Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	)	DATE: December 19, 2007
Kailash C. Singhvi, M.D.,	)	
Petitioner,	)	Civil Remedies CR1632 App. Div. Docket No. A-07-131
- v. -	)	Decision No. 2138
The Inspector General.	)	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Kailash C. Singhvi, M.D. (Petitioner) appealed the August 2, 2007 decision by Administrative Law Judge (ALJ) Jose A. Anglada. Kailash C. Singhivi, M.D., DAB CR1632 (2007) (ALJ Decision).[1] The ALJ Decision affirmed the Inspector General's (I.G.'s) determination excluding Petitioner for five years from participation in Medicare, Medicaid, and all other federal health programs pursuant to section 1128(a)(1) of the Social Security Act (the Act) (42 U.S.C. § 1320a-7(a)(1)).[2] Section 1128(a)(1)

[1] The caption of the ALJ Decision spells Petitioner's last name "Singhivi." Petitioner's attorney, however, spells Petitioner's name Singhvi, and that spelling appears to be more consistent with the record as a whole. Accordingly, we use the latter spelling.

[2] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding

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requires the exclusion of any individual convicted of a criminal offense related to the delivery of an item or service under Medicare or any state health care program. Section 1128(c)(3)(B) provides that an exclusion pursuant to section 1128(a) must be for a minimum period of five years. Regulations at 42 C.F.R. §§ 1001.101(a) and 1001.102(a) implement these statutory mandates.

Petitioner's only argument before the ALJ and the Board is that the I.G.'s decision to exclude Petitioner was untimely, due to the length of time between Petitioner's conviction on August 27, 2001, and the I.G.'s December 29, 2006 decision to exclude Petitioner effective January 18, 2007. For the reasons explained below, we uphold the ALJ Decision. The Act mandates Petitioner's exclusion for a minimum period of five years, and neither the Act nor the regulations authorize the ALJ or the Board to adjust the beginning date of an exclusion. For the reasons discussed below, we also reject Petitioner's suggestion that we are required to make findings as to whether the timing of the imposition of the exclusion was reasonable or, even assuming we were, that Petitioner has demonstrated any basis for finding the timing unreasonable or prejudicial.

The ALJ Decision

The ALJ made the following findings of fact and conclusions of law:

> 1. Petitioner was convicted of a criminal offense that warrants a five-year exclusion pursuant to section 1128(a)(1) of the Act.
>
> 2. I do not have the authority to review the timeliness of the I.G.'s imposition of an exclusion.

ALJ Decision at 3.

The ALJ found that on August 27, 2001, Petitioner pled guilty in United States District Court to one count each of health care fraud and payment of kickbacks, and two counts of conspiracy. On April 19, 2006, the District Court sentenced Petitioner to time served, forfeiture of $1,605,000 in restitution to the United

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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.

States and payment of $5,400 in fines and assessments. On December 29, 2006, the I.G. notified Petitioner that he was being excluded for a period of five years, effective January 18, 2007. Id. at 1, 3, citing I.G. Exhibits (Exs.) 4, 6, 7.

The ALJ noted Petitioner's arguments that the I.G.'s decision to exclude Petitioner now instead of earlier (as upon his guilty plea) was unduly harsh, excessively punitive and highly prejudicial in light of his rehabilitative behavior and his cooperation with law enforcement officials. The ALJ found that these arguments amounted to equitable claims, given Petitioner's failure to show that his exclusion is barred by a statute of limitations or equivalent regulatory requirement, and that the ALJ had no authority to consider those arguments. The ALJ concluded that there is nothing in either the Act or regulations that would preclude the I.G. from excluding Petitioner when it excluded him. Id. at 4-5.

Standard of Review

Our standard of review of an ALJ decision to uphold the I.G.'s exclusion is set by regulation. We review to determine whether the decision is erroneous as to a disputed issue of law and whether the decision is supported by substantial evidence in the record as a whole as to any disputed issues of fact. 42 C.F.R. § 1005.21(h).

