

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

Raymond Lamont Shoemaker
Docket No. A-14-24
Decision No. 2560
March 5, 2014

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

Raymond Lamont Shoemaker (Petitioner) appeals the November 13, 2013 decision of an Administrative Law Judge (ALJ). *Raymond Lamont Shoemaker*, DAB CR2993 (2013). The ALJ sustained the determination by the Inspector General of the Department of Health and Human Services (I.G.) to exclude Petitioner from all federal health care programs under section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1), based on his conviction for felony health care fraud in the United States District Court for the Northern District of Mississippi. The ALJ determined, however, that the I.G.'s proposed 10-year term of exclusion was unreasonably short and increased the term to 12 years. Petitioner challenges the length of the exclusion, arguing that even a 10-year period of exclusion is excessive.

We reverse the ALJ's extension of Petitioner's exclusion from 10 years to 12 and reinstate the 10-year term originally imposed by the I.G. As we explain below, although an ALJ is authorized by regulation to increase the term of exclusion imposed by the I.G., fundamental fairness dictates that, before an ALJ exercises this authority, a petitioner must receive adequate notice that the ALJ is considering an increase in his case and an opportunity to show that an increase is not justified. Here, Petitioner received no such notice. In addition, we conclude that a 10-year period of exclusion is within a reasonable range.

Statutory and Regulatory Background

Section 1128(a)(1) of the Act requires the Secretary of Health and Human Services (Secretary) to exclude an individual from participation in all federal health care programs if that individual has been convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.¹ *See also* 42 C.F.R. § 1001.101. Five years is the minimum period of an exclusion under section 1128(a)(1). Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2). That period may be

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.

lengthened based on application of the aggravating factors in 42 C.F.R. § 1001.102(b). Two aggravating factors are at issue here: the “acts that resulted in the conviction, or similar acts, were committed over a period of one year or more” and the “sentence imposed by the court included incarceration.” 42 C.F.R. § 1001.102(b)(2), (5). If an exclusion period is extended based on application of one or more aggravating factors, any applicable mitigating factors may then be used to reduce the length. *Id.* § 1001.102(c).

An excluded individual may request a hearing before an ALJ, but only on the issues of whether the I.G. had a basis for the exclusion and whether the length of the exclusion is unreasonable. 42 C.F.R. §§ 1001.2007(a), 1005.2(a). Any party dissatisfied with the ALJ’s decision may appeal to the Board. *Id.* § 1005.21.

Case Background²

Petitioner was the chief management official, first designated chief operating officer, and later the chief executive officer of a hospital in Batesville, Mississippi called Tri-Lakes Medical Center (TLMC) that participated in the Medicare and Medicaid programs. In September 2011, Petitioner was named as one of three co-defendants in a 14-count superseding indictment in the United States District Court for the Northern District of Mississippi. I.G. Ex. 3. The indictment alleged that Petitioner and his co-defendants were involved in three related conspiracy schemes, including a scheme in which Petitioner solicited and received bribes in exchange for ensuring that when TLMC hired temporary nursing staff, it gave preferential treatment to a nurse staffing business owned by one of the defendants.³

A jury convicted Petitioner of ten of the eleven counts of which he was charged, but it appears that the court subsequently granted Petitioner’s post-trial motions for judgment of acquittal on two of the counts and for a new trial on one of the counts.⁴ In the end, Petitioner was convicted of one count of health care fraud (kickback, bribe, or rebate), in violation of 42 U.S.C. § 1320a-7b; one count of false statements to the United States, in violation of 18 U.S.C. § 1001; three counts of false statements in a federal loan or credit application, in violation of 18 U.S.C. § 1014; one count of conspiracy to violate section 1014, in violation of 18 U.S.C. § 371; and one count of embezzlement from an

² Background information is drawn from the ALJ Decision and the record before the ALJ and is not intended to substitute for his findings.

³ The factual predicates for the various offenses with which Petitioner was charged are detailed in the ALJ Decision. *See* ALJ Decision at 7-9. We discuss those facts in this decision only where they are relevant to the issues raised on appeal.

