

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

In the Case of:)	
)	
Tamara Brown,)	DATE: August 28, 2008
)	
Petitioner,)	Civil Remedies CR1799
)	App. Div. Docket No. A-08-108
- v. -)	
)	Decision No. 2195
Inspector General)	
)	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Tamara Brown (Petitioner) appealed the June 4, 2008 decision by Administrative Law Judge (ALJ) Richard J. Smith. Tamara Brown, DAB CR1799 (2008) (ALJ Decision). The ALJ Decision upheld the determination of the Inspector General (I.G.) to exclude Petitioner from participation in Medicare, Medicaid, and all other federal health care programs for a period of five years.

For the reasons explained below, we conclude that the ALJ correctly determined that Petitioner was subject to exclusion for a period of five years under section 1128(a)(1) of the Social Security Act (Act).¹ We also conclude that there is no basis for disturbing the ALJ's April 1, 2008 order denying Petitioner's Motion for Complete Reversal of Charges of Exclusion and reject Petitioner's other arguments.

¹ The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

Legal Background

Section 1128(a)(1) of the Act requires the Secretary of Health and Human Services (HHS) to exclude from participation in federal health care programs any individual who "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." Section 1128(h) defines "State health care program" to include state Medicaid plans.

Section 1128(i) of the Act defines the term "convicted," in relevant part, as follows:

For purposes of subsections (a) and (b), an individual or entity is considered to have been "convicted" of a criminal offense—

(1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;

(2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court; [or]

(3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court

Section 1128(c)(3)(B) of the Act states that "in the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years. . . ."

Case Background²

On August 15, 2006, a special grand jury sitting for the Common Pleas Court of Franklin County, Ohio, indicted and charged Petitioner, a licensed practical nurse, with one count of fourth-

² Our discussion of the case background is drawn from the ALJ Decision and the record and is not intended to substitute or amend any of the findings in the ALJ Decision.

degree felony Medicaid Fraud, in violation of OHIO REV. CODE § 2913.40(B). That section defines "Medicaid Fraud" to mean "knowingly mak[ing] or caus[ing] to be made a false or misleading statement or representation for use in obtaining reimbursement from the medical assistance program."

Petitioner appeared before the Common Pleas Court on March 20, 2007. Represented by counsel, Petitioner pleaded guilty to the stipulated lesser offense of attempted Medicaid fraud, classified as a first-degree misdemeanor in violation of section 2923.02 of the Ohio code as it relates to section 2913.40(B). Under section 2923.02, an attempt to commit a criminal offense is a crime. Pursuant to Petitioner's plea, the Common Pleas Court found Petitioner guilty of the misdemeanor charge and entered an order requiring Petitioner to pay a fine of \$100 and the payment of the cost of her prosecution.

On September 28, 2007, the Inspector General notified Petitioner that she was being excluded from participation in all federal health care programs for five years, pursuant to sections 1128(a)(1) and 1128(i) of the Act. I.G. Ex. 1. The notice stated that the exclusion was based on Petitioner's "conviction as defined in section 1128(i) . . . , in the Court of Common Pleas of Franklin County, Ohio, of a criminal offense related to the delivery of an item or service under Medicare or a State health care program" Id. at 1.

On November 2, 2007, Petitioner appealed the I.G.'s exclusion by filing a request for an ALJ hearing. Petitioner appeared pro se. The ALJ held a pre-hearing conference with the parties by telephone on January 28, 2008, during which time the parties agreed that the appeal likely could be decided on written submissions. On January 29, 2008, the ALJ issued an order summarizing the conference discussions and establishing a schedule for the parties to file documents and briefs.

The I.G. filed a motion for summary affirmance and supporting brief on February 29, 2008.

