Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Rosa Velia Serrano
Docket No. A-19-55
Request for Reconsideration of Decision No. 2923
Ruling No. 2019-2
April 25, 2019

RULING ON PETITIONER'S MOTION TO RECONSIDER AND SUPPLEMENT THE RECORD

Petitioner Rosa Velia Serrano, appearing *pro se*, asks the Board to reconsider its decision in the case of *Rosa Velia Serrano*, DAB No. 2923 (2019). The Board affirmed an Administrative Law Judge's (ALJ's) decision upholding the Inspector General's (I.G.'s) decision to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs for at least 25 years under section 1128(a)(1) of the Social Security Act (Act)[1] based on Petitioner's Texas court conviction for Medicaid fraud. *Rosa Velia Serrano,* DAB CR5170 (2018) (ALJ Decision). Petitioner also asks the Board to supplement the administrative record with the transcript of her sentencing hearing in the Texas court.

The Board may reopen and reconsider a decision for the purpose of correcting a clear error of law or fact. As discussed below, Petitioner's motion does not identify any such error. Accordingly, we deny Petitioner's motion and affirm DAB No. 2923.

Background

Under section 1128(a)(1) of the Act and 42 C.F.R. § 1001.101(a), the I.G. must exclude an individual from participating 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 under any state health care program.

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. Also, a cross-reference table for the Act and the United States Code can be found at https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

In DAB No. 2923, the Board determined that the undisputed evidence showed that a jury in a Texas court criminal proceeding convicted Petitioner for felony Medicaid fraud under Texas law for knowingly making or causing to be made false statements or misrepresentations of material fact to permit a person to receive a benefit or payment under the Medicaid program that was not authorized. DAB No. 2923, at 2, 6-7 (citing I.G. Exs. 2, 3, 4). "False billing for items or services," the Board explained, "has been repeatedly held to be an offense related to the delivery of an item or service within the meaning of section 1128(a)(1)." *Id.* at 7 (quoting *Joann Fletcher Cash*, DAB No. 1725, at 3 (2000)). Moreover, Petitioner did not dispute that the offense underlying her conviction related to the delivery of items or services under a state health care program.

Petitioner, however, contested the validity of her conviction. As she argued before the ALJ, Petitioner indicated that she had appealed her conviction to state and federal courts. She asserted, among other things, that the Texas trial court imposed a sentence of incarceration for Medicaid fraud *and* theft, though Petitioner was only tried and convicted for Medicaid fraud. Petitioner further argued that the 11-year sentence of incarceration imposed by the court exceeded the Texas penal code's maximum sentence for the crime for which she was tried and convicted. Consequently, Petitioner asserted, the sentence was invalid, the conviction was void and the ALJ lacked jurisdiction over her exclusion. In connection with these arguments, Petitioner asked the Board to issue an order to obtain the transcript of her Texas court sentencing hearing and to delay the Board's decision until it had an opportunity to review the transcript.

The Board's decision in DAB No. 2923 concluded that Petitioner's arguments constituted collateral attacks on the validity of her criminal conviction, which the Board is not permitted to review under 42 C.F.R. § 1001.2007(d). "When the exclusion is based on the existence of a criminal conviction," the regulation states, "the basis for the underlying conviction . . . ***is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal.***" DAB No. 2923, at 7 (quoting and adding emphasis to 42 C.F.R. § 1001.2007(d)). "The purpose of the provision," the Board explained, "is to prevent excluded individuals from relitigating the validity of their convictions." *Id.* (quoting *Cash* at 6). Therefore, the Board stated, the ALJ properly exercised jurisdiction over Petitioner's appeal of her exclusion and relied on Petitioner's conviction for Medicaid fraud to affirm the exclusion. *Id.* at 8.