⁴ The disposition of the eleventh count is unclear from the record. The ALJ speculated that it was severed from the other charges for which Petitioner stood trial. ALJ Decision at 2 n.2; 21.

organization receiving federal assistance, in violation of 18 U.S.C. § 666. ALJ Decision at 2, citing I.G. Ex. 2; P. Ex. 5; *see also* ALJ Decision at 20-21 (Appendix summarizing the disposition of the criminal charges contained in the superseding indictment). Based on these convictions, the court sentenced Petitioner to seven concurrent 55-month terms of imprisonment. I.G. Ex. 2.

By letter dated March 29, 2013, the I.G. notified Petitioner that he was being excluded from participation in all federal health care programs for a period of 10 years. The letter explained that the exclusion was based on Petitioner's conviction in district court "of a criminal offense related to the delivery of an item or service under 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 programs." I.G. Ex. 1, at 1. The letter also explained that the I.G. was imposing a longer term of exclusion than the five-year minimum term required under section 1128(c)(3)(B) of the Act because the acts that resulted in Petitioner's conviction, or similar acts, were committed over a period of one year or more and the sentence imposed by the court included incarceration. The letter noted that the "acts occurred from about November 2005 to about June 2007" and that the court had sentenced Petitioner to 55 months of incarceration. *Id.*

Petitioner filed a request for hearing before an ALJ to challenge the I.G.'s determination. Petitioner conceded that there was a basis for excluding him under section 1128(a)(1) of the Act based on his conviction for health care fraud, but disputed that the 10-year term of exclusion was reasonable.

The ALJ rejected Petitioner's arguments and granted the I.G.'s motion for summary disposition in its favor. The ALJ concluded that the undisputed facts established that the "minimum five-year period of exclusion must be imposed, and that the I.G.'s determination to enhance that period to 10 years based on proof of the aggravating factors found at 42 C.F.R. §§ 1001.102(b)(2) and (b)(5) is supported by fact and law." ALJ Decision at 1. However, the ALJ also determined *sua sponte* that the I.G.'s proposed exclusion of Petitioner for a period of 10 years was "unreasonably short." *Id.* at 1, 3, 6. The ALJ concluded that a 12-year period exclusion was "not unreasonable," so he increased Petitioner's term of exclusion to that length. *Id.* at 3, 6. Petitioner timely appealed the ALJ Decision to the Board.

Standard of Review

The Board's standard of review in I.G. exclusion cases is set by regulation. The standard of review on a disputed factual issue is whether the ALJ 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). The regulations also provide that an ALJ may "[u]pon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact" *Id.*

§ 1005.4(b)(12). Whether summary judgment is appropriate is a legal issue the Board addresses de novo, viewing the proffered evidence in the light most favorable to the non-moving party. *Timothy Wayne Hensley*, DAB No. 2044, at 2 (2006).

Analysis

Below, we first discuss the ALJ's conclusion that the I.G. had the authority to impose an exclusion longer than the five-year mandatory minimum term based on evidence supporting the existence of the aggravating factors in section 1001.102(b)(2) and (b)(5) of the regulations. We next discuss the ALJ's *sua sponte* decision to increase Petitioner's term of exclusion from 10 years to 12. Finally, we discuss whether the 10-year term of exclusion initially imposed by the I.G. was within a reasonable range.

1. The ALJ correctly concluded that the I.G. had a basis for excluding Petitioner for more than five years based on the aggravating factors in section 1001.102(b)(2) and (5).

Under section 1001.102(b)(2), the I.G. may increase a period of exclusion if the "acts that resulted in the conviction [leading to exclusion], or similar acts, were committed over a period of one year or more." Under section 1001.102(b)(5), the I.G. may also increase a period of exclusion if the "sentence imposed by the court included incarceration." As the ALJ concluded, the undisputed facts establish that both of these factors are present in this case, so the I.G. was authorized to increase Petitioner's term of exclusion beyond the five-year mandatory minimum term.

Petitioner has never disputed that because his sentence included incarceration, the aggravating factor at section 1001.102(b)(5) applies. Nor has he asserted that any mitigating factors apply. Instead, he argued before the ALJ and continues to argue before the Board that his crimes did not last for a year or more, so the aggravating factor at section 1001.102(b)(2) is not present.

