Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Emmanuel Uko Akpan
Docket No. A-10-78
Decision No. 2330
September 17, 2010

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Emmanuel Uko Akpan (Petitioner), appearing *pro se*, appeals the July 8, 2010 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes sustaining the exclusion of Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for a period of 20 years. *Emmanuel Uko Akpan*, DAB CR2178 (2010) (ALJ Decision). The Inspector General (I.G.) of the Department of Health and Human Services excluded Petitioner under section 1128(a)(1) of the Social Security Act (Act) based on based on Petitioner's conviction in federal district court of two counts including felony health care fraud.[1]

On appeal, Petitioner argues principally that he was denied due process because he did not have a timely opportunity for a hearing on the exclusion. As discussed below, we conclude that this argument and Petitioner's other arguments lack merit. We thus sustain the exclusion.

Legal Background

Section 1128(a)(1) of the Act requires the Secretary of the Department 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." Under section 1128(i)(3) of the Act, an individual "is considered to have been 'convicted' of a criminal offense" for purposes of section 1128(a) when a guilty plea or plea of nolo contendere by the individual has been accepted by a federal, state, or local court. Section 1128(c)(3)(B) of the Act provides

[1] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/compssa.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 42 U.S.C.A. Ch. 7, Disp Table.

that in the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years[.]"

The right to notice of, and opportunity for a hearing to contest, a mandatory exclusion arises under section 1128(f) of the Act. That section provides that "any individual or entity that is excluded (or directed to be excluded) from participation under this section is entitled to reasonable notice and an opportunity for a hearing[.]"

Implementing regulations at 42 C.F.R. Part 1001 set forth the specific requirements for notices of exclusion and the procedures to appeal an exclusion. If the I.G. determines that exclusion pursuant to section 1128(a)(i) of the Act is warranted, the I.G. must send a written notice of the decision to the affected individual. 42 C.F.R. § 1001.2002(a). The exclusion will be effective 20 days from the date of the notice. 42 C.F.R. § 1001.2002(b). The notice must state, among other things, the basis for the exclusion, the length of the exclusion, the factors considered in setting the length of the exclusion (where applicable), the effect of the exclusion, and the appeal rights available. 42 C.F.R. § 1001.2002(c). If the I.G. proposes to impose an exclusion pursuant to section 1128(a)(i) for a period exceeding five years, the I.G. must first send written notice of its intent to exclude, stating the basis for the proposed exclusion and the potential effect of the exclusion, and permitting the individual to submit documentary evidence and written argument concerning whether the exclusion is warranted and any related issues. 42 C.F.R. § 1001.2001(a). Under section 1005.2(c), a hearing request must be filed within 60 days after the notice of exclusion is received by the petitioner.

Case Background[2]

Petitioner owned and operated a durable medical equipment supply business in Dallas, Texas. ALJ Decision at 1. On April 16, 2004, Petitioner signed a document captioned "Elements of Offenses & Factual Resume" filed in a criminal proceeding in the U.S. District Court for the Northern District of Texas. I.G. Ex. 2. In that document, Petitioner stipulated to facts in support of his guilty pleas to two counts in the indictment filed on February 3, 2004: 1) "knowingly and willfully" executing a scheme to defraud the Medicare program in violation of "18 U.S.C. §§ 1347 & 24 and 2"; and 2) "knowingly" conducting a financial transaction of more than $10,000 involv[ing] the proceeds of a specified unlawful activity, namely, health care fraud," in violation of 18 U.S.C. § 1957(a). ALJ Decision at 3, citing I.G. Ex. 2. According to Petitioner, he formally entered his guilty plea in district court on May 17, 2004. ALJ Decision at 2.[3]

[2] The following background information is drawn from the ALJ Decision and the record before the ALJ and summarized here for the convenience of the reader, but should not be treated as new findings.

[3] The ALJ Decision cites to "P. Br. at 3" in support of this statement. It is unclear what document this refers to since none of Petitioner's numerous filings below is labeled as a brief and, while several of these filings state that he entered a guilty plea, we can find no statement identifying the date the plea was entered. However, Petitioner admits on appeal that the plea was entered on May 17, 2004. Notice of Appeal at 5; Reply Br. at 2.

