Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Amir Tadros
Docket No. A-13-100
Decision No. 2550
December 16, 2013

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Amir Tadros (Petitioner) appeals the June 19, 2013 decision of an administrative law judge (ALJ) sustaining Petitioner's exclusion from all federal health care programs for five years. *Amir Tadros*, DAB CR2836 (2013)(ALJ Decision). The Inspector General of the Department of Health and Human Services (I.G.) excluded Petitioner under section 1128(a)(3) of the Social Security Act (Act) based on his conviction in a New Jersey state court for the crime of health care claims fraud. The ALJ concluded that Petitioner's conviction, classified under New Jersey statutes as a criminal offense in the third degree, constituted a felony conviction for purposes of section 1128(a)(3) and, therefore, provided a basis for the exclusion. The ALJ further concluded the exclusion period imposed by the I.G. was reasonable as a matter of law because it was the minimum period allowed for a mandatory exclusion under section 1128(a)(3). On appeal, Petitioner assets that the ALJ erred in concluding that the crime for which he was convicted was a felony offense, as required for a mandatory exclusion under section 1128(a)(3). After carefully considering the arguments made in the parties' briefs and at oral argument, we affirm the ALJ Decision.

Statutory and Regulatory Background

Section 1128(a)(3) of the Act, in applicable part, requires the Secretary of the Department of Health and Human Services (Secretary) to exclude from participation in all federal health care programs "[a]ny individual convicted for an offense . . . under . . . State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program . . . operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct." *See also* 42 C.F.R. § 1001.101(c)(implementing regulation). As relevant to this case, a person is "convicted" for purposes of the Act, "when a plea of guilty . . . has been accepted by a Federal, State, or local court[.]" Act § 1128(i)(3); 42 C.F.R. § 1001.2.

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)(1), 1005.2(a). Five years is the minimum length permitted for a section 1128(a) exclusion and, thus, is reasonable as a matter of law when imposed for such an exclusion. Act § 1128(c)(3)(B); 42 C.F.R. §§ 1001.102(a), 1001.2007(a)(2); *Mark K. Mileski*, DAB No. 1945 (2004), *aff'd*, *Mileski v. Levitt*, Civ. No. 04-00403 RAS-DDB (E.D. Tex. Jun. 3, 2005). Any party dissatisfied with the ALJ's decision may appeal to the Board. 42 C.F.R. § 1005.21.

Case Background[1]

Summary of facts regarding Petitioner's conviction

During the relevant time period, Petitioner was a practicing licensed pharmacist in New Jersey who owned Five Corners Pharmacy, where he was pharmacist-in-charge. ALJ Decision at 1. On February 14, 2011, the Superior Court of New Jersey, Hudson County, indicted Petitioner and other co-conspirators for 27 counts of organizing and executing a scheme to systematically defraud health care programs and illegally distribute controlled substances. *Id*. at 1-2. On May 24, 2011, Petitioner pled guilty to amended count 17 of the indictment which charged reckless health care claims fraud, in violation of N.J. STAT.ANN. § 2C:21-4.3b, an offense classified as "a crime of the third degree" in New Jersey.[2] ALJ Decision at 2; I.G. Ex. 10, at 1. The court accepted Petitioner's plea the same day. *Id*.; I.G. Exs. 7, 9. On June 6, 2011, the court sentenced Petitioner to five years of probation and 200 hours of community service and required him to pay a total of $55,741.03 in costs, restitution and assessments.[3] *Id*. at 2; I.G. Ex. 9.

Summary of facts regarding procedural history and the ALJ proceeding

On November 7, 2012, the I.G. notified Petitioner of its intent to exclude him from Medicare, Medicaid and all other federal health care programs, citing, as the basis for the exclusion, section 1128(a) generally. ALJ Decision at 2. The I.G.'s notice of exclusion cited section 1128(a)(1) as the basis therefor and incorrectly stated (unlike the notice of *intent* to exclude) that the criminal conviction was in a New York court. *Id*. Petitioner filed his notice of appeal on January 24, 2013. *Id*. On March 7, 2013, the I.G. wrote

[1] The facts stated here are from the ALJ Decision or are record facts that are not disputed and do not constitute new findings.

[2] The Judgment of Conviction form describes amended Count 17 somewhat differently, i.e., as "healthcare claims fraud while providing prof[essional] services," but the difference is not material since there is no disagreement about the statute Petitioner was convicted of violating or that his conviction was for reckless rather than knowing conduct. I.G. Ex. 9, at 1.

[3] As part of his plea agreement, Petitioner also agreed to a five-year bar from New Jersey's Medicaid program. I.G. Ex. 7, at 24-25.

