Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Michael D. Miran, Esta Miran, & Michael D. Miran, Ph.D. Psychologist P.C.
Docket No. A-12-56
Decision No. 2469
July 12, 2012

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Michael D. Miran, Esta Miran, and their corporation, Michael D. Miran, Ph.D. Psychologist P.C. (Miran P.C.) (collectively, Petitioners), appeal the March 6, 2012 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes. *Michael D. Miran, et al.*, DAB CR2512 (2012) (ALJ Decision). In that decision, the ALJ upheld the Inspector General's (I.G.'s) decision to exclude the Mirans and Miran P.C. from participating in Medicare, Medicaid, and all federal health care programs for 13 and 14 years, respectively. Petitioners challenge both the ALJ's determination that they are subject to exclusion and her conclusion that the periods of exclusion imposed by the I.G. are within a reasonable range. We affirm the ALJ Decision.

Applicable Law

Section 1128(a)(1) of the Social Security Act (Act)[1] requires the Secretary of Health and Human Services (Secretary) to exclude from participation in all federal health care programs any "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."

Section 1128(c)(3)(B) of the Act provides for a minimum exclusion period of five years, but the I.G. may lengthen the exclusion period if specific aggravating factors are present. 42 C.F.R. § 1001.102(b). If an aggravating factor is established, certain enumerated mitigating factors may be considered to reduce the exclusion to a period of not less than five years. *Id.* § 1001.102(c).

[1] The current version of the Act is available at http://www.socialsecurity.gov/OP_Home/ssactissact.htm. On this website, each section of the Act contains a reference to the corresponding chapter and section in the United States Code.

Factual Background[2]

In 2009 Petitioners were indicted on numerous criminal charges in Monroe County court in New York. I.G. Ex. 8. In July 2010 Michael D. Miran pled guilty to second degree offering a false instrument for filing, and Esta Miran pled guilty to first degree offering a false instrument for filing. Specifically, the Mirans admitted to knowingly submitting to the New York State Medicaid program an invoice for group psychotherapy that contained false information. ALJ Decision at 2-3; I.G. Exs. 2, 4, 9, 10. The Mirans' corporation, Miran P.C., pled guilty to second degree grand larceny and admitted to knowingly submitting numerous false Medicare claims over a three-year period. ALJ Decision at 2-3; I.G. Exs. 6, 11. In their plea agreements, Petitioners agreed to be jointly and severally liable for $257,946.93 in restitution to the New York State Medicare Fraud Control Unit Restitution Fund, repaying $114,647.21 to Medicaid and $143,299.72 to Medicare. ALJ Decision at 6; I.G. Exs. 9-11. The court accepted their pleas and entered judgment against them. ALJ Decision at 2; I.G. Exs. 2, 4, 6, 9-11.

The I.G. subsequently notified Petitioners that they were excluded from participation in all federal health care programs pursuant to section 1128(a)(1) of the Act. ALJ Decision at 2; I.G. Exs. 1, 3, 5. Petitioners appealed the exclusion by filing a request for an ALJ hearing. The parties later agreed that an in-person hearing was unnecessary, so the ALJ Decision was based solely on the parties' written submissions. ALJ Decision at 3.

The ALJ Decision

An individual or entity excluded by the I.G. may request a hearing before an ALJ on two issues: (1) whether there is a basis for imposing the exclusion, and (2) whether the "length of exclusion is unreasonable." 42 C.F.R. § 1001.2007(a)(1). Petitioners raised both issues before the ALJ.

The ALJ first concluded that Petitioners were convicted of program-related crimes within the meaning of section 1128(a)(1) of the Act, so they must be excluded from program participation for at least five years. ALJ Decision at 3, 5. In so ruling, the ALJ rejected Petitioners' arguments that they had not been "convicted" under this section because the New York Attorney General allegedly lacked authority to prosecute them and that their convictions are not final while their appeal on this jurisdictional issue remains pending. *Id.* at 4-5.

[2] Background information is drawn from the ALJ Decision and the record before her and is not intended to substitute for her findings. We note that, as Petitioners point out, the ALJ erroneously found that both Mirans are clinical psychologists. ALJ Decision at 1-2. According to Petitioners, although Michael D. Miran is a clinical psychologist, Esta Miran has a doctorate in Art and Education. P. Br. at 2. Esta Miran's profession has no bearing on her exclusion, however, so the ALJ's error is harmless.

