

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Joseph L. Leyva

and

Respiratory and Medical Services, Inc. d/b/a RAMS Medical

(OI File No. H-11-40480-9),

Petitioners,

v.

The Inspector General.

Docket No. C-12-538

Decision No. CR2563

Date: July 2, 2012

**DECISION**

Petitioner, Joseph L. Leyva, is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(5) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(b)(5)) effective March 20, 2012, based upon his exclusion from participation in the Alaska Medicaid program for reasons bearing on his professional competence, professional performance, or financial integrity. There is a proper basis for exclusion. Petitioner Leyva's exclusion for the period during which he is excluded from participation in the Alaska Medicaid program is mandated by section 1128(c)(3)(E) of the Act (42 U.S.C. § 1320a-7(c)(3)(E)) and 42 C.F.R. § 1001.601(b)(1).

Petitioner, Respiratory and Medical Services, Inc. d/b/a RAMS Medical, is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(8) of the Act (42 U.S.C. § 1320a-7(b)(8)) effective March 20, 2012, based on the fact that it is owned, managed, or controlled by Petitioner Leyva, an

excluded individual. There is a proper basis for exclusion. Petitioner RAMS is subject to the same period of exclusion as Petitioner Leyva pursuant to section 1128(b)(8) of the Act and 42 C.F.R. § 1001.1001(b)(1).

## **I. Background**

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner Leyva by letter dated February 29, 2012, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs until such time as he is reinstated by the Alaska Department of Health and Social Services (the state agency), pursuant to section 1128(b)(5) of the Act. The basis cited for Petitioner's exclusion was his exclusion from the Alaska Medicaid program for reasons bearing on his professional competence, professional performance, or financial integrity. I.G. Exhibit (Ex.) 1.

By separate letter dated February 29, 2012, the I.G. notified Petitioner RAMS that it was also being excluded from participation in Medicare, Medicaid, and all federal health care programs for an indefinite period of time. The I.G. advised Petitioner RAMS that it was being excluded pursuant to section 1128(b)(8) of the Act, because of its association with Petitioner Leyva, a sanctioned individual who had a direct or indirect ownership or managerial control over Petitioner RAMS. I.G. Ex. 2.

Petitioner Leyva timely requested a hearing on behalf of RAMS and himself by letter dated March 12, 2012, which was received at the Civil Remedies Division on April 4, 2012. The case was assigned to me for hearing and decision on April 6, 2012. A prehearing telephone conference was convened on April 19, 2012, the substance of which is memorialized in my order dated April 23, 2012. During the prehearing conference, Petitioner declined to waive an oral hearing. The I.G. requested the opportunity to file a motion for summary judgment and I established a briefing schedule.

On April 19, 2012, Petitioners filed a request for an emergency stay of the exclusion. The I.G. filed a response in opposition on April 24, 2012, accompanied by I.G. Exs. 1 and 2. Petitioners' motion for an emergency stay of exclusion was denied on April 26, 2012, on the grounds that I am without authority to order that the exclusions not be imposed or that their effective date be stayed.

The I.G. filed a motion for summary judgment and a supporting brief (I.G. Brief) on May 15, 2012, with I.G. Exs. 3 through 8. Petitioners filed a response to the I.G.'s motion for summary judgment (P. Response) on May 25, 2012, with Petitioner's Exhibits (P. Exs.) 1 and 2. On May 31, 2012, the I.G. filed a reply brief. Petitioner has not objected to my consideration of I.G. Exs. 1 through 8 and they are admitted as evidence. The I.G. did not object to my consideration of P. Exs. 1 and 2, and they are admitted.

## II. Discussion

### A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioners' rights to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services (the Secretary).

Section 1128(b)(5) of the Act provides:

(b) Permissive Exclusion.—The Secretary may exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):

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(5) Exclusion or suspension under federal or state health care program.—Any individual or entity which has been suspended or excluded from participation, or otherwise sanctioned, under—

(A) any Federal program, including programs of the Department of Defense or the Department of Veterans Affairs, involving the provision of health care, or

(B) a State health care program,

for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity.

The Secretary has promulgated regulations implementing this provision of the Act. 42 C.F.R. § 1001.601(a)(1).