The Board also denied Petitioner's request that the Board issue an order to obtain the transcript of her Texas court sentencing proceeding and admit it into the record. The Board explained that an excluded party must present its evidence to the ALJ, who will rule on its admissibility. DAB No. 2923, at 5 (citing 42 C.F.R. §§ 1005.8, 1005.15, 1005.16, 1005.17). Section 1005.21(f) provides that if a party demonstrates to the Board that additional evidence is relevant and material and that there were reasonable grounds

for the failure to produce it during the ALJ proceedings, the Board may remand the matter to the ALJ for consideration of the additional evidence. The governing regulations do not, however, authorize the Board to issue orders or subpoenas to obtain evidence on behalf of a party or to enter new evidence into the record and review it de novo. Moreover, the Board explained, the purposes for which Petitioner sought to introduce the transcript – to show that her sentence was excessive and invalid and, consequently, voided her conviction – amounted to impermissible collateral attacks on the conviction underlying her exclusion. DAB No. 2923, at 5-6. The sentencing hearing transcript, therefore, was irrelevant and immaterial.

With respect to the duration of Petitioner's exclusion, the Board explained, the I.G. had extended the five-year mandatory minimum period for an exclusion under section 1128(a)(1) of the Act in Petitioner's case based on two aggravating factors. First, the acts that resulted in Petitioner's conviction were committed over a period of one year or more. 42 C.F.R. § 1001.102(b)(2). The Board noted that Petitioner did "not deny that the acts that resulted in her conviction took place over more than four years, from on or about January 10, 2012, through on or about February 19, 2016." DAB No. 2923, at 9 (citing I.G. Ex. 2 (Indictment)). Second, the sentence imposed by the court for her Medicaid fraud conviction included incarceration. 42 C.F.R. § 1001.102(b)(5). In Petitioner's case, the record showed that the court sentenced Petitioner to 11 years' incarceration based on her Medicaid fraud conviction. DAB No. 2923, at 9; I.G. Ex. 3. In light of the protracted period of Petitioner's criminal conduct and the significant sentence to incarceration, the Board stated, the ALJ did not err in concluding that the 25-year exclusion imposed by the I.G. was within a reasonable range. DAB No. 2923, at 9.

Petitioner's Motion and the Parties' Arguments

In her Motion to Reconsider, Petitioner describes the alleged history of her arrest, indictment, Texas court conviction, and efforts to appeal her conviction in state and federal court. She argues that the history of her criminal case shows that the Texas court conviction is void, that she is wrongfully incarcerated, that her constitutional rights to due process have been denied, and, therefore, the ALJ did not have jurisdiction over her exclusion. With respect to the Board's determination that her arguments contesting the validity of her conviction amount to collateral attacks that do not establish a basis for reversing her exclusion, Petitioner argues, "Although this Court has no authority to reverse the state conviction, it has authority to reverse [the] ALJ's decision." Motion to Reconsider and Motion to Supplement at 5. Petitioner states that the Board "cannot escape its duty by simply saying that a collateral attack . . . is not permitted for consideration to reverse [the] ALJ's decision." *Id.* According to Petitioner, the ALJ and the Board have the authority to uphold an exclusion "upon a valid conviction," but not a "state proceeding conducted invalidly." *Id.* at 5-6; *see also id.* at 18. Petitioner also

submitted the transcript from her Texas court sentencing proceeding "to show that another proceeding was included in the determination of the sentence." Cover Letter for Motion to Reconsider and Motion to Supplement.

The I.G. filed a response, opposing Petitioner's motion for reconsideration and to supplement the record. The I.G. states that Petitioner is attempting to relitigate issues that the Board has previously considered and ruled on and that the evidence offered by Petitioner is untimely and immaterial.

Petitioner submitted a reply to the I.G.'s response, again alleging multiple errors by the Texas trial court and referring to her appeals to other courts.[2] She also contends that the "jury failed to ascertain an amount defrauded by Serrano" and when she "initiated [the] alleged fraud." Reply at 2-3. Petitioner says that the "sentencing hearing [transcript] confirms that testimony given by [Medicaid] enrollees . . . establish[es] that the fraud took place within one year and . . . [that the amount defrauded] sums up to $17,712." *Id.* at 3. Consequently, Petitioner says, she "is permitted to be charged with a Class A misdemeanor," not a third degree felony, and excluded from federal health care programs for no more than three years. *Id.* Alternatively, she asserts that her 25-year exclusion should be dismissed until she has a new trial or her conviction is dismissed. *Id.* at 4.

