

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Robert E. Deck III, O.D.
(OI File No. H-15-41098-9),

Petitioner,

v.

The Inspector General,
U.S. Department of Health and Human Services.

Docket No. C-15-3772

Decision No. CR4523

Date: February 5, 2016

DECISION

The request for hearing of Petitioner, Robert E. Deck III, O.D., is dismissed pursuant to 42 C.F.R. § 1005.2(e)(1),¹ because it was untimely filed.

I. Background

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated April 30, 2015, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years. The I.G. cited section 1128(a)(2) of the Social Security Act (the Act) (42 U.S.C. § 1320a-7(a)(2)) as the basis for Petitioner's exclusion and stated that the exclusion was based on his conviction in the 6th Judicial Circuit Court, County of Oakland, State of Michigan, of a criminal offense related to neglect or abuse of patients,

¹ References are to the 2014 revision of the Code of Federal Regulations (C.F.R.) in effect at the time of the agency action, unless otherwise stated.

in connection with the delivery of a health care item or service. I.G. Exhibit (Ex.) 1. Petitioner filed a request for hearing (RFH) on August 14, 2015, with a three-page attachment. The case was assigned to me for hearing and decision on September 21, 2015. A prehearing conference was convened on October 8, 2015. The substance of the prehearing conference is memorialized in my Order to Show Cause, Prehearing Conference Order, and Schedule for Filing Briefs and Documentary Evidence dated October 9, 2015 (Prehearing Order). During the prehearing conference, the I.G. requested to file a motion to dismiss prior to case development. I set a briefing schedule for a motion to dismiss by the I.G. Prehearing Order ¶ II.5.

The I.G. filed a motion to dismiss on November 9, 2015, with I.G. Exhibit (Ex.) 1. On December 9, 2015, Petitioner filed a response to the I.G. motion (P. Response) with Petitioner's Exhibits (P. Exs.) 1 through 3. The I.G. moved for leave to file a reply on December 11, 2015, and filed a reply on the same date. The I.G.'s motion for leave to file a reply is granted. Neither party objected to my consideration of the proposed exhibits, and I.G. Ex. 1 and P. Exs. 1 through 3 are admitted as evidence.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's rights to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of the United States Department of Health and Human Services (Secretary). The Secretary has provided by regulation that an excluded individual has the right to request a hearing before an ALJ. 42 C.F.R. §§ 1001.2007(a)(1), 1005.2(a). The regulations require that a request for hearing be in writing and be filed not more than 60 days from the date of receipt of the notice of exclusion. 42 C.F.R. §§ 1001.2007(b), 1005.2(c). The notice of exclusion is presumed to be received five days after the date on the notice, unless there is a reasonable showing to the contrary. 42 C.F.R. § 1005.2(c). I am required to dismiss a request for hearing that is not filed timely. 42 C.F.R. § 1005.2(e)(1). The regulations grant me no discretion to waive a late-filing or to extend the time for filing.

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's request for hearing was not timely filed.**
- 2. Petitioner's request for hearing must be dismissed pursuant to 42 C.F.R. § 1005.2(e)(1).**

There is no dispute that the I.G. mailed Petitioner a letter dated April 30, 2015, notifying him of his exclusion from Medicare, Medicaid, and all federal health care programs. I.G. Ex. 1. Pursuant to 42 C.F.R. § 1005.2(c), there is a rebuttable presumption that the April 30, 2015 notice was received by Petitioner on Tuesday, May 5, 2015. As discussed hereafter, Petitioner has not presented credible evidence that he received the notice of exclusion after May 5, 2015. Pursuant to 42 C.F.R. §§ 1001.2007(b) and 1005.2(c), Petitioner had 60 days to file his request for hearing. The 60th day after presumed receipt fell on July 4, 2015, a Saturday and a federal holiday. Therefore, the deadline for Petitioner to file his request for hearing was the next business day, Monday, July 6, 2015. 42 C.F.R. § 1005.12(a).

There is no dispute that Petitioner filed his request for hearing using the Departmental Appeals Board Electronic Filing System (DAB E-File) on August 14, 2015. Petitioner's request for hearing had to be filed not later than July 6, 2015, but he did not file the request for hearing until August 14, 2015, which was 39 days late. Because Petitioner's request for hearing was 39 days late, the I.G. has moved that this case be dismissed.

The regulations grant me no discretion to extend the time for filing a request for hearing or to excuse the late filing of a request for hearing. I am required to dismiss a hearing request that is not timely filed. 42 C.F.R. § 1005.2(e)(1). Petitioner's only possible defense to the motion to dismiss is a showing that he received the April 30, 2015 notice of exclusion not more than 60 days prior to August 14, 2015. Petitioner would need to show that he received the notice of exclusion on or after June 15, 2015. Petitioner has failed to make the required showing. Accordingly, I have no discretion but must dismiss Petitioner's request for hearing.

