Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Sirri A. Nomo-Ongolo, M.D.
Docket No. A-17-107
Decision No. 2840
December 28, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Sirri A. Nomo-Ongolo, M.D. (Petitioner) appeals a decision by an administrative law judge (ALJ) upholding the Inspector General's (I.G.) decision to exclude her from participation in all federal health care programs for the period during which she is excluded from the Minnesota Health Care Program (State program).[1] *Sirri A. Nomo-Ongolo, M.D.*, DAB CR4888 (2017) (ALJ Decision). The ALJ determined on summary judgment that the I.G. had a legal basis for the exclusion under section 1128(b)(5) of the Social Security Act (Act)[2] and 42 C.F.R. § 1001.601 because Petitioner voluntarily withdrew from participation in the State program to avoid a formal sanction within the meaning of 42 C.F.R. § 1001.601(a)(2).[3] The ALJ also concluded that "Petitioner's exclusion for the period during which she is excluded from participation in the state program is mandated by section 1128(c)(3)(E) of the Act . . . and 42 C.F.R. § 1001.601(b)(1)."[4] ALJ Decision at 1.

[1] The State program includes Minnesota's Medicaid program. *See* I.G. Ex. 3.

[2] The current version of the Act can be found at https://www.ssa.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. Also, a cross-reference table for the Act and the United States Code can be found at https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

[3] We refer to the version of the Code of Federal Regulations in effect when Petitioner was excluded. *See Robert Hadley Gross*, DAB No. 2807 at 2 n.3 (2017), *appeal docketed*, No. 17-801 (D.D.C. Sept. 22, 2017), (noting that the ALJ properly applied the version of the regulations in effect when Petitioner was excluded).

[4] This conclusion does not state the law quite accurately. Excluding Petitioner from federal health care programs for the period she was excluded from the State program was the mandatory minimum period of exclusion permitted by the cited provisions of the Act and regulations. The inaccuracy is not material since the I.G. excluded Petitioner for the mandatory minimum period.

For the reasons set out below, we affirm the ALJ's conclusion that the I.G. had a basis to exclude Petitioner under section 1128(b)(5) of the Act and 42 C.F.R. § 1001.601. As we explain, however, our analysis differs from that of the ALJ. We also affirm the ALJ's conclusion upholding the duration of Petitioner's exclusion since it is the shortest duration permitted by law and, in any event, is not disputed by Petitioner.

Legal Background

Section 1128(b)(5)(B) of the Act permits the Secretary of Health and Human Services (Secretary) to exclude an individual from participation in all federal health care programs if the individual "has been suspended or excluded from participation, or otherwise sanctioned, under . . . a State health care program, for reasons bearing on the individual's . . . professional competence, professional performance, or financial integrity." The Secretary has delegated the exclusion authority to the I.G. The wording of 42 C.F.R. § 1001.601(a)(1)(ii) tracks the language of the statute, providing that the I.G. may exclude an individual "suspended or excluded from participation, or otherwise sanctioned, under . . . [a] State health care program, for reasons bearing on the individual's . . . professional competence, professional performance or financial integrity." While the Act does not define "otherwise sanctioned," the implementing regulation specifies that "otherwise sanctioned" is "intended to cover all actions that limit the ability of a person to participate in the program at issue regardless of what such an action is called, and includes situations where an individual . . . voluntarily withdraws from a program to avoid a formal sanction." *Id.* § 1001.601(a)(2).

Section 1128(c)(3)(E) of the Act and 42 C.F.R. § 1001.601(b)(1) provide that the period of exclusion under section 1128(b)(5) will be not less than the period of exclusion or suspension from the state health care program. An excluded individual's reinstatement in federal health care programs after the exclusion period ends is not automatic; the individual must file, and the I.G. must approve, a request for reinstatement. 42 C.F.R. §§ 1001.3001-3004.

An excluded individual may request a hearing before an ALJ only on the issues of whether the "basis for the imposition of the [exclusion] exists" and, except for mandatory exclusions of five years or less, whether the "length of exclusion is unreasonable." 42 C.F.R. § 1001.2007(a)(1).[5] Any party dissatisfied with the ALJ's decision may appeal the decision to the Board. *Id.* § 1005.21(a).

[5] Since Petitioner's exclusion is a permissive exclusion, the exception does not apply.

