

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Charles Brian Griffin
Docket No. A-17-17
Request for Reconsideration of Decision No. 2733
Ruling No. 2017-3
May 10, 2017

RULING ON REQUEST FOR RECONSIDERATION

Petitioner Charles Brian Griffin asks the Board to reconsider its *Determination to Decline Review of Administrative Law Judge Decision*, Decision No. 2733 (Sept. 19, 2016). In Decision No. 2733, the Board determined that it need not render a separate decision and, accordingly, summarily affirmed the administrative law judge (ALJ)'s decision, *Charles Brian Griffin*, Decision No. CR4602 (May 5, 2016) (ALJ Decision). In his decision, the ALJ upheld the Inspector General (I.G.)'s determination to exclude Petitioner from participating in all federally-funded health care programs under section 1128(a)(4) of the Social Security Act (Act) based on his felony conviction of a crime related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The ALJ also determined that section 1128(c)(3)(B) of the Act required Petitioner to be excluded for a minimum of five years. The ALJ further determined that extending the exclusion period to ten years was not unreasonable based on the presence of two aggravating factors (i.e., the sentence imposed included incarceration and Petitioner has been the subject of any other adverse action by a federal, state, or local government agency or board based on the same circumstances on which the exclusion was imposed, under 42 C.F.R. § 1001.102(b)(5) and (b)(9)) and the absence of proof of a mitigating factor under 42 C.F.R. § 1001.102(c) that may be a basis for reducing the ten-year exclusion to no less than the mandatory minimum period of exclusion of five years.

For the reasons explained below, the Board rejects the request for reconsideration.

Decision No. 2733

In his appeal of the ALJ Decision, Petitioner reasserted an argument he made below that the record proved the existence of a mitigating factor under 42 C.F.R. § 1001.102(c)(2) – that the judge who presided over the criminal trial sentencing hearing determined that Petitioner's culpability was reduced, mainly due to his gambling addiction. As the Board stated in Decision No. 2733, however, Petitioner merely averred that the sentencing judge had made such a determination, relying on statements allegedly made during the

sentencing hearing. The transcript of the sentencing hearing was not in the record of the ALJ proceedings and, on appeal, Petitioner did not request or make the required showing to have the transcript admitted and considered as additional evidence. The Board therefore determined that it could not consider whether the alleged statements from the transcript constituted additional evidence requiring remand. Decision No. 2733, at 1 n.1, citing 42 C.F.R. § 1005.21(f) (if a party shows that evidence not presented to the ALJ is relevant and material and that there were reasonable grounds for not presenting it to the ALJ, the Board may remand the case to the ALJ for consideration of the evidence).

Request for Reconsideration

Petitioner, appearing pro se, asks the Board to reconsider Decision No. 2733. He submitted a copy of the transcript with his one-page reconsideration request. He states that he did not submit the transcript “prior to this point” because he did not know that he should have submitted it to the ALJ until after he received the ALJ Decision that purportedly set out the “outline of steps [that] needed to be taken in order to show proof of the mitigating factor” in 42 C.F.R. § 1001.102(c)(2). He also states that he failed to appreciate “what was necessary” because he does not have a “strong legal background.” Petitioner also states that when he appealed the ALJ Decision he “acted under the incorrect impression that the [transcript] would be able to be accessed since it is of public record and therefore not needed to be entered as additional evidence for consideration.”

Discussion

The regulations in 42 C.F.R. Part 1005 governing appeals of exclusions do not expressly authorize the Board to reopen and reconsider its decisions or vest the Board with continuing jurisdiction over a case after it has issued its decision. The Board has recognized, however, that a decision-maker generally has inherent authority to reopen and reconsider a decision even in the absence of express authorization by procedures. *See Mark B. Kabins, M.D.*, Ruling No. 2012-1 on Request for Reconsideration of Decision No. 2410, at 3 (Oct. 14, 2011). As in *Kabins*, we apply here the procedures applicable to many types of disputes heard by the Board, which provide for reconsideration of a Board decision upon prompt allegation of clear error of fact or law. *Id.*, citing 45 C.F.R. § 16.13. Reopening a Board decision ““is not a routine step”” in the process of appealing an ALJ decision, but “[r]ather, it is the means for the parties and the Board to point out and correct any errors that make the [Board’s] decision clearly wrong.”” *Id.*, quoting *Highland Pines Nursing Home, Ltd.*, Ruling No. 2011-4 on Petition to Reopen Decision No. 2361, at 2 (Feb. 25, 2011).

Thus, although the Board may reopen a decision, it does so only to determine whether there is a clear error of law or fact in the decision, not to permit relitigation of the case based on new evidence. Indeed, even during the proceedings on appeal of an ALJ decision, the Board may admit evidence not presented to the ALJ only if it is “relevant and material” and “there were reasonable grounds for the failure to adduce such evidence” before the ALJ. 42 C.F.R. § 1005.21(f). As we explain below, even assuming we had authority to admit evidence now (which we do not), Petitioner has not shown reasonable grounds for not submitting the transcript earlier.

