Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Subramanya K. Prasad, M.D.
Docket No. A-14-25
Decision No. 2568
April 11, 2014

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

The Inspector General (I.G.) appeals the November 27, 2013 decision of the Administrative Law Judge (ALJ) in *Subramanya K. Prasad, M.D.*, DAB CR3014 (2013) (ALJ Decision). In that decision, the ALJ set aside the I.G.'s exclusion of Dr. Subramanya K. Prasad (Petitioner) under section 1128(b)(2) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(b)(2), on the ground that Petitioner's conviction for making a false statement to federal agents was not in connection with the interference with or obstruction of an investigation into a criminal offense described in section 1128(b)(1) or 1128(a) of the Act. For the reasons discussed below, we reverse the ALJ Decision and reinstate the one-year term of exclusion imposed by the I.G.

Legal Background

Under section 1128(b)(2) of the Act, the Secretary of Health and Human Services may exclude from participation in any federal health care program:

> Any individual or entity that has been convicted, under Federal or State law, in connection with the interference with or obstruction of any investigation or audit related to—
>
> > (i) any offense described in paragraph (1) or in subsection (a); [or]
> > (ii) the use of funds received, directly or indirectly, from any Federal health care program . . . .

Act § 1128(b)(2); *see* 42 C.F.R. § 1001.301 (implementing regulation). The criminal offenses described in section 1128(a) include felonies committed after August 21, 1996 "related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." Act § 1128(a)(4).

As is relevant here, it is illegal under 18 U.S.C. § 1001 to knowingly and willfully make "any materially false, fictitious, or fraudulent statement or representation" in "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government." 18 U.S.C. § 1001(a)(2).

Factual Background

Petitioner, who is a physician, worked for an organization called Affpower that used the Internet to "distribute and dispense prescription pharmaceuticals unlawfully" to customers located throughout the United States. I.G. Ex. 5, at 2. According to Petitioner, he began working for Affpower in March 2006 after he responded to an advertisement in a medical journal for an immediate opening for a "physician performing online pharmacy reviews." P. Response Br. at 3; *see* P. Ex. 12. Petitioner says that he worked for Affpower for only three months, until June 2006, when federal authorities who had been investigating Affpower's activities contacted him and instructed him to stop working for the organization. P. Response Br. at 3.

In July 2007, Petitioner was one of 18 defendants named in a 313-count sealed Indictment in the United States District Court for the Southern District of California regarding the "Affpower enterprise." I.G. Ex. 2. Charges included conspiracy, wire and mail fraud, money laundering, racketeering, and a number of violations based on the illegal distribution of controlled substances. *Id.* According to the Indictment, Petitioner's role at Affpower involved issuing prescriptions for controlled-substance and non-controlled-substance prescription drugs based solely on questionnaire answers provided by customers over the Internet. *Id.* at 2, 7.

On September 19, 2007, Petitioner pled guilty to Count 3 of the Indictment, conspiracy to distribute and dispense controlled substances, in violation of 21 U.S.C. §§ 841, 843, and 846. Joint Exs. 1, 2; I.G. Ex. 2, at 54-55. He was not sentenced at that time, and instead remained out of custody on an unsecured bond, as he had been since his first court appearance in August 2007. *See* P. Ex. 9. As part of his plea, Petitioner agreed to "provide substantial assistance to the Government in the investigation and prosecution of others." Joint Ex. 2, at 24. Immediately after Petitioner pled guilty, he participated in a proffer session with agents from several federal agencies. Joint Ex. 1. During the proffer, Petitioner falsely stated that he had contacted a co-defendant who the Indictment alleges recruited doctors to work for Affpower – "in an attempt to verify the legality of his conduct." I.G. Ex. 5, at 3; Joint Ex. 1, at 6.