Discussion

The regulations in 42 C.F.R. Part 1005 governing appeals of exclusions do not expressly authorize the Board to reopen and reconsider a decision to exclude an individual from federal health care programs. *Charles Brian Griffin*, Ruling on Request for Reconsideration, DAB Ruling No. 2017-3, at 2 (May 10, 2017); *Mark B. Kabins, M.D.*, Ruling on Motion for Reconsideration, DAB Ruling No. 2012-1, at 2-3 (Oct. 14, 2011).[3]

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[2] Petitioner's reply was accompanied by a pleading titled "Notice of Appeal of Departmental Appeals Board" and captioned Rosa Serrano v. Warden Mary Comstock-King et.al., No. W-19-CA-163-ADA (D.W.D. Texas, Waco Division). The pleading (dated March 24, 2019, four days before the date of her reply) states that Petitioner received notice of DAB No. 2923 on or about February 5, 2019, and had filed a motion for the Board to reconsider its decision and supplement the record. The pleading states that Petitioner was filing the Notice of Appeal under 42 C.F.R. § 1005.21(j) and "as a precaution to assure jurisdiction by this Court is attained." The Board's January 29, 2019 letter transmitting DAB No. 2923 to Petitioner explained that under 42 C.F.R. § 1005.21(j), the Board's decision "becomes final and binding 60 days after the date of service," and "[j]udicial review is available in an appropriate United States district court if a civil action is filed within 60 days after service of this decision" (citing sections 1128(f)(1) and 205(g) of the Act and 42 C.F.R. § 1005.21(k)(1)). It is not clear whether the Notice of Appeal accompanying Petitioner's reply is a copy of a pleading that Petitioner filed with the United States District Court for the Western District of Texas, Waco Division, before she filed her reply, or if it was mistakenly filed only with the Board instead of the district court.

[3] Available at https://www.hhs.gov/sites/default/files/board-rul-2017-3.pdf and https://www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2011/rul2012-1.pdf.

The Board has recognized, however, that it has inherent authority to reopen and reconsider such a decision under the general principle that an adjudicator may act to correct an error in a decision. *Id.*; *Appellate Division Practice Manual - What can I do if I think a decision issued by the Board is wrong and should be reconsidered?*[4] "Such authority serves the Department by ensuring fair process and sound decisions." *Kabins* at 3 (citation omitted).

As in *Griffin* and *Kabins*, we apply here the standards applicable to many types of disputes heard by the Board, which provide for reconsideration of a Board decision when a party promptly alleges a clear error of fact or law. *See* 45 C.F.R. § 16.13. The Board has repeatedly emphasized that reopening a Board decision "is not a routine step" in the Board's adjudication process. *Kabins* at 3 (citation omitted). Rather, "it is the means for the parties and the Board to point out and correct any errors that make the decision clearly wrong." *Id.* (citation omitted). A "motion for reconsideration is not a vehicle for an aggrieved party to repeat arguments already made and rejected." *Id.* (citation and internal quotation marks omitted).

Applying the standards for reconsideration in this case, we conclude that Petitioner's arguments do not establish any clear legal or factual error in DAB No. 2923. Rather, Petitioner's motion repeats her prior arguments that her criminal conviction was invalid or void and, consequently, the ALJ did not have jurisdiction to review and affirm Petitioner's exclusion. We have previously considered and rejected these arguments because they amount to collateral attacks on the conviction that formed the basis of Petitioner's exclusion, which the ALJ and the Board are expressly barred from considering in an appeal of an I.G. decision to exclude an individual based on a criminal conviction. 42 C.F.R. § 1001.2007(d). It is not the Board's role to assess whether the Texas court committed error over the course of Petitioner's criminal proceedings. If Petitioner believes that there were serious errors in the state court criminal proceedings or that her constitutional rights were denied in the course of those proceedings, she must challenge them in the appropriate forum. Moreover, Petitioner's argument that the ALJ lacked jurisdiction or the authority to hear Petitioner's appeal and issue an initial decision affirming her exclusion is meritless. The ALJ's jurisdiction is established by federal statute and regulations and arose from Petitioner's appeal of the exclusion sanction imposed by the I.G. 42 C.F.R. §§ 1001.2007, 1005.2, 1005.4, 1005.20.

