Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Ruben Aguilár, R.Ph.
(O.I. File Number 2-06-40373-9),

Petitioner

v.

The Inspector General.

Docket No. C-11-30

Decision No. CR2327

Date: February 22, 2011

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion to Dismiss and arises from the I.G.'s determination to exclude Petitioner Ruben Aguilár, R.Ph., from participation in Medicare, Medicaid, and all federal health care programs, for a period of 13 years pursuant to sections 1128(a)(1) and 1128(a)(3) of the Social Security Act (Act). 42 U.S.C. § 1320a-7(a)(1) and (a)(3). 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

On June 30, 2010, the I.G. notified Petitioner that he was to be excluded from Medicare, Medicaid, and all other federal health care programs for a period of 13 years. The I.G.'s notice-of-exclusion letter explained the basis for the exclusion, informed Petitioner of his appeal rights, told him that any request for hearing must be made in writing within 60 days of his receipt of the notice-of-exclusion letter, pointed out the content requirements for an effective request for hearing, and provided Petitioner with the address to which his request for hearing should be mailed. Petitioner filed his request for hearing by letter

dated October 8, 2010.

I convened a prehearing conference by telephone on November 8, 2010. During the telephone conference the timeliness of Petitioner's request for hearing was discussed, and co-counsel for the I.G. stated their intention to seek the dismissal of the request for hearing as untimely. By Order of that date I established a briefing schedule by which the parties could 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 February 9, 2011.

The evidentiary record on which I decide this case contains 15 exhibits. The I.G. proffered eight exhibits marked I.G. Exhibits 1-8 (I.G. Exs. 1-8). Petitioner proffered seven exhibits designated by number in a separate Petitioner's Exhibit List. These exhibits were not individually marked in compliance with Civil Remedies Division Procedures (CRDP), although the importance of doing so was emphasized in paragraphs 5(e) and 10 of the Order of November 8, 2010. I have marked them Petitioner's Exhibits 1-7 (P. Exs. 1-7). I have admitted all proffered exhibits.

II. Issue

The sole 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 for hearing 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.

The record before me requires that this issue be resolved against Petitioner. I find that his request for hearing was filed untimely, a month past the deadline established by regulation. Petitioner's argument that he perfected his appeal from the I.G.'s proposed action by his attorney's letter dated June 25, 2010 is unpersuasive, for reasons I shall discuss below. Accordingly, 42 C.F.R. § 1005.2(e)(1) requires that I dismiss Petitioner's 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-7c(3)(b). If aggravating factors are present, the period of exclusion may be lengthened beyond five years. 42 C.F.R. § 1001.102(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 intent to exclude to the affected individual or entity. The affected party is permitted to respond to this notice of intent with "documentary evidence and written argument concerning whether the exclusion is warranted and any related issues." 42 C.F.R. § 1001.2001(a). This opportunity for an affected party to make its position known to the I.G. before a final decision is made regarding exclusion is consistent with the "reasonable notice" language of section 1128(c)(1) of the Act, 42 U.S.C. § 1320a-7(c)(1).

If the I.G. remains convinced that exclusion is warranted, he must send written notice of his final 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 sets limits on the issues that may be considered on appeal and establishes requirements for the hearing request's content. It also establishes a discrete 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 in the regulations governing the conduct of an excluded party's appeal before the ALJ that appear at 42 C.F.R. §§ 1005.1-1005.23. The 60-day deadline is repeated 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 content requirements for an effective request for hearing, adopted by reference at 42 C.F.R. § 1001.2007(a)(3), are set out explicitly at 42 C.F.R. § 1005.2(d):

> The request for hearing will contain a statement as to the specific issues or findings of fact and conclusions of law in the notice letter with which the petitioner . . . disagrees, and the basis for his or her contention that the specific issues or findings and conclusions were incorrect.

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.

