Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of: Randall Dean Hopp, Petitioner, - v. - Inspector General.	DATE: March 27, 2008 Civil Remedies CR1722 App. Div. Docket No. A-08-57 Decision No. 2166

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Randall Dean Hopp (Petitioner) appealed the January 9, 2008 decision of Administrative Law Judge (ALJ) Steven T. Kessel. Randall Dean Hopp, DAB CR1722 (2008) (ALJ Decision). The ALJ Decision affirmed the determination of the Inspector General (I.G.) excluding Petitioner from participation in Medicare, Medicaid, and all other federal health care programs for five years pursuant to section 1128(a)(2) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(2)).[1] Section 1128(a)(2) requires the exclusion of any individual who "has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service." Section 1128(c)(3)(B) provides that an exclusion pursuant to section 1128(a) must be for a minimum of five years.

[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. Also, a cross reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

The ALJ made two numbered findings of fact and conclusions of law (FFCLs):

> 1. Petitioner's exclusion is mandated by section 1128(a)(2) of the Act.
>
> 2. A five-year exclusion is mandated by the Act.

ALJ Decision at 3, 5.

On appeal, Petitioner takes exception to the second FFCL, arguing that his "right to due process has been violated by" the ALJ's decision to uphold the exclusion. In particular, Petitioner objects to the "delay" of more than three years between the time he entered an Alford plea (February 4, 2004) and the time he was notified by the I.G. of his exclusion (August 31, 2007). In support of his position, Petitioner cites, inter alia, the decision of the U.S. District Court in Connell v. Sec'y of Health and Human Servs., 2007 WL 1266575 (S.D. Ill. Apr. 30, 2007) (reversing and remanding Jeffrey Knute Connell, DAB No. 1971 (2005)). The Connell court, adopting a magistrate judge's report and recommendation, acknowledged that the regulations do not permit an ALJ to consider questions regarding the timing of exclusions but nevertheless remanded the case to the Secretary for fact-finding as to the reasons for a 35-month delay between Connell's criminal conviction and his exclusion pursuant to section 1128(a)(1) of the Act. Id. at *2, 5, 8.[2] Petitioner also states that he "would accept a retro decision" to exclude him "starting in early 2004," pointing out that if the I.G. had initiated the exclusion in 2004, he could resume his career as an emergency room nurse "in 2 more years instead of now having to wait 5 more years." P. Appeal Br. at 2-3 (unnumbered).

Addressing similar arguments below, the ALJ stated:

> . . . I am without authority to consider Petitioner's equitable argument that it is unfair to now exclude him given that several years have elapsed since the date of his conviction and that he has had an exemplary work history [as] a nurse during the intervening period. By regulation I am limited in a case such as this - where the I.G. has imposed an exclusion against Petitioner for

[2] On remand in Connell, the ALJ dismissed the case pursuant to the petitioner's motion to withdraw his hearing request.

> a statutory minimum period - to deciding only whether the I.G. is required by the Act to impose the exclusion.

ALJ Decision at 4-5. The ALJ noted the court's decision in Connell, but stated "that decision notwithstanding, the regulations preclude me from deciding whether Petitioner was denied due process as a consequence of the I.G.'s long and inexplicable delay in excluding him." Id. at 5, n.4.

The Board's standard of review on a disputed issue of law is whether the ALJ's initial decision is erroneous. 42 C.F.R. § 1005.21(h). We conclude that the ALJ did not err in holding that he did not have authority to review the timeliness of the I.G.'s imposition of the exclusion. The applicable regulations provide that when the I.G. has imposed a mandatory five-year exclusion, the ALJ is limited to considering whether there was a basis for imposing the exclusion. 42 C.F.R. § 1001.2007(a)(1)(i), (2). In addition, the statute and regulations set the effective date of an exclusion. Section 1128(c)(1) of the Act provides that an exclusion under section 1128(a) "shall be effective at such time and upon such reasonable notice to the public and to the individual or entity excluded as may be specified in regulations . . . ." The regulations specify that an exclusion "will be effective 20 days from the date of the notice." 42 C.F.R. § 1001.2002(b).[3]

Thus, the Board has repeatedly held that the statute and regulations give an ALJ no authority to adjust the beginning date of an exclusion by applying it retroactively. Thomas Edward Musial, DAB No. 1991, at 4-5 (2005), citing Douglas Schram, R.Ph., DAB No. 1372, at 11 (1992) ("Neither the ALJ nor this Board may change the beginning date of Petitioner's Exclusion."); David D. DeFries, DAB No. 1317, at 6 (1992) ("The ALJ cannot . . . decide when [the exclusion] is to begin."); Richard D. Phillips, DAB No. 1279 (1991) (an ALJ does not have "discretion . . . to adjust the effective date of an exclusion, which is set by regulation."); Samuel W. Chang, M.D., DAB No. 1198, at 10 (1990) ("The ALJ has no power to change . . . [an exclusion's] beginning date," but even if he did, making the exclusion retroactive would present insuperable practical problems); accord Lisa Alice Gantt, DAB No. 2065, at 2-3 (2007) (reiterating the Board's holding in these cases and upholding a mandatory exclusion imposed approximately five years after conviction). In

[3] We cite to the regulations in the 2006 C.F.R., which are unchanged from those in effect during the times at issue here.

