

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Yuliana Munthe,	)	Date: March 25, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-84
	)	Decision No. CR1933
The Inspector General.	)	
_____	)	

**DECISION**

The request for hearing of Petitioner, Yuliana Munthe, is dismissed pursuant to 42 C.F.R. § 1005.2(e)(1).

**I. Background**

The Inspector General for the U.S. Department of Health and Human Services (the I.G.) notified Petitioner by letter dated June 30, 2008, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs as defined in section 1128B(f) of the Social Security Act (Act) (42 U.S.C. § 1320a-7b(f)). The I.G. advised Petitioner that her exclusion was pursuant to section 1128(b)(4) of the Act (42 U.S.C. § 1320a-7(a)(1)) because her license to practice medicine or provide health care as a nurse assistant in the State of California was revoked, suspended, or otherwise lost or was surrendered while a formal disciplinary proceeding was pending before the California Department of Health Services for reasons bearing on her professional competence, professional performance, or financial integrity. The I.G. further advised Petitioner that her exclusion would remain in effect until she is reinstated by the Office of Inspector General and that to be eligible for reinstatement, she must regain her license as a nurse assistant in the State of California. I.G. Exhibit (I.G. Ex.) 1.

Petitioner requested a hearing before an administrative law judge (ALJ) by letter dated October 23, 2008. I.G. Ex. 5. The case was docketed and assigned to me for hearing and decision on November 14, 2008. On November 26, 2008, I convened a prehearing conference by telephone, the substance of which is memorialized in my Order dated November 26, 2008. During the conference, I explained to Petitioner that she could retain counsel to represent her and I described how the proceedings before me would progress. The I.G. asserted during the prehearing conference that I do not have jurisdiction because Petitioner did not file her hearing request timely. I explained to Petitioner that if the hearing request was untimely, I must dismiss it. Accordingly, I established a briefing schedule to permit the I.G. to file a motion to dismiss or an alternative motion for summary judgment, a response by Petitioner, and a reply, if any, by the I.G.

On December 23, 2008, the I.G. filed a motion to dismiss the request for hearing on grounds that the request for hearing was not timely filed and an alternative motion for summary judgment, with six exhibits (I.G. Exs. 1-6) and Attachment A. Petitioner's response to the I.G. motion was due January 31, 2009. No response was received from Petitioner and on February 11, 2009, I ordered that Petitioner show cause not later than February 27, 2009, why this case should not be dismissed for abandonment. On March 3, 2009, my office received a one-page letter from Petitioner dated January 20, 2009. The envelope with Petitioner's letter had no visible postmark. Petitioner's January 20, 2009 letter was identical to her October 23, 2008 hearing request, except for the "regarding" line. I have marked Petitioner's January 20, 2009 letter ALJ Ex. 1 for ease of reference. Although Petitioner's January 20, 2009 letter was not responsive to my Order to Show cause, I accept it as evidence that Petitioner did not intend to abandon her appeal. My office provided a copy of ALJ Ex. 1 to counsel for the I.G. as there was no indication on the face of the letter that Petitioner had done so. The I.G. advised me by electronic-mail on March 9, 2009, that the I.G. waived filing a reply to Petitioner's January 20, 2009 letter. I admit as evidence I.G. Exs. 1 through 6 and ALJ Ex. 1.

## **II. Discussion**

### **A. Findings of Fact**

The following findings of fact are based upon the uncontested and undisputed assertions of fact in the pleadings and the exhibits admitted. Citations may be found in the analysis section of this decision if not included here.

1. The I.G. notified Petitioner by letter dated June 30, 2008, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(4) of the Act. I.G. Ex. 1.

2. The June 30, 2008 I.G. notice advised Petitioner that she could request a hearing before an ALJ by submitting a written request within 60 days of her receipt of the I.G.'s notice. I.G. Ex. 1.
3. The presumed date of receipt by Petitioner of the I.G.'s notice of exclusion dated June 30, 2008 is July 5, 2008, which is five days after the date on the I.G.'s notice.
4. Petitioner requested a hearing by an ALJ by submission dated October 23, 2008, which is more than 60 days after her presumed receipt of the I.G.'s notice of exclusion.

### **B. Conclusions of Law**

1. Pursuant to 42 C.F.R. § 1005.2(c), a request for hearing must be filed within 60 days of the date on which the notice of exclusion is received by the person to be excluded and there is a rebuttable presumption that the date of receipt is five days after the date of the notice.
2. Petitioner has not rebutted the presumption that she received the I.G.'s notice of exclusion on July 5, 2008, five days after the June 30, 2008 date on the notice.
3. An ALJ is required to dismiss a hearing request that is not timely filed. 42 C.F.R. § 1005.2(e)(1).
4. Petitioner's request for hearing must be dismissed.

### **C. Issue**

Whether Petitioner's request for hearing must be dismissed because it was not filed timely.

### **D. Analysis**

The I.G. notified Petitioner by letter dated June 30, 2008, that she was being excluded from Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(4) of the Act. The notice was mailed to Petitioner at 1565 Shedden Drive, Loma Linda, California 92354-1732, the same address that was on the letterhead of Petitioner's hearing request dated October 23, 2008 and on Petitioner's January 20, 2009 letter. I.G. Ex. 1; ALJ Ex. 1.

The regulations are clear that a request for hearing must be filed in writing within 60 days of receipt of the notice of exclusion. The date of receipt of the notice is presumed to be five days after the date of the notice, unless there is a reasonable showing to the contrary. 42 C.F.R. § 1005.2(c). In neither her hearing request of October 23, 2008 nor her January 20, 2009 letter, does Petitioner dispute that she received the I.G. notice within five days of the date of the notice. Therefore, the date of receipt of the I.G.'s June 30, 2008 notice is presumed to be July 5, 2008, and that is the date on which the 60-day period in which Petitioner could request a hearing began to run. There is no dispute that the I.G.'s notice letter included an attachment that advised Petitioner of her right to file a request for hearing within 60 days and the regulatory requirements to accomplish the filing. Because the I.G.'s notice is presumed to have been received by Petitioner on July 5, 2008, Petitioner had until September 3, 2008 to file her request for hearing. Petitioner does not dispute that she received the I.G.'s notice and she offers no explanation for why she waited until October 23, 2008 to request an ALJ hearing.

The regulations are clear that I "will dismiss" a hearing request where a petitioner's hearing request is not timely filed. 42 C.F.R. § 1005.2(e)(1). The regulation at 42 C.F.R. § 1005.2(e)(1) gives me no discretion to waive a late filing or to grant an extension of time in which to file a request for hearing.

Accordingly, Petitioner's request for hearing must be dismissed.

### **III. Conclusion**

For the foregoing reasons, Petitioner's request for hearing dated October 23, 2008, is dismissed.

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/s/  
Keith W. Sickendick  
Administrative Law Judge