

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Frank Rivera,
(O.I. File No. H-14-40267-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-1535

ALJ Ruling No. 2015-3

Date: November 17, 2014

**RULING DISMISSING REQUEST
FOR HEARING**

I dismiss the hearing request of Petitioner, Frank Rivera. Petitioner has not raised any issue that I have authority to hear and decide.

The Inspector General (I.G.) excluded Petitioner from participating in Medicare, State health care programs (Medicaid), and all other federally funded health care programs based on the mandate contained in section 1128(a)(1) of the Social Security Act (Act). This section directs the exclusion of any individual who is convicted of a criminal offense related to the delivery of an item or service under Medicare or a Medicaid program. The I.G. excluded Petitioner for a minimum period of five years. That is the minimum exclusion period required by the Act for individuals who are excluded pursuant to section 1128(a)(1). Act § 1128(c)(3)(B).

Petitioner requested a hearing. In his hearing request he challenged only the length of his exclusion, contending that it was unreasonable. He did not deny that he had been convicted of an offense within the meaning of section 1128(a)(1) nor did he challenge the I.G.'s authority to exclude him.

The I.G. moved to dismiss Petitioner's hearing request on the grounds that Petitioner had failed to state a reviewable issue. I directed Petitioner to file a brief answering the I.G.'s motion and I afforded the I.G. the opportunity to reply. Petitioner filed a brief and the I.G. replied. The I.G. also filed six exhibits to support its arguments, which are identified as I.G. Ex. 1 – I.G. Ex. 6. I receive these into the record.

In cases involving exclusions imposed pursuant to section 1128(a)(1) there are only two potential issues that I have the authority to hear and decide: first, whether the exclusion is for a crime that mandates exclusion pursuant to the section; and second, whether the length of the exclusion – if it is for a period of more than five years – is reasonable. I have no authority to review the I.G.'s exercise of discretion to exclude an individual nor do I have authority to review the I.G.'s exercise of discretion as to the date when an exclusion begins. 42 C.F.R. § 1005.4(c)(7). I also lack the authority to reduce an exclusion period to a length that is shorter than the five-year statutory minimum period. Act § 1128(c)(3)(B).

As I have stated, Petitioner concedes that he was convicted of a crime within the reach of section 1128(a)(1). The only issue that Petitioner raised in his hearing request and brief is whether the five-year exclusion is reasonable in his case. I do not have the authority to review that contention inasmuch as the exclusion imposed by the I.G. is for the five-year statutory minimum period.

Petitioner also raises issues that address the timing of his exclusion. He asserts that the New York Medicaid program had excluded him more than five years prior to the I.G. excluding him. He asserts that it is unfair for the I.G. now to exclude him, arguing, essentially, that the I.G. is tacking on a second period of exclusion to the one that was imposed previously.

That also is an argument that I have no authority to consider because the timing of the commencement of an exclusion period is, as I have stated, a non-reviewable act of discretion by the I.G. That said, it is clear from the facts that the I.G. actually imposed the mandatory exclusion in this case in close proximity to the date of Petitioner's conviction of the crime for which he was excluded. The undisputed facts are that Petitioner was finally convicted of a crime related to the New York Medicaid program on July 2, 2013. I.G. Ex. 5; I.G. Ex. 6. The I.G. excluded Petitioner on June 30, 2014, less than a year after the date of his conviction.

What Petitioner really asserts is that it is unfair that he be excluded by the New York Medicaid program and then, nearly five years later, be excluded by the I.G. But, the I.G.'s mandate to exclude Petitioner is unrelated to the actions taken by the New York Medicaid program. The I.G.'s mandate derives from Petitioner's 2013 conviction and not from the actions taken previously by State authorities. Moreover, the Act mandates

the I.G.'s exclusion determination. The I.G. *must* exclude Petitioner irrespective of the actions taken by New York authorities, it *could not* exclude Petitioner pursuant to section 1128(a)(1) until his conviction became final, and it was *mandated* at that point to exclude Petitioner for a minimum period of five years. All of this is required by law and I have no authority to modify or even to address it.

Finally, Petitioner argues that he should at least be given credit for his State-imposed exclusion and that the time that he was excluded by the State of New York should be subtracted from the period of the I.G.-imposed exclusion. The I.G. has no discretion to do that. Furthermore, I have no authority to address that argument for the reasons that I have explained.

/s/

Steven T. Kessel
Administrative Law Judge