Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Summit S. Shah, M.D.
Docket No. A-17-121
Decision No. 2836
December 18, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Summit S. Shah, M.D. (Petitioner) appeals a decision by an administrative law judge (ALJ) upholding on the written record Petitioner's exclusion by the Inspector General (I.G.) from participation in all federal health care programs for a period of five years. *Summit S. Shah, M.D.*, DAB CR4927 (2017) (ALJ Decision). The ALJ concluded that the I.G. properly excluded Petitioner pursuant to section 1128(a)(1) of the Social Security Act (Act),[1] which, pursuant to section 1128(c)(3)(B), requires a minimum exclusion period of five years. For the reasons set out below, we affirm the ALJ's decision.

Legal Background

Section 1128(a)(1) of the Act provides that the Secretary of Health and Human Services "shall exclude" from participation in federal health care programs an individual who has been convicted, under federal or state law, "of a criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program."

When an exclusion is imposed under section 1128(a), section 1128(c)(3)(B) requires that the "minimum period of exclusion . . . be not less than five years[.]"

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 an exclusion longer than the mandatory minimum period is unreasonable in light of any of the aggravating and mitigating factors specified in the regulations that apply to the case before the ALJ. 42 C.F.R. §§ 1001.2007(a), 1005.2(a). A party dissatisfied with the ALJ's decision may appeal it to the Board. *Id*. § 1005.21.

[1] The current version of the Act can be found at https://www.ssa.gov/OP_Home/ssact/ssact-toc.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, cross-reference tables for the Act and the United States Code can be found at http://uscode.house.gov/table3/1935_531.htm.

Case Background[2]

Petitioner is a physician in Ohio specializing in allergy medicine. I.G. Ex. 7, at 4. On September 18, 2015, a grand jury in the Common Pleas Court of Franklin County, Ohio indicted Petitioner on four felony charges, including Medicaid fraud, telecommunications fraud, tampering with records, and perjury. I.G. Ex. 2. The indictment alleged that from approximately January 1, 2012, to December 31, 2014, Petitioner knowingly made false or misleading statements for use in obtaining reimbursement from the Ohio Medicaid program. *Id.* at 1-2. The case was docketed as case number 15CR4591.

On August 25, 2016, Petitioner was charged in two additional cases by criminal information with four felony counts of selling, purchasing, distributing, or delivering dangerous drugs and for selling "various allergy injections, including antigen extract and serum used in allergy immunotherapy, without the proper legal authority to do so." I.G. Exs. 3, 4. The new cases were docketed as case numbers 16CR4628 and 16CR4629. The informations for case numbers 16CR4628 and 16CR4629 did not explicitly link the new charges with the Ohio Medicaid program, nor did they specifically reference the facts in case number 15CR4591.

That same day, August 25, 2016, Petitioner entered into a plea agreement in which he agreed to enter a guilty plea to the four counts of the indictments in case numbers 16CR4628 and 16CR4629. I.G. Exs. 5-7. At the hearing, the prosecuting attorney provided a summary of the offenses:

> Beginning on or about June 1, 2011, Dr. Shah was required to be licensed by the Ohio Board of Pharmacy before providing dangerous drugs. Dr. Shah and his employees, operating at his direction, provided such dangerous drugs, which are not controlled substances, without the required licensure between June 1, 2011 and October 4, 2014, and as such these offenses are not related to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct, and are solely offenses related to the failure to obtain a proper license.

I.G. Ex. 7, at 4-5. As part of the judgment, the judge ordered Petitioner to pay restitution to the Ohio Attorney General's Office in the amount of $33,205.65 for case number 16CR4628, and $176,826.71 for case number 16CR4629. I.G. Ex. 7, at 18-19; I.G. Ex. 10; I.G. Ex. 11; I.G. Ex. 12, at 2; I.G. Ex. 13, at 2. Petitioner made the checks payable to the "Treasurer-State of Ohio." I.G. Ex. 15, at 2.

