

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Tammy B. Wojtach,  
(OI File No. H-14-41156-9),

Petitioner,

v.

The Inspector General.

Docket No. C-15-2538

ALJ Ruling No. 2015-13

Date: June 26, 2015

**DISMISSAL**

This Ruling summarizes matters discussed during the telephone prehearing conference that I held on June 17, 2015, and rules on the Inspector General's (IG) Motion to Dismiss (MTD) Petitioner's hearing request. *See* 42 C.F.R. § 1005.6. Present at the conference were: Ms. Tammy B. Wojtach, Petitioner *pro se*; Mr. David Blank, counsel for the Inspector General (IG); Ms. Allison Potenza, legal intern with the IG's office; and Mr. Joshua Jowers, Civil Remedies Division staff attorney.

**1. Background**

By letter dated September 30, 2014, the IG notified Petitioner that she was being excluded from Medicare, Medicaid, and all federal health care programs for the minimum statutory period of 5 years pursuant to 42 U.S.C. § 1320a-7(a)(1). The IG based the exclusion on her conviction "in the Suffolk County First District Court of the State of New York, of a criminal offense related to the delivery of an item or service under the Medicare or a State health care program, including the performance of management or administrative services relating to the delivery of items or services, under any such program."

Petitioner filed a request for hearing with the Departmental Appeals Board (DAB) on or about April 10, 2015. Petitioner explained that her former counsel erroneously mailed a hearing request to the New York State Office of the Medicaid Inspector General (NYSOMIG) to contest her exclusion. Petitioner included a copy of a November 19, 2014 letter from her former counsel to the NYSOMIG that seeks review, and reduction or elimination of Petitioner's exclusion. Petitioner asserted in the April 10, 2015 hearing request that if her former counsel had mailed the November 19, 2014 letter to the proper address (i.e, the address of the DAB), her hearing request in the present matter would have been timely filed.

I was assigned to hear and decide this case on May 18, 2015.

On June 15, 2015, the IG moved to dismiss Petitioner's hearing request as untimely filed.

## **2. Information Provided to Petitioner**

Because Petitioner was unrepresented by counsel at the prehearing conference, I explained that she had the right to be represented by an attorney in these proceedings, at no expense to the government. I also told her that I could not appoint an attorney to represent her. Petitioner stated that she did not intend to retain counsel.

## **3. Issues**

The general issue in this case is whether the IG was authorized to exclude Petitioner from participation in Medicare, Medicaid, and other Federal Health Care Programs pursuant to 42 U.S.C. § 1320a-7(a)(1) based on a conviction of a criminal offense related to the delivery of an item or service under the Medicare or a State health care program.

Because the IG filed a motion to dismiss, an initial issue that I must decide before reaching the general issue is whether Petitioner timely submitted a request for hearing to dispute the IG's exclusion.

## **4. IG's Motion to Dismiss and Petitioner's Response**

Two days before the scheduled prehearing conference, the IG moved to dismiss Petitioner's hearing request as untimely. The IG argues that Petitioner did not submit her hearing request within the timeframe the regulations require and that there is no "good cause" exception to this filing requirement under the regulations. MTD at 3-4. Therefore, according to the IG, I must dismiss Petitioner's hearing request. During the conference, counsel for the IG maintained that he had no choice but to move for dismissal.

During the prehearing conference, Petitioner acknowledged that she had received the IG's motion prior to the conference and read it. At the conference, I offered Petitioner the opportunity to file a written response at a later date. Petitioner declined that opportunity and instead responded to the IG's motion orally. Petitioner explained that she received the notice of exclusion on or about September 30, 2014, but the attorney who previously represented her submitted a hearing request to the wrong office. She stated that when she learned of her attorney's mistake, she submitted a hearing request to the correct address. Petitioner gave an impassioned plea for leniency and requested understanding of her circumstances, explaining that she was without fault in regard to the error in misfiling the hearing request. Petitioner stated she was trying to do the right thing and put her life back together. Petitioner wanted this proceeding to continue forward in case she could receive relief in this matter.

## 5. Discussion

Petitioner was presumed to have received the notice of exclusion five days after the IG mailed the notice, or October 6, 2014; therefore, Petitioner's hearing request had to be filed by December 5, 2014, or 60 days thereafter. 42 C.F.R. § 1005.2(c). The DAB's Civil Remedies Division received Petitioner's hearing request on April 27, 2015.

