Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Alan K. Mitchell, M.D.,	)	Date: June 19, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-115
	)	Decision No. CR1614
The Inspector General.	)	
	)	

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion to Dismiss, as untimely filed, the Request for Hearing filed on November 7, 2006 by Petitioner, Alan K. Mitchell, M.D. The I.G.'s Motion is based on the terms of 42 C.F.R. §§ 1001.2007(b) and 1005.2(c). As I explain below, I find that the Request for Hearing was not timely filed, and for that reason I grant the I.G.'s Motion to Dismiss.

I. Procedural Background

On August 31, 2006, the I.G. wrote to Petitioner and notified him of his exclusion from Medicare, Medicaid, and all federal health care programs. The I.G.'s letter relied on the authority of sections 1128(b)(14) and 1892 of the Social Security Act (Act), 42 U.S.C. §§ 1320a-7(b)(14) and 1395ccc, and asserted that the predicate for the I.G.'s action was Petitioner's alleged failure to repay or otherwise discharge his National Health Service Corps Debt.[1] Petitioner requested a hearing in a *pro se* letter dated November 7, 2006.

[1] The I.G.'s notice letter also cited section 1892 of the Act, 42 U.S.C. § 1395ccc, as a source of his authority to exclude Petitioner. The I.G. does not rely on section 1892 in these proceedings as an additional basis for Petitioner's exclusion, and this Decision does not address Petitioner's exclusion under section 1892 of the Act.

Following an unsuccessful effort to do so on December 27, 2006, I convened a prehearing conference with the parties by telephone on Monday, February 12, 2007, pursuant to 42 C.F.R. § 1005.6. A summary of that conference appears in my Order of February 12, 2007. It should be noted that although Petitioner filed his Request for Hearing *pro se*, he was represented by counsel during the conference and has been represented by that counsel at all subsequent stages of this litigation.

Since the dates of the I.G.'s notice letter and Petitioner's Request for Hearing suggested the issue of its timeliness within the terms of 42 C.F.R. § 1005.2(c), I established a schedule for the I.G.'s submission of a Motion to Dismiss, and for briefing on that Motion. That cycle of motion practice and briefing is now closed. Petitioner filed no Response Brief, yet failed to give notice of his intention not to file such a brief as he was required to do by the plain terms of paragraph 5(d) of the Order of February 12, 2007.

The record on which I decide this case is made up of five exhibits. Petitioner raised no objection to the four exhibits proffered by the I.G., and I have admitted them as I.G. Exhibits 1-4 (I.G. Exs. 1-4). On my own motion, and in the circumstances set out in my Order of May 25, 2007, I have admitted ALJ Exhibit 1 (ALJ Ex. 1). Neither party has objected to my doing so.

Petitioner attached two unmarked documents to his April 10, 2007 pleading, and in the text of that pleading refers to one of them as Petitioner's Exhibit A. It is a copy of the I.G.'s August 31, 2006 notice letter, which I have admitted as I.G. Ex. 1. The second attached but unmarked document is a copy of his November 7, 2007 Request for Hearing, which I have admitted as I.G. Ex. 2. Pursuant to paragraph 10 of the Order of February 12, 2007, these two unmarked documents are not admitted to the record in this case, although, as I note above, copies of them have been admitted as I.G. Exs. 1 and 2.

II. Issue

The issue before me is whether Petitioner's Request for Hearing was filed in a timely manner, in compliance with the terms of 42 C.F.R. §§ 1001.2007(b) and 1005.2(c). If the Request was not filed in a timely manner, I am obliged by the mandatory terms of 42 C.F.R. § 1005.2(e)(1) to dismiss it.

This issue must be resolved against Petitioner. Although his Request for Hearing was filed only a day later than the deadline for doing so established by regulation, the regulations do not permit me to consider the narrowness of the margin by which

Petitioner missed the deadline, or the cause of his untimeliness. Because he has failed here to make a reasonable showing that he did not receive the I.G.'s August 31, 2006 notice on or before September 5, 2006, his November 7, 2006 Request for Hearing must be dismissed.

III. Controlling Statutes and Regulations

Section 1128(b)(14) of the Act, 42 U.S.C. § 1320a-7(b)(14), authorizes the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of "Any individual who the Secretary determines is in default on repayments of scholarship obligations or loans in connection with health professions education made or secured, in whole or in part, by the Secretary . . . ." The terms of section 1128(b)(14) are restated in similar regulatory language at 42 C.F.R. § 1001.1501(a)(1).

