

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

Gena C. Randolph
Docket No. A-13-71
Decision No. 2526
July 30, 2013

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

Petitioner, Gena C. Randolph, a speech therapist, appeals the May 24, 2013 decision of an administrative law judge (ALJ). *Gena C. Randolph*, DAB CR2799 (2013) (ALJ Decision). The ALJ affirmed a determination by the Inspector General of the Department of Health and Human Services (I.G.) to exclude Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for five years under section 1128(a)(1) of the Social Security Act.¹ The ALJ concluded that Petitioner was “convicted of a criminal offense” under section 1128(a)(1) because she pleaded guilty in the South Carolina Court of General Sessions to Medical Assistance Provider Fraud. The ALJ concluded that the duration of the exclusion was mandated as a matter of law.

On appeal, Petitioner argues that the I.G. failed to produce and authenticate admissible evidence and a court transcript to prove that Petitioner entered a guilty plea in the Court of General Sessions to a program-related crime. Petitioner asserts that documents on which the ALJ relied in finding that Petitioner pleaded guilty to Medical Assistance Provider Fraud were false, fraudulent and not authenticated. Petitioner also contends that the judgment against her is the product of fraud.

For the reasons explained below, we conclude that the ALJ properly admitted and relied on the documents in the record evidencing Petitioner’s conviction. We find that the ALJ Decision is supported by substantial evidence on the record as a whole and is free of legal error. We also conclude that Petitioner’s other allegations constitute collateral attacks on her conviction that are not subject to ALJ or Board review. Accordingly, we sustain the exclusion.

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. 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.

Legal Background

Section 1128(a)(1) of the Act requires the Secretary of the Department of Health and Human Services (Secretary) 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.” An individual “is considered to have been ‘convicted’ of a criminal offense” under this provision when a guilty plea or plea of nolo contendere by the individual has been accepted by a federal, state, or local court. Act § 1128(i)(3). The minimum period for exclusion in these circumstances is five years. Act § 1128(c)(3)(B).

An individual excluded from participation under section 1128 is entitled to a hearing to contest the exclusion. Act § 1128(f). The procedures for appealing an exclusion determination are set forth at 42 C.F.R. Part 1005.

The I.G. Determination

By letter dated January 31, 2013, the I.G. notified Petitioner that she was excluded from Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years under section 1128(a)(1) of the Act. I.G. Ex. 1. The notice stated that Petitioner’s exclusion was based on her conviction in the Court of General Sessions, State of South Carolina, Charleston County, of “a criminal offense related to the delivery of an item or service under the Medicare or a State health care program, including the performance of management of administrative services relating to the delivery of items or services, under any such program.” *Id.*

Petitioner requested an ALJ hearing to contest the I.G. determination.

The ALJ Decision

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

- A. Petitioner pleaded guilty in the Court of General Sessions in the State of South Carolina to one count of Medical Assistance Provider Fraud.

- B. Petitioner was convicted of a criminal offense for purposes of [section 1128(a)(1)].

C. Petitioner's conviction requires exclusion under [section 1128(a)(1)] because her criminal conduct related to the delivery of an item or service under Medicaid.

D. Petitioner must be excluded for the statutory minimum period of five years under [section 1128(c)(3)(B)].

Petitioner appealed the ALJ Decision to the Board.

Standard of Review

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

Analysis

1. The ALJ's conclusion that Petitioner pleaded guilty in the Court of General Sessions in the State of South Carolina to Medical Assistance Provider Fraud is free from legal error and based on substantial evidence in the record as a whole.

Petitioner argues that the I.G. failed to produce admissible documentary evidence and a court transcript to prove that Petitioner entered a guilty plea to a program-related crime. P. Br.; P. Addendum to Appellate Br.² According to Petitioner, the state court Sentence Sheet (I.G. Ex. 2) and Indictment (I.G. Ex. 4) on which the ALJ relied to support his findings were not authenticated and are "false/fraudulent instruments." P. Addendum to Appellate Br. at 2; P. Fundamental Errors Noted in ALJ Decision. Petitioner asserts that

² Petitioner appears pro se and filed multiple documents, without leave, after submitting her May 24, 2013 notice of appeal and brief. The I.G. moved to strike the additional submissions on the ground that they were unauthorized. The Presiding Board Member issued a ruling on June 6, 2013 admitting the additional submissions into the record. To ensure that these filings did not prejudice the I.G., the Presiding Board Member permitted the I.G. to file his response within 30 days from the date the I.G. received Petitioner's last substantive submission.

