Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Andrew Louis Barrett
Docket No. A-18-43
Decision No. 2887
August 13, 2018

DECISION REMANDING CASE TO THE ADMINISTRATIVE LAW JUDGE

On February 28, 2017, the Office of Inspector General (IG) of the Department of Health & Human Services notified Andrew Louis Barrett (Petitioner) that he was being excluded from participation in federal health care programs for 23 years pursuant to section 1128(a)(1) of the Social Security Act (Act).[1] Petitioner contested the exclusion by requesting a hearing before an administrative law judge (ALJ). The parties later advised the ALJ that an in-person hearing was unnecessary and that the case could be decided based on their documentary evidence and written legal arguments. On February 5, 2018, the ALJ issued a decision holding that Petitioner's felony met the criteria for exclusion under section 1128(a)(1); that the IG had established the existence of three aggravating factors that justified an exclusion longer than the mandatory minimum of five years; and that a 23-year exclusion was reasonable in light of those factors. *Andrew Louis Barrett*, DAB CR5020 (2018) (ALJ Decision).

Petitioner then filed this appeal, contending that the exclusion's length is "not reasonable" and that his cooperation with federal authorities – evidence of which he provided to the Board – and other factors warrant a shorter exclusion. Concurrently with the submission of its response brief, the IG notified the Board that it had reviewed Petitioner's evidence of cooperation, determined that it constituted a mitigating factor under the governing regulations, and reduced the exclusion period from 23 to 20 years on that basis. Because these actions by the IG require a reconsideration of whether the exclusion (as revised) is unreasonable, we remand the case to the ALJ for that purpose.

[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.

Applicable Law

Section 1128(a) of the Act mandates the exclusion of individuals who have been convicted of certain types of criminal offenses from participating in Medicare, Medicaid, and other federal health programs. Of relevance here is paragraph (1) of section 1128(a), which requires the IG to exclude "[a]ny individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program." The general purpose of a section 1128 exclusion is "to protect federal health care programs and the programs' beneficiaries and recipients from untrustworthy providers." *Susan Malady, R.N.*, DAB No. 1816, at 9 (2002); *see also Joann Fletcher Cash*, DAB No. 1725, at 13 (2000) (stating that section 1128's exclusion authority "is primarily a mechanism by which Congress sought to enable the IG to prevent untrustworthy individuals from abusing Federal health care programs or the[ir] beneficiaries or recipients").

When an individual or entity has been convicted of an offense that meets the criteria in section 1128(a), the IG must, with irrelevant exceptions, exclude the individual for a period of "not less than five years[.]" Act § 1128(c)(3)(B); *see also* 42 C.F.R. §§ 1001.102(a), 1001.101(a). The IG may increase the exclusion period above the statutory minimum if certain aggravating factors, described in its regulations, are present. 42 C.F.R. § 1001.102(b). Those factors include:

> (2) The acts resulting in the conviction, or similar acts, caused, or were intended to cause, a financial loss to a government agency or program . . . of $50,000 or more. . . .
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> * * *
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> (5) The sentence imposed by the court included incarceration;
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> * * *
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> (9) The individual or entity has been the subject of any other adverse action by any Federal, State or local government agency or board if the adverse action is based on the same set of circumstances that serves as the basis for the imposition of the exclusion.

Id.

If one or more aggravating factors is established, then certain enumerated "mitigating factors" may "be considered as a basis for reducing the period of exclusion to no less than 5 years." *Id.* § 1001.102(c). One such mitigating factor is the excluded individual's "cooperation with Federal or State officials" – cooperation that must have produced certain results, such as "[o]thers being convicted or excluded from" federal health programs. *Id.* § 1001.102(c)(3).

An excluded individual may request a hearing before an ALJ, but only on the issues of: (1) whether there was a "basis for . . . imposition" of the exclusion – that is, whether the individual was convicted of the type of offense that rendered him excludable under the provision of section 1128 cited by the IG; and (2) whether "[t]he length of exclusion [imposed by the IG] is unreasonable." *Id.* § 1001.2007(a).

A party dissatisfied with an ALJ's decision may appeal to the Board. *Id.* § 1005.21(a). The Board reviews an ALJ's decision to determine if it is supported by substantial evidence and free of legal error. *Id.* § 1005.21(h). In general, Board review is "based on the record developed before the ALJ." *Gracia L. Mayard, M.D.*, DAB No. 2767, at 6 (2017) (internal quotation marks omitted).