Despite Petitioner's false statement, the Government did not exercise its option in Petitioner's plea agreement to withdraw from the agreement if, prior to sentencing, Petitioner "engage[d] in additional criminal conduct . . . or breache[d] any of the terms of any agreement with the Government." Joint Ex. 2, at 20. Petitioner remained out of custody on bond and continued to assist the Government during the course of his co-

defendants' criminal cases. According to an Assistant United States Attorney (AUSA) involved in the prosecution, Petitioner "cooperated extensively" with the Government, "met with federal agents many times," "appeared to be forthright and open in sharing all information," and testified "extensively over the course of two days" during his co-defendants' trial in 2009. P. Exs. 3, 11; Joint Ex. 1.

In October 2010, Petitioner was permitted to withdraw his 2007 guilty plea to Count 3 of the Indictment. I.G. Ex. 3. The Government immediately presented a new Superseding Information that charged Petitioner with making a false statement to federal agents and aiding and abetting, in violation of 18 U.S.C. §§ 1001 and 2, based on the false statement that he made during the proffer session in September 2007. The Superseding Information alleged:

1. At all times material to this Information, the United States was investigating the illegal sale of prescription pharmaceuticals over the Internet.
2. At all times material to this Information, it was material to the government investigation to determine, among other things: (1) the participants in the illegal activity; and (2) which participants in the scheme were aware of the illegality of the activity.

I.G. Ex. 6, at 1. The Superseding Information charged:

> On or about September 19, 2007, within the Southern District of California, defendant SUBRAMANYA PRASAD, in a matter within the jurisdiction of the [Food and Drug Administration (FDA)], a department and agency of the United States, did knowingly and willfully make a false, fictitious, and/or fraudulent statement as to a material fact, in that defendant did represent and state to federal agents that he had contacted [B.H.] (an individual involved in the government's investigation) in an attempt to verify the legality of defendant's conduct, whereas in truth and fact, as defendant then and there well knew, this statement was false, fictitious and/or fraudulent when made; in violation of Title 18, United States Code, Sections 1001 and 2.

Id. at 2. Petitioner immediately pled guilty to the offense. In his plea agreement, Petitioner admitted that his false statement "was material to the [FDA's] activities or decisions." I.G. Ex. 5. The District Court sentenced him to a one-year term of supervised release. I.G. Exs. 3, 4.

By letter dated April 30, 2013, the I.G. informed Petitioner that he was being excluded from participation in Medicare, Medicaid, and all other federal health care programs for a period of three years under section 1128(b)(2) of the Act. I.G. Ex. 1, at 1. The letter explained that the exclusion was based on Petitioner's conviction "in the United States

District Court, Southern District of California, of a criminal offense in connection with the interference with or obstruction of any investigation into a criminal offense as described in section 1128(a) or 1128(b) of the Act." *Id.*

Petitioner, through counsel, requested a hearing before an ALJ to challenge the I.G.'s determination. Petitioner argued that his conviction did not support an exclusion under section 1128(b)(2) and that a three-year period of exclusion was unreasonable. During the course of the proceedings before the ALJ, the I.G. reduced Petitioner's exclusion period to one year because Petitioner's "cooperation with Federal . . . officials resulted in [o]thers being convicted or excluded from Medicare, Medicaid and all other Federal health care programs." I.G. Ex. 7; *see* 42 C.F.R. § 1001.301(b)(3)(ii)(A) (regulatory mitigating factor). Both parties moved for summary disposition on the written record.

The ALJ Decision

The ALJ granted summary disposition on the written record in Petitioner's favor and set aside the proposed exclusion. The ALJ explained that an exclusion based on section 1128(b)(2) depends on proof of two essential elements:

1. The individual to be excluded must have been convicted of a criminal offense; and
2. The conviction must have been in connection with the interference with or obstruction of an investigation into any criminal offense described in section 1128(b)(1) or 1128(a) of the Act.

