

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Gilbert Rosales, M.D.,
(CCN: OI File No. H-12-42681-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-1382

ALJ Ruling No. 2014-25

Date: February 11, 2014

DISMISSAL

Petitioner, Gilbert Rosales, M.D., is a physician, licensed in California, who was convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Pursuant to section 1128(a)(1) of the Social Security Act (Act), the Inspector General (I.G.) has excluded him from participating in Medicare, Medicaid, and all federal health care programs for a period of five years. Petitioner appeals, challenging the length of the exclusion.

The I.G. has moved to dismiss, arguing that Petitioner fails to raise an issue that may be properly addressed in a hearing. I agree and, for the reasons discussed below, grant the I.G.'s Motion to Dismiss.

Discussion

In a letter dated July 31, 2013, the I.G. advised Petitioner Rosales that he was excluded from participation in Medicare, Medicaid, and all federal health care programs because he had been convicted of a criminal offense related to the delivery of an item or service

under Medicare or a state health care program. The letter explained that section 1128(a)(1) of the Act authorizes the exclusion. I.G. Ex. 1 at 1.

Petitioner concedes that he was convicted and is subject to exclusion under section 1128(a)(1), but argues that the period of exclusion is too severe, and that, because he is a sole community physician or sole source of essential specialized services in his community, his period of exclusion should be waived or reduced under 42 C.F.R. § 1001.1801.

Section 1128(a)(1) of the Act mandates that the Secretary of Health and Human Services exclude from program participation any individual who has been convicted under federal or state law of a criminal offense related to the delivery of an item or service under the Medicare or a state health care program. *See also* 42 C.F.R. § 1001.101(a). The exclusion must be for a minimum period of five years. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.102(a). Mitigating factors may be considered as bases for reducing the period of exclusion *only* if the exclusion period is longer than five years. 42 C.F.R. § 1001.102(c).

An excluded individual may challenge the basis for the exclusion and the length of the exclusion. 42 C.F.R. § 1001.2007(a)(1). However, where, as here, the I.G. imposes an exclusion of five years, the length of the exclusion is not reviewable. 42 C.F.R. § 1001.2007(a)(2). I am required to dismiss a request for hearing where that request fails to raise any issue that may properly be addressed in a hearing. 42 C.F.R. § 1005.2(e)(4).

With respect to the purported harm his exclusion will cause his former patients and the neighborhood in which he worked, the I.G. may grant a state health care program's request to waive an exclusion "if the individual or entity is the sole community physician or the sole source of essential specialized services in a community." However, "[t]he decision to grant, deny, or rescind a request for a waiver is not subject to administrative or judicial review." 42 C.F.R. § 1001.1801(f); Act § 1128(c)(3)(B). Thus, any such request for waiver must be made directly to the I.G. by the state health care program, not by Petitioner, and the I.G.'s determination with respect to any waiver is not reviewable in this or any other forum.

Because Petitioner's hearing request does not raise an issue that I am empowered to resolve, I grant the I.G.'s motion and dismiss Petitioner's appeal.

/s/
Carolyn Cozad Hughes
Administrative Law Judge