

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Samuel Gerson, M.D.  
(O.I. File No. H-14-42946-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-647

ALJ Ruling No. 2017-2

Date: October 27, 2016

**ORDER RETURNING CASE TO THE INSPECTOR  
GENERAL TO ADJUDICATE PETITIONER'S  
APPEAL UNDER 42 C.F.R. § 1001.3004**

Because the Inspector General (IG) of the Department of Health and Human Services failed to properly provide Samuel Gerson, M.D. (Dr. Gerson or Petitioner) with notice of his right to appeal the IG's initial denial of his request for reinstatement, but Dr. Gerson timely directed such an appeal to the Departmental Appeals Board (DAB) of the Department of Health and Human Services, I return Dr. Gerson's case to the IG to provide a full and fair adjudication under 42 C.F.R. § 1001.3004.

On April 30, 2015, the IG notified Dr. Gerson that he was being excluded from participating in Medicare, Medicaid, and all other federal health care programs for five years based on a conviction for a felony offense involving the illegal manufacture, distribution, prescribing, or dispensing of controlled substances. Dr. Gerson requested a hearing before an administrative law judge (ALJ) to contest the exclusion. After receiving prehearing submissions from the parties, I granted summary judgment for the IG and affirmed the exclusion under 42 U.S.C. § 1320a-7(a)(4). In doing so, I concluded

that Dr. Gerson had been convicted in the state of California of one count of felony prescription forgery. My conclusion that Petitioner was “convicted” of the crime was based on the statutory definition of that term in 42 U.S.C. § 1320a-7(i), which indicates that for exclusion purposes, a conviction includes either pleading guilty to a crime and a court accepting that plea, or participating in a deferred adjudication program. In Dr. Gerson’s case, he both pled guilty and a court accepted that plea, and entered a deferred adjudication program. *See Samuel Gerson, M.D.*, DAB CR4373 (2015).

A number of months after my decision, California enacted a new law permitting Petitioner to withdraw his guilty plea. Petitioner took advantage of this new law and, on March 1, 2016, obtained an order from the Superior Court of California, County of San Diego, accepting the withdrawal of his previously entered guilty plea, permitting Petitioner to enter a not guilty plea, and dismissing the criminal case against Petitioner. IG Exhibit (Ex.) 5 at 8. On April 6, 2016, Petitioner requested reinstatement (i.e., termination of the exclusion) from the IG under 42 C.F.R. § 1001.3005. IG Ex. 5 at 1-2. Section 1001.3005 mandates retroactive reinstatement to individuals whose conviction is reversed or vacated on appeal. On May 26, 2016, the IG denied Petitioner’s request for reinstatement. IG Ex. 6. Although the IG warned Petitioner not to participate in any federal health care program and advised Petitioner that he could request reinstatement again 90 days before his five-year exclusion ended, the IG notably did not advise Petitioner that he had the right to appeal this denial of reinstatement to the IG within 30 days. IG Ex. 6 at 2-3.

On June 21, 2016, Petitioner filed an appeal of the IG’s denial of reinstatement with the DAB. Petitioner’s appeal indicated that he sought review of the reinstatement denial, but also asked that an ALJ reopen my decision upholding his exclusion in order to consider the California Superior Court’s March 1, 2016 order dismissing the criminal charges against him. I was assigned to Petitioner’s appeal and, on July 20, 2016, I held a prehearing conference with counsel for the parties. At that conference, I told the parties that I needed them to brief whether I had jurisdiction to review the denial of Petitioner’s reinstatement request and/or to reopen my previous decision involving Dr. Gerson to reverse the exclusion. The IG filed a brief (IG Br.) and 11 exhibits. Petitioner filed a brief (P. Br.) and one exhibit.

While conceding that an ALJ may reopen an exclusion decision, the IG argues that the authority to reopen a decision is limited to correcting clear errors in the decision and that my decision was not erroneous when I issued it. IG Br. at 7. The IG also asserts that only the IG has jurisdiction to review the denial of reinstatements and Petitioner failed to avail himself of the IG’s appeal process. IG Br. at 8.

