Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Ambulance Service, Inc.,	)	Date: November 24, 1998
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-98-315
	)	Decision No. CR557
The Inspector General.	)	
	)	

DECISION

I decide to dismiss for untimeliness Petitioner's request for hearing dated May 7, 1998 pursuant to 42 C.F.R. § 498.70(c).

I. Background

This case is before me on Petitioner's request for hearing dated May 7, 1998.

Previously, Petitioner had received from the Inspector General (I.G.) a letter dated October 31, 1997 (Notice Letter), which informed Petitioner that it would be excluded from participation in the Medicare and various other federally funded health care programs for a period of five years pursuant to section 1128(b)(8) of the Social Security Act (Act). According to the Notice Letter, the I.G. was imposing the exclusion due to Petitioner's association with William Wallace, a convicted or sanctioned individual who was serving as one of Petitioner's officers, directors, agents, or managing employees. The Notice Letter enclosed an explanation of Petitioner's appeal rights and advised also that reinstatement may be requested before the expiration of the exclusion period if Mr. Wallace is no longer associated with Petitioner in the foregoing manner.

The Notice Letter stated that the exclusion would become effective in 20 days, i.e., on November 20, 1997.

On November 19, 1997, Petitioner, by its prior counsel, sent to the I.G.'s office a document entitled "Petition

to Immediately Terminate Exclusion and/or Intended Exclusion" (November 19, 1997 letter). Petitioner alleged that it had dissociated itself from Mr. Wallace prior to his conviction and, therefore, no exclusion should be effectuated for the reasons stated in the Notice Letter.

By letter dated April 28, 1998, the I.G. notified Petitioner that it had been reinstated as of February 1, 1998.

Petitioner, by its current counsel, then filed its request for hearing dated May 7, 1998, seeking "reinstatement for November 20, 1997 to January 31, 1998." Petitioner attached to its hearing request a copy of the I.G.'s April 28, 1998 letter, which reinstated Petitioner's right to participate in the federally funded programs as of February 1, 1998. According to its hearing request, Petitioner believes that it "should not have been excluded in the first place."

After the parties advised me that no compromise was possible in this case, I established a briefing schedule for the parties to address the following three issues:

a. Whether the November 19, 1997 letter from Petitioner's prior Counsel to William Libercci should be construed as a timely filed request for an administrative law judge to hear and decide the merits of certain controversies between Petitioner and the I.G., or, whether the letter should be construed as Petitioner's request to the I.G. for reinstatement. See, e.g., 42 C.F.R. §§ 1001.2007(a) and (b) and 1005.2(c) and (d).

b. If the November 19, 1997 letter from Petitioner's prior counsel should be construed as a timely filed request for hearing, whether that letter has preserved any issue which is subject to adjudication in this forum. See 42 C.F.R. §§ 1001.2007(a), 1001.3004(c), and 1005.2(e)(4).

C. Whether I have the authority to extend the 60-day filing period specified by 42 C.F.R. §§ 1001.2007(b) and 1005.2(c) upon the request of a petitioner and for good cause shown.

Order of July 20, 1998, 3.

II. The Parties' Cross-Motions

Petitioner addressed the above three issues in its filing titled, "Extension to Appeal Due to Good Cause." Petitioner's motion is accompanied by seven exhibits (P. Exs. 1 through 7).

The I.G. filed a Motion to Dismiss for Untimeliness and incorporated a discussion of her position on the same three issues. Her motion is accompanied by six exhibits (I.G. Exs. 1 through 6).

Petitioner's position is that its November 19, 1997 letter should be construed as a timely filed request for hearing based on its prior counsel's intent and his understanding of conversations with the I.G.'s representatives. P. Mot., Para. 11 - 17. Alternatively, Petitioner contends that its May 7, 1998 letter should be construed as a timely filed appeal of the reinstatement determination issued by the I.G. on April 28, 1998. P. Mot., Para. 18. Petitioner argues also in the alternative that the period for filing a hearing request should be extended for good cause shown in order to accept its May 7, 1998 letter as a timely challenge to the I.G.'s Notice Letter dated October 31, 1997. P. Mot., Para. 19 - 24.