Case Background[6]

Petitioner's termination from the State program

On January 13, 2015, the Minnesota Department of Human Services (State) sent Petitioner written notice that her participation in the State program would be terminated effective 30 days after the date of the letter and advised that she could appeal the action by written request. ALJ Decision at 5; I.G. Ex. 2.[7] The stated reason for the termination was that Petitioner had requested and received prohibited direct payments from program recipients for services covered by the State program. ALJ Decision at 5-6; I.G. Exs. 2, 3.

On February 2, 2015, Petitioner appealed the termination. ALJ Decision at 6; I.G. Ex. 4. On February 19, 2015, the State wrote Petitioner to notify her that it had received her appeal and that it was referring the appeal for an administrative hearing. I.G. Ex. 5. The notice also informed Petitioner that the State program would continue paying for her services to program participants pending a final decision on her appeal. *Id*. The State Office of Administrative Hearings notified Petitioner that a prehearing conference would be held on June 30, 2015. I.G. Ex. 6. On June 30, 2015, the judge in the state administrative hearing issued an order dismissing Petitioner's appeal based on Petitioner's "withdrawal of her appeal." I.G. Ex. 7. On July 9, 2015, the State notified Petitioner that her participation had been terminated effective July 1, 2015 based on the dismissal of her appeal. I.G. Ex. 8.

The I.G. Exclusion and ALJ Proceeding

By letter dated November 30, 2016, the I.G. notified Petitioner that she was excluded from participation in Medicare, Medicaid and all federal health care programs pursuant to section 1128(b)(5) of the Act based on her having been "suspended, excluded or otherwise sanctioned by the [State] . . . for reasons bearing on your professional competence, professional performance or financial integrity." I.G. Ex. 1, at 1.

On January 18, 2017, Petitioner requested a hearing before an ALJ; a number of attachments were submitted with her hearing request. ALJ Decision at 2. The I.G. filed a motion for summary judgment with eight numbered exhibits. *Id*. The I.G. argued that it had a basis for the exclusion because 1) the State program had notified Petitioner that she was being terminated from the program for reasons "bearing on [her] professional

[6] The findings of fact stated in this background are taken from the ALJ Decision and the record. We make no new findings. Unless otherwise noted, the stated facts are undisputed.

[7] The ALJ admitted I.G. exhibit 2 over Petitioner's objection that it was unreliable hearsay. *See* ALJ Decision at 2-3. Petitioner argues that the ALJ erred in admitting the exhibit. We discuss later why we reject that argument.

competence, professional performance, or financial integrity" within the meaning of section 1128(b)(5)(B) of the Act and 42 C.F.R. § 1001.601(a)(1)(ii) and 2) the termination took effect after Petitioner's appeal was dismissed, pursuant to her withdrawal of the appeal. *See* I.G.'s Memorandum In Support of Summary Judgment at 2-7. The I.G. did not move for summary judgment on the ground that Petitioner had voluntarily withdrawn from the State program within the meaning of section 1001.601(a)(2).

Petitioner filed a Brief In Favor of Her Summary Judgment Motion and Against the Motion of O.I.G. (Pet. Summary Judgment Motion). In that brief, Petitioner argued that she had voluntarily withdrawn from the program but that her exclusion from the State program was not for one of the reasons stated in the exclusion statute and regulations. *See* Pet. Summary Judgment Motion at 7-8. The gist of Petitioner's argument was that the day before the administrative hearing on her termination from the State program was to begin, she entered into an agreement with counsel for the State program that she would voluntarily opt out of the State program in exchange for the program's dropping her termination case. *Id*. Petitioner also argued that since the case did not go to hearing, no findings were made as to her professional competence, professional performance or financial integrity and that her exclusion, therefore, was not justified. *Id*. at 5-7. Petitioner included with her brief a personal affidavit, dated May 8, 2017, which recited facts intended to support her "voluntary withdrawal" argument. In a reply to Petitioner's cross-motion, the I.G. disagreed that Petitioner had voluntarily withdrawn from the State program but argued that the exclusion would be lawful on that ground as well.[8] *See* I.G.'s Reply at 3.

The ALJ admitted all of the I.G.'s exhibits, rejecting Petitioner's argument that I.G. Exhibit 2 – the State program termination notice – was unreliable hearsay. ALJ Decision at 2. The ALJ also admitted Petitioner's May 8, 2017 affidavit as Petitioner exhibit (P. Ex.) 1. *Id*.