Petitioner argues in response that ALJs have the authority to reopen exclusion cases to consider new evidence that an individual should not be excluded. P. Br. at 4. Petitioner asserts that my exclusion decision is now erroneous in light of the March 1, 2016 California Superior Court order and that I should reopen the case to correct my decision. P. Br. at 5. Petitioner also argues that he sought reinstatement from the IG, but was denied based on the IG's incorrect interpretation of 42 C.F.R. § 1001.3005, and alleges that the IG never provided notice of his appeal rights. P. Br. at 6-7.

I agree with both parties that the DAB has recognized that adjudicators in exclusion cases may exercise inherent authority to reopen decisions in order to correct errors. *Mark B. Kabins, M.D.*, DAB Ruling No. 2012-1 at 2-3 (2011); *Henry L. Gupton*, DAB Ruling No. 2007-1 (2007). However, the regulations provide an avenue by which Petitioner may obtain the relief he seeks short of me exercising "inherent authority." Rather, Petitioner's timely appeal of the IG's denial must be adjudicated and, under the regulations, it is the IG, and not I, who must perform the adjudication.

With certain exceptions not applicable in this case, the Administrative Procedure Act 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). Individuals excluded by the IG are afforded hearing rights under section 205(b) of the Social Security Act (42 U.S.C. § 405(b)). 42 U.S.C. § 1320a-7(f)(1). Hearings under section 205(b) are hearings held pursuant to the Administrative Procedure Act. *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004).

Although an excluded individual has a right to notice and an opportunity for a hearing on the record, and thus ALJ review, regarding the imposition of exclusion, no such right exists for decisions related to reinstatement. Rather, the Secretary of Health and Human Services has statutory authority to terminate an individual's exclusion, but that individual has no right to a hearing to dispute the Secretary's decision. *See* 42 U.S.C. § 1320a-7(g)(2). The Secretary promulgated regulations assigning the Office of the Inspector General to consider requests for reinstatement, and if the Office of the Inspector General should deny the request initially, then the excluded individual could appeal that denial to the Office of the Inspector General. 42 C.F.R. §§ 1001.3002-.3004. Significantly, the regulations prohibit an ALJ from ordering the reinstatement of an excluded individual and preclude administrative review of the IG's ultimate decision regarding reinstatement. 42 C.F.R. §§ 1001.3002(f), 1001.3004(c).

Although I do not have authority to review the IG's denial of Petitioner's reinstatement, I order the IG to fully consider Petitioner's appeal of that denial. Petitioner had a right to seek review of the denial of his reinstatement request within 30 days of the decision denying the request. 42 C.F.R. § 1001.3004(a). The IG's denial notice sent to Petitioner

did not mention his right to appeal. Not illogically, Petitioner filed his appeal with the DAB, the entity with whom he filed his appeal after receiving the initial exclusion determination. Importantly, Petitioner filed that appeal within 30 days of the notice denying his reinstatement request.

ALJs have the authority to remand timely filed appeals to the Department of Health and Human Services' component with jurisdiction to conduct the adjudication. *See Victor Alvarez*, DAB CR2070 at 5-6 (2010), *aff'd*, DAB No. 2325 at 12-13 (2010). Therefore, in line with the *Alvarez* case, I construe Petitioner's timely appeal with the DAB as an appeal under 42 C.F.R. § 1001.3004(a). DAB CR2070 at 5. I return this case to the IG and order the IG to adjudicate Petitioner's appeal under 42 C.F.R. § 1001.3004(b). Because the IG failed to provide Petitioner with notice of his appeal rights, the IG will afford Petitioner, prior to rendering a final decision on appeal, the opportunity to submit any written argument or documentary evidence he wishes to submit and/or a written request to present written evidence and oral argument to an IG official. *See* 42 C.F.R. § 1001.3004(a). When rendering a decision on appeal, the IG will respond to Petitioner's particular claim that he deserves early reinstatement based on 42 C.F.R. § 1001.3005.

Because adjudication of Petitioner's appeal through the regulatory process can be achieved, I do not rule on Petitioner's request to reopen his exclusion decision.

It is so ordered.

\_\_\_\_\_/s/\_\_\_\_\_  
Scott Anderson  
Administrative Law Judge