Analysis

On appeal, Petitioner does not dispute that he was convicted of a criminal offense described in section 1128(a)(1). Petitioner also does not dispute that the law required the I.G. to exclude Petitioner from Medicare, Medicaid and all federal health care programs for at least five years based on that conviction. However, Petitioner argues that the exclusion is unreasonable, untimely and arbitrary because of the length of time between Petitioner's conviction in August 2001 and the I.G.'s notice in December 2006 that he would be excluded effective January 18, 2007. Petitioner argues that he is effectively being excluded for more than ten years following his conviction and will be substantially unable to practice medicine even though he has satisfied the terms of his criminal sentence and has had his medical license restored. Petitioner reports that during the interval between his conviction and his sentencing in April 2006 he underwent rehabilitation, performed thousands of hours of community service and cooperated extensively with law enforcement authorities in criminal investigations that led to multiple indictments and convictions. He asserts that he should have been

excluded as early as 2001 or 2002, based on his conviction on August 27, 2001, the surrender of his medical licenses shortly thereafter and the termination of his participation in New York's Medicaid program effective December 3, 2002.[3] He argues that the I.G.'s decision to delay the exclusion until after Petitioner was sentenced is dilatory, inequitable and contrary to the intent of the statute that an exclusion be not punitive but remedial in nature. Petitioner also argues that the eight-month delay between his sentencing in April 2006 and his exclusion in December 2006 is unreasonable.

We reject these arguments and conclude that the ALJ correctly held that he did not have the authority to review the timeliness of the I.G.'s imposition of the exclusion and that nothing in the Act or regulations precludes the I.G. from excluding Petitioner when it did. ALJ Decision at 3-4. The applicable regulations permit an individual being excluded under section 1128(a)(1) for the minimum five-year period to request an ALJ hearing only on the issue of whether the basis for the imposition of the sanction exists. 42 C.F.R. § 1001.2007(a)(1),(2).[4] In addition, the statute and regulations set the effective date of an exclusion following notice to the excluded individual and afford the ALJ no authority to adjust the effective date. Section 1128(c) of the Act (an exclusion under section 1128 "shall be effective at such time . . . and upon such reasonable notice . . . as may be specified in regulations"); 42 C.F.R. § 1001.2002(b) (the exclusion "will be effective 20 days from the date of the notice" of the exclusion).[5] Thus, the Board has repeatedly held that the statute and regulations give an ALJ no authority to adjust the beginning date of an exclusion by applying it retroactively. Thomas Edward Musial, DAB No. 1991, at 4-5 (2005) (relying on 42

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[3] As part of his plea agreement, Petitioner agreed to surrender his licenses to practice medicine in Texas, New York and New Jersey within 60 days of his conviction. I.G. Ex. 4 at 18. The State of New York Department of Health terminated Petitioner's enrollment in the Medicaid program based on his surrender of his license to practice medicine in that state. I.G. Ex. 5.

[4] An individual being excluded for more than five years may request an ALJ hearing on the additional issue of whether the length of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(1).

[5] Although the ALJ did not rely on section 1128(c) and 42 C.F.R. § 1001.2002(b), they support our decision here.

C.F.R. § 1001.2002(b)), citing Douglas Schram, R.Ph., DAB No. 1372, at 11 (1992) ("Neither the ALJ nor this Board may change the beginning date of Petitioner's Exclusion"); David D. DeFries, DAB No. 1317, at 6 (1992) ("The ALJ cannot . . . decide when [the exclusion] is to begin"); Richard D. Phillips, DAB No. 1279 (1991) (an ALJ does not have "discretion . . . to adjust the effective date of an exclusion, which is set by regulation"); Samuel W. Chang, M.D., DAB No. 1198, at 10 (1990) ("The ALJ has no power to change . . . [an exclusion's] beginning date"); accord Lisa Alice Gantt, DAB No. 2065 at 2-3 (2007)(reiterating the Board's holding in these cases and upholding a mandatory exclusion imposed approximately five years after conviction). In Schram, we held that this lack of discretion extends to the Board as well as the ALJs, and we reiterated that holding in Musial and Gantt. Thus, the ALJ and this Board do not have the authority to review the I.G.'s decision on when to impose the exclusion (including the decision to exclude Petitioner some eight months after he was sentenced), and may not grant Petitioner the essentially equitable relief he seeks.

