Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Clemenceau Theophilus Acquaye
Docket No. A-16-125
Decision No. 2745
October 31, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

We sustain the decision of an Administrative Law Judge affirming the determination of the Inspector General of the Department of Health and Human Services (I.G.) to exclude Clemenceau Theophilus Acquaye (Petitioner) from all federal health care programs for a period of 13 years. *Clemenceau Theophilus Acquaye*, DAB CR4653 (2016) (ALJ Decision). The I.G. excluded Petitioner under sections 1128(a)(1) and (a)(2) of the Social Security Act based on his convictions for felony Medicaid and health care fraud, the unlawful practice of medicine, and criminal sexual conduct. The I.G. excluded Petitioner for 13 years (instead of the mandatory minimum of five years) based on the presence of the aggravating factor in the regulations relating to the length of Petitioner's incarceration (three to 15 years). The ALJ determined that Petitioner's exclusion was warranted under the Act and that the 13-year period of exclusion was not unreasonable.

Petitioner on appeal raises arguments as to why he should not have been excluded, all of which amount to collateral attacks on his criminal convictions that the Board and the ALJ may not consider under the applicable regulations. Petitioner also provides no arguments as to why the period of exclusion is unreasonable. We therefore sustain the ALJ Decision.

Legal Authority

Section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1), requires the Secretary of the Department of Health and Human Services (Secretary) to exclude from participation in all federal health care programs anyone "convicted of a criminal offense related to the delivery of an item or service" under Medicare or a state health care program.[1] Section 1128(a)(2) of the Act requires the Secretary to exclude from

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

participation in all federal health care programs anyone "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." *See also* 42 C.F.R. § 1001.101(a), (b).

An exclusion under section 1128(a)(1) or (a)(2) must be for a minimum period of five years. Act § 1128(c)(3)(B). The regulation at 42 C.F.R. § 1001.102(b) sets forth specific "aggravating" factors that may be the basis for lengthening the period of exclusion beyond the mandatory five years, and 42 C.F.R. § 1001.102(c) sets forth specific "mitigating" factors that may be the basis for reducing the period of an exclusion that has been lengthened beyond the mandatory five year minimum based on one or more aggravating factors.

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 the length of the exclusion is unreasonable. 42 C.F.R. §§ 1001.2007(a), 1005.2(a). "When the exclusion is based on the existence of a criminal conviction or a civil judgment . . . 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, which "may decline to review the case, or may affirm, increase, reduce, reverse or remand any penalty, assessment or exclusion determined by the ALJ." 42 C.F.R. § 1005.21(a), (g).

Background[2]

The I.G. by notice of July 31, 2015 excluded Petitioner for 13 years under section 1128(a)(1) and (a)(2) of the Act, based on his conviction in a Michigan court of criminal offenses "related to the delivery of an item or service under the Medicare or a State health care program" and "related to neglect or abuse of patients, in connection with the delivery of a health care item or service . . . ." ALJ Decision at 2, citing I.G. Ex. 1, at 1. The I.G. extended the exclusion period from the statutory minimum of five years to 13 years based on the presence of one aggravating factor: "[t]he sentence imposed by the court included incarceration" with a period of three to 15 years. *Id*. citing I.G. Ex. 1, at 1-2.

Petitioner filed a timely request for hearing. In response to the ALJ's order setting procedures, the I.G. filed an informal brief and nine proposed exhibits and a reply brief, and Petitioner filed "a lengthy handwritten informal brief," 15 exhibits, and a response to the I.G.'s brief. *Id*. at 3. The ALJ denied Petitioner's request for a "live hearing" on the

[2] The facts of the case before the ALJ stated here and in our analysis are from the ALJ Decision and the record and do not constitute new findings.

ground that Petitioner's arguments in support of the hearing request "center on his attempt to essentially re-litigate his conviction and establish that his defense attorney 'destroyed evidence' and was 'a paid attorney but he worked for the prosecution.'" *Id*. at 3-4, citing 42 C.F.R. § 1001.2007(d) (barring collateral attacks on conviction underlying an exclusion).

The ALJ sustained the exclusion and determined that the 13-year term was not unreasonable. The ALJ rejected Petitioner's arguments as little more than attempts to re-litigate his conviction that were barred by regulation, and noted that Petitioner "does not make any cogent arguments supporting why he should not be excluded . . . nor does he address with any specificity whether the 13-year length of the exclusion is unreasonable." *Id*. at 3 n.1.

