Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

James W. Marshall, Jr., D.O.
(OI File No. H-16-4-2175-9),

Petitioner,

v.

The Inspector General

Docket No. C-17-126

ALJ Ruling No. 2017-9

Date: February 15, 2017

DISMISSAL

Effective October 20, 2016, the Inspector General (IG) for the United States Department of Health and Human Services excluded James W. Marshall, Jr., D.O. (Dr. Marshall or Petitioner) from participating in Medicare, Medicaid, and all other federal health care programs for five years under 42 U.S.C. § 1320a-7(a)(4). Dr. Marshall requested a hearing to obtain an earlier effective date of exclusion so that the exclusion would run concurrently with the revocation of Medicare billing privileges and the associated reenrollment bar imposed by the Centers for Medicare & Medicaid Services (CMS). Dr. Marshall's hearing request did not dispute that there is a factual and legal basis for imposing a five-year mandatory exclusion on him and I have no authority to alter the effective date of his exclusion. Therefore, I must dismiss Dr. Marshall's hearing request because it does not raise an issue that I can adjudicate in this proceeding. 42 C.F.R. §§ 1001.2007(a)(1)-(2); 1005.2(e)(4).

I. Background

Dr. Marshall is a physician who was enrolled in the Medicare program. A number of years ago, Dr. Marshall supervised another physician whose medical license was on

probation due to a federal felony conviction in the late 1990's. Request for Hearing (RFH), Exhibit (Ex.) C at 21. While under Dr. Marshall's supervision, the other physician was convicted and incarcerated for prescribing medication for an undercover agent of the Drug Enforcement Administration even though the undercover agent indicated he would resell the medication. RFH, Ex. C at 22. During the time that the other physician was in prison, Dr. Marshall wrote 144 prescriptions to individuals associated with the other physician that Dr. Marshall had not seen as patients. RFH, Ex. C at 21-22. These prescriptions included narcotics such as Oxycodone and Hydrocodone, and involved approximately 4,385 pills. RFH, Ex. C at 23. Dr. Marshall only received approximately $5,000 for the prescriptions he provided to the other physician's patients. RFH, Ex. C at 22, 39-40. Dr. Marshall engaged in this conduct in January 2010. RFH, Ex. D at 1.

Dr. Marshall's improper prescription writing resulted in criminal charges. On March 1, 2011, Dr. Marshall pled guilty in the United States District Court for the District of Connecticut (District Court) to Count One of an Information charging him with conspiracy to distribute a controlled substance outside the scope of the usual course of business in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). RFH, Ex. C at 2; RFH, Ex. D at 1. On August 5, 2014, the District Court held a sentencing hearing.[1] At the end of the hearing, the District Court sentenced Dr. Marshall to unconditional discharge and a $5,000 fine. The District Court did not sentence Dr. Marshall to incarceration or probation because: Dr. Marshall essentially had already served his period of probation from 2011 to 2014; the District Court found Dr. Marshall to have committed his criminal acts out of compassion for the other physician's patients rather than financial gain; Dr. Marshall had an impressive history of service to his community as a doctor; and the District Court wanted Dr. Marshall to be allowed to practice medicine again. RFH, Ex. C at 32-40. On August 28, 2014, the District Court issued a Judgment in a Criminal Case that noted Petitioner's guilty plea and imposed the sentence outlined at the sentencing hearing. RFH, Ex. D at 1.

In initial determinations dated February 25, 2016, a CMS administrative contractor revoked the Medicare billing privileges for both Dr. Marshall and Dr. Marshall's medical practice retroactive to August 5, 2014.[2] The CMS administrative contractor also imposed

[1] It is unclear why several years passed between Petitioner's guilty plea and sentencing; however, neither the prosecutor nor the court appear to have caused this. RFH Ex. C at 9, 28-29.

[2] Petitioner does not assert that he requested CMS to reconsider its initial determinations or that he requested an administrative law judge hearing to dispute the revocations. Neither does the Civil Remedies Division case docket show a pending or completed case related to Petitioner's revocations. Therefore, the revocations may now be administratively final and binding. 42 C.F.R. §§ 405.803(a), 498.20(b).

a three-year reenrollment bar that commenced on March 27, 2016. RFH, Ex. B at 1-4. Due to the retroactive nature of the revocations, in April and May 2016, CMS and the Railroad Retirement Board sought recovery of Medicare payments previously made to Petitioner. *See* RFH, Ex. B at 5-26.

