Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: April 10, 2009
Cathy Statler,	
Petitioner,	Civil Remedies CR1871 App. Div. Docket No. A-09-44
	Decision No. 2241
- v. -	
Inspector General.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Cathy Statler (Petitioner) appeals the December 8, 2008 decision by Administrative Law Judge (ALJ) Keith W. Sickendick dismissing Petitioner's request for hearing. Cathy Statler, DAB CR1871 (2008) (ALJ Decision). The ALJ held that Petitioner failed to file a timely hearing request. For the reasons explained below, we uphold the ALJ Decision and affirm and adopt all of the findings of fact and conclusions of law in the ALJ Decision.

Legal Background

Section 1128(a)(1) of the Social Security Act (Act)[1] requires the Secretary of the Department of Health and Human Services to

[1] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

exclude from participation in Medicare, Medicaid, and all federal health care programs any individual who "has been convicted of a criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program."

Under section 1128(i)(3) of the Act, an individual "is considered to have been 'convicted' of a criminal offense" for purposes of section 1128(a) when a guilty plea or plea of nolo contendere by the individual has been accepted by a federal, state, or local court. Section 1128(c)(3)(B) of the Act provides that "in the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years. . . ."

The right to notice of, and opportunity for a hearing to contest a mandatory exclusion arises under section 1128(f) of the Act. That section provides that "any individual or entity that is excluded (or directed to be excluded) from participation under this section is entitled to reasonable notice and an opportunity for a hearing . . . ."

Implementing regulations at 42 C.F.R. Part 1001 set forth the specific requirements for notices of exclusion and the procedures to appeal an exclusion. Under 42 C.F.R. § 1001.2002, if the Inspector General of the Department of Health and Human Services (I.G.), pursuant to the Secretary's delegated authority, determines that exclusion is warranted, the I.G. must send a written notice of the decision to the affected individual. The written notice must state the basis for the exclusion, the length of the exclusion and factors considered in setting the length, the effect of the exclusion, the earliest date on which the I.G. will consider a request for reinstatement, the requirements and procedures for reinstatement, and the appeal rights available to the excluded individual. Id.

Under section 1005.2(c) of the regulations, a hearing request "must be filed within 60 days after the notice . . . is received by the petitioner," and "the date of receipt of the notice letter will be presumed to be 5 days after the date of such notice unless there is a reasonable showing to the contrary." Section 1005.2(e)(1) provides that the "ALJ will dismiss a hearing request" when the "petitioner's . . . hearing request is not filed in a timely manner[.]"

Case Background[2]

In 1999, Petitioner, a registered nurse and former owner of Southwest Home Health (Southwest), entered a plea of guilty to a Class A misdemeanor in a criminal action brought before the United States District Court for the District of Arizona. Petitioner Brief on Appeal of the ALJ Decision (P. Br.) at 1-2; P. Request for Hearing Ex. 2, at 1-2. "As a factual basis for the plea," Petitioner "admitted that between June 1997 through June 1998" she ". . . fraudulently submitted or caused to be submitted a false claim to [the agency that administered the Medicare program] for skilled nursing services" when she "knew she had not properly satisfied conditions of participation in the Medicare program and was therefore not entitled to payment . . . ." P. Request for Hearing Ex. 2, at 2.[3] Under the criminal action plea agreement between Petitioner and the United States Department of Justice, Petitioner "agree[d] to be permanently excluded, directly or indirectly, as an eligible provider from CHAMPUS, Medicare, Medicaid . . . and any other program with a federal pay source." P. Request for Hearing Ex. 6, at 1.

According to Petitioner, under the terms of the criminal plea agreement she consented to a separate settlement agreement involving possible civil and administrative claims against her

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[2] The following background information is drawn from the ALJ Decision and the record before the ALJ and summarized here for the convenience of the reader, but should not be treated as new findings.