ALJ Decision at 6-7.[1] The ALJ determined that the I.G. had made the first showing but only part of the second. The ALJ first concluded that, as Petitioner conceded, Petitioner was convicted of a criminal offense – making a false statement to federal agents and aiding and abetting, in violation of 18 U.S.C. §§ 1001 and 2. *Id.* at 7. The ALJ also concluded (and noted that it was undisputed) that Petitioner's false statement was made during the course of the investigation into Affpower's illegal sale of prescription drugs over the Internet (the Affpower investigation), and thus was made in connection with an investigation into a criminal offense described in section 1128(a) of the Act. *Id.* The ALJ further concluded, however, that there was "no evidence" that Petitioner's false statement was connected with the obstruction of or interference with the Affpower investigation, so the I.G. was not authorized to exclude Petitioner under section 1128(b)(2). *Id.* at 6-7.

[1] The ALJ also observed that, at least in this case, it might be more helpful to think of an exclusion under section 1128(b)(2) as requiring proof of three essential elements, the latter two being the existence of an investigation into a criminal offense described in sections 1128(b)(1) or 1128(a) of the Act and a connection between the acts underlying Petitioner' s conviction and an interference with or obstruction of that investigation. ALJ Decision at 7 n.1.

Relying on *United States v. Aguilar*, 515 U.S. 593 (1995), the ALJ reasoned that to find a nexus or common-sense connection between Petitioner's criminal offense and the obstruction of or interference with the Affpower investigation, Petitioner's criminal conduct must have had as its "'natural and probable effect' the real subornation of the investigative or judicial process." ALJ Decision at 8, quoting *Aguilar*, 515 U.S. at 599. The ALJ noted that "there is no inherent blanket requirement that a violation of 18 U.S.C. § 1001 actually effect an obstruction" of an investigation. *Id.* He concluded that because "government reliance on or frustration by the false statement is not an essential element of" a section 1001 violation in the Ninth Circuit (where Petitioner was convicted), there was "no basis" for the I.G.'s argument that Petitioner's conviction "amounts *per se* to proof that he obstructed any part of the Affpower investigation." *Id.*, citing *United States v. Goldfine*, 538 F.2d 815 (9th Cir. 1976); *United States v. Cole*, 469 F.2d 640 (9th Cir. 1972).

The ALJ also rejected the I.G.'s reliance on *Nazirul Quayum, D.D.S.*, where an ALJ determined that the petitioner's conviction for attempted perjury based on false testimony provided to a grand jury supported an exclusion under section 1128(b)(2) because the testimony was "material to the grand jury's investigation." ALJ Decision at 8-9, quoting DAB CR408, at 7 (1995), *aff'd, Quayum v. U.S. Dep't of Health & Human Servs.*, 34 F. Supp. 2d 141 (E.D.N.Y. 1998).[2] The I.G. argued that under both the Superseding Information and Petitioner's plea agreement, Petitioner's false statement was similarly "material" to the Government's investigation, so Petitioner's exclusion here was also appropriate. I.G. Br.-in-Chief in Supp. of M. for Summ. Disposition at 9, citing I.G. Ex. 3, at 7; I.G. Ex. 5, at 3; I.G. Ex. 6. The ALJ reasoned that in *Quayum*, the petitioner's perjury had an "obvious" and "crucial effect" on the grand jury's investigation, so the term "material" was "clearly synonymous with 'important.'" ALJ Decision at 10. The ALJ concluded that here, in contrast, "what that term might mean in the Superseding Information is obscure at best and empty in any case." *Id.*

The ALJ noted that because the record did not contain any details about Petitioner's proffer session, it was impossible to know the context of his false statement. ALJ Decision at 10. The ALJ determined that the use of the term "material" to describe Petitioner's statement was "empty," apparently meaning that the use of the term was not determinative of whether Petitioner's criminal conduct was in connection with the interference with or obstruction of the Affpower investigation. The ALJ considered: (1) the time that elapsed between Petitioner's first plea, his testimony on behalf of the Government, and the filing of the Superseding Information; (2) the Government's decision not to withdraw from the original plea agreement despite the false statement; (3) the "strategic effect" of the Superseding Information, which reduced Petitioner's base

