Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Laurie D. Spenler, R.N.,
(O.I. File Number 7-07-40759-9),

Petitioner

v.

The Inspector General.

Docket No. C-11-470

Decision No. CR2416

Date: August 17, 2011

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion to Dismiss. It arises in the context of the I.G.'s determination to exclude Petitioner Laurie D. Spenler, R.N., from participation in Medicare, Medicaid, and all federal health care programs for a period of five years pursuant to section 1128(a)(4) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(4). As I explain below, I find that Petitioner's request for hearing was not timely filed as required by 42 C.F.R. §§ 1001.2007(b) and 1005.2(c), and for that reason I grant the I.G.'s Motion to Dismiss.

I. Procedural Background

By letter dated March 31, 2008, the I.G. notified Petitioner that she was to be excluded from Medicare, Medicaid, and all other federal health care programs for a period of five years. The I. G. relied on the terms of section 1128(a)(4) of the Act. Acting *pro se*, Petitioner requested review of the exclusion by letter dated May 16, 2011.

I convened a prehearing conference by telephone on June 7, 2011. During the telephone conference, the timeliness of Petitioner's request for hearing was discussed, and counsel for the I.G. stated his intention to seek dismissal of the request for hearing as untimely. By Order of that date I established a briefing schedule for the parties to submit their

positions and exhibits. All briefing is now complete, and the record in this case closed for purposes of 42 C.F.R. § 1005.20(c) on August 15, 2011.

The evidentiary record on which I decide the issue before me contains five exhibits. The I.G. proffered two exhibits marked I.G. Exhibits 1 and 2 (I.G. Exs. 1, 2). Petitioner proffered three exhibits marked Petitioner's Exhibits 1-3 (P. Exs. 1-3). All proffered exhibits are admitted to this evidentiary record.

II. Issue

The sole issue now 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. Petitioner admits that she received the I.G.'s notice-of-exclusion letter, but failed to appeal the exclusion for more than three years. Her reasons for not filing a timely appeal are not sufficient to avoid the mandatory effect of 42 C.F.R. § 1005.2(e)(1), and I must dismiss her request for hearing.

III. Controlling Statutes and Regulations

Section 1128(a) of the Act, 42 U.S.C. § 1320a-7(a), requires the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any individual or entity convicted of certain classes of criminal offenses. The terms of section 1128(a) are restated in similar language at 42 C.F.R. § 1001.101. This mandatory exclusion must be imposed for a minimum of five years. Act § 1128(c)(3)(B), 42 U.S.C. § 1320a-7(c)(3)(B).

The I.G. is charged with effecting exclusions based on sections 1128(a) and 1128(c)(3)(B) of the Act. *See* 42 C.F.R. § 1001.1001. If the I.G. determines that a conviction constitutes a proper predicate for exclusion, he must send notice of his decision to exclude to the affected individual or entity, and must in that notice provide detailed information on a number of points, including the appeal rights of the excluded party. 42 C.F.R. § 1001.2002; *see also* Act § 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 establishes a time limit for the filing of a request for hearing. Specifically, 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 [section] 1001.2002 to file a request for such a hearing.

This filing time limit is reiterated at 42 C.F.R. § 1005.2(c):

> The request for hearing will be made in writing to the DAB; signed by the petitioner . . . 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 [section] 1001.2002 . . . 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 regulation at 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 for any reason. 42 C.F.R. § 1005.2(e)(1). A tardy or dilatory petitioner can gain relief only by negating the presumption of regular delivery through a "reasonable showing" that the I.G.'s notice-of-exclusion letter was not received as presumed by 42 C.F.R. § 1005.2(c).

IV. Findings of Fact and Conclusions of Law

I find and conclude that:

1. The I.G. mailed a letter giving notice of the proposed exclusion of Petitioner from Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(3) of the Act to Petitioner on March 31, 2008. I.G. Ex. 1.

2. Petitioner filed her request for hearing on May 16, 2011. I.G. Ex. 2.

3. Petitioner's request for hearing was not filed in a timely manner. 42 C.F.R. §§ 1001.2007(b), 1005.2(c).

4. Petitioner's request for hearing must be dismissed. 42 C.F.R. § 1005.2(e)(1).

V. Discussion

My consideration of the I.G.'s Motion to Dismiss applies three points well-established in this forum.