By letter dated September 30, 2016, the IG notified Dr. Marshall that he was being excluded from Medicare, Medicaid, and all other federal health care programs for the minimum statutory period of five years under 42 U.S.C. § 1320a-7(a)(4), effective in 20 days, which was October 20, 2016. The IG imposed the exclusion due to Dr. Marshall's "conviction . . . in the United States District Court, District of Connecticut, of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance as defined under Federal or State law." RFH, Ex. A at 1.

Petitioner timely filed a request for a hearing before an administrative law judge (ALJ) along with four exhibits marked as Exhibits A through D. In the hearing request, Petitioner conceded that he "pled guilty to one felony count of Conspiracy to Distribute Controlled Substances Outside the Scope of the Usual Course of Professional Practice." RFH at 2. Petitioner also conceded that the five-year exclusion period is mandatory, but he asks for the period to "be made effective as of August 5, 2014." RFH at 4. He noted that CMS revoked his Medicare billing privileges and those of his practice retroactive to August 5, 2014. RFH at 1. Petitioner argued that it would be unfair and inconsistent for his exclusion to extend beyond CMS's revocation period as that would effectively "extend his exclusion period to seven years . . . or two years more than the minimum five year period the Secretary [of Health and Human Services] intended to impose." RFH at 1-2, 4.

On November 30, 2016, I issued an Acknowledgment, Prehearing Order, and Notice of Prehearing Conference that established a number of prehearing submission deadlines and set the date for a prehearing conference. Before the prehearing conference, the IG moved for dismissal of Petitioner's hearing request because Petitioner failed to raise an issue that can be properly addressed at a hearing. At the prehearing conference, I provided Petitioner with time to respond to the motion to dismiss and the IG an opportunity to reply to Petitioner's response.

In his timely filed response to the motion to dismiss (P. Response), Petitioner again conceded his conviction and that the IG was required to exclude Petitioner for five years. P. Response at 1. However, Petitioner asserted that the IG had delayed imposing the exclusion for five and a half years, which resulted in a seven-year exclusion if one starts counting at the beginning of the retroactive effective date of CMS's revocation of Medicare billing privileges (August 5, 2014) and ends when the five-year exclusion would terminate (October 20, 2021). P. Response at 1-2. In order to avoid this, Petitioner requests that the exclusion effective date be made retroactive to his guilty plea in 2011, or to the revocation effective date of August 5, 2014, so that the exclusion and

revocation may run nearly contemporaneously.[3] P. Response at 2. Petitioner asserts that I should not dismiss his hearing request because he has a right to a hearing under the statute governing exclusions and that if I interpret the CMS and IG revocation actions together as a seven year exclusion, then Petitioner could dispute the length of exclusion and be able to exercise both his administrative hearing rights and rights to judicial review. However, Petitioner points out that if his hearing request is dismissed, then he may have difficulty obtaining judicial review of the IG's delay in imposing the exclusion. P. Response at 3-5.

The IG filed a reply to Petitioner's response (IG Reply). The IG argued that: the IG did not need to explain the timing of the exclusion it imposed; ALJs are without authority to change the effective date of exclusions; and CMS revocations are separate and distinct from IG exclusions. IG Reply at 1-2.

II. Discussion

The Secretary of Health and Human Services (Secretary) must exclude any individual from participating in any federal health care program for at least five years if that individual was convicted of a federal or state felony offense, which occurred after 1996, relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. 42 U.S.C. § 1320a-7(a)(4), (c)(3)(B). The Secretary has delegated this exclusion authority to the IG. 42 C.F.R. § 1001.101. An excluded individual is entitled to reasonable notice and opportunity for a hearing under 42 U.S.C. § 405(b) and to judicial review under 42 U.S.C. § 405(g). 42 U.S.C. § 1320a-7(f)(1).

Hearings held under section 405(b) are hearings that are held pursuant to the Administrative Procedure Act (*Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004)), which mandates ALJ review "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. §§ 554(a), 556(a)-(b). However, in exclusion cases, the Secretary restricted the issues an ALJ may adjudicate to the following: whether there is a basis for the imposition of the exclusion; and whether the length of exclusion is unreasonable if it exceeds the mandatory five year minimum length of exclusion. 42 C.F.R. § 1001.2007 (a)(1)-(2). The Secretary also directs ALJs to dismiss hearing requests that fail to raise one of these issues. 42 C.F.R. § 1005.2(e)(4). Finally, the Secretary requires ALJs to comply with all statutes and regulations. 42 C.F.R. §§ 1001.1(b), 1005.4(c)(1).