[3] Petitioner did not provide a copy of the criminal information, the criminal plea agreement, or the record of the entry of judgment against Petitioner in the U.S. District Court criminal matter. The provisions of the criminal plea agreement cited in this decision are drawn from the following secondary sources in the record quoting from it, which are: A separate consent agreement entered in a matter before the Arizona State Board of Nursing, settling charges that Petitioner violated the Nurse Practice Act (P. Request for Hearing Ex. 2); a June 24, 2003 letter from the lawyer who represented Petitioner in the criminal action (P. Request for Hearing Ex. 6); and a May 19, 2004 letter from the I.G. Office of Investigations to Petitioner (P. Request for Hearing Ex. 7).

arising under the False Claims Act, the Program Fraud Civil Remedies Act, the Civil Monetary Penalties Law, the common law, and the provisions for Medicare, Medicaid and other federal health care program exclusions and civil monetary penalties. P. Request for Hearing at 2; P. Request for Hearing Ex. 1. The civil claims settlement agreement, "entered into" on April 8, 1999, provided in part:

> 2. The United States alleges that a review of Southwest's claims from June, 1997 through June, 1998 for home health care services indicated that claims were false because Southwest submitted claims for more visits than was contemplated by the plan of care. The United States also alleges that false claims were submitted for payment to the Medicare program because Southwest paid for the referrals of Medicare patients in violation of the Anti-Kickback statute, 42 U.S.C. §1320a-7b. The conduct described in this paragraph is hereinafter referred to as the Covered Conduct.

P. Request for Hearing Ex. 1, at 2. The settlement agreement further provided that in "compromise and settlement of the rights and requirements of [the I.G.] to exclude . . . Cathy A. Statler pursuant to 42 U.S.C. § 1320a-7, . . . Cathy A. Statler agree[s] to be permanently excluded under 42 U.S.C. § 1320a-7(a)(1) and § 1320a-7(b)(7) for the Covered Conduct." Id. Under the agreement, Petitioner also "agree[d] not to contest such exclusion either administratively or in any State or Federal court." Id. at 2-3.

In addition, the settlement agreement separately stated that, notwithstanding any other provision, the parties understood the agreement "expressly [did] not release Southwest or its current and former directors, officers, trustees and employees . . . from (a) any criminal liability which may arise from the Covered Conduct described in paragraph 2; . . . and (g) all rights and statutory obligations of the [I.G.] to exclude from the Medicare or Medicaid programs under 42 U.S.C. § 1320a-7(a) (mandatory exclusion for criminal convictions). Id. at 3-4. The effective date of the settlement agreement was August 30, 1999. Id. at 8-9.

By letter dated November 30, 1999, the I.G. notified Petitioner that she was "being excluded permanently from participation in the Medicare, Medicaid, and **all** Federal health care programs as

defined in section 1128(B)(f) of the Social Security Act (Act)." P. Response to I.G. Motion to Dismiss Ex. 4, at 1; I.G. Ex. 1, at 1 (emphasis in original). The notice further stated:

> This action is being taken under section 1128(a)(1) of the Act (42 U.S.C. § 1320a-7(a)) and is effective **August 30, 1999**. This exclusion is due to your conviction as defined in section 1128(i) (42 U.S.C. § 1320a-7(i)), in the Arizona United States District Court, of a criminal offense related to the delivery of an item or service under the Medicare program. Your period of exclusion is in accord with the terms set forth in the agreement you entered into with the United States Department of Health and Human Services on **April 8, 1999.**
>
> A detailed explanation of the authority for this exclusion and its effect is enclosed and is incorporated as part of this notice by specific reference. You should read this document carefully, act upon it as necessary, and retain it for future reference.

Id. (emphasis in original).

The detailed explanation enclosed with, and incorporated into, the November 30, 1999 notice stated:

> You are excluded from participation in the Medicare, Medicaid, and all Federal Health care programs as defined in section 1128B(f) of the Social Security Act. **The effect of your exclusion is that no program payment will be made for any items or services, including administrative and management services . . . furnished, ordered, or prescribed by you . . . during the period you are excluded.**
>
> * * * *
>
> **If you are an individual, program payment will not be made to any entity in which you are serving as an employee, administrator, operator, or in any other capacity, for any services including administrative and management services that you furnish, order, or**

> **prescribe on or after the effective date of this exclusion.**
>
> * * * *
>
> **Any service you provide is a noncovered service. Therefore, you cannot submit claims or cause claims to be submitted for payment under any Federal health care program.** Violations of the conditions of your exclusion may subject you to criminal prosecution . . . .
>
> You may request a hearing before an administrative law judge in accordance with 42 CFR 1001.2007. Such a **request must be made in writing within 60 days of your receiving the [I.G.'s] letter of exclusion** and sent to Chief, Civil Remedies Division, Departmental Appeals Board, [at the mailing address provided].

