

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Denise A. Hardy, D.P.M.,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-709

Decision No. CR2478

Date: December 16, 2011

DECISION DISMISSING REQUEST FOR HEARING

I dismiss the hearing request of Petitioner, Denise Hardy, D.P.M. Petitioner filed her request untimely and has not shown good cause for her failure to file a timely hearing request.

I. Background

Petitioner is a podiatrist who participated in the Medicare program. On July 22, 2009, the Centers for Medicare and Medicaid Services (CMS) notified Petitioner that it was revoking Petitioner's participation in Medicare. CMS's asserted basis for revoking Petitioner's participation was that Petitioner was convicted in the United States District Court for the Eastern District of Missouri of a felony count of Medicare fraud. CMS's notice specifically advised Petitioner that she had 60 days within which to challenge the determination to revoke her participation. She was told that her failure to do so would be deemed to be a waiver of her right to administrative review of the determination to revoke.

Petitioner did not request a hearing until August 15, 2011, more than two years after she received CMS's notice of revocation of her Medicare participation. The case was assigned to me for a hearing and a decision. CMS moved to dismiss the hearing request or, in the alternative, for summary judgment. Petitioner opposed CMS's motion.

CMS filed five proposed exhibits that are identified as CMS Exhibit (Ex.) 1 – CMS Ex. 5 along with its motion. Petitioner did not file any proposed exhibits in opposition to CMS's motion. I receive all of CMS's exhibits into the record.

II. Issue, Findings of Fact, and Conclusions of Law

A. Issue

The issue in this case is whether Petitioner established good cause for her untimely request for a hearing.

B. Findings of Fact and Conclusions of Law

CMS's revocation of Petitioner's Medicare participation was an "initial determination" that conferred hearing rights on Petitioner. 42 C.F.R. § 498.3(b)(17). However, Petitioner was required to request a hearing within 60 days of her receipt of the notice letter (presumed to be 65 days from the date of mailing of that letter) to retain her hearing right. 42 C.F.R. § 498.40(a)(2). A party who fails to exercise his or her right to request a hearing timely loses that right. An administrative law judge may dismiss an untimely hearing request absent a showing of good cause for the untimely request by the party requesting the hearing. 42 C.F.R. § 498.70(c).

There is no dispute that Petitioner received CMS's notice nor is there any disagreement that Petitioner waited more than two years to file her hearing request. Therefore, Petitioner has lost her right to a hearing in this case. Dismissal of her hearing request is appropriate absent a showing by Petitioner that there is good cause for her untimely filing.

The term "good cause" is not defined in the regulations. However, that term has long been held to consist of a circumstance or circumstances beyond a party's control that prevents the party from filing a hearing request timely. *Hospicio San Martin*, DAB No. 1554 (1996).

Petitioner argues that there are three bases to find good cause for her untimely filing. I find that none of Petitioner's arguments establish good cause, and, consequently, I dismiss her hearing request.

First, Petitioner contends that she has suffered from psychiatric problems – depression – that impaired her judgment and caused her not to file a timely hearing request. However, Petitioner has offered no proof whatsoever to support this contention. She has offered no medical records showing that she was diagnosed or treated for depression. She has offered nothing to show that, if she suffered from depression, it was so severe as to impair her judgment and cause her not to realize the possible implications of failing to challenge CMS's determination to revoke her Medicare participation. Indeed, Petitioner has not even offered an affidavit or a declaration in which she attests under oath to having suffered from depression. I find no psychiatric or psychological justification for Petitioner's untimely hearing request given the absence of any proof that she even suffered from an impairment, much less proof that such impairment – if it existed at all – would have prevented her from filing a hearing request.

Second, Petitioner asserts that CMS's notice is defective in that it failed to inform her of the precise basis in law for CMS's revocation determination. From this, Petitioner appears to argue that she was unaware of the significance of CMS's notice. I disagree that the notice inadequately informed Petitioner of the basis for CMS's determination. The notice specifically tells Petitioner that the regulatory authority for CMS's determination is at 42 C.F.R. § 424.535. CMS Ex. 1. That section includes as grounds for revocation a felony conviction of a financial crime and a felony conviction of any of the crimes described at section 1128(a) of the Social Security Act (Act). 42 C.F.R. § 424.535(a)(3)(i)(B), (D). Petitioner's conviction of Medicare fraud was both a financial crime and a program-related crime within the meaning of section 1128(a)(1) of the Act. Petitioner surely would have discovered this had she read the regulation cited in CMS's notice.

Furthermore, the notice plainly informs Petitioner that the reason for revoking her Medicare participation was that she had pled guilty to health care fraud charges. That language, in and of itself, was adequate notice to Petitioner of the basis for CMS's determination.

Finally, Petitioner argues that the notice is defective in that it fails to apprise her of the specific regulatory basis for stating that she had 60 days within which to appeal CMS's determination. That is not a defect. The notice is explicit. It tells Petitioner that she has 60 days within which to file an appeal. Petitioner was plainly informed of her rights and of her duties.

CMS moved in the alternative for summary judgment against Petitioner, arguing that its determination to revoke Petitioner's Medicare participation was correct as a matter of law. It is unnecessary for me to address this issue inasmuch as I am dismissing Petitioner's hearing request.

/s/

Steven T. Kessel
Administrative Law Judge