Petitioner amending the exclusion notice previously sent to correct its statement of the state and court where Petitioner was convicted but repeating the previously cited statutory basis for the exclusion**.** *Id*. On April 4, 2013, shortly before filing its summary judgment motion, the I.G. notified Petitioner that the I.G. was actually relying on section 1128(a)(3) for the exclusion.[4] *Id*. at 2-3. The ALJ concluded the I.G. had established that Petitioner's conviction established the basis for the exclusion and that the period of exclusion was "not unreasonable" since it was the minimum period allowed for a mandatory exclusion. *Id*. at 3.

Standard of Review

Regulations governing Board review of ALJ decisions involving the I.G.'s determination to impose an exclusion provide, "The standard of review on a disputed issue of fact is whether the initial decision is supported by substantial evidence on the whole record . . . [and] . . . 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 . . . ." 42 C.F.R. § 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).

Discussion

As the ALJ correctly stated, there are "four essential elements necessary to support an exclusion based on section 1128(a)(3)[.]" ALJ Decision at 5. These include: (1) conviction of a felony offense; (2) the felony offense must relate to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct; (3) the felony offense must have been connected to the delivery of a health care item or service or an act or omission in a health care program operated by or financed in whole or part by any federal, state or local government agency; and (4) the felonious conduct must have occurred after August 21, 1996. The ALJ found each of these elements met based on undisputed facts supported by the record in this case and, in particular, the documents related to Petitioner's criminal conviction.

[4] The ALJ noted the parties did not make an issue of the changing notices in their briefs and concluded that "the apparent change in the I.G.'s statutory reliance has not operated to Petitioner's prejudice because notice was given of the I.G.'s reliance on section 1128(a)(3) before the filing of the I.G.'s Brief-in-Chief." ALJ Decision at 3. The ALJ further stated that "[n]othing in Petitioner's request for hearing or briefing reflects a claim or defense available to him in a section 1128(a)(1) appeal not also available to him in an action based on section 1128(a)(3)." *Id.*, n.1. Petitioner's appeal does not take issue with the ALJ's conclusion or statements on this matter, and we find no error in his allowing the change.

On appeal, Petitioner does not dispute that he was convicted of a "criminal offense . . . relating to fraud" or that his crime was "in connection with the delivery of a health care item or service . . . ."[5] 42 U.S.C. § 1128(a)(3). Nor could he dispute that these elements were met, since it is clear from the record that they were. *See* I.G. Ex. 9, at 1(describing the charge of which he was convicted as "healthcare claims fraud while providing prof[essional] services"); I.G. Ex. 7, at 16-22 (transcript of plea hearing – Petitioner admits recklessly billing insurance program for pharmaceuticals not dispensed and defrauding that program);[6] *see also* Tr. at 13 (Petitioner admits the plea shows what actually happened the day of the crime). Nor does Petitioner deny that the I.G. had grounds to exclude him from participation in the Medicare program. Petitioner's argument is that because his conviction was based on reckless conduct (rather than the knowing conduct for which he was originally indicted), his crime should be considered a misdemeanor and, "[a]ccordingly, my exclusion would be permissive under 1128(b)(1)(A)."[7] P. Appeal Br. at unnumbered page 3. At oral argument, Petitioner reiterated this argument, asking the Board to "modify the mandatory exclusion[] to a permissive exclusion under 1128(b)(1)(a) of the Act." Tr. at 10.

The Board, like the ALJ, can determine only whether the I.G.'s basis for the exclusion is supported by substantial evidence and is legally correct; the Board cannot modify the basis. Furthermore, as the ALJ correctly noted, given the mandatory nature of the language in section 1128(a), if the basis for an exclusion under that section exists, the I.G. has no discretion to impose a permissive exclusion under section 1128(b) instead, even if the underlying conviction could arguably be the basis for an exclusion under both provisions. *E.g. Gregory J. Salko, M.D.*, DAB No. 2437 (2012); *Craig Richard Wilder*, DAB No. 2416 (2011). Petitioner does not specifically challenge this statement, and it is legally correct for the reasons stated by the Board in *Salko, Wilder* and other decisions. Thus, the only issue remaining on appeal is whether the ALJ erred in concluding that Petitioner's conviction for reckless health care claims fraud constitutes a felony for purposes of section 1128(a)(3). We find no error in that conclusion.

[5] Petitioner also does not dispute the ALJ's finding that Petitioner's conviction occurred after August 21, 1996. *See* ALJ Decision at 5-6, citing I.G. Exs. 7, at 16-21; 8, at 25.