On June 30, 2009, the district court entered judgment against Petitioner on the two counts to which he pled guilty. I.G. Ex. 1, at 1. In addition, the court sentenced Petitioner to a five-year prison term and ordered him to pay restitution of $710,000 to the Centers for Medicare & Medicaid Services, which administers the Medicare program. *Id*. at 2, 5.

By letter dated July 17, 2009, the I.G. advised Petitioner that, as a result of his conviction in the U.S. District Court, the Department of Health and Human Services was required by section 1128(a) of the Act to exclude him from eligibility to participate in any capacity in the Medicare, Medicaid, and all federal health care programs. The letter provided an opportunity for Petitioner to submit any information and supporting documentation he wanted the I.G. to consider before a final determination regarding his exclusion was made. I.G. Ex. 5, at 1-2. Petitioner responded by letter dated July 20, 2009, and provided a copy of his notice appealing his conviction to the Fifth Circuit. I.G. Ex. 5, at 3-4.

By letter dated December 31, 2009, the Reviewing Official, Health Care Program Exclusions, Office of Counsel to the Inspector General, advised Petitioner that he was being excluded under section 1128(a)(1) of the Act from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of 20 years "effective 20 days from the date of this letter." 12/31/09 letter at 1 (attached to Petitioner's January 8, 2010 hearing request). The letter indicated that the period of exclusion was greater than the minimum period of five years provided by section 1128(c)(3)(B) of the Act because there was evidence of four aggravating circumstances. *Id*. at 1-2. The letter also incorporated by reference an explanation of Petitioner's appeal rights. *Id*. at 2.

Petitioner filed a request for an ALJ hearing on his exclusion by letter dated January 8, 2010.

The ALJ Decision

The ALJ made the following findings of fact and conclusions of law (FFCLs):

A. Petitioner must be excluded, because he was convicted of a criminal offense related to the delivery of an item or service under the Medicare or a state health program, within the meaning of section 1128(a)(1) of the Social Security Act.

B. Based on the aggravating factors presented in this case, the twenty-year exclusion is reasonable.

C. No mitigating factors justify decreasing the period of exclusion.

ALJ Decision at 3-4, 6. In her discussion of FFCL C, the ALJ stated in part as follows:

> Petitioner also claims, without any support, that he was, in fact, excluded over six years ago. According to Petitioner, after he entered his guilty plea, a government agent told him that he was automatically excluded and sent him a copy of the exclusion rules. P. Br. at 2-3. I accept this as true for purposes of resolving this case, but I do not find it material. That a government employee advised him of, and sent him the rules governing, mandatory exclusions does not mean that the I.G. excluded him any earlier than January 2010, as set forth in the I.G.'s December 31, 2009 notice letter. Indeed, he could not have been excluded prior to the date of his conviction, June 30, 2009.
>
> Moreover, all of the evidence in this record establishes that Petitioner was excluded effective January 20, 2010.

ALJ Decision at 6.

Standard of Review

The regulations set the Board's standard of review in I.G. exclusion cases. The standard of review on a disputed factual issue is whether the initial 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

We note preliminarily that Petitioner submitted a total of four attachments with his Notice of Appeal and his reply brief (Petitioner's Response to the Inspector General's Brief in Opposition to Appellant's Brief). Three of these attachments consist of documents not in the record before the ALJ: Attachment I to the Notice of Appeal, identified by Petitioner as "Feb. 10, 2004-Detention Hearing transcript;" Attachment II to the Notice of Appeal, identified by Petitioner as "Chain of Custody Log/Final Disposition/Inventory of Items Returned;" and Attachment A1 to the reply brief, identified by Petitioner as "U.S. Court of Appeals, D.C. Cir. Order."[4] The applicable regulations provide that if a party submits additional evidence on appeal, the Board may remand the appeal to the ALJ for consideration of the additional evidence if the party demonstrates to the satisfaction of the Board that such evidence "is relevant and material and that there were reasonable grounds for the failure to adduce such evidence at such hearing[.]" 42 C.F.R. § 1005.22(f). Petitioner did not allege any grounds for his failure to offer the additional evidence in the proceeding before the ALJ. Moreover, we are not persuaded that any of the additional evidence is material. Accordingly, we do not admit this additional evidence into the record.