P. Response to I.G. Motion to Dismiss Ex. 4, at 2; I.G. Ex. 1, at 2 (emphasis added).

On May 16, 2008, well over eight years after receiving this notice, Petitioner filed a "Motion to Enjoin [the I.G.] from Future Exclusion, Request for Hearing and Memorandum of Law in Support Thereof." Following the submission of briefs by the parties addressing the threshold issue of jurisdiction, the ALJ dismissed the hearing request as untimely.

The ALJ Decision

The ALJ Decision sets forth the following findings of fact and conclusions of law:

> **A. Findings of Fact**
>
> 1. The I.G. notified Petitioner by letter dated November 30, 1999, that she was being permanently excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Act. P. [Response to I.G. Motion to Dismiss] Ex. 4; I.G. Ex. 1.
>
> 2. The November 30, 1999, I.G. notice advised Petitioner that she could request a hearing before an

administrative law judge (ALJ), by submitting a written request within 60 days of her receipt of the I.G. notice. P. [Response to I.G. Motion to Dismiss] Ex. 4, at 2; I.G. Ex. 1.

3. Petitioner received the I.G. notice of exclusion dated November 30, 1999, not more than five days after the date of that notice.

4. Petitioner requested a hearing by [an] ALJ by pleading dated May 16, 2008, which is more than 60 days after her presumed receipt of the I.G. notice of exclusion.

B. Conclusions of Law

1. Pursuant to 42 C.F.R. § 1005.2(c), a request for hearing must be filed within 60 days of the date on which the notice of exclusion is received by the person to be excluded and there is a rebuttable presumption that the date of receipt is five days after the date of the notice.

2. Petitioner has not rebutted the presumption that she received the I.G. notice of exclusion on December 5, 1999, five days after the "November 30, 1999" date on the notice.

3. An ALJ is required to dismiss a hearing request that is not timely filed. 42 C.F.R. § 1005.2(e)(1).

4. Petitioner's request for hearing must be dismissed.

ALJ Decision at 2-3. In reaching these findings and conclusions, the ALJ determined that the November 30, 1999 exclusion notice "adequately advised Petitioner of her right to request a hearing as required by 42 C.F.R. § 1001.2002(b)(6) and the time-limit for doing so." ALJ Decision at 4. The ALJ further determined that Petitioner had not identified any "defect in the notice of exclusion that prevented her from exercising her right to review in a timely manner." Id. In addition, the ALJ concluded, "Petitioner's other alleged defects in the notice of exclusion could have been raised before an ALJ, if the request for hearing had been timely filed." Id.

Petitioner takes exception to each of the ALJ's findings of fact and conclusions of law.

Standard of Review

The standard of review on a disputed issue of law is whether the ALJ decision is erroneous. 42 C.F.R. § 1005.21(h). The standard of review on a disputed issue of fact is whether the ALJ decision is supported by substantial evidence on the whole record. Id.

Analysis[4]

Petitioner argues that the ALJ erred in concluding that Petitioner had identified "no defect in the notice of exclusion that prevented her from exercising her right to review in a timely manner." P. Br. at 14; ALJ Decision at 6. Specifically, Petitioner contends, the I.G.'s November 30, 1999 notice misled Petitioner because it "stated it would comply with" and "claim[ed] to follow" what Petitioner understood to be the limited program exclusion to which she had agreed under the plea and settlement agreements. P. Br. at 8, 14. Petitioner argues that she did not consent "to a permanent 'exclusion,' as that term is defined under 42 U.S.C. §1320a-7a [section 1128(a) of the Act], nor did [she] agree to the imposition of that sanction by the [I.G.]." Id. at 9. Rather, Petitioner contends, she merely "agreed not to own or act as chief operator or have billing authority for a health care related company." Id. at 2. The exclusion to which she agreed, Petitioner contends, did not preclude her from "working in a federally funded healthcare program." Id. Petitioner consequently argues that she was not on "notice that she would have needed to appeal the matter until much later, when she discovered that the [I.G.] was not following the settlement agreement's provisions." Id. at 14. The essence of Petitioner's position is that she was not notified of the scope of the exclusion as understood and implemented by the I.G. until years later, when she had been

[4] Although some specific points made by the parties are not discussed in detail in this decision, we have considered all of the arguments in the parties' briefs in reaching the conclusions set forth below.

suspended from employment as a nurse. Id.; P. Request for Hearing Exs. 6, 7.

