

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Stefan Murza, D.C.
Docket No. A-18-18
Decision No. 2848
February 6, 2018

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Petitioner, Stefan Murza, D.C., appeals the December 13, 2017, administrative law judge decision, *Stefan Murza, D.C.*, DAB CR4985 (ALJ Decision). The ALJ sustained a June 30, 2017, decision by the Inspector General (I.G.) to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(4) of the Social Security Act (Act).¹ The ALJ concluded that the I.G. was authorized to exclude Petitioner because the Virginia Board of Medicine suspended Petitioner’s chiropractic license indefinitely for reasons bearing on his professional competence or professional performance. The ALJ additionally concluded that Petitioner must be excluded at least until he regains his Virginia chiropractic license.

The Board affirms the ALJ Decision for the reasons set out below.

I. Legal Background

Section 1128(b)(4)(A) of the Act authorizes the Secretary of the Department of Health and Human Services to exclude from participation in any federal health care program an individual “whose license to provide health care has been revoked or suspended by any State licensing authority . . . for reasons bearing on the individual’s . . . professional competence, professional performance, or financial integrity[.]” The implementing regulation at 42 C.F.R. § 1001.501(a)(1) tracks the language of the statute, providing that the I.G. may exclude an individual who has had “a license to provide health care revoked or suspended by any State licensing authority . . . for reasons bearing on the individual’s or entity’s professional competence, professional performance or financial integrity[.]”

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. In addition, 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 Act also provides that the length of an exclusion based on subsection 1128(b)(4) “shall not be less than the period during which the individual’s . . . license to provide health care is revoked, suspended, or surrendered . . .” Act § 1128(c)(3)(E); *accord* 42 C.F.R. § 1001.501(b)(1).

An excluded individual may request a hearing before an ALJ but only on the issues of whether the “basis for the imposition of the [exclusion] exists” and, except for mandatory exclusions of five years or less, whether the “length of exclusion is unreasonable.” 42 C.F.R. § 1001.2007(a)(1).

A party seeking to appeal an adverse ALJ decision must file a notice of appeal with the Board pursuant to 42 C.F.R. § 1005.21. The appellant must file with its notice of appeal “a written brief specifying exceptions to the [ALJ’s] initial decision and reasons supporting the exceptions.” *Id.* § 1005.21(c). The Board “will not consider any issue not raised in the parties’ briefs, nor any issue in the briefs that could have been raised before the ALJ but was not.” *Id.* § 1005.21(e).

II. The I.G. Determination

By letter dated June 30, 2017, the I.G. notified Petitioner that he was “being excluded from participation in” Medicare, Medicaid, and all federal health care programs because the Virginia Board of Medicine suspended his chiropractic license for reasons bearing on his professional competence, professional performance, or financial integrity. I.G. Exhibit (Ex.) 1, at 1, citing Act § 1128(b)(4); 42 C.F.R. § 1001.501. The notice explained that the exclusion would remain in effect until the I.G. reinstated Petitioner, and that, to be eligible for reinstatement, Petitioner “must regain [his] license as a chiropractor in the State of Virginia.” *Id.*

The June 30, 2017, notice included instructions for Petitioner to appeal the exclusion if he disagreed with it: “You may file a request for a hearing before an ALJ only on the issues of: (i) whether the [I.G.] has a basis for the imposition of the sanction, and/or (ii) whether the length of exclusion is unreasonable.” *Id.* at 4 (emphasis in notice).²

² The June 30, 2017, notice additionally stated that the I.G. “will also consider early reinstatement if you obtain a professional health care license in any State OR have been excluded as a result of this action for a minimum of 3 years. See 42 C.F.R. 1001.501(c) for details and exceptions.” I.G. Ex. 1, at 1. Another attachment to the notice explained that reinstatement is not automatic and that a request for reinstatement “must be made in writing and should be sent to Director, Exclusions Branch, Office of Investigations. . . .” *Id.* at 3. The I.G.’s discretion to consider “early reinstatement” for individuals excluded under section 1128(b)(4) of the Act, provided for under 42 C.F.R. § 1001.501(c), and the reinstatement process, set forth in 42 C.F.R. Part 1001, Subpart F, are distinct from the process for an individual or entity to appeal an exclusion decision, set forth in 42 C.F.R. § 1001.2007. A decision by the I.G. to deny reinstatement is not subject to administrative or judicial review. 42 C.F.R. § 1001.3004(c).