Section 1128(b)(8) of the Act authorizes the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any business entity that is owned, operated, or managed by, or has as its agent, any person “who has been convicted of any offense described in subsection (a) of this section . . .” or who has been excluded from a federal or state health care program. Exclusions under section 1128(b) are permissive, i.e. discretionary. Entities excluded under section 1128(b)(8) generally must be excluded for the same period as the person whose relationship with the entity is the basis for the exclusion. 42 C.F.R. § 1001.1001(b)(1).

The standard of proof is a preponderance of the evidence. 42 C.F.R. § 1001.2007(c). Petitioner bears the burden of proof and the burden of persuasion on any affirmative defenses or mitigating factors, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b).

## **B. Issues**

The Secretary has by regulation limited my scope of review to two issues:

Whether there is a basis for the imposition of the exclusion; and

Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1). Whether the length of exclusion is unreasonable is not an issue in this case, as the period is specified by Congress and the Secretary. Act §1128(c)(3)(E); 42 C.F.R. § 1001.1001(b).

## **C. Findings of Fact, Conclusions of Law, and Analysis**

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

- 1. Petitioners' request for hearing was timely, and I have jurisdiction.**
- 2. Summary judgment is appropriate in this case.**

Petitioners' request for hearing was timely filed and preserved Petitioners' right to review of justiciable issues. I have jurisdiction.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The Secretary has provided by regulation that a sanctioned party has the right to hearing before an ALJ and both the sanctioned party and the I.G. have a right to participate in the hearing. 42 C.F.R. §§ 1005.2, 1005.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). An ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12). Summary judgment is appropriate and no hearing is required where either: there are no disputed issues of material fact and the only questions that must be decided involve application of law to the undisputed facts; or the moving party prevails as a matter of law even if all disputed facts are resolved in favor of the party against whom the motion is made. A party opposing summary judgment must allege facts which, if true, would refute the facts relied upon by the moving party. *See, e.g.,* FED. R. CIV. P. 56(c); *Garden City Med. Clinic*, DAB No.

1763 (2001); *Everett Rehab. and Med. Ctr.*, DAB No. 1628, at 3 (1997) (holding in-person hearing required where non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also New Millennium CMHC*, DAB CR672 (2000); *New Life Plus Ctr.*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case. There is no dispute that Petitioners were excluded by the State of Alaska from its state Medicaid programs for their failure to repay an overpayment. I.G. Ex. 3. Petitioner Leyva questions the validity of the state action, contending that the overpayment determination was based on questionable evidence and he claims also that the state agency “engaged in spoliation of evidence.” P. Br. at 1. However, I may not review the underlying state action and Petitioners may not collaterally attack that action before me. As discussed hereafter, this case must be resolved against Petitioners as a matter of law because the state action provides a basis for permissive exclusion and the period of exclusion is fixed by law. There are no genuine disputes as to any facts material to the issues before me. Accordingly, summary judgment is appropriate.

**3. There is a basis to exclude Petitioner Leyva pursuant to section 1128(b)(5) of the Act.**

On August 6, 2010, the state agency notified Petitioner Leyva by letter that Petitioners’ participation in the Alaska Medicaid program would be terminated effective 30 days from the date of the letter, unless Petitioners requested an appeal. The basis stated for the action was failure to repay or make arrangements to repay an overpayment or other erroneous payment. I.G. Ex. 3, at 3.<sup>1</sup> On October 11, 2010, the state agency informed Petitioner Leyva by letter that no appeal had been received from Petitioners and that the state agency had received Petitioner Leyva’s September 26, 2010 letter in which he had stated that he would not appeal the sanction. The state agency advised Petitioner Leyva that the state agency had no choice but to impose the sanction of exclusion from Alaska Medicaid, effective September 6, 2010, based upon Petitioners’ failure to repay or arrange for repayment of an overpayment or other erroneous payment. I.G. Ex. 3, at 8-9.

The state agency notified the I.G. by letter dated March 11, 2011, that Petitioners were being sanctioned “with indefinite exclusion” from Alaska Medicaid due to failure to repay an overpayment in the amount of \$39,640.65. The exclusion from the Medicaid program became effective on September 6, 2010. I.G. Ex. 3, at 1.