[6] The conduct to which Petitioner admitted during his plea hearing is consistent with the conduct described in Count 17; the amendment to Count 17 changed only the statutory citation to reflect the lower degree of intent to which Petitioner pled and the dates of his conduct, not the substance of the conduct. *Compare* I.G. Ex. 11, at 5 *with* I.G. Ex. 8, at 25; *see also* I.G. Exs. 9, at 1, 4; 10, at 1; Tr. at 18.

[7] Section 1128(b)(1)(A) permits the I.G. to exclude individuals and entities convicted of "a criminal offense consisting of a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct . . . in connection with the delivery of a health care item or service . . .."

A. Petitioner's state of mind or level of intent is irrelevant to whether his crime constitutes a felony for exclusion purposes.

Petitioner's argument that his conviction for health care claims fraud should be considered a misdemeanor rather than a felony rests on a misconception that his state of mind is relevant to whether he was convicted of a felony within the meaning of section 1128(a)(3). Petitioner reads into section 1128(a)(3) a state of mind element that is not supported by the plain language of the statute. The statute speaks of "a criminal offense consisting of a felony relating to fraud . . . ." without any reference to the state of mind of the individual or entity committing the offense. For example, the statute does not use the language "a felony relating to knowingly committed fraud." Thus, the statute must be read as broadly covering all felonies related to fraud (or the other types of offenses listed in the statute) without regard to state of mind.

As the ALJ found, Petitioner was convicted of reckless health care claims fraud in violation of N.J.STAT.ANN. § 2C:21-4.3b.[8] ALJ Decision at 4 (Finding and Conclusion 1). The issue before us is whether that crime constitutes a felony for purposes of section 1128(a)(3). As the ALJ discussed, New Jersey law does not classify crimes as felonies versus misdemeanors but, instead, as crimes of the first, second, third or fourth degree. ALJ Decision at 6, citing N.J.STAT.ANN. §2C:1-4a-d.[9] New Jersey classifies reckless health care claims fraud as a crime of the third degree. ALJ Decision at 4, 6; *see also* N.J. STAT. ANN. § 2C:21-4.3(b); I.G. Ex. 9, at 1. The ALJ concluded that a New Jersey conviction for reckless health care claims fraud, a crime of the third degree, is a felony for purposes of the mandatory exclusion statute. ALJ Decision at 4, 6. The ALJ relied on analyses to that effect in two ALJ decisions, stating as follows:

> I can add nothing to those perceptive discussions, and I adopt their reasoning and conclusions as my own: for purposes of this analysis of section 1128(a) of the Act, a "crime in the third degree" under the New Jersey Code of Criminal Justice, N.J.STAT.ANN.§ 2C:1-1 *et seq.*, is the equivalent of a felony.

[8] The ALJ's citation to the New Jersey statute covering reckless health care claims fraud in his Finding shows that his reference to unamended Count 17 elsewhere in his decision does not mean, contrary to what Petitioner suggests, that the ALJ had an "erroneous understanding" that Petitioner was convicted of knowingly committing health care claims fraud. *See* P. Appeal Br. at unnumbered p. 2. As the I.G. notes, "To the extent the ALJ relied on the language of Count 17, it was in support of his determination that Appellant's offense related to fraud and occurred in connection with the delivery of a health care item or service – two findings that are beyond debate and that Appellant has not challenged." I.G. Response at 7 (citations omitted).

[9] Under New Jersey law, there are also "petty offenses" that are not classified as "crimes." *Id.*

ALJ Decision at 6, citing *Cynthia D. Critchfield*, DAB CR1839 (2008) and *Catherine Ann Fee*, DAB CR1598 (2007).[10] *Critchfield*, like the instant case, involved a New Jersey pharmacist's exclusion based on health care claims fraud in the third degree, albeit under N.J.STAT.ANN. § 2C:21-4.3(c) rather than N.J.STAT.ANN. § 2C:21-4.3b. *Fee* involved another type of offense classified by New Jersey as a crime of the third degree. During oral argument, Petitioner cited his attempt to distinguish these cases in his Answer Brief in the ALJ proceeding. Tr. at 7.

Whether those cases are distinguishable or not, is not material to our review because ALJ decisions do not bind the Board. *E.g. Britthaven of Chapel Hill*, DAB No. 2284, at 9-10 (2009). Petitioner's alleged distinctions also are not meaningful because they rest largely on an assertion we have already rejected – Petitioner's assertion that whether a conviction is a felony offense for purposes of section 1128(a)(3) depends on state of mind. Moreover, although ALJ decisions do not bind the Board, we find the analyses in *Critchfield* and *Fee* persuasive to the extent they rely on the New Jersey and Federal cases we discuss below, which conclude that conviction of a crime of the third degree in New Jersey constitutes a felony for purposes of section 1128(a)(3) because crimes of the third degree in New Jersey carry a possible prison term of more than a year.