Standard of Review

The Board's "standard of review on a disputed issue of fact is whether the ALJ decision is supported by substantial evidence on the whole record. The standard of review on a disputed issue of law is whether the [ALJ] decision is erroneous." 42 C.F.R. § 1005.21(h); *Guidelines – Appellate Review of Decisions of Administrative Law Judges in Cases to Which Procedures in 42 C.F.R. Part 1005 Apply* (*Guidelines*).[3]

Analysis

The Board's role in this appeal is to determine whether the ALJ's factual findings supporting the decision are "supported by substantial evidence on the whole record" and whether the ALJ's conclusion on any "disputed issue of law . . . is erroneous." 42 C.F.R. § 1005.21(h). The "only . . . issues" legally before the ALJ were "whether . . . [t]he basis for the imposition of the sanction [i.e. the exclusion] exists" and "whether . . . [t]he length of the exclusion is unreasonable." 42 C.F.R. § 1001.2007(a); ALJ Decision at 4. For the reasons we discuss below, we conclude that the ALJ's conclusions that there was a basis for the exclusion and that the 13-year duration of exclusion was not unreasonable were supported by substantial evidence in the record as a whole and were not legally erroneous.

[3] The *Guidelines* are available at http://www.hhs.gov/dab/divisions/appellate/guidelines/procedures.html.

I. The ALJ's determinations that Petitioner was convicted of "criminal offenses related to the delivery of an item or service under a state health care program" and "relating to the abuse or neglect of patients in connection with the delivery of a health care item or service," warranting his exclusion under sections 1128(a)(1) and (2), are supported by substantial evidence and not legally erroneous.

Petitioner did not dispute before the ALJ the evidence upon which the ALJ relied in upholding the I.G.'s determination to exclude Petitioner from all federal healthcare programs for 13 years. Likewise, on appeal to the Board, Petitioner does not dispute that he was convicted of the offenses to which he pled guilty or that those offenses met the standards for exclusions under sections 1128(a)(1) and (a)(2) of the Act. Instead, Petitioner makes arguments that amount to collateral attacks on his conviction that are barred by regulation or otherwise show no error in the ALJ Decision. Below we address separately Petitioner's arguments before the ALJ and before the Board.

a. Substantial evidence on the whole record supports the ALJ Decision.

The ALJ found, and it is not disputed, that from September 2013 to September 2014, the State of Michigan charged Petitioner with 15 felony offenses that included one count of conducting criminal enterprises, nine counts of Medicaid fraud and two counts of health care fraud relating to the filing of false claims, one count of unlawful practice of medicine, and one count of third degree felony criminal sexual conduct "as an alternative to" one count of first degree criminal sexual conduct. ALJ Decision at 5, citing I.G. Exs. 4-7. Petitioner pled guilty to two counts of Medicaid fraud, one count of health care fraud, one count of unlawful practice of medicine, and one count of third degree criminal sexual conduct. *Id*. citing I.G. Ex. 7, at 1. On September 24, 2014, he was sentenced to incarceration for three to fifteen years for the criminal sexual conduct conviction, and for two to four years for the Medicaid and health care fraud and unlawful practice of medicine convictions, with the sentences to be served concurrently. *Id*. at 5-6, citing I.G. Ex. 7, at 2.

The ALJ also found, and it is not disputed, that the Medicaid and health care fraud offenses for which Petitioner was convicted "involved the submission of false claims," and that the offense of unlawful practice of medicine for which Petitioner was convicted "involved him treating patients and billing Medicaid as if Dr. Elrington," the owner of the medical center where Petitioner worked, "had treated those patients."[4] ALJ Decision at 6, citing I.G. Exs. 2, 3, 6. We conclude that convictions for the felony offenses of

[4] The ALJ noted that Dr. Elrington had fled the country to evade prosecution and is listed by the I.G. on its website as a wanted fugitive. ALJ Decision at 3 n.1, citing www.oig.hhs.gov/fraud/fugitives/profiles.asp, accessed Oct. 21, 2016.

Medicaid fraud, health care fraud, and the unauthorized practice of medicine, all involving the filing of false Medicaid claims, are convictions for criminal offenses "related to the delivery of an item or service" under a state health care program requiring the offender's exclusion under section 1128(a)(1) of the Act.[5] As the ALJ concluded, "Petitioner was unquestionably convicted of criminal offenses related to the delivery of a health care item or service under the Medicaid program." *Id.*