The ALJ upheld the exclusion on summary judgment. In doing so, he did not address the I.G.'s principal argument that Petitioner was "excluded from participation" in "a State health care program" within the meaning of section 1128(b)(5) of the Act and section 1001.601(a)(1)(ii) of the regulations. Instead, the ALJ found the exclusion authorized under section 1128(b)(5) of the Act and section 1001.601(a)(2) of the regulations. The ALJ concluded "that Petitioner's voluntary withdrawal of her appeal of the state program termination action and her voluntary withdrawal from the state program were with the

[8] Petitioner filed a sur-reply, but did not change her argument that she voluntarily withdrew from the State program.

intent to avoid further proceedings and a formal sanction as she states in her affidavit." *Id*. at 6, citing P. Ex. 1 at ¶¶ 11-13; P. Br. at 8. "Accordingly," the ALJ continued, "there is a basis for the exclusion of Petitioner pursuant to section 1128(b)(5) of the Act and 42 C.F.R. § 1001.601." *Id*. at 6-7, citing *Judy Pederson Rogers & William Ernest Rogers,* DAB No. 2009 (2006), *aff'd, Rogers v. U.S. Dep't of Health & Human Servs.*, Civ. No. 06-CV-115 PB (D.N.H. Feb. 26, 2007).

Standard of Review

Regulations governing Board review of ALJ decisions involving the I.G.'s exclusion determinations provide, "The standard of review on a disputed issue of fact is whether the initial decision is supported by substantial evidence on the whole record . . . [and] . . . on a disputed issue of law is whether the initial decision is erroneous." 42 C.F.R. § 1005.21(h). The regulations also provide that an ALJ may "[u]pon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact . . . ." 42 C.F.R. § 1005.4(b)(12). Whether summary judgment is appropriate is a legal issue the Board addresses de novo, viewing the proffered evidence in the light most favorable to the non-moving party. *Timothy Wayne Hensley,* DAB No. 2044, at 2 (2006).

Analysis

We agree with the ALJ that there is no genuine material factual dispute and that section 1128(b)(5) of the Act and section 1001.601(a) of the regulations authorized the I.G. to exclude Petitioner from participation in all Federal health care programs. Our analysis, however, differs from that of the ALJ. As indicated above, the ALJ analyzed the case as a voluntary withdrawal from a state program in order to avoid a formal sanction. The undisputed material fact, however, is that the termination went into effect because the judge in the state administrative hearing dismissed Petitioner's appeal of the termination action pursuant to her withdrawal of that appeal.[9] I.G. Exs. 7, 8. In other words, Petitioner's

[9] Petitioner cites an alleged "Exhibit 3" which she indicates contains emails allegedly supporting her "voluntary withdrawal" argument. Petitioner's Brief In Favor of Her Appeal (NA or Notice of Appeal) at 12. However, the only "Exhibit 3" in the record is the I.G.'s exhibit 3, which contains no emails. Petitioner submitted copies of emails and an August 12, 2016 affidavit with her Request for Hearing, but she did not resubmit them as exhibits as directed by the ALJ in his Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence (Order). *See* Order at 3, ¶ 7 Exhibits and the Record. Accordingly, none of those documents are part of the evidentiary record before the ALJ or this Board. We note that while Petitioner submitted to us duplicates of the documents she submitted to the ALJ with her hearing request (but which were not admitted as exhibits), she did not move to have these documents admitted as "additional evidence" under section 1005.21(f). Nor could she have prevailed on such a motion since, having had an opportunity to submit the documents as evidence in the hearing before the ALJ, she would not have been able to show the Board "that there were reasonable grounds for the failure to adduce such evidence at such hearing." *Id.*

termination from the State program became final by operation of law based on the dismissal of her appeal, not because the State program dropped the termination proceeding in exchange for her voluntarily withdrawing from the State program. As explained below, the termination itself provided a basis for the I.G. to exclude her under Section 1128(b)(5)(B) of the Act and section 1001.601(a)(1)(ii) of the regulations, and the ALJ did not need to decide whether her exclusion would also be authorized under the voluntary withdrawal provision of section 1001.601(a)(2).

