Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Janine L. Wright
Docket No. A-13-107
Decision No. 2553
December 20, 2013

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Janine L. Wright, Petitioner, a speech language pathologist, appeals the July 26, 2013 decision of an administrative law judge (ALJ) sustaining Petitioner's exclusion from participation in Medicare, Medicaid, and all federal health care programs. Janine L. Wright, DAB2872 (2013) (ALJ Decision). The Inspector General (I.G.) excluded Petitioner for 10 years under section 1128(a)(1) of the Social Security Act (Act) based on her conviction of felony Medicaid fraud. The ALJ found that a 10-year exclusion was within a reasonable range based on the presence of three aggravating factors and the absence of any mitigating factor that would justify decreasing the period of exclusion. On appeal, Petitioner argues principally that her cooperation with government officials constitutes a mitigating factor and claims she did not make this argument before the ALJ because she did not have access to the applicable regulation.

For the reasons discussed below, we conclude that Petitioner has not shown that her alleged cooperation constitutes a mitigating factor within the meaning of the regulation and that her other arguments have no merit. Accordingly, we sustain the I.G.'s exclusion of Petitioner for 10 years.

Applicable Legal Authority

Section 1128(a)(1) of the Act requires the Secretary of Health and Human Services to exclude from participation in Medicare, Medicaid, and all 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 [[e.g., Medicaid]." An exclusion imposed under section 1128(a) must be for a minimum period of five years. Act § 1128(c)(3)(B).[1]

[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.

The regulation at 42 C.F.R. § 1001.102 specifies aggravating and mitigating factors the I.G. may consider in setting the period of the exclusion. Section 1001.102(b) lists the factors that "may be considered to be aggravating and a basis for lengthening the period of exclusion[.]" If the I.G. applies any of the aggravating factors to increase the period of exclusion beyond five years, section 1001.102(c) lists three mitigating factors that may be considered and provide a basis for reducing the period of exclusion to no less than five years.

An excluded individual may request a hearing before an ALJ, but only on the issues of whether the I.G. had a basis for the exclusion and whether "[t]he length of exclusion is unreasonable." 42 C.F.R. §§ 1001.2007(a), 1005.2(a). If the exclusion is based on the existence of a criminal conviction by a federal, state or local court, "the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal." 42 C.F.R. § 1001.2007(d). Any party dissatisfied with the ALJ's decision may appeal to the Board. 42 C.F.R. § 1005.21.

Standard of Review

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

The ALJ Decision

The ALJ made the following lettered findings of fact and conclusions of law (FFCLs):

A. Petitioner must be excluded from program participation, because she was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program within the meaning of section 1128(a)(1).

B. Based on the aggravating factors present in this case, the ten-year exclusion falls within a reasonable range.

C. No mitigating factors justify decreasing the period of exclusion.

ALJ Decision at 2-4.

Analysis

I. The ALJ's conclusion that Petitioner must be excluded under section 1128(a)(1) based on her conviction is supported by substantial evidence and free of legal error.

Before the ALJ, Petitioner did not dispute that she was convicted in court of submitting false claims to Medicaid and to managed care organizations that serve Medicaid recipients. ALJ Decision at 1. The ALJ concluded that Petitioner must be excluded from program participation based on her conviction. ALJ Decision at 3, FFCL A. On appeal, Petitioner does not dispute this conclusion. Indeed, Petitioner acknowledges that "unless and until the conviction is overturned, the Inspector General is mandated by law to exclude the Appellant. . ." P. Br. at 4 (emphasis in original). We therefore uphold FFCL A without further discussion.

II. The ALJ's conclusion that a 10-year exclusion is within a reasonable range based on the presence of three aggravating factors is supported by substantial evidence and free of legal error.

The ALJ concluded that a 10-year period of exclusion was within a reasonable range based on the presence of three aggravating factors. ALJ Decision at 3, FFCL B. The ALJ found that three of the aggravating factors listed in section 1001.102(b) were present here: program financial loss (section 1001.102(b)(1)); duration of crime (section 1001.102(b)(2)); and incarceration (section 1001.102(b)(5)). *Id*. at 4. Petitioner does not dispute that these aggravating factors were present here. Nor does she directly dispute the ALJ's conclusion that a 10-year exclusion was reasonable based on these aggravating factors. However, Petitioner suggests that 10 years might be an unreasonable period by asserting that the amount of restitution, which was the basis for the ALJ's finding of an aggravating factor under section 1001.102(b)(1), has been adjusted downward. P. Reply Br. at 4. We reject Petitioner's suggestion that the aggravating factor of financial loss should have been given less weight by the ALJ.

