

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Emily J. Arowosaye
(OI File No.: H-11-41769-9),

Petitioner

v.

The Inspector General.

Docket No. C-15-1396

ALJ Ruling No. 2016-02

Date: October 26, 2015

DISMISSAL

The Inspector General of the United States Department of Health and Human Services (IG) asserts that it mailed Emily Arowosaye (Petitioner) a letter on April 30, 2012, notifying her that she was excluded from participating in Medicare, Medicaid, and all other federal health care programs for a period of ten years. Petitioner asserts that she did not receive that letter in the mail and did not see the letter until her attorney requested a copy of the letter from the IG in January 2015. Petitioner requested a hearing shortly thereafter to dispute the exclusion. The IG filed a motion to dismiss the hearing request as untimely. As explained below, because Petitioner has not made a reasonable showing that she did not receive the exclusion notice within five days of the date the IG mailed it, I must dismiss Petitioner's hearing request as untimely.

I. Procedural History

Petitioner filed a hearing request with the Civil Remedies Division (CRD) on January 16, 2015, to dispute an exclusion that the IG imposed on her in 2012. In the hearing request, Petitioner stated that she did not know about the exclusion or receive an exclusion notice. Petitioner's Exhibit (P. Ex.) C. On April 1, 2015, I held a telephonic prehearing

conference at which IG counsel said she intended to move for dismissal of the hearing request because it was untimely. Petitioner, representing herself, stated that she never received the original notice of exclusion because the IG sent it to the wrong address. Petitioner stated that her address was not 234 Cunningham Drive, West Orange, NJ 07052, but rather 24 Cunningham Drive in West Orange. P. Ex. A ¶ 12.

At the conference, Petitioner requested five or six months to retain counsel in this matter. IG counsel did not object to this request. Therefore, I ordered the IG to file his motion to dismiss by May 6, 2015, and Petitioner to file her response by October 1, 2015.

The IG timely filed his motion to dismiss (IG Motion) along with two exhibits (IG Exs. 1-2). Petitioner, through counsel, filed a timely opposition (P. Opposition) to the IG Motion with six exhibits (P. Exs. A-F). After requesting and receiving leave to file a reply, the IG filed a reply brief (IG Reply) with an additional exhibit (IG Ex. 3).

II. Discussion

The IG's Exclusion Staff drafted a letter notifying Petitioner that she was being excluded from Medicare, Medicaid, and all federal health care programs for a period of ten years pursuant to 42 U.S.C. § 1320a-7(a)(1). IG Ex. 1. The IG's letter advised that Petitioner was excluded due to her conviction in the Superior Court of Essex County, New Jersey of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. Petitioner's name and mailing address of 24 Cunningham Drive, West Orange, NJ 07052, appear on the first page of the letter. IG Ex. 1 at 1. This is Petitioner's current address and was her correct address in 2012. P. Ex. A ¶¶ 1, 3; IG Ex. 2 at 1. The letter also shows a stamped date of April 30, 2012. IG Ex. 1 at 1.

According to the IG's Exclusion Staff Director, "it is the policy and practice of this office to send out notice of exclusion letters on the day that they were dated. Thus the date on the notice of exclusion letter reflects the date it is placed in the mail." IG Ex. 3 ¶ 5. Further, the Exclusion Staff Director stated: "[i]t is the policy and the practice of this office to mail notice of exclusion letters using window envelopes. Thus the address on the notice of exclusion letter itself reflects the address to which the document was sent." IG Ex. 3 ¶ 6. Finally, because the post office did not return the exclusion letter to the Exclusion Staff, the Exclusion Staff Director considers Petitioner to have received the exclusion letter five days after the date of mailing. IG Ex. 3 ¶ 8.

Petitioner states that she did not receive the IG's exclusion letter "and nothing had ever been mailed to my home address, 24 Cunningham Drive, West Orange, NJ, where I had been living for 16 years." P. Ex. A ¶ 3. In January 2015, Petitioner's attorney (a different attorney than Petitioner's current counsel) learned from a local prosecutor that Petitioner was excluded. Ex. A ¶ 2. That attorney requested that the IG provide a copy

of the exclusion notice. P. Ex. A ¶ 4. On January 13, 2015, the IG provided Petitioner's attorney with a copy of the April 30, 2012 exclusion letter. P. Ex. A ¶ 5; P. Ex. B. Petitioner filed her hearing request on January 16, 2015. P. Ex. A ¶ 6; P. Ex. B.

The CRD Director sent a letter to the parties on March 11, 2015, indicating that I had scheduled a prehearing conference. Due to a clerical error, CRD addressed that letter to Petitioner at the incorrect address of 234 Cunningham Drive, West Orange, NJ 07052, when it should have been 24 Cunningham Drive. P. Ex. E. On March 24, 2015, IG counsel filed a notice of appearance with CRD and sent a copy of that notice to Petitioner at the same incorrect address that appeared on the March 11, 2015 CRD letter: 234 Cunningham Drive, West Orange, NJ 07052. P. Ex. F.