[4] The fourth document, Attachment A2 to Petitioner's reply brief, identified by Petitioner as DHHS/OIG Exclusion Notice of 7/17/2009, is already included in the record as I.G. Exhibit 5. As discussed later, this document is not in fact an exclusion notice but rather a notice of intent to exclude.

Below, we first discuss Petitioner's due process arguments. We then discuss why we reject Petitioner's argument that the ALJ erred in denying his motion for discovery and then why we conclude that the remaining arguments Petitioner appears to be making on appeal are unavailing.

1. Petitioner's due process arguments are predicated on unsupported assertions that he was excluded and/or convicted in 2004, contrary to the facts shown by substantial evidence in the record.

Petitioner argued before the ALJ that he was denied due process because he was excluded in 2004 and did not receive a hearing on the exclusion at that time. *See, e.g.*, Petitioner's Response to Order to Show Cause at 3; Petitioner's Emergency Motion for Stay of ALJ Proceeding/Appointment of Counsel and Issuance of Writ of Habeas Corpus at 4. The ALJ rejected the factual predicate for that argument, finding that, contrary to what Petitioner asserted, he was not excluded in 2004 after he entered his guilty plea, but rather on January 20, 2010, the effective date set out in the I.G.'s December 31, 2009 letter. ALJ Decision at 6.

On appeal, Petitioner makes the same general argument regarding the date of his exclusion as he made before the ALJ, i.e., that the special agent for the I.G. who investigated his case advised him in 2004 that he was excluded. Petitioner asserts specifically that upon his plea of guilty in May 2004, Special Agent David Anderson "sent a '**Notice of Exclusion'** to the Petitioner similar to the notice sent to the Petitioner upon his sentence by **Cindy L. Castillo – Assistant Special Agent in-Charge, Dallas Regional Office;** dated July 17, 2009[.]" P. Reply Br. at 3 (emphasis in original); *see also id*. at 6. Petitioner states that because he has been incarcerated, he has been unable to retrieve this "notice of exclusion" from his residence. *Id*. at 3.

The July 17, 2009 letter Petitioner claims is similar to Special Agent Anderson's "notice of exclusion" gave Petitioner 30 days to submit any information and supporting documentation he wanted the I.G. to consider "before it makes a final determination regarding your exclusion." I.G. Ex. 5, at 2. The letter further states that "[o]nce the OIG has made its determination, the OIG will send you a letter notifying you of its decision and, if an exclusion is imposed, of the effective date and length of the exclusion, as well as your appeal rights." *Id*. Thus, even if Special Agent Anderson had sent the same type of letter to Petitioner, it would have been a notice of intent to exclude, not a notice of exclusion. However, it is clear from Petitioner's earlier account of what Anderson sent him that it was "similar to" the July 17, 2009 notice of intent to exclude only in a very limited sense. Petitioner asserted before the ALJ that Anderson informed him that by entering a guilty plea, he was "automatically excluded . . . for five years," and that Anderson subsequently mailed to him "two pages of DHHS/OIG rules [in] which Agent Anderson highlighted the section of the rule stating '**As provided in section 1128(c)(3)(B) of the Act, the minimum period of program exclusion shall be at least 5 years. . . .Id.**'" Emergency Motion for Stay of ALJ Proceeding/Appointment of

Counsel and Issuance of Writ of Habeas Corpus at 6 (emphasis in original); *see also* Motion to Recuse at 2. Thus, the ALJ did not err in concluding that Anderson simply sent Petitioner "the rules governing [] mandatory exclusions" and that this "does not mean that the I.G. excluded him any earlier than January 2010, as set forth in the I.G.'s December 31, 2009 notice letter." ALJ Decision at 6.

On appeal, Petitioner also offers a variant of his argument that he was excluded in 2004. According to Petitioner, he was convicted in 2004, not in 2009 as the ALJ found. Petitioner argues that he was denied due process because the I.G. waited to exclude him and provide the opportunity for a hearing on his exclusion until after he was sentenced in 2009. *See* Notice of Appeal at 6.

