Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Guy R. Seaton
(O.I. File No. 9-95-040211-9),

Petitioner

v.

The Inspector General,
Department of Health and Human Services.

Docket No. C-12-84

Decision No. CR2496

Date: January 30, 2012

DECISION DISMISSING CASE

Petitioner's request for a hearing is dismissed because it was untimely filed.

I. Background

The Inspector General (I.G.) of the Department of Health and Human Services notified Petitioner by letter dated December 30, 2004, that he was being excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) for a period of 25 years. The I.G. cited as a basis for the exclusion that Petitioner had been convicted in the United States District Court, Northern District of California, Oakland Division, of a criminal offense related to the delivery of an item or service under the Medicare or state health care program. The I.G.'s notice cited three factors for extending Petitioner's exclusion beyond the minimum five-year period: (1) the acts resulting in the conviction caused a financial loss to a government program, or to one or more entities, of $5,000 or more (Petitioner was ordered to pay restitution in the amount of $1,621,343 to the Centers for Medicare and Medicaid Services); (2) the acts that resulted in the conviction were committed over a period of one year or more (Petitioner's conspiracy to defraud began in

or about 1996 and continued until or about 2000); and (3) the sentence imposed by the court included incarceration (Petitioner was ordered to serve 78 months in prison).

In a letter dated October 26, 2011, Petitioner requested the status of a request for hearing he asserts that he filed pursuant to 42 C.F.R. § 1005.2 on or about January 5, 2005. Petitioner enclosed with his October 26, 2011 letter, a copy of an unsigned letter dated January 5, 2005, which is purported to be a request for hearing addressed to the Chief of the Civil Remedies Division (CRD) at the Departmental Appeals Board (DAB), sent by certified mail. Petitioner also enclosed a copy of the I.G.'s notice of exclusion. CRD staff treated Petitioner's October 26, 2011 letter and enclosures as a request for hearing that was docketed and assigned to me for hearing and decision on November 7, 2011.

On November 18, 2011, the I.G. filed a Motion to Dismiss Petitioner's request for hearing on grounds that it was untimely filed. The I.G.'s motion was accompanied by four exhibits (I.G. Exs. 1 through 4). On November 22, 2011, Petitioner filed an objection to the I.G.'s Motion to Dismiss accompanied by four exhibits (P. Exs. 1 through 4). Petitioner also filed an objection to I.G. Ex. 4, the declaration of Mariel A. Filtz. I convened a telephonic prehearing conference in this case on November 28, 2011. The substance of the prehearing conference is recorded in my Order to the Director of the Civil Remedies Division, Departmental Appeals Board dated November 29, 2011 (Order). In the Order, I directed that the CRD Director review the records of the CRD, DAB and file a declaration by December 15, 2011, stating whether any record existed that the CRD, DAB received a request for hearing from Petitioner after December 2004 and prior to October 2011. The CRD Director, Theodore J. Kim, filed a declaration on December 14, 2011, which I have marked as Court Exhibit 1 (Ct. Ex. 1). On January 2, 2012, Petitioner filed a pleading titled "Objection to Theodore J. Kim's Declaration and for Denial of the Inspector General's Motion to Dismiss."

Petitioner objects to the admissibility and my consideration of I.G. Ex. 4, the declaration of Mariel A. Filtz, on the following grounds: it is not relevant; its probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues; the declarant does not establish personal knowledge; the declaration is hearsay; lack of authentication; and the "Best Evidence Rule." Petitioner objects to the admissibility and my consideration of Ct. Ex. 1, the declaration of Theodore J. Kim, on the same grounds. Petitioner's objections are overruled. Petitioner is correct that both documents contain hearsay. However, evidence is generally admissible in administrative proceedings, such as this, so long as the evidence is both authentic and relevant. 42 C.F.R. § 1005.17. The fact that a document contains hearsay is not grounds for exclusion of the document. Rather, Petitioner's objection goes to the weight to be accorded the document and the statements therein. Petitioner's reliance upon the "Best Evidence Rule" is unfounded, as the documents contain the declarations and constitute the best evidence of their content. Petitioner raises no real question as to the authenticity of either declaration, and both declarations clearly identify the declarants, their official positions, the declarants' bases