Petitioner subsequently proffered a sworn statement dated June 10, 2013 to support her arguments. 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 her failure to offer the additional evidence in the proceeding before the ALJ. Moreover, for the reasons detailed above, we are not persuaded that this evidence is material. Accordingly, we do not admit this additional evidence into the record.

the I.G.'s failure to authenticate these documents and the ALJ's decision to admit and rely on them violated Rule 901 of the Federal Rules of Evidence and constitute "reversible, harmful error." P. Reversible, Harmful Errors noted within ALJ's May 24, 2013 Decision.

Petitioner further argues that markings on the Sentence Sheet show that it is fraudulent. According to Petitioner, the Sentence Sheet "appears to have been altered or modified by a third party," "contains two different handwritings and numerous 'scratch-out' marks," and bears an "obstructed" court seal and an illegible Deputy Clerk signature. P. Addendum to Appellate Br.; P. Fundamental Errors Noted in ALJ Decision; P. Objection Authentication and Admissibility, Addendum. The Indictment, Petitioner argues, was not dated or witnessed by Petitioner or her counsel. P. Br. at 1; P. Addendum to Appellate Br. Moreover, Petitioner states, two different individuals signed the Indictment and Sentence Sheet as Deputy Clerk although these documents "were reportedly executed at the same date and time." P. Reply Br.

We reject Petitioner's arguments. Petitioner does not deny that she appeared before the Court of General Sessions in August 2012 and entered a guilty plea to Medical Assistance Provider Fraud. To the contrary, Petitioner's Notice of Appeal plainly states that there was a "Judgment against Petitioner," and her May 30, 2013 submission to the Board refers to her "court appearance" on "Aug 15, 2012." P. Objection Authenticity and Admissibility Addendum.

In addition, when the I.G. proffered the Indictment and Sentence Sheet during the ALJ proceedings, Petitioner did not argue that the documents themselves were false or that she had not signed them. Instead, Petitioner argued that her plea was "the product of undue influence" and "coercion." P. Br. Docket No. C-13-388. Only on appeal to the Board has Petitioner specifically claimed that the Indictment and Sentence Sheet were not properly authenticated and that the Sentence Sheet was modified or altered by a third party. The inconsistencies in Petitioner's arguments over the course of these proceedings undercut her recent challenge to the authenticity of the Indictment and Sentence Sheet.

We also note that under section 42 C.F.R. § 1005.21(e), the Board "will not consider" any issue in the parties' briefs "that could have been raised before the ALJ but was not." The I.G. asserts that the authentication arguments are an issue that was not raised before the ALJ and, therefore, should not be considered by the Board. I.G. Br. at 1, 4. Because some of Petitioner's arguments before the ALJ are sufficiently ambiguous to arguably be considered related to the issue of the court documents' authenticity, and because Petitioner is represented pro se, we do consider Petitioner's allegations regarding the authenticity of I.G. Exhibits 2 and 4. However, we agree with the I.G. that Petitioner's arguments are meritless. *See* I.G. Br. at 4. We first note that Rule 902(4) of the Federal Rules of Evidence provides that no extrinsic evidence is needed to authenticate a copy of a public record where the document is certified as correct by its custodian or some other

person authorized to make such a certification. Here, as the I.G. points out, both the court Sentence Sheet and Indictment bear a legible, signed stamp/seal of the South Carolina Court of General Sessions Clerk attesting that each document is “A TRUE COPY.” I.G. Br. at 4, *citing* I.G. Exs. 2, 4. We additionally note that, contrary to what Petitioner argues, the signatures of the Deputy Clerk on the signed stamps/seals on both documents appear to be of the same individual, and Petitioner has not disputed that that individual served as Deputy Clerk on the date the stamps/seals were signed. Thus, the Indictment and Sentence Sheet are considered self-authenticating documents under the Federal Rules of Evidence.

In addition, the regulations governing exclusion proceedings make clear that ALJs have the authority to determine the admissibility of evidence and, except for certain types of evidence not at issue here, ALJs are not “bound by the Federal Rules of Evidence.” 42 C.F.R. § 1005.17(a) - (b). Accordingly even if the Indictment and Sentence Sheet were not certified as true copies by a Deputy Clerk of the Court of General Sessions, the ALJ would have the authority to admit the documents into the record without extrinsic evidence and a court transcript. Indeed, the Board previously has determined that copies of court records need not be certified and that the entire record of a state court proceeding need not be entered into the administrative record to support an exclusion. *Marc Schneider, D.M.D.*, DAB No. 2007, at 12-13 (2005), *citing* 42 C.F.R. § 1005.17 (sustaining determination that Petitioner was convicted, under section 1128(i), of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance).