Case Background

In 2016, Petitioner was convicted in a federal district court of one count of health care fraud, a violation of 18 U.S.C. § 1374. IG Ex. 4. The underlying indictment states that Petitioner, a pharmacist, participated in a "fraudulent scheme" in which he billed Medicare and Medicaid for prescription medication that he never dispensed to patients. IG Ex. 3, at 8-10. For this offense Petitioner was sentenced to 43 months in prison and three years of supervised release, and was ordered to pay restitution totaling $2.7 million (an amount that the court found was owed to Medicare and the New York Medicaid program).[2] IG Ex. 5. As a condition of supervised release, the sentencing judge ordered Petitioner to "refrain from engaging in any employment which involves any interaction with Medicaid or Medicare[.]" IG Ex. 4, at 4.

[2] In addition to the single count of health care fraud, Petitioner was simultaneously convicted of one count of filing a false personal income tax return. I.G. Ex. 4; IG. Ex. 3, at 9, 14. Petitioner was sentenced to 36 months in prison and one year of supervised release on the tax fraud count. IG Exs. 4-5. The sentences for the health care and tax fraud counts were imposed to run concurrently. IG Ex. 5, at 1. Neither the tax fraud conviction, nor the concurrent term of incarceration imposed or the amount of restitution assessed ($736,192) as a result of that conviction, was a basis upon which the IG found Petitioner excludable under section 1128 or upon which the IG increased the length of the exclusion above the mandatory minimum. *See* ALJ Decision at 9 n.5. Although the ALJ commented on the tax fraud conviction, we do not view it as adding any weight to the consideration of financial loss as an aggravating factor.

On February 28, 2017, the IG notified Petitioner that he was being excluded from federal health care programs pursuant to section 1128(a)(1). IG Ex. 1, at 1. The IG further advised Petitioner that the length of the exclusion exceeded the mandatory minimum of five years because of the following aggravating factors: (1) the amount of financial loss sustained by federal programs or agencies as a result of his criminal conduct exceeded $50,000; (2) the fact that he received a term of incarceration for his health care fraud offense; and (3) an "adverse action" taken against him by the New York Medicaid program "based on the same set of circumstances." *Id.* at 1; *see also* ALJ Decision at 5-6 n.3.
After Petitioner (who has been incarcerated throughout the administrative appeal process) requested a hearing to contest the exclusion, the ALJ held a pre-hearing conference and established a schedule for submitting legal argument and evidence.[3] ALJ Decision at 2. Both parties submitted documentary evidence, and both indicated that a hearing to receive in-person testimony was unnecessary. *Id.* The ALJ admitted all of the documentary evidence submitted by the parties. *Id.*

In his "Informal Brief" to the ALJ, Petitioner conceded that he was subject to exclusion under section 1128(a)(1) and focused instead on matters affecting the exclusion's length. Informal Brief of Petitioner dated Aug 1, 2017 (Inf. Br.) at 2. In particular, Petitioner contended that the IG relied on incorrect information concerning the financial loss resulting from his misconduct and overlooked a potential mitigating factor – namely, his alleged cooperation with a U.S. Food and Drug Administration (FDA) investigation. *Id.* at 2, 5-6, 8. Petitioner also emphasized that the exclusion imposed by the IG was more than three times longer than his terms of imprisonment and supervised release, which totaled about seven years. *Id.* at 3, 7. According to Petitioner, the judge in his criminal case could have "exclude[ed] me for many more years but chose this amount of time [seven years] basing her decision on all of the facts of the case." *Id.* at 7. Finally, Petitioner sought to demonstrate the unreasonableness of a 23-year exclusion by comparing his circumstances to those in other exclusion cases appealed to the Board. *Id.* at 8-13.

The ALJ concluded that Petitioner's conviction for health care fraud rendered him excludable under section 1128(a)(1) and subject to a mandatory minimum five-year exclusion. ALJ Decision at 4-5. The ALJ also found that the IG had proved three aggravating factors justifying an exclusion longer than the mandatory minimum: (1) a $2.7 million loss to Medicare and Medicaid as a result of Petitioner's criminal conduct; (2) Petitioner's 43-month prison term; and (3) an "adverse action" taken by the New York State Office of Medicaid Inspector General to exclude Petitioner from New York's

[3] The case was initially assigned to ALJ Anderson and transferred to ALJ Thomas shortly after the pre-hearing conference.