By letter dated March 13, 2008, Petitioner submitted a Motion for Complete Reversal of Charges of Exclusion (Petitioner's Motion for Reversal) on the ground that counsel for the I.G. "failed to meet the designated deadline date of February 29, 2008 . . . in the [January 29, 2008] Order and Schedule for filing Briefs and Documentary Evidence" Petitioner's Motion for Reversal at 1. Specifically, Petitioner argued that counsel for the I.G. did not correctly address the copy of the pleading intended for Petitioner, resulting in delayed receipt. The envelope was sent

to the correct street address, but the named addressee was an individual other than Petitioner. Id.

On March 27, 2008, the I.G. filed a response opposing Petitioner's motion. The I.G. argued that: 1) its motion for summary affirmance was timely filed (since under the governing regulation, a document is considered filed when mailed); and 2) the relief requested by Petitioner was "disproportionate to any harm" Petitioner might have suffered due to the I.G.'s error in mailing the document intended for Petitioner. The Inspector General's Opposition to Petitioner's Motion for Complete Reversal of Charges of Exclusion (I.G.'s Opposition to Petitioner's Motion for Reversal).

On April 1, 2008, the ALJ issued an order denying Petitioner's motion and revising the schedule for filing briefs. The ALJ stated that Petitioner's request for relief in response to the I.G.'s "simple" clerical error was "overdrawn and unrealistic." Order Denying Petitioner's Motion and Revised Schedule for Filing Briefs at 1. The ALJ then set forth a revised schedule for filing pleadings, "provid[ing] another opportunity [for Petitioner] to file a responsive Answer Brief, [and] eliminat[ing] any possibility of prejudice to her ability to present her case." Id. The order set a revised date of April 30, 2008 for filing of Petitioner's responsive brief.

On April 2, 2008, Petitioner filed a Continued Motion for Complete Reversal of Charges of Exclusion (Petitioner's Continued Motion). Petitioner restated the arguments made in her March 13, 2008 motion. Petitioner also stated that when she consented to the entry of a guilty plea and judgment against her for the misdemeanor charge, she was unaware that it would result in her exclusion from participation in federal health care programs. Further, Petitioner argued, the Ohio Attorney General's representative "initiated vengeance" against Petitioner by "forward[ing] false and misleading information to the Inspector General's Office . . . stating [Petitioner] was convicted of a felony 4 [crime] vs misdemeanor 1." Petitioner's Continued Motion at 1.

On April 9, 2008, Petitioner filed an objection to the ALJ's April 1, 2008 order, restating the arguments made in her earlier motions.

On April 10, 2008, the ALJ issued a letter to clarify the procedural status of the case. The ALJ stated that: 1) the issue of Petitioner's delayed receipt of the I.G.'s motion and brief was fully resolved by the April 1, 2008 order and preserved

for appeal, and the ALJ would not consider further argument or discussion of that matter; 2) Petitioner's April 2, 2008 submission would be "received as her Answer Brief," but she could supplement it before April 30, 2008 if she chose; and 3) the briefing cycle set out in the ALJ's April 1, 2008 order remained in effect. ALJ Letter to Petitioner and I.G. Counsel, Dated April 10, 2008.

There is no evidence in the record before us that Petitioner filed a supplemental brief before April 30, 2008, as she could have done under the ALJ's April 1, 2008 order. The record contains no document filed after April 1 and before April 30, 2008, and in a reply brief in support of its motion for summary judgment, filed on May 14, 2008, the I.G. indicated that it had not received a copy of a supplemental brief from Petitioner.³ The Inspector General's Reply Brief In Support of Motion for Summary Affirmance at 1-2. In its reply brief, the I.G. argued that Petitioner's assertion that her exclusion was based on misinformation sent by the Ohio Attorney General's office was incorrect and irrelevant.

