Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Lena Lasher, aka Lena Contang, aka Lena Congtang
Docket No. A-17-52
Decision No. 2800
June 28, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Lena Lasher, aka Lena Contang, aka Lena Congtang (Petitioner) appeals the January 30, 2017 decision of an Administrative Law Judge (ALJ), *Lena Lasher, aka Lena Contang, aka Lena Congtang*, DAB No. CR4780 (2017) (ALJ Decision). The ALJ sustained the determination by the Inspector General (I.G.) of the Department of Health & Human Services to exclude Petitioner from participation in all federal health care programs for 10 years, effective April 20, 2016. For the reasons set forth below, we affirm the ALJ Decision.

Background

The I.G. excluded Petitioner pursuant to section 1128(a)(3) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(3), which requires the I.G. to impose an exclusion of at least five years for convictions for felony offenses related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. The I.G. determined that a 10-year exclusion was warranted based on the aggravating factors at 42 C.F.R. § 1001.102(b)(2) and (b)(5) that may be a basis for lengthening the period of exclusion and on the absence of any mitigating factors.

Petitioner was convicted of five felony offenses, including mail fraud, wire fraud and conspiracy to commit mail fraud and wire fraud. ALJ Decision at 1, 7. The ALJ concluded that Petitioner's "convictions [were] undoubtedly related to fraud" since they "related to her role in a scheme to illegally dispense drugs" and included "actual commission of fraud" as well as "conspiracy to commit fraud." ALJ Decision at 7. The ALJ also concluded that Petitioner's "criminal offenses were in connection with the delivery of a health care item or service" because the "crux of Petitioner's criminal offense was that she was dispensing drugs in a manner contrary to law." *Id*. at 7-8. The ALJ further concluded that the aggravating factors in sections 1001.102(b)(2) and (b)(5)

were present because Petitioner "acknowledged that her offenses occurred 'from 2010 to November 2012[,]'" and the court "ordered that Petitioner be committed to the custody of the United States Bureau of Prisons for a term of three years." *Id*. at 9-10. In addition, the ALJ concluded that a "10-year minimum exclusion is not unreasonable" based on the two aggravating factors established by the I.G. and no mitigating factors. *Id*. at 9 (emphasis omitted). Finally, the ALJ concluded that the April 20, 2016 effective date of the exclusion was established by 42 C.F.R. § 1001.2002(b) (making an exclusion "effective 20 days from the date of the [I.G.'s] notice") and that the ALJ was "bound by that provision." *Id*. at 10.

Analysis

Petitioner timely appealed the ALJ Decision in accordance with 42 C.F.R. § 1005.21 pursuant to an extension of time granted by the Board. As discussed below, Petitioner has not identified any basis for reversing the ALJ Decision.

Petitioner's principal argument on appeal, as before the ALJ, is that she was "wrongly convicted." P. Ltr. dated 2/27/17, 1st pg. (unnumbered).[1] The ALJ correctly held that Petitioner's attempts to show that she was wrongly convicted are collateral attacks on the validity of her criminal conviction on which the exclusion was based and are expressly forbidden by regulation. *See* ALJ Decision at 8-9, citing 42 C.F.R. § 1001.2007(d) (providing that an individual "may not collaterally attack" a criminal conviction on which an exclusion is based "either on substantive or procedural grounds in" an appeal of the I.G.'s imposition of an exclusion) and *Clemenceau Theophilus Acquaye*, DAB No. 2745, at 7 (2016). Petitioner argues that not permitting her to attack her conviction violates her "4th, 5th, and 6th Amendment rights[.]" P. Ltr. dated 4/3/17, at 3; *see also* P. Ltr. dated 5/8/17, 1st pg. However, ALJs and the Board have no authority to "[f]ind invalid or refuse to follow Federal statutes or regulations . . . ." 42 C.F.R. § 1005.4(c)(1). Petitioner's argument amounts to a direct attack on the constitutionality of section 1001.2007(d) which we have no authority to consider. *Cf. Robert Seung-Bok Lee*, DAB No. 2614, at 9 (2015), citing *Keith Michael Everman*, DAB No. 1880, at 12 (2003).

[1] The Board extended the time for the filing of Petitioner's notice of appeal to April 5, 2017. Petitioner submitted three letters making substantive arguments, dated 2/27/17, 4/3/17, and 5/8/17, each accompanied by exhibits. We have considered all three letters. We reviewed all of the accompanying exhibits but conclude they are not appropriately part of the record for our decision because they either were never submitted to the ALJ or were excluded from the record by the ALJ on the ground that they were untimely filed. Petitioner has not shown that the exhibits she did not submit to the ALJ exhibits are relevant and material or that there were reasonable grounds for her failure to submit them to the ALJ. *See* 42 C.F.R. § 1005.21(f). Nor has Petitioner alleged, much less shown, that the ALJ abused her discretion in excluding documents from the record as untimely filed.

