Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Guy R. Seaton
Docket No. A-12-48
Decision No. 2465
June 13, 2012

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Guy R. Seaton (Petitioner) appeals the January 30, 2012 decision of Administrative Law Judge (ALJ) Keith R. Sickendick to dismiss Petitioner's request for a hearing on a determination by the Inspector General (I.G.) of the Department of Health and Human Services to exclude Petitioner from participation in Medicare, Medicaid and all federal health care programs for 25 years. *Guy R. Seaton*, DAB CR2496 (2012). The I.G. excluded Petitioner pursuant to section 1128(a)(1) of the Social Security Act (Act)(42 U.S.C. § 1320a-7(a)) based on Petitioner's conviction of a criminal offense related to the delivery of an item or service under the Medicare or state health care programs. [1] The ALJ dismissed Petitioner's hearing request for untimely filing pursuant to 42 C.F.R. § 1005.2(e)(1). For the reasons explained below, we affirm the ALJ's dismissal of Petitioner's hearing request.

Statutory and Regulatory Background

Section 1128(a)(1) of the Act requires the Secretary of the Department of Health and Human Services (Secretary) to exclude an individual or entity from participation in all federal health care programs if that individual or entity "has been convicted of a criminal offense related to the delivery of an item or service under [the Medicare statute] or under any State health care program." The Secretary has delegated her exclusion authority to the I.G. by regulation. *See* 42 C.F.R. § 1001.101(a). When the I.G. excludes an individual or entity, that individual or entity may request a hearing before an ALJ. Act § 1128(f); 42 C.F.R. §§ 1001.2007(a), 1005.2(a). The individual or entity must file the hearing request within 60 days from receipt of the notice of exclusion. 42 C.F.R. § 1005.2(c). The date of receipt is presumed to be five days after the date on the notice unless there is a reasonable showing to the contrary. *Id*. A petitioner's hearing request

[1] The current version of the Act is available at http://www.socialsecurity.gov/OP_Home/ssactissact.htm. On this website, each section of the Act contains a reference to the corresponding chapter and section in the United States Code.

"will be made in writing to the DAB; signed by the petitioner, or by his or her attorney; and sent by certified mail." *Id.* "The ALJ will dismiss a hearing request" that "is not filed in a timely manner." 42 C.F.R. § 1005.2(e). Any party dissatisfied with an ALJ decision may appeal to the Departmental Appeals Board. 42 C.F.R. § 1005.21(a).

Case Background

In a letter dated December 30, 2004, the I.G. excluded Petitioner based on his conviction, in the United States District Court, Northern District of California, Oakland Division, of a criminal offense related to the delivery of an item or service under the Medicare or state health care program.[2] ALJ Decision at 1. Petitioner acknowledged receiving the exclusion notice on or about January 2, 2005. ALJ Decision at 4, citing P. Ex. 1 (Declaration of Guy Seaton stating, in paragraph 1, "I received an OIG exclusion letter on or about January 2, 2005, dated December 30, 2004.") [3]; I.G. Ex. 1 (exclusion notice).

In an October 26, 2011 letter addressed to the Chief of the Civil Remedies Division (CRD) of the Departmental Appeals Board of the Department of Health and Human Services (DHHS), Petitioner inquired about the status of a request for hearing he asserted he filed on or about January 5, 2005. *Id.* at 2. Petitioner enclosed with his letter a copy of an unsigned letter dated January 5, 2005, which he purports is a request for hearing sent by certified mail on January 5, 2005. *Id.* CRD staff docketed Petitioner's October 26 letter and enclosures as a request for hearing. *Id.*

On November 18, 2011, the I.G. filed a Motion to Dismiss Petitioner's Request for Hearing (Motion), and four exhibits, on the ground the hearing request was not timely filed. *Id.* On November 22, 2011, Petitioner filed an objection to the Motion, accompanied by four exhibits. *Id.* Petitioner also objected to I.G. Exhibit 4, the declaration of Mariel A. Filtz, Program Support Assistant, Office of Counsel to the Inspector General, Office of Inspector General, DHHS. The Filtz declaration states, inter alia, that she "diligently searched the OIG data compilation systems for any record of appeal by Petitioner Guy Seaton. That search failed to disclose any record of receipt of any hearing request by Petitioner . . . by either the DAB or OIG prior to November 4, 2011." I.G. Ex. 4, at 4.

[2] Petitioner was convicted in June 2004 of six criminal counts involving a conspiracy to defraud Medicare. I.G. Ex. 2, at 1-2. He was sentenced to 78 months in prison and three years of supervised release and ordered to pay criminal monetary penalties totaling $600 as well as restitution (to the Centers for Medicare and Medicaid Services) in the amount of $1,621,343. *Id.* at 3-7.

[3] Petitioner's Declaration actually appears in the record as an unmarked attachment to Guy Seaton's Objection to Motion to Dismiss, but the motion refers to the attachment as "GS's Exhibit 1". We use the ALJ's designation (P. Ex. 1) to avoid confusion.