For its unreasonable delay argument, Petitioner relies, without attribution, on language from a footnote in the ALJ Decision that paraphrased remand instructions in the United States District Court decision Connell v. Secretary of Health and Human Services, slip op., 2007 WL 1266575 (S.D. Ill. Apr. 30, 2007).[6] Petitioner Request for Review (P. RR) at 4. The Connell court, adopting a magistrate judge's report, reversed and remanded Jeffrey Knute Connell, DAB No. 1971 (2005), in which the Board declined review and summarily affirmed the ALJ decision in Jeffrey Knute Connell, DAB CR1271 (2005).[7] Petitioner Connell argued that the three-

[6] The ALJ cited Connell as a recent court decision examining the question of the timeliness of the imposition of an exclusion. The ALJ noted that the Connell court directed the Secretary on remand to evaluate the reasonableness of the delay and, in particular, to "consider the relevant circumstances, including the complexity of the issues considered, the volume of materials reviewed, any justification for delay, and the adverse impact" on the pharmacist. ALJ Decision at 5, n.3, paraphrasing 2007 WL 1266575, at *3. (We note that although the ALJ did not quote Connell, the language is the same in both decisions.) This is the language Petitioner Singhvi uses in his notice of appeal without citing either the ALJ Decision or Connell.

[7] Petitioner also cites White v. Mathews, 559 F.2d 852 (2nd Cir. 1977), cert. denied, 435 U.S. 908 (1978), for the

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year lapse of time between his conviction and the I.G.'s notice of exclusion was untimely and barred by laches, but the ALJ there, as here, held that there was no statute of limitations on the I.G.'s imposition of exclusions and that he had no authority to consider whether the exclusion was equitable or fair in light of the delay. DAB CR1271, at 4. The Connell court noted the magistrate judge's acknowledgment that the relevant regulations do not permit an ALJ to consider such questions but also noted the magistrate judge's conclusion that administrative delay cannot be unreasonable and remanded for the Secretary to make factual findings on that issue. 2007 WL 1266575, at *2, citing Magistrate Judge's Report and Recommendation. The court held that under the applicable substantial evidence standard of review, it was "not empowered to weigh evidence itself and make factual findings."[8] Id.

We do not view the court's decision in Connell as compelling either reversal of the exclusion here or findings by the Board (or the ALJ) as to whether the delay in this case was reasonable. As noted, the court did not itself find the delay unreasonable. Furthermore, the court did not state that it rejected the magistrate judge's acknowledgment that the regulations do not permit an ALJ to consider such questions. As indicated, the Board has consistently articulated that this limitation on the ALJ's review authority applies to the Board as well, and other district courts have reached conclusions different from the Connell court. See Seide v. Shalala, 31 F.Supp. 2d 466 (D. Pa. 1998)(court declined to modify an exclusion because of a 26-month delay between conviction and imposition of the exclusion, noting

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[7](...continued)
notion that "[c]ourts have also held that the Secretary must provide a hearing within a reasonable time" and argues that this holding "should apply to exclusionary hearings as well . . . ." P. RR at 4. White concerned the interval between the date that a hearing is requested to challenge the denial of an application for disability benefits under title II of the Social Security Act and the dates that the ALJ convenes the hearing and issues a decision. There is no such issue in the instant case, and I.G. exclusions are not governed by the regulations that govern Social Security benefits and hearings. Accordingly, we find White inapplicable.