The ALJ also found, and it is not disputed, that Petitioner's criminal sexual conduct offense involved "Petitioner, who held no medical license, performing digital pelvic examinations on a victim and performing a breast examination on the same victim 'even when she was not being seen for a condition that she believed would have warranted a breast exam.'" ALJ Decision at 6, citing I.G. Ex. 9. The ALJ noted that Michigan law states that third degree criminal sexual conduct, a felony, "entails a person engaging 'in sexual penetration with another person' and 'force or coercion is used to accomplish the sexual penetration.'" *Id.*, citing Mich. Comp. Laws § 750.520d(l)(b), (2); *see also* Mich. Comp. Laws § 750.520b(1)(f)(iv) (referenced in § 750.520d(l)(b) and stating that force or coercion includes when "the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable"). The ALJ thus found that "Petitioner posed as a doctor who was licensed to practice medicine, and employed this scheme in order to sexually penetrate the victim" and that exclusion for the mandatory minimum of five years under section 1128(a)(2) of the Act "is warranted because Petitioner pleaded guilty to an offense involving the abuse of a patient in connection with the delivery of a health care item or service." ALJ Decision at 6-7.

The Board has stated that the I.G. must prove four elements to exclude an individual under section 1128(a)(2): "(1) a conviction; (2) of an offense relating to abuse; (3) of a patient; and (4) in connection with delivery of a health care service." *Narendra M. Patel, M.D.,* DAB No. 1736, at 6 (2000), *aff'd*, *Patel v. Thompson*, 319 F.3d 1317 (11th Cir. 2003). Those elements unquestionably are present here, where Petitioner was convicted of a felony sexual offense for his conduct during an ostensible examination of a patient of a medical center seeking medical care. As the ALJ noted, the Board in *Patel* concluded that the offense of sexual battery of a patient during an examination constituted "abuse in connection with the delivery of a health care item or service" justifying exclusion under section 1128(a)(2). *Patel* at 6; ALJ Decision at 7. Therefore, we find that the ALJ's determinations are supported by substantial evidence on the whole record.

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[5] As the ALJ pointed out, section 1128 of the Act defines Medicaid as a state health care program and provides that a "conviction" for the purpose of an exclusion includes the entry of a guilty plea that has been accepted by a federal, state, or local court. Act § 1128(h)(1), (i)(3); ALJ Decision at 6.

b. The ALJ Decision is free from legal error and Petitioner's arguments provide no basis to disturb it.

In his wide-ranging but somewhat incoherent appeal (much of which is irrelevant and otherwise not properly before the Board), Petitioner assails the validity of his conviction for sexual assault and claims to be the victim of a conspiracy by national governments and of abuses of power by Michigan courts and law enforcement. Petitioner asserts that he was falsely charged by Michigan police with criminal sexual conduct and alleges discrepancies in the evidence against him, including that a "[p]olygraph examination at the office of Attorney general was manipulated by the use of magic trick cards for petitioner to fail." Notice of Appeal (NA) at 6, 8-10. Petitioner asserts that the exhibits he submitted to the ALJ are "clear and convincing that the sexual abuse never occurred" and further alleges that he pled guilty involuntarily because his attorney had threatened that Petitioner would otherwise receive a life sentence. NA at 6, 10-11. Petitioner also argues that his attack on his conviction is "about sending a notice to the Attorney General of the State of Michigan and the other attorney Generals of the States of the Union that no longer will the federal Judges rubber stamp cases brought to them by the states." NA at 16.

Petitioner moreover alleges that his current predicament began when U.S. and Israeli agents brought him to the U.S. and later conspired to spoil his career as punishment for his refusal to take part in a coup d'état in Ghana. NA at 2. In support of his contention that the criminal case against him could have been based on false records, Petitioner cites "cases [that] involve falsification of information" including the Flint, Michigan "water situation," the U.S. invasion of Iraq, the Vietnam war, and the shooting of Black men by law enforcement in U.S. cities. NA at 3-4. Petitioner also asserts that attorney generals have historically abused their power, and caused the convictions and executions of innocent people for "fabricated charges," and that police have falsified reports to conceal their killings of innocent people. NA at 15.

Petitioner made similar arguments to the ALJ who rejected them as an "attempt to essentially re-litigate his conviction" that was barred by 42 C.F.R. § 1001.2007(d). ALJ Decision at 3-4; *see also id.* at 3 n.1 (noting that Petitioner "challenges his conviction, arguing that evidence was planted, witnesses were coached and told lies under oath, prosecutors committed fraud, and that a polygraph examiner was 'high on Marijuana when he conducted the polygraph examination'"; that Petitioner argued that he "'refused to be trained by the State Department and then sent to Ghana to lead a coup d'état'"; and that his submissions "also make references to a myriad of irrelevant topics, such as the Flint city water situation, opioid-related overdoses, the basis for United States invading Iraq, and shootings involving law enforcement officers").