On November 28, 2011, the ALJ convened a prehearing conference by phone and on November 29, 2011, he issued an Order directing the CRD Director to review CRD records and file a declaration "stating whether any record existed that the CRD received a request for hearing from Petitioner after December 2004 and prior to October 2011." *Id.* CRD Director Theodore Kim, filed a declaration on December 14, 2011, and the ALJ marked the declaration as Court Exhibit (Ct. Ex.) 1. The Kim declaration states, inter alia,

> On November 29, 2011, I diligently searched the records and correspondence that CRD has in its possession for a hearing request from Guy R. Seaton for the time period mentioned in Judge Sickendick's order of November 29, 2011. In addition, I diligently searched the computer database of the CRD for any record of an appeal by Petitioner Guy R. Seaton. The searches failed to disclose any record of receipt of any hearing request by Petitioner Guy R. Seaton prior to his correspondence of October 26, 2011.

Ct. Ex. 1, at 1-2, ¶4. On January 2, 2012, Petitioner filed a pleading objecting to Court Exhibit 1 and asking for denial of the I.G.'s Motion. *Id*. The ALJ overruled all of Petitioner's objections to the Filtz and Kim declarations, finding the declarations "authentic and relevant" and "highly probative of what is reflected by the records of the I.G. and the [CRD] as to receipt and docketing of any prior request for hearing." *Id*. at 2-3. The ALJ also found,

> To the extent Petitioner perceives that the declarations are contrary to his interest, he is correct, but that prejudice does not outweigh the probative value of the documents related to the issue of whether either the I.G. or the CRD . . . have a record that a prior request for hearing was received and docketed.

Id. at 3.

Based on Petitioner's admission that he received the exclusion notice on or about January 2, 2005, the ALJ concluded that the latest date Petitioner could have mailed a hearing request that was timely under section 1005.2(c), was March 3, 2005, the sixtieth day after the date of receipt. ALJ Decision at 4, citing P. Ex. 1. *Id*. The ALJ then concluded that Petitioner's October 26, 2011 letter, with its enclosed purported hearing request, was "more than six years and six months too late to be treated as a timely request for hearing." *Id*. at 5.

The ALJ's analysis in his Decision focused primarily on Petitioner's admission that although he alleged the January 5, 2005 letter was sent by certified mail on that date, he did not have a certified mail receipt to prove that it was, in fact, mailed on January 5, 2005 or received by the CRD on any date. *Id*. at 4-5. The ALJ stated that by providing for hearing requests to be sent by certified mail, section 1005.2(c) put the burden of proof on the timely filing issue on a petitioner and gave the petitioner a means to meet that burden by producing the certified mailing receipt in the event a dispute arose as to the filing date. The ALJ stated:

> Petitioner has conceded that he has no certified mail receipt establishing either mailing of his request for hearing on [or] about January 5, 2005, or subsequent delivery. Accordingly, Petitioner cannot meet his burden to show that his request for hearing was timely filed. Petitioner's declaration (P. Ex. 1) is neither acceptable nor adequate proof of mailing on [or] about January 5, 2005 and subsequent delivery of a request for hearing.

ALJ Decision at 5.

Petitioner timely filed a notice of appeal of the ALJ Decision with the Board and later filed a supplemental brief.[4] Petitioner's principal argument on appeal is that the ALJ should have relied on Petitioner's declaration rather than the declarations of Ms. Filtz and Mr. Kim. *See* Notice of Appeal at 2; Supplemental Brief (Br.) at 1. Petitioner asserts that the ALJ should have accepted his declaration as proof he mailed a hearing request on January 5, 2005 and concluded, based on that declaration, that his hearing request was timely. He notes that the I.G. did not object to his declaration or question his truthfulness and challenges the Filtz and Kim declarations as "hearsay statement that only shows that the office could not find any records." Notice of Appeal at 2. Petitioner also objected that the declarants "are newly [sic] employees of the Office and have no direct information or knowledge of the events." *Id.* Petitioner also states that the ALJ should not have relied on the fact that Petitioner did not provide a certified mailing receipt. Supplemental Br. at 1.

[4] In his notice of appeal, Petitioner had asserted he did not have a complete copy of the record the ALJ relied on and requested 30 days to review the record and supplement his notice of appeal. With a March 20, 2012 letter acknowledging receipt of the appeal, the Presiding Board Member sent Petitioner a copy of the record of the proceedings before the ALJ and gave him 35 days from the date of the letter to file supplemental arguments.