Medicaid program. *Id.* at 5-6. In addition, the ALJ found no mitigating factors, noting that Petitioner had failed to proffer evidence of his alleged cooperation with an FDA investigation. *Id.* at 7-8. The ALJ also concluded that a 23-year exclusion was "not unreasonable" in light of the "quality of the aggravating factors proven by the IG." *Id.* at 8-10. Finally, the ALJ rejected any suggestion that the exclusion should be comparable in length to his criminal sentence. *Id.* at 9.

On April 10, 2018, Petitioner filed this appeal, reiterating his allegation that he had cooperated with a federal investigation. To support that allegation, Petitioner submitted a partial transcript of his 2016 sentencing hearing (a document that he did not submit to the ALJ), which indicates that the presiding judge considered his "assistance to the Government in an unrelated FDA investigation" in deciding the length of his prison term. Besides the claim that his cooperation was a mitigating factor, Petitioner's appeal restates or elaborates on other positions that he took before the ALJ. Petitioner does not dispute the existence of any aggravating factor found by the ALJ, nor does he assert that the ALJ assigned improper weight to a factor.

On May 22, 2018, the day before the IG submitted its response to the appeal, the IG sent a letter to Petitioner stating that, in light of "new information" about his cooperation, it was "amending" the February 28, 2017 notice of exclusion to reduce the length of the exclusion from 23 to 20 years. The IG indicates that it took that action after: (1) considering information in the transcript of Petitioner's sentencing hearing; (2) determining that the transcript contained "sufficient evidence" of cooperation that qualified as a mitigating factor under 42 C.F.R. § 1001.102(c)(3); and (3) "tak[ing] this new evidence of cooperation into consideration as a mitigating factor" in determining the appropriate length of the exclusion. IG's Brief in Opposition (IG Resp.) at 12. The IG asserts that the three-year reduction in the exclusion period "is reasonable considering the three aggravating factors that were correctly applied and the newly considered mitigating factor." *Id.*

In his June 1, 2018 reply,[4] Petitioner asserts that a 23-year exclusion and a 20-year exclusion are both "arbitrary and capricious."

<u>Analysis</u>

Even though it revised the exclusion after the ALJ completed his review, the IG asks the Board to affirm the ALJ's decision. IG Resp. at 1, 14. As noted, the ALJ concluded that Petitioner's criminal offense subjected him to exclusion under section 1128(a)(1); that three aggravating factors justified an exclusion longer than the mandatory minimum of five years; that Petitioner failed to prove any mitigating factor; and that a 23-year

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[4] Petitioner did not comply with the Board's instruction to seek permission in advance to file the reply. However, because we would have granted such a request in light of the IG's decision to reduce the exclusion period, we accept the June 1, 2018 reply.

exclusion was within a "reasonable range" based on the "quality" of the aggravating factors. These findings and conclusions are supported by the record that was before the ALJ and are consistent with the governing statute and regulations. In addition, the ALJ followed Board precedent in assessing the reasonableness of the exclusion's length. *See Craig Richard Wilder, M.D.*, DAB No. 2416, at 8 (2011) (holding that an ALJ properly reviews the length of an exclusion by considering whether it falls "within a reasonable range" based on established aggravating and mitigating factors); *Sushil Aniruddh Sheth, M.D.*, DAB No. 2491, at 5 (2012) (holding that the evaluation of whether the duration of an exclusion is reasonable "does not rest on the specific number of aggravating or mitigating factors or any rigid formula for weighing those factors, but rather on a case-specific determination of the weight to be accorded each factor based on a qualitative assessment of the circumstances surrounding the factors in that case").