The ALJ correctly rejected Petitioner's argument. Even after the District Court granted Petitioner's motions for judgment of acquittal and a new trial, Petitioner remained convicted of Counts Six through Twelve of the superseding indictment. I.G. Ex. 2, at 1. Count Six – the count alleging health care fraud, which Petitioner conceded provided a basis for his exclusion – provides in relevant part:

From on or about November 2005 to on or about June 2007, in the Northern District of Mississippi, RAYMOND LAMONT SHOEMAKER, aka "RAY SHOEMAKER," defendant herein, did knowingly and willfully solicit and receive remuneration, that is, a kickback, bribe, or rebate, in return for arranging for or

recommending purchasing or ordering a service for which payment may be made in whole or in part under a Federal health care program, in violation of Title 42, United States Code, Section 1320a-7b.

I.G. Ex. 3, at 10 (emphasis added). Thus, it is clear from the face of the charges of which Petitioner was convicted that the acts leading to his conviction were committed over a period of one year or more.

Petitioner maintains that the time period specified in Count Six is just “surplus language,” emphasizing that the jury instruction for that count did not require the jury to determine the duration of his conduct. P. Br. at 9-10; *see* P. Ex. 4 (jury instruction). Petitioner relies on *Rajitha Goli*, DAB CR1153 (2004), where the ALJ rejected the I.G.’s general reliance on a superseding indictment as evidence that the petitioner there committed similar acts that lasted for one year or more. In that case, the ALJ noted that indictments must be supported by probable cause, which is a lesser evidentiary standard than preponderance of the evidence and thus insufficient to meet the I.G.’s burden of proof. Petitioner also contends that the evidence adduced at trial in support of his conviction for Count Six only established that he committed criminal acts from December 2005 to July 2006. P. Br. at 10-11.

Petitioner’s arguments lack merit. As an initial matter, ALJ decisions like *Goli* are not binding precedent on the Board or other ALJs. *See, e.g., Michael D. Dinkel*, DAB No. 2445 (2012); *Mark B. Kabins, M.D.*, DAB No. 2410 (2011). In any event, the ALJ in *Goli* only rejected the I.G.’s reliance on charges in the indictment of which the petitioner was not subsequently convicted. The ALJ instead relied on allegations in the indictment that were incorporated by reference into the one count to which the petitioner pled guilty. Based on those allegations, the ALJ concluded that the preponderance of the evidence established that the petitioner had engaged in criminal conduct for a period of more than a year.

Here, Petitioner was found guilty of Count Six of the superseding indictment, which described his conduct as lasting from November 2005 to June 2007. Although Petitioner asserts that the evidence at trial established a shorter duration for his criminal acts than was charged in the indictment, the judgment – which listed the end date for each count of conviction – did not modify the dates of Petitioner’s criminal conduct. To the contrary, the judgment of conviction provided that the conduct described in Count Six ended on June 1, 2007. I.G. Ex. 2, at 1. Thus, the I.G. could properly rely on the indictment and the judgment to establish that Petitioner’s acts lasted longer than one year. Despite Petitioner’s contention that he is “[n]ot contesting his conviction in this forum” (P. Br. at 2), his attempt to challenge the time frame for Count Six provided in these court documents constitutes an impermissible collateral attack on his conviction. *See* 42 C.F.R. § 1001.2007(d).

The ALJ also found that the conduct underlying Petitioner's convictions for Counts Seven through Twelve constituted "similar acts" to the conduct underlying his conviction for Count Six. ALJ Decision at 10-11. Because those additional convictions involved conduct that began in June 2005 and ended in March 2010, the ALJ determined that the convictions provided additional evidence that Petitioner's criminal conduct lasted for more than a year. *Id.* at 11. However, the ALJ concluded, and we agree, that "Count Six alone is sufficient to support the I.G.'s reliance on 42 C.F.R. § 1001.102(b)(2)." *Id.* at 10.

Based on the undisputed facts that Petitioner's sentence included incarceration and that both the judgment of conviction and the superseding indictment provided that Petitioner's criminal acts constituting health care fraud lasted over a year, the ALJ correctly determined that the aggravating factors in sections 1001.102(b)(2) and (5) applied. Thus, the I.G. had a basis for excluding Petitioner for more than five years.

2. The ALJ erred in *sua sponte* increasing Petitioner's term of exclusion without providing notice and an opportunity to respond.