An exclusion based on section 1128(b)(14) of the Act is discretionary, and the I.G. is charged with effecting exclusions based on that section. *See* 42 C.F.R. § 1001.1501. If the I.G. determines that a valid predicate exists for the exclusion, and that the exclusion is warranted, he must send written notice of his final decision to exclude to the affected individual, and must in that notice provide information about the appeal rights of the excluded party. 42 C.F.R. § 1001.2002. *See also* Act, section 1128(c), 42 U.S.C. § 1320a-7(c).

The individual or entity to be excluded may appeal the exclusion by filing a request for hearing before an Administrative Law Judge (ALJ). 42 C.F.R. § 1001.2007. That regulation sets limits on the issues that may be considered on appeal and sets certain requirements in the hearing request's content. It also establishes a discrete time limit for the filing of a request for hearing. 42 C.F.R. § 1001.2007(b) provides that:

> The excluded individual or entity has 60 days from the receipt of notice of exclusion provided for in § 1001.2002 to file a request for such a hearing.

This filing time limit is reiterated in the regulations governing the conduct of an excluded party's appeal before the ALJ, which appear at 42 C.F.R. §§ 1005.1-1005.23. The 60-day deadline appears at 42 C.F.R. § 1005.2(c):

> The request for a hearing will be made in writing to the DAB; signed by the petitioner or respondent, or by his or her attorney; and sent by certified mail. The request must be filed within 60 days after the notice, provided in accordance with §§1001.2002, 1001.203 or 1003.109, is received by the

> petitioner or respondent. For purposes of this section, the date of receipt of the notice letter will be presumed to be 5 days after the date of such notice unless there is a reasonable showing to the contrary.

The terms of 42 C.F.R. § 1005.11(a)(4) provide that pleadings and other papers in proceedings such as this are considered filed when they are mailed.

Finally, 42 C.F.R. § 1005.2(e) directs that:

> The ALJ will dismiss a hearing request where —
>
> (1) The petitioner's or the respondent's hearing request is not filed in a timely manner.

The ALJ may not extend the 60-day filing deadline. A tardy or dilatory petitioner can gain relief only by negating the presumption of receipt through a "reasonable showing" that the I.G.'s notice letter was not received as presumed by 42 C.F.R. § 1005.2(c).

IV. Findings and Conclusions

I find and conclude as follows:

1. The I.G. mailed notice of the proposed exclusion of Petitioner from Medicare, Medicaid, and all other federal health programs pursuant to section 1128(b)(14) of the Act to Petitioner on August 31, 2006. I.G. Ex. 1.

2. Petitioner received the I.G.'s August 31, 2006 notice letter not later than September 5, 2006. I.G. Exs. 1, 4; 42 C.F.R. § 1005.2(c).

3. Petitioner's Request for Hearing was dated November 7, 2006, and for purposes of this Decision I find that it was mailed on that date. I.G. Ex. 2; ALJ Ex. 1.

4. Petitioner has failed to make a reasonable showing that he did not receive the I.G.'s August 31, 2006 notice letter on or before September 5, 2006. I.G. Exs. 1, 3; 42 C.F.R. § 1005.2(c).

5. Petitioner's Request for Hearing was not timely filed and must be dismissed. 42 C.F.R. §§ 1001.2007(b), 1005.2(c), and 1005.2(e)(1).

V. Discussion

My ruling on the I.G.'s Motion to Dismiss applies principles long established in the jurisprudence of this forum.

The first principle is the presumption of the receipt, within five days, of exclusion notices mailed pursuant to 42 C.F.R. § 1001.2002. This principle is established by 42 C.F.R. § 1005.2(c) and is endorsed in *Sharon R. Anderson, D.P.M.*, DAB No. 1795 (2001). In the context of this case, that presumption is buttressed by I.G. Ex. 4, the affidavit of the Director of the I. G.'s Exclusions Staff, who asserts that her office's regular practice in conducting its official business is to mail exclusion letters on the day they are dated, and that the exclusion letter sent to Petitioner was not returned as undelivered. This first principle establishes the presumed date on which Petitioner received the I.G.'s notice letter as not later than September 5, 2006.