[2] The Board declined review of the ALJ decision in *Quayum*. *See* 34 F. Supp. 2d at 143.

offense level from 19 to 4 and altered the collateral consequences of a conviction from a mandatory exclusion under section 1128(a)(4) of the Act to a discretionary exclusion under section 1128(b)(2); and (4) the Government's "stated eagerness" to deal with Petitioner. *Id.* at 10-11.

Thus, the ALJ concluded, the record did not establish a nexus or common-sense connection between Petitioner's 2007 false statement and the obstruction of or interference with the Affpower investigation. Instead, he found that the record showed "a clear effort by the prosecution to do everything but baldly overlook Petitioner's misconduct while employed at Affpower," and "perhaps to make an issue of" Petitioner's false statement "only insofar as it might provide a useful basis for a much-reduced and much less consequential plea and sentence." ALJ Decision at 11.

The I.G. timely appealed the ALJ Decision to the Board.

Standard of Review

Our standard of review on a disputed issue of law is whether the decision is erroneous. Our standard of review on a disputed issue of fact is whether the decision is supported by substantial evidence on the record as a whole. 42 C.F.R. § 1005.21(h).

Analysis

On appeal, the I.G. contends that substantial evidence establishes that Petitioner's conviction for making a false statement was connected with the obstruction of or interference with the Affpower investigation. I.G. Br. at 14-15. Contrary to what the I.G. argues, the issue before the Board is not whether substantial evidence supports a different result, but whether the ALJ Decision is supported by substantial evidence in the whole record. *See* 42 C.F.R. § 1005.21(h). In essence, the I.G. argues that the ALJ erred by failing to find, based on the text of section 1001, the Superseding Information, and Petitioner's plea agreement, that Petitioner's false statement was connected with the obstruction of or interference with the Affpower investigation. While we disagree with some of the I.G.'s contentions, we agree with the I.G. that the ALJ could not reasonably decline to infer that such a connection existed based on the record before him.

As an initial matter, under 42 C.F.R. § 1005.15(c), the ALJ had the discretion to "allocate the burden of proof" as he "deem[ed] appropriate." The ALJ explained in an order transmitted to the parties after the prehearing conference that Petitioner bore the burden of proof and persuasion on any affirmative defenses or mitigating factors and the I.G. bore the burden on all other issues. Order & Sched. For Filing Br. & Doc. Evid. at 2. Thus, the ALJ appropriately determined that the I.G. bore the burden of establishing, among other things, that Petitioner's conviction for making a false statement was in connection with the interference with or obstruction of an investigation.

We conclude that the I.G. met this burden. As the ALJ recognized, the Board has interpreted the phrase "in connection with" as requiring only a "'common sense connection or nexus' between a conviction and the underlying forbidden conduct." ALJ Decision at 7, citing *Lyle Kai, R.Ph.*, DAB No. 1979 (2005); *Salvacion Lee, M.D.*, DAB No. 1850 (2002); *Berton Siegel, D.O.*, DAB No. 1467 (1994); *Chander Kachoria, R.Ph.*, DAB No. 1380 (1993). The ALJ explained that his responsibility was to "examine whether there is some nexus or common sense connection between the acts constituting the offense of which Petitioner was convicted and the obstruction of or interference with the Affpower investigation." *Id.* at 8. We conclude that Petitioner's plea agreement and the Superseding Information establish a common-sense connection between Petitioner's false statement and the interference with or obstruction of the Affpower investigation.