Petitioner challenges the ALJ's *sua sponte* decision to increase his term of exclusion from 10 years to 12, contending that an ALJ has no authority to increase a period of exclusion. He relies on section 1001.2007 of the regulations, which, as noted above, provides that an excluded individual may file a request for hearing before an ALJ only on the issues of whether the I.G. had a basis for the exclusion and whether the length of the exclusion is unreasonable. Petitioner contends that the Secretary has determined that "unreasonable" means "excessive or extreme," so an ALJ has the power only to reduce a period of exclusion. P. Br. at 6-7, citing 48 Fed. Reg. 3742, 3744 (Jan. 27, 1983).

Petitioner's argument overlooks section 1005.20(b) of the regulations, which provides in relevant part: "The ALJ may affirm, increase or reduce the penalties, assessment or exclusion proposed or imposed by the IG, or reverse the imposition of the exclusion." 42 C.F.R. § 1005.20(b) (emphasis added). Thus, the regulations expressly provide that an ALJ has the authority to increase the length of an exclusion.⁵ However, while section 1005.20(b) in general puts petitioners on notice that in some cases an ALJ may increase a period of exclusion, the regulation by itself did not provide Petitioner with sufficient notice that an issue in this case was whether the period of his exclusion may be increased. Basic tenets of fundamental fairness require that a petitioner receive adequate notice and an opportunity to respond before his period of exclusion is increased. Here, although the I.G. defended against Petitioner's contention that a 10-year period of exclusion was unreasonably long, the I.G. never asserted before the ALJ that the proposed 10-year period was unreasonably short. Indeed, nothing in the record suggests that Petitioner had

⁵ The ALJ did not cite or otherwise appear to rely upon section 1005.20(d) as the source for his authority to increase Petitioner's term of exclusion.

any reason to suspect that the ALJ was considering increasing the period of exclusion. Under these circumstances, the ALJ should have notified Petitioner that he was considering increasing Petitioner's term of exclusion. Because he did not do so and the issue was not otherwise raised on the record, Petitioner did not have an opportunity to identify facts or present legal argument for why that should not occur. For that reason, we conclude the ALJ's determination that a 12-year exclusion, not a 10-year exclusion, was within a reasonable range was fundamentally unfair and raises due process concerns. Accordingly, the ALJ's extension of the term of exclusion from 10 years to 12 years must be reversed.

3. A 10-year term of exclusion is within a reasonable range.

Based on the ALJ's error in increasing Petitioner's period of exclusion *sua sponte* without notice, we could remand the case for a redetermination of the reasonableness of the period of exclusion. However, on appeal both parties have addressed whether a 10-year exclusion is within a reasonable range, and there are no disputed issues of material fact related to that issue. Because that issue is ripe for resolution, we exercise our authority to review the issue *de novo*. See Act §§ 205(b)(1), 1128(f); 42 C.F.R. § 1005.21(g), (h). We conclude that, in light of the circumstances surrounding the applicable aggravating factors, a 10-year term of exclusion is within a reasonable range.

It is well-settled in our cases (to date in the context of whether an imposed exclusion was unreasonably long) that in determining whether the I.G.'s proposed period of exclusion is unreasonable, an ALJ's – and the Board's – role is limited to considering whether the period of exclusion the I.G. imposed was “within a reasonable range, based on demonstrated criteria.”⁶ *Craig Richard Wilder, M.D.*, DAB No. 2416, at 8 (2011); *Joann Fletcher Cash*, DAB No. 1725, at 17 (2000), quoting 57 Fed. Reg. 3298, 3321 (Jan. 29, 1992). In determining whether a period of exclusion is within a reasonable range, the ALJ may not substitute his judgment for that of the I.G. or determine what period of exclusion would be “better.” *Wilder* at 8. The preamble to 42 C.F.R. Part 1001 indicates that the I.G. has “broad discretion” in setting the length of an exclusion in a particular case, based on the I.G.'s “vast experience” in implementing exclusions. 57 Fed. Reg. at 3321. The preamble also states that the aggravating and mitigating factors do not “have specific values; rather, these factors must be evaluated based on the circumstances of a particular case.” *Id.* at 3314. Thus, where, as here, the undisputed facts establish that all of the aggravating factors relied on by the I.G. are present and there are no mitigating

⁶ In explaining his rationale for increasing Petitioner's term of exclusion from 10 years to 12, the ALJ expressed at length his view that in the past few years the Board has “abandoned” settled precedent and assumed new, increased authority when reviewing the reasonableness of an exclusion. ALJ Decision at 12-15. The ALJ misconstrued the Board's recent decisions, which are consistent with its settled precedent, existing authority and the analytical framework historically used by the Board to review the reasonableness of the length of exclusions. In any event, the ALJ's comments are mere dicta, and we need not address them any further. See *Ollie Futrell*, DAB No. 2540 (2013).