The first point is the presumption of the receipt, within five days, of an exclusion notice mailed pursuant to 42 C.F.R. § 1001.2002. This presumption is established by regulation at 42 C.F.R. § 1005.2(c), and is acknowledged by the Departmental Appeals Board (Board) in *Sharon R. Anderson, D.P.M.*, DAB No. 1795 (2001). The second point is a

calculation: if a request for hearing is to be timely, then it must under most circumstances be filed no more than 65 days after the date of the notice-of-exclusion letter to which it responds. The I.G.'s notice-of-exclusion letter was dated March 31, 2008. I.G. Ex. 1. The third point is found in 42 C.F.R. § 1005.11(a)(4): "Papers are considered filed when they are mailed." The terms of CRDP § 5 repeat this rule. Thus, if Petitioner intended to appeal the I.G.'s March 31, 2008 notice-of-exclusion letter, she was obliged to mail her request for hearing not later than June 4, 2008. 42 C.F.R. §§ 1001.2007(b), 1005.2(c), 1005.12. She did not file her request for hearing until May 16, 2011. I.G. Ex. 2.

There is no provision for the extension of the filing deadline based on a showing of good cause or equitable considerations. *Kris Durschmidt*, DAB No. 2345 (2010); *Cathy Statler*, DAB No. 2241 (2009); *John Maiorano, R.Ph.*, DAB CR1113 (2003), *aff'd*, *John Maiorano, R.Ph., v. Thompson*, Civil Action No. 04-2279, 2008 WL 304899, at *3-4 (D. N.J. 2008). The only relief available from that 65-day time limit demands that the presumption of receipt in due course set out at 42 C.F.R. § 1005.2(c) be rebutted by a "reasonable showing to the contrary." Petitioner has not attempted to make that "reasonable showing" here. She candidly admits receiving the notice-of-exclusion letter, and candidly admits that her request for hearing is untimely. P. Ans. Br. at 1.

The core of Petitioner's appeal is an argument built around other dates and times, however. She points out that the conviction on which the I.G. proposed to act in March, 2008 occurred in March, 2006.[*] P. Ex. 1. The term of probation to which she was sentenced ended in August, 2008. P. Ex. 2. The Iowa Board of Nursing restored her license to practice on May 5, 2009. P. Ex. 3. She argues that if the I.G. had begun this five-year exclusion process promptly following her conviction, she would be eligible to practice in federal programs now. P. Ans. Br. at 2. It is her position that the two-year delay in the I.G.'s action in pursuing this five-year exclusion is unreasonable and that its effect, by extending the period of her exclusion into at least 2013, is punitive. *Id.*

It is not difficult to understand Petitioner's dissatisfaction, but this case must be resolved without discussing it further. As I have pointed out above, this case is before me on the

[*] The I.G.'s March 31, 2008 notice-of-exclusion letter contains these sentences: "We are aware that you are currently excluded from participation in any capacity in the Medicare, Medicaid, and **all** Federal health care programs under section 1128(b)(4) of the Act. This exclusion is in addition to that action and will run concurrently with it." I.G. Ex. 1. Section 1128(b)(4) allows the I.G. to exclude an individual while that individual's license to provide health care has been revoked or suspended by a state licensing authority. The Iowa Board of Nursing took disciplinary action against Petitioner on April 5, 2007. P. Ex. 3. The record does not show the date of the I.G.'s exclusion based on section 1128(b)(4), nor does it show whether Petitioner applied for reinstatement from the 1128(b)(4) exclusion after her Iowa license was restored in May, 2009.

very limited question of the timeliness of Petitioner's request for hearing. That is a threshold question, and because I must dismiss Petitioner's request for hearing as untimely, the reasonableness or the effect of the two-year gap between Petitioner's conviction and the I.G.'s final determination to exclude her pursuant to section 1128(a)(4) is simply not before me. But if it were, I could not aid Petitioner, for the Board has made it unmistakably clear that neither it nor the ALJs of this forum "have authority to review the timing of a petitioner's exclusion." *Randall Dean Hopp*, DAB No. 2166, at 4 (2008); *Kevin J. Bowers*, DAB No. 2143, at 6-7 (2008); *Kailash C. Singhvi, M.D.*, DAB No. 2138, at 5 (2007).

I note once more that Petitioner appears here *pro se*. Because of that I have been guided by the Board's reminders that *pro se* litigants should be offered "some extra measure of consideration" in developing their records and their cases. *Louis Mathews*, DAB No. 1574 (1996); *Edward J. Petrus, Jr., M.D., et al.*, DAB No. 1264 (1991). I have searched all of Petitioner's pleadings for any arguments or contentions that might raise a valid, relevant defense to the I.G.'s Motion to Dismiss, but have found nothing that could be so construed. In particular, her suggestion that in 2008 she did not fully understand the ramifications of the exclusion on her work as a nurse does not excuse her failure to seek review of the exclusion in a timely manner.

VI. Conclusion

For the reasons set forth above, I grant the I.G.'s motion to dismiss. The request for hearing filed by Petitioner Laurie D. Spenler, R.N., on May 16, 2011 must be, and it is, DISMISSED.

/s/
Richard J. Smith
Administrative Law Judge