Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: February 8, 2007
Lisa Alice Gantt,	
Petitioner,	Civil Remedies CR1550 App. Div. Docket No. A-07-49
- v. -	Decision No. 2065
Inspector General.	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Lisa Alice Gantt (Petitioner) appealed the December 22, 2006 decision by Administrative Law Judge (ALJ) Alfonso J. Montano. Lisa Alice Gantt, DAB No. CR1550 (2006) (ALJ Decision). The ALJ Decision affirmed the Inspector General's (I.G.'s) determination excluding Petitioner for five years from participation in Medicare, Medicaid, and all other federal health programs pursuant to section 1128(a)(4) of the Social Security Act (the Act). Section 1128(a)(4) requires exclusion of individuals convicted after August 21, 1996 of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Regulations at 42 C.F.R. §§ 1001.101(d) and 1001.102(a) implement this statutory mandate.

We uphold the ALJ Decision.

Standard of review

Our standard of review of an ALJ decision to uphold the I.G.'s exclusion is set by regulation. We review to determine whether

the decision is erroneous as to a disputed issue of law and whether the decision is supported by substantial evidence in the record as a whole as to any disputed issues of fact. 42 C.F.R. § 1005.21(h).

Analysis

On June 11, 2001, Petitioner was convicted of an offense described by section 1128(a)(4). On June 30, 2006, the I.G. notified Petitioner that, based on this conviction, she was to be excluded from Medicare, Medicaid and all federal health care programs for five years. Under 42 C.F.R. § 1001.2002(b), this exclusion became effective 20 days from the date of the notice.

On appeal, Petitioner does not dispute that she was convicted of an offense described in section 1128(a)(4). Neither does she dispute that the I.G. was required by law to exclude her from Medicare, Medicaid and all federal health care programs for at least five years based on that conviction. However, Petitioner argues that, because of the interval between the conviction and the I.G.'s exclusion notice, the exclusion should be imposed retroactively, i.e., for a period of time preceding the effective date of the exclusion. Notice of Appeal at 2. Petitioner also represents that she "had not practiced [as a Registered Nurse in the State of Florida] since February 1998," and argues that "this period of inactivity should be considered and that some or all of this time should be applied retroactively to the Exclusion."[1] Notice of Appeal at 2.

We reject this argument and conclude that the ALJ correctly held that he did not have the authority to alter the effective date of the exclusion. ALJ Decision at 3. The Board has repeatedly held

[1] It is possible that the I.G. did take the delay in excluding Petitioner into account since he could have excluded Petitioner for more than the five-year statutory minimum based on evidence of aggravating factors in the record. See 42 C.F.R. § 1001.102(b). An administrative complaint filed by the Florida Department of Health alleges that Petitioner had a prior criminal record for non-controlled substance related offenses and was also previously convicted of criminal offenses involving similar circumstances. I.G. Ex. 1; see 42 C.F.R. §§ 1001.102(b)(6) and (8). Additionally, Petitioner's nursing license was suspended as a result of that complaint; thus, she was the subject of adverse action by a State agency based on the same set of circumstances that served as the basis for imposition of the exclusion. P. Ex. 2; see 42 C.F.R. § 1001.102(b)(9).

that the applicable statute and regulations give an ALJ no authority to adjust the beginning date of an exclusion by applying it retroactively. Thomas Edward Musial, DAB No. 1991, at 4-5 (2005), citing Douglas Schram, R.Ph., DAB No. 1372, at 11 (1992) ("Neither the ALJ nor this Board may change the beginning date of Petitioner's Exclusion."); David D. DeFries, DAB No. 1317, at 6 (1992) ("The ALJ cannot . . . decide when [the exclusion] is to begin."); Richard D. Phillips, DAB No. 1279 (1991) (An ALJ does not have "discretion . . . to adjust the effective date of an exclusion, which is set by regulation."); Samuel W. Chang, M.D., DAB No. 1198, at 10 (1990) ("The ALJ has no power to change . . . [an exclusion's] beginning date.").[2] In Schram, we held that this lack of discretion extends to the Board as well as the ALJs, and we reiterated that holding in Musial.

On appeal to the Board, but not before the ALJ, Petitioner appears to raise two additional arguments concerning delay in notification and punitive sanctions. Notice of Appeal at 2. We are not required to review these issues since they were not raised before the ALJ, and Petitioner has not shown any reason why they could not have been raised. 42 C.F.R. § 1005.21(e). However, we note as follows.

Contrary to what Petitioner argues, delay between the conviction on which the exclusion is based and the notice of exclusion does not make the notice or the exclusion invalid. Afer reviewing relevant statutory and regulatory provisions and related caselaw in Chang, DAB No. 1198, we concluded that reasonable notice, as prescribed in section 1128(c) of the Act, does not require prompt notice. Id. at 11. Rather, the term "reasonable" requires that the notice "is reasonably calculated to reach [a Petitioner] in adequate time for him to request a hearing, notify him what the proceeding is about, and inform him how he is to go about requesting a hearing." Id. at 14; see Steven R. Caplan, R.Ph. v. Tommy G. Thompson, CIV. No. 04-00251 (D. Hawaii, December 17, 2004) (court declined to modify exclusion because of delay in notification); Seide v. Shalala, 31 F.Supp. 2d 466, at 469 (E.D. Pa. 1998) (court declined to modify exclusion, writing that

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[2] Since these cases were decided, the I.G. amended and renumbered the notice regulation. 57 Fed. Reg. 3330 (Jan. 29, 1992); compare 42 C.F.R. § 1001.123 (1991) (suspension effective 15 days from notice) and 42 C.F.R. § 1001.2001 (2003) (exclusion effective 20 days from date of notice). Petitioner identified no difference between these versions of the notice regulations that would require a result different from the Board's prior decisions, and we see no such difference.

"[n]either the Social Security Act nor its implementing regulations set any deadline within which the Inspector General must act.")

On appeal, Petitioner also cites United States v. Halper, 490 U.S. 435 (1989) and asserts that a section 1128(a)(4) exclusion is an impermissible punitive sanction rather than a civil sanction. Notice of Appeal at 2. Again, this argument has been rejected repeatedly by federal courts and the Board, which have held that a section 1128 exclusion is civil and remedial rather than criminal and punitive. Mannochio v. Kusserow, 961 F.2d 1539, 1541-1543 (11th Cir. 1992); Greene v. Sullivan, 731 F.Supp. 838, 839-840 (E.D. Tenn. 1990); Joann Fletcher Cash, DAB No. 1725 (2000); Carolyn Westin, DAB No. 1381 (1993); Schram, DAB No. 1382; and Janet Wallace, L.P.N., DAB No. 1126 (1992).

Conclusion

For the reasons explained above, we affirm and adopt all of the Findings of Fact and Conclusions of Law in the ALJ Decision.

/s/
Judith A. Ballard

/s/
Donald F. Garrett

/s/
Sheila Hegy
Presiding Board Member