

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Alexis Vincent Robinson, X57135)	Date: August 10, 2009
(OI File Number 4-07-41263-9),)	
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-359
)	Decision No. CR1985
The Inspector General.)	

DECISION DISMISSING REQUEST FOR HEARING

I dismiss the hearing request of Petitioner, Alexis Vincent Robinson, because Petitioner filed his hearing request untimely.

I. Background

The Inspector General (I.G.) determined to exclude Petitioner from participating in Medicare and other federally funded health care programs. The I.G. sent a notice to Petitioner on December 31, 2007 advising him that he was excluded. Petitioner did not request a hearing until March 18, 2009. The case was assigned to me for a hearing and a decision. The I.G. then moved to dismiss Petitioner’s hearing request on the ground that it was untimely filed. Petitioner opposed the motion.

The I.G. attached two exhibits to his brief in support of dismissal. I.G. Ex. 1 is the I.G.’s two-page December 31, 2007 notice letter. I.G. Ex. 2 is the I.G.’s two-page December 31, 2007 notice letter with a one-page addendum providing information about the effect of exclusion. The I.G. also submitted attachments to its brief, which the I.G. labeled as Attachment A – Attachment T. I receive I.G. Exs. 1 and 2 into the record. As part of his opposition to the I.G.’s motion Petitioner submitted the unsigned affidavits of his wife, Shanel Robinson, and his two sons, Alexis Robinson II and Alexis Robinson III. He also filed a single page excerpt of what may be a portion of a court record, a document

entitled “Motion to Accept Petitioner’s Objection to the Inspector General’s Motion to Dismiss Petitioner’s Appeal,” and a copy of an order that I issued on July 7, 2009. None of these documents were identified as exhibits by Petitioner. I identify the unsigned affidavit of Shanel Robinson as P. Ex. 1, the affidavit of Alexis Robinson II as P. Ex. 2, the unsigned affidavit of Alexis Robinson III as P. Ex. 3, and the one-page excerpt of an apparent court record as P. Ex. 4. I receive P. Ex. 1 – P. Ex. 4 into the record.

II. Issue, findings of fact and conclusions of law

A. Issue

The issue in this case is whether I must dismiss Petitioner’s hearing request.

B. Findings of fact and conclusions of law

1. I must dismiss a hearing request that is not timely filed.

Regulations governing hearings in cases involving an exclusion determination made by the I.G. require the administrative law judge to dismiss any hearing request that is not timely filed. 42 C.F.R. § 1005.2(e)(1). The regulation states:

- (e) The . . . [administrative law judge] *will* dismiss a hearing request where –
- (1) The petitioner’s or the respondent’s hearing request is not filed in a timely manner.

(emphasis added). I read the word “will” in the regulation as giving me no discretion. Where a hearing request is untimely I must dismiss it without regard to any showing of good cause for a late filing made by the party who filed the request.

2. I must dismiss Petitioner’s hearing request because he filed it untimely.

As I state in the introduction to this decision the I.G. sent Petitioner notice of his exclusion on December 31, 2007. Petitioner did not request a hearing until March 18, 2009, more than a year and two months after the I.G. sent the exclusion notice to him.

In order to be timely a hearing request in an exclusion case such as this one must be filed within 60 days from the date of receipt of the I.G.’s notice of an adverse determination. 42 C.F.R. § 1005.2(c). The notice is presumed to be received five days after the date of the notice unless there is a reasonable showing to the contrary. *Id.* Thus, in order for a hearing request to be presumed to be timely it must be filed within 65 days of the date that the notice is mailed to the adversely affected party.

In this case Petitioner filed his hearing request more than a year after the presumed date of receipt (January 5, 2008) of the I.G.'s notice. I must conclude the request to be untimely and I must dismiss it absent proof from Petitioner that: rebuts the presumption that he received the notice within 65 days of its mailing; and establishes he filed his hearing request within 60 days of the date that he actually received the notice.

Petitioner has provided me with no proof that he failed to receive the notice within five days of its mailing. Consequently, I have no choice but to dismiss his hearing request.

In his hearing request Petitioner asserts, without explanation, that he “did not receive notification of this exclusion within the required time to appeal . . . [it].” That assertion, unsupported by either evidence or explanation, is on its face insufficient to rebut the presumption of receipt within five days of the mailing date of the notice.

Petitioner has not made any additional personal statement in which he avers that he received the I.G.'s exclusion notice on a date that was beyond the presumed receipt date. He filed no affidavit nor did he offer an explanation of when and how he came to see the notice.

However, in his unsigned affidavit, Alexis Robinson II avers that in January 2008 he inadvertently packed some of his father's mail while preparing to move from his parents' home. He avers that “part of this mail was the exclusion letter that . . . [Petitioner] stated he did not receive until February of 2009.” P. Ex. 2.

Alexis Robinson II's affidavit, assuming its truth, provides no defense to the I.G.'s motion. Indeed, it is an admission that Petitioner received the I.G.'s notice in January 2008. His receipt of the notice triggered the 60-day period within which he had to file a hearing request. Negligence by a family member does not provide Petitioner with an excuse for failing to file his hearing request timely because there are no good cause exceptions to the requirement that the hearing request be filed within 60 days from receipt. Furthermore, the affidavit does not state when Petitioner actually saw the notice. It only says that the mail that Alexis Robinson II inadvertently packed included the notice that Petitioner *stated* that he did not receive until February 2009. There is nothing to explain when Alexis Robinson II gave the notice he allegedly inadvertently packed to his father.

The other two affidavits – the unsigned affidavits of Alexis Robinson III and Shanel Robinson – offer nothing to show that the notice was delivered to Petitioner later than the presumed date of delivery. Both Alexis Robinson III and Shanel Robinson aver that the family's household failed to receive mail for an extended period of time in 2008 due to an error by the post office relating to a change of address card that had been filed by Alexis Robinson II. But, neither individual declares that the I.G.'s notice was one of the items that were not delivered timely due to this alleged error.

Indeed, in her affidavit Shanel Robinson avers that in February 2009 Alexis Robinson II handed her the unopened envelope containing the exclusion letter. That assertion merely confirms that Petitioner received the letter and underscores that it was not opened due to negligence.

/s/

Steven T. Kessel
Administrative Law Judge