The ALJ Decision

The ALJ upheld the I.G.'s determination excluding Petitioner from Medicare, Medicaid, and all other federal health care programs for a period of five years based on six enumerated findings of fact and conclusions of law (FFCLs). The ALJ first found that "on [Petitioner's] accepted plea," the Court of Common Pleas found Petitioner guilty of the first-degree misdemeanor offense of attempted Medicaid fraud in violation of OHIO REV. CODE §§ 2913.40(B) and 2923.02(a). ALJ Decision at 4 (FFCL 1). "The accepted plea and finding of guilt," the ALJ further found, "constitute[d] a 'conviction' within the meaning of section[] 1128(a)(1) of the Act, and 42 C.F.R. § 1001.2." Id. (FFCL 2). The ALJ then found that "[a] nexus and a common-sense connection exist between the criminal offense to which Petitioner pleaded guilty and of which she was found guilty, . . . and the delivery of an item or service under a State health care program." Id. (FFCL 3). Next, the ALJ determined, Petitioner's conviction provided a basis for the I.G. to exclude Petitioner from participation in Medicare, Medicaid and all other federal health

³ However, on May 12, 2008, Petitioner filed a document entitled "The Petitioner's Response Brief" in which she reiterated that the ALJ should reverse the exclusion due to the I.G.'s alleged failure to comply with the ALJ's January 29 order.

care programs under section 1128(a)(1) of the Act. Id. (FFCL 4). The ALJ additionally concluded that the duration of the exclusion (five years) was the mandatory minimum period under section 1128(c)(3)(B) of the Act and 42 C.F.R. §§ 1001.102(a) and 1001.2007(a)(2) and, therefore, was not unreasonable. Id. (FFCL 5). Finally, the ALJ concluded that there were no disputed issues of material fact and that summary disposition was warranted. Id. (FFCL 6).

Standard of Review

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

The Board may not disturb an otherwise appropriate ruling, order or act by the ALJ for harmless error. 42 C.F.R. § 1005.23; Thomas M. Horras and Christine Richards, DAB No. 2015, at 5 (2006), aff'd, Horras v. Leavitt, 495 F.3d 894 (8th Cir. 2007).

Analysis

The ALJ did not err in upholding the duration of Petitioner's exclusion since five years is the mandatory minimum period under the applicable law.

Petitioner argues on appeal that the five-year period of her exclusion from participation in Medicare, Medicaid and any other federal health care program is unreasonable and excessively harsh. Petitioner states that the Act "differentiates between felony and misdemeanor convictions" and that "if a punishment is necessary, . . . it should not be for any more than three years." June 24, 2008 Notice of Appeal at 2. Petitioner cites section 1128(b)(1)(A) of the Act, which provides for permissive exclusions, to support this argument.

Petitioner's reliance on section 1128(b)(1)(A) is misplaced. Section 1128(b)(1)(A) applies to an individual convicted of a misdemeanor relating to fraud-

- (i) in connection with the delivery of a health care item or service, or
- (ii) with respect to any act or omission in a health care program (**other than those specifically described in subsection (a)(1)**) operated by or financed in whole or in part by any Federal, State, or local government agency

(Emphasis added.) The programs "specifically described in subsection (a)(1)" are "title XVIII [Medicare]" and "State health care programs," which, under section 1128(h), include Medicaid programs. Thus, the provision upon which Petitioner relies for her argument that the I.G. should have excluded her for less than five years based on her misdemeanor conviction does not apply where, as here, the misdemeanor involves "program-related crimes" such as those "related to the delivery of an item or service" in the Medicare or Medicaid programs. Act § 1128(a)(1).

Section 1128(b)(1)(A), and its authority to exclude for less than five years, applies only when an individual has been convicted of a misdemeanor relating to health care fraud in connection with a program **other than** Medicare or State health care programs. As the Board has stated, the Act "draws a distinction between felony and misdemeanor offenses only for fraud committed in connection with the delivery of a health care item or service in a health program *other than* Medicare or State health care programs." Lorna Fay Gardner, DAB No. 1733, at 5-6 (2000) (emphasis in original). Section 1128(a)(1) of the Act, which applies to "program related" convictions, draws no distinctions between degrees of offense. Id. at 5.⁴ Thus, when an individual is convicted of a "program related" misdemeanor involving the delivery of an item or service under Medicaid or another State health care program, the mandatory exclusion applies, and the minimum period of exclusion is five years, as set forth under the plain language of section 1128(c)(3)(B).