[8] On remand, the ALJ dismissed the case in an order, dated May 16, 2007, indicating that the hearing request was withdrawn by motion dated May 11, 2007.

that "[n]either the Social Security Act nor its implementing regulations set any deadline within which the Inspector General must act" id. at 469); Steven R. Caplan, R Ph. v. Tommy G. Thompson, CIV. No. 04-00251, at 15 (D. Haw. Dec. 17, 2004) (quoting Seide for the proposition that only "[t]he I.G. has the discretion to determine when to impose an exclusion" and finding no legal basis to modify the date the exclusion began).

But even if we did view Connell as requiring such findings, we perceive no basis for finding that the delay here was unreasonable or prejudiced Petitioner. An exclusion imposed in accordance with 42 C.F.R. § 1001.101, cannot be less than five years. However, the I.G. can impose an exclusion longer than five years if any of a number of aggravating factors are present. These factors include, inter alia, that the criminal acts resulting in the conviction, or similar acts, caused a financial loss to the government of $5,000 or more. 42 C.F.R. § 1001.102(b)(1); that the criminal acts, or similar acts, were committed over a period of one year or more, 42 C.F.R. § 1001.102(b)(2); that the sentence imposed by the court included incarceration, 42 C.F.R. § 1001.102(b)(5); or, that the individual convicted has been the subject of any other adverse action by any Federal, State or local government agency or board, 42 C.F.R. § 1001.102(b)(9). The existing record shows that Petitioner pled guilty to and was convicted of four counts of criminal conduct, including fraud, that deprived Medicare of more than $1.6 million over a 16-year period and that Petitioner was subject to adverse action by State agencies, consisting of the loss of his licenses to practice medicine in three states and the termination of his enrollment in the State of New York Medicaid program.[9] See I.G. Exs. 3 (Information), 4 (plea hearing transcript), 5 (letter from State of New York Department of Health), 6 (sentencing transcript) and 7 (sentencing opinion).[10] These aggravating factors were a matter of record in 2001 and

[9] As part of his sentence, Petitioner was required to forfeit $1,605,000 in restitution to the United States, in addition to $800,000 he had previously repaid. I.G. Ex. 7 at 3-4.

[10] Petitioner does not dispute any of these record facts. Furthermore, when an exclusion is based on the existence of a criminal conviction, as this one is, the basis for the conviction is not subject to collateral attack during an appeal of the exclusion. 42 C.F.R. § 1001.2007(d); Lyle Kai, R. Ph., DAB No. 1979 (2005), aff'd, Kai v. Leavitt, Civ. No. 05-00514 BMK (D. Haw. July 17, 2006).

2002 when Petitioner's conviction and the State adverse actions occurred. Thus, had the I.G. acted to impose the exclusion at one of those times, as Petitioner urges, the I.G. could have imposed an exclusion substantially longer than the minimum five years. See, e.g.,Jeremy Robinson, DAB No. 1905 (2004)(15-year exclusion supported by $205,000 in loss, three years of conduct and 366 days of incarceration); Fereydoon Abir, M.D., DAB No. 1764 (2001)(15-year exclusion supported by $30,000 restitution, four years of conduct and two-year Medicaid debarment).

In addition, the I.G. asserts that it could not have known until April 19, 2006, the date of Petitioner's sentencing hearing, to what extent another aggravating factor, incarceration, would apply.[11] Neither, the I.G. asserts, could it determine before sentencing to what extent the only mitigating factors set forth in 42 C.F.R. § 1001.102(c) that are potentially applicable here (reduced culpability and the results of cooperation with federal or state officials) would apply.[12]

Thus, the I.G. asserts that it did not have all of the information it needed to determine whether there were mitigating factors to weigh against the aggravating factors until after the

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[11] The I.G. states, and Petitioner does not dispute, that the court could have sentenced Petitioner to a maximum of 25 years in prison (five years for each of the first three counts, ten years for the fourth) but instead chose to sentence him to time served. I.G. Br. at 11, citing I.G. Ex. 4 (plea hearing transcript) at 8.

