Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Mohammed Asgar, M.D.,
(OI File No. 5-10-4-004-9),

Petitioner,

v.

The Inspector General.

Docket No. C-17-123

ALJ Ruling No. 2018-5

Date: January 12, 2018

RULING DENYING MOTION TO VACATE ORDER DISMISSING REQUEST FOR HEARING

On June 12, 2017, Petitioner filed a motion to withdraw his hearing request. I granted that motion in a dismissal order dated June 14, 2017. On November 24, 2017, Petitioner moved to vacate the dismissal order and reopen the case (Motion to Vacate).[1] The Inspector General (I.G.) opposed Petitioner's application (I.G. Resp.). For the reasons discussed below, I deny Petitioner's motion.

I. Background.

The I.G. advised Petitioner by letter dated September 30, 2016 that he was excluded for a five-year period from participation in all federal health care programs. I.G. Exhibit

[1] Petitioner styled his pleading as a "Request to Vacate Order Dismissing Case." The governing regulations describe any application made to me for an order or ruling as a motion, which is further described as including relief sought, authority relied upon, and facts alleged. 42 C.F.R. § 1005.13(a). Petitioner's Request clearly falls within that description. I therefore refer to it as a motion herein.

(Ex.) 1. The I.G. cited section 1128(a)(1) of the Social Security Act as the basis for the five-year exclusion, referring to Petitioner's conviction in U.S. District Court for "a criminal offense related to the delivery of an item or service under the 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." *Id.* at 1.

Petitioner timely requested an Administrative Law Judge (ALJ) hearing regarding the exclusion (Request for Hearing). In his request, he argued that the length of the exclusion was "harsh, unreasonable, and unjust" given his cooperation in thwarting a Medicare billing scheme. Request for Hearing at 1. Petitioner further cited both comments by the sentencing judge and the government's sentencing memorandum in his criminal case for the proposition that he should be able to return to active medical practice. *Id.*

After the I.G. submitted a motion for summary judgment and accompanying exhibits, Petitioner through counsel submitted a motion to withdraw his hearing request, which I granted in a dismissal order dated June 14, 2017.

II. The Parties' Arguments.

On November 7, 2017, Petitioner filed his request to vacate my dismissal order and reopen his case (Motion to Vacate), citing new information that had come to light that was unknown to him at the time he withdrew his hearing request. Specifically, he contends that when he submitted his motion to withdraw, he believed that the State of Indiana would suspend his license to practice medicine, and that he learned only after withdrawing his request that Indiana would in fact allow him to continue practicing there. Motion to Vacate at 2. He further asserted that he believed, at the time of his hearing request withdrawal, that no harm would befall the community in which he worked, as other physicians could provide adequate substitute care to his own, but that subsequently, based on communication with the local hospital, discovered this was not the case. *Id.*

In his response opposing Petitioner's Motion to Vacate, the I.G. argues that the reasons Petitioner provided for why I should grant his motion are not relevant to Petitioner's appeal. I.G. Resp. at 1-2. Specifically, the I.G. argues that pursuant to 42 C.F.R. § 1001.2007(a)(1), my review is limited to whether the basis for the exclusion exists and whether the length of the exclusion is reasonable. *Id.* The I.G. asserts denial is proper because Petitioner's arguments do not have any bearing on whether Petitioner was convicted of a program-related offense or whether the period of exclusion is unreasonable. *Id.* at 3. He also argues that Petitioner's Motion should be denied as

untimely because ALJ decisions are final and binding 30 days after service, pursuant to 42 C.F.R. § 1005.20(d). *Id.* at 3-4.

Petitioner's December 7, 2017 reply characterizes the I.G.'s response as an attempt to argue the merits of the appeal, rebuts the I.G.'s timeliness argument on the ground that my dismissal order is not a decision as that term is used by the applicable regulations, and again reiterates the equitable reasons he believes reopening would be appropriate here. Reply at 1-3.

III. Discussion.

While I have considered the arguments made by both parties, I note that neither party actually addressed the critical threshold issue in this matter: whether I have the authority to reopen a matter that has been dismissed. Petitioner merely asserts, without citing authority, that "nothing in statute or regulation prohibits this Tribunal from vacating the Order . . . ." Motion to Vacate at 4. The I.G. briefly contends the time period for reopening has passed. *See* Resp. at 3-4.