Petitioner admits in his request for hearing that it is filed "past the typical 60-days that [he would] normally have for an appeal." RFH at 2, ¶ 2. He states that he did respond to a letter from the Office of the Inspector General signed by J. David Cope, which he received in May. But, Petitioner does not assert that he actually filed a request for hearing prior to August 14, 2015. Petitioner asserts that from mid-January "to recently" he did not receive his mail, including the I.G. notice. RFH at 2, ¶ 3. This assertion is not

credible because it is inconsistent with Petitioner's assertion that he received a letter in May from the I.G.

Petitioner filed with his request for hearing a copy of the April 30, 2015 exclusion letter and an email from the I.G. dated August 3, 2015 that shows he telephoned the I.G. and stated that he did not recall receiving the notice of exclusion issued by the I.G. on April 30, 2015. The email refers to a notice issued by Mr. Cope at the Office of Personnel Management. Petitioner asserts in his request for hearing that he did not receive a copy of the April 30 notice letter until he received the email from the I.G. on August 3, 2015, with a copy attached. RFH at 2, ¶ 2. Petitioner's assertion is inconsistent with the fact that he telephoned the I.G. on August 3, 2015, which shows that he had some information that caused him to call the I.G. More importantly, Petitioner also admits in his response that he actually received it on or about April 30, 2015. His assertion that he did not receive the April 30, 2015 notice of exclusion until August 3, 2015, is simply not credible.

In response to the I.G. motion to dismiss, Petitioner filed P. Exs. 1 through 3. P. Ex. 1 is the letter referred to in his request for hearing from the Office of the Inspector General of the Office of Personnel Management (OPM I.G.) dated May 26, 2015. The letter was signed by J. David Cope and addressed to Petitioner at 436 Franklin Lake Circle, Oxford, Michigan 48371, the same address that is on the April 30, 2015 notice of exclusion. P. Ex. 1 at 1; I.G. Ex. 1 at 1. Petitioner responded to that letter on June 15, 2015, requesting an extension of time to contest the OPM I.G. debarment action. P. Ex. 1 at 2-3. Both the letter from the OPM I.G. and Petitioner's response letter refer to the fact that the Department of Health and Human Services (HHS) excluded Petitioner from participating in Medicare and Medicaid effective May 20, 2015. P. Ex. 1 at 1-2. Petitioner offered as evidence another letter from the OPM I.G. dated July 21, 2015, also from Mr. Cope and also addressed to Petitioner at 436 Franklin Lake Circle, Oxford, Michigan 48371. P. Ex. 1 at 4. This letter also specifically states that HHS excluded Petitioner from participating in Medicare and Medicaid effective May 20, 2015, pursuant to section 1128(a)(2) of the Act. Both the OPM letters clearly advised Petitioner that he was being debarred by the OPM I.G. based on the HHS exclusion. The fact that Petitioner received these letters and responded is inconsistent with his assertion he received no mail from mid-January 2015 to just before filing his request for hearing on August 14, 2015.

P. Ex. 2 at 3-4 is a copy of a letter from CMS dated June 30, 2015, sent to a different address from that on the April 30, 2015 notice of exclusion and the two OPM I.G. letters. The CMS letter notified Petitioner that his Medicare enrollment and billing privileges were revoked because the HHS I.G. excluded him from participating in Medicare and Medicaid effective May 20, 2015, under section 1128(a)(2) of the Act. The fact that Petitioner received this letter is inconsistent with his assertion he received no mail from mid-January 2015 to just before filing his request for hearing on August 14, 2015.

Petitioner offered a letter from an attorney notifying him that the attorney had been appointed receiver for Petitioner's assets. P. Ex. 3. The letter says nothing about seizing Petitioner's mail. Petitioner has not offered any additional credible evidence, such as an affidavit or declaration from the receiver, regarding Petitioner's mail.

In his response to the motion to dismiss, Petitioner denies that his hearing request was filed untimely. He asserts that he may not have "sent the appeals to the correct agencies." P. Response at 2. He concedes he did receive a letter from the I.G. on April 30, 2015, which I construe to be an admission that he received the I.G. letter on or about April 30, 2015, as it is unlikely an I.G. letter dated and mailed on April 30, 2015 could be received on April 30, 2015. The gist of Petitioner's argument is that he was confused by the multiple letters from different agencies. Whether or not Petitioner was confused or that his confusion may have been the cause for his untimely request for hearing is not the issue.² He concedes in his response that he received the April 30, 2015 I.G. notice of exclusion on about April 30, 2015. He concedes in his request for hearing that it was not timely filed. Petitioner failed to show his request for hearing was filed within 60 days of receipt of the notice of exclusion. Therefore, I have no option but to dismiss his request for hearing.

Accordingly, I conclude Petitioner did not timely file a request for hearing and dismissal is required by 42 C.F.R. § 1005.2(e)(1).

III. Conclusion

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

/s/

Keith W. Sickendick
Administrative Law Judge

² Petitioner's assertion that he was confused about the content of the various notice letters he has offered as evidence or the requirements for requesting review set forth in those letters, is belied by the fact that he managed to meet the requirements to become a licensed optometrist; the content of his request for hearing and his response to the motion to dismiss; and his June 15, 2015 letter to the OPM I.G. requesting more time to contest the OPM debarment action.