Petitioner also argues that the exclusion discriminates against her because "[o]thers who have testified on trial that they committed the [same] crime [as Petitioner] were not punished by the [I.G.]"[2] P. Ltr. dated 2/27/17; *see also* P. Ltr. dated 4/3/17, 2nd pg. The ALJ did not address this argument when Petitioner raised it below. *See* P. Informal Br. at 18 (if the exclusion is upheld, "this may be viewed as discrimination due to the fact that the [I.G.] . . . [d]id not exclude the two male pharmacists . . . who testified [at my trial] that they violated pharmacy laws and committed fraud . . . ."). The ALJ committed no error in not addressing this argument. The ALJ's review was limited to the exclusion action before her, which, as she concluded, was an exclusion mandated by section 1128(a) of the Act and the implementing regulations. As indicated above, the regulations expressly provide that the ALJ "does not have the authority to . . . refuse to follow Federal statutes or regulations . . . ." 42 C.F.R. § 1005.4(c)(1). Thus, the ALJ could not overturn Petitioner's exclusion "regardless of what transpired in any other case." *Lee G. Balos*, DAB No. 1541, at 9 (1995)("The issue before us (as before the ALJ) is not whether the I.G. erred in determining that mandatory exclusions were not applicable in some other cases, but whether Petitioner's convictions required the I.G. to impose a mandatory exclusion in this case."); s*ee also, Kris Durschmidt,* DAB No. 2345 at 3 (2010)(citing *Balos* for holding that Board had no authority to review equal protection claim)*; Jewish Home of Eastern Pa.*, DAB No. 2254, at 14 (2009) ("allegations by a party against which an action has been taken that the treatment accorded to it is harsher than that accorded to others similarly situated do not prohibit an agency of this Department from exercising its responsibility to enforce statutory requirements") (internal quotation omitted)), *aff'd*, *Jewish Home of Eastern PA v. Ctrs. for Medicare & Medicaid Servs.*, 693 F.3d 359 (3rd Cir. 2012).

Petitioner also takes issue with the ALJ's decision to decide the case "on the written submissions and documentary evidence." ALJ Decision at 4. The ALJ stated, "Petitioner has not asserted that she desires an in-person hearing, and she has not availed herself of the opportunity [provided in the ALJ's pre-hearing order] to submit written direct testimony." *Id*. at 3. The ALJ also pointed out that her pre-hearing order put the parties on notice that a "live hearing will only be held for cross-examination of a witness or witnesses who provided direct testimony, if [cross-examination] is deemed necessary." *Id*. at 3-4 (quoting pre-hearing order). Petitioner notes that, contrary to what the ALJ stated, she requested an in-person hearing. P. Ltr. dated 2/27/17; P. Informal Br. at 17 (stating "I'd like an in-person hearing to decide my case"). Petitioner also argues that "[d]enying her a[n] [in-person] hearing . . . violates due process." P. Ltr. dated 5/8/17, 2nd pg. Although the ALJ was mistaken as to Petitioner's request for an in-person

[2] We note that Petitioner points to nothing in the record to support the factual assertions underlying this argument.

hearing, Petitioner does not deny that she did not submit written direct testimony as the ALJ's order required the parties to do if they sought to establish the need for an in-person hearing for the purpose of cross-examining witnesses. The Board has previously observed that the federal courts "have allowed, and even strongly encouraged, written direct testimony in a variety of proceedings. Since it is offered under oath, [written direct testimony] is generally no less credible in most instances than oral testimony in the hearing room, as long as the witness is subject to cross-examination." *Pacific Regency Arvin*, DAB No. 1823, at 7-8 (2002), citing *Kuntz v. Sea Eagle*, 199 F.R.D. 665 (D. Haw. 2001). Further, the Board has also stated that not holding an in-person hearing does not generally pose a due process concern where neither party seeks to cross-examine any witness for whom the opposing party has submitted written direct testimony. *Igor Mitreski, M.D.*, DAB No. 2665, at 7 (2015). Here, Petitioner does not allege any prejudice from the requirement to submit written direct testimony, and since neither party submitted any such testimony, no purpose would be served by holding an in-person hearing.[3]

Finally, Petitioner states that, although her conviction was upheld by the Court of Appeals for the Second Circuit, she will be filing a request for a writ of certiorari with the U.S. Supreme Court, and she requests that her exclusion be "stayed" while that matter is pending. P. Ltr. dated 2/27/17; P. Ltr. dated 4/3/17, 1st pg.; P. Ltr. dated 5/8/17, 1st pg. (indicating that writ had been requested).[4] The Board has repeatedly held that ALJs and the Board have no authority to adjust the beginning date of an exclusion, which, as the ALJ here pointed out, is set by regulation at 20 days from the date of the I.G.'s notice of exclusion. *See, e.g., Robert Kolbusz, M.D.*, DAB No. 2759, at 10 (2017) and cases cited therein. Thus, in *Kolbusz*, the Board concluded that the ALJ "correctly declined to stay the effective date of the exclusion pending disposition of Petitioner's appeal of his criminal conviction." *Id*. at 11. Accordingly, the ALJ did not err in determining based on 42 C.F.R. § 1001.2002(b) that the effective date of Petitioner's exclusion is April 20, 2016.

[3] Petitioner states that "[a]t the hearing, [she] would expect to have expert witness to corroborate [her] testimony. . . ." P. Ltr. dated 2/27/17; P. Ltr. dated 5/8/17, 2nd pg. However, Petitioner did not identify any such witness or explain why she did not submit written direct testimony from that witness.

[4] A February 5, 2016 letter to the I.G. from Petitioner's then attorney noted that Petitioner's appeal of her conviction was pending before the Second Circuit and asked that the I.G. "delay any final determination in this case until such time as the appellate process is concluded." Request for Hearing, attachment. However, Petitioner did not ask the ALJ to delay the effective date of the exclusion.

Conclusion

For the foregoing reasons, we affirm the ALJ's decision upholding the 10-year exclusion imposed by the I.G. effective April 20, 2016.

/s/
Christopher S. Randolph

/s/
Susan S. Yim

/s/
Sheila Ann Hegy
Presiding Board Member