None of Petitioner's contentions reveal any error by the ALJ. Petitioner's primary contention is that the exclusion should approximate the length of his terms of imprisonment and supervised release. *See* Appeal Letter at 10-11. That view is untenable in part because the length of a criminal sentence is "influenced by factors not present" in exclusion cases, such as prosecutorial charging decisions, plea agreements, and the application of sentencing statutes and guidelines.[5] *Sheth* at 9; *see also Barry D. Garfinkel, M.D.*, DAB No. 1572, at 34 (1996) (noting that the "overall purpose" of the federal sentencing guidelines is to "determine the proper punishments for convicted criminals" and that those guidelines "do not directly address the remedial purposes of the exclusion provisions" in section 1128 of the Act), *aff'd, Garfinkel v. Shalala*, No. 3-96-604 (D. Minn. June 25, 1997) (adopting Magistrate's Report and Recommendation). Furthermore, criminal sentencing and administrative exclusions have different objectives. "The goals of criminal law generally involve punishment and rehabilitation of the offender, possibly deterrence of future misconduct by the same or other persons, and various public policy goals," whereas "[e]xclusions imposed by the I.G. . . . are civil sanctions, designed to protect the beneficiaries of health care programs and the federal fisc, and are thus remedial in nature rather than primarily punitive or deterrent." *Henry L. Gupton*, DAB No. 2058, at 7 (2007), *aff'd, Henry L. Gupton v. Leavitt*, 575 F.Supp.2d 874 (E.D. Ill. 2008); *see also Mayard* at 9 (noting that "criminal justice policy is irrelevant" in the exclusion context). That section 1128 mandates a five-year minimum exclusion in this case – to be imposed *without regard to* the criminal sentence – strongly indicates that Congress did not expect that an exclusion matching the length of the sentence would necessarily serve the statute's remedial purposes.

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[5] To the extent that Petitioner implies that the judge in his criminal case was contemplating an appropriate exclusion period when she imposed Petitioner's criminal sentence, the ALJ correctly rejected that implication. *See* ALJ Decision at 9. As the ALJ noted, the authority to impose and determine the length of an exclusion resides not with federal courts, but with the Secretary of Health & Human Services, who has delegated that authority to the IG. *See* Act § 1128(a); 42 C.F.R. § 1001.1 *et seq.*

Petitioner suggests that his criminal sentence is a fair measure of the exclusion's reasonableness because the IG was unaware of all the circumstances considered by the sentencing judge in imposing the sentence, including his family ties and "charitable works." Appeal Letter at 8-10, 13 (stating that the IG did not weigh "all the facts and factors that the Federal Judge weighed in crafting a sentence"). However, a circumstance that a court might weigh at criminal sentencing is not necessarily relevant in an administrative appeal of a section 1128(a)(1) exclusion. In setting the length of an exclusion above the mandatory minimum, the IG may consider *only* the mitigating factors specified in 42 C.F.R. § 1001.102(c). *Robert Seung-Bok Lee*, DAB No. 2614, at 6 (2015) (noting that section 1001.102(c) "precludes consideration" by the IG of any mitigating factors other than those specified in that regulation). Similarly, an ALJ's review of the exclusion's reasonableness must be based only on the aggravating and mitigating factors specified in the IG's regulations. *Wilder* at 8. Other than his apparent cooperation with federal authorities, Petitioner does not identify a legally relevant mitigating factor that the IG or the ALJ failed to recognize or consider. While a sentencing court in a criminal case may consider a person's charitable works and family ties, these are not mitigating factors under the regulations governing exclusion from participation in federal health care programs.

Petitioner contends that the discrepancy between the length of his criminal sentence and the length of his exclusion is "arbitrary and capricious" given the IG's failure to explain how the exclusion period was "calculated." Appeal Letter at 11. However, Petitioner has not pointed to any law or regulation requiring such an explanation. The IG's obligation in this case was to prove the legal elements of the exclusion, including any aggravating factors upon which it relied to determine the exclusion's duration. *John E. Calhoon*, DAB No. 1729, at 12 (2000), *aff'd, Calhoon v. Dept. of Health & Human Servs.*, No. 8:01-CV-647-T-26TBM (M.D. Fl. Dec. 5, 2001); *see also* 42 C.F.R. § 1001.2002(c)(2) (requiring the IG to notify Petitioner of "the factors considered in setting the length" of the exclusion). The IG met that obligation. Furthermore, the role of the Board and its ALJs is not to review the adequacy of the IG's analytical or decision-making process. *Wilder* at 12. With respect to the exclusion's length, the ALJ was obliged to determine whether the exclusion fell "within a reasonable range" given the evidence before him concerning the relevant aggravating and mitigating factors. *Id.* Petitioner does not argue that the ALJ failed to meet that obligation.