Analysis

We have carefully considered Petitioner's arguments on appeal but find no basis to reverse the ALJ's dismissal of his hearing request as untimely filed. Substantial evidence on the record as a whole clearly supports the ALJ's conclusion that Petitioner did not file a hearing request within 60 days of receiving the I.G.'s notice of exclusion, as required by section 1005.2(c). Under that regulation, the purported letter requesting a hearing (dated January 5, 2005) that Petitioner included with his October 26, 2011 letter to the CRD is clearly untimely. Although Petitioner claims he sent the January 5, 2005 letter to the CRD on January 5, 2005, the only evidentiary support he cites is his declaration, which contains the bare statement that "[o]n January 5, 2005, I composed an appeal request and mailed to Chief of [CRD] . . . ." Notice of Appeal at 2; Supplemental Br. at 1; P. Ex. 1, ¶2. The ALJ found Petitioner's declaration "neither acceptable nor adequate proof of mailing on [or] about January 5, 2005 and subsequent delivery of a request for hearing." ALJ Decision at 5. Although the ALJ does not further explain that finding, it is clear from his decision as a whole that he relied on the absence of evidence to corroborate Petitioner's assertion, including, in particular, Petitioner's admission that he could not provide a receipt for the alleged certified mailing. On appeal Petitioner challenges the ALJ's reliance on the absence of a receipt, but does not explain the basis for that challenge or provide any explanation for why he was unable to provide a receipt.[5] We conclude that it was reasonable for the ALJ to rely on the absence of a certified mail receipt for the January 5, 2005 letter as evidence that the letter was not mailed on January 5, 2005, and that this evidence undercuts Petitioner's assertion to the contrary in his declaration.

It was also reasonable for the ALJ to rely on the declarations by Ms. Filtz and Mr. Kim that neither the I.G. nor the CRD had any record of having received a hearing request from Petitioner before receiving the purported hearing request enclosed with Petitioner's October 26, 2011 letter. The ALJ addressed and rejected Petitioner's objection, raised again on appeal, that the declarations are inadmissible hearsay. The ALJ correctly noted that hearsay evidence is generally admissible in these administrative proceedings. ALJ Decision at 2. The regulations expressly authorize ALJs hearing appeals of I.G. exclusions to "determine the admissibility of evidence" and provide that, with specific limited exceptions not relevant here, the ALJs "will not be bound by the Federal Rules of Evidence." 42 C.F.R. § 1005.17(b).

[5] Petitioner also asserts that the I.G. exclusion letter did not state that he had to file a hearing request by certified mail. Supplemental Br. at 1-2. While the letter does not expressly state this, the instructions attached to the notice refer to the procedures in section 1001.2007 as governing ALJ hearings in I.G. exclusion appeals, and subsection (e) of that section, in turn, refers to the procedures in part 1005, which include the certified mail requirement. In any event, Petitioner had notice of this requirement from the publication of the regulations.

In addition, the regulations provide that the Board can disturb an ALJ's otherwise appropriate ruling on admissibility only if failure to do so appears to be inconsistent with substantial justice. 42 C.F.R. § 1005.23. We find no such appearance here. The reasons the ALJ gave for admitting the Filtz and Kim declarations are detailed and persuasive, and we agree that the declarations are "highly relevant, as they address whether there is any record at either the I.G.'s office or the CRD . . . of the receipt and docketing of a prior hearing request by Petitioner." ALJ Decision at 3. Thus, admission of the declarations serves the interests of justice. In this regard, we note the ALJ's statement that the searches of government records by the declarants "were an expenditure of government resources, potentially for the benefit of Petitioner if evidence of a prior filing in 2005 had been located." *Id*.

We find no merit in Petitioner's suggestion on appeal that the weight accorded to Ms. Filtz's or Mr. Kim's declarations is somehow diminished because the declarants have not held their positions for long periods of time. The issue is not, as Petitioner suggests, whether the declarants have direct information or knowledge about the events that transpired in 2004, *see* Notice of Appeal at 2, but, rather, whether they are now responsible for and familiar with the established data collection systems used by their respective agencies in the regular course of business to document the arrival and docketing of hearing requests. Petitioner does not dispute that both declarants are responsible for and familiar with the systems used for this purpose by their respective agencies. We also note that Mr. Kim specifically attested that the CRD database "is complete and was in existence prior to December 20, 2004, the date of the notice letter excluding Guy R. Seaton." Ct. Ex. 1, ¶3.

Although the ALJ's analysis on pages 4-5 of his decision focuses primarily on the absence of corroborating evidence in the form of a certified mail receipt, the declarations of Ms. Filtz and Mr. Kim, which the ALJ discussed earlier in his decision and found "highly relevant," provide further support for his conclusion that Petitioner did not file a timely hearing request. We conclude that the record evidence as a whole clearly constitutes substantial evidence supporting the ALJ Decision.

Petitioner asserts that "[e]ven if the OIG had the right to den[y] [his] appeal based upon late filing," it waived that right when it "schedule[d] an [sic] hearing upon receiving the petitioner['s] October 26, 2011 [letter] requesting the status of petitioner's request for hearing." Notice or Appeal at 3. This assertion reflects a misunderstanding of fact and the regulations. The I.G. did not schedule a hearing; an ALJ of the DAB, not the I.G., provides hearings requested on I.G. exclusions, and the I.G. is a party to such a hearing. 42 C.F.R. § 1005.2(c). Furthermore, the docketing of a hearing request does not (and cannot) eliminate the ALJ's authority under the regulations to dismiss a hearing request for any of the reasons stated in section 1005.2(e).

Conclusion

For the reasons stated above, we affirm the ALJ Decision to dismiss Petitioner's appeal pursuant to section 1005.2(e)(1) because it was untimely.

/s/
Sheila Ann Hegy

/s/
Constance B. Tobias

/s/
Stephen M. Godek
Presiding Board Member