Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Mark B. Newland, R.N.,
(O.I. File No. H-12-42947-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-1009

ALJ Ruling No. 2014-28

Date: March 25, 2014

ORDER OF DISMISSAL

Petitioner, Mark B. Newland, R.N., requested a hearing before an administrative law judge to challenge a determination by the Inspector General (I.G.) of the Department of Health and Human Services that excludes Petitioner from participating in Medicare, Medicaid, and all other federal health care programs for five years pursuant to 42 U.S.C. § 1320a-7(a)(1). After consideration of the arguments raised in Petitioner's hearing request and in his prehearing submissions, I conclude that Petitioner failed to raise an issue which may properly be addressed in a hearing. Therefore, I dismiss Petitioner's hearing request pursuant to 42 C.F.R. § 1005.2(e)(4).

I. Background

By letter dated April 30, 2013, the I.G. notified Petitioner that he was being excluded from Medicare, Medicaid, and all other federal health care programs for the minimum statutory period of five years pursuant to 42 U.S.C. § 1320a-7(a)(1), effective May 20, 2013. I.G. Exhibit (Ex.) 1; *see* 42 C.F.R. § 1001.101(a). The I.G. advised Petitioner that the exclusion was based on his conviction in the Court of Common Pleas, Franklin County, Ohio, of a criminal offense related to the delivery of an item or service under

Medicare or a state health care program, including the performance of management or administrative services relating to the delivery of items or services under any such program. I.G. Ex. 1, at 1.

Petitioner subsequently filed a request for hearing. In his request, Petitioner stated that the basis for his request was that the I.G. "reviewing official" did not consider all of the facts relevant to Petitioner's case and that the exclusion period was too lengthy. Petitioner also requested that the exclusion be stayed.

I was assigned to hear and decide the case. I initially set a pre-hearing conference for July 31, 2013, but was forced to reschedule it after Petitioner failed to provide his contact information upon request. During the rescheduled conference on November 13, 2013, Petitioner was represented by an attorney. I explained that I did not have authority to enjoin or stay the exclusion and denied Petitioner's request that I do so. I also explained that the only issue I may hear and decide in Petitioner's case is whether the I.G. had a basis for excluding Petitioner from participation in Medicare, Medicaid, and other federal health care programs. I stated that an exclusion authorized under 42 U.S.C. § 1320a-7(a)(1) must be for a minimum of five years and an administrative law judge does not have the authority to consider whether or not the five-year length of the exclusion is reasonable. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2); *see* Order and Schedule for Filing Briefs and Documentary Evidence, November 13, 2013, at 2-3 ¶ 3.

On December 23, 2013, the I.G. filed his Informal Brief and eight proposed exhibits (I.G. Exs. 1-8). Petitioner, through counsel, filed his Informal Brief on February 3, 2014. Petitioner acknowledged that he was convicted of a criminal offense. P. Br. at 1. It is unclear whether Petitioner's "yes" response to the question posed in section II of the Informal Brief challenges whether his conviction (for theft from Ohio's Medicaid program) required his exclusion from Medicare, Medicaid, and all other federal health care programs, but he failed to provide any explanation as to why his conviction would not require exclusion. *See* P. Br. at 2. Petitioner's only argument was that he stopped participating in federal health care programs on January 9, 2013, and requested that the five-year exclusion "be retroactive to January 10, 2013." P. Br. at 3.

On February 18, 2014, the I.G. filed a reply brief in which the I.G. argued that an administrative law judge is without authority to amend the effective date of an exclusion.

II. Discussion

Petitioner has not disputed in either his hearing request or his informal brief that he was convicted of a criminal offense. Petitioner offered no explanation as to why his conviction does not require his exclusion under 42 U.S.C. § 1320a-7(a)(1) as the I.G. alleges in his April 30, 2013 exclusion notice. However, the regulations require Petitioner to state which of the I.G's findings of fact and conclusions of law he disputes

and the basis for the contention that they are incorrect. 42 C.F.R. § 1005.2(d). Therefore, I find that Petitioner has not sufficiently raised the issue of whether the I.G. had a basis to exclude Petitioner pursuant to 42 U.S.C. § 1320a-7(a)(1) due to his conviction. Because the I.G. has imposed the statutory minimum five-year exclusion, a dispute as to the basis for the exclusion is the only issue I can entertain. I cannot review the reasonableness of an exclusion of five years. 42 C.F.R. § 1001.2007(a)(1)-(2).

Further, I have no jurisdiction to change the effective date of the exclusion. *Kailash C. Singhvi, M.D.*, DAB No. 2138, at 4 (2007). The notice of exclusion "shall be effective at such time and upon such reasonable notice to the public and the individual . . . excluded as may be specified in the regulations . . . ." 42 U.S.C. § 1320a-7(c)(1). The regulations state that an exclusion is effective 20 days from the date of the exclusion notice, 42 C.F.R. § 1001.2002(b); however, the regulations do not specify *when* the I.G. must issue an exclusion notice. *Seide v. Shalala*, 31 F. Supp. 2d 466, 469 (E.D. Pa. 1998). It is well-settled that neither administrative law judges nor the Departmental Appeals Board has "the authority to review the timing of the I.G.'s decision to impose an exclusion where the I.G. has a legal basis to exclude." *Kris Durschmidt*, DAB No. 2345, at 3 (2010) (citing *Singhvi*, DAB No. 2138). Administrative law judges also do not have the authority to alter the effective date of an exclusion by retroactively changing the beginning date of the exclusion. *Lisa Alice Gantt*, DAB No. 2065, at 2-3 (2007); *see also* 57 Fed. Reg. 3,298, 3,325 (Jan. 29, 1992) (stating that an administrative law judge is not authorized to modify the date of the commencement of the exclusion identified in the notice of exclusion). The regulations are binding on me and I must follow them. 42 C.F.R. §§ 1001.1(b), 1005.4(c)(1).

III. Conclusion

Because Petitioner does not dispute that there is a basis for the imposition of an exclusion, is unable to dispute the length of the exclusion, and has objected only to the effective date of the exclusion (an issue over which I have no jurisdiction), I must dismiss Petitioner's hearing request because "it fails to raise any issue which may properly be addressed in a hearing." 42 C.F.R. § 1005.2(e)(4).

This dismissal is final and not subject to further administrative appeal. *See Ivette Hernandez-Ramirez, M.D.*, ALJ Ruling 2013-8, at 3 n.1 (HHS CRD April 25, 2013).

It is so ordered.

/s/
Scott Anderson
Administrative Law Judge