Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Igor Mitreski, M.D.
Docket No. A-15-106
Decision No. 2665
October 30, 2015

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Igor Mitreski, M.D. (Petitioner) appeals a decision by an Administrative Law Judge (ALJ) upholding his exclusion by the Inspector General (I.G.) from participation in all federal health care programs for three years based on his conviction of the misdemeanor offense of aiding and abetting the possession of controlled substances. *Igor Mitreski, M.D.*, DAB CR4124 (2015) (ALJ Decision). The ALJ determined that the I.G. is authorized to exclude Petitioner and that a three-year period of exclusion is reasonable. The Board affirms the ALJ Decision for the reasons set out below.

Legal Background

Section 1128(b) of the Social Security Act (Act)[1] permits the Secretary of Health and Human Services (Secretary) to exclude an individual from participation in all federal health care programs if the individual has been convicted "under Federal or State law, of a criminal offense consisting of a misdemeanor relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." Act § 1128(b)(3). Exclusions under section 1128(b) are for three years "unless the Secretary determines in accordance with published regulations 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). Regulations at 42 C.F.R. § 1001.401 charge the I.G. with exercising this exclusion authority and specify aggravating and mitigating factors that the I.G may consider in setting the period of the exclusion. Section 1001.401(c)(3) states in relevant part: "Only the following factors may be considered as

[1] The current version of the Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssacttoc.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.

mitigating and a basis for shortening the period of exclusion – (i) The individual's or entity's cooperation with Federal or State officials resulted in – . . . (B) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses[.]"

With exceptions not applicable here, an exclusion imposed by the I.G. becomes effective "20 days from the date of the [I.G.'s] notice" of exclusion. 42 C.F.R. § 1001.2002(b).

If, as here, the exclusion is permissive, the individual may request a hearing before an ALJ only on the issues of whether the "basis for the imposition of the [exclusion] exists" and the "length of exclusion is unreasonable." 42 C.F.R. § 1001.2007(a)(1); *see also id.* § 1001.2007(d) ("the basis for the underlying conviction . . . is not reviewable and the individual . . . may not collaterally attack it either on substantive or procedural grounds in this appeal."). Any party dissatisfied with the ALJ's decision may appeal the decision to the Board. *Id*. § 1005.21(a). The Board "will not consider any issue not raised in the parties' briefs or any issue in the briefs that could have been raised before the ALJ but was not." *Id*. § 1005.21(e).

Case Background[2]

Petitioner was employed as a physician by the U.S. Department of Veterans Affairs (VA). During the course of his employment, he used his VA prescription pad and Drug Enforcement Administration registration number to write prescriptions for controlled substances to six individuals who did not have a doctor-patient relationship with him and were not eligible to receive VA benefits. Petitioner pled guilty in the U.S. District Court for the Southern District of Iowa to violating 21 U.S.C. § 844(a) and 18 U.S.C. § 2(a), aiding and abetting simple possession of controlled substances, a misdemeanor. ALJ Decision at 2; I.G. Ex. 2, at 1.

By letter dated February 27, 2015, the I.G. notified Petitioner that, pursuant to section 1128(b)(3) of the Act, he was being excluded from Medicare, Medicaid, and all federal health care programs for three years beginning 20 days from the date of the letter, based on his misdemeanor conviction. ALJ Decision at 1; I.G. Ex. 1, at 1. Petitioner requested an in-person hearing before an ALJ, identifying himself as his only witness. ALJ Decision at 2. The ALJ issued a decision based on the written record, explaining that "there is no need to convene an in-person hearing" because "Petitioner has already offered his written direct testimony as evidence" and the "I.G. did not request cross-examination of Petitioner." *Id*. The I.G. did not offer any witnesses. I.G.'s Informal Br. at 8.

[2] The following background information is drawn from the ALJ Decision and the record before the ALJ and summarized here for the convenience of the reader, but should not be treated as new findings.