factors, “a holding that the exclusion period chosen by the I.G. was unreasonable must be based on analysis of those factors, considering the particular circumstances and affording them appropriate weight.” *Jeremy Robinson*, DAB No. 1905, at 10 (2004). As the ALJ observed here, the Board has long recognized that a petitioner’s trustworthiness is “the touchstone for evaluating an exclusion.” ALJ Decision at 12.

Regarding the duration of Petitioner’s criminal conduct, the I.G. stated in his exclusion letter that a 10-year exclusion was being imposed, in part, because the acts that resulted in Petitioner’s conviction, or similar acts, “occurred from about November 2005 to about June 2007.” I.G. Ex. 1, at 1. That is the period of criminal conduct encompassed by Petitioner’s conviction for Count Six, the conviction on which the exclusion apparently relied. In our view, criminal conduct consisting of health care fraud that lasted approximately a year and a half is sufficiently serious to warrant a 10-year exclusion, especially when considered along with the other aggravating factor.

Regarding Petitioner’s sentence of incarceration, we agree with the ALJ’s conclusion that a 55-month prison term is a “substantial term of confinement . . . that seems an unmistakable reflection of the District Court’s assessment of Petitioner’s untrustworthiness.” ALJ Decision at 16.⁷ In light of the high degree of untrustworthiness reflected in the length of Petitioner’s term of incarceration, a five year extension of the mandatory minimum five-year exclusion based on this factor alone would not be unreasonable.

Although the I.G. now defends before us the ALJ’s increase in the exclusion period from 10 to 12 years, he does not contend that the proposed 10-year term failed to adequately serve the exclusion statute’s goals of deterring fraud and protecting the federal health care programs and their beneficiaries from misconduct by untrustworthy providers generally or Petitioner specifically. Nor does the I.G. now contend that he erred in determining that 10 years was reasonable or that it is now outside a reasonable range. We also note that there is no indication that the evidence reviewed by the ALJ in support of Petitioner’s exclusion was any different from that considered by the I.G. when he originally proposed the 10-year term. Further, as the ALJ found, there are no mitigating factors present to justify the reduction of the 10-year period of exclusion. ALJ Decision at 3.

⁷ Contrary to what the ALJ Decision states, the Board did not hold in *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491 (2012), that the length of a period of incarceration is irrelevant. *See* ALJ Decision at 16-17. In that case, the Board did not discount the potential significance of the length of a period of exclusion, but instead explained why it disagreed with the petitioner’s position that his 60-month sentence indicated more about the degree of risk that he posed to the federal health care programs than did the \$12 million program loss caused by his solo scheme.

In arguing that even a 10-year exclusion is excessive, Petitioner asserts, as he did before the ALJ, that the length of his prison sentence should carry less weight because his actions did not cause any financial loss to the Medicare or Medicaid programs. P. Br. at 14. Whether a petitioner's actions caused such loss is a separate aggravating factor, 42 C.F.R. § 1001.102(b)(1), on which the I.G. did not rely in setting Petitioner's term of exclusion. The absence of this aggravating factor is therefore irrelevant. Petitioner also argues, without support, that his 55-month sentence was "based in greater part on his other convictions, not the single healthcare related crime." *Id.* The judgment states that he was sentenced to 55 months of imprisonment "as to each of Counts 6, 7, 8, 8, 10, 11, and 12, all such terms to run concurrently." I.G. Ex. 2, at 3 (emphasis added). Thus, the judgment shows that Petitioner received a sentence of 55 months for each count, including his conviction for health care fraud.

Based on the circumstances surrounding Petitioner's prison sentence and the duration of his criminal conduct, we conclude that the 10-year term of exclusion imposed by the I.G. is within a reasonable range.

Conclusion

For the reasons discussed above, we reverse the ALJ's decision to increase Petitioner's term of exclusion from 10 years to 12 and reinstate the 10-year term imposed by the I.G.

_____/s/
Sheila Ann Hegy

_____/s/
Leslie A. Sussan

_____/s/
Stephen M. Godek
Presiding Board Member