Furthermore, the documents contested by Petitioner bear multiple, distinctive features and markings indicating that they are reliable proof of Petitioner’s guilty plea and the court’s acceptance of the plea. In addition to the signed stamps/seals of the Court of General Sessions Clerk attesting that each document is “A TRUE COPY,” both documents are dated August 2012 and captioned identically under the same docket number: 2012-GS-10-01464, State of South Carolina, County of Charleston; Court of General Sessions, The State vs. Gena C. Randolph. I.G. Exs. 2, 4. The Indictment and the Sentence Sheet both identify the crime to which Petitioner pleaded guilty as “Medical Assistance Provider Fraud, § 43-7-60(B)(1), *S.C. Code of Laws.*”

Further supporting their authenticity, the documents bear the signatures of multiple individuals, including government officials. The Indictment is signed by the South Carolina Attorney General and includes a signed statement dated August 15, 2012 that reads: “I, Gena C. Randolph, hereby waive presentment of the within charge and Indictment” I.G. Ex. 4. Immediately below the signed statement is another signature designated to be that of an “Attorney or Witness.” *Id.* The Sentence Sheet bears the signatures of the “Presiding Judge,” a “Deputy Clerk,” a “Court Reporter,” an “AAG” the “Defendant” and the “Attorney for Defendant.” I.G. Ex. 2.

As noted, Petitioner argues that “scratch out” marks and different handwriting on the Sentence Sheet show that it was “clearly modified and altered by a third party.” Fundamental Errors Noted in ALJ Decision. Petitioner also asserts that the “Indictment *was not* dated or witnessed by Petitioner or her counsel.” P. Br.; P. Addendum to Appellate Br. (emphasis in original).

Petitioner’s contentions are unpersuasive. While there are several “scratch-out marks” on the Sentence Sheet, we disagree with Petitioner that they show the document was “altered or modified by a third party.” Rather, text appears to have been appropriately scratched out where inapplicable. For example, in the part of the form that specifies the term of the defendant’s sentence, the form contains the words “days/months/years.” I.G. Ex. 2. The words “days/months” are crossed out, and the word “years” is circled to make clear that defendant’s term was for a period of years. *Id.*

We also note that the ALJ did not “solely rel[y] on these exhibits to confirm Petitioner’s program related conviction” under section 1128(a)(1), as Petitioner contends. P. Fundamental Errors Noted in ALJ Decision. In addition to the Sentence Sheet and Indictment, the ALJ cited I.G. Exhibit 3, a five-page document titled “Plea Agreement” and captioned “State of South Carolina, County of Richland . . . vs. Gena C. Randolph, Defendant, In the Court of General Sessions” The Plea Agreement states that on July 10, 2012, “between and among the State of South Carolina (hereinafter ‘State’) and Gena C. Randolph (hereinafter ‘Defendant’) and her attorneys, . . .

1. Defendant agrees to waive presentment and plead guilty to one (1) Indictment which charges Defendant with Filing False Claims with the South Carolina Medicaid Program in violation of § 43-7-60(B), *S.C. Code of Laws, 1976*, as amended. Section 43-7-60(B) is a misdemeanor punishable by imprisonment for not more than three (3) years or a fine of not more than One Thousand Dollars (\$1,000.00) or both.

Id. The Plea Agreement bears the signatures of Petitioner, two individuals identified as her counsel, and an attorney for the State of South Carolina. *Id.* at 5. Petitioner does not claim that this document was not authenticated or that the ALJ erred in entering it into the record.

In light of Petitioner’s not denying that she pleaded guilty to Medical Assistance Provider Fraud and the evidence discussed above, which the ALJ was authorized to admit into the record, we conclude that substantial evidence in the record as a whole supports the ALJ’s finding that Petitioner pleaded guilty in the Court of General Sessions in the State of South Carolina to Medical Assistance Provider Fraud and that the court accepted her plea.

2. The ALJ did not err in concluding that Petitioner was convicted of a criminal offense for purposes of section 1128(a)(1).

As noted above, section 1128(i)(3) of the Act provides that an individual “is considered to have been ‘convicted’ of a criminal offense” under section 1128(a)(1) when a guilty plea by the individual has been accepted by a federal, state, or local court. “Considering Petitioner’s guilty plea,” the ALJ found “that the record supports the finding that Petitioner was convicted within the meaning of the statute.” ALJ Decision at 4.