A. Petitioner was "excluded from participation . . . under a State health care program."

Section 1128(b)(5)(B) of the Act, as implemented by section 1001.601(a)(1)(ii), permits exclusion if the individual has been "suspended or excluded from participation . . . under . . . [a] State health care program, for reasons bearing on the individual's . . . professional competence, professional performance or financial integrity." There is no dispute that Petitioner was terminated from the State program or that the State program was a "State health care program" within the meaning of the exclusion statute and implementing regulations. Nor is there any dispute that once Petitioner's termination from that program became final, which happened by operation of law when her appeal was dismissed, Petitioner could no longer participate in the program. Indeed the final termination notice states as follows:

> Your participation as a provider in the Minnesota Health Care Programs (MHCP) is terminated, effective July 1, 2015 because your appeal of the Department of Human Services' Notice of Termination, issued on January 13, 2015, was dismissed.
>
> Under Minnesota Rules, part 9505.2235, a provider who is terminated from participation in MHCP may not submit any claims for MHCP payment either personally or through claims submitted by a clinic, group, corporation, or other association. You may not provide services to any MHCP recipient.

I.G. Ex. 8. Accordingly, there is no dispute that the first test for an exclusion under section 1128(b)(5)(B) of the Act and section 1001.601(a)(1)(ii) has been met.

B. The reasons for Petitioner's exclusion from the State program bear on her financial integrity.

Since there is no dispute that the State excluded Petitioner from participating in the State program, the only question remaining is whether the ALJ properly concluded that "as a matter of law the undisputed facts are sufficient to establish the 'common sense'

connection or nexus between the state program termination action and the allegations of receiving prohibited direct payments, which is clearly an attack upon and related to Petitioner's financial integrity." ALJ Decision at 6, citing *George Iturralde, M.D.*, DAB No. 1374, at 10-11 (1992). Petitioner argues that the ALJ's conclusion was error, but we disagree. As the ALJ noted, Petitioner does not dispute that she received the termination notice and that it stated as the reason for Petitioner's termination the fact that she had requested and received prohibited direct payments from program recipients for services covered by the State program. ALJ Decision at 5-6; I.G. Ex. 2; *see also* I.G. Ex. 3 (Minnesota Health Care Programs FAQ Sheet). More specifically, the notice stated that Petitioner "ha[d] received at least 46 direct payments from [State program] recipients for treatment of opiate dependency . . ., which is a service covered by [the State program]." I.G. Ex. 2, at 1. The notice further stated that State program "providers are prohibited from requesting, receiving, or attempting to collect payment from [a State program] recipient for [a State program] covered service, unless copayment for the service is authorized by Minnesota law." *Id.*

Petitioner argued below, and argues again here, that the ALJ erred in admitting the termination notice in I.G. exhibit 2 over her objection. *See* Pet. Summary Judgment Motion at 10-13; NA at 6 n.1. Petitioner's objection is based on her assertion that the reasons for the termination stated in that notice are allegations or preliminary findings, not adjudicative findings and, thus, should be considered unreliable hearsay under the Federal Rules of Evidence (Federal Rules). NA at 6 n.1. As such, Petitioner argues, the statements in the termination notice are not sufficient to establish that her termination from the State program was "for reasons bearing on her 'professional competenc[e], professional performance or financial integrity[.]'" *Id.* at 9. The ALJ rejected Petitioner's argument for excluding the notice, and did not err in doing so.

Although the regulations governing these proceedings permit ALJs to apply the Federal Rules "where appropriate, for example, to exclude unreliable evidence[,]" the regulations expressly state that "[e]xcept as provided in this part, the ALJ will not be bound by [the Federal Rules]." 42 C.F.R. § 1005.17(b). Petitioner does not claim that any of the exceptions stated in the regulations apply to the termination notice.[10] Nor, as the ALJ noted, does Petitioner question the authenticity or relevance of the notice, ALJ Decision at 2; indeed, the notice is not only relevant but material since without that notice there

[10] The ALJ independently considered whether the exception in section 1005.17(d) for relevant evidence whose probative value is outweighed by risk of unfair prejudice, confusion, undue delay, or needless presentation of cumulative evidence would require exclusion of the termination notice but concluded it would not. ALJ Decision at 2. The ALJ also concluded that Petitioner's hearsay objection "goes to the weight to be accorded to the letter and is not a basis for exclusion of the exhibit." *Id.* at 3. Petitioner does not challenge these specific findings so we need not address them further.

would be no proceeding before us.[11] Petitioner also concedes that even if the ALJ were bound by the Federal Rules, there is an exception to those rules for public records. NA at 6 n.1. Petitioner argues that that exception would not apply to the termination notice "because it does not set forth factual finding[s] and is not trustworthy." *Id.* However, as we discuss below, the fact that the findings stated in the notice were not adjudicated (since Petitioner withdrew her appeal before a hearing began) is irrelevant to the I.G.'s exclusion authority. Thus, we find that the ALJ did not err in admitting the termination notice as I.G. exhibit 2.