[2] The factual information in this section is drawn from the ALJ Decision and the record and is presented to provide a context for the discussion of the issues raised on appeal. Nothing in this section is intended to replace, modify, or supplement the ALJ's findings of fact.

Also on the same day, August 25, 2016, the State of Ohio filed a motion to dismiss case number 15CR4591. I.G. Ex. 8. The stated basis for the motion to dismiss was that case numbers 16CR4628 and 16CR4629 were resolved and Petitioner had "compensated the victims accordingly in those cases." *Id*. The presiding judge subsequently dismissed case number 15CR4591 "due to the resolutions in case numbers 16CR4628 and 16CR4629." I.G. Ex. 9.

The Ohio Attorney General's Office forwarded Petitioner's restitution check in the amount of $176,826.71 to the Ohio Department of Medicaid on August 26, 2016. I.G. Exs. 15, 16. The forwarding memo indicates that the check was "payment in full of restitution owed the State from an action of the Ohio Attorney General's Office and/or other State/Federal agencies." I.G. Ex. 15, at 1. The memo also indicates that the payment was restitution for case number 15CR4591. A handwritten note, however, references case number 16CFR4629 and breaks down the payment between money owed to "Fed" and money owed to "State." *Id*.

By letter dated December 30, 2016, the I.G. notified Petitioner that, pursuant to section 1128(a)(1) of the Act, he was being excluded from Medicare, Medicaid, and all federal health care programs for the statutory minimum period of five years. I.G. Ex. 1. The I.G. stated that the exclusion was due to Petitioner's conviction of a criminal offense related to the delivery of an item or service under Medicare or a State health care program. *Id*. at 1-2.

Petitioner timely requested a hearing before an ALJ (RFH). Petitioner argued that the crime he was convicted of was not related to the delivery of an item or service under a State health care program. RFH at 1. During the course of the proceedings, Petitioner also objected to the admission of I.G. Exhibit 14 (a document headed "State Medicaid Fraud Control Unit HHS-OIG Consolidated Reporting Worksheet: Individual Subject"), arguing that the document is irrelevant, factually inaccurate, and constitutes unauthenticated hearsay. Petitioner's Objection at 2. I.G. Exhibit 14 includes a summary of Petitioner's restitution payment, stating in relevant part:

> Dr. Shah paid $176,826.71 in restitution to the Ohio Department of Medicaid today. This principled sum represents the entire amount that Dr. Shah and Premier Allergy received in reimbursement from the Medicaid program for the provision of allergy serum between June 1, 2011 and October 4, 2014.

I.G. Ex. 14, at 3.

ALJ Decision

On August 18, 2017, the ALJ issued a decision based on the written record concluding that the five-year exclusion is lawful. First, the ALJ admitted I.G. Exhibit 14, stating:

> The document is admitted for the limited purpose of showing that there is a nexus between Petitioner's conviction and the Ohio Medicaid program, the purpose for which the I.G. offered the document. It is noted that the document includes hearsay, and it is weighed accordingly. Out of an abundance of caution, I give no weight to the specific information that Petitioner identifies as being inaccurate.

ALJ Decision at 2. The ALJ then concluded that a nexus exists between Petitioner's criminal offenses and the delivery of an item or service under the Ohio Medicaid program, explaining in relevant part:

> The only evidence the I.G. has presented to establish the required connection or nexus between the offenses of which Petitioner was convicted and the Ohio Medicaid program is evidence that part of Petitioner's court-ordered restitution was paid to the Ohio Medicaid program by the Ohio Attorney General. I.G. Exs. 15-16 . . . . The fact that the Ohio Attorney General delivered part of Petitioner's court-ordered restitution to Ohio Medicaid, rather than to another state account, is sufficient evidence to show it was more likely than not that the offenses of which Petitioner was convicted were related to the sale of allergy injections under Ohio Medicaid. Furthermore, under Ohio law "making restitution to the victim of the offense, the public, or both" is one of the purposes of sentencing. Ohio Revised Code §§ 2929.11(A), 2929.18(A)(1), 2929.21(A), 2929.28(A)(1). Petitioner does not deny that the Ohio Attorney General delivered a part of the restitution paid by Petitioner to Ohio Medicaid or offer any evidence that there was some other reason for that action.