Section 1001.102(b)(1) sets out the following aggravating factor: "The acts resulting in the conviction, or similar acts, that caused, or were intended to cause, a financial loss to a Government program or to one or more entities of $5,000 or more. . . ." In finding that this aggravating factor was present, the ALJ stated:

> Petitioner['s] actions resulted in program financial losses more than ten times greater than the $5,000 threshold for aggravation. The court ordered her to pay $59,570.25 in restitution to the state Medicaid program. I.G. Ex. 3. Restitution has long been considered a reasonable measure of program losses. . . . Because the

> financial losses were significantly in excess of the threshold amount for aggravation, the I.G. may justifiably increase significantly Petitioner's period of exclusion. . . .

ALJ Decision at 4. According to Petitioner, on September 11, 2013, the trial judge reduced the amount of restitution she was required to pay from $59,570.25 to $57,676.44. P. Reply Br. at 4. As the ALJ noted, the threshold for this aggravating factor is $5,000. Thus, this aggravating factor would still be present even if the amount of restitution was reduced as Petitioner alleges. Moreover, the ALJ found the amount significant because it was "more than ten times greater than" the $5,000 threshold. Since that is also true of the reduced amount alleged by Petitioner, the alleged reduction does not undercut the ALJ's conclusion that a 10-year exclusion was reasonable based on the aggravating factors.

We therefore uphold FFCL B.

III. The ALJ's conclusion that no mitigating factors justify decreasing the period of exclusion is free of legal error.

The regulations recognize three mitigating factors:

> (1) The individual or entity was convicted of 3 or fewer misdemeanor offenses and the entire amount of financial loss . . . to Medicare of any other Federal, State or local governmental health care program due to the acts that resulted in the conviction, and similar acts, is less than $1,500;
> (2) The record in the criminal proceedings, including sentencing documents, demonstrates that the court determined that the individual had a mental, emotional or physical condition before or during the commission of the offense that reduced the individual's culpability; or
> (3) The individual's or entity's cooperation with Federal or State officials resulted in—
> (i) Others being convicted or excluded from Medicare, Medicaid and all other Federal health care programs,
> (ii) Additional cases being investigated or reports being issued by the appropriate law enforcement agency identifying program vulnerabilities or weaknesses, or
> (iii) The imposition against anyone of a civil money penalty or assessment under part 1003 of this chapter.

42 C.F.R. § 1001.102(c)(1)-(3).

The ALJ found that there were no mitigating factors that justified reducing the period of exclusion. ALJ Decision at 5, FFCL C. The ALJ explained her finding as follows:

> Obviously, because Petitioner was convicted of a felony that involved program financial losses many times greater than $1,500, the first factor does not apply here. Nor does Petitioner claim any mental, physical, or emotional condition that reduced her culpability. She does not allege that she cooperated with government officials.

Id. at 4.

On appeal, Petitioner asserts that she "did not have the opportunity" to address the mitigating factors before the ALJ and asks the Board to consider her argument that mitigating factors were present here. According to Petitioner, she "did not have access" to information concerning the meaning of the term "mitigating factors" until the ALJ issued her decision (which lists the mitigating factors). P. Notice of Appeal at 2; P. Br. at 2. In a letter to the staff attorney assisting the ALJ accompanying Petitioner's short-form (informal) brief, Petitioner, who was incarcerated and appeared before the ALJ *pro se*, stated that she could not respond to the question whether she believed there were any mitigating factors in her case because she did not have a copy of section 1001.102(c), the regulation referred to in the question, and requested a copy of the regulation.[2] 5/4/13 letter at 3-4. The record for the ALJ Decision includes a copy of a May 15, 2013 letter to Petitioner from the staff attorney enclosing a copy of section 1001.102(c). Petitioner denies receiving that letter. P. Reply Br. at 2. However, it is immaterial whether Petitioner received the letter since, as we discuss below, Petitioner has not alleged any circumstances that would constitute a mitigating factor.

Petitioner now takes the position that the mitigating factor specified in section 1001.102(c)(3) is present here, stating:

> I was in cooperation with government officials throughout the investigation . . . and I also participated in a trial and post-conviction hearings. Also, shortly after I was indicted and arrested in public, several other cases or indictments for Malicious Fraud were announced in the Metro Atlanta area for amounts 3-10 times greater than the amount that I was indicted for, for <u>my</u> conviction. I can only assume that there was an area wide investigation but after my conviction was announced in February of 2012, at least <u>five</u> other cases were announced and they

[2] On February 28, 2013, the ALJ issued an order directing the parties to "answer the questions on their respective short-form briefs" attached to the order and provide any supporting documentation. Order and Schedule for Filing Briefs and Documentary Evidence at 2. The Petitioner's short-form brief asked whether Petitioner believes "that a mitigating factor or factors exist(s) that support(s) reducing the length of your exclusion (before answering this question, read the list of potentially mitigating factors that is set forth at 42 C.F.R. § 1001.102(c))?".