The ALJ found that it was undisputed that the I.G. was authorized by section 1128(b)(3) of the Act to exclude Petitioner. ALJ Decision at 2. The ALJ also stated that "[b]y regulation, my review is limited to whether there is a legal basis for exclusion, not whether the I.G. should have exercised his discretion to exclude." *Id.*, citing 42 C.F.R. § 1001.2007(d). Thus, the ALJ stated, "Petitioner's arguments regarding the motivation behind his criminal conduct, the 'victimless' nature of his crime, his cessation of criminal conduct upon realizing he was involved in criminal conduct, and his personal or professional character have no bearing on my decision to sustain Petitioner's exclusion as being legally permissible." ALJ Decision at 2.

The ALJ also addressed Petitioner's argument "that there is a mitigating factor the I.G. did not consider when setting the three-year exclusion" as follows:

> He claims that he "fully cooperated with government officials as part of their investigation and helped verify all non-VA individuals to whom he had prescribed controlled substances for investigation." P. Br. at 5. As a result of his cooperation, Petitioner alleges that additional cases were investigated, although the government determined that all six of the individuals for whom Petitioner wrote prescriptions "had legitimate health needs that required prescription medication," so no further action was taken against them. P. Br. at 5. But Petitioner has not offered any evidence to support his claim. There is no evidence that the government initiated any new or "additional" investigations because of Petitioner's cooperation as the mitigating factor requires. *See* 42 C.F.R. § 1001.401(c)(3)(i)(B). Petitioner bears the burden of persuasion to prove the presence of a mitigating factor, and his unsupported claims fail to meet that burden. *Id*. § 1005.15(b)(1).

Id. at 3.

Finally, the ALJ addressed Petitioner's argument that the effective date of his exclusion should not be March 19, 2015, 20 days after the I.G.'s February 27, 2015 notice of exclusion, but should instead be October 21, 2014, 20 days after an October 1, 2014 letter issued by the I.G. The ALJ found that, contrary to what Petitioner asserted, the "October 1, 2014 letter is not an exclusion notice as it expressly states that the I.G. was, at that time, 'considering excluding' Petitioner"; that "[n]otice of the actual exclusion determination came in the February 27, 2015 letter"; and that "Petitioner's exclusion was correctly made effective 20 days after the notice of the actual exclusion." *Id*. at 3, citing 42 C.F.R. § 1001.2002(b).

Petitioner timely requested review by the Board of the ALJ Decision.

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 in the record as a whole. *Id.*; *see also Guidelines – Appellate Review of Decisions of Administrative Law Judges in Cases to Which Procedures in 42 C.F.R. Part 1005 Apply* (available at http://www.hhs.gov/dab/divisions/appellate/guidelines/procedures.html).

Analysis

On appeal, Petitioner reprises arguments he made before the ALJ regarding "the motivation behind his criminal conduct, the 'victimless' nature of his crime, his cessation of criminal conduct upon realizing he was involved in criminal conduct, and his personal or professional character[.]" *See* Notice of Appeal (N.A.) section I ("Dr. Mitreski's Actions, Which Gave Rise to His Conviction, Do Not Warrant Exclusion"). As already noted, the ALJ concluded that these arguments have no bearing on whether Petitioner's exclusion was legally permissible and that he has no authority to determine whether the I.G. should have exercised his discretion to exclude. *See* ALJ Decision at 2, citing 42 C.F.R. § 1001.2007(d). Petitioner does not identify any error in this conclusion, which is consistent with Board precedent. *See*, *e.g.*, *Donna Rogers*, DAB No. 2381, at 6 (2011). ("Section 1005.4(c)(5) of 42 C.F.R. provides that the ALJ 'does not have the authority to . . . review the exercise of discretion by the [I.G.] to exclude an individual . . . under section 1128(b) of the Act, or determine the scope or effect of the exclusion.' Therefore, the ALJ may not review the I.G.'s decision to impose an exclusion . . . on the ground that the excluded person is a good person or well-thought of in the profession or suffering from the loss of his/her vocation").