Id. at 7. Based on his finding that the "elements necessary to trigger mandatory exclusion pursuant to section 1128(a)(1) of the Act" – conviction for criminal offenses related to the delivery of an item or service under the Ohio Medicaid program – "are satisfied," the ALJ concluded that there is a lawful basis for excluding Petitioner for the statutory minimum period of five years. *Id.* at 7-8.

Standard of Review

Our standard of review of an exclusion imposed by the I.G. is established by regulation. We review a disputed issue of fact as to "whether the initial decision is supported by substantial evidence on the whole record." 42 C.F.R. § 1005.21(h). We review a disputed issue of law as to "whether the initial decision is erroneous." *Id.*

Analysis

Petitioner's appeal rests on two assignments of error. Petitioner asserts that the ALJ erred in admitting I.G. Exhibit 14 into the record. Request for Review (R.R.) at 10-13. Petitioner also asserts that the ALJ erred in finding a "nexus based exclusively on the unilateral, post-restitution redirection of funds by the State…." R.R. at 6-10.

For the reasons set forth below, we find these arguments are without merit.

I. *The ALJ did not err in admitting I.G. Exhibit 14 into the record.*

Petitioner states that the ALJ should have excluded I.G. Exhibit 14 from the record because it was prepared in reference to the dismissed charges in case number 15CR4591, and is thus irrelevant. R.R. at 11. Petitioner also states that "the only evidence presented by the I.G. that could arguably connect Dr. Shah's offense with the Ohio Medicaid program" is unauthenticated hearsay, and "any potential probative value of Exhibit 14 is substantially outweighed by unfair prejudice" to Petitioner. *Id.* at 13.

The ALJ must exclude irrelevant or immaterial evidence. 42 C.F.R. § 1005.17(c). The ALJ may also exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence. 42 C.F.R. § 1005.17(d). The Board has made clear, however, that "evidence that is extrinsic to the criminal court process (regardless of whether or not the evidence or its content were presented at the grand jury, trial, plea or sentencing phases) is admissible to show that the conduct underlying the offense met the elements of the exclusion law. However, such evidence is probative only if it is reliable and credible." *Narendra M. Patel, M.D.*, DAB No. 1736, at 14 (2000), *aff'd sub nom., Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003), *cert. denied*, 539 U.S. 959 (2003).

Moreover, the ALJ is not bound by the Federal Rules of Evidence. 42 C.F.R. § 1005.17(b). The Board has long held that hearsay is admissible in administrative proceedings generally and can be probative on the issue of the truth of the matter asserted, where sufficient indicia of reliability are present.

Britthaven, Inc., d/b/a Britthaven of Smithfield, DAB No. 2018, at 3 (2006), citing *Pacific Regency Arvin*, DAB No. 1823, at 14 n.6 (2002) and *Richardson v. Perales*, 402 U.S. 389, 402 (1971). The question facing an ALJ presented with hearsay evidence is not whether it is admissible, but what weight it should be accorded. *Gateway Nursing Ctr.*, DAB No. 2283, at 6 (2009).

The ALJ admitted I.G. Exhibit 14 into the record "for the limited purpose of showing that there is a nexus between Petitioner's conviction and the Ohio Medicaid program." ALJ Decision at 2. The ALJ weighed the exhibit for hearsay and gave no weight to information that Petitioner identified as being inaccurate.[3] *Id.* The ALJ's actions clearly indicate that he weighed the probative value of the document against concerns of unfair prejudice to the parties. We find that the ALJ's actions were reasonable and conclude that he did not err in admitting I.G. Exhibit 14.