There is no dispute that Petitioner's hearing request dated April 10, 2015, is untimely. However, Petitioner filed two hearing requests challenging determinations to exclude her. Petitioner sent a November 19, 2014 letter to the NYSOMIG, and Petitioner sent an April 10, 2015 hearing request to the DAB. The IG misconstrued the issue as being whether "Petitioner's request for hearing received by the DAB on April 27, 2015 was timely filed." MTD at 2. The IG did not address the possibility that the November 19, 2014 letter requested a hearing to challenge the IG's exclusion. The IG urges I adopt an interpretation of the regulations that would require me to dismiss Petitioner's hearing request if something as minor as a clerical error prevented it from arriving at the DAB within the timeframe the regulations provide. This, I will not do.

Rather, the issue is whether Petitioner in fact submitted *any* timely hearing request challenging the IG's exclusion. If Petitioner had properly requested a hearing to challenge the IG's exclusion by her former counsel's November 19, 2014 letter, I would accept that letter as timely filed, since it was mailed before December 5, 2014, even if improperly addressed.

Petitioner's former counsel did not request a hearing before the DAB to challenge the IG's exclusion, however. Petitioner's former counsel challenged the State of New York's exclusion of Petitioner from its state Medicaid program and sought to appeal that determination. The November 19, 2014 letter indicates that it was written "in response to the letter dated October 21, 2014." Request for Hearing at 2. The IG issued its exclusion notice on September 30, 2014, whereas the NYSOMIG issued an October 21, 2014 notice

excluding Petitioner from the New York State Medicaid program based on the IG's exclusion. Request for Hearing, Attachment. The November 19, 2014 letter referenced "Provider ID # 03182547," which appears to be Petitioner's state provider number, contained only in the NYSOMIG's exclusion notice. The NYSOMIG provided Petitioner the opportunity to appeal its exclusion "determination within thirty (30) days of [the] notice," and the November 19, 2014 letter was dated 29 days from the date of the NYSOMIG exclusion notice. The NYSOMIG exclusion notice stated that "[w]ritten arguments or documentation for an appeal should be submitted to" the NYSOMIG, and that is precisely what Petitioner's counsel did: he submitted an appeal to the NYSOMIG of the NYSOMIG's decision to exclude Petitioner from the state Medicaid program. Request for Hearing, Attachment; Request for Hearing at 2. While the November 19, 2014 letter does have some ambiguous elements, such as a reference to Petitioner's exclusion falling under "section 1128(a)(1)," a detail not found in the NYSOMIG's letter, on balance I find that Petitioner's counsel did not seek to appeal the IG's exclusion. Petitioner's former counsel challenged the NYSOMIG's October 21, 2014 determination to exclude Petitioner from the New York state Medicaid program.

Petitioner requests that consideration be given to the fact that her former counsel attempted to file a hearing request timely, but mailed it to the incorrect address in error. However, as indicated above, it is not clear that Petitioner's former counsel mistakenly sent the appeal to the NYSOMIG. Petitioner received two exclusion notices in October 2015, one from the IG and the other from the NYSOMIG. Petitioner's counsel had an obligation to follow the instructions in each of the exclusion notices Petitioner received, instead of merely replying to the NYSOMIG's exclusion notice. While that may not have been Petitioner's fault, I cannot accept that the November 19, 2014 letter properly and timely requested a hearing before the DAB to challenge the IG's exclusion, as required by 42 C.F.R. § 1005.2(c).

Although I have not had the opportunity to consider the merits of this case, I note that it appears that Petitioner concedes that she was convicted of a crime that could be a basis for exclusion. Although Petitioner was apparently told by someone at the NYSOMIG that she would be a candidate for a reduction in her exclusion, this is incorrect if Petitioner's conviction subjected her to a mandatory exclusion under section 1128(a)(1) of the Act. The IG's five-year exclusion would be the minimum exclusion permitted under law. I am cognizant of the extreme financial hardship that Petitioner and her children are experiencing due to her misdemeanor conviction; however, because the law requires a five-year exclusion, I would have had no power to reduce the length of the exclusion, unless Petitioner had in fact not been convicted of a crime related to the delivery of an item or service under the Medicare or a State health care program. Petitioner submitted her only hearing request challenging the IG's exclusion on April 10, 2015, well beyond the required regulatory timeframe. In such a circumstance, I am