Petitioner also takes the position that the length of his exclusion is unreasonable given the totality of the circumstances. N.A. at 4-5. Petitioner argues first that the I.G. incorrectly determined that there is an aggravating circumstance under 42 C.F.R. § 1001.401(c)(2)(i), i.e., the "acts that resulted in the conviction or similar acts were committed over a period of one year or more[.]" Petitioner argues, as he did below, that "his conviction relates to a single prescription, which occurred within the year" and that "the dates that the prescriptions were written (versus filled) were less than a year." *Id*. at 4. This argument has no merit. The regulations provide that an aggravating factor is the basis for lengthening the period of exclusion beyond three years. 42 C.F.R. § 1001.401(c). The I.G. did not seek to impose an exclusion period of more than three years; indeed, the February 27, 2015 notice of exclusion contains no mention of an aggravating factor. *See* I.G. Ex. 1. Furthermore, there is no provision in the regulations for reducing the period of exclusion to less than three years based on the absence of an aggravating factor. Thus,

although the I.G. indicated in its briefing before the ALJ that the aggravating factor in section 1001.401(c)(2)(i) was present (I.G.'s Informal Br. at 7; I.G.'s Reply Br. at 5), the ALJ correctly stated that he "need not address whether the I.G. has established the presence of that aggravating factor[.]" ALJ Decision at 3 n.1.

Next, Petitioner disputes the ALJ's conclusion that Petitioner's identification of all six individuals for whom he wrote prescriptions for controlled substances in violation of federal law did not result in "[a]dditional cases being investigated" within the meaning of the mitigating factor in section 1001.401(c)(3)(i)(B). As already noted, the ALJ found that Petitioner did not offer any evidence that additional cases were investigated and thus did not meet his burden of persuasion to prove the presence of a mitigating factor. ALJ Decision at 3, citing 42 C.F.R. § 1005.15(b)(1). Petitioner reiterates his argument below that his actions resulted in the investigation of additional cases even though "the prosecution determined that there were no other perpetrators since the other individuals involved were not substance abusers or dealers, and had legitimate health care needs that required prescription medication." N.A. at 5; *see also* P.'s Informal Br. at 5. Petitioner's position appears to be that the prosecutors considered whether there was a basis for bringing charges against the individuals for whom he wrote the prescriptions and that this was an adequate basis for finding a mitigating factor under section 1001.401(c)(3)(i)(B). Petitioner's position is not supported by the record and is inconsistent with the regulation.

The Board has previously read a regulation identical to section 1001.401(c)(3)(i)(B) (section 1001.102(c)(3)(ii), which applies to mandatory exclusions under section 1128(a)(1) of the Act) as contemplating "a situation where the target of the original investigation (i.e., the person who later claims that the mitigating factor applies) gives information that results in investigation of a new target or targets." *Marcia C. Smith, a/k/a Marcia Ellison Smith*, DAB No. 2046, at 9 -10 (2006). In *Smith*, the Board found that the petitioner's cooperation with state officials by turning over her Medicaid patient files for review merely expanded the investigation of her own case (involving a felony charge based on false claims for services she had not provided) and concluded that this was not the type of cooperation to which the regulations refers. Here, as in *Smith*, there is no evidence that Petitioner's identification of the six individuals for whom he wrote the prescriptions resulted in anything more than the expansion of the investigation of the case against him. Petitioner does not point to any evidence in the record that law enforcement opened any investigations to pursue the possibility that charges could be brought against any of the individuals he identified. The "mere receipt and evaluation of the information provided during the 'cooperation' cannot itself be viewed as the 'investigation' of an additional case." *Stacey R. Gale*, DAB No. 1941, at 10 (2004) (holding that the mitigating factor in section 1001.102(c)(3)(ii) was not established by the fact that the petitioner gave the state prosecutor investigating her case information regarding alleged acts that might constitute Medicaid fraud by another entity). Accordingly, the ALJ's conclusion that there was no mitigating factor here is free from error.

Petitioner also challenges the ALJ's conclusion that the exclusion was effective March 19, 2015 instead of October 21, 2014, the date for which Petitioner had argued. Petitioner asserts:

> The IG first notified [Petitioner] of its inten[t] to exclude him [on] September 3, 2014, then sent a second notice October 1, 2014. Unfortunately, [Petitioner] did not receive either of these letters and it was not until March 19, 2015, seven months later, that he received his third notice, upon which this exclusion action is based. We do not believe that [Petitioner] should be [excluded] the extra seven months as a result of this delay, which was due to circumstances beyond his control, and request that the exclusion period run 20 days from the date of the IG's October 1, 2015 notice of exclusion. *See* 42 C.F.R. § 1001.2002. The IG notice dated February 27, 2015 was its second notice of exclusion.

