Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: May 17, 2001
Peter D. Barran, M.D.,	
Petitioner,	Civil Remedies CR733 App. Div. Docket No. A-01-45
- v. -	Decision No. 1776
Inspector General.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Peter D. Barran, M.D. (Petitioner), appealed a January 26, 2001 decision by Administrative Law Judge (ALJ) Joseph K. Riotto. Peter D. Barran, M.D., DAB CR733 (2001) (ALJ Decision). The ALJ's Decision upheld the Inspector General's (I.G.'s) determination that Petitioner should be excluded from participation in Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services programs[1] for a period concurrent with the suspension of Petitioner's license to practice medicine or provide health care in the Commonwealth of Massachusetts (Commonwealth).

The I.G. imposed this exclusion pursuant to section 1128(b)(4) of the Social Security Act (Act) based on a September 5, 1988 decision by the Massachusetts Board of Registration in Medicine finding that Petitioner was guilty of practicing medicine while impaired. Following consideration of the parties' written submissions and evidence, the ALJ granted summary affirmance for the I.G.

[1] Hereafter, we refer to these programs generally as "Medicaid".

Predicated on 21 Findings of Fact and Conclusions of Law (FFCLs), the ALJ Decision considered whether: (1) summary disposition was appropriate; (2) the I.G.'s action constituted impermissible retroactive application of section 1128(b)(4) of the Act; and (3) Petitioner's request for a hearing was timely filed. The ALJ ruled against Petitioner on all three issues, and he therefore dismissed the request for hearing. ALJ Decision at 2-5.

Exceptions

Petitioner took exception to three FFCLs:

8. On December 21, 1989 Petitioner was notified of his indefinite exclusion from participation in federal health care programs. I.G. Ex. 1.

12. The I.G. was authorized to exclude Petitioner pursuant to section 1128(b)(4) of the Act.

18. An excluded individual is presumed to have received notice of exclusion that is delivered to the excluded individual's address within five days from the date of the notice of exclusion unless he can make a reasonable showing to the contrary. 42 C.F.R. § 1005.2.

Analysis

Our standard of review on a disputed conclusion of law is whether the ALJ Decision is erroneous. Our standard of review on a disputed finding of fact is whether the ALJ Decision is supported by substantial evidence on the record as a whole. 42 C.F.R. § 1005.21(h).

This case presents the threshold question of whether Petitioner's August 7, 2000 Request for a Hearing constituted a timely appeal of his December 21, 1989 exclusion from Medicaid. As discussed below, we find that Petitioner's hearing request was not timely. Accordingly, we affirm the ALJ's dismissal of Petitioner's appeal pursuant to 42 C.F.R. § 1005.2(e)(1) without reaching the other issues raised by Petitioner's exceptions.

On October 4, 1989, the I.G. notified Petitioner that he was considering excluding him from participation in Medicaid. This notice was sent to Petitioner's last known home address as well as that of Petitioner's court-appointed counsel who was representing Petitioner on the criminal charges in the Commonwealth which were at the root of the exclusion proceedings. On October 27, 1989, Petitioner received, from his counsel, a copy of the October 4th letter. On December 21, 1989, the I.G. sent Petitioner's counsel a copy of the final exclusion letter. Petitioner Br. (October 19, 2000) at 4. Petitioner alleged that

his court-appointed counsel did not forward a copy of the December 21st exclusion letter to him. Consequently, Petitioner asserted that he did not learn of his exclusion until 10 years later, when applying for licensure in another state, and that he acted promptly to appeal at that time. Id. Petitioner argued that the ALJ erred when he based his finding that Petitioner had not timely filed a request for hearing on the fact that Petitioner did not timely respond to the notice of exclusion sent to his court-appointed counsel. Id.

Section 1128(f) of the Act imposes upon the I.G. a duty to provide an individual to be excluded from Medicaid reasonable notice of that exclusion. A petitioner then has 60 days to file a written request for a hearing. 42 C.F.R. § 1005.2(c). The applicable regulation at 42 C.F.R. § 1005.2(c) provides that receipt of a notice letter, here the I.G.'s December 21, 1989 letter, "will be presumed to be 5 days after the date of such notice unless there is a reasonable showing to the contrary." Consequently, Petitioner's request for a hearing was due in late February 1990.