The I.G. seeks to dismiss the action on the basis that the November 19, 1997 letter was not a request for hearing before an administrative law judge, but a request for the I.G. to reinstate Petitioner. I.G. Mot., 4 - 7. The I.G. notes that her reinstatement determination is not subject to challenge or review in this forum. I.G. Mot. 7 - 9. Additionally, the I.G. notes that the regulations do not permit any extension of the time limit for filing a request for hearing. I.G. Mot., 4. Accordingly, the I.G. seeks dismissal of this action because no hearing request challenging her exclusion determination dated October 31, 1997 had been filed by the deadline date of January 5, 1998.

Petitioner replied to the I.G.'s motion to dismiss by reiterating its previous arguments and by requesting that the I.G.'s motion be denied.

III. Findings and discussion

Having considered the written arguments and exhibits filed by each party, I hereby dismiss the action on the basis of the four Findings of Fact and Conclusions of Law (FFCL) listed in italics and discussed below.

> *1. In order to challenge the exclusion imposed by the I.G.'s Notice Letter at a hearing before an administrative law judge, Petitioner had until January 5, 1998 to file a request for hearing addressed to, or directed to the attention of, the Departmental Appeals Board.*

Even though Petitioner's prior counsel asserted some doubt about the nature of the I.G.'s letter of October 31, 1997[1], the I.G.'s October 31, 1997 letter constituted a valid notice of exclusion in conformity with the requirements of 42 C.F.R. § 1001.2002. See I.G. Ex. 1. For disposition of the issues before me, it is immaterial whether Petitioner's prior counsel was also aware that the I.G. had previously issued notice of intent to exclude (see 42 C.F.R. § 1001.2001) to Petitioner. Petitioner does not deny having received the I.G.'s notice of intent to exclude in advance of the Notice Letter dated October 31, 1997. The I.G.'s October 31, 1997 letter stated very clearly that Petitioner's five-year exclusion "is effective 20 days from the date of this letter." HCFA Ex. 1 at 1; 42 C.F.R. § 1001.2002(b).

Additionally, the I.G.'s notice letter stated as follows, in informing Petitioner of its hearing rights as required by 42 C.F.R. § 1001.2002(c)(6):

> [y]ou may request a hearing before an administrative law judge in accordance with 42 C.F.R. § 1001.2007. Such a request must

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[1] The relevant portion of Attorney Aaron Metcalf's affidavit states that, on November 19, 1997, his firm--

> was not aware of the letter sent to Ambulance Services, Inc. on July 23, 1997, proposing exclusion. Therefore, we were uncertain whether we were responding in an attempt to prevent action from being taken by OIG or if our response was an appeal of action previously taken.

P. Ex. 6 at 2.

> be made in writing within 60 days of receiving the OIG's letter of exclusion and sent to Chief, Civil Remedies Division, Departmental Appeals Board, Room 637D, Hubert H. Humphrey Building, 200 Independence Avenue, S.W., Washington, D.C. 20201. Such a request must be accompanied by a copy of the OIG's letter, a statement as to the specific issues or findings with which you disagree, along with the basis for your contention that the specific issues and/or findings are incorrect.

I.G. Ex. 1 at 2.

As correctly summarized in the I.G.'s letter, the deadline for requesting a hearing before an administrative law judge is 60 days after receipt of the I.G.'s notice of exclusion. 42 C.F.R. §§ 1001.2007 and 1005.2(a). The receipt of the I.G.'s Notice Letter is presumed to be five days after the date of the notice, unless there is a reasonable showing to the contrary. 42 C.F.R. § 1005.2(c). In this case, the presumed receipt date of November 5, 1997 controls, since there has been no showing to the contrary.