N.A. at 5.

Petitioner's argument is unclear. Petitioner appears to dispute the ALJ's finding that the October 1, 2014 notice was only a notice of intent to exclude, asserting that the February 27, 2015 notice was the I.G.'s "second notice of exclusion." That assertion is undercut by the language in the October 1, 2014 notice, which states that the Department of Health and Human Services "is considering excluding you . . . ," provides a 30-day period for Petitioner "to submit any information and supporting documentation you want the [I.G.] to consider before it makes a final determination regarding your exclusion," and concludes by stating that "[o]nce the [I.G.] has made its determination, the [I.G.] will send you a letter notifying you of its decision and, if an exclusion is imposed, of the effective date and length of the exclusion, as well as your appeal rights." P. Ex. 1, at 1-2. In addition, Petitioner seemed to recognize below that the October 1, 2014 notice was only a notice of intent to exclude when he asserted that he did not receive the October 1, 2014 notice and thus did not have the opportunity to provide supplemental information to the I.G. P. Ex. 2, at 1; Mitreski Affidavit at 1.

Petitioner also appears to argue that the I.G. would have imposed the exclusion earlier if Petitioner had received the October 1, 2014 notice or a September 3, 2014 notice and that Petitioner should not be penalized for a delay due to circumstances beyond his control.[3] (The alleged delay would have been five months, not seven months as Petitioner states.) Since Petitioner did not raise this argument before the ALJ, it is not properly before us.

[3] There is no document dated September 3, 2014 in the record, nor do any of the parties' exhibits refer to such a document.

See 42 C.F.R. § 1005.21(e). In any event, it is well-established that the ALJs and the Board lack authority to review the timing of a petitioner's exclusion. *See, e.g.*, *Kevin J. Bowers*, DAB No. 2143, at 5-7 (2008), *aff'd*, *Bowers v. Inspector Gen. of the Dep't of Health & Human Servs*., No. 1:08-CV-159, 2008 WL 5378338 (S.D. Ohio Dec. 19, 2008).

Finally, Petitioner argues that the ALJ erred in denying his request for an in-person hearing to present his testimony, stating that, at a hearing, he "would have been able to provide additional information regarding this matter, particularly related to his cooperation with federal investigators." N.A. at 5. We conclude that the ALJ reasonably determined that there was no need for an in-person hearing under the circumstances of this case. The ALJ's Order and Schedule for Filing Briefs and Documentary Evidence stated that "if a party requests an in-person hearing, the party must submit as an exhibit the written direct testimony of any proposed witness in the form of an affidavit or sworn declaration" and that the ALJ would determine whether a hearing is necessary after receiving the parties' submissions. Order, 2nd page. Petitioner submitted his written direct testimony in the form of an affidavit. The I.G. submitted no written direct testimony and did not ask to cross-examine Petitioner. *See* I.G.'s Informal Br. at 8; I.G.'s Reply Br. As the Board has previously observed, the federal courts "have allowed, and even strongly encouraged, written direct testimony in a variety of proceedings. Since it is offered under oath, [written direct testimony] is generally no less credible in most instances than oral testimony in the hearing room, as long as the witness is subject to cross-examination." *Pacific Regency Arvin*, DAB No. 1823, at 7- 8 (2002), citing *Kuntz v. Sea Eagle*, 199 F.R.D. 665 (D. Haw. 2001). Thus, where the opposing party does not seek to cross-examine any witness for whom written direct testimony has been submitted, there is generally no reason to proceed with an in-person hearing. Petitioner did not offer any reason here. Petitioner's affidavit states with respect to the issue of his cooperation only that he "fully cooperated with government officials as part of their investigation[.]" Mitreski Affidavit at 2. However, Petitioner does not argue that he could not have included in his affidavit all of the information about this and any other issues as to which he wished to offer testimony. Accordingly, the ALJ's denial of Petitioner's request for an in-person hearing was not error.

Conclusion

For all of the foregoing reasons, we sustain the ALJ Decision.

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member