As she argued before the ALJ, Petitioner maintains on appeal that the “[j]udgment against Petitioner is the product of fraud, misrepresentation and perjured testimony.” Notice of Appeal; ALJ Decision at 4 (“Petitioner claims that the plea agreement is a product of coercion, undue influence and prosecutorial misconduct.”). Petitioner claims that “this action is the result of misconduct by the South Carolina Medicaid Fraud Control Unit, an entity governed and funded by the Inspector General.” Notice of Appeal. Petitioner refers to a sworn statement that she was denied due process. P. Br. at 1.

As the ALJ accurately explained, “constitutional arguments about the process leading to a state criminal conviction are not relevant in determining whether the I.G. has authority to exclude a petitioner.” ALJ Decision at 4, *quoting Chander Kachoria, R. Ph.*, DAB No. 1380 (1993). In addition, 42 C.F.R. § 1001.2007(d) states that when an exclusion is based on a criminal conviction in a state court, “the basis for the underlying conviction . . . is not reviewable and [a petitioner] may not collaterally attack it either on substantive or procedural grounds[.]” Petitioner’s contention that her guilty plea was the product of coercion constitutes such a collateral attack on the basis of the exclusion that may not be reviewed by the ALJ or the Board. *Emmanuel Uko Akpan*, DAB No. 2330, at 8 (2010).

Accordingly, we conclude the ALJ did not err in determining that Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1) and that “the alleged circumstances surrounding the plea agreement cannot serve as a basis to reverse the exclusion.” ALJ Decision at 5.³

³ Petitioner also “renews her request for financial relief” on the ground that she was deprived of her property without due process “by the South Carolina Medicaid Fraud Control Unit, an entity governed and funded by the Inspector General.” P. Br. at 1, *citing* ALJ Decision at 5, n. 1. The Board “has a limited role as the forum for administrative review of an ALJ’s decision in an exclusion case.” *Janet Wallace*, DAB No. 1326 (1992). The Board may “decline to review the case, or may affirm, increase, reduce, reverse or remand any penalty, assessment or exclusion determined by the ALJ.” 42 C.F.R. § 1005.21(g). The Board does not have the authority to grant financial relief to Petitioner.

3. The ALJ’s conclusion that Petitioner’s conviction requires exclusion under section 1128(a)(1) of the Act because her criminal conduct related to the delivery of an item or service under Medicaid is supported by substantial evidence in the record as a whole and free from legal error.

As noted, section 1128(a)(1) of the Act provides that any individual convicted of a crime related to the delivery of an item or service under Medicare or any state health care program must be excluded from participation in any federal health care program. The ALJ determined that the record in this case “fully supports” the conclusion that Petitioner’s conviction was related to the delivery of services under a state health care program. ALJ Decision at 5. Specifically, the ALJ noted that the Indictment “makes it clear that Petitioner ‘knowingly and willfully filed, or caused to be filed, false claims for speech therapy . . . for Medicaid recipient C.J. with the South Carolina Department of Health and Human Services (SCDHHS).’” *Id. quoting* I.G. Ex. 4, at 2. The ALJ further explained that “SCDHHS administers the State’s Medicaid program,” and that Medicaid is a “State health care program” for exclusion purposes. *Id. citing* 42 C.F.R. § 1001.2.

On appeal, Petitioner does not deny that the criminal offense underlying her conviction related to the delivery of services under a state health care program, and we find no error in the ALJ’s characterization of the evidence or legal analysis.

Accordingly, we conclude that the ALJ correctly determined that Petitioner’s conviction is related to the delivery of services under a State healthcare program and required Petitioner’s mandatory exclusion under section 1128(a)(1).

4. The ALJ’s conclusion that Petitioner must be excluded for the statutory minimum period of five years under section 1128(c)(3)(B) of the Act is free from legal error.

Section 1128(c)(3)(B) of the Act states that with the exception of circumstances not applicable here, in the case of an exclusion under section 1128(a), “the minimum period of exclusion shall be not less than five years.” The ALJ determined that because he concluded that a basis exists to exclude Petitioner pursuant to section 1128(a)(1), “Petitioner must be excluded for a mandatory minimum period of five years.” ALJ Decision at 6.

On appeal, Petitioner does not argue that the ALJ erred in applying section 1128(c)(3)(B) to determine the duration of her exclusion, and we find no error in the ALJ’s legal analysis.

Accordingly, we conclude that the ALJ correctly determined that Petitioner must be excluded for the statutory minimum period of five years.

Conclusion

For the reasons discussed, we affirm the ALJ Decision.

_____/s/
Judith A. Ballard

_____/s/
Sheila Ann Hegy

_____/s/
Stephen M. Godek
Presiding Board Member