The second principle is found in the terms of 42 C.F.R. § 1005.11(a)(4): "Papers are considered filed when they are mailed." This record does not contain direct evidence of the precise day on which Petitioner mailed his letter dated November 7, 2006, but in the absence of any showing or suggestion to the contrary, I have treated it as having been mailed — and thus filed — on the date it bears, November 7, 2006. I.G. Ex. 2; ALJ Ex. 1.

The third principle is the extension of the first two, and provides that if a hearing request is to be timely pursuant to 42 C.F.R. § 1001.2007(b), it must be mailed not more than 65 days after the date of the notice letter to which it responds. The only relief available from that time limit demands a "reasonable showing to the contrary" of the presumption set out at 42 C.F.R. § 1005.2(c) that the notice letter was timely received. By strict "day-counting," the 65th day in this case would have been Saturday, November 4, 2007, but 42 C.F.R. § 1005.12(a) operates to exclude both Saturday, November 4, 2007 and Sunday, November 5, 2007 in tolling the last day of the appeal period. In the absence of a "reasonable showing to the contrary" of the presumption of timely receipt, Petitioner's Request for Hearing would have been timely only if mailed on or before Monday, November 6, 2007.

The fourth principle is the precedent-established rule that "a reasonable showing to the contrary" of the presumption of timely receipt must be made through demonstration of facts calling the presumed receipt of the notice directly into question, and not by mere speculation or self-serving denials of receipt. *Andrew M. Perez*, DAB CR1371 (2005); *George P. Rowell, M.D.*, DAB CR974 (2002); *Peter D. Farr, M.D.*, DAB CR909 (2002); *Sunil R. Lahiri, M.D.*, DAB CR296 (1993). In the context of this case, as I shall discuss

below, Petitioner has offered nothing more than unsupported speculation and a labored effort to suggest that a week shortened by a Monday holiday should somehow not count in measuring the deadline for filing.

But it may be well first to emphasize that Petitioner's position here does not depend on the very narrow margin by which he missed the filing deadline, nor on a possible error in the calculation of the deadline's last day. Petitioner concedes that the presumptive appeal period began to run on September 5, 2007 and expired on November 6, 2007. He does not suggest that I can or should treat the one-day violation of the deadline as *de minimis* and ignore it. His argument is that his own purported work schedule amounted to a "reasonable showing to the contrary" of the presumed regular delivery of the I.G.'s notice letter, and thus operated to extend the presumptive deadline. Here, in his own words, is how he makes his argument, beginning with his unequivocal acknowledgment of the presumptive deadline for appeal:

> On its face, the calculation of 65 days requires Mitchell to request a hearing on or before November 6, 2006. Mitchell's request for hearing was filed on November 7, 2007. One day after the presumptive deadline to file a request for hearing.

Petitioner's Answer Brief (Pet. Ans. Br.) at 2.

Having made that concession, Petitioner then advances his case against the presumed delivery of the notice letter by September 5, 2006:

> Mitchell received the I.G.'s notice on Monday, September 11, 2006 not on Tuesday, September 5, 2006 as presumed. Labor Day is a National Holiday. In the year 2006 Labor Day was celebrated on Monday, September 4, 2006. The U.S. Post Office did not deliver mail on September 4, 2006. As a result, the earliest date Mitchell could have gotten the I.G.'s notice was Tuesday, September 5, 2006.
>
> However, the presumption is rebuttable. Because of the holiday weekend from Friday, September 1, 2006 to Tuesday, September 5, 2006 and the short week of September 6, 2006, Mitchell did not resume normal and regular routine until Monday, September 11, 2006. As a result, Mitchell did not have actual notice of the I.G.'s notice until September 11, 2006.

> Because all presumptions are rebuttable, it is conceivable to conclude that because of the long holiday weekend and the short holiday week, Mitchell did not get actual notice of the I.G.'s notice until September 11, 2006. As such, Mitchell's request for hearing would be timely filed up to and including November 12, 2006. And because November 12, 2006 was a Sunday, Mitchell's request for hearing would be timely filed up to and including November 13, 2006.

Pet. Ans. Br. at 3.