[3] CMS's revocation plus the three-year reenrollment bar commencing on March 27, 2016, will run from August 5, 2014 through March 27, 2019. Petitioner requests that the exclusion run from August 5, 2014, through August 5, 2019.

In the present case, although Petitioner concedes that he was convicted of a felony offense that requires exclusion for at least five years, he argues that I have the authority to review the effective date of his exclusion because he asserts that his length of exclusion is really seven years in length when taken in combination with CMS's revocation of Medicare billing privileges.

I cannot conclude that Petitioner's exclusion is for more than five years in length based on the revocation of Petitioner's Medicare billing privileges. The revocation of Petitioner's Medicare billing privileges and the statutory exclusion under 42 U.S.C. § 1320a-7(a)(4) are "distinct remedial tools" that the Secretary may use against individuals. *Ahmed v. Sebelius*, 710 F. Supp. 2d 167, 175 (D. Mass. 2010). The revocation of Petitioner's Medicare billing privileges is an action that precludes Petitioner from billing the Medicare program for items and services provided to Medicare beneficiaries. 42 C.F.R. §§ 424.500, 424.502 (definition of *Revoke/Revocation*), 424.535. In contrast, an exclusion is significantly broader in scope than a revocation and "extends beyond Medicare to Medicaid and all other federal health care programs." *Ahmed*, 710 F. Supp. at 176. While a revocation action results in a Medicare reenrollment bar ranging from one to three years depending on the circumstances related to the revocation, the minimum required duration of an exclusion will be based on whether the exclusion is mandatory or permissive, and the exclusion may only exceed five years if certain aggravating factors are present and there are no mitigating factors that offset the aggravating factors. *See Ahmed*, 710 F. Supp. at 175; 42 U.S.C. § 1320a-7(a)-(c); 42 C.F.R. §§ 424.535(c), 1001.102. Although Petitioner has been subjected to both a revocation and an exclusion based on the same set of circumstances, they are distinct actions. Therefore, I cannot consider the retroactive effective date for Petitioner's revocation to conclude that Petitioner has been excluded for seven years in order to exercise jurisdiction over this case.[4]

[4] The Secretary may terminate a physician's participation in the Medicare program if the physician "has been convicted of a felony under Federal or State law for an offense which the Secretary determines is detrimental to the best interests of the [Medicare] program or program beneficiaries." 42 U.S.C. § 1395u(h)(8). CMS exercises this authority on behalf of the Secretary through the revocation regulations. 42 C.F.R. § 424.535a)(3). The Secretary also promulgated a regulation making the effective date for the revocation of Medicare billing privileges based on a felony conviction retroactive to the date of the conviction. 42 C.F.R. § 424.535(g). However, in regard to exclusions based on criminal convictions, the Secretary promulgated a regulation that did not include a retroactive effective date. 42 C.F.R. § 1001.2002(b). It is this inconsistency in the regulations, taken with the fact that CMS and the IG act independently to impose revocations and exclusions, which has understandably caused Petitioner's to assert that he is subject to sanctions imposed by the Secretary that will last a total of seven years based on the same conviction.

In any event, 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). It is significant, however, that those 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 ALJs nor the Departmental Appeals Board has "the authority to review the timing of the I.G.'s decision to impose an exclusion where the IG has a legal basis to exclude." *Kris Durschmidt*, DAB No. 2345 at 3 (2010). ALJs also do not have the authority to alter the effective date of the exclusion by retroactively changing the beginning date of an 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 ALJ is not authorized to modify the date of the commencement of the exclusion identified in the notice of exclusion). ALJs also do not have the authority to enjoin an act of the Secretary. 42 C.F.R. § 1005.4(c)(4). As a result, I do not have jurisdiction to grant Petitioner the relief he seeks and must dismiss the 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).

As noted above, Petitioner is concerned that he will not be able to obtain judicial review of the IG's exclusion if I dismiss this matter. In case Petitioner wants to seek further administrative review in order to assist in its efforts to obtain judicial review, the appropriate guidelines for filing an appeal with the Appellate Division of the Departmental Appeals Board will accompany this decision.

III. Conclusion

I dismiss Petitioner's hearing request because it failed to raise an issue over which I have jurisdiction.

/s/
Scott Anderson
Administrative Law Judge