B. Federal law and the New Jersey courts define felonies as any offense carrying a possible prison sentence exceeding one year, and a New Jersey crime of the third degree is such an offense.

The third degree crime of which Petitioner was convicted carries a potential prison term of three to five years. N.J.STAT.ANN. § 2C:43-6a(3). *See also* I.G. Exs. 7, at 13 and 10, at 1. Federal criminal law provides:

> An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is . . . less than five years but more than one year, as a Class E felony

18 U.S.C. § 3559(a). Thus, as the I.G. notes, a felony, for federal criminal law purposes, is any offense that carries a potential maximum prison term exceeding one year. I.G. Response at 8. The I.G. argues that this federal law should control what constitutes a felony for purposes of the exclusion statutes. However, we need not reach this issue, because, as the I.G. further notes, court decisions construing New Jersey's classification

[10] The ALJ also cited the Board decision in *Akram A. Ismail, M.D.*, DAB No. 2429 (2011) as "hint[ing] at" a similar conclusion. *Id*. However, as the ALJ's reference to "dictum" seems to recognize, the Board did not actually decide the issue in *Ismail*. *Id.* The petitioner in that case, unlike Petitioner here, did not argue that the conviction of a third degree crime was not a felony.

system have reached conclusions consistent with federal law. In *Serio v. Allstate Ins. Co*., 210 N.J. Super. 167, 173 n.1, 509 A.2d 273, 277 n.1 (1986)(citing *State v. Doyle*, 42 N.J. 334, 349, 200 A.2d 606, 614 (1964)), the court construed the term "felony" to mean any offense "punishable by more than one year in state prison." In *Kaplowitz v. State Farm Mutual Auto. Ins. Co*., 101 N.J. Super. 593, 598, 493 A.2d 637, 640 (1985), the court relied on this principle (citing *Doyle*) in holding that the term "felony" under New Jersey law might encompass even lesser (fourth degree) crimes – with certain exceptions not applicable here. The United States Court of Appeals for the Second Circuit has recognized and relied on this definition of "felony" in New Jersey case law. *United States v. Brown*, 937 F.2d 68, 70 (2d Cir. 1991)(holding that, for purposes of sentencing enhancement, a New Jersey conviction punishable by up to five years imprisonment was appropriately classified as a felony). In the absence of any conflicting definition of "felony" in section 1128(a)(3), and considering the consistency between the New Jersey court and federal criminal code definitions, we conclude it is reasonable to apply this definition. Accordingly, we conclude, as did the ALJ, that reckless health care claims fraud, the offense of which Petitioner was convicted, is a felony for purposes of the mandatory exclusion statute because that offense carried a possible prison sentence of more than one year.

C. The sentencing guidelines and/or their application in Petitioner's case do not alter our conclusion that his conviction was for a felony offense requiring a mandatory exclusion.

Petitioner conceded at oral argument that generally "a third degree crime [in New Jersey] is punishable by a maximum of 3 to 5 years[.]" Tr. at 22; *see also* I.G. Ex. 7, at 13 (Petitioner acknowledges at his plea hearing his understanding that he was pleading guilty to "an offense that carries . . . potential punishment of three to five years in prison"). However, he asserted that his particular third degree crime is not punishable by imprisonment because the sentencing guidelines in New Jersey establish a presumption of non-imprisonment for third degree crimes that are first offenses, as his was, and because he was not actually sentenced to prison.[11] Tr. at 7, 22; *see also* I.G. Ex. 7, at 13. (Petitioner acknowledges at the plea hearing his understanding that because he was a first offender, there was a presumption that he would receive probation rather than a term of imprisonment although the judge emphasized that he had the discretion to sentence him to a term of up to 364 days in county jail). We find Petitioner's argument unpersuasive.

[11] We note that although Petitioner made this argument in his Answer Brief in the ALJ proceeding, he did not raise it on appeal to the Board until oral argument. Exceptions to an ALJ Decision should be stated in the brief accompanying a notice of appeal, not for the first time at oral argument. 42 C.F.R. § 1005.21(c). We are addressing Petitioner's argument notwithstanding his having raised it belatedly.

It is true that New Jersey sentencing guidelines establish a "Presumption of Nonimprisonment" and that the judge in Petitioner's case did not sentence him to a term of imprisonment. P. Ex. 2, at 10; N.J.STAT.ANN. § 2C:44-1(e). The guideline at issue begins by stating as follows:

> B. Presumption of Nonimprisonment
>
> 1. General Rules
>
> a. When dealing with a person convicted of an offense other than a first or second degree crime, who has not previously been convicted of an offense, a court shall not impose a sentence of incarceration. N.J.S.A. 2C:44-1(e).