Petitioner asserts that prior exclusion cases cited by the IG were not "similar in nature" to his own. Appeal Letter at 10. In support of that assertion, Petitioner attached to his initial appeal submission a chart listing 22 prior IG exclusion cases allegedly cited by the IG. For each prior case, the chart indicates the length of the exclusion imposed; the excluded individual's occupation; whether the exclusion was based on misconduct involving "pharmacy services"; and Petitioner's single-word opinion ("no" or "none")

about whether the prior case had a "similar issue" or "correlation" to his exclusion. The substance of the chart was included in Petitioner's brief to the ALJ, who held that Petitioner had merely documented "surface discrepancies with other IG exclusion cases" – discrepancies "insufficient to show the IG's determination in this case is unreasonable." ALJ Decision at 10.

That holding was not erroneous. In general, "[c]omparisons with other cases are not controlling and of limited utility given that aggravating and mitigating factors 'must be evaluated based on the circumstances of a particular case' . . ., which can vary widely." *Paul D. Goldenheim, M.D., et al.*, DAB No. 2268, at 29 (2009) (quoting 57 Fed. Reg. 3298, 3314 (Jan. 29, 1992)), *rev'd and remanded*, *Friedman, et al. v. Sebelius*, 686 F.3d 813 (D.C. Cir. 2012) (upholding the legal basis for the exclusion but remanding for further consideration of the length of the exclusion); *Sheth* at 15 (stating that the "reasonableness of exclusion periods must be made on a case-by-case basis, and, similarities notwithstanding, the facts of each case are unique to that case"). Although the Board has said that case-to-case comparisons "can inform whether a period of exclusion falls within a reasonable range," *Hussein Awada, M.D.*, DAB No. 2788, at 10 (2017), none of the comparisons drawn by Petitioner is remotely useful because he failed to lay out details concerning the aggravating and mitigating factors at play in each case and how the ALJ weighed those factors. *See* Inf. Br. at 8-13. Petitioner instead focused on circumstances, such as the occupation of the excluded individual and whether that person's misconduct involved pharmacy services, which are not aggravating or mitigating factors specified in the regulations and thus irrelevant in assessing the reasonableness of the exclusion's length.

Finally, Petitioner suggests that the ALJ should not have dismissed his then-unsubstantiated allegation of substantial cooperation with federal authorities. Stating that the ALJ "was given the name and phone number of the FDA agent," Petitioner implies that the ALJ should have investigated the matter to verify the allegation's truth. However, Petitioner had the burden in the ALJ proceeding to prove the existence of any mitigating factor. *Awada* at 3. Furthermore, the regulations did not authorize the ALJ to contact potential witnesses or independently investigate a party's allegations (beyond questioning witnesses at a hearing). *See* 42 C.F.R. § 1005.4(b). The regulations do permit an ALJ to issue subpoenas requiring the attendance of witnesses and the production of documents, *id.* § 1005.4(b)(5), but Petitioner did not ask the ALJ to issue any subpoenas on his behalf.

Although we agree with the IG, for all the reasons just stated, that the ALJ rendered a legally sound decision on the record and issues before him, the parties' dispute remains unresolved. The unresolved issue is whether a *20-year* exclusion – not the 23-year exclusion reviewed by the ALJ – is reasonable based on the three aggravating factors and one mitigating factor found by the IG. That issue is properly before us because the IG

made it clear in its May 22, 2018 letter to Petitioner that the February 28, 2017 notice of exclusion "remain[ed] in effect," a circumstance that renders the reduction of the exclusion period retroactive to February 28, 2017. However, because the ALJ has not had an opportunity to address that contested issue in the first instance, remand is appropriate. *Cf.* 42 C.F.R. §§ 1005.20(a) (stating that the ALJ will issue the "initial decision" with respect to a contested exclusion) and 1005.21(g) (authorizing the Board to remand a case to the ALJ).

Conclusion

We remand the case to the ALJ to decide whether the 20-year exclusion is unreasonable in light of the established aggravating and mitigating factors. Before issuing a decision, the ALJ shall give Petitioner an opportunity to submit additional written argument on that issue. In addition, the ALJ shall rule on any request by Petitioner to admit to the record the portion of the transcript that Petitioner submitted on appeal.

/s/

Sheila Ann Hegy

/s/

Leslie A. Sussan

/s/

Christopher S. Randolph
Presiding Board Member