II. *The ALJ did not err in finding that Petitioner's exclusion was authorized under section 1128(a)(1)because his criminal offenses were related to the delivery of an item or service under the Ohio Medicaid program.*

The Board has repeatedly held that the phrase "related to" within the context of section 1128(a)(1) requires only that a common-sense nexus exists between the offense and the delivery of a health care item or service under the state healthcare program. *See, e.g., James O. Boothe*, DAB No. 2530, at 3 (2013); *James Randall Benham*, DAB No. 2042, at 5 (2006). Petitioner seeks to define the test for establishing this common-sense nexus, stating that at least one of the following criteria must be present: "1) the category of offense expressly and directly involves the Medicare or Medicaid programs; 2) the criminal case record contains stated or stipulated facts relating to some Medicare or Medicaid billing or reimbursement activity; or 3) restitution is ordered and/or paid directly to the Medicare or Medicaid programs." R.R. at 8. Petitioner notes that none of these three criteria is present in this case. *Id*.

In applying the test as he defines it, Petitioner relies on his own analysis of three ALJ decisions (*Carolyn R. Parker*, CR4683 (2016); *Anna Zaichik*, CR4649 (2016); and *Christina Ortega*, CR3145 (2014)).[4] R.R. at 7-8. It is well established, however, that an ALJ decision is not precedent or binding on the Board. *See, e.g., Willie Goffney, Jr., M.D.*, DAB No. 2763, at 8 (2017); *Alexander C. Gatzimos, MD, JD, LLC*, DAB No. 2730, at 16 (2016). Petitioner provides no statutory or regulatory authority for this

[3] We note that it is unclear from the ALJ Decision which parts of I.G. Exhibit 14 the ALJ gave no weight to in the decision making process.

[4] Petitioner misidentified these cases as Board decisions. They are in fact ALJ decisions.

supposed test, and Petitioner's narrow interpretation of the phrase "related to" within the context of section 1128(a)(1) is inconsistent on its face with applicable case law. *See Friedman v. Sebelius*, 686 F.3d 813, 820 (D.C. Cir. 2012) (describing the phrase "relating to" in another part of section 1128 as "deliberately expansive words," "the ordinary meaning of [which] is a broad one," and one that is not subject to a "crabbed and formalistic interpretation") (internal quotation marks omitted).

Moreover, Petitioner's specific arguments about why his case is not "related to" Medicaid are unsupported by Board precedent. First, Petitioner argues that the criminal offenses for which he was convicted were solely "related to the failure to obtain a license" and were thus not related to the delivery of an item or service under the Medicaid program. R.R. at 7. Petitioner relies upon the characterization of the offenses by the prosecuting attorney in the plea colloquy as "not related to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct, and are solely offenses related to the failure to obtain a proper license."[5] I.G. Ex. 7, at 4-5. In other words, Petitioner argues that the I.G. has not established a nexus between Petitioner's criminal offenses and the delivery of an item or service to the Ohio Medicaid program because the State's label and definition of the offenses do not explicitly reference the Ohio Medicaid program.

The Board has long held, however, that an ALJ is free to look beyond the narrow constructs of a state's criminal statutes. *Narendra M. Patel* at 10 (2000) (Congress did not intend to limit the I.G.'s exclusion authority through "dependence on the vagaries of state criminal law definitions or record development"); *Berton Siegel, D.O.*, DAB No. 1467, at 4 (1994) ("[i]t is not the labeling of the offense under the state statute which determines whether the offense is program-related"). Moreover, when determining whether an exclusion is warranted, an ALJ may look at "evidence as to the nature of an offense" such as "facts upon which the conviction was predicated." *Id.*; *Michael S. Rudman, M.D.*, DAB No. 2171, at 9 (2008), *aff'd sub nom. Rudman v. Leavitt*, 578 F. Supp. 2d 812 (D. Md. 2008) (an ALJ may consider "evidence regarding the nature of the offense, rather than the state's labeling of the admitted offense"). The ALJ in this case was thus not limited to only considering the State of Ohio's label and definitions of the criminal statute under which Petitioner was convicted.

[5] Petitioner's claims that he was not convicted of a crime "related to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct" mirror the language of the exclusion authority found in section 1128(a)(3) for a "Felony Conviction Relating to Health Care Fraud." We note, however, that Petitioner was excluded based on section 1128(a)(1) for a "Conviction of Program-Related Crimes," not section 1128(a)(3).