P. Ex. 2, at 10 (emphasis added). Petitioner claims that the underscored phrase "is an order" that leaves the sentencing judge no discretion as to whether to sentence the individual convicted to a term of incarceration. Tr. at 26. However, in context, that is not correct. As stated in the title, the guideline establishes only a "Presumption" of nonimprisonment.[12] The guidelines provide that the presumption can be overcome—

> by a conclusion that the defendant's imprisonment is "necessary for the protection of the public" under the criteria set forth in N.J.S.A. 2C:44-1(a), with regard given to 'the nature and circumstances of the offense and the history, character and condition of the defendant." N.J.S.A. 2C:44-1(e).

P. Ex. 2, at 11. The judge in this case apparently did not find that imprisoning Petitioner was necessary to protect the public because he ultimately did not sentence Petitioner to prison. However, that does not mean he did not have discretion to do so. He clearly had discretion to determine whether grounds for rebuttal of the presumption existed.

We also reject Petitioner's argument that because the judge in his case did not actually sentence him to prison, we cannot lawfully conclude that he was convicted of a felony within the meaning of the exclusion statute. We agree with the I.G. that the legal principle that governs whether an offense constitutes a felony for purposes of the exclusion statute is the potential term of imprisonment (on nonimprisonment) attached to the statutory offense for which the individual is

[12] As Petitioner acknowledges, the guidelines also provide (in subparagraph b. of the General Rules) exceptions, circumstances where the presumption does not apply. P. Ex. 2, at 10; Tr. at 24.

convicted, not the actual sentence a court determines to apply in any particular case. The applicability of this principle is clear from the language in section 1128(a)(3) which refers to "a criminal offense consisting of a felony relating to fraud . . . ." This phrase, reasonably read, refers to the statutory offense of which an excluded individual is convicted. Accordingly, a conclusion as to whether the offense of which the individual is convicted is punishable by a term of imprisonment of more than a year must logically be made by reference to the potential term of imprisonment carried by the statutory offense, not the actual sentence meted out by any particular sentencing court to any particular convicted individual.

As further support for this conclusion, we note that the court decisions holding that whether a criminal offense is a "felony" under New Jersey law is determined by reference to the term of imprisonment (if any) connected to the offense by statute also speak to the potential prison term, not the term received in any particular case. *See United States v. Brown*, 937 F.2d at 70 ("Such cases have clearly established that under New Jersey law, offenses punishable by more than one year in prison constitute common-law felonies.")(citing *Kaplowitz*, 201 N.J. Super. 593, 493 A.2d 637, 639-40); *Serio*, 210 N.J.Super. at 173, 509 A.2d at 277 ("Although neither the Code nor the No Fault Act contains a definition of "felony," the Court concluded in . . . *Doyle* [citation omitted] that offenses which are punishable by more than one year in state prison should be treated as common law felonies.") (emphasis added)). The phrase "offense[s] punishable" clearly means the maximum punishment that may be imposed for the particular statutory offense, not any actual punishment in any individual case. The mere fact that after a person is convicted of a third (or fourth) degree offense, the court uses sentencing guidelines to determine the actual sentence for an individual convicted of that offense does not alter the fact that the conviction itself carried a potential term of imprisonment.

Petitioner's argument also is inconsistent with the regulatory scheme governing exclusions. The Secretary expressly provided for consideration of whether the excluded individual's sentence included incarceration at the stage where the I.G. assesses whether one or more aggravating factor justifies a mandatory exclusion longer than the minimum five years required by statute. 42 C.F.R. § 1001.102(b)(5). That stage is not reached unless and until the I.G. determines that the basis for a mandatory exclusion exists. The Secretary did not direct the I.G. to consider whether the individual was actually sentenced to incarceration at the stage where the I.G. determines whether the basis for a mandatory exclusion exists. In light of this contrast, it is reasonable to conclude that the Secretary did

not intend the I.G. to consider the sentence (if any) actually imposed in an individual case when determining whether the basis for excluding that individual under section 1128(a) exists but only when determining whether a longer exclusion is justified.

Conclusion

For the reasons stated above, we uphold the ALJ's decision affirming the I.G.'s exclusion of Petitioner for five years pursuant to section 1128(a)(3).

/s/
Stephen M. Godek

/s/
Leslie A. Sussan

/s/
Sheila Ann Hegy
Presiding Board Member