It is important to note that 42 C.F.R. § 1005.2(e)(1) does not permit the ALJ to extend the 60-day filing deadline on a showing of good cause. 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-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 the notice-of-exclusion letter to Petitioner, announcing his final decision to exclude Petitioner from Medicare, Medicaid, and all other federal health care programs for a period of 13 years, on June 30, 2010. I.G. Ex. 1.

2. Petitioner's letter of June 25, 2010 was written and mailed five days before, and not "within 60 days after," the I.G. announced his final decision to exclude Petitioner from Medicare, Medicaid, and all other federal health care programs for a period of 13 years. P. Ex. 6; I.G. Exs. 1, 8; 42 C.F.R. § 1005.2(c).

3. Petitioner's letter of June 25, 2010 does not comply with the address and mailing requirements of 42 C.F.R. § 1001.2007(a)(3) and 42 C.F.R. § 1005.2(c). P. Ex. 6; I.G. Ex. 8.

4. Petitioner's letter of June 25, 2010 does not comply with the content requirements of 42 C.F.R. § 1001.2007(a)(3) and 42 C.F.R. § 1005.2(d). P. Ex. 6; I.G. Ex. 8.

5. Petitioner's letter of June 25, 2010 is not a request for hearing within the meaning of 42 C.F.R. § 1005.2(c), and did not perfect Petitioner's appeal from the I.G.'s notice-of-exclusion letter of June 30, 2010.

6. Petitioner is presumed to have received the I.G.'s June 30, 2010 notice-of-exclusion letter not later than July 6, 2010. I.G. Ex. 1; 42 C.F.R. § 1005.2(c).

7. Petitioner filed his request for hearing on October 8, 2010. Request for Hearing; P. Ex. 7.

8. Petitioner's request for hearing was not timely filed. 42 C.F.R. §§ 1001.2007(b),

1005.2(c).

9. 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 begins by evaluating the timeliness of Petitioner's October 8, 2010 letter requesting a hearing. My analysis applies rules well-established in this forum.

The first rule is the presumption of the receipt, within five days, of exclusion notices mailed pursuant to 42 C.F.R. § 1001.2002. This rule 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). Given the dates of the Independence Day holiday in 2010, that presumption relies on the date of I.G. Ex. 1, the June 30, 2010 notice-of-exclusion letter, to establish July 6, 2010 as the latest date from which the 60-day filing period could be calculated.[1]

The second rule 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. The date of Petitioner's letter is, of course, October 8, 2010, and neither party has suggested that it was mailed or filed on any other date.

The third rule is simply 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. Given the dates of the Labor Day holiday in 2010, in order to be timely, Petitioner was required to file his request for hearing not later than September 7, 2010. 42 C.F.R. §§ 1001.2007(b), 1005.2(c), 1005.12. There is no provision for the extension of that deadline for good cause shown. *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 a "reasonable showing to the contrary" of the presumption of receipt in due course set out at 42 C.F.R. § 1005.2(c).

[1] The I.G. asserts that there is direct evidence that Petitioner's attorney received the June 30, 2010 notice-of-exclusion letter on July 6, 2010, based on the "RECEIVED" stamp on the copy of that letter admitted as I.G. Ex. 1, at 1. A similar stamp appears on Petitioner's copy of the I.G.'s acknowledgment letter of June 2, 2010. But the stamp impressions are generic and not otherwise identifiable with Petitioner's attorney, and there is no explanation of how the I.G. came into possession of Petitioner's copy of I.G. Ex. 1. Since the presumptive receipt date is the same as this direct evidence would show if I found it reliable, I employ the presumptive date in this decision.

The fourth rule is that “a reasonable showing to the contrary” of the presumption of timely receipt must be made through demonstration of articulated facts calling the presumed delivery of the notice-of-exclusion letter genuinely into question. *Alan K. Mitchell, M.D.*, CR1614 (2007); *Andrew M. Perez*, DAB CR1371 (2005); *Dulal Bhattacharjee, M.D.,* CR1107 (2003); *George P. Rowell, M.D.*, DAB CR974; *Peter D. Farr, M.D.*, DAB CR909 (2002); *Sunil R. Lahiri, M.D.*, DAB CR296 (1993).

