

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Edward J. Yablecki, Jr.,

Petitioner,

v.

The Inspector General.

Docket No. C-10-479

Decision No. CR2138

Date: May 24, 2010

DECISION

Petitioner, Edward Yablecki, Jr., asks review of the Inspector General's (I.G.'s) determination to exclude him from participation in the Medicare, Medicaid, and all federal health care programs under section 1128(a)(4) of the Social Security Act. The I.G. has moved to dismiss, arguing that the appeal is untimely. I agree and dismiss Petitioner's appeal.

Petitioner's hearing request must be dismissed pursuant to 42 C.F.R. § 1005.2(e)(1), because it was not timely filed.¹

In a letter dated May 31, 2007, the I.G. advised Petitioner that, based on his conviction "of a criminal offense related to unlawful manufacture, distribution, prescription, or dispensing of a controlled substance," he was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. With the notice letter, the I.G. sent Petitioner an explanation of his appeal rights: he was entitled to a hearing before an administrative law judge if he filed a written request for review within sixty days after receipt of the notice. CMS Ex. 1 at 3. Petitioner filed his hearing request two years and eight months later, on February 16, 2010 (which the Civil Remedies Division (CRD) received on February 22, 2010).

¹ I make this one finding of fact/conclusion of law.

The I.G. has filed a motion to dismiss, accompanied by two exhibits (I.G. Exs. 1-2). Petitioner has filed a response. Although no exhibits accompany that response, he alludes to an unmarked document (“Driver License Checklist”) submitted on March 30, 2010, in response to my order summarizing the prehearing conference call. I will accept that two-page document as Petitioner’s Exhibit 1 (P. Ex. 1)

The regulations governing these proceedings grant me virtually no discretion. An aggrieved party *must* request a hearing within sixty days after receiving notice of the exclusion. 42 C.F.R. § 1001.2007(b). The date of receipt 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). The regulations include no good-cause exceptions for untimely filing, providing that the ALJ *will* dismiss a hearing request that is not filed in a timely manner. 42 C.F.R. § 1005.2(e)(1); *John Maiorano, R. Ph., v. Thompson*, Civil Action No. 04-2279, 2008 WL 304899, at *3-4 (D. N.J. 2008).

I held a prehearing conference in this matter on March 16, 2010. At that time, Petitioner told me that he received the notice letter in a timely fashion but decided not to file a hearing request until February 2010. I explained that the regulations compelled me to dismiss an untimely request. Order and Schedule for Filing Submissions (March 16, 2010); *See* I.G. Br. at 7. Following the call, he sent e-mail correspondence to my CRD staff attorney (which staff copied to I.G. counsel), saying that he had just noticed that the I.G. notice letter was mailed to his parents’ house, although he “would frequently pick up mail at my parents’ place which was deemed more ‘junk mail.’” Then he wrote that he “very infrequently picked up” mail from his parents’ house. I.G. Ex. 2 at 1.

In response to my order summarizing the prehearing conference, Petitioner objected to my characterization of his admission and claimed that “the letter was not mailed to the correct address and not received in time to respond to it procedurally.” He attached a document to show that, from May 2006 until April 2008, he lived at a different address in Spring Hill Florida. P. Ex. 1.

I do not doubt that the notice letter was mailed to Petitioner’s parents’ house. However, this does not mean that he did not receive it timely, particularly since, by his own admission, he picked up his mail from them. Thus, I find that Petitioner’s evidence and argument fall far short of establishing the “reasonable showing” necessary to overcome the presumption that he timely received the I. G. notice. I therefore have no discretion, and I dismiss his request for a hearing pursuant to 42 C.F.R. § 1005.2(e)(1).

/s/
Carolyn Cozad Hughes
Administrative Law Judge