Schram, we held that this lack of discretion extends to the Board as well as to the ALJs, and we reiterated that holding in Musial and Gantt. DAB No. 1372, at 11; DAB No. 1991, at 405; DAB No. 2065, at 2-3.

In two recent decisions, Kevin J. Bowers, DAB No. 2143 (2008), and Kailash C. Singhvi, M.D., DAB No. 2138 (2007), the Board again concluded that the ALJ correctly decided that he did not have authority to review the timing of a petitioner's exclusion. DAB No. 2143, at 6-7; DAB No. 2138, at 4-5. In addition to discussing the Board precedent above, the Board cited several court decisions declining to modify exclusions based on plaintiffs' complaints of delay in the notification or imposition of exclusions, finding that the statute and the regulations set no deadlines for the I.G. to act. DAB No. 2143, at 7 and DAB No. 2138, at 6-7, citing Steven R. Caplan, R.Ph. V. Thompson, Civ. No. 04-00251 (D. Haw. Dec. 17, 2004) (affirming Steven R. Caplan, R.Ph., DAB CR1112 (2003)); Seide v. Shalala, 31 F. Supp. 2d 466, 469 (E.D. Pa. 1998) (affirming Charles Seide, DAB CR525 (1998)). In Singhvi, the Board noted the court decision in Connell but concluded that that decision did not compel either reversal of petitioner's exclusion or findings on whether the delay in imposing the exclusion was reasonable since "the court did not itself find the delay unreasonable" and "did not state that it rejected the magistrate judge's acknowledgment that the regulations do not permit an ALJ to consider such questions." DAB No. 2138, at 6. (In Bowers, the Board also noted the Connell court decision although the petitioner did not cite or discuss it on appeal. DAB No. 2143, at 7, n.9.)

Similarly, we conclude here that Connell is not a basis for reversing the ALJ Decision regardless of the I.G.'s failure to explain the reason for the delay in imposing the exclusion on Petitioner.[4]

We note that Petitioner submitted with his notice of appeal an undated, unsigned copy of a document that he identified as his

[4] The other two court decisions cited by Petitioner also do not advance his position. Miller v. DeBuono, 689 N.E.2d 518 (N.Y. 1997), does not raise any issue of delay. Cortlandt Nursing Home v. Axelrod, 66 N.Y.2d 169, 486 N.E.2d 785 (N.Y. 1985), actually undercuts Petitioner's position, stating that "[i]t is settled that the equitable doctrine of laches may not be interposed as a defense against the State when acting in a governmental capacity to enforce a public right or protect a public interest." 66 N.Y.2d at 178.

"expungement." This evidence is not properly admitted into the record since it is not material to our decision. See 42 C.F.R. § 1005.21(f). Petitioner does not appear to dispute the ALJ's conclusion that "[e]xpungement of Petitioner's conviction - should it occur - is not a basis" for finding "the I.G. without authority to exclude him." ALJ Decision at 4. This conclusion was based on section 1128(i)(1) of the Act, which provides that an individual is considered to have been convicted of a criminal offense "regardless of whether the judgment of conviction or other record relating to criminal conduct has been expunged." Petitioner argues that he sought the expungement in reliance on advice by I.G. counsel that he would no longer be excluded if his conviction were expunged. P. Appeal Br. at 3 (unnumbered). Even assuming that he received such advice, however, he could not reasonably rely on it, given the clear language of the statute.

Finally, we note that the I.G. appealed the ALJ's ruling to exclude as untimely two exhibits (I.G. Exhibits 7 and 8) submitted by the I.G. with its reply brief in the proceedings below. I.G. Response Br. at 3-4; ALJ Decision at 2, n.1. The I.G. apparently submitted the exhibits to dispute Petitioner's claim that the conviction that was the basis for his exclusion was the only blemish on his record. It is unnecessary to consider these exhibits in order to uphold the five-year exclusion imposed by the I.G., however. Thus, even were we to find any error in excluding these exhibits, it would be harmless.

Conclusion

Based on the foregoing analysis, we uphold the ALJ Decision, and affirm the ALJ's Findings of Fact and Conclusions of Law.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member