A. I do not have express authority to reopen a dismissal.

In an effort to ground my authority to deny Petitioner's Motion in the governing regulations, the I.G cites the 30-day window provided by 42 C.F.R. § 1005.20(d) for reopening of decisions; his reliance is misplaced. That regulation refers to the time period after which ALJ *decisions* become final if not appealed, and characterizes a decision as being "based only on the record" and "contain[ing] findings of fact and conclusions of law." 42 C.F.R. § 1005.20(a). My June 14, 2017 Order Dismissing Case is not based on the record and does not make findings of fact or law. It simply notes Petitioner's withdrawal request and the applicable regulation that required me to dismiss the matter. Thus, it does not appear the regulations providing for a 30-day window of reopening are intended to apply to a dismissal.

This view is reinforced by the fact that initial decisions, which are subject to a 30-day reopening window, are appealable. *See* 42 C.F.R. § 1005.21(a) ("Any party may appeal the initial decision of the ALJ to the DAB by filing a notice of appeal with the DAB within 30 days of the date of service of the initial decision."). However, there is no appeal from a dismissal of a hearing request. 55 Fed. Reg. 12,205, 12,213 (Apr. 2, 1990) ("If [a] party fails to file a timely request for a hearing, or thereafter withdraws or abandons his or her request for a hearing, the [administrative law judge] is required to dismiss the hearing request. In such a case, the CMP or exclusion would *become final with no further appeal permitted.*") (emphasis added).

There are no appeal rights attached to my dismissal of Petitioner's hearing request. It is therefore not a decision and not subject to the 30-day reopening window provided by 42 C.F.R. § 1005.20(d). There being no other instances in the applicable regulations where my authority to reopen is discussed, I must conclude I have no express authority to reopen a dismissal.

B. While I may have the inherent authority to reopen, reopening in this instance is improper.

Federal courts have uniformly held that agencies have inherent authority to reconsider their own decisions. *See, e.g., Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 418 (6th Cir. 2004) (citing *Belville Mining Co. v. United States*, 999 F.2d 989, 997 (6th Cir. 1993)) ("Even where there is no express reconsideration authority for an agency. . . the general rule is that an agency has inherent authority to reconsider its decision . . . .").

This inherent authority is heightened where agencies act in a quasi-judicial capacity. *See Albertson v. Federal Communications Commission,* 182 F.2d 397, 399 (D.C. Cir. 1950) ("[I]n the absence of statutory prohibition . . . [t]he power to reconsider is inherent in the power to decide."); *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972), citing Kenneth Culp Davis, *Administrative Law Treatise* § 18.09 (1958) ("Every tribunal, judicial or administrative, has some power to correct its own errors or otherwise appropriately to modify its judgment, decree, or order.").

Consistent with this view, the Departmental Appeals Board has noted that "[g]enerally, a decision-maker has inherent authority to reopen and reconsider a decision even in the absence of express authorization in its procedures. Such authority serves the Department by ensuring fair process and sound decisions." *Henry L. Gupton*, DAB Ruling No. 2007-1 at 2 (2007).

However, the Board went on to observe that in circumstances where regulations or procedure did allow reopening, it was only permitted where "a party promptly alleges a clear error of fact or law." *Id.* at 3. Thus, in cases where it relied on its inherent authority to reopen, the Board thought it reasonable to apply the same clear error standard. I find that reasoning to be persuasive here as well. If I do have the inherent ability to reopen this matter, it should only be exercised where one party has "promptly allege[d] a clear error of fact or law." *Id.; see also Bookman,* 453 F.2d at 1265 ("[R]econsideration is often the sole means of correcting errors of procedure or substance.").

However, the Board has also made clear that reopening to correct an error of fact or law is only appropriate where the error is that of the decision-maker, not of the parties. *See Highland Pines Nursing Home, Ltd.*, DAB No. 2361 at 2 (2011) (denying a request to reopen based on party error, not an error in the Board's decision); *see also Mimiya Hospital*, DAB No. 1833 at 2 (2002) (observing that "[reopening] is the means for the parties and the Board to point out and correct any errors that make the decision clearly wrong.").

Here, Petitioner's motion, filed almost five months after the dismissal, can hardly be characterized as prompt. *See Chao v. Russell P. Le Frois Builder*, 291 F.3d 219, 230 (2nd Cir. 2002) (reconsideration must be conducted "reasonably promptly"); *Belville Mining Co.*, 999 F.2d at 1000 ("[A]bsent unusual circumstances, the time period would be measured in weeks, not years.").

And, more critically, Petitioner does not argue my dismissal was based on a clear error of fact or law. He cites no error on my part that could be corrected by reopening. Instead, he explains that he sought dismissal of his hearing request based on assumptions about his medical license and the state of his medical community that he subsequently discovered to be inaccurate. Petitioner's rationale for seeking reopening is reasonable, but he attempts to undo his own error, not mine. For the foregoing reasons, Petitioner's Motion is denied.

_____/s/_____
Bill Thomas
Administrative Law Judge