Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Bernard Harmon,	)	DATE: September 3, 1996
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-95-158
	)	Decision No. CR435
The Inspector General.	)	
	)	

DECISION

I conclude that I have no authority to hear and decide Petitioner's July 3, 1995 request for a hearing. Therefore, I dismiss Petitioner's request for a hearing.

I. Background

By letter dated December 13, 1993, Bernard Harmon, the Petitioner herein, was notified by the Inspector General (I.G.) of the U.S. Department of Health and Human Services (HHS), that it had been decided to exclude Petitioner for a period of five years from participation in Medicare and Medicaid. The I.G.'s rationale was that the exclusion is mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act (Act) because Petitioner had been convicted of a criminal offense related to the delivery of an item or service under Medicaid.

Petitioner, through counsel, filed a hearing request dated January 6, 1994, and the case was assigned to me as Docket Number C-94-051. By letter dated January 18, 1994, the I.G. imposed and directed a five-year exclusion against C.D. Hearing Laboratories, Inc. (Docket Number C-94-287), which Petitioner apparently owned at the time, pursuant to section 1128(b)(8) of the Act. I consolidated the two cases in February 1994.

In February 1994, pursuant to my Order and Schedule for Filing Briefs and Documentary Evidence dated February 7, 1994, the I.G. filed a brief in support of a motion for

summary disposition accompanied by I.G. Exhibits (I.G. Exs.) 1-9.

By letter dated April 4, 1994, Petitioner's counsel withdrew the hearing requests as to Docket Nos. C-94-051 and C-94-287. He stated that Petitioners (i.e., Bernard Harmon and C.D. Hearing Laboratories, Inc.) would not oppose the imposed exclusion and that the "non-opposition was being made without prejudice" since they were seeking a request for a waiver from the State of New York. On April 13, 1994, based on Petitioner's letter, I dismissed both cases. Order Dismissing Cases, dated April 13, 1994.

By letter dated July 3, 1995, Petitioner, acting pro se, requested a hearing to contest his December 1993 five-year exclusion. This hearing request was assigned to me as Docket Number C-95-158. Petitioner contended in his letter that the withdrawal of his previous hearing request was arranged by his attorney without his knowledge or consent. Petitioner argued also that, although he had pled guilty to the underlying charge, there was no basis for the charge upon which his conviction was based.

I issued an Order to Show Cause dated July 25, 1995, in which I gave Petitioner a deadline by which to respond and show to my satisfaction that he did not know or consent to his attorney's withdrawal of the previous hearing request and why, after all the time that has elapsed since his exclusion and my dismissal, he should have a hearing. The Order stated further that, if Petitioner did submit a response, the I.G. would have until October 5, 1995 to reply.

I received two letters in response to my Order to Show Cause: a letter dated August 22, 1995 from Petitioner and a letter dated August 16, 1995 from Mr. Finkelstein, the attorney who had previously represented Petitioner in the earlier actions (Docket Nos. C-94-051 and C-94-287). In his letter, Petitioner again requested a hearing to contest his December 1993 exclusion. Petitioner contended that he did not believe he had been properly represented by his criminal attorney. Petitioner argued that he was innocent of the charges against him and was unfairly convicted. He reiterated his contention that he had not known of or consented to the withdrawal of his earlier hearing request. Petitioner briefly set forth his version of the circumstances of his criminal case and alleged that he had never made any improper charges to Medicaid.

In his letter dated August 16, 1995, Mr. Finkelstein stated that Petitioner had informed him of his new request for a hearing. He alleged that Petitioner may not have fully understood the withdrawal of the earlier cases. He stated that requests for a waiver from New York State and also an attempt to set aside Petitioner's guilty plea based upon legal malpractice were unsuccessful. Mr. Finkelstein contended further that Petitioner claimed he was never informed of the consequences of pleading guilty by his criminal attorney and that, "had he known that he would be excluded for five years he never would have pleaded guilty to a program-related crime but would have gone to trial. . . ." Mr. Finkelstein expressed his opinion that Petitioner "was under the impression that he never, technically or otherwise, consented to or understood what took place in terms of my withdrawl [sic] of the previous hearing request. Rather, he believed that the matter was being held in abeyance pending the outcome of local proceedings and that he would be given an opportunity to oppose the exclusion at a later date if he saw fit." Mr. Finkelstein requested that Petitioner be given a hearing.

