

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Ricardo Garcia Ramirez,	)	Date: April 25, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-203
	)	Decision No. CR1779
The Inspector General.	)	

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**DECISION**

Here, Petitioner, Ricardo Garcia Ramirez, asks review of the Inspector General’s (I.G.’s) determination to exclude him for five years from participation in Medicare, Medicaid and all federal health care programs under section 1128(a)(1) of the Social Security Act. The I.G. has moved for dismissal, arguing that the appeal is untimely. For the reasons discussed below, I decline to dismiss based on timeliness. However, on the merits, I find that the I.G. is authorized to exclude Petitioner, and that the statute mandates a minimum five-year exclusion.

**I. Background**

On May 22, 2000, Petitioner pled guilty in California state court to grand theft by embezzlement, a violation of section 12022.6(a)(2) of the California penal code. I.G. Exs. 9, 10.

Thereafter, in a letter dated August 31, 2007, the I.G. advised Petitioner that, because he had been convicted of a criminal offense related to the delivery of an item or service under the Medicare or state health care program, the I.G. was excluding him from participation in Medicare, Medicaid, and all other federal health care programs for a minimum period of five years. I.G. Ex. 1. Section 1128(a)(1) of the Social Security Act (Act) authorizes such exclusion. Petitioner requested review, and the matter has been assigned to me for resolution.

The I.G. has submitted a motion to dismiss based on timeliness, and a brief on the merits, accompanied by 12 exhibits (I.G. Exs. 1-12). Although Petitioner declined to submit a response, he did not withdraw his hearing request. In the absence of any objections, I admit into evidence I.G. Exs. 1-12.

## II. Issues

Two issues are before me: 1) whether Petitioner's hearing request was timely filed; and, if so, 2) whether the I.G. has a basis for excluding Petitioner from program participation. Because an exclusion under section 1128(a)(1) must be for a minimum period of five years, the reasonableness of the length of the exclusion is not an issue.

## III. Discussion

### *A. Petitioner timely sought review of the I.G.'s determination.<sup>1</sup>*

The regulations governing these proceedings provide that an individual excluded under section 1128 of the Act is entitled to a hearing if he files a written request for hearing within 60 days of receiving the exclusion notice. 42 C.F.R. §§ 1001.2007(b), 1005.2(c). The ALJ *must* dismiss a hearing request that is not timely filed. No exception is permitted, even upon a showing of good cause. 42 C.F.R. § 1005.2(e)(1).

Here, the I.G.'s August 31, 2007 notice advised Petitioner that he could request a hearing before an administrative law judge in accordance with 42 C.F.R. § 1001.2007, and that such a request had to be made in writing within 60 days of receiving the letter. I.G. Ex. 1, at 3. In a letter dated September 14, 2007, well within the 60 day time limit, Petitioner advised the I.G. that he intended to appeal, and asked that the effective date of his exclusion be extended, a request the I.G. subsequently denied. I.G. Exs. 2, at 4; 3. In a letter dated October 24, 2007, also within the 60 day time limit, Petitioner asked the I.G. for an extension of time because his attorney was recuperating from surgery. I.G. Ex. 4. Thereafter, by letters dated November 27, 2007 and December 21, 2007, Petitioner, through counsel, formally requested a hearing. I.G. Exs. 2, at 1; 6.

In a January 30, 2008 prehearing conference, I.G. counsel stated that the I.G. would not raise the timeliness issue because it considered that Petitioner's September 14, 2007 letter preserved his hearing rights. *See* Order and Schedule for Filing Briefs and Documentary

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<sup>1</sup> My findings of fact/conclusions of law are set forth, in italics, in the discussion headings of this decision.

Evidence (January 31, 2008). The I.G. has apparently undergone a change of heart, which it rationalizes by the dubious assertion that the question of timeliness was raised by the *Administrative Law Judge*, not the *I.G.*

Of course, at the time of the prehearing conference, Petitioner's September 14 and October 24 letters had not been submitted, so the few filings before me suggested that Petitioner's first communication with the I.G. occurred after the filing deadline had elapsed. In any event, I have no idea why it should matter who initially raised the timeliness question, and the I.G. does not explain why it should not accept the September 14 submission as preserving Petitioner's appeal rights. In that letter, Petitioner explicitly advised the I.G. of his intent to appeal, and I find that it preserved his rights.

I therefore conclude that Petitioner timely appealed and decline to dismiss pursuant to 42 C.F.R. § 1005.2(e)(1).

***B. Petitioner was convicted of a criminal offense related to the delivery of an item or service under a state health care program, within the meaning of section 1128(a)(1) of the Social Security Act.***

On the merits, however, Petitioner has not disputed any of the facts critical to the I.G.'s case. Section 1128(a)(1) of the Act requires that the Secretary of Health and Human Services (Secretary) exclude an individual who has been convicted under federal or state law of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.<sup>2</sup> 42 C.F.R. § 1001.101. Individuals excluded under section 1128(a)(1) of the Act must be excluded for a period of not less than five years. Section 1128(c)(3)(B).

On May 22, 2000, Petitioner pled guilty to grand theft by embezzlement, California penal code 487(a)(2) with enhancements under Penal Code section 12022.6(a)(2) (excessive loss over \$150,000). I.G. Exs. 9, 10. He admitted to stealing more than \$150,000 from Hillside House, where he worked from 1993 until 1998. I.G. Ex. 10, at 5. Hillside House is an Intermediate Care Facility, funded primarily by the Medicaid program. Petitioner was employed there as the controller and accountant. I.G. Ex. 11. I consider that theft from an institution funded almost exclusively by the Medicaid program falls within the ambit of 42 C.F.R. § 1128(a)(1), so the I.G. has a basis for the exclusion.

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<sup>2</sup> The term "state health care program" includes a state's Medicaid program. Section 1128(h)(1) of the Act; 42 U.S.C. § 1320a-7(h)(1).

***C. The statute mandates a five year mandatory minimum exclusion, and mitigating factors may not be considered to reduce that period of exclusion.***<sup>3</sup>

An exclusion under section 1128(a)(1) of the Act must be for a minimum mandatory period of five years. As set forth in section 1128(c)(3)(B) of the Act:

Subject to subparagraph (G), in the case of an exclusion under subsection (a), the minimum period of exclusion shall be not less than five years . . . .

When the I.G. imposes an exclusion for the mandatory five-year period, the reasonableness of the length of the exclusion is not an issue. 42 C.F.R. § 1001.2007(a)(2).

#### **IV. Conclusion**

For these reasons, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid, and all other federal health care programs, and I sustain the five-year exclusion.

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/s/  
Carolyn Cozad Hughes  
Administrative Law Judge

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<sup>3</sup> I recognize that significant time elapsed between the time of the conviction and the imposition of the exclusion. Petitioner has not challenged that delay, and, even if he had raised it, I have no authority to consider such a challenge. *Tanya A. Chuoke, R.N.*, DAB No.1721 (2000); *Samuel W. Chang, M.D.*, DAB No. 1198 (1990). It nevertheless appears that the I.G. considered that delay, because he imposed the minimum 5-year exclusion even though he cited three aggravating factors (financial loss of \$264,000, Petitioner's incarceration, and an additional adverse action by a State agency) that would have justified a much longer period of exclusion. See 42 C.F.R. § 1001.102(b).