Furthermore, the quoted statement of the prosecutor does not indicate that the drug sales that Petitioner admitted to making in violation of licensing requirements were outside the Medicaid program. The only assertion of the prosecutor was that the plea was limited to the criminal offenses of sales in violation of those requirements rather than to the criminal charges involving Medicaid fraud or related offenses. The basis under which the I.G. excluded Petitioner does not require any proof of fraud or similar offense, only that the conduct underlying the conviction be "related to" the Medicaid program in some way.

Petitioner's second argument is that there is no explicit "mention in the record" of "Medicare or Medicaid billing or reimbursement activity." R.R. at 8. Petitioner is correct in noting that the record, including the facts adopted in the plea colloquy, do not create an explicit link between Petitioner's actions and the Ohio Medicaid program. *See e.g.*, I.G. Ex. 7, at 4-5. The Board, however, has held that the test for whether a common-sense nexus exists is "based on all relevant facts" and "not merely a narrow examination of the language within the four corners of the final judgment and order of the criminal trial court." *Dewayne Franzen*, DAB No. 1165, at 3 (1990). This has led to a body of case law in which the convicted charges displayed no explicit link to a protected health care program, but where additional extrinsic evidence established a nexus under section 1128(a)(1). *See, e.g., Andrew Anello*, DAB No. 1803 (2001) (a factual resume and plea indictment unambiguously connected petitioner's misprision conviction with the predicate Medicare fraud conviction); *Surabhan Ratanasen, M.D.*, DAB No. 1138 (1990) (the records of petitioner's conviction included admissions acknowledging the conviction's link with a prior indictment on charges of Medicaid fraud).

In this case, the ALJ concluded that the additional evidence was sufficient to establish a common-sense nexus between Petitioner's criminal offenses and the delivery of an item or service under the Ohio Medicaid program. Specifically, the ALJ relied on the "evidence that part of Petitioner's court-ordered restitution was paid to the Ohio Medicaid program by the Ohio Attorney General." ALJ Decision at 7. The ALJ cited two exhibits as evidence: I.G. Exhibit 15 (Petitioner's restitution check and memorandum from the Ohio Attorney General's Office to the Ohio Medicaid program) and I.G. Exhibit 16 (payment receipt showing that the Ohio Medicaid program received Petitioner's restitution check from the Ohio Attorney General's Office). *Id.*

Petitioner's third argument is that his restitution payment was not sufficient to establish a nexus between his criminal offenses and the Ohio Medicaid program. The Board has long recognized restitution as a measure of program loss. *Hussein Awada, M.D.*, DAB No. 2788, at 7 (2017)*; Juan de Leon, Jr.*, DAB No. 2533, at 5 (2013); *Craig Richard Wilder*, DAB No. 2416, at 9 (2011). The Board has also recognized that a criminal offense resulting in financial loss to a State Medicaid program is "related to" the delivery of items or services under that Medicaid program because it results "in less funds being

available to pay for covered services" delivered to Medicaid patients. *Berton Siegel,* at 6-7. Petitioner does not deny that payment of restitution made directly to a State Medicaid program would be compelling evidence of a nexus between the criminal offense and the State Medicaid program. Petitioner notes, however, that his payment of restitution was not made directly to the Ohio Medicaid program, stating in relevant part:

> The two exhibits relied upon by the ALJ as the sole basis for finding the nexus provide evidence only that, post-restitution, the monies paid by Dr. Shah to the Treasurer – State of Ohio were unilaterally redirected by the State to the Department of Medicaid. This unilateral, post-restitution redirection was a discretionary action by [] the State, and does not establish a "common sense" relationship between the [convicted offenses] and the delivery of an item or service under the Ohio Medicaid program.

R.R. at 10.