Petitioner's argument has no merit in light of the plain language of the November 30, 1999 notice. Contrary to Petitioner's characterization, the I.G.'s November 1999 notice did not simply state that the effect of Petitioner's exclusion would "follow" or "comply with" the exclusion established under the April 1999 settlement agreement.[5] Rather, the I.G.'s November 30, 1999 notice, quoted above, unambiguously stated that the exclusion action was "being taken under section 1128(a)(1) of the Act (42 U.S.C. § 1320a-7(a))" and was "due to" Petitioner's "conviction as defined in section 1128(i) . . . in the Arizona United States District Court, of a criminal offense related to the delivery of an item or service under the Medicare program." P. Request for Hearing Ex. 3, at 1; I.G. Ex. 1, at 1. The notice referred to the settlement agreement only with respect to the "period of exclusion," stating that the starting date for the exclusion, August 30, 1999, was "in accord with the terms set forth in the agreement you entered into with the United States Department of Health and Human Services on April 8, 1999." Id.

The notice then explained in detail that the "effect" of Petitioner's exclusion was "that no program payment [would] be made for any items or services . . . furnished, ordered, or prescribed by" Petitioner. P. Request for Hearing Ex. 3, at 2; I.G. Ex. 1, at 2. Moreover, the notice explicitly advised Petitioner that "program payment [would] not be made to any

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[5] We therefore do not separately review the civil action settlement agreement or the provisions of the criminal plea agreement. We note, however, that Petitioner's argument that the exclusion in the settlement agreement "was only for 'covered conduct' as defined in the settlement agreement as certain conduct under ownership, management, or billing for a health care company" is not supported by the language of that document. P. Br. at 10-12. As noted in the factual background section of this decision, the settlement agreement used the term "Covered Conduct" not to refer to the parameters of the exclusion but to refer to the alleged submission of false claims as described in paragraph two of the agreement. The exclusion was thus "for" the "Covered Conduct" only in the sense that it was a consequence of that conduct.

entity in which [Petitioner] serv[ed] as an employee, administrator, operator, or in any other capacity, for any services . . . that [Petitioner] furnish[ed], order[ed], or prescribe[d]." Id.

In light of this detailed explanation of the effect of the I.G.'s action, we conclude that Petitioner could not reasonably have read the November 30, 1999 notice to mean that Petitioner's exclusion from program participation would be limited "to owning, operating, managing or having billing authority for a health care related company," as she now claims. P. Br. at 2. Nor could Petitioner reasonably have read the language of the notice to mean that she would be permitted, as an employee of a health care provider, to furnish services for which Medicare, Medicaid or any other federal health care program payments would be claimed.

We further concur with the ALJ that there was no defect in the November 30, 1999 notice that would have excused Petitioner from exercising her right to an ALJ hearing in a timely matter. As quoted above, the I.G.'s notice plainly advised Petitioner that she could "request a hearing before an administrative law judge in accordance with 42 CFR 1001.2007" and that any such "request must be made in writing within 60 days of" Petitioner's receipt of the I.G.'s exclusion notice. P. Request for Hearing Ex. 3, at 2; I.G. Ex. 1, at 2. While Petitioner contends that the I.G. "violated its promise that the exclusion would follow the exclusion under the settlement agreement plea[] in Arizona US District Court," as that exclusion was understood by Petitioner, Petitioner could have raised this issue in a timely filed request for hearing. P. Br. at 9. In any event, we find no evidence of such a promise by the I.G. in the November 1999 notice or in any other documentation provided by Petitioner.[6]

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[6] Petitioner in part relies on a letter dated July 24, 2003 from the assistant United States attorney involved in the plea agreement in which the attorney states that at the time of Petitioner's sentencing, he believed Petitioner would be permitted to "work in the medical field, for an employer seeking reimbursement from federal pay sources." P. Response to I.G. Motion to Dismiss Ex. 3. As the letter further provides, however, regardless of the attorney's personal understanding of the agreement, he had "no authority over HHS in this area." Id.

