Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Clifton Howell, M.D.,
(OI File No. H-11-41768-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-23

ALJ Ruling No. 2013-9

Date: April 29, 2013

ORDER OF DISMISSAL

I dismiss Petitioner's request for hearing because it fails to raise an issue which may properly be addressed in a hearing. 42 C.F.R. § 1005.2(e)(4).

I. Background

The Inspector General (I.G.) of the Department of Health and Human Services, by letter dated September 28, 2012, notified Petitioner Clifton Howell, M.D. that he was being excluded from Medicare, Medicaid, and all other federal health care programs for the minimum statutory period of five years pursuant to 42 U.S.C. § 1320a-7(a)(1). *See* 42 C.F.R. § 1001.101(a). The I.G. advised Petitioner that the exclusion was based on his conviction in the Hudson County Superior Court of the State of New Jersey of a criminal offense related to the delivery of an item or service under Medicare or a state health care program, including the performance of management or administrative services relating to the delivery of items or services under any such program.

On October 6, 2012, Petitioner filed a timely request for hearing. In his request, Petitioner stated that the basis for his request was that the "length of the exclusion is unreasonable."

I was assigned to hear and decide the case on October 22, 2012. I initially set a pre-hearing conference for November 7, 2012, but rescheduled it at Petitioner's request. During the rescheduled December 12, 2012 conference, I first advised Petitioner that he had the right to be represented by an attorney at his own expense. Petitioner indicated that he had consulted with an attorney but had not yet hired one. Further, I explained to the parties that the only issue I am authorized to hear and decide in Petitioner's case is whether the I.G. had a basis for excluding Petitioner from participation in Medicare, Medicaid, and other federal health care programs. I stated that an exclusion authorized under 42 U.S.C. § 1320a-7(a)(1) must be for a minimum of five years and an administrative law judge does not have the authority to consider whether or not the five-year length of the exclusion is reasonable. 42 U.S.C. § 1320a-7(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

The I.G. requested to be allowed to file a motion to dismiss asserting that Petitioner had not requested a hearing on an issue I am authorized to hear. I offered to permit Petitioner to verbally amend his request for hearing to dispute the issue as to whether there was a basis for his exclusion. I informed Petitioner that if he made such an amendment I would set a briefing schedule and adjudicate the case on the merits. Petitioner did not verbally amend his request for hearing, but asked for an opportunity to obtain counsel. I set a briefing schedule for the I.G.'s motion to dismiss. In order to allow Petitioner sufficient time to consult and retain an attorney, I gave Petitioner until March 7, 2013 to respond to the I.G.'s motion to dismiss.

On January 15, 2013, the I.G. filed his "Motion to Dismiss for Failure to Raise an Appealable Issue" and supporting brief. The I.G. stated that the only issue raised by Petitioner was one that I could not adjudicate. 42 C.F.R. § 1005.2(e)(4). On March 7, 2013, Petitioner requested additional time to retain counsel. On March 14, 2013, I granted Petitioner an extension until April 8, 2013 to respond to the motion to dismiss.

Petitioner filed a response on April 8, 2013. Petitioner noted that he had not been able to find an attorney to represent him. Petitioner admitted that he pled guilty to one count of Medicaid fraud. Petitioner argues, however, that his exclusion should have "started at the beginning of [his] sentence . . . ." and closer in time to his criminal conviction.

On April 9, 2013, the I.G. again moved to dismiss Petitioner's hearing request because Petitioner had failed to raise an issue that may be addressed at hearing.

II. Discussion

The issue before me is whether Petitioner's hearing request raises an issue that is within my jurisdiction to adjudicate. Petitioner has never disputed the basis for his exclusion (i.e., that he was convicted of a criminal offense requiring exclusion under 42 U.S.C. § 1320a-7(a)(1), and admits that he was convicted of Medicaid fraud, a basis for exclusion under 42 U.S.C. § 1320a-7(a)(1). Because the I.G. has imposed the statutory minimum five-year exclusion, a dispute as to the basis for the exclusion is the only issue I can entertain. I cannot review the reasonableness of an exclusion of five years. 42 C.F.R. § 1001.2007(a)(1)-(2).

Further, I have no jurisdiction to change the effective date of the exclusion. *Kailash C. Singhvi, M.D.*, DAB No. 2138 (2007). The regulations indicate that an exclusion is effective 20 days from the date of the exclusion notice, 42 C.F.R. § 1001.2002(b); however, the 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 administrative law judges nor the Departmental Appeals Board has "the authority to review the timing of the I.G.'s decision to impose an exclusion where the I.G. has a legal basis to exclude." *Kris Durschmidt*, DAB No. 2345, at 3 (2010) (*citing Singhvi*, DAB No. 2138). Administrative law judges 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 administrative law judge is not authorized to modify the date of the commencement of the exclusion identified in the notice of exclusion). The regulations are binding on me and I must follow them. 42 C.F.R. §§ 1001.1(b), 1005.4(c)(1).

III. Conclusion

Because Petitioner expressly concedes that there is a basis for the imposition of an exclusion, is unable to dispute the length of the exclusion, and has objected to the effective date of the exclusion (an issue over which I have no jurisdiction), I must dismiss Petitioner's 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).

This dismissal is final and not subject to further administrative appeal.[1]

It is so ordered.

/s/
Scott Anderson
Administrative Law Judge

[1] Parties may only appeal an administrative law judge's initial decision (42 C.F.R. § 1005.20), and the I.G. may appeal an interlocutory ruling that a hearing request was timely. 42 C.F.R. § 1005.21(a), (d); *Departmental Appeals Board, Guidelines – In Cases to which Procedures in 42 C.F.R. Part 1005 Apply; see also* 57 Fed. Reg. 3,298, 3,327 (Jan 29, 1992) (stating that administrative appeals of administrative law judge decisions have been limited by regulation). There is no administrative appeal from a dismissal of a hearing request. 55 Fed. Reg. 12,205, 12,213 (Apr. 2, 1990) ("If [a] party fails to file a timely request for a hearing, or thereafter withdraws or abandons his or her request for a hearing, the [administrative law judge] is required to dismiss the hearing request. In such a case, the CMP or exclusion would *become final with no further appeal permitted)* emphasis added); *see also* 57 Fed. Reg. 3,298, 3,325 (Jan. 29, 1992) (adding as a ground for dismissal in 42 C.F.R. § 1005.2(e) a party's failure to raise any issue that may properly be addressed in a hearing).