The ALJ then evaluated the reasonableness of Petitioners' periods of exclusion. She found that the I.G. had established two aggravating factors that justified "significantly increasing" all three Petitioners' periods of exclusion from the mandatory five-year minimum. ALJ Decision at 6. First, because Petitioners conceded in their plea agreements that Medicare and Medicaid paid them $257,946.93 to which they were not entitled and because they agreed to jointly and severally repay that amount in restitution, the ALJ found that Petitioners' actions resulted in financial losses to Medicare and Medicaid "of $5,000 or more." 42 C.F.R. § 1001.102(b)(1). Second, because the New York State Office of the Medicaid Inspector General excluded Petitioners from participating in the State Medicaid program based on their convictions, she determined that Petitioners were the subjects of "other adverse actions" by a state agency based on the same circumstances that justified their federal program exclusion. *Id.* § 1001.102(b)(9).

In addition, the ALJ determined that the I.G. had established a third aggravating factor with regard to Miran P.C. that warranted adding at least an additional year to its period of exclusion. ALJ Decision at 6. The corporation admitted in its plea agreement that its criminal conduct lasted for three years, so the acts that resulted in its conviction were "committed over a period of one year or more." *Id.*; 42 C.F.R. § 1001.102(b)(2).

Finally, the ALJ found that Petitioners failed to establish any mitigating factors that justified decreasing their extended periods of exclusion. ALJ Decision at 7. Accordingly, she sustained the exclusion periods as reasonable, noting that "Petitioners' crimes demonstrate that they present significant risks to the integrity of health care programs." *Id.*

Analysis

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

1. <u>The ALJ did not err in concluding that Petitioners were convicted of crimes that subject them to exclusion under section 1128(a)(1).</u>

As they did before the ALJ, Petitioners assert that they are not subject to exclusion under section 1128(a)(1). They maintain that the New York Attorney General lacked jurisdiction to prosecute them because, they say, they provided federal Medicare services, not primarily state Medicaid services. Petitioners also contend that the rationale used to prosecute them is not part of any state or federal law and in fact conflicts with the Medicare statutes and regulations. P. Br. at 3-5; P. Reply Br. (Part 1) at 9.

The ALJ correctly refused to entertain these arguments as impermissible collateral attacks on the underlying convictions. ALJ Decision at 5. In an exclusion appeal, an individual or entity excluded from program participation based on a criminal conviction, civil judgment, or other prior determination where the facts were adjudicated and a final decision was made is barred from collaterally attacking the basis for that underlying decision "on substantive or procedural grounds." 42 C.F.R. § 1001.2007(d). The regulation's prohibition on collateral attacks recognizes that it is "the fact of the conviction which causes the exclusion. The law does not permit the Secretary to look behind the conviction." *Peter J. Edmonson*, DAB No. 1330, at 4 (1992). Petitioners' plea agreements each acknowledged that the "plea agreement in this matter will be a complete and final disposition of the matter." I.G. Exs. 9, 10, 11. Petitioners nonetheless erroneously suggest that they are not making a collateral attack because they are not seeking to overturn their criminal convictions in these proceedings. P. Reply Br. (Part 2) at 2nd page. Although Petitioners did not ask the ALJ or this Board to reverse their convictions, they seek reversal of their exclusions based on what they perceive as deficiencies in the convictions. This constitutes a collateral attack on the basis underlying the convictions.

Petitioners also argue that the ALJ erred in concluding that they have been "convicted" within the meaning of section 1128(a)(1). In their plea agreements, Petitioners reserved the right to appeal the denial of their motion to dismiss the indictment based on their contention that the Attorney General did not have authority to prosecute them. I.G. Exs. 9-11. Their appeal is now pending. Petitioners argue that their pleas were "conditional," so their convictions are not yet final and they cannot yet be subject to exclusion under section 1128(a)(1). P. Br. at 5-6; P. Reply Br. (Part 1) at 4-7.

The ALJ did not err in concluding that Petitioners' appeal has no impact on the status of their convictions for purposes of section 1128(a)(1). As noted in the ALJ Decision, certificates of conviction in the record confirm that the court accepted Petitioners' pleas and entered judgments against them. ALJ Decision at 5, citing I.G. Exs. 2, 4, 6. Under the Act, an individual or entity has been "convicted" of a criminal offense if a judgment of conviction has been entered, "regardless of whether there is an appeal pending . . ." Act § 1128(i)(1). The Act also provides that an individual or entity has been convicted when a court has accepted that individual or entity's guilty plea. *Id.* § 1128(i)(3). Petitioners do not take exception to the ALJ's findings that their pleas were accepted and judgments entered against them. Nor do Petitioners point to anything in the text or legislative history of the Act that supports their assertion that it matters whether the plea is "conditional." Indeed, a Senate committee report regarding the bill that provided the basis for the text of section 1128(i) explains that the bill "*broadly defines* the term 'conviction' for the purposes of both the mandatory and permissive exclusions under section 1128." S. Rep. No. 109, 100th Cong., 1st Sess. (1987), *reprinted in* 1987 U.S.C.C.A.N. 682, 694 (emphasis added). Moreover, the Act's implementing regulations