Petitioner additionally contends that the I.G.'s November 1999 notice was void because it "retroactively imposed the sanction effective August 30, 1999." P. Br. at 5. Under section 1001.2002 of the regulations, Petitioner writes, "the imposition of the exclusion sanction requires that it become effective 20 days after the notice letter." Id. at 6. Further, Petitioner argues, where the exclusion is for a period exceeding five years, the individual "is provided with 30 days to submit documentary evidence and written argument concerning the proposed exclusion and any related issues . . . ." Id. at 6-7, citing 42 C.F.R. §§ 1001.2001 - 1001.2003. The I.G.'s "disregard for the 20 day statutory notice requirement," Petitioner contends, denied Petitioner "due process prescribed by statute and regulation" and "renders its November 1999 exclusion notice void." Id. at 7. Consequently, Petitioner argues, "the limitations period was not triggered," and the I.G. "does not get the protections of the 60 day limitation period." Id. at 7-8.

This argument also is unavailing. Petitioner's opportunity to exercise her appeal rights was not affected by the I.G.'s determination as to the effective date of Petitioner's exclusion from program participation. Cf. Cary Health and Rehabilitation Center, DAB No. 1771 (2001)(holding under the long-term care facility survey, enforcement and appeals regulations that a facility's objection to the effective date of a determination must be raised in a timely filed appeal). Indeed, Petitioner has made no showing that the August 1999 effective date in any way interfered with her ability to file a timely appeal within 60 days of her receipt of the November 30, 1999 notice, let alone prevented her from availing herself of her appeal rights for more than eight years after the period for filing an appeal had expired. Furthermore, Petitioner's claim that the alleged defect in the notice relating to the effective date of the exclusion denied Petitioner due process has no merit since the November 30, 1999 letter unambiguously advised Petitioner of the steps to take to appeal the I.G.'s action under the 60-day deadline for filing an appeal under 42 C.F.R. § 1001.2007. Any due process issue about lack of a prior opportunity to submit evidence to the I.G. or about the starting date of the exclusion could have been raised in a timely appeal.[7]

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[7] We also note that the start date was, as mentioned, consistent with the settlement agreement. Moreover, as part of

(To be continued . . .)

We further note that the 60-day period to file a request for hearing is not, as Petitioner suggests, a mechanism for "protecting" an I.G.'s decision to exclude an individual from program participation. The 60-day period provides an excluded party a reasonable amount of time in which the party may submit a written request to contest the I.G.'s action and ensures timely resolution of any dispute.

Finally, we reject Petitioner's argument that the ALJ was not required to dismiss Petitioner's hearing request as untimely under section 1005.2(e)(1) since the "imposition of the exclusion sanction was illegally done." P. Br. at 10. To support this argument, Petitioner contends that "if the ALJ has no jurisdiction over this case, then there is no remedy for any petitioner who has an illegally imposed exclusion sanction levied against them." P. Br. at 11.

As explained in detail above, the I.G.'s November 30, 1999 letter provided Petitioner with sufficient notice of the I.G.'s exclusion decision and opportunity to request an ALJ hearing to challenge the legality of that decision by filing a written request within 60 days of her receipt of the notice, as required under 42 C.F.R. § 1001.2002. Petitioner failed to avail herself of this opportunity by filing a timely appeal. Accordingly, the ALJ did not err in concluding that, pursuant to section 1005.2(e)(1) of the regulations, he was required to dismiss Petitioner's May 16, 2008 hearing request as untimely.

(Continued . . .)
that agreement, Petitioner consented "not to contest [the] exclusion either administratively or in any State or Federal court." P. Request for Hearing Ex. 1, at 2-3.

Conclusion

For the reasons explained above, we uphold each of the findings of fact and conclusions of law in the ALJ Decision dismissing Petitioner's hearing request.

/s/
Judith A. Ballard

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member