The ALJ did not err in rejecting Petitioner's attacks on the validity of his criminal conviction. The Board has long held that such "collateral attacks" on the validity of criminal convictions on which exclusions are based are forbidden by regulation. Section 1001.2007(d) states that when an exclusion "is based on the existence of a criminal conviction or a civil judgment imposing liability by Federal, State or local court" (or "on a determination by another Government agency, or any other prior determination where the facts were adjudicated and a final decision was made"), then "the basis for the underlying conviction, civil judgment or determination ***is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal***" (emphasis added). *See, e.g.*, *Michael J. Vogini, D.O.*, DAB No. 2584, at 8 (2014) ("Petitioner pled guilty to and was convicted of Count 14 and may not now collaterally attack that conviction"); *Lyle Kai, R.Ph.*, DAB No. 1979, at 5 (2005) ("'the basis for the underlying conviction . . . is not reviewable and the individual . . . may not collaterally attack it . . . .' 42 C.F.R. § 1001.2007(d)"); *Peter J. Edmonson*, DAB No. 1330, at 4 (1992). Moreover, "[e]ven before section 1001.2007(d) took effect in 1992, the Board held that the exclusion statute never intended that the party being excluded under section 1128(b)(4) could mount a collateral attack on the state procedure." *Marvin L. Gibbs, Jr., M.D.*, DAB No. 2279, at 8 (2009), citing *John W. Foderick, M.D.*, DAB No. 1125 (1990). A petitioner who "believes there are serious flaws" in the state's action on which the exclusion is based thus "must challenge it 'in the appropriate forum.'" *Marvin L. Gibbs, Jr., M.D.* at 10, citing *Leonard Friedman, M.D.*, DAB No. 1281 (1991). Per section 1001.2007(d), this is not the appropriate forum for Petitioner to air his grievances about the propriety of his conviction.

Thus, Petitioner's claims that he was wrongfully convicted of a sexual crime or was coerced into pleading guilty are collateral attacks on his conviction and, as such, may not be considered by the ALJ or the Board as bases to reverse the exclusion. *See, e.g.*, *Michael D. Miran, Esta Miran, & Michael D. Miran, Ph.D. Psychologist P.C.*, DAB No. 2469, at 7 (2012) (seeking reversal of exclusions based on perceived "deficiencies in the convictions . . . constitutes a collateral attack on the basis underlying the convictions"); *Emannuel Adebayo Ayodele*, DAB No. 2602, at 4 (2014) ("Board has concluded that a petitioner's contention that he was coerced to enter into a plea agreement constitutes such a collateral attack on the basis of the exclusion that may not be reviewed by the ALJ or the Board").

Petitioner also accuses the ALJ of animus based on Petitioner's African origins and accuses the ALJ of being "angry" and "getting personal." NA at 7. Petitioner, however, provides no evidence of any bias by the ALJ and apparently refers here to the ALJ's refusal to permit him to further develop his arguments against his conviction (including claims to have been victimized by corrupt governmental forces) that are barred by the regulatory prohibition on collateral attacks at section 1001.2007(d). The Board moreover has observed that the standard for disqualifying a judge for bias requires that the alleged

bias "must stem from an extrajudicial source and result in an opinion on the merits on some other basis than what the judge learned from his participation in the case" and that in civil proceedings, a judge's rulings do not by themselves establish bias constituting a sufficient basis for disqualification. *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 15-16 (2009) (citations omitted); *Britthaven of Goldsboro*, DAB No. 1960, at 15 (2005); *see also In re Rouse*, 582 F. App'x 132, 133 (3rd Cir. 2014) ("[a]dverse rulings alone generally do not constitute a sufficient basis for holding that a judge's impartiality is in doubt"). An ALJ's actions additionally do not demonstrate bias where, like the ALJ's refusal here to consider Petitioner's assertions about his criminal case, they are compelled by regulation and do not entail any exercise of discretion by the ALJ.

