

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Petronella Smith Howard,
(OI File No. M-10-40287-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-1215

ALJ Ruling No. 2014-19

Date: January 10, 2014

ORDER OF DISMISSAL

Petitioner, Petronella Smith Howard, pled guilty in federal district court to one count of conspiracy to possess with the intent to distribute oxycodone and oxymorphone, one count of possession with the intent to distribute oxycodone and oxymorphone, and one count of conspiracy to commit health care fraud. I.G. Ex. 2, at 1. Pursuant to sections 1128(a)(1) and 1128(a)(4) of the Social Security Act (Act) (42 U.S.C. §§ 1320a-7(a)(1) and (a)(4)), the Inspector General (I.G.) excluded her from participating in Medicare, Medicaid, and all federal health care programs for a period of fifteen years. Petitioner appealed, challenging the length of the exclusion.

The I.G. moved to dismiss, relying upon four exhibits (I.G. Exs. 1-4), and argued that Petitioner fails to raise an issue that may be properly addressed in a hearing. Following a telephone conference with the parties, I issued an order in which I gave Petitioner the opportunity to file a response to the I.G.'s motion to dismiss. Petitioner filed a response titled "Out of Time Appeal" (P. Resp.). The I.G. requested leave to file a reply to Petitioner's submission, accompanied by the reply. I have accepted the I.G.'s reply for filing without objection. For the reasons discussed below, I grant the I.G.'s Motion to Dismiss.

Discussion

In a letter dated January 31, 2013, the I.G. notified Petitioner that she was excluded from participation in Medicare, Medicaid, and all federal health care programs for fifteen years pursuant to sections 1128(a)(1) and 1128(a)(4) of the Act (42 U.S.C. §§ 1320a-7(a)(1) and (a)(4)). The I.G. cited as the basis for Petitioner's exclusion, pursuant to section 1128(a)(1) of the Act, her conviction of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. The I.G. additionally cited as the basis for Petitioner's exclusion, pursuant to section 1128(a)(4) of the Act, her felony convictions for criminal offenses related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance as defined under federal or state law. I.G. Ex. 1, at 1.

Petitioner does not dispute her convictions and that she is subject to exclusion under sections 1128(a)(1) and (a)(4) of the Act, but she argues that the period of exclusion is unreasonable because she suffers from chronic health care conditions. P. Req. for Hearing (July 17, 2013). Petitioner also contends in her response that her exclusion is unreasonable because she wishes "to own and operate a business assisting Medicaid & Medicare patients to their doctor's appointments" and also because she is 54 years old. P.Resp.

Section 1128(a)(1) of the Act mandates that the Secretary of the U.S. Department of Health and Human Services (Secretary) exclude from program participation any individual who has been convicted under federal or state law of a criminal offense related to the delivery of an item or service under the Medicare or a state health care program. *See also* 42 C.F.R. § 1001.101(a). Section 1128(a)(4) of the Act also mandates that the Secretary exclude from program participation any individual who has been convicted under federal or state law of a felony criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. *See also* 42 C.F.R. § 1001.101(d). An exclusion under section 1128(a) must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a). Regulations specify the factors that the I.G. may consider as aggravating and a basis for lengthening an exclusion period. 42 C.F.R. § 1001.102(b). Mitigating factors may be considered as bases for reducing the period of exclusion *only* if the exclusion period is longer than five years. 42 C.F.R. § 1001.102(c).

An excluded individual may appeal the basis for the exclusion and the length of the exclusion. 42 C.F.R. § 1001.2007(a)(1). Petitioner has not disputed that her convictions provided a basis to exclude her pursuant to sections 1128(a)(1) and 1128(a)(4) of the Act. Thus, Petitioner must be excluded for at least a minimum of five years.

Here, the I.G. found that two aggravating factors exist that support increasing Petitioner's exclusion period to fifteen years. The I.G. alleged that Petitioner's criminal acts were

committed over a period of one year or more, and the sentence imposed by the court included incarceration. I.G. Ex. 1, at 2; 42 C.F.R. § 1001.102(b)(2); 42 C.F.R. § 1001.102(b)(5).

Petitioner has attempted to claim that her chronic health care conditions, her desire to start a business, and her age justify a shorter period of exclusion. However, none of these factors can be considered in determining the reasonableness of Petitioner's exclusion beyond the five-year minimum period because they are not mitigating factors under the regulations. 42 C.F.R. § 1001.102(c). Therefore, I find that Petitioner has failed to raise any issue that may be properly addressed in a hearing.¹

I am required to dismiss a request for hearing where that request fails to raise any issue that may properly be addressed in a hearing. 42 C.F.R. § 1005.2(e)(4). Because Petitioner's hearing request does not raise an issue that I am empowered to resolve, I grant the I.G.'s motion and dismiss Petitioner's appeal.

/s/
Joseph Grow
Administrative Law Judge

¹ I note that, in her request for hearing, Petitioner states that she “need[s] to receive all the benefits that [she] was receiving prior to [her] incarceration.” I direct Petitioner to review the I.G.'s notice letter dated January 31, 2013. In that letter, the I.G. advised Petitioner that “[t]his exclusion does not affect your rights or the rights of your family members to collect benefits to which you or they may be entitled as a beneficiary under any Federal program such as Medicare, Medicaid or Social Security.” I.G. Ex. 1, at 3 (emphasis in original).