> will likely go to trial within the next year. I believe that my case was used to "fuel" and process other indictments. I was not given credit for my participation but I feel that it should be considered as a Mitigating Factor for the appeal of my exclusion . . . .

P. Br. at 3-4 (emphasis in original). Petitioner cites an archive of press releases by the Attorney General of Georgia, without identifying any particular press release, as proof that the indictments were issued. *Id*. at 3, citing http://law.ga.gov/press-releases. Petitioner also states that she has "proof" that she "was in cooperation with law enforcement for pre-trial, trial and post-conviction matters," including "e-mail communication and written documentation" of her participation in the investigation of her case, but provides no supporting documentation. P. Reply Br. at 3.

Even if Petitioner had made these allegations in the proceeding below, the ALJ could not have concluded there was a mitigating factor under section 1001.102(c)(3). Petitioner does not allege that others were convicted or excluded or that a civil money penalty was imposed as a result of her cooperation. Thus, only section 1001.102(c)(3)(ii) is potentially applicable here. As the Board has previously stated, section 1001.102(c)(3)(ii) "requires an individual to demonstrate that a law enforcement official actually exercised his or her discretion and began an investigation or issued a report as a result of the individual's cooperation." *Stacey R. Gale*, DAB No. 1941, at 10 (2004) (emphasis added). In addition, it is "entirely" a petitioner's "burden to demonstrate that her cooperation with a state or federal official resulted in additional cases being investigated." *Id*. at 9. The I.G., conversely, does not have the responsibility to substantiate that any cooperation by a petitioner did not have the results required by the regulation. *Id.*

Petitioner fails to meet her burden. Petitioner does not describe the nature of her alleged cooperation in the investigation of her case or explain how that cooperation was connected to the alleged subsequent indictments. Instead, Petitioner merely asserts her "belie[f]" that her case "was used to 'fuel' and process other indictments." Accordingly, even if Petitioner could substantiate that additional cases were investigated following her indictment or conviction, Petitioner has not provided any basis for finding that this resulted from her alleged cooperation. In addition, it is unclear how Petitioner's participation in the proceedings in her own criminal case qualifies as "cooperation" within the meaning of the regulation, much less how it affected other individuals. As the Board has previously observed, "all the parts of section 1001.102(c)(3) . . . refer to cooperation that affects persons other than the target of the original investigation." *Marcia C. Smith*, DAB No. 2046, at 11 (2006). Thus, we conclude that there was no mitigating factor under section 1001.102(c)(3).

Petitioner also asks that the Board consider her Habeas Corpus Petition as a mitigating factor. P. Notice of Appeal at 2-3; P. Br. at 5, citing P. Ex. 4 (court order setting hearing on petition for habeas corpus). Petitioner provides no explanation other than to state that her Habeas Corpus Petition "is a civil action that is independent of the appellate process" by which she seeks to challenge her conviction.[3] P. Notice of Appeal at 3; P. Br. at 5. Petitioner does not claim that any of the three mitigating factors recognized by the regulation encompasses a pending habeas corpus petition; nor is there a factor that even arguably does so. Thus, even if the fact that Petitioner has petitioned for a writ of habeas corpus had some bearing on the reasonableness of the length of the exclusion (and we do not so find), the regulation would not permit a reduction of the length of the exclusion on that basis.

We therefore uphold FFCL C.

Conclusion

For the foregoing reasons, we sustain the imposition of a 10-year exclusion on Petitioner.

/s/
Judith A. Ballard

/s/
Stephen M. Godek

/s/
Sheila Ann Hegy
Presiding Board Member

[3] This appears to be an attempt to distinguish the Habeas Corpus Petition from the pending appeals of her conviction on which Petitioner relied in arguing before the ALJ that she was not subject to exclusion. The ALJ rejected that argument, which Petitioner does not pursue on appeal, on the ground that the "regulations specifically preclude any collateral attack on an underlying conviction." ALJ Decision at 2-3, citing 42 C.F.R. § 1001.2007(d). Even if a petition for habeas corpus does not constitute a collateral attack on a conviction within the meaning of section 1001.2007(d), it does not follow that it qualifies as a mitigating factor.