, therefore, the length of the exclusion imposed by the I.G. was reasonable. *Id.* at 3. The ALJ concluded that Petitioner’s grounds for appeal consisted essentially of collateral attacks on his criminal conviction, which the ALJ could not consider. *Id.* at 2-3. Therefore, the ALJ upheld the I.G.’s exclusion.

Analysis

On appeal to the Board, Petitioner argues that the I.G.’s exclusion is unconstitutional because, he says, the duration of his exclusion is excessive and disproportionate to the gravity of his offenses, especially when viewed in conjunction with the sentence imposed by the District Court. NA at 1-2. We explain below why we conclude that Petitioner’s arguments have no merit.

1. The ALJ’s conclusion that the I.G. was authorized to exclude Petitioner pursuant to section 1128(a)(4) is supported by substantial evidence and is free from error.

Before the ALJ, the I.G. entered into the record documents establishing Petitioner’s felony conviction, the duration of the criminal conspiracy and illegal opioid distribution in which Petitioner engaged, and the length of Petitioner’s prison sentence. *See* I.G. Exs. 2, 4 and 5. Petitioner did not dispute that the evidence in the record established these facts, but claimed that all of the evidence was based upon “mistaken beliefs or fallacies and misrepresentation of facts by unscrupulous individuals.” Request for Hearing at 2. The ALJ concluded that Petitioner’s argument “[was] no defense against the I.G.’s exclusion determination.” ALJ Decision at 2.

We agree with the ALJ. This argument is a collateral attack on Petitioner’s underlying conviction which is prohibited by regulation. Section 1001.2007(d) provides:

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.

The Board has explained that “[t]he regulation’s prohibition on collateral attacks recognizes that it is ‘the fact of the conviction which causes the exclusion. The law does not permit the Secretary to look behind the conviction.’” *Laura Leyva*, DAB No. 2704 (2016) at 7, *aff’d*, *Leyva v. Burwell*, No. 8:16-cv-1986 (M.D. Fla. Apr. 25, 2017), *citing Michael D. Miran, Esta Miran, & Michael D. Miran, Ph.D. Psychologist P.C.*, DAB No. 2469, at 4 (2012), quoting *Peter J. Edmonson*, DAB No. 1330, at 4 (1992). (Emphasis added.) In other words, the court has already settled these issues by adjudicating the conviction and Petitioner is not permitted to relitigate them before the ALJ or the Board. The ALJ correctly rejected this argument by Petitioner and concluded that Petitioner had failed to show that the I.G. lacked authority to exclude him.

2. The ALJ’s conclusion that the period of exclusion is reasonable is free from error.

On appeal to the Board, Petitioner’s sole basis for challenging the ALJ Decision is that his exclusion from federal health care programs for 40 years constitutes cruel and unusual punishment prohibited under the Eighth Amendment to the United States Constitution. NA at 1-2. Specifically, he contends that the “[p]enalty against Petitioner by virtue of its excessive duration and lack of proportion to gravity of the offense constitutes cruel and unusual penalty,” in violation of the Eighth Amendment. *Id.* at 2.

The Board has on numerous occasions rejected this argument:

The regulations governing this matter expressly preclude the ALJ (and hence the Board in its review of the ALJ Decision) from finding “invalid or refusing to follow Federal statutes or regulations,” including the five-year minimum period for a mandatory exclusion pursuant to sections 1128(a)(3) and 1128(c)(3)(B) of the Act. 42 C.F.R. § 1005.4(c)(1). Petitioner’s contention[] that his exclusion would violate his constitutional rights under the . . . Eighth Amendment[] constitute[s] an attack upon the Act and regulations on which neither the ALJ nor the Board may rule.

W. Scott Harkonen, DAB No. 2485, at 21 (2012), *aff’d*, *Harkonen v. Sebelius*, No. C 13-0071 PJH, 2013 WL 5734918 (N.D. Cal. Oct. 22, 2013); *see also, e.g., Zahid Imran*, M.D., DAB No. 2680, at 9 (2016), *citing Ethan Edwin Bickelhaupt, M.D.*, DAB No. 2480, at 3 (2012), *aff’d*, *Bickelhaupt v. Sebelius*, No. 12 C 9598 (N.D. Ill. May 29, 2014); *citing* 42 C.F.R. § 1005.4(c)(1); *see also Kenneth M. Behr*, DAB No. 1997, at 10 (2005); *Keith Michael Everman, D.C.*, DAB No. 1880, at 12 (2003).