We also reject Petitioner's substantive argument for the ALJ's alleged error in concluding that the allegations in the termination notice are sufficient to establish that the State program terminated her participation for reasons related to financial integrity. Petitioner argues that the allegations are not sufficient to establish this element of the regulation because while the termination notice alleges facts bearing adversely on her financial integrity, she disputed those facts and they never became findings since her appeal of the termination was dismissed without a hearing. *Id.* at 6-7. "The ALJ's error here was upholding the exclusion based on a connection between the allegations, not the findings, and Petitioner's financial integrity." *Id.* at 6. Petitioner points to the statement in *Iturralde* that "the relationship is established where there is a common sense connection between a state's findings and either professional competence, performance, or financial integrity" and emphasizes the word "findings." *Id.* citing DAB No. 1374, at 11. Petitioner has taken that sentence out of context and misconstrues the Board's use of the term "findings." Since the Board had already noted that Dr. Iturralde's suspension from the Medicaid program never went to hearing, it is clear that the Board's use of that term on page 11 of its decision referred to the investigative findings recited in the state program notice suspending Dr. Iturralde, not to evidentiary findings made during a hearing. *See* DAB No. 1374, at 5 and n.2 (discussing the investigative findings and the fact the petitioner did not appeal the state program action suspending his participation); *see also id.* at 9 (finding substantial evidence that the state program's reasons for suspending Dr. Iturralde "involved charges [not hearing findings] of a pattern of overbilling and providing inferior services" (emphasis added)).

[11] We note that Petitioner herself submitted a copy of the termination notice with her hearing request and again with her Notice of Appeal. As we noted in footnote 9, none of the documents Petitioner submitted with her hearing request or her Notice of Appeal are part of the evidentiary record. Nonetheless, we find it a bit disingenuous for Petitioner to object to the admission of a document she herself brought forward, albeit not as an exhibit.

To the extent Petitioner is arguing that it was unfair for the I.G. to rely on the allegations in the termination notice since they were not adjudicated in a hearing, we reject that argument here as the Board did in *Iturralde*. In that case, the petitioner argued "that he was denied due process because Kansas Medicaid [which had suspended him from the Medicaid program] never held an administrative hearing on [the Medicaid claims review agency's] findings and the I.G. based his exclusion on Kansas Medicaid's action without making separate factual determinations on Kansas Medicaid's findings." *Id.* at 5. The Board rejected that argument, concluding that it amounted to a collateral attack on the state program action, which is not permitted in I.G. exclusion proceedings. *Id. at* 7, citing *Olufemi Okonuren*, DAB No. 1319 (1992); *accord Rogers*, DAB No. 2009, at 5-6. As the Board explained, an I.G. exclusion under section 1128(b)(5), like many of the exclusions under section 1128, is a derivative action. These exclusions are derivative because the I.G.'s authority to exclude is based on the fact that another administrative or judicial body took a certain type of action against the excluded individual. DAB No. 1374, at 7. Where an I.G. exclusion is derivative, "the fairness of a state's process in taking action against a petitioner is irrelevant . . . ." *Id*. We note that the *Iturralde, Okonuren* and *Rogers* cases, like this one, all involved state program actions to suspend or exclude the individual's participation based on allegations or investigative findings that the excluded individual denied and that were not adjudicated in a hearing on appeal of the state program's action. *Iturralde*, DAB No. 1374, at 5; *Rogers*, DAB No. 2009, at 5; *Okonuren*, DAB No. 1319, at 7-9.[12]

C. While we need not decide whether the I.G. had the alternative basis for exclusion relied on by the ALJ, we find no merit in Petitioner's argument that her alleged voluntary withdrawal was not to avoid formal sanctions.