Because CRD misaddressed its letter, Petitioner did not receive it. Petitioner's attorney learned from the IG's office that a letter regarding Petitioner's case had been issued. P. Ex. A ¶ 7. Petitioner states that she went to the West Orange Post Office to inquire about the letter. P. Ex. A ¶ 9. A postal employee located a letter addressed to Petitioner at 234 Cunningham Drive, which Petitioner states was from the IG.¹ The postal employee told Petitioner that "they were preparing to send this back to the sender because the address did not exist." P. Ex. A ¶ 11. Petitioner stated that the first document she received from the IG in the mail was the IG's motion to dismiss. P. Ex. A ¶ 12.

Section 1128(a) of the Social Security Act requires the exclusion from participation in Medicare, Medicaid and other Federal health care programs of any individual or entity convicted of certain classes of criminal offenses. 42 U.S.C. § 1320a-7(a). If the IG determines that a conviction constitutes a proper basis for exclusion, he must send notice of the decision to exclude to the affected individual or entity. 42 U.S.C. § 1320a-7(c); 42 C.F.R. § 1001.2002(a). The exclusion notice must include information on the appeal rights of the excluded party. 42 C.F.R. § 1001.2002(a)(6).

The regulations provide that an excluded individual has 60 days from the receipt of the notice of exclusion to file a hearing request. 42 C.F.R. §§ 1001.2007(b), 1005.2(c). The regulations further provide that "the date of receipt of the notice letter [is] presumed to be five days after the date of such notice unless there is a reasonable showing to the contrary." 42 C.F.R. § 1005.2(c). The regulations do not provide an administrative law judge with the authority to extend the 60-day filing deadline, but only allow a petitioner to make a "reasonable showing" to rebut the presumption that he or she received the exclusion notice more than five days after the date of the notice. *Id.* If the request for hearing is untimely filed, the regulations require an administrative law judge to dismiss that hearing request. 42 C.F.R. § 1005.2(e)(1).

¹ It is unclear whether Petitioner obtained CRD's March 11 letter, the IG counsel's March 24 notice of appearance, or both from the West Orange Post Office. *See* P. Ex. D (showing an image of an IG counsel's office envelope superimposed on CRD's letter.

In the present case, Petitioner argues that the exhibits she submitted with her opposition to the IG Motion provide a reasonable showing that Petitioner did not receive the exclusion letter in April 2012. Specifically, Petitioner points to correspondence directly related to the present case addressed to Petitioner at the 234 Cunningham Drive address to show that the IG used an incorrect mailing address. P. Exs. D-F. Petitioner argues that she could not have received the exclusion notice. P. Opposition at 2-3.

The IG argues that, unlike CRD's March 11, 2015 letter and IG counsel's March 24, 2015 notice of appearance, the April 30, 2012 exclusion letter was addressed properly to Petitioner at 24 Cunningham Drive. IG Motion at 3; IG Reply at 1-2, 3 n.1. The IG argues that had the post office returned the April 30 exclusion letter, the IG would have followed procedures to locate a new address for Petitioner; however no letter was returned. IG Reply at 2; IG Ex. 3 ¶¶ 7, 8. Therefore, Petitioner received the letter.

I agree with the IG that Petitioner has failed to meet her burden of making a reasonable showing that she did not receive the exclusion letter within five days of mailing on April 30, 2012. Petitioner's argument is premised on a clerical error that CRD committed in sending its March 11, 2015 letter to 234 Cunningham Drive rather than to 24 Cunningham Drive. P. Ex. E. Later in March 2015, IG counsel followed suit and sent a notice of appearance to Petitioner at the same incorrect address of 234 Cunningham Drive. P. Ex. F. However, neither of these mailings impacted the original exclusion letter, which bears Petitioner's proper address of 24 Cunningham Drive. Further, it was CRD, not the IG's office, which first made this error three years after the IG's exclusion notice. Therefore, I conclude that there is no basis for me to disregard the regulatory presumption that Petitioner received the exclusion letter five days after April 30, 2015.

Although, I must consider Petitioner to have received the exclusion letter five days after mailing on April 30, 2012, May 5, 2012, fell on a Saturday; therefore, I must presume receipt of the letter to be May 7, 2012. *See* 42 C.F.R. §§ 1005.2(c), 1005.12(a). Petitioner then had 60 days, until July 6, 2012, to file a hearing request. It is undisputed that Petitioner did not file her hearing request until January 13, 2015, making it untimely.

III. Order

Because the regulations require me to dismiss untimely hearing requests, I grant the IG's Motion and dismiss Petitioner's hearing request. 42 C.F.R. § 1005.2(e)(4).

_____/s/
Scott Anderson
Administrative Law Judge