Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Arnold Roth,
(O.I. File Number H-14-40426-0),

Petitioner,

v.

The Inspector General,
Department of Health and Human Services.

Docket No. C-14-1377

Decision No. CR3446

Date: November 6, 2014

DECISION

The request for hearing of Petitioner, Arnold Roth, is dismissed pursuant to 42 C.F.R. § 1005.2(e)(4),[*] for failure to raise any issue that may properly be addressed in a hearing.

I. Background

The Inspector General of the Department of Health and Human Services (I.G.) notified Petitioner by letter dated May 30, 2014, that he was excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory

[*] References are to the 2013 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

The provisions of the Social Security Act cited in this decision are available at www.ssa.gov/OP_Home/ssact/ssact-toc.htm.

period of five years pursuant to section 1128(a)(4) of the Social Security Act (the Act) (42 U.S.C. § 1320a-7(a)(4)). The basis for Petitioner's exclusion was his felony conviction in the Dutchess County Court of the State of New York, of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance as defined under federal or state law.

Petitioner timely requested a hearing (RFH) by letter dated June 9, 2014, and postmarked on June 13, 2014. The case was assigned to me on June 27, 2014, for hearing and decision. On July 21, 2014, I convened a prehearing conference by telephone, the substance of which is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence (Prehearing Order) issued on July 21, 2014. Petitioner did not waive an oral hearing. The I.G. requested the opportunity to file a motion to dismiss prior to further development of the case and I set a briefing schedule.

On August 20, 2014, the I.G. filed a motion to dismiss with a supporting brief (I.G. Br.) and one exhibit marked I.G. Exhibit (Ex.) 1. On September 30, 2014, Petitioner filed a response in opposition to the I.G.'s motion to dismiss with three unmarked attachments consisting of a copy of the I.G.'s brief, a copy of I.G. Ex. 1, and Petitioner's hearing request (P. Br.). The I.G. filed a reply brief (I.G. Reply) on October 20, 2014. On October 29, 2014, Petitioner filed a letter dated October 27, 2014, which I treat as a sur-reply (P. Reply). The parties have not objected to my consideration of I.G. Ex. 1 or the documents submitted by Petitioner, and all are considered.

II. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold, followed by the pertinent facts and analysis.

> **1. Petitioner has no right to a hearing on the issue of whether or not his five-year period of exclusion under section 1128(a)(4) of the Act is unreasonable.**
>
> **2. Petitioner's request for hearing raises no issue that I may review, therefore, 42 C.F.R. § 1005.2(e)(4) requires that I dismiss his request for hearing.**

Petitioner conceded in his request for hearing that he cannot contest the basis for the I.G.'s decision to exclude him, that is, his conviction. Petitioner specifically requested review as to the five-year period of exclusion. Petitioner argues that he should be released from custody no later than about September 22, 2015, but the period of his exclusion will run beyond his maximum release date of September 22, 2016. Petitioner argues that because the exclusion will extend beyond his release from prison he will be deprived of his livelihood. RFH at 1. Petitioner argues in his opposition to the I.G.'s motion to dismiss that his sentence to confinement will be complete on September 22, 2016, but his exclusion will not be complete until June 2019. He argues that the

exclusion is unreasonable because it runs from June 2014 to June 2019, rather than from the date of his sentencing on September 26, 2013, to September 26, 2018. P. Br. at 1-2. Petitioner argues in his sur-reply that the June 20, 2014 effective date of his exclusion is unreasonable. Petitioner argues that I should have authority to review whether or not his exclusion is unreasonable. P. Reply.

