

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD

Appellate Division

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| In the Case of: |) | |
| |) | DATE: March 25, 2010 |
| Michael J. Rosen, M.D., |) | |
| |) | |
| Petitioner, |) | Civil Remedies Dkt. No.C-09-753 |
| |) | |
| |) | App. Div. Docket No. A-10-37 |
| |) | |
| - v. - |) | Decision No. 2308 |
| |) | |
| The Inspector General |) | |

DECISION TO DISMISS NOTICE OF APPEAL

Petitioner Michael J. Rosen filed a "Notice of Appeal" seeking to appeal the December 29, 2009 "Order Dismissing Case" (ALJ Order) of Administrative Law Judge (ALJ) Richard J. Smith in the above-captioned matter. The dismissed case involved the Inspector General's (I.G.) June 30, 2006 exclusion of Petitioner from federal healthcare programs, effective July 20, 2006, under section 1128(b)(14) of the Social Security Act (Act). Previously the ALJ upheld the exclusion and the Board affirmed in a decision that constituted the final decision of the Secretary of Health and Human Services (Secretary). Michael J. Rosen, M.D., DAB CR1566 (2007), aff'd, Michael J. Rosen, M.D., DAB No. 2096 (2007). Petitioner appealed the Secretary's final decision to the United States District Court for the District of Arizona, and the court, after denying the Secretary's motion for summary judgment, granted the Secretary's alternative motion to "remand for fact-finding on the issue of 'access of beneficiaries to physician services' . . . under section 1128(b)(14)." Michael J. Rosen, M.D. v. Johnson, No. CV 07-

1686-PHX-EHC at 15 (D. Ariz. Aug. 12, 2009) (order reversing decision and remanding for further proceedings) (District Court Order).

During the proceedings on remand, the I.G. informed the ALJ that it had withdrawn Petitioner's exclusion retroactive to July 20, 2006, its original effective date, and expressed the opinion that "no further steps are necessary in this appeal because of the withdrawal." ALJ Order at 2. Following the issuance of an order to show cause, the ALJ dismissed the case pursuant to 42 C.F.R. § 1005.2(e)(4) for failure "to raise any issue which may properly be addressed in a hearing." Id. The ALJ concluded that there was no issue for hearing because the exclusion had been mooted by the I.G.'s withdrawal of the exclusion retroactive to its effective date. Id.

Petitioner's Notice of Appeal states that the ALJ Order was "erroneously made." Notice of Appeal at 1. However, Petitioner's Notice of Appeal does not dispute that the I.G. withdrew the exclusion retroactive to its effective date. Nor does the Notice of Appeal dispute the ALJ's stated basis for his dismissal order, his conclusion that 42 C.F.R. § 1005.2(e)(4) required dismissal since, given the withdrawal, there was no longer an appealable issue. Instead, Petitioner argues that because the exclusion was withdrawn and because the District Court Order stated, in part, that it was reversing the Secretary's decision, "[t]he [ALJ] Order of December 29, 2009 should be struck from the record and replaced by the . . . Board's own Order, which should rescind the remand to the ALJ and should confirm that by operation of law . . . the Decisions No. CR1566 (2007) and DAB No. 2096 (2007) have been irrevocably vacated and struck from the record (including removal from the [HHS] internet site/Board and ALJ Decisions database." Notice of Appeal at 3.¹

¹ Petitioner criticizes the tenor of the ALJ Order, characterizing it as "disrespectful and patronizing . . . relegat[ing] [the court's] mandate to a mere 'disagreement' with the ALJ and the Appeal Board." Notice of Appeal at 2. We find no support for Petitioner's characterization. The ALJ Order simply noted, correctly, that although the District Court remanded for an evidentiary showing on the issue of beneficiary access, the court "explicitly left undisturbed my findings and the Board's findings that Petitioner had borrowed substantial sums of money to finance his medical education, that he had defaulted on his obligation to repay those federally-guaranteed student loans, and that the Secretary . . . had taken all

(Continued. . .)