Petitioner has not attempted to make that “reasonable showing” here. Although Petitioner never concedes the point in so many words, he neither argues that the I.G.’s June 30, 2010 notice of exclusion failed to reach him as presumed, nor does he argue that his October 8, 2010 letter was a timely response to it. Petitioner thus tacitly concedes the untimeliness of the October 8, 2010 letter as a request for hearing. But that tacit concession is essentially gratuitous, for on this record I find and conclude that Petitioner’s October 8, 2010 request for hearing was untimely filed and subject to dismissal pursuant to the mandatory terms of 42 C.F.R. § 1005.2(e)(1).

But that is hardly the end of the matter, for Petitioner pointedly does not rely on his October 8, 2010 letter as his actual request for hearing. Instead, Petitioner claims to have perfected this appeal by a letter dated June 25, 2010 his attorney sent to an official in the I.G.’s Office of Investigations in Manhattan five days before the I.G. announced his final decision to exclude Petitioner. P. Ex. 6; I.G. Ex. 8.

To understand this remarkable claim, and to assay its merits fairly, it is important to appreciate the context in which Petitioner’s attorney wrote the letter of June 25, 2010. Chronologically, it was the sixth written communication in a series of seven letters that began on April 14, 2010 and culminated in the I.G.’s notice-of-exclusion letter on June 30, 2010. It is also important — and quite revealing — to note the exact language Petitioner uses to identify certain of those written communications.

On April 14, 2010, the I.G. wrote to Petitioner and notified him of the I.G.’s intention to exclude him from the protected health-care programs. P. Ex. 1; I.G. Ex. 3. This notice-of-intention letter complied fully with 42 C.F.R. § 1001.2001(a) and section 1128(c)(1) of the Act, for it alerted Petitioner that he faced exclusion, pointed out his exposure to an enhanced period of exclusion, invited his responses, and closed by assuring Petitioner that “Once the OIG has made its determination, the OIG will send you a letter notifying you of its decision and, if an exclusion is imposed, of the effective date and length of the exclusion, as well as your appeal rights.” P. Ex. 1, at 2, I.G. Ex. 3, at 2. This notice-of-intention letter was sent from the I.G.’s Manhattan office and was signed by the Assistant Special Agent in Charge (ASAC).

Petitioner’s attorney responded on April 22, 2010, in a letter she sent to the ASAC at the I.G.’s Manhattan address. P. Ex. 2; I.G. Ex. 4. The letter is a vigorous and detailed request that “Mr. Aguilar will not be excluded from eligibility to participate in any

capacity in the [protected health-care] programs." The last paragraph of the letter reads: "Please advise in writing whether my request will be granted." P. Ex. 2, at 7; I.G. Ex. 4, at 7.

These two letters leave little doubt as to what Petitioner's attorney knew about the state of the exclusion process in late April 2010. It was clear that the I.G. proposed to exclude Petitioner, clear that the period of exclusion might be enhanced beyond the mandatory minimum of five years, and clear that the I.G. had solicited and had received from Petitioner information intended to forestall or minimize the exclusion. It was also clear that Petitioner's attorney understood that the I.G. had made no final decision, and that the attorney expected written notice of it when a final decision had been made.

The third letter is, on its face, innocuous enough: on June 2, 2010, the I.G.'s ASAC in Manhattan wrote to acknowledge receipt of Petitioner's April 22 communication. P. Ex. 3; I.G. Ex. 5. It is a "form" letter, and the only things distinguishing it from another "form" letter in this record are its own date and the reference to the date "April 22, 2010" in identifying the correspondence it acknowledged. In Petitioner's Exhibit List this letter is accurately described as "Health and Human Services, Office of Investigations Acknowledgement of Petitioner's Letter."

On June 7, 2010, Petitioner's attorney sent the ASAC in Manhattan the fourth letter in this sequence. By its own terms, it conveyed additional information intended to "supplement my previous letter." P. Ex. 4, at 1; I.G. Ex. 6, at 1. The entire letter, and especially its penultimate paragraph, shows that Petitioner's attorney was well aware that no final decision had been reached by the I.G.

