

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Desiree Cumbermack
(OI File No. H-13-42688-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-1292

ALJ Ruling No. 2015-2

Date: October 31, 2014

DISMISSAL OF HEARING REQUEST

The Inspector General (I.G.) of the United States Department of Health and Human Services excluded Petitioner, Desiree Cumbermack, from participating in Medicare, Medicaid, and other federal health care programs for a period of five years pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)). Approximately five months after the I.G. notified Petitioner of the exclusion, Petitioner mailed her request for a hearing. The I.G. subsequently moved to dismiss Petitioner's hearing request as being untimely filed.

By letter dated January 31, 2014 (notice letter), the I.G. informed Petitioner that she was being excluded from participating in Medicare, Medicaid, and other federal health care programs as a result of her conviction in the Rensselaer County Court, State of New York, of a criminal offense related to the delivery of a health care item or service under Medicare or a state health care program. The I.G. cited section 1128(a)(1) of the Act as

the basis for exclusion and imposed an exclusion period of five years, the minimum length for an exclusion pursuant to section 1128(a)(1). I.G. Exhibit (Ex.) 1, at 1; *see* Act § 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)). Attached to the notice letter was a document titled “HOW TO APPEAL YOUR EXCLUSION,” which stated, in relevant part:

A request for hearing must be made in writing within 60 days of receiving the OIG’s notice of exclusion. The date you receive the Inspector General’s notice of exclusion will be presumed to be five (5) days after the date of such notice unless there is a reasonable showing to the contrary.

I.G. Ex. 1, at 3. The notice also provided steps on how Petitioner could file her appeal, including, “you may submit all of the required information by mail” I.G. Ex. 1, at 3. On June 9, 2014, the Civil Remedies Division of the Departmental Appeals Board received Petitioner’s request for hearing. Petitioner included a copy of the notice providing her appeal rights along with a copy of the I.G.’s exclusion notice letter as part of her hearing request. The request for hearing was postmarked May 30, 2014. However, the actual letter requesting a hearing was dated March 3, 2014. *See* Req. for Hrg. Petitioner did not dispute the basis for her exclusion or the length of her exclusion in her hearing request, but, rather, she challenged the effective date of the I.G.’s exclusion action against her. Req. for Hrg. at 1.

I convened a pre-hearing conference by telephone on July 6, 2014. During the pre-hearing conference, counsel for the I.G. represented that she wanted an opportunity to file a motion to dismiss Petitioner’s hearing request as untimely. I permitted the I.G. that opportunity and allowed Petitioner the opportunity to respond to the I.G.’s motion. On July 25, 2014, the I.G. filed the motion to dismiss Petitioner’s hearing request along with one exhibit (I.G. Ex. 1). On August 5, 2014, Petitioner filed a response (P. Resp.) that opposed the I.G.’s motion to dismiss.

An individual or entity excluded under 42 C.F.R. Part 1001 may request a hearing before an administrative law judge to challenge the basis for the exclusion and whether the length of the exclusion is unreasonable. 42 C.F.R. § 1001.2007(a). “The excluded individual or entity has 60 days from the receipt of notice of exclusion . . . to file a request for such a hearing.” *Id.* § 1001.2007(b). The regulations that govern appeals of exclusions further state that:

The request for a hearing will be made in writing to the [Departmental Appeals Board]; 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.

42 C.F.R. § 1005.2(c). An administrative law judge “will dismiss a hearing request” if the hearing request “is not filed in a timely manner.” *Id.* § 1005.2(e)(1). In this case, the I.G.’s notice letter was dated January 31, 2014. I.G. Ex. 1. Petitioner is presumed to have received the notice letter on February 5, 2014. 42 C.F.R. § 1005.2(c). The regulatory presumption applies here because there has been no reasonable showing that Petitioner received the notice letter earlier or later than February 5, 2014. Petitioner had 60 days from February 5, 2014, which was Sunday, April 6, 2014, to appeal her exclusion by filing her request for a hearing. 42 C.F.R. §§ 1001.2007(b); 1005.2(c). Because the original deadline to file fell on a Sunday, Petitioner’s actual deadline to file her hearing request became Monday, April 7, 2014. *See* 42 C.F.R. § 1005.12(a).

Petitioner filed a letter requesting a hearing that was dated March 3, 2014. *See* Req. for Hrg. However, the Civil Remedies Division received Petitioner’s hearing request on June 9, 2014, postmarked May 30, 2014. The Civil Remedies Division Procedures (CRDP) state that “[w]ritten material is considered filed when placed in the U.S. mail or with an express delivery service, such as FedEx.” CRDP § 5 (rev. July 6, 2009). Therefore, despite the date on the hearing request itself, the evidence before me shows that Petitioner actually filed her hearing request 114 days after receiving the I.G.’s notice letter and 53 days after the regulatory deadline for filing her hearing request. Petitioner’s hearing request is thus subject to dismissal. 42 C.F.R. § 1005.2(e)(1).

In response to the I.G.’s motion to dismiss, Petitioner explains that she mailed her hearing request on March 6, 2014, but that “the letter was returned to me after several weeks and it was at that time that I decided to resend the letter via registered mail.” P. Resp. at 1. She acknowledges that she “did not think to keep the envelope that shows that the letter was returned to me.” P. Resp. at 1. However, the envelope that Petitioner reportedly disposed of was potentially the best evidence of an earlier filing date in this case.

While Petitioner was not notified in the notice letter and accompanying information that her hearing request needed to be mailed by certified mail, the regulations require that form of mailing, likely intended to avoid situations such as the case presented here. 42 C.F.R. § 1005.2(c). Had Petitioner actually mailed her hearing request on March 6, 2014 by certified mail, she would have clear evidence of a timely filing date. Without such proof, I must find that her hearing request was untimely filed and is therefore dismissed pursuant to 42 C.F.R. § 1005.2(e)(1).

I note that even if I found that Petitioner timely filed her hearing request, she did not raise any issues that may be addressed at a hearing. Petitioner asks that I modify the effective date of her exclusion and make it nearly two years earlier to be consistent with an action

taken by the New York Office of the Medicaid Inspector General; however, I am without authority to do so. *See* 42 C.F.R. § 1001.2007. I may only address whether there is a proper basis to exclude an individual and whether the length of exclusion is unreasonable. Therefore, Petitioner's hearing request is also subject to dismissal pursuant to 42 C.F.R. § 1005.2(e)(4).

/s/

Joseph Grow
Administrative Law Judge