Petitioner timely appealed the I.G. determination.

III. The ALJ Decision

The ALJ determined that the I.G. had a legal basis to exclude Petitioner pursuant to section 1128(b)(4) of the Act because the Virginia Board of Medicine suspended indefinitely Petitioner's chiropractic license for reasons bearing on his professional competence or professional performance. ALJ Decision at 3-4. In reaching this conclusion, the ALJ summarized the Virginia Board's findings, which included:

- Petitioner pled guilty to one count of manufacturing marijuana, a felony;
- Petitioner testified before the Virginia Board that he did not grow, use or manufacture marijuana, even though he admitted that the drug was grown in his attic, which was only accessible by means of a ladder placed in the locked closet of his bedroom;
- Petitioner claimed that, of the many people living in his house, he did not know who had access to his closet, nor was he aware of the multiple pieces of drug paraphernalia in his home, including "an eight-foot smoking device" that police found in the house's common area;
- Petitioner's testimony was "improbable, inconsistent, and not credible";
- Petitioner "has not demonstrated that he is safe and competent to return to the practice of chiropractic."

ALJ Decision at 3, citing I.G. Ex. 3, at 1, 2. The ALJ further noted that the Virginia "Board concluded that Petitioner's felony conviction is a violation of the Virginia Code provisions relating to unprofessional conduct, § 54.1-2915(A)(10), (17), and (20)." ALJ Decision at 4, citing I.G. Ex. 3, at 2. "Under those sections," the ALJ stated, the Virginia Board "may suspend a license indefinitely for 'acts of unprofessional conduct,' which include 'knowingly and willfully' committing a felony; violating any statute or regulation relating to the manufacture, distribution, dispensing, or administration of drugs; and conviction of a felony." *Id.* Consequently, the ALJ concluded, the Virginia Board suspended Petitioner's license "for reasons that, as a matter of law, bear on his professional competence or professional performance." *Id.*

With respect to the duration of Petitioner's exclusion, the ALJ concluded that the governing statute and regulations require that the period of exclusion "shall not be less than the period during which [his] license is ... suspended" ALJ Decision at 4, quoting Act § 1128(c)(3)(E); 42 C.F.R. § 1001.501(b)(1).

IV. Standard of Review

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

V. Analysis

A. *The ALJ did not err in determining the length of Petitioner's exclusion.*

The only exception to the ALJ Decision identified in Petitioner's appeal to the Board concerns the length of his exclusion. According to Petitioner, his "initial appeal of the time frame for exclusion was not adequately addressed by the judge." Notice of Appeal. Petitioner states that he "did not agree with the length of exclusion because it was excessive and unjust." *Id.*

The ALJ did not err in determining the length of Petitioner's exclusion. The regulations provide that the ALJ lacks authority to find invalid or refuse to follow federal statutes or regulations, or to review the exercise of discretion by the I.G. to exclude an individual under section 1128(b) of the Act. 42 C.F.R. § 1005.4(c)(1), (5).

Where, as here, the I.G. excludes an individual based on the suspension of the individual's health care license for reasons bearing on the individual's professional competence, professional performance or financial integrity, the Act does not give the ALJ discretion to set the length of the exclusion less than the period during which the individual's license is suspended. Act § 1128(c)(3)(E); 42 C.F.R. § 1001.501(b). Insofar as Petitioner relies on letters from patients and colleagues attesting to his professional competence and good character to support a reduction in the length of his exclusion, neither the ALJ nor the Board may reduce the exclusion period based on equitable grounds. As the ALJ plainly stated, her "authority is limited by the regulations" and she may not review the I.G.'s decision "on the ground that [he] is a good person or well-thought-of in the profession" ALJ Decision at 4, quoting *Donna Rogers*, DAB No. 2381, at 6 (2011). Accordingly, we conclude that the ALJ's decision as to the length of Petitioner's exclusion is free from error.