Because the I.G. was not initially aware that Petitioner had filed a submission since Petitioner had not served the I.G., the I.G. requested an extension of one month to submit a response. I granted the I.G.'s request.

The I.G. filed a Memorandum of Law seeking an order dismissing Petitioner's request for a hearing. In its Memorandum, the I.G. argued that Petitioner's request for a hearing should be dismissed for untimeliness and because it did not raise any issues which I have the authority to hear and decide. The I.G. alleged that Petitioner's July 3, 1995 hearing request was untimely since it was filed almost seventeen months after Petitioner received the I.G.'s December 13, 1993 exclusion notice. The I.G. questioned the credibility of Petitioner's contention that he did not know of or consent to his counsel's withdrawal of his earlier hearing request. The I.G. argued that Petitioner's counsel's correspondence shows that Petitioner was informed of his counsel's course of action and that in hindsight Petitioner may not have fully understood the significance of the withdrawal of his hearing request.

The I.G. contended further that Petitioner's request for a hearing is a collateral attack upon his conviction, which is prohibited under the regulations. The I.G. asserted that Petitioner does not dispute that a basis for his exclusion exists. Lastly, the I.G. argued that the relevant regulations do not allow the reopening of cases which have been dismissed.

I issued another Order to Show Cause dated April 18, 1996. I stated, inter alia, that, based on the letters from Petitioner and Mr. Finkelstein, it appeared that Petitioner admits that he pled guilty to a program-related crime. I stated further that, even without addressing the timeliness issue, there appeared to be little doubt that Petitioner's exclusion for five years is warranted under the regulations. I gave Petitioner the opportunity to address the issue of the validity of his exclusion, with a brief and documentation in support of his arguments. I stated that, if I did not receive anything from Petitioner by the deadline given, I would decide the case based on what was then in the record before me, which included the I.G.'s brief, with accompanying exhibits, which was filed on February 28, 1994, in support of its motion for summary disposition in the earlier consolidated action (Docket Nos. C-94-051 and C-94-287). I stated further that although I did not consider the I.G.'s brief in issuing the April 1994 dismissal order, I would consider it in this present action.

Lastly, in the Order to Show Cause, I informed Petitioner that, if he was seeking also a hearing on the five-year exclusion against C.D. Hearing Laboratories, Inc., he should state that in his response and include any pertinent arguments and documentation.[1]

Petitioner submitted three exhibits (P. Exs. 1-3), in response to the Order to Show Cause. The I.G. has not objected to the admission into evidence of the exhibits submitted by Petitioner. In the absence of objection, I admit into evidence P. Exs. 1-3.

I did not receive anything from the I.G. in response to Petitioner's submission.

Petitioner has not objected to the admission into evidence of the exhibits submitted previously by the I.G. in 1994. In the absence of objection, I admit into evidence I.G. Exs. 1-9.

I GRANT the I.G.'s motion to dismiss Petitioner's hearing request. I have no authority to consider Petitioner's arguments as they may relate to reopening, or to grant him a new hearing in this case. For the reasons stated

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[1] Petitioner did not respond to the portion of the Order to Show Cause which requested him to clarify his position with regard to the hearing request of C.D. Hearing Laboratories, Inc. For this reason, my decision addresses only the hearing request relating to Petitioner himself.

below, Petitioner's 1995 request for a hearing is dismissed.

II. Issue

The issue is whether I have authority to hear and decide Petitioner's July 3, 1995 request to, in effect, reopen his case and grant him a hearing.

III. Findings

1. By letter dated December 13, 1993, Petitioner was notified by the I.G. that it had been decided to exclude him for five years from participation in Medicare and Medicaid as a result of his conviction of a criminal offense related to the delivery of an item or service under Medicaid.

