

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)
In the Case of:)
Cathy Statler,) Date: December 8, 2008
Petitioner,) Docket No. C-08-464
-v.-) Decision No. CR1871
The Inspector General.)
_____)

DECISION

The request for hearing of Petitioner, Cathy Statler, is dismissed pursuant to 42 C.F.R. § 1005.2(e)(1).

I. Background

The Inspector General for the U.S. Department of Health and Human Services (the I.G.) notified Petitioner by letter dated November 30, 1999, that she was being excluded permanently from participation in Medicare, Medicaid, and all federal health care programs as defined in section 1128B(f) of the Social Security Act (Act) (42 U.S.C. § 1320a-7b(f)). The I.G. advised Petitioner that her exclusion was pursuant to section 1128(a)(1) of the Act (42 U.S.C. § 1320a-7(a)(1)) based upon her conviction in the United States District Court for the District of Arizona, of a criminal offense related to the delivery of an item or service under the Medicare program. The I.G. further advised Petitioner that her exclusion was effective August 30, 1999. Petitioner's Exhibit (P. Ex.) 4; I.G. Exhibit (I.G. Ex.) 1.

On May 16, 2008, Petitioner submitted to the Civil Remedies Division (CRD) of the Departmental Appeals Board (DAB), a motion to enjoin the I.G. from future exclusion, request for hearing, and a memorandum of law in support of its motion. Petitioner's motion was treated as a request for hearing before an administrative law judge (ALJ) and it was docketed and assigned to me for hearing and decision on May 22, 2008. On June 25, 2008, I convened a prehearing conference by telephone, the substance of which is

memorialized in my Order dated June 30, 2008. The I.G. asserted during the prehearing conference that I do not have jurisdiction and the parties agreed that resolution of any jurisdictional question is appropriate prior to developing the case for hearing. Accordingly, I established a briefing schedule for an I.G. motion to dismiss, Petitioner's response, and any reply or sur-reply.

On August 11, 2008, the I.G. filed a motion to dismiss the request for hearing on grounds that the request for hearing is untimely and that the requested relief is not within my authority to grant. The I.G. filed I.G. Exhibit 1 with its motion. On October 15, 2008, Petitioner filed a motion for leave to file her response to the I.G. motion out-of-time and that motion is granted. Petitioner filed with her motion for leave to file out-of-time her response to the I.G. motion to dismiss with Petitioner's Exhibits 1 through 4. The I.G. filed a reply to Petitioner's response on October 29, 2008. On November 12, 2008, Petitioner filed a motion for leave to file a sur-reply, which is granted, with its sur-reply attached. No objections have been made to the offered exhibits and I.G. Exhibit 1 and Petitioner's Exhibits 1 through 4 are admitted.

II. Discussion

A. Findings of Fact

The following findings of fact are based upon the uncontested and undisputed assertions of fact in the pleadings and the exhibits admitted. Citations may be found in the analysis section of this decision if not included here.

1. The I.G. notified Petitioner by letter dated November 30, 1999, that she was being permanently excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Act. P. Ex. 4; I.G. Ex. 1.
2. The November 30, 1999, I.G. notice advised Petitioner that she could request a hearing before an administrative law judge (ALJ), by submitting a written request within 60 days of her receipt of the I.G. notice. P. Ex. 4, at 2; I.G. Ex. 1.
3. Petitioner received the I.G. notice of exclusion dated November 30, 1999, not more than five days after the date of that notice.
4. Petitioner requested a hearing by ALJ by pleading dated May 16, 2008, which is more than 60 days after her presumed receipt of the I.G. notice of exclusion.

B. Conclusions of Law

1. Pursuant to 42 C.F.R. § 1005.2(c), a request for hearing must be filed within 60 days of the date on which the notice of exclusion is received by the person to be excluded and there is a rebuttable presumption that the date of receipt is five days after the date of the notice.
2. Petitioner has not rebutted the presumption that she received the I.G. notice of exclusion on December 5, 1999, five days after the “November 30, 1999” date on the notice.
3. An ALJ is required to dismiss a hearing request that is not timely filed. 42 C.F.R. § 1005.2(e)(1).
4. Petitioner’s request for hearing must be dismissed.