Petitioner has stated no basis for appeal to the Board. The regulations at 42 C.F.R. Part 1005 govern Board review in I.G. exclusion cases and provide for the Board to review (or decline review of) ALJ initial decisions reversing I.G. exclusions or modifying penalties, assessments or exclusions. 42 C.F.R. § 1005.21(a), (g). Petitioner does not dispute that the I.G. withdrew the exclusion retroactive to its effective date, or that the withdrawal leaves the Board, like the ALJ, with no exclusion to review. Furthermore, as indicated above, Petitioner's Notice of Appeal only asserts that the ALJ Order was "erroneously made," without actually arguing that the ALJ had no basis for dismissing its appeal on remand or specifically challenging the ALJ's reliance on 42 C.F.R. § 1005.2(e)(4). Notice of Appeal at 1. See 42 C.F.R. § 1005.21(c) (providing that a notice of appeal will be accompanied by a written brief specifying exceptions to the initial decision of the ALJ and reasons supporting the exceptions).

Petitioner also provides no basis for us to order any of the "relief" Petitioner seeks; thus, we decline to grant it. Petitioner asks that we "rescind the remand to the ALJ," but the District Court said it was granting the Secretary's "request for fact finding" and ordered the remand for "further administrative proceedings consistent with this order." District Court Order at 15-16. While the court-ordered remand was delivered to the Board first, the Board sent it on to the ALJ, as the initial finder of fact, consistent with the purpose of the remand.

Petitioner also asks us to "confirm" that the District Court Order, as a matter of law, "irrevocably vacated and struck from the record" the ALJ and Board decisions in this matter. Notice of Appeal at 3. However, once again, Petitioner provides no basis for this request. Nothing in the District Court Order indicates that it was intended to have this effect, or even that Petitioner requested that it have such an effect. Petitioner's assertions about the legal effect of that Order appear to be premised on an incomplete reading or understanding of the Order. The District Court concluded that there was substantial evidence in the record to support the key findings in the ALJ and Board decisions. District Court Order at 12-13. While the District

(Continued. . .)

reasonable steps to recover the outstanding debt prior to the exclusion action." ALJ Decision at 2; see District Court Order at 11, 12, 13.

Court Order did state that the court was "reversing the decision of Defendant," it also stated that it was "remanding the case," and the remand was for the narrow purpose of developing a factual record on the issue of "access of beneficiaries to physician services" under section 1128(b)(14) of the Act and 42 C.F.R. § 1001.1501. ALJ Decision at 13-15. There would have been no need for the District Court to remand for the taking of further evidence if the reversal meant that the court had reached a final decision on the merits of Petitioner's exclusion, as Petitioner seems to suggest.

Finally, we deny Petitioner's request that the ALJ Order, and the ALJ and Board decisions in this matter, be removed "from the record (including removal from the [HHS] internet site" Under the Freedom of Information Act, 5 U.S.C. § 552(a)(2)(A), the Departmental Appeals Board (DAB), is required to make Board and ALJ decisions available for public inspection and copying.² In order to achieve this, it is DAB policy to post and retain all final decisions on the DAB website. The DAB has no control over the publication of DAB decisions on public websites other than its own. Furthermore, the Altered Privacy Act System Notice (Privacy Act Notice), issued on March 6, 2006, permits the DAB to "make disclosures to the public and to commercial reporters of DAB decisions and rulings for the purpose of distributing and publishing the decisions and rulings." 71 Fed. Reg. 11,204, 11,205 (2006). The fact that the District Court reversed the Secretary's decision (in addition to remanding for further evidentiary proceedings) does not alter the historical record. The ALJ Order and ALJ and Board decisions Petitioner seeks to expunge are part of the record of proceedings before the DAB and will be retained on the website under DAB policy, FOIA and "routine uses" for the DAB's system of records, as defined in the Privacy Act Notice. Id.

² The DAB includes the ALJs, supported by the Civil Remedies Division staff, as well as the Board Members, supported by the Appellate Division staff, among other components.

Conclusion

For the reasons stated above, we dismiss the Notice of Appeal filed by Petitioner in the above-docketed matter because it does not specify any exceptions to the ALJ's dismissal under 42 C.F.R. § 1005.2(e)(4) or otherwise state a basis for relief the Board may grant.

_____/s/_____
Judith A. Ballard

_____/s/_____
Leslie A. Sussan

_____/s/_____
Sheila Ann Hegy
Presiding Board Member