Petitioner also refers to a response he filed to an order the ALJ issued for "redaction of Petitioner's submissions because he repeatedly identified the victim of a sexual assault for which he had been adjudicated guilty by name, and also submitted documentation regarding the victim's medical treatment." ALJ Decision at 3 n.2, citing ALJ Order (June 6, 2016). The ALJ permitted Petitioner to file a response to the order "so long as the response neither exceeded three pages in length nor identified the sexual assault victim" and "further cautioned that I may impose sanctions if Petitioner submitted a noncompliant response." *Id.* Petitioner then filed a 14-page response dated June 15, 2016 that the ALJ said "identified the sexual assault victim by name," after which the ALJ "issued an Order Sanctioning Petitioner and Striking Petitioner's Submission" as "a sanction pursuant to 42 C.F.R. § 1005.14(a)." That regulation authorizes ALJs to impose sanctions that "reasonably relate to the severity of the misconduct," including "[s]triking pleadings," on any party "for failing to comply with an order or procedure[.]" Petitioner asserts that he did redact the names of the sexual assault victim in ball point pen, leaving only her initials.[6] NA at 8. Arguments relating to the victim in his sexual misconduct case are inextricably related to the forbidden collateral attacks on Petitioner's conviction that constitute his appeal. As such, we find that Petitioner's claims regarding the redaction of his response to the ALJ's order do not demonstrate bias by the ALJ or otherwise show any basis to reverse the ALJ's determination that the I.G. had a basis to exclude Petitioner under sections 1128(a)(1) and (a)(2) of the Act.

[6] The document was not made part of the record of the ALJ proceedings. Although we acknowledge that Petitioner claims that he did redact the document, Petitioner does not allege that the ALJ abused her discretion in striking the document pursuant to her order dated June 6, 2016.

II. The ALJ's determination that a 13-year exclusion is not unreasonable is based on substantial evidence in the record and is not erroneous.

The ALJ sustained the 13-year exclusion the I.G. imposed based on the presence of one of the aggravating factors specified in 42 C.F.R. § 1001.102 – that the sentence imposed by the court in the underlying criminal case "included incarceration" – and on the absence of any of the mitigating factors also specified in the regulation. ALJ Decision at 7-8; 42 C.F.R. § 1001.102(a)(5).

The ALJ called Petitioner's three-to-15 year incarceration "quite significant," citing Board decisions that characterized incarceration terms of nine months and of one to seven years as "significant." ALJ Decision at 7, citing *Jason Hollady, M.D.,* DAB No. 1855, at 12 (2002); and *Gary Alan Katz, R.Ph.,* DAB No. 1842, at 10 (2002). The ALJ also noted the nature of Petitioner's crimes (Medicaid and health care fraud, treating patients and billing Medicaid as a doctor without a medical license, committing "a felonious sexual assault on a patient") and concluded that "Petitioner's conduct for which he pleaded guilty demonstrates his untrustworthiness and a lack of integrity in dealing with health care programs." ALJ Decision at 7-8. The ALJ also cited *Jeremy Robinson*, DAB No. 1905, at 3 (2004), as holding that ALJ review "must reflect the deference accorded to the IG by the Secretary" and concluded "that the 13-year period of exclusion is not unreasonable." *Id*. at 8.[7]

The Board has recognized that the I.G. "has 'broad discretion' in setting the length of an exclusion in a particular case, based on [his] 'vast experience' implementing exclusions" and "[a]n ALJ may not substitute his or her judgment for that of the I.G. or determine a 'better' exclusion period. *Michael J. Vogini, D.O.* at 9, citing *Craig Richard Wilder*, DAB No. 2416, at 8 (citing 57 *Fed. Reg*. 3298, 3321 (Jan. 29, 1992)). Petitioner identifies no error in the ALJ's analysis of the period of exclusion, does not dispute that his term of incarceration was an aggravating factor under the regulation and does not allege the presence of any mitigating factors. As noted above, Petitioner argues only that his criminal conviction was wrongfully obtained and that he has been the victim of government misconduct and that the ALJ erred and showed bias by refusing to entertain those prohibited collateral attacks. Given the presence of the aggravating factor that Petitioner was sentenced to a "significant" period of incarceration of three to 15 years for the offences of Medicaid and health care fraud and the sexual abuse of a patient seeking medical care, we see no basis to reverse the ALJ's conclusion that the 13-year exclusion the I.G. imposed was not unreasonable.

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[7] The ALJ also sustained the August 20, 2015 effective date of the exclusion as being established by regulation by which she was bound. ALJ Decision at 8, citing 42 C.F.R. §§ 1001.2002(b) (exclusion is "effective 20 days from the date of the notice" of exclusion), 1005.4(c)(l) (ALJ does not have authority to find invalid or refuse to follow federal statutes or regulations). The ALJ's determination of the effective date is correct based on the July 31, 2015 date of the notice of exclusion. I.G. Ex. 1, at 1. Absent any allegation by Petitioner that the ALJ erred in confirming the effective date of the exclusion we do not address that determination further.

Conclusion

For the reasons discussed above, we affirm the ALJ Decision.

/s/

Constance B. Tobias

/s/

Susan S. Yim

/s/

Christopher S. Randolph
Presiding Board Member