In this case, Petitioner does not dispute (and we find no error in the ALJ's finding) that Petitioner was "convicted" of a criminal offense within the meaning of the Act. Further, Petitioner does not dispute (and we find no error in) the ALJ's finding that the crime of which Petitioner was convicted related to the delivery of an item or service under a State health care program, since that crime was attempted Medicaid fraud. ALJ Decision at 4-5. Accordingly, the ALJ properly determined that the elements necessary to support an exclusion based on section 1128(a)(1) of the Act are present. See e.g., Boris Lipovsky,

⁴ In Gardner, the Board discussed how the legislative history of these provisions demonstrates that Congress intentionally drew a distinction between program-related and nonprogram-related offenses. Gardner at 6-7. See also Jack W. Greene, DAB No. 1078 (1989), aff'd, Greene v. Sullivan, 731 F. Supp. 835 (E.D. Tenn. 1990).

M.D., DAB No. 1363 (1992). Consequently, the plain language of the statute requires the duration of Petitioner's exclusion to be no less than five years, and the ALJ made no error in concluding that the duration of the penalty was reasonable as a matter of law.

We find no basis for disturbing the ALJ's April 1, 2008 order.

Petitioner argues on appeal that the ALJ committed procedural error in his April 1, 2008 order. In the order, the ALJ: 1) denied Petitioner's motion for a reversal of the exclusion which alleged that the I.G. "failed to meet the designated deadline date of February 29, 2008 as indicated in the Order and Schedule for filing Briefs and Documentary Evidence . . ."; and 2) revised the briefing schedule to give Petitioner more time to file her response. Petitioner argues that the order "covered" I.G. counsel's mistake and that Petitioner should be granted similar lenience - a reversal of the exclusion - for her "simple mistake." June 24, 2008 Notice of Appeal at 2.

Section 1005.23 of 42 C.F.R. states that in reviewing alleged procedural errors by an ALJ, the Board applies a harmless error standard:

. . . no error or defect in any ruling or order . . . is ground for vacating, modifying or otherwise disturbing an otherwise appropriate ruling or order . . . unless refusal to take such action appears . . . inconsistent with substantial justice. The [Board] . . . will disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

Section 1005.23 was "modeled on Rule 61 of the Federal Rules of Civil Procedure." 55 Fed. Reg. 12,205, 12,214 (Apr. 2, 1990). The federal rule "teaches that the proceedings are not to be disturbed because of an error that prejudiced no one." 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2883 (2d ed. 2008); see also Play Time, Inc. v. LDDS Metromedia Communications, Inc., 123 F.3d 23, 30 n.8 (1st Cir. 1997) ("Under the harmless error rubric, trial court error affects 'substantial rights' only if it results in substantial prejudice or has a substantial effect on the outcome of the case.").

The record shows, and Petitioner does not dispute, that the I.G. mailed its motion for summary affirmance to the ALJ on February

29, 2008, the due date established under the ALJ's January 29, 2008 scheduling order. Since 42 C.F.R. § 1005.11(a)(4) establishes that documents are "considered filed when they are mailed," the I.G.'s submission was timely filed. Thus, the ALJ did not overlook a failure by the I.G. to comply with a filing deadline because that failure did not occur.

The record shows that the I.G.'s representative did make a simple clerical mistake in serving the copy of the document on Petitioner. Section 1005.11(b) of the regulations requires a party filing a document with the ALJ to serve a copy of the document on the other party at the time the document is filed. Here, counsel for the I.G. mailed the copy of the pleading intended for Petitioner to Petitioner's correct address, but named a person other than Petitioner as the addressee. Petitioner asserts that the consequence of this mistake was that her receipt of the pleading was delayed. However, Petitioner herself contributed to the delay by returning the package unopened to the I.G. even after counsel for the I.G. telephoned Petitioner to state that the addressee's name on the package was an error and that Petitioner should open the mail. See Petitioner's Motion for Reversal at 1.