As noted above, Petitioner admitted in his plea agreement that his false statement "was material to the [FDA's] activities or decisions." I.G. Ex. 5. Petitioner pled guilty to the offense charged in the Superseding Information, and that document charged Petitioner with making a false statement "as to a material fact," in that he falsely "represent[ed] and state[d] to federal agents that he had contacted [B.H.] (an individual involved in the government's investigation) in an attempt to verify the legality of [his] conduct." I.G. Ex. 6, at 2. The Information also alleged that at the time Petitioner made his false statement, the Government "was investigating the illegal sale of prescription pharmaceuticals over the Internet" and "it was material to the government investigation to determine, among other things: . . . which participants in the scheme were aware of the illegality of the activity." *Id.* at 1. Thus, it is reasonable to infer from the Superseding Information that the way Petitioner's false statement was material to an activity or decision of the FDA was that it related to whether the individuals being investigated knew their actions were illegal, and therefore that the false statement was in connection with the interference with that aspect of the investigation.

The ALJ declined to draw this inference, but his reasons for doing so are unpersuasive. The ALJ focused first on the timing of the Superseding Information, noting that it was not filed until three years after Petitioner's first plea and a year and a half after he testified on behalf of the Government. ALJ Decision at 10. The relevant timing in our view, however, is the timing of the false statement itself: Petitioner admittedly made the false statement while the Affpower investigation was still underway and while it was "material" to the Government to know who had participated in the Affpower scheme and whether those participants were aware of the illegality of their conduct. *See* I.G. Ex. 6, at 1. The ALJ is correct that the record does not contain details about the context of Petitioner's false statement, given that neither party submitted evidence about what Petitioner or the investigators said before or after Petitioner made the false statement. Petitioner does not deny, however, that he made the statement to the investigators immediately after he formally agreed to cooperate with their investigation.

The ALJ also focused on the Government's decision not to withdraw from its initial plea agreement with Petitioner despite his false statement, even though the plea agreement gave it the right to do so (*see* Joint Ex. 2, at 20), and on its "stated eagerness" to deal with Petitioner. ALJ Decision at 10-11. The ALJ reasoned that the "most likely" reasons for the Government's "forbearance" were that Petitioner's false statement "was either already known by investigators to be false or was quickly recanted, or was simply *de minimis* to the prosecution's work." *Id.* at 10. It seems to us equally, if not more likely that the Government chose to continue its relationship with Petitioner, despite his initial "material" false statement, because he provided other truthful and helpful information that aided the prosecution. Indeed, it is undisputed that Petitioner did provide such information and that his cooperation ultimately resulted in others being convicted or excluded. The Government could seek to benefit from Petitioner's cooperation without implying it condoned or was not impacted at all by his false statement.

Finally, the ALJ focused on the Government's willingness to allow Petitioner to withdraw his initial plea and to plead guilty to a new charge with less severe consequences. ALJ Decision at 11. However, the Government still chose to prosecute Petitioner. Petitioner still pled guilty to a felony, and his potential prison time remained five years. *See* P. Ex. 4. The choice to prosecute on the "lesser" charge hardly shows that the Government found Petitioner's conduct not worthy of criminal blame. Indeed, the Superseding Information expressly spells out the prosecutors' view of how the false statement was connected to a specific goal of the investigation.

Thus, Petitioner's plea agreement and the Superseding Information support the inference that Petitioner's false statement was in connection with the interference with or obstruction of the Affpower investigation, and nothing in the record undercuts making such an inference. Petitioner failed to provide any explanation or evidence that his false statement was <u>not</u> in connection with the interference with or obstruction of the Affpower investigation, and the ALJ gave no reason why Petitioner would make such a statement other than in an attempt to influence the investigators' evaluation of his culpability and the state of knowledge of the conspirators. Accordingly, the ALJ Decision is not supported by substantial evidence and must be overturned.