The fifth letter in the series is another facially-innocuous "form" letter. On June 23, 2010, the I.G.'s ASAC in Manhattan acknowledged Petitioner's June 7 communication. P. Ex. 5; I.G. Ex. 7. Given that it is a "form" letter, it is hardly surprising that it is in every way identical to the I.G.'s letter of June 2, 2010, except for its own date and the date of the letter that it acknowledged. Like the I.G.'s letter of June 2, this letter contains the following assurance: "The material you submitted has been associated with the file and will be sent to OIG Headquarters for further consideration. That office will communicate to you and your client about the proposed program exclusion and the appeal rights."

Now, I have described the I.G.'s letters of June 2 and June 23 as substantively-identical and facially-innocuous. I emphasize that except for dates relevant only so far as they place the two letters in context, they employ exactly the same language to convey exactly the same information and to make exactly the same promise: that when a final decision should be made, the I.G. "will communicate to you and your client about the proposed program exclusion and the appeal rights." In no way can either letter reasonably be construed as a response to Petitioner's attorney's April 22, 2010 request: "Please advise

in writing whether my request will be granted." P. Ex. 2, at 7; I.G. Ex. 4, at 7. The I.G.'s June 23 letter signals no change in the stage reached in the I.G.'s deliberative process, and most certainly does not suggest a final decision. But these two identical letters elicited very different responses from Petitioner's attorney, and in doing so became anything but innocuous.

I have pointed out that in Petitioner's Exhibit List, the I.G.'s June 2 acknowledgment letter is accurately described as "Health and Human Services, Office of Investigations Acknowledgement of Petitioner's Letter." I have pointed out the identical nature of the I.G.'s June 23 acknowledgment letter, and have pointed out that the June 23 acknowledgment letter cannot reasonably be understood to convey any suggestion of movement in the I.G's deliberative process or any hint of a final decision. One might expect, then, that Petitioner's attorney would have understood and characterized the I.G.'s June 23 acknowledgment letter (P. Ex 5) exactly as she had the identical letter of June 2 (P. Ex. 3) as "Health and Human Services, Office of Investigations Acknowledgement of Petitioner's Letter."

At least as far as the position taken here by Petitioner is concerned, any such expectation would be disappointed. Petitioner's Exhibit List inexplicably describes the I.G.'s June 23 letter (P. Ex. 5) as "Health and Human Services, Office of Inspector General notice of Proposed Exclusion from Program." No reason for this new characterization is offered in Petitioner's briefing, but the new characterization is the catalyst by which the two identical I.G. letters are transmuted from innocuous "form" letters to indicators of very troubling aspects of Petitioner's position. Bluntly put, Petitioner's characterization of the June 23 acknowledgment letter, and the discussions of it in Petitioner's briefing, suggest a studied effort to call it something that it manifestly is not, and then to use that manifest misnomer to justify three subsequent errors.

Petitioner's first error was in assuming, entirely without justification, that the I.G.'s June 23 acknowledgment letter represented the I.G.'s final decision on the questions of exclusion, the effective date of any exclusion the I.G. might determine to impose, and the precise period of any exclusion so imposed. Petitioner's unjustified assumption could have been made only by ignoring the closing lines of the I.G.'s April 14, 2010 notice-of-intent letter quoted above. P. Ex. 1, at 2, I.G. Ex. 3, at 2.

Petitioner's second error lay in responding to the I.G.'s June 23 letter with his attorney's letter of June 25, 2010. P. Ex. 6; I.G. Ex. 8. Petitioner's Exhibit List now calls that letter "Petitioner's Notice to Health and Human Services, Office of Inspector General, Notice of Appeal from June 23, 2010 Proposed Exclusion from Program." That designation is, however, a rather patent effort to build on Petitioner's mischaracterization of what the I.G. wrote on June 23, and thereby to legitimatize an imperfect and premature attempt to seek appellate relief from a decision not yet final.