for knowledge, contain the proper attestation, and are signed and dated. Both declarations are accepted as authentic, as all indicia are that they are what they purport to be. Both declarations are also highly relevant, as they address whether there is any record at either the I.G.'s office or the CRD, DAB, of the receipt and docketing of a prior hearing request by Petitioner. The declarations state the bases for the declarants' knowledge, and Petitioner's objection based on lack of that foundation is unfounded. The declarations are highly probative of what is reflected by the records of the I.G. and the DAB as to receipt and docketing of any prior request for hearing. The declarations are not confusing, and Petitioner does not specifically articulate the potential prejudice that concerns him. To the extent Petitioner perceives that the declarations are contrary to his interest, he is correct, but that prejudice does not outweigh the probative value of the documents related to the issue of whether either the I.G. or the CRD, DAB have a record that a prior request for hearing was received and docketed. Furthermore, as discussed hereafter, the burden is not upon the government to show that a request for hearing was not filed. Rather, the searches of the files of the I.G. and the CRD, DAB, were an expenditure of government resources, potentially for the benefit of Petitioner if evidence of a prior filing in 2005 had been located. Accordingly, I.G. Exs. 1 through 4, P. Exs. 1 through 4, and Ct. Ex. 1 are admitted.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes a petitioner's rights to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of Health and Human Services (the Secretary).

Pursuant to 42 C.F.R. §§ 1001.2007(b) and 1005.2(c), an excluded individual or entity has 60 days from receipt of notice of exclusion to file a request for a hearing before an ALJ. The date of receipt of the notice of exclusion is presumed to be five days after the date on the notice unless there is a reasonable showing to the contrary. The request for hearing must be in writing to the DAB, the request for hearing must be signed by the petitioner or his attorney, and the request for hearing must be sent to the DAB by certified mail. 42 C.F.R. § 1005.2(c).

I must dismiss a hearing request that is not timely filed. 42 C.F.R. § 1005.2(e)(1).

B. Issue

> Whether Petitioner's request for hearing must be dismissed because it was not timely filed.

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

1. Petitioner has failed to show that he timely filed his request for a hearing.

2. Petitioner's request for hearing was not timely filed.

3. Petitioner's request for hearing must be dismissed.

a. Facts

Petitioner admits that on about January 2, 2005, he received the I.G. notice of exclusion dated December 30, 2004. P. Ex. 1; I.G. Ex. 1. The sixtieth day after January 2, 2005 was Thursday, March 3, 2005, and that was the last day on which Petitioner could postmark his request for hearing.

Petitioner's letter dated October 26, 2011, was received at the CRD on November 4, 2011. It was docketed as a request for hearing and assigned to me for hearing and decision on November 7, 2011. The declaration of Mariel A. Filtz establishes that the I.G. has no record of a prior hearing request from Petitioner. I.G. Ex. 4. The declaration of Theodore J. Kim establishes that the CRD has no record of receipt of a prior hearing request from Petitioner. Ct. Ex. 1.

Petitioner admitted during the prehearing conference on November 28, 2011, that he does not possess a certified mail receipt that shows mailing and receipt of Petitioner's January 5, 2005 letter by the government. Order at 2.

b. Analysis

The Secretary requires by regulation that an excluded individual or entity request a hearing by certified mail. 42 C.F.R. § 1005.2(c). The Secretary's requirement to send a request for hearing by certified mail ensures that the requesting individual has proof of mailing and proof of delivery. Furthermore, the regulatory requirement that a request for hearing be sent by certified mail squarely places the burden to prove mailing and delivery upon the individual requesting the hearing. The burden is not upon the government, including the I.G. or the CRD, DAB, to show that a request for hearing was or was not received. The regulatory requirement to send a request for hearing by certified mail also establishes the proof a party must present to show timely filing if that issue arises.

Petitioner has conceded that he has no certified mail receipt establishing either mailing of his request for hearing on about January 5, 2005, or subsequent delivery. Accordingly, Petitioner cannot meet his burden to show that his request for hearing was timely filed. Petitioner's declaration (P. Ex. 1) is neither acceptable nor adequate proof of mailing on about January 5, 2005 and subsequent delivery of a request for hearing.

There is no question that Petitioner's letter, dated October 26, 2011, is more than six years and six months too late to be treated as a timely request for hearing.

The regulation clearly states that an ALJ "will dismiss" a hearing request where a petitioner's hearing request is not timely filed. 42 C.F.R. § 1005.2(e)(1). The regulation grants me no discretion to waive a late filing or to grant an extension of time in which to file a request for hearing. I conclude that Petitioner's request for hearing must be dismissed pursuant to 42 C.F.R. § 1005.2(e)(1), because it was not timely filed.

III. Conclusion

For the foregoing reasons, Petitioner's request for hearing dated October 26, 2011 is dismissed.

/s/
Keith W. Sickendick
Administrative Law Judge