Since we have concluded that the I.G. had a basis to exclude Petitioner, under section 1128(b)(5)(B) of the Act and section 1001.601(a)(1)(ii) of the implementing regulations because she was "excluded from participation . . . under . . . [a] State health care program, for reasons bearing on [her] . . . financial integrity," we need not decide whether the I.G. also had a basis to exclude her under the part of the regulation addressing voluntary withdrawals, section 1001.601(a)(2), the part on which the ALJ relied in upholding the exclusion. *See* 42 C.F.R. § 1001.2007(a)(1) (providing that the only issues on appeal are

[12] Petitioner argues that the fact that the *Rogers* case ended in a settlement and consent order distinguishes it from her case. NA at 12. However, Petitioner does not specifically allege that the settlement agreement or consent order contained admissions to the alleged conduct on which the State agency action was based, and the *Rogers* decision made no such finding. The decision indicates only that the order "state[d] that Petitioners 'voluntarily agree to permanently refrain from engaging in any health care services or related administration of such services within the State of Connecticut.'" DAB No. 2009, at 2.

whether the I.G. had a basis for the exclusion and whether – with qualifications not relevant here – the length of the exclusion is reasonable). However, because the parties' briefs to the Board reflect (understandably) the ALJ's voluntary withdrawal analysis, we deem it appropriate to explain why Petitioner's arguments on that issue would not persuade us to overturn the exclusion even if we needed to reach that alternate basis.

In concluding that Petitioner had voluntarily withdrawn from the State program to avoid formal sanctions, the ALJ relied on statements made in Petitioner's affidavit and briefs, finding them to be admissions. ALJ Decision at 6, citing P. Ex. 1 at ¶¶ 6-15, and ¶¶ 11-13; P. Br. at 8. On appeal, Petitioner agrees that she voluntarily withdrew from the program but asserts that "she did not opt out to avoid further proceedings or formal sanctions." NA at 11 (capital letters omitted). Indeed, Petitioner argues that "[i]t was legally impossible for [her] to intend to avoid further proceedings, because all proceedings against her had already been terminated." *Id*. (capital letters omitted).

Petitioner's argument is baseless. Her affidavit statements clearly show that if she voluntarily withdrew from the program, as she contends, she did so because she was concerned about the "consequences" of proceeding to a hearing, especially because she was no longer represented by counsel and had received notice from the hearing officer of the serious charges against her. *See* P. Ex. 1, at 2, ¶¶ 11-12; I.G. Ex. 6. Furthermore, Petitioner's brief to the ALJ, which he cited in his decision, clearly shows that Petitioner agreed to withdraw her appeal, at least in part, because counsel for the State program "warned Petitioner of dire consequences if she went through a contested hearing and lost." Pet. Summary Judgment Motion at 8, cited in ALJ Decision at 6.

Furthermore, Petitioner's argument that as a matter of law she could not have withdrawn from the State program to avoid formal sanctions is premised on her mistaken assertion that all proceedings against her had been terminated by the time she "opted out" of the program. NA at 11. As already discussed, Petitioner did not "opt out" of the program; rather, her participation in the State program was terminated, and the termination went into effect by operation of law because Petitioner's appeal of the termination was dismissed. I.G. Exs. 7, 8. Moreover, contrary to Petitioner's assertion (NA at 12), her termination from the State program was "effective July 1, 2015," as stated in the final termination letter, not July 9, 2015, the date the letter was written. I.G. Ex. 8. Thus, Petitioner's participation in the State program ended the day after the judge in the state administrative hearing dismissed her appeal of the termination, not nine days later as Petitioner asserts. *See* I.G. Ex. 7 (dismissal order dated June 30, 2015). Moreover, the dismissal of her appeal, which ended the appeal proceedings (but not the termination as Petitioner suggests), occurred after, not before, Petitioner's alleged agreement to "opt out" of the program which, had it occurred at all, would have occurred by Petitioner's own admission on June 29, 2015, the day before the hearing on her appeal of the termination was scheduled to begin.

Conclusion

For the reasons stated above, we affirm the ALJ Decision to uphold the I.G.'s exclusion of Petitioner from federal health care programs pursuant to section 1128(b)(5) of the Act and 42 C.F.R. § 1001.601, although we do so based on an analysis that differs from that employed by the ALJ.

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Sheila Ann Hegy
Presiding Board Member