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<sup>1</sup> The State of Alaska reported Petitioners to the Healthcare Integrity and Protection Data Bank. I.G. Ex. 3, at 3.

Pursuant to section 1128(b)(5) of the Act, the Secretary may exclude from participation any individual or entity: (1) excluded from participation in a state health care program; (2) for reasons bearing upon the individual's or entity's professional competence, professional performance, or financial integrity. In this case, there is no dispute that the Alaska Medicaid program is a state health care program within the meaning of section 1128(h) of the Act. There is no dispute that Petitioners were excluded from the Alaska Medicaid program. There is also no dispute that the exclusions were based on failure to repay the overpayment determined by the state agency. The undisputed facts are sufficient to establish the "common sense" connection or nexus between the exclusions and Petitioners' financial integrity. *George Iturralde, M.D.*, DAB No. 1374, at 10-11 (1992). Accordingly, there is a basis for the exclusion of Petitioner Leyva pursuant to section 1128(b)(5) of the Act.

**4. There is a basis to exclude Petitioner RAMS pursuant to section 1128(b)(8) of the Act.**

The exclusion of Petitioner Leyva provides a basis for the exclusion of Petitioner RAMS pursuant to section 1128(b)(8) of the Act, due to the relationship of Petitioners. Petitioner RAMS's official business filings with the Alaska Department of Commerce establish that Petitioner Leyva is the President, Treasurer, and Director of RAMS, as well as its registered agent. I.G. Exs. 7, 8. Petitioner Leyva, a sanctioned individual, controls Petitioner RAMS within the meaning of section 1128(b)(8)(A) of the Act. Accordingly, a basis exists for the exclusion of Petitioner RAMS pursuant to section 1128(b)(8) of the Act.

Petitioners argue that the state agency's action was flawed in that it was based on questionable evidence, and that it was a "lie in judgment (P. Br. at 1)." However, Petitioners may not collaterally attack in this forum the state action that resulted in their exclusion, and I have no jurisdiction to review the underlying state action.

When the exclusion is based on the existence of a criminal conviction or a civil judgment imposing liability by Federal, State or local court, a determination by another Government agency, or any other prior determination where the facts were adjudicated and a final decision was made, the basis for the underlying conviction, civil judgment or determination is not reviewable and the individual or entity may not collaterally attack it either on substantive or procedural grounds in this appeal.

42 C.F.R. § 1001.2007(d). My review is limited to determining whether the I.G. was correct that there was an adverse state action upon which to base a permissive exclusion. I have concluded that there was an adverse state action. Petitioners' arguments are attempts to collaterally attack the state's action, which is simply not permitted in this proceeding. Petitioners requested subpoenas for transcripts of the state proceedings. The request is denied as Petitioners have not shown that the transcripts are sought for any reason other than to support Petitioners' attack upon the state action. I do not have the authority to grant the review of the state action that Petitioners seek.

Petitioners also claim that the state agency "engaged in spoliation of evidence" and that the state agency withheld evidence in a state court proceeding. These arguments are without merit in this proceeding. Spoliation by the state agency, even if true, is not grounds upon which I may grant relief. Petitioners must take their complaint regarding state agency conduct to the proper state authorities, as I have no jurisdiction to provide the review of the state agency action or the relief that Petitioners seek.

**5. The periods of the exclusions are not unreasonable as a matter of law.**

In this case, there is no issue as to the reasonableness of the periods of exclusion, as the periods of exclusion are fixed by the Act and regulations. The Act and regulations mandate that the periods of exclusion will be not less than the period of exclusion from the state program. Act § 1128(c)(3)(E); 42 C.F.R. § 1001.601(b)(1). Accordingly, the exclusion of Petitioner Leyva and Petitioner RAMS until Petitioner Leyva is reinstated in the Alaska Medicaid program is not unreasonable as a matter of law.<sup>2</sup>

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<sup>2</sup> Petitioner's reinstatement in Medicare or other federal programs is not automatic. When Petitioner Leyva is reinstated into the Alaska Medicaid program, he must apply to the I.G. for reinstatement. 42 C.F.R. §§ 1001.3001-.3004. If the state action is overturned on appeal, then Petitioner Leyva should advise the I.G. and request reinstatement in accordance with the regulations. 42 C.F.R. § 1001.3005.