provide that an individual or entity "will be reinstated" into participation in federal health care programs retroactive to the effective date of an exclusion if the exclusion is based on a conviction that is reversed or vacated on appeal. 42 C.F.R. § 1001.3005(a)(1). There would be no need for such a provision if exclusions were stayed while a court appeal is ongoing.

2. The ALJ did not err in concluding that the exclusion periods imposed by the I.G. fall within a reasonable range.

Petitioners challenge the ALJ's conclusion that the I.G. imposed reasonable periods of exclusion. They take issue with the ALJ's finding that there were two aggravating factors that justified increasing the exclusions of both the Mirans and Miran P.C. and contend that the ALJ failed to consider special mitigating circumstances.

Petitioners argue that the ALJ erred in accepting the I.G.'s position that the amount they agreed to pay as restitution in their plea agreements – $257,946.93 – may be counted as financial loss to Medicare and Medicaid for purposes of extending their exclusions under 42 C.F.R. § 1001.102(b)(1). They assert that this figure is unreliable because it was calculated using laws they say were "created by" the New York Attorney General. P. Br. at 8; P. Reply Br. (Part 2) at 3rd page. Petitioners also argue that the ALJ should have considered the amount it will cost taxpayers to pay for Medicare services for their former patients, who they say will need to be hospitalized now that the patients are not in Petitioners' care. According to Petitioners, it will cost $200,000 a year to hospitalize just one of their patients. P. Br. at 7-8.

The ALJ's finding that the I.G. proved that the acts resulting in Petitioners' conviction, or similar acts, resulted in financial loss of $5,000 or more to Medicare and state health programs is supported by substantial evidence. The ALJ correctly determined that the amount of restitution a petitioner agreed to pay has long been considered a reasonable measure of program loss. *See Craig Richard Wilder*, DAB No. 2416, at 8 (2011). In addition, Petitioners' attempt to contest the restitution figure is another impermissible collateral attack under 42 C.F.R. § 1001.2007(d) since the plea agreement was a final disposition of that matter, as well.[3] Even if excluding Petitioners would, as they allege, increase program costs, that fact is irrelevant in determining the amount of financial loss to the programs caused by the acts for which Petitioners were convicted or similar acts, and is not a basis for finding that any of the mitigating factors enumerated in the regulations was present. *See* 42 C.F.R. § 1001.102(c).

[3] With their reply brief on appeal, Petitioners submitted additional evidence to support their assertions about the expenses taxpayers will incur to cover alternative treatments for Petitioners' former patients and other arguments. But in an earlier order the Board specifically denied Petitioners' request to make such submissions based on Petitioners' failure to offer "reasonable grounds" for not submitting the evidence to the ALJ. *See* 42 C.F.R. § 1005.22(f); Board Ruling of June 4, 2012. Thus, as the Board further notified Petitioners in a letter dated June 7, 2012, it will not consider the additional evidence.

Petitioners also argue that the ALJ erred in finding that their exclusion from the New York State Medicaid program constituted another "adverse action" that merited an extended exclusion under 42 C.F.R. § 1001.102(b)(9). As Petitioners did before the ALJ, they maintain that the jurisdictional problems that plague their criminal convictions also impact the State Medicaid exclusion. They also maintain that this exclusion is invalid because it was not based on any independent investigation by the New York State Office of the Medicaid Inspector General. P. Reply Br. (Part 2) at 3rd page. The ALJ correctly rejected Petitioners' arguments as collateral attacks that can be considered only in the State agency's own review process. ALJ Decision at 6.

Petitioners do not dispute that, if the Board were to uphold the ALJ's finding that the two aggravating factors discussed above are present, these factors are adequate to support the 13-year exclusions imposed on the Mirans. Petitioners do not contest the ALJ's finding that a third aggravating factor – length of criminal conduct – was present or dispute her conclusion that it justified an additional year of exclusion for Miran P.C. Accordingly, we conclude that the proposed 13- and 14-year periods of exclusion fall within a reasonable range.

Conclusion

Based on the preceding analysis, we affirm the ALJ Decision.

/s/
Stephen H. Godek

/s/
Leslie A. Sussan

/s/
Judith A. Ballard
Presiding Board Member