2. Petitioner, through counsel, filed a hearing request dated January 6, 1994, and the case was assigned to me as Docket Number C-94-051.

3. By letter dated January 18, 1994, the I.G. imposed and directed a five-year exclusion against C.D. Hearing Laboratories, Inc. (Docket Number C-94-287), which Petitioner apparently owned at the time, pursuant to section 1128(b)(8) of the Act. I consolidated the two cases in February 1994.

4. On April 13, 1994, based on Petitioner's letter dated April 4, 1994, I dismissed both cases. Order Dismissing Cases, dated April 13, 1994.

5. By letter dated July 3, 1995, Petitioner, acting pro se, requested a hearing on the December 1993 five-year exclusion. Petitioner's July 3, 1995 request is, in effect, a request to reopen his case and grant him a hearing.

6. The regulation at 42 C.F.R. § 1005.20(d) provides that "Except as provided in paragraph (e) of this section, unless the initial decision is appealed to the DAB, it will be final and binding on the parties 30 days after the ALJ serves the parties with a copy of the decision. If service is by mail, the date of service will be deemed to be 5 days from the date of mailing."

7. Inasmuch as a dismissal of a case is a disposition of the matter, albeit not on the merits, I find that the rationale of 42 C.F.R. § 1005.20(d) applies to dismissals, as well as to decisions.

8. Under the rationale of 42 C.F.R. § 1005.20(d), once an administrative law judge issues a dismissal of a case, that dismissal becomes final and binding on the parties 30 days after the administrative law judge serves the parties with a copy of the dismissal.

9. My dismissal became final and binding on May 18, 1994.

10. Petitioner made his July 3, 1995 request to reopen his case more than one year after the date my dismissal order became final.

11. I do not have authority to hear and decide the merits of Petitioner's July 3, 1995 request for a hearing under the regulations contained in 42 C.F.R. Part 1005.

12. Given that my dismissal of Petitioner's case has become final, Petitioner has no right to a hearing at this time.

13. In the alternative, if I were to reopen Petitioner's case, I would conclude that the I.G. was required to exclude Petitioner for five years as a matter of law because Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act.

IV. Discussion

The Part 1005 regulations contain no language relating specifically to reopening or revising an administrative law judge or an appellate panel decision, or a dismissal of a case by an administrative law judge. See 42 C.F.R. §§ 1005.4, 1005.20, 1005.21. The regulations provide that, unless appealed, an administrative law judge decision will become final and binding on the parties 30 days from the date that the administrative law judge serves the parties with a copy of the decision. 42 C.F.R. § 1005.20(d). The regulations provide additionally that a decision by an appellate panel will become final and binding 60 days from the date that it serves the parties with a copy of its decision. 42 C.F.R. § 1005.21(j).

A logical reading of 42 C.F.R. § 1005.20(d) is that it permits the administrative law judge to consider reopening and revising a decision during the 30-day time period prior to the decision becoming final and binding, or during the dates between the date of service of a decision on the parties and the date of appeal of that

decision.[2] However, it is also logical to read the regulations as precluding the administrative law judge from reopening or revising a decision after that decision becomes final and binding or after DAB appellate review is sought. Keith O. Irby, DAB CR427 (1996).

I note that the regulations cited above specifically refer to decisions.[3] Inasmuch as a dismissal of a case is a disposition of the matter, albeit not on the merits, I find the regulations cited above should be interpreted to apply to dismissals as well. Thus, once an administrative law judge issues a dismissal of a case, under the rationale of 42 C.F.R. § 1005.20(d), it would become final and binding on the parties 30 days after the ALJ serves the parties with a copy of the dismissal.

As stated above, Petitioner made his original hearing request in 1994. I dismissed Petitioner's hearing request (as well as that of his company) on April 13, 1994, pursuant to the April 4, 1994 letter filed by his counsel, Mr. Finkelstein.

By his letter dated July 3, 1995, Petitioner, now acting pro se, is, in effect, seeking a reopening of his case despite the fact that I dismissed the matter in April 1994. In her brief, the I.G. argued that Petitioner's hearing request should be dismissed for untimeliness and because it did not raise any issues which I have the authority to hear and decide. The I.G. argued also, among other things, that the relevant regulations do not contain any provisions which permit the reopening of cases which have been dismissed.