[12] The I.G. also denies that a period of eight months between the notice of exclusion and the final decision to exclude is unreasonable. The I.G. cited the need to correspond with Petitioner, which included sending him a notice of intent to exclude and providing him with a 30-day period of time to respond. The I.G. also noted that after it received Petitioner's response, a reviewing official had to make the final exclusion decision, taking into consideration the information received from Petitioner. I.G. Response to RR at 13-14. The I.G. also noted that it excluded more than 3,000 people during the 12-month period in which Petitioner was excluded. Id. As we discuss in this decision, the Board is not authorized to change the date that an I.G. exclusion takes effect. However, even assuming the Board could do so, we see nothing inherently unreasonable about the eight months it took the I.G. to move administratively from issuing the exclusion notice to taking the final exclusion action.

sentencing.[13] I.G. Br. at 12. After his sentencing on April 19, 2006, the I.G. asserts, it knew the court's choice to sentence Petitioner to time served and also knew that his cooperation over the five-year period was substantial.[14] Id. at 11-13. The I.G. further asserts that it considered the mitigating factor of Petitioner's cooperation as well as the court's sentencing him to time served when deciding to exclude Petitioner for no more than the mandatory minimum five-year exclusion period. Id. at 15-16. The I.G. made these assertions in its brief responding to Petitioner's notice of appeal to the Board.

The applicable Board regulations provide that the DAB "may permit the parties to file reply briefs." 42 C.F.R. § 1005.21. Petitioner did not ask to file a reply disputing the I.G.'s assertions. Neither has Petitioner indicated how any fact-finding proceeding, which is the most that Connell would require if it required any action at all in this case, could result in his mandatory exclusion ending any sooner than five years from the current effective date of January 18, 2007.

In his Request for Review, Petitioner alleged specific results of his cooperation with law enforcement – that three individuals were indicted and convicted in 2002 and 2003 and that he testified in 2005 – that arguably could be verified by the taking of further evidence. P. RR at 3, 5. (The I.G.'s brief does not address these specific facts, and while Petitioner Exhibit A, a New Jersey State Board of Medical Examiners Order of Reinstatement of License, indicates that three individuals were indicted and convicted, it does not state when. In addition, the Board President's signature and the date of Petitioner's signature are missing.) Petitioner argues that the I.G. would have known of these alleged results prior to sentencing had the I.G. checked with federal officials and suggests that these

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[13] The I.G. states that for reasons such as these, it has a policy of not evaluating an individual for exclusion under section 1128(a) until the individual's case has been resolved by the trial court, either through sentencing or other means. I.G. Response to RR at 10, citing I.G. Ex. 8 (Declaration of William J. Hughes). Thus, the procedures the I.G. followed in this case appear to be consistent with its general policy and practice.

[14] The I.G. noted that this substantial cooperation was reflected in comments by the United States Attorney at the sentencing hearing to the effect that Petitioner was "ready, willing, and able to do whatever we asked him to do" and by the court's sentencing him to time served. Id. at 13.

facts, assuming their truth, would have given the I.G. enough information to exclude him before sentencing. Petitioner's suggested conclusion is neither compelled nor sufficiently colorable to warrant the taking of further evidence, assuming arguendo that either the ALJ or the Board was authorized or required to do so. Petitioner does not claim that the cited events reflect the totality of his five-year cooperation (or its results), which is what the I.G. says it considered. In any event, this evidence would not eliminate the undisputed facts showing that three aggravating factors existed and were known to the I.G. from August 27, 2001 onward and that the extent to which a fourth aggravating factor (incarceration) might apply could not be known before the court sentenced Petitioner. Under the regulations, mitigating factors become relevant "[o]nly if any of the aggravating factors . . . justifies an exclusion longer than 5 years." 42 C.F.R. § 1001.102(c).

Conclusion

For the reasons discussed above, we affirm and adopt all of the Findings of Fact and Conclusions of Law in the ALJ Decision.

/s/
Judith A. Ballard

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member