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4 Available at https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/practice-manual/index.html#40.

We also reject Petitioner's motion to supplement the record with the transcript of her trial court sentencing hearing. As summarized above, Petitioner previously asked the Board to obtain the transcript of the proceeding. We rejected that request because the regulations governing appeals of I.G. exclusions do not authorize the Board to obtain evidence on behalf of a party. Moreover, while the regulations permit the Board to remand to the ALJ for consideration of evidence not previously presented to the ALJ if it is "relevant and material" and "there were reasonable grounds for the failure to adduce such evidence" earlier, 42 C.F.R. § 1005.21(f), the purposes for which Petitioner sought the transcript were to collaterally attack her conviction. Therefore, we concluded, the transcript was irrelevant and immaterial. Petitioner points to no error of law or fact in our determination to deny her prior request to obtain the transcript.

As summarized above, Petitioner suggests in her final submission to the Board that the transcript of her sentencing hearing also shows that the acts resulting in her conviction for Medicaid fraud took place over only one year, not more than four years. She additionally claims that because the jury did not determine the exact amount of funds that she obtained by fraud, she should be considered to have committed a misdemeanor rather than a felony. Reply at 2-3. Petitioner relies on these new characterizations of the transcript and arguments to contest both the legal basis for the exclusion and the 25-year duration of her exclusion.

Though "the Board may reopen a decision, it does so only to determine whether there is a clear error of law or fact in the decision, not to permit relitigation of the case based on new evidence." DAB Ruling No. 2017-3, at 3. A motion for reconsideration, the Board has previously held, may not be used to make arguments and representations that an appellant could have made during its appeal, but did not. *E.g., Econ. Opportunity Comm'n of Nassau Cnty., Inc.*, Ruling on Request for Reconsideration, DAB Ruling No. 2017-1, at 1, 7-8 (Jan. 26, 2017); *Alaska Dep't of Health & Soc. Servs.*, Ruling on Request for Partial Reconsideration, DAB Ruling No. 2008-1, at 4 (Oct. 15, 2007).[5]

Petitioner here attempts to use the reconsideration process for just such impermissible purposes by challenging the legal foundation of her exclusion and the duration of her exclusion based on new allegations and theories. The I.G.'s notice plainly advised Petitioner that her exclusion was based on sections 1128(a)(1) and 1128(c)(3)(B) of the Act, which provide that an individual "convicted of *a criminal offense* related to the delivery of an item or service under [Medicare] or under any State health care program" must be excluded for no fewer than five years. I.G. Ex. 1; Act § 1128(a)(1) (emphasis

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[5] Available at https://www.hhs.gov/sites/default/files/board-rul-2017-1.pdf and https://www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2007/Ruldab2008-1.pdf.

added). Before the ALJ and the Board on appeal, Petitioner did not challenge the applicability in her case of section 1128(a)(1), the text of which "plainly applies to all 'criminal offenses' related to" Medicare and state health care programs "and makes no distinction between misdemeanor and felony convictions." *Craig Richard Wilder,* DAB No. 2416, at 6-7 (2011). The I.G.'s notice also plainly stated that the I.G. extended the minimum exclusion period in Petitioner's case based on the duration of the acts that resulted in the conviction (more than four years) and her 11-year sentence of incarceration. The record evidence, including the State's indictment of Petitioner and the trial court's notice of conviction, supports the factual bases underlying the duration of Petitioner's 25-year exclusion. Before the ALJ and on appeal to the Board, Petitioner did not dispute that her criminal conduct took place over more than four years or that she was convicted of a program-related crime carrying a five-year minimum period of exclusion. I.G. Exs. 2, 3. It is too late to do so now.

Conclusion

For the reasons explained above, we deny Petitioner's motion.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Susan S. Yim
Presiding Board Member