Petitioner’s explanation of why he did not submit the transcript to the ALJ is not convincing. In his request for hearing and briefs submitted to the ALJ, Petitioner himself repeatedly advanced as his chief argument that the exclusion period must be reduced to the mandatory minimum five years based on the sentencing judge’s determination that Petitioner’s culpability was reduced. In light of this argument below, Petitioner cannot plausibly maintain before the Board that he did not know that the transcript was evidence he should have submitted to the ALJ to support his assertion that the sentencing judge found grounds for reduced culpability.

We also note that, on November 16, 2015, the ALJ held a telephone prehearing conference with Petitioner (appearing pro se) and the I.G.’s counsel present. As stated in the ALJ’s November 17, 2015 Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence (Order) summarizing the discussion during the conference, the ALJ told Petitioner that he, “represented [by an attorney] or not[,]” would be “subject to the same statutes, regulations, procedural rules, and schedules” to which the I.G. would be held (Order at 3), and “bears the burden of persuasion on any . . . mitigating factors” (*id.* at 4), and that “[t]he record . . . will consist only of the documents submitted as exhibits by the parties and admitted to the record by [his] order,¹ the pleadings filed, and the transcript from any evidentiary hearing conducted.” *Id.* at 5. Therefore, Petitioner had early notice that the ALJ would decide the appeal based *only* on the record as developed during the ALJ proceedings and that *Petitioner* would be responsible for submitting to the ALJ *any* evidence he believed could support his case, including his assertion that the sentencing judge found grounds for reduced culpability. Petitioner submitted almost 200 pages of documents to the ALJ. The transcript was not among them. Petitioner does not allege, nor do we see any indication in the record, that Petitioner was unable to obtain and provide the transcript to the ALJ.

¹ *Janet R. Constantino*, DAB No. 2666, at 7 (2015) (“In general, a party that appeals an exclusion must present its evidence to the ALJ, who is expressly authorized to rule on its admissibility. 42 C.F.R. §§ 1005.8, 1005.15, 1005.17(a).”).

Petitioner's statement that he believed the transcript would be available to the Board even though it was not included in the record below is undercut by his actions before the Board. As noted above, 42 C.F.R. § 1005.21(f) permits the Board to admit evidence not presented to the ALJ only if it is "relevant and material" and "there were reasonable grounds for the failure to adduce such evidence" before the ALJ. Furthermore, the Board's guidelines for appealing an ALJ decision to the Board, sent to Petitioner with the ALJ Decision, state that "[t]he Board will review only those parts of the record before the ALJ which are cited by the parties or which the Board considers necessary to decide the appeal" and that if a party shows to the Board's satisfaction that "evidence not presented to the ALJ is relevant and material and that there were reasonable grounds for the failure to present the evidence to the ALJ, the Board may remand the case to the ALJ for consideration of such additional evidence." *Guidelines – Appellate Review of Decisions of Administrative Law Judges in Cases to Which Procedures in 42 C.F.R. Part 1005 Apply* (available at <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/procedures/index.html>), "Completion of the Review Process." Thus, Petitioner had notice from this language and the language of 42 C.F.R. § 1005.21(f) quoted above that: (1) the Board's review in general is limited to a review of the evidentiary record as developed during the ALJ proceedings (which here did not include the transcript); and (2) the Board may not simply admit new evidence into the record and consider it to decide the appeal, but must first examine it for relevance and materiality and, if relevant and material, would require a party to show reasonable grounds for not presenting it to the ALJ. The Board then "may" (as opposed to "must") remand the case to the ALJ for consideration of the new evidence in accordance with 42 C.F.R. § 1005.21(f).

This notice notwithstanding, when he sought to appeal the ALJ Decision, Petitioner did not submit the transcript to the Board or explain why he did not or could not submit it to the ALJ, but, in his May 24, 2016 letter to the Board (page 1), Petitioner asked for a 30-day extension of time to appeal because he was awaiting, among other things, "ancillary documentation from [the] sentencing court" to prepare his appeal filing. The I.G. stated that it did not object to the extension. The Board granted the extension as requested. However, in his appeal brief, filed several days before the extended due date, Petitioner purported to quote portions of the sentencing hearing transcript, including certain statements attributed to the presiding judge. Regardless of whether the alleged statements were, in fact, accurate quotes from the sentencing transcript, Petitioner's use of quotation marks strongly suggested that he actually possessed the transcript when he prepared his brief. Yet Petitioner still did not submit any part of the transcript to the Board, let alone address why he failed to submit it to the ALJ. It was not until mid-November 2016 that Petitioner submitted the transcript with his reconsideration request.

Petitioner's submission of the sentencing transcript is simply too late. Petitioner should have submitted the transcript to the Board on or before the extended due date for appealing the ALJ Decision, with an explanation of why he did not submit it in the proceedings before the ALJ. Had he done so, the Board would have been able to examine the transcript, determine whether it was relevant and material, and consider whether to remand the case to the ALJ for consideration of the new evidence.

Petitioner, however, did not submit the transcript. Accordingly, the Board had no basis for considering whether to remand and issued its decision declining review based on the record before it. Petitioner has not shown any error at all in that decision, much less clear error, and, thus, has not shown a basis for reconsideration.

Conclusion

For the reasons discussed above, we reject Petitioner's request for reconsideration.

_____/s/
Sheila Ann Hegy

_____/s/
Constance B. Tobias

_____/s/
Susan S. Yim
Presiding Board Member