As specified in the I.G.'s Notice Letter, the Chief of the Civil Remedies Division for the Departmental Appeals Board is the designated agent for receipt of any request for hearing an excluded individual or entity may wish to file. Given the explicit instructions provided by the I.G.'s letter, there is no reason for an excluded entity or individual to send its request to a different individual or location if its intent is to obtain a hearing before an administrative law judge.

Therefore, for Petitioner to secure a hearing before an administrative law judge to contest the exclusion determination set forth in the I.G.'s October 31, 1997 letter, Petitioner needed to submit a written request for hearing addressed to, or directed to the attention of, the Departmental Appeals Board by no later than January 5, 1998.

2. The November 19, 1997 letter from Petitioner's prior counsel to William Libercci of the I.G.'s Office was not a timely filed request for an administrative law judge to hear and decide the merits of any controversy between Petitioner and the I.G.

Contrary to Petitioner's arguments, the instructions contained in the I.G.'s Notice Letter are clear on their face and could not have been misinterpreted as inviting Petitioner to send its request for hearing before an administrative law judge to the attention of the I.G. Petitioner knew or should have known from the I.G.'s Notice Letter that the exclusion would go into effect 20 days hence, without regard for any action Petitioner might take in the interim. I.G. Ex. 1. In addition to providing the specific details about how and where to submit a request for hearing, the I.G.'s letter also gave instructions on the earliest date on which the I.G. would consider a request for reinstatement, as required by 42 C.F.R. § 1001.2002(c)(4) and (6). I.G. Ex. 1.

In the exercise of its options, Petitioner, through its prior counsel, chose to send a letter addressed to the I.G.'s office, instead of the Departmental Appeals Board, on November 19, 1997. The letter did not mention a hearing or an administrative law judge, and Petitioner did not ask that its letter be forwarded to the Departmental Appeals Board. Instead, Petitioner pled the merits of its case directly to the I.G.'s representative, William Libercci, in asking, in essence, that he reconsider[2] the imposition of the exclusion scheduled to take effect by operation of law on November 20, 1997.

Nothing in Petitioner's November 19, 1997 letter indicated an intent for anyone other than the I.G.'s representatives to review and determine the merits of its statements. Since the regulations on requesting a hearing before an administrative law judge are published at 42 C.F.R. § 1001.2007 and Part 1005 et seq., as well as summarized in the I.G.'s notice letter, I cannot reasonably interpret the following words as meaning that

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[2] Petitioner's prior counsel described Mr. Libercci as the "debarring official" in this case. P. Ex. 6 at 3. Counsel addressed the November 19, 1997 letter to Mr. Libercci and discussed the merits of its position with him. P. Ex. 6; I.G. Ex. 3.

Petitioner was inquiring about its hearing rights before an administrative law judge in its November 19, 1997 letter:

> I have been unable to locate regulations describing the proper procedure for avoiding this intended exclusion. If I am procedurally in error, please construe this letter as a formal request to comply with any such regulation, and inform me where i can discover the proper procedure and format.

P. Ex. 4 at 2 - 3. Additionally, it was not procedurally impermissible for Petitioner to request reinstatement before the expiration of the exclusion period, as provided by the I.G.'s notice letter and the regulations at 42 C.F.R. § 1001.3001(a)(2). Therefore, I attribute no significance to Petitioner's contention that "[i]n our Petition, we requested that OIG inform us if the form of our response was improper." P. Ex. 6 at 2. Nor do I attribute significance to its like argument that "[a]t no time . . . was it ever suggested that Ambulance Services, Inc.'s response to the proposed exclusion was procedurally deficient or that Ambulance Services, Inc. needed to file a more formal appeal." P. Ex. 6 at 4.

No action taken by Petitioner until May 7, 1998 supports the proposition that it had been expecting to have a hearing before an administrative law judge since submitting its November 19, 1997 letter. Petitioner has described various conversations with I.G. representatives and alleges that one of them, Ms. Kathy Pettit, told him in February of 1998 that the matter was being treated as an "appeal" by the I.G. P. Ex. 6 at 3. Even if Ms. Pettit had made this statement (which Ms. Pettit denies[3]), it merely shows that the I.G. had chosen to accept an informal "appeal" of the case, as was done here in accordance with Petitioner's wishes. The I.G. and her representatives have the discretion to reconsider their previously made determinations upon request.