C. Issues

The Secretary of the U.S. Department of Health and Human Services (the Secretary) has by regulation limited my scope of review to the following issues:

- Whether Petitioner’s request for hearing was timely filed;
- Whether there is a basis for the imposition of the exclusion; and,
- Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1); 42 C.F.R. § 1005.2(c).

D. Applicable Law

Petitioner’s right to a hearing by an ALJ and judicial review of the final action of the Secretary is provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). Pursuant to 42 C.F.R. § 1005.2(c), a request for hearing must be filed within 60 days of the date on which the notice of exclusion is received by the person to be excluded. The regulation establishes the rebuttable presumption that the date of receipt is five days after the date of the notice unless there is a reasonable showing to the contrary. 42 C.F.R. § 1005.2(c). A request for hearing that is not filed timely must be dismissed. 42 C.F.R. § 1005.2(e)(1).

Pursuant to section 1128(a)(1) of the Act, the Secretary must exclude from participation in Medicare and Medicaid programs any individual convicted of a criminal offense related to the delivery of an item or service under Medicare or any state health care program.

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years may mitigating factors be considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c).

The standard of proof is a preponderance of the evidence and there may be no collateral attack of the conviction that is the basis for the exclusion. 42 C.F.R. §§ 1001.2007(c) and (d). Petitioner bears the burden of proof and persuasion on any affirmative defenses or mitigating factors and the I.G. bears the burden on all other issues. 42 C.F.R. §§ 1005.15(b) and (c).

E. Analysis

Petitioner does not dispute that the I.G. notice of exclusion was dated November 30, 1999. Petitioner does not argue she did not receive the notice by December 5, 1999, or rebut the presumption that arises pursuant to 42 C.F.R. § 1005.2(c), that she received the notice by that date. There is also no question that Petitioner did not request a hearing until she did so by letter dated May 16, 2008, obviously more than 60 days after the I.G. notice of exclusion should have been received based upon the regulatory presumption of receipt. Pursuant to 42 C.F.R. § 1005.2(e)(1), a request for hearing that is not timely filed must be dismissed. The regulations grant me no discretion to waive a late-filing or to extend the time for filing.

I have considered Petitioner's arguments regarding why I may exercise authority and review Petitioner's exclusion. However, I find all of Petitioner's arguments to be unpersuasive and without merit. The November 30, 1999, I.G. notice of exclusion adequately advised Petitioner of her right to request a hearing as required by 42 C.F.R. § 1001.2002(b)(6) and the time-limit for doing so. Petitioner points to no defect in the notice of exclusion that prevented her from exercising her right to review in a timely manner. Petitioner's other alleged defects in the notice of exclusion could have been raised before an ALJ, if the request for hearing had been timely filed. Petitioner's arguments regarding the settlement agreement among her, her husband, the U.S. Attorney for the District of Arizona, and the I.G. are not subject to my review or enforcement. Petitioner has cited no authority for me to review or enforce a settlement agreement and I

am aware of none. Regarding Petitioner's request that I enjoin further exclusion of Petitioner, I note that the Secretary has specifically provided that an ALJ has no authority to enjoin any act of the Secretary, which I construe to include his delegee in this case. 42 C.F.R. § 1005.4(c)(4).

Petitioner failed to exercise her right to request an ALJ hearing within 60 days of her receipt of the I.G. notice of exclusion. Petitioner offers no explanation for why she waited more than eight years to request an ALJ hearing. Dismissal is required.

III. Conclusion

For the foregoing reasons, Petitioner's request for hearing is dismissed.

/s/

Keith W. Sickendick
Administrative Law Judge