Although we conclude that the I.G. met its burden of establishing that Petitioner's offense was in connection with the interference with or obstruction of an investigation, we disagree with the I.G. that Petitioner's conviction under 18 U.S.C. § 1001 amounts *per se* to proof that Petitioner obstructed the Affpower investigation. *See* I.G. Br. at 11-14. Under section 1001, it is a crime to knowingly and willfully make "any materially false, fictitious, or fraudulent statement or representation" in "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government." 18 U.S.C. § 1001(a)(2). Thus, while his conviction establishes that Petitioner's false statement was

material to at least some matter within the Government's jurisdiction, section 1001 itself does not require any finding that the false statement was material to interfering with an investigation. As we discussed above, the evidence as a whole provides that link here, but the bare fact of a conviction under section 1001 does not.

We also disagree with the I.G.'s assertion that the *Quayum* decision is directly on point. *See* I.G. Br. at 12-13. In that case, the petitioner pled guilty to attempted perjury based on his false testimony before a grand jury. DAB CR408, at 4-5. The preamble to the proposed rule concerning 42 C.F.R. § 1001.301, the regulatory counterpart to section 1128(b)(2), specifically mentions "perjury, witness tampering, and obstruction of justice" as examples of offenses that section 1001.301 "covers." 55 Fed. Reg. 12,205, 12,207 (April 2, 1990). Here, Petitioner's false statement was not made under oath and is not one of the covered offenses listed in the preamble (although that list is not exhaustive). *See id.* In addition, the count to which the petitioner pled guilty in *Quayum* charged that his false testimony "was material to the special grand jury's investigation of a Medicaid fraud scheme involving employees of pharmacies near Petitioner's dental office." DAB CR408, at 4. The ALJ there concluded that it "follow[ed]" from this fact that "in testifying falsely, he obstructed or interfered with the grand jury's investigation." *Id.* at 7.

In *Quayum*, the applicable test of materiality for the petitioner's conviction under New York law was "whether the false testimony has the natural effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation." 34 F. Supp. 2d at 143. Under section 1001, the applicable test, however, is whether a false statement "could" influence or was "capable of" influencing the FDA's activities or decisions. *See U.S. v. Goldfine*, 538 F.2d 815 (explaining that under section 1001 the critical question to establish materiality is "Could the false statement have affected or influenced the exercise of a governmental function?"); *U.S. v. Cole*, 469 F.2d 640 (stating that the test for materiality under section 1001 is "whether the false statement has a natural tendency to influence, or was capable of influencing the decision of the tribunal making the determination required to be made"). Thus, the definition of materiality in the underlying conviction in *Quayum* gave rise to a stronger inference that the necessary connection existed between the petitioner's offense and the obstruction of or interference with an investigation than does the definition at issue here.

Nonetheless, as discussed above, the only reasonable inference that could be drawn from the record as a whole in this case is that Petitioner's false statement was in connection with the interference with or obstruction of the Affpower investigation. Accordingly, the I.G. established that it had a basis for excluding Petitioner under section 1128(b)(2) of the Act.

We also conclude that the one-year term of exclusion imposed by the I.G. is within a reasonable range. For an exclusion under section 1128(b)(2) of the Act, "the period of the exclusion shall be 3 years, unless the Secretary determines . . . that a shorter period is appropriate because of mitigating circumstances or that a longer period is appropriate because of aggravating circumstances." Act § 1128(c)(3)(D); *see* 42 C.F.R. § 1001.301(b). The I.G. reduced Petitioner's term of exclusion to one year based on the fact that Petitioner's cooperation with federal officials resulted in others being convicted or excluded from Medicare, Medicaid, and all other federal health care programs. I.G. Ex. 7; *see* 42 C.F.R. § 1001.301(b)(3)(ii)(A). A one-year term of exclusion accounts for the impact of Petitioner's cooperation in accordance with the applicable regulatory mitigating factor while still serving section 1128's remedial objective of protecting the federal health care programs and their beneficiaries from untrustworthy providers.

Conclusion

Based on the preceding analysis, we reverse the ALJ Decision and reinstate the one-year term of exclusion imposed by the I.G.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member