B. *The Board has no authority to address Petitioner's arguments concerning the August 31, 2017 I.G. determination to exclude Petitioner pursuant to section 1128(a)(4) of the Act.*

Petitioner's appeal also refers to a second and separate I.G. determination, dated August 31, 2017, which excluded Petitioner from participating in Medicare, Medicaid, and all federal health care programs for five years pursuant to section 1128(a)(4) of the Act. Section 1128(a)(4) of the Act requires the Secretary to exclude an individual from

participation in all federal health care programs if that individual has been convicted of a felony criminal offense under federal or state law that relates “to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.” Section 1128(c)(3)(B) imposes a minimum exclusion period of five years for any mandatory exclusion imposed under section 1128(a) of the Act.

The I.G. proffered a copy of the August 31, 2017, section 1128(a)(4) exclusion determination in the ALJ proceedings (I.G. Ex. 2). The I.G. noted in its brief before the ALJ, however, that the brief “focuse[d] solely on the I.G.’s exclusion under section 1128(b)(4) because [Petitioner’s] appeal, dated July 14, 2017, related solely to the exclusion under section 1128(b)(4).” Docket No. C-17-920, I.G. Br. at 1 n.1. The ALJ noted that while Petitioner’s appeal was pending, the I.G. issued the second exclusion notice, but “Petitioner apparently did not appeal the five-year exclusion.” ALJ Decision at 2 n.1.

Petitioner argues before the Board that he moved to North Carolina and “was not aware of, and did not receive notice of a second exclusion dated August 31, 2017 which extended [his exclusion] to five years.” Notice of Appeal at 1. Petitioner states that he is “appealing the five year exclusion because it is excessive and unreasonable in [his] case.” *Id.* He adds that he is “requesting that [his] exclusion remain as originally reported: three years or until I regain my Virginia license because that would support my position for Inclusion.” *Id.*

The Board has no authority to address Petitioner’s arguments concerning the August 31, 2017, determination to exclude Petitioner pursuant to section 1128(a)(4) of the Act. The regulations provide that an individual may appeal a notice of exclusion by filing a timely request for an ALJ hearing. 42 C.F.R. §§ 1001.2007(b), 1005.2. The ALJ will dismiss a hearing request where it is not filed in a timely manner. *Id.* § 1005.2(e)(1). As noted above, the ALJ’s review is limited to issues of: (1) whether the “basis for the imposition of the sanction exists”; and (2) except for mandatory exclusions of five years or less, whether the “length of exclusion is unreasonable.” *Id.* § 1001.2007(a)(1). On appeal, the Board has the authority to decline to review, affirm, increase, reduce, reverse or remand an exclusion determined by the ALJ. *Id.* §1005.21(g).

Here, Petitioner timely requested and received an ALJ hearing to contest the I.G.’s decision to exclude Petitioner pursuant to section 1128(b)(4) of the Act. The ALJ, in turn, issued a determination finding that there was a basis for the imposition of the section 1128(b)(4) exclusion and finding that the length of exclusion was mandated by law. On Petitioner’s timely appeal of the ALJ Decision, the Board has determined that the ALJ Decision – which relates only to the section 1128(b)(4) exclusion, is free from error. There is no evidence in this case that Petitioner requested an ALJ hearing to

contest the I.G.'s subsequent decision to exclude him pursuant to section 1128(a)(4) of the Act, nor is there an ALJ decision (or dismissal) addressing that exclusion determination. Because the regulations do not provide for the Board to review a determination by the I.G. to exclude an individual where the individual has not requested an ALJ hearing to contest that determination, we have no authority to consider Petitioner's arguments relating to the section 1128(a)(4) exclusion.

Conclusion

For the foregoing reasons, we affirm the ALJ Decision.

/s/
Sheila Ann Hegy

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member