Both before the ALJ and this Board, Petitioner has offered no explanation for his failure to timely request a hearing other than the vague and wholly unsubstantiated excuse that his attorney at the time did not provide him with a copy of the Notice of Exclusion. Rather than focusing on the threshold issue of whether Petitioner's request for hearing was timely filed under the regulations, the ALJ adopted Petitioner's view that "lack of jurisdiction is a proper issue to be raised at any time" (Petitioner Br. (October 19, 2000) at 2; Petitioner Response Br. (December 4, 2000) at 3-4), and reviewed the merits of Petitioner's contention that the I.G. did not have jurisdiction to take the exclusion. However, Petitioner never identified any authority to support his assertion that he could seek adjudication of the I.G.'s authority to impose this exclusion despite his admitted failure to file a timely request for hearing or to obtain an extension of time for filing. The only nonwaivable jurisdiction argument that the Panel is aware of is the argument that, because a federal district court's jurisdiction is limited by the U.S. Constitution, a litigant in federal court may challenge the jurisdiction of the court at any time. See generally 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3522 (1984). Petitioner's contention concerning jurisdiction is not apposite here, since the ALJ's jurisdiction is limited to adjudicating a timely filed hearing request pursuant to 42 C.F.R. § 1005.2. As we discuss below, the ALJ correctly determined that Petitioner's hearing request was not timely; thus, the other issues addressed by the ALJ were not properly before him.

Petitioner conceded that he received, from his attorney, the I.G.'s proposed Notice of Exclusion in October 1989. Petitioner

Br. at 4. Petitioner offered no evidence that his relationship with his attorney was severed between October and December 1989, or that the I.G. was otherwise notified that service on counsel would not constitute service on Petitioner. Thus, without notice of a change in Petitioner's circumstances relative to counsel, the I.G. could reasonably rely on the same manner of delivery as when issuing the Notice of Exclusion in December.

The I.G. made reasonable efforts to provide Petitioner with notice of his exclusion. The I.G.'s efforts appear all the more reasonable in view of the fact that Petitioner has made no showing that the I.G. knew or should have known that his efforts were inadequate. There is simply no evidence that there was anything unusual about Petitioner's circumstances so that the I.G. could not, at the very least, rely on service on Petitioner's counsel as being sufficient. Moreover, in spite of Petitioner's circumstances in December 1989[2], as early as October 1989, both he and his counsel were aware of the specter of exclusion looming over him. Moreover, the October 1989 letter specifically stated that the "purpose of this letter is to furnish you with an opportunity to provide us with any information that you feel we should consider as mitigating in nature." The I.G. provided Petitioner 30 days to respond or face a determination on the record as it currently existed. Thus, the I.G. was not precluding a channel of communication with either Petitioner or his counsel. More importantly, however, Petitioner clearly was on notice that an exclusion was pending.

Additionally, the file before the ALJ contains a November 27, 1989 memorandum from the Regional Inspector General in Boston to his Director in Washington, D.C., summarizing the bases for excluding Petitioner. In the final sentence of that memorandum, the Regional Inspector General indicates that Petitioner's "attorney has requested that the Exclusion Notice be sent to his office since . . . [Petitioner's] current address is not available." Thus, in serving Petitioner's counsel, not only did the I.G. act reasonably in general, but also followed the directions of counsel for Petitioner to ensure service.

If the facts are as Petitioner asserts, he may have a cause for complaint against his counsel in 1989. Even if he does, however, that action is irrelevant to the case before us. Petitioner was properly excluded from Medicaid in 1989, a situation that was, apparently, of no import to him until recently when he sought a license to practice medicine in Montana. To practice medicine as he wishes, Petitioner must have his exclusion from Medicaid lifted. The first step available to Petitioner in overcoming his

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[2] It is not clear from the record if Petitioner was institutionalized in December 1989 in connection with the criminal charges against him.

exclusion is reinstatement of his license to practice medicine in the Commonwealth of Massachusetts.

Conclusion

Based on the preceding analysis, we conclude that the Request for Hearing filed by Peter D. Barran, M.D. was properly dismissed by the ALJ under 45 C.F.R. § 1005.2(e)(1) and that no other issues were properly considered by the ALJ.

/s/
Donald F. Garrett

/s/
Marc R. Hillson

/s/
M. Terry Johnson
Presiding Panel Member