

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
David Albert Hoxie, M.D.,)	Date: May 30, 2008
)	
Petitioner,)	
)	
- v. -)	Docket No. C-08-272
)	Decision No. CR1794
The Inspector General.)	
_____)	

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, David Albert Hoxie, M.D., from participating in Medicare and other federally funded health care programs for a minimum of five years. Petitioner's exclusion is mandated by sections 1128(a)(4) and 1128(c)(3)(B) of the Social Security Act (Act).

I. Background

Petitioner, a physician, requested a hearing from the I.G.'s determination to exclude him. The case was assigned to me for a hearing and a decision. I held a pre-hearing conference by telephone at which I ordered the parties to file and exchange proposed exhibits and briefs addressing the issues in the case. I also afforded each party the opportunity to request an in-person hearing. The I.G. timely filed his brief and proposed exhibits. He did not request that I convene an in-person hearing. Petitioner failed to file a brief or exhibits. I sent an order to show cause to Petitioner in which I directed him either to file his brief and proposed exhibits or to explain his failure to do so.

Petitioner did neither. Instead, on May 21, 2008 Petitioner's counsel belatedly filed a notice of appearance. Additionally, Petitioner moved that I stay this proceeding, or alternatively, dismiss it without prejudice while Petitioner appeals his conviction to an appellate court in the State of Ohio.

I deny Petitioner's motions. It would not be in the interest of justice to stay this case pending the outcome of what may be a lengthy State appellate process. Furthermore, I do not have authority to dismiss a case "without prejudice." A dismissal of Petitioner's hearing request renders the decision of the Secretary in this case administratively final and I do not have authority to grant a party new hearing rights in that circumstance. However, I note that regulations governing exclusions provide that the I.G. will reinstate an excluded individual if a conviction on which an exclusion is based is reversed or vacated on appeal. 42 C.F.R. § 1001.3005(a)(1). Consequently, Petitioner will be entitled to reinstatement should he prevail on his appeal of his conviction.

The I.G. filed proposed 10 exhibits, which he designated as I.G. Ex. 1 - I.G. Ex. 10, to support his determination to exclude Petitioner. I receive these exhibits into evidence.

II. Issues, findings of fact and conclusions of law

A. Issues

I could sanction Petitioner for failing to file a brief or exhibits addressing the merits. My authority to impose sanctions includes the authority to dismiss Petitioner's hearing request. However, I am electing to issue a decision on the merits in light of the overwhelming evidence offered by the I.G. supporting his determination to exclude Petitioner. In deciding this case I have considered and I address the argument that Petitioner raised in his hearing request.

The sole issue in this case is whether Petitioner's five-year exclusion is mandated by sections 1128(a)(4) and 1128(c)(3)(B) of the Act.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding as a separate heading.

1. An exclusion of Petitioner is mandated by section 1128(a)(4) of the Act.

Section 1128(a)(4) mandates the exclusion of any individual who is convicted of a felony occurring after August 21, 1996, relating to the manufacture, distribution, dispensing, or prescription of a controlled substance. The undisputed facts of this case prove that Petitioner was convicted of such a felony. On August 21, 2006, Petitioner pled guilty to a felony under Ohio law and that plea was accepted by a State court. I.G. Ex. 6, at 19 - 20. In pleading guilty Petitioner admitted to violating an Ohio law which makes it unlawful to