The petitioner in *Harkonen* challenged the mandatory five-year exclusion imposed by the I.G. Petitioner's argument here is no more availing regarding his exclusion for 40 years. Despite Petitioner's characterization of exclusion as a "penalty" and "punishment[]," courts and the Board have explained that exclusion is not a punitive but rather a remedial measure to "protect federal health care programs and their beneficiaries from individuals who have been shown to be untrustworthy[.]" *Harkonen* at 22; *see also Sushil Aniruddh Sheth, M.D.*, DAB No. 2491, at 15 (2012) (legislative intent of exclusion is "to protect the Medicare program from untrustworthy individuals, not to punish them") (citing *Manocchio v. Sullivan*, 768 F.Supp. 814, 817 (S.D. Fla. 1991), *aff'd Manocchio v. Kusserow*, 961 F.2d 1539 (11th Cir. 1992) (exclusions are not punitive in nature and do not violate the Double Jeopardy or Ex Post Facto Clauses)). While the term of the exclusion here is not directly mandated by the statute, the Act and the regulations provide for longer terms to be imposed when aggravating factors are present. Petitioner's challenge on constitutional grounds is effectively a way of asking us to overturn or refuse to implement these provisions, which we are not permitted to do.

Even if we viewed Petitioner's argument as a challenge to the reasonableness of the exclusion period beyond five years on other than constitutional grounds, Petitioner's challenge would fail. As the ALJ concluded, it was not unreasonable for the I.G. to extend the Petitioner's exclusion period beyond five years because he found two aggravating factors present: that Petitioner's criminal activity that resulted in the conviction was committed over a period of three years, and that the sentence imposed by the trial court included incarceration. Petitioner does not contend that the aggravating factors cited by the I.G., and considered by the ALJ, are unsupported by evidence in the administrative record. Moreover, Petitioner did not offer mitigating evidence before the ALJ (and the regulations limit the factors which may be considered as mitigating to specific items, none of which Petitioner alleges are present in his case). The ALJ considered the aggravating factors, finding that "the evidence unequivocally proves that Petitioner was convicted of multiple felonies falling within the purview of section 1128(a)(4)," and that "the duration of Petitioner's crimes and his sentence plainly constitute evidence that falls within the aggravating factors justifying an exclusion of more than five years." ALJ Decision at 2-3. In concluding that the exclusion period was reasonable, the ALJ considered what the relevant evidence said about Petitioner's trustworthiness to provide care to Medicare beneficiaries. *See id.* at 3. The ALJ weighed the fact that Petitioner had spent approximately three years "engaged in a willful and protracted plan to distribute or dispense unlawfully a highly dangerous narcotic" – Oxycodone. *Id.* In addition, he concluded that Petitioner's more than 24-year prison sentence "is a measure of the seriousness and highly destructive nature of his crimes," and that therefore the evidence "more than justifies the I.G.'s exclusion determination." *Id.* at 3-4.

The ALJ did not err in applying the regulations to the facts here. An ALJ reviews the length of an exclusion de novo to determine whether it falls within a reasonable range given the aggravating and mitigating factors and the circumstances underlying them. *Sheth* at 5, citing *Joseph M. Rukse, Jr. R.Ph.*, DAB No. 1851, at 10-11 (2002), quoting *Gary Alan Katz, R.Ph.*, DAB No. 1842, at 8 n.4 (2002). The ALJ considered the aggravating factors established by the evidence in the administrative record and, based on those factors, found the exclusionary period reasonable. Although Petitioner contends that his exclusion for 40 years is disproportionate to the seriousness of his conduct and implies that it is inconsistent with consequences imposed upon similarly situated Medicare enrollees facing exclusion, Petitioner cites no such cases, and, in any event, the Board makes decisions about the reasonableness of exclusion periods on a case-by-case basis. *Sheth* at 15. Case comparisons are of limited value and are not controlling on the issue of whether an exclusion period is reasonable. *Id.* at 5 (citations omitted). Thus, Petitioner's constitutional arguments do not change the analysis or the outcome of Petitioner's appeal.

Conclusion

For the foregoing reasons, we affirm the ALJ Decision.

/s/

Leslie A. Sussan

/s/

Constance B. Tobias

/s/

Christopher S. Randolph
Presiding Board Member