Based on the foregoing, we find that the ALJ committed no error with respect to the I.G.'s compliance with the timely filing requirements of his order. With respect to service of the I.G.'s motion on Petitioner, we agree with the ALJ that Petitioner's response to what was essentially a simple clerical error - the wrong name on an otherwise properly addressed and timely mailed envelope - was "overdrawn and unrealistic." Order Denying Petitioner's Motion and Revised Schedule for Filing Briefs at 1. Furthermore, even if we had accepted Petitioner's claim that the ALJ erred in denying Petitioner's Motion for Reversal, that error would be harmless. Petitioner suffered no prejudice as a result of any delay caused by the I.G.'s error since the ALJ revised the briefing schedule to compensate for that delay. Absent prejudice, there is no basis for the Board to disturb the ALJ's ruling. 42 C.F.R. § 1005.23.

In addition, even assuming the ALJ could appropriately have applied some sanction to the I.G., reversal of an otherwise lawful exclusion is not listed under 42 C.F.R. § 1005.14(a) as a sanction available to an ALJ in exclusion cases. We also agree with the ALJ that a reversal of the exclusion, assuming it were an available sanction, would be grossly disproportionate to the nature and practical impact of the I.G.'s mistake, especially given the ALJ's extension of the due date for Petitioner's response to the I.G.'s motion.

Petitioner's remaining arguments have no merit.

Petitioner argues here, as she did below, that the Ohio Attorney General's office misled the I.G. to believe that Petitioner was convicted of a felony, and that this "misinformation triggered [the] 5 year exclusion." Petitioner's Continued Motion for Complete Reversal of Charges of Exclusion, April 2, 2008. Since the statutory authority under which Petitioner was excluded recognizes no difference between a felony or misdemeanor conviction, this argument fails on its face. Moreover, the record supports the ALJ's finding that the I.G. was not, in fact, under "any such misapprehension." ALJ Decision at 6. The I.G.'s September 28, 2007 exclusion notice refers to Petitioner's conviction of a criminal offense but does not state that it was a felony offense, and the I.G.'s pleadings below explained that the exclusion was based on Petitioner's conviction of a misdemeanor. I.G. Brief-in-Chief; I.G. Reply at 2. Accordingly, the I.G. was not misled.

Petitioner's appeal alludes to the argument she made below that at the time she pleaded guilty to the misdemeanor offense of attempted Medicaid fraud, she was unaware that the plea would result in her exclusion from participation in Medicare, Medicaid and all other federal health care programs. We find no error in the ALJ's conclusion that, even if Petitioner was ignorant of section 1128(a) of the Act at the time she consented to the plea agreement, her ignorance would not "bar the exclusion." ALJ Decision at 6. The Board has previously held that once accepted by a state court, a plea constitutes a "conviction" supporting exclusion under the Act, regardless of whether the individual excluded was advised of all of the possible consequences of his or her plea. Douglas Schram, R.Ph., DAB No. 1372, at 11 (1992); see also Charles W. Wheeler and Joan K. Todd, DAB No. 1123, at 9 (1990), aff'd, Wheeler v. Sullivan, No. 2:90-0266 (S.D. W.Va. Sept. 26, 1991) (stating that since the record showed that the court accepted the excluded individual's guilty plea, the exclusion must be upheld regardless of whether the plea was "knowingly and willfully made"). Petitioner may not seek to collaterally attack her state court conviction in these exclusion proceedings.

Conclusion

For the reasons above, the ALJ Decision is affirmed.

_____/s/
Leslie A. Sussan

_____/s/
Constance B. Tobias

_____/s/
Sheila Ann Hegy
Presiding Board Member