We conclude that Petitioner's argument that the restitution payment was "unilaterally redirected" to the Ohio Office of Medicaid is without merit. Petitioner participated in the plea process and agreed to pay restitution to the State. I.G. Ex. 6; I.G. Ex. 7, at 6-7. The ALJ noted in his decision that "under Ohio law making restitution to the victim of the offense, the public, or both is one of the purposes of sentencing. Ohio Revised Code §§ 2929.11(A), 2929.18(A)(1), 2929.21(A), 2929.28(A)(1)[]" (internal quotation marks omitted). ALJ Decision at 7. The payment of restitution to the "Treasurer – State of Ohio" implies that the State of Ohio was in some way the victim of financial loss due to Petitioner's actions. Petitioner was convicted on four counts of "selling, purchasing, distributing, or delivering dangerous drugs," a health-care related statute meant to control and monitor the distribution of medications. I.G. Exs. 3, 4. It is a reasonable inference that Petitioner's payment of restitution to the State of Ohio for a health care-related crime was meant to compensate the State health care program. Moreover, it is a reasonable inference that at least some of the "antigen extract and serum used in allergy immunotherapy" that Petitioner illegally distributed over a period of three years was distributed under the Medicaid program.

The record as a whole unambiguously supports the inference that restitution was remitted to the Ohio Medicaid program by the Ohio Attorney General's office as redress for financial loss resulting from the underlying actions of Petitioner's convicted offenses. The most explicit link in the record is I.G. Exhibit 14, which provides a narrative that Petitioner paid in restitution the entire amount he "received in reimbursement from the Medicaid program." I.G. Ex. 14, at 2. It is unclear, however, which factual components of I.G. Exhibit 14 the ALJ disregarded as disputed. ALJ Decision at 3.

Even assuming the ALJ did not rely on this element, the other exhibits to which the ALJ did cite provide sufficient basis for the ALJ to have reasonably inferred a nexus. The exhibits clearly indicate that Petitioner's restitution check in the amount of $176,826.71 was remitted to the Ohio Office of Medicaid by the Ohio Attorney General's Office for a program identified as "Medicaid Fraud." I.G. Exs. 15, 16. I.G. Exhibit 15 contains a note that explicitly breaks down the amount of money owed to the Federal Medicaid program and the Ohio Medicaid program, which corresponds to the "Federal Medical Assistance Percentages for Ohio Medicaid for the period of Appellant's conduct." I.G. Brief at 9; I.G. Ex. 15. While Petitioner questioned the provenance and authenticity of this note, the ALJ accepted it and we have no compelling reason to overturn that treatment or to find it inappropriate to consider this evidence. The ALJ reasonably relied on this evidence as one element on which to base the inference that the payment of the restitution was linked to the harm to the Medicaid program, especially since the State had no incentive otherwise to direct a part of the recovered funds to the federal government.

The record as a whole, moreover, indicates that the underlying actions resulting in the charges in case number15CR4591, which included a charge of Medicaid fraud, were the same as the underlying actions resulting in the charges in case numbers 16CR4628 and 16CR4629. The motion to dismiss the charges in case number 15CR4591 was filed on August 25, 2016, the same day that Petitioner pleaded guilty to the charges in case numbers 16CR4628 and 16CR4629, and the stated basis for the motion was that "cases 16CR4628 and 16CR4629 have been resolved and the Defendant [Petitioner] has compensated the victims accordingly in those cases." I.G. Ex. 8, at 1. The judge dismissed case number 15CR4591 expressly "due to the resolutions of case numbers 16CR4628 and 16CR4629." I.G. Ex. 9. A reasonable inference may therefore be made that the resolution of case numbers 16CR4628 and 16CR4629, which included a payment of restitution to the State, also satisfied the underlying actions that led to the Medicaid fraud charge in case number 15CR4591.

Based on the entire record, we find that Petitioner's arguments are without merit and conclude that the ALJ did not err in finding that there was "sufficient evidence to show it was more likely than not that the offenses of which Petitioner was convicted were related to the sale of allergy injections under Ohio Medicaid." ALJ Decision at 7.

Conclusion

For the reasons stated above, we affirm the ALJ Decision.

/s/
Christopher S. Randolph

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member