Moreover, Petitioner's arguments of reliance is unpersuasive, especially since it has never questioned the absence of any assignment notification or order from

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[3] In her declaration, Ms. Pettit stated that she had told Petitioner's prior counsel, Mr. Metcalf, that he must file an appeal with the Departmental Appeals Board to seek administrative review of the exclusion. I.G. Ex. 6.

any administrative law judge. I cannot reasonably construe Petitioner's voluntary and exclusive dealings with the I.G.'s representatives over the lengthy period of time between November 19, 1997 and May 7, 1998 as demonstrating that it had wanted an "appeal" in the sense of a formal, on-record hearing before an administrative law judge as provided by 42 C.F.R. § 1001.2007 and Part 1005 et seq. In describing his communications with William Libercci of the I.G.'s Office until March of 1998, Petitioner's prior counsel referred to Mr. Libercci as the "debarring official." P. Ex. 6 at 3. Petitioner, by its then representatives, must have known the difference between a "debarring official" acting for the I.G. and an administrative law judge who is to preside over disputes between the I.G. and the excluded entity.

3. Petitioner's November 19, 1997 letter did not preserve any issue which is subject to adjudication in this forum.

Administrative law judges are authorized to hear and decide issues set forth in a timely filed request for hearing. 42 C.F.R. § 1005.2. Since Petitioner's November 19, 1997 letter was not a timely filed hearing request for the reasons discussed under FFCL 2, above, the matters raised therein are not subject to adjudication in this forum.

However, because the November 19, 1997 letter has resulted in the I.G.'s determination to reinstate it on February 1, 1998 instead of on November 20, 1997 as requested, Petitioner argues that the correctness of the reinstatement date has become reviewable at a hearing before me. I reject this argument. The regulations provide no administrative hearing for the purpose of reviewing the I.G.'s determination on whether or when an excluded entity or individual should be reinstated into the programs. See 42 C.F.R. § 1001.3004(c). The existence of a letter from a law firm stating its contrary view (P. Ex. 7) is immaterial. Since the reinstatement issue was non-reviewable in this forum ab initio, no legal significance can be attributed to the fact that Petitioner's letter dated November 19, 1997 failed to secure the reinstatement date sought by Petitioner.

4. I have no authority to extend the 60-day period for filing a hearing request specified by 42 C.F.R. §§ 1001.2007(b) and 1005.2(c).

Petitioner asks that I extend the 60-day time limit for filing a request for hearing based on good cause shown. It acknowledges that no extension for "good cause" is provided in any of the regulations governing proceedings between an excluded individual and the I.G. P. Mot., Para. 20. However, Petitioner relies on the examples of "good cause" provided in the regulations governing Social Security disability cases.[4]

I agree with the I.G. that I am without the discretion to extend the filing period provided by regulation. The I.G. points out that cases which arose under now superseded regulations defined the "good cause" exception as those circumstances which were beyond the petitioner's ability to control. I.G. Mot., 4 at 1. It is not necessary to specifically find that this definition of "good cause" is inapplicable to the facts of this case, since the current regulations leave me with no authority to grant an enlargement of time for filing a hearing request. In fact, the regulation specifies that the "ALJ will dismiss a hearing request where -- (1) The petitioner's . . . hearing request is not filed in a timely manner . . . ." 42 C.F.R. § 1005.2(e).

IV. Conclusion

For the above reasons, I deny the relief requested by Petitioner and grant the I.G.'s motion to dismiss this action.

/s/

Mimi Hwang Leahy

Administrative Law Judge

[4] The citation provided by Petitioner is 42 C.F.R. § 404.911. However, the correct citation is 20 C.F.R. § 404.911.