The ALJ identified the date of Petitioner's conviction as June 30, 2009 in response to Petitioner's argument that he was excluded in 2004, pointing out that Petitioner "could not have been excluded prior to the date of his conviction, June 30, 2009." ALJ Decision at 6 We conclude that there was no error in the ALJ's determination of that date. As previously noted, under section 1128(i)(3) of the Act, an individual "is considered to have been 'convicted' of a criminal offense" for purposes of section 1128(a) when a guilty plea by the individual has been accepted by a federal, state, or local court. Under this section, the two elements of a conviction are: 1) the individual has entered a guilty plea, and 2) the court has accepted the guilty plea. *See Kim J. Rayborn*, DAB No. 2248, at 5-6 (2009). With respect to the second element, the Board has observed that it "is well-established that a guilty plea is 'accepted' when a court concludes, after personal questioning of the defendant under oath, that there is a factual basis for the plea and that the plea is voluntary and informed." *Michael S. Rudman, M.D.*, DAB No. 2171, at 6, n.5 (2008), citing *McCarthy v. U.S.*, 395 U.S. 459, 464-65 (1969) and Fed. R. Crim. P. 11(b) (captioned "Considering and Accepting a Guilty or Nolo Contendere Plea").

In the case now before us, Petitioner entered a guilty plea on May 17, 2004. Petitioner asserts that "the U.S. District Court, Dallas, Texas, accepted the Petitioner's plea the same day[.]" P. Reply Br. at 2, 5. However, the "Judgment in a Criminal Case" signed by the U.S. District Court Judge on June 30, 2009 includes a checkbox, which is checked, next to the statement that Petitioner "pleaded guilty to count(s) [1 and 4 of the indictment filed on February 3, 2004] before a U.S. Magistrate Judge, which was accepted by the court." I.G. Ex. 1, at 1. This statement is reasonably read as meaning that Petitioner pled guilty in a proceeding before a U.S. Magistrate Judge and that the U.S. District Court Judge accepted the guilty plea on June 30, 2009, the date he signed the judgment. Petitioner submitted no evidence that the District Court in fact accepted the guilty plea at an earlier date. Therefore, substantial evidence supports the ALJ finding that Petitioner was convicted on June 30, 2009. That was the date his plea was accepted and the date of

his conviction pursuant to section 1128(i)(3) of the Act, notwithstanding the fact that his plea was entered several years earlier.[5]

Thus, the factual predicate for Petitioner's argument on appeal that his due process rights were violated because the I.G. convicted him in 2004 but did not exclude him until 2009 is also incorrect. The basis for an exclusion under section 1128(a)(1) is a conviction. Because Petitioner was not convicted until June 30, 2009, the I.G's December 31, 2009 notice of exclusion, issued after the requisite notice of intent to exclude, gave Petitioner prompt notice of his right to a hearing on the exclusion.

Petitioner also argues on appeal that excluding him based on the date of his sentencing violated the Act. *See* Notice of Appeal at 8. The fact that the court sentenced Petitioner in the same document in which it accepted Petitioner's guilty plea does not mean that the exclusion was based on his sentencing rather than his conviction, however.

Even if Petitioner had been convicted in 2004, that would not change the result in this case. Neither the Act nor the implementing regulations set any deadline within which the I.G. must act to impose an exclusion. *See, e.g., Kailash C. Singhvi, M.D.*, DAB No. 2138 (2007), *aff'd, Kailash C. Singhvi, M.D. v. Inspector General Dep't of Health & Human Servs.*, No. CV-08-0659 (SJF) (E.D. N.Y. Sept. 21, 2009).

2. The ALJ did not abuse her discretion in denying Petitioner's motion for discovery.

In a submission filed with the ALJ, Petitioner moved for discovery. *See* Petitioner's Motion and Affidavit to Stay Consideration Opposing Informal Brief of Inspector General for Dismissal or Summary Judgment Pursuant to Fed. Rul. Civ. P. 56(f)" at 1-2. As grounds for the motion, Petitioner argued that discovery was necessary in order to establish that there were genuine issues of material fact and that summary judgment against him was therefore not appropriate. The ALJ Decision notes that Petitioner moved for discovery. The ALJ stated, however, that the regulations at 42 C.F.R. § 1005.7 "limit discovery to documents that are 'relevant and material'" and that "Petitioner has not shown how discovery would produce documents that are 'relevant and material.'" ALJ Decision at 2, n.4.