Because I am treating Petitioner's July 1995 request as a motion to vacate my 1994 dismissal of his case, the relevant issue is not whether this request was filed timely in accordance with 42 C.F.R. § 1005.2(e), but whether I have the authority under the regulations to now reopen Petitioner's case. I conclude that I do not have that authority.

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[2] I do not have authority to interpret regulations which affect the handling of appeals at the DAB. Therefore, I am making no decision concerning whether an appellate panel might have authority to reopen or revise its decision in a case, under 42 C.F.R. § 1005.21(j).

[3] 42 C.F.R. § 1005.20(a) provides that "[t]he ALJ will issue an initial decision, based only on the record, which will contain findings of fact and conclusions of law."

Applying the rationale of 42 C.F.R. § 1005.20(d) to dismissals, it is logical to conclude that my dismissal of the cases concerning Petitioner and his company became final and binding on the parties 30 days from the date they were served. Petitioner does not allege, nor do the facts support, that he filed his July 1995 request within 30 days of receipt of my April 1994 dismissal. Petitioner's July 1995 request to reopen my April 13, 1994 dismissal order is thus out of time. Accordingly, I am without authority under the regulations to hear and decide Petitioner's July 1995 request to, in effect, reopen my dismissal of his case. Given that the dismissal has become final, Petitioner has no right to a hearing at this time. Therefore, I grant the I.G.'s motion and dismiss Petitioner's July 3, 1995 hearing request.

Furthermore, to the extent that Petitioner misunderstood the withdrawal of his hearing request and its consequences, it appears that any such misunderstanding occurred between Petitioner and his counsel, Mr. Finkelstein. The dismissal order I issued was unequivocal and stated that the cases (i.e., the two cases concerning Petitioner and his company) were dismissed. If Petitioner had a question about the nature of the dismissal, it was incumbent upon him or his counsel to raise such questions upon receiving the order. I agree with the I.G. that "the remedy lies between counsel and petitioner." I.G. Memorandum of Law, at 3.

Although I gave Petitioner the opportunity to address the validity of his exclusion by submitting documentation in support of his arguments (Order to Show Cause, dated April 18, 1996), for the reasons stated above, I have since determined that I lack authority to reopen the record in this case and grant Petitioner a hearing on the merits.

However, in the alternative, were I to consider Petitioner's case on the merits, I would find that the I.G. properly excluded him for five years from participation in the Medicare and Medicaid programs pursuant to sections 1128(a)(1) and 1128(c)(3)(B) of the Act, for the reasons stated below.

It is undisputed that Petitioner pled guilty to the crime of offering a false instrument for filing in the second degree, and that the State court accepted the plea. I.G. Ex. 2. Petitioner was thus convicted of a criminal offense within the meaning of sections 1128(a)(1) and 1128(i) of the Act.

Petitioner, in pleading guilty, admitted at the sentencing proceeding that he had filed a false Medicaid claim form with a fiscal agent for New York State Medicaid. I.G. Ex. 2 at 6. Petitioner admitted that the claim form falsely stated the acquisition cost of a hearing aid that he dispensed. Id. It has been previously determined that financial misconduct directed at Medicare or Medicaid, in connection with the delivery of items or services under the program, constitutes a program-related offense invoking mandatory exclusion. Jack W. Greene, DAB CR19 (1989), aff'd DAB 1078 (1989), aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990). Thus, the criminal offense which provided the basis for Petitioner's conviction constitutes a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act.

V. Conclusion

I lack authority to reopen Petitioner's case because the dismissal of his case has become final and binding. Therefore, I grant the I.G.'s motion to dismiss. In the alternative, were I to consider Petitioner's case on the merits, I would conclude that the I.G. was required to exclude Petitioner for five years as a matter of law because Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicaid, within the meaning of section 1128(a)(1) of the Act.

/s/

Joseph K. Riotto
Administrative Law Judge