Congress has directed that the Secretary of Health and Human Services (the Secretary) exclude from participation in any federal health care program any individual convicted after August 21, 1996, of a felony related to the unlawful manufacture, distribution, prescription or dispensing a controlled substance. Act § 1128(a)(4). Congress directed that an exclusion would be "effective at such time and upon such reasonable notice to the public and to the individual or entity excluded as may be specified in regulations" issued by the Secretary. Act § 1128(c)(1) (42 U.S.C. § 1320a-7(c)(1)). Congress has further directed that the period of exclusion for any of the reasons specified under section 1128(a) of the Act will be not less than five years, subject to waiver on facts not present in this case. Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)). Congress specified that an individual or entity that is subject to exclusion has a right to notice and administrative and judicial review. Act § 1128(f) (42 U.S.C. § 1320a-(7)(f)).

The Secretary has issued regulations implementing section 1128 of the Act. 42 C.F.R. pts. 1001-1005. The regulations provide that an individual or entity excluded under section 1128 of the Act has the right to request an Administrative Law Judge (ALJ) hearing, but only on the issues of:

> Whether there is a basis for the exclusion; and
>
> Whether the length of exclusion is unreasonable.

However, the regulations further provide that when the I.G. excludes an individual or entity for the minimum five-year period authorized for a mandatory exclusion under section 1128(a) of the Act, there is no right to request review as to whether or not the period of exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(1)-(2). The limitation on the right to review is consistent with the fact that Congress mandated a minimum five-year period for mandatory exclusions and the Secretary, ALJs, and the courts have no authority to impose a lesser period of exclusion. Because Petitioner was excluded pursuant to section 1128(a)(4) of the Act for the minimum five-year period authorized by Congress, he has no right to request ALJ review of the reasonableness of the period of his exclusion. An ALJ is bound to comply with the Act and regulations. 42 C.F.R. § 1005.4(c)(1). A request for hearing that does not raise an issue that may be properly addressed in a hearing must be dismissed. 42 C.F.R. § 1005.2(e)(4). Accordingly, Petitioner's request for hearing must be dismissed.

Even if I concluded that I have jurisdiction to grant Petitioner the review he requests, I have no ability to adjust the effective date of his period of exclusion. Petitioner argues that his exclusion should begin no later than the date of his sentencing. However, the Act and regulations are clear in this regard. The Act provides that exclusion "shall be effective at such time and upon such reasonable notice to the public and to the individual . . . excluded as may be specified in regulations." Act § 1128(c). The Secretary has provided by regulation that exclusion is effective 20 days from the date of the I.G.'s written notice of exclusion to the affected individual or entity. 42 C.F.R. § 1001.2002(b). I am bound to follow the Secretary's regulations. 42 C.F.R. § 1005.4(c)(1). Furthermore, the Departmental Appeals Board (Board) has consistently held that the applicable statute and regulations give an ALJ and the Board no authority to adjust the beginning date of an exclusion period by ruling that the effective date was some date prior to 20 days following the issuance of the notice of exclusion. *Randall Dean Hopp*, DAB No. 2166, at 3 (2008); *Lisa Alice Gantt*, DAB No. 2065, at 2-3 (2007); *Thomas Edward Musial, R.Ph.*, DAB No. 1991 (2005), *citing Douglas Schram, R.Ph.*, DAB No. 1372, at 11(1992) ("Neither the ALJ nor this Board may change the beginning date of Petitioner's exclusion."); *David D. DeFries*, DAB No.1317 (1992) ("The ALJ cannot . . . decide when [the exclusion] is to begin."); *Richard D. Phillips*, DAB No. 1279 (1991) (An ALJ does not have "discretion . . . to adjust the effective date of an exclusion, which is set by regulation."). The Board's rationale in its prior decisions is sound and Petitioner offers me no justification for a departure. I conclude that I have no authority to change the effective date of Petitioner's exclusion as Petitioner requests. Accordingly, Petitioner's mandatory exclusion must remain effective June 19, 2014, twenty days after the May 30, 2014 I.G. notice of exclusion. 42 C.F.R. § 1001.2002(b).

III. Conclusion

For the foregoing reasons, Petitioner's request for hearing must be dismissed.

/s/
Keith W. Sickendick
Administrative Law Judge