On appeal, Petitioner argues that the ALJ's denial of discovery constitutes an abuse of discretion. Citing his May 24, 2010 motion, Petitioner states that he "demonstrated that discovery would produce documents that are relevant and material." Notice of Appeal at 7. Petitioner also cites what he characterizes as the court's holding in *Central Inc. v. Estrin*, 538 F.3d 402 (6th Cir. 2008) that "typically when the parties have no opportunity for discovery, denying the Rule 56(f) motion and ruling on a Summary Disposition motion is likely to be an abuse of discretion." *Id.* at 8.

[5] The ALJ stated that "[n]either party has explained the long delay between the date Petitioner pled guilty and the date the court entered a judgment against him." ALJ Decision at 3. No explanation was offered in the proceeding before the Board.

Contrary to what Petitioner's argument suggests, the I.G. did not move for summary disposition (also known as summary judgment) in this case. Instead, the I.G. stated that an in-person hearing was not necessary and that the matter was ripe for adjudication on the written record. *See* I.G.'s Informal Brief at 6. Regardless of the posture of the case, the applicable regulations permit a party to "make a request to another party for production of documents for inspection and copying which are relevant and material to the issues before the ALJ." 42 C.F.R. § 1005.7(a). The regulations further provide that the "burden of showing that discovery should be allowed is on the party seeking discovery." 42 C.F.R. § 1005.7(e)(4). Here, Petitioner's motion did not identify the issues as to which he sought discovery, much less the types of documents he was seeking.

Although we see no basis in Petitioner's motion, the I.G. understood Petitioner to be seeking discovery "to attack Petitioner's underlying conviction." I.G.'s Reply to Petitioner's Response at 1. Any documents relating to that matter would not be relevant or material. As the I.G. indicated in opposing Petitioner's motion, and as explained in the next section, the validity of an underlying conviction is not an issue that is properly considered by an ALJ.

We therefore conclude that the ALJ did not err in denying Petitioner's motion for discovery.

3. Petitioner's remaining arguments are unavailing.

Petitioner's Notice of Appeal asserts that his guilty plea "was based on coercion, threats, promises, conflict of interest and misrepresentation by his attorney and the government." Notice of Appeal at 6-7; *see also id.* at 10. To the extent that Petitioner intended this as an argument that his subsequent conviction was therefore not a proper basis for his exclusion, we reject this argument. When an exclusion is based on a criminal conviction in a federal, state or local court, "the basis for the underlying conviction . . . is not reviewable and [a petitioner] may not attack it either on substantive or procedural grounds[.]" 42 C.F.R. § 1001.2007(d); *see also Lyle Kai, R.Ph.*, DAB No. 1979 (2005), *aff'd, Kai v. Leavitt*, Civ. No. 05-00514 BMK (D. Haw. July 17, 2006).

Petitioner also asserts on appeal that "the ALJ used the short-form brief against the Petitioner in making her decision." Notice of Appeal at 7. The ALJ Decision notes that the ALJ's March 17, 2010 order "directed Petitioner to complete and submit a 'short-form brief," answering specific questions. . . ." ALJ Decision at 2. The ALJ Decision notes further that "Petitioner did not respond to the specific questions on the short-form brief, but instead submitted the following documents . . . ." *Id*. The ALJ Decision does not state that Petitioner's failure to file the short-form brief (which Petitioner claimed was not sent to him with the ALJ's order) affected the ALJ's consideration of the case. Moreover, Petitioner does not allege that the ALJ failed to consider the arguments that were raised in the documents he submitted in lieu of the short-form brief. Nor does Petitioner claim that, had he received the short-form brief, he would have submitted

information and argument in addition to what he in fact submitted to the ALJ. Thus, we conclude that Petitioner was not prejudiced by his failure to file a short-form brief.

Petitioner makes other contentions on appeal that are not identified in this decision. To the extent that their meaning is clear, we have concluded that these contentions are either meritless or would not materially affect the outcome of the appeal.

Conclusion

For the reasons explained above, we affirm and adopt the FFCLs in the ALJ Decision.

_____/s/_____
Judith A. Ballard

_____/s/_____
Constance B. Tobias

_____/s/_____
Stephen M. Godek
Presiding Board Member