When Petitioner's attorney wrote the letter of June 25, the I.G. had not yet announced a final decision on Petitioner's exclusion. Because no final decision had been announced, no effective date for the beginning of such an exclusion had been set pursuant to 42 C.F.R. § 2001.2002(b). The results of the I.G.'s consideration of aggravating factors, and of the potentially-mitigating factors outlined in Petitioner's letters of April 22 and June 7, had not been announced, and thus no final decision as to the period of any eventual exclusion had been conveyed to Petitioner.[2]

To put the situation plainly, on June 25, 2010 nothing had happened in this case from which Petitioner could appeal. And to put the matter even more plainly, Petitioner's premature letter was sent to the wrong addressee — the I.G.'s ASAC in Manhattan, not the DAB, as required by 42 C.F.R. § 1005.2(c) — contained none of the particulars required by 42 C.F.R. § 1005.2(d), and does not appear to have been sent by certified mail as required by 42 C.F.R. § 1005.2(c). Now, the certified-mail requirement may not go to the substance of a successful appeal, but the other two mentioned requirements at 42 C.F.R. § 1005.2(c) and 1005.2(d) certainly do, and Petitioner's June 25 letter was thus inadequate in its address, insufficient in its content, and premature in its timing, and was for those three reasons nugatory.

Petitioner's third error lay in not realizing, once the I.G.'s June 30, 2010 notice-of-exclusion letter reached his attorney, that the premature and insufficient effort to "exercise his appeal rights in this matter" was nugatory and that further action was demanded if he hoped to exercise his right to an appeal of the now-final exclusion. It may be significant that Petitioner has not included the notice-of-exclusion letter in his proffer of exhibits — it does, of course appear in the I.G.'s proffer as I.G. Ex. 1 — but even the most superficial comparison between the acknowledgment letter of June 23 and the notice-of-exclusion letter of June 30 would have alerted Petitioner's attorney to the need for action if an appeal were to be perfected, to the form and content required of that action, and to the ample time still available for completing that action and perfecting an appeal. For whatever reason, however, no action was forthcoming from Petitioner until October 8, 2010, three months after the notice-of-exclusion and too late by one month to meet the filing deadline established by 42 C.F.R. §§ 1001.2007(b) and 1005.2(c).

In sum, the 60-day period for filing Petitioner's request for hearing established by 42

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[2] Although the procedural settings and legal matrices are quite different, it still may be worth noting that the Article III courts generally disfavor premature appeals and enforce their so-called "final judgment rule," and the Board itself is extremely reluctant to entertain appeals in situations where litigation has not been fully resolved before the ALJ. See, for example, *Del Rosa Villa*, App. Div Docket No. A-11-20 (December 2, 2010). But even those situations arise only after some sort of adverse ruling has been made and announced. Here, nothing whatsoever had been decided, and there was simply no ruling, decision, or determination as to even a subordinate part of this exclusion process.

C.F.R. §§1001.2007(b) and 1005.2(c) expired on September 7, 2010. Petitioner's request for hearing, filed as it was on October 8, 2010, was out-of-time by one month. No previous actions by Petitioner — specifically including his attorney's letters of June 25, 2010, June 7, 2010, or April 22, 1010 — constitute an effective and jurisdictionally-sufficient request for hearing within the plain terms of 42 C.F.R. §§ 1001.2007(a)(3), 1001.2007(b), 1005.2(c) and 1005.2(d). The regulations and the unvarying decisions of this forum deny an ALJ the authority to extend the filing period. *Kris Durschmidt*, DAB No. 2345; *Cathy Statler*, DAB No. 2241. Petitioner's request for hearing is untimely and it must be dismissed. 42 C.F.R. § 1005.2(e)(1).

VI. Conclusion

For the reasons set forth above, I grant the I.G.'s Motion to Dismiss. The request for hearing filed by Petitioner Ruben Aguilár, R.Ph., on October 8, 2010 must be, and it is, DISMISSED.

/s/
Richard J. Smith
Administrative Law Judge