Now, save for its first sentence, there is almost nothing exceptional about Petitioner's first paragraph. That the 2006 Labor Day holiday precluded the delivery of mail on Sunday, September 3, 2006 and Monday, September 4, 2006 is an assertion safely beyond cavil. Whether Petitioner's mail was undelivered on Saturday, September 2, 2006 is less certain and ultimately not important. But Petitioner's first sentence is neither proof nor an offer of proof: it is instead rather pure *ipse dixit*, and valueless as part of a "reasonable showing to the contrary." And Petitioner's second paragraph offers nothing more of substance. It will be noted that Petitioner employs the somewhat elastic phrase "did not resume normal and regular routine until Monday, September 11, 2006" in implying, without proof or offer of proof, that Petitioner left his medical office unvisited, his practice unattended, and his mail unread for the remaining four days of the Labor Day week.

Thus, the first two paragraphs of Petitioner's argument set out above place it squarely within the application of the fourth principle I mention above. That principle requires the demonstration of articulated facts, not speculation or self-serving denials, as the evidentiary bricks and mortar in a "reasonable showing to the contrary" of presumed receipt. Moreover, the cases upon which that principle rests are especially apposite here. For example, Petitioner has offered no evidence whatsoever in support of his *ipse dixit* of receipt on September 11, 2006. He has offered no evidence of any sort reflecting precisely what his "normal and regular routine" was during the times at issue, or that it was interrupted at all. He has not offered evidence to clarify the exact scope, nature, or duration of any such interruption, or to clarify in what degree that alleged interruption operated to keep him from receiving his mail as presumed by law. Those deficiencies are fatal shortcomings in his effort to make a "reasonable showing to the contrary." *Andrew M. Perez*, DAB CR1371; *George P. Rowell, M.D.*, DAB CR974; *Peter D. Farr, M.D.*, DAB CR909. Two of these cases, and the principle itself, were called to Petitioner's attention in the I.G.'s Reply Brief. Detailed guidance on what might help in attempting a

"reasonable showing" was available to Petitioner in *Dulal Bhattacharjee, M.D.*, DAB CR1107 (2003). Although thus on notice of the importance of this point, Petitioner filed no Response Brief. From that tactical decision, I can conclude only that he has no articulated facts to demonstrate.

But would Petitioner's position now be stronger if he could prove that his medical office was closed during those four days, and that the mail simply piled up until Monday, September 11, 2006? The answer is found in *Sunil R. Lahiri, M.D.*, DAB CR296, and that answer is "No." Petitioner's management of his office and any consequences that arise from it, including delays in his personally reviewing mail delivered to him at that address, are simply not sufficient as a "reasonable showing to the contrary."

The final principle, established by regulation and repeatedly acknowledged by decision, is that because the ALJ lacks the authority to extend the filing deadline, the ALJ is without jurisdiction to consider an untimely-filed hearing request and must dismiss it. 42 C.F.R. § 1005.2(e)(1); *Lynette Mae Rohar*, DAB CR1382 (2005); *Andrew M. Perez*, DAB CR1371; *Patricia Ann Petrak*, DAB CR1172 (2004); *John F. Pitts, R.Ph.*, DAB CR820 (2001); *Clifford M. Sonnie, M.D.*, DAB CR732 (2001). It cannot be gainsaid that the margin of Petitioner's untimeliness here is the narrowest possible, but I have been unable to find any authority or rationale by which I may disregard it, excuse it, or treat it as *de minimis*.[2] Since the terms of 42 C.F.R § 1005.4(c)(1) expressly forbid me to ignore the clear terms of 42 C.F.R. § 1005.2(e)(1), I must apply the latter regulation.

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[2] With a single exception, no other decisions in this forum have addressed a hearing request late by only one day. That exception is *Nelson Ramirez-Gonzalez, M.D.*, DAB CR175 (1992), a case decided according to procedural regulations no longer applicable to exclusion cases. At that time the controlling regulations permitted the ALJ to consider whether good cause might exist for Dr. Ramirez' failure to meet his appeal deadline. Dr. Ramirez filed his hearing request one day late. The ALJ weighed Dr. Ramirez' attempted showing of good cause, found it wanting, and dismissed Dr. Ramirez' appeal.

VI. Conclusion

For all of the reasons set forth above, I grant the I.G.'s Motion to Dismiss. Pursuant to 42 C.F.R. § 1005.2(e)(1), the Request for Hearing filed by Petitioner Alan K. Mitchell, M.D., on November 7, 2006 must be, and it is, DISMISSED.

/s/
Richard J. Smith
Administrative Law Judge