

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Kevin Joseph Oliver, DDS,
(OI File No. H-11-40826-9),

Petitioner,

v.

The Inspector General
Docket No. C-12-695

Decision No. CR2572

Date: July 24, 2012

DECISION

Petitioner, Kevin Joseph Oliver, DDS, asks review of the Inspector General's (I.G.'s) November 30, 2011 determination to exclude him, for a minimum period of five years, from participation in the Medicare, Medicaid, and all federal health care programs, as provided for in section 1128(a)(1) 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 November 30, 2011, the I.G. advised Petitioner that, based on his conviction "of a criminal offense related to the delivery of an item or service under the Medicare program," he was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of twenty 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. By means of the Civil Remedies Division's

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

electronic filing system, Petitioner filed his hearing request almost six months later, on May 14, 2012.

The I.G. filed his motion to dismiss (I.G. Br.), accompanied by five exhibits (I.G. Exs. 1-5), and Petitioner filed a response (P. Br.) with one attachment, which we have marked 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 do not include a good-cause exception for untimely filing; they provide that the ALJ *will* dismiss a hearing request that is not filed in a timely manner.² 42 C.F.R. § 1005.2(e)(1); *John Maiorano, R. Ph., v. Thompson*, Civil Action No. 04-2279 at 6 (D. N.J. 2008), 2008 WL 304899.

Based on the regulatory presumption, we assume that Petitioner received the notice on December 5, 2011. His hearing request was therefore due on or before February 3, 2012. 42 C.F.R. § 1005.12(a). But he did not file his request until May 14, 2012.

Although Petitioner now complains that the I.G. sent correspondence to the wrong address, his ex-wife's address, he has not denied that he timely received the notice of exclusion, which the I.G. mailed on November 30, 2011. Indeed, in his request for review, he explicitly conceded that he received the letter: "The original exclusion letter I received dated 11/30/2011. . . ." *See also* Order and Schedule for Filing Briefs and Documentary Evidence (June 4, 2012).

I therefore have no discretion here, and I dismiss Petitioner's request for a hearing pursuant to 42 C.F.R. § 1005.2(e)(1).

/s/
Carolyn Cozad Hughes
Administrative Law Judge

² Petitioner argues that I may extend the filing deadline based on a showing of good cause. However, the cases he cites in support of his argument involve a different set of governing regulations and do not apply here.