Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Ahmed Abouelhoda
(O.I. File Number 2-05-40316-9),

Petitioner

v.

The Inspector General.

Docket No. C-11-142

Decision No. CR2365

Date: May 3, 2011

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion to Dismiss. It arises in the context of the I.G.'s determination to exclude Petitioner Ahmed Abouelhoda from participation in Medicare, Medicaid, and all federal health care programs for a period of 10 years pursuant to section 1128(a)(3) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(3). As I explain below, I find that Petitioner's request for hearing was not timely filed as required by 42 C.F.R. §§ 1001.2007(b) and 1005.2(c), and for that reason I grant the I.G.'s Motion to Dismiss.

I. Procedural Background

By letter dated August 31, 2005, the I.G. notified Petitioner that he was to be excluded from Medicare, Medicaid, and all other federal health care programs for a period of 10 years. This notice-of-exclusion letter was mailed to an address in Woodside, New York.

At the request of Petitioner's present counsel, the I.G. mailed a copy of the August 31, 2005 notice-of-exclusion letter to Petitioner's counsel on August 11, 2010. This copy of the notice-of-exclusion letter was mailed to Petitioner's counsel at his Manhattan office address.

Acting through his counsel, Petitioner requested review of the exclusion by letter dated December 3, 2010.

I convened a prehearing conference by telephone on December 28, 2010. During the telephone conference, the timeliness of Petitioner's request for hearing was discussed, and counsel for the I.G. stated her intention to seek dismissal of the request for hearing as untimely. By Order of that date, as amended by my subsequent Order of March 29, 2011, I established a briefing schedule for the parties to submit their positions and exhibits. All briefing is now complete, and the record in this case closed for purposes of 42 C.F.R. § 1005.20(c) on April 13, 2011.

The evidentiary record on which I decide the issues before me contains 11 exhibits. The I.G. proffered five exhibits marked I.G. Exhibits 1-5 (I.G. Exs. 1-5). Petitioner proffered six exhibits marked Petitioner's Exhibits 1-6 (P. Exs. 1-6). All proffered exhibits are admitted to this evidentiary record. Petitioner's objection to I.G. Ex. 2 is overruled.[1]

II. Issue

The sole issue now before me is whether Petitioner's request for hearing was filed in a timely manner in compliance with the terms of 42 C.F.R. §§ 1001.2007(b) and 1005.2(c). If the request was not filed in a timely manner, I am obliged by the mandatory terms of 42 C.F.R. § 1005.2(e)(1) to dismiss it.

This issue must be resolved against Petitioner. Petitioner's argument that he did not receive the I.G.'s notice-of-exclusion letter until sometime in 2010 is insubstantial, but that is not the basis on which I decide the issue.

Instead, I find that Petitioner and his counsel received a second full and effective notice of the I.G.'s action not later than August 17, 2010, and that October 18, 2010 was the last possible date by which his request for hearing could be filed timely. Because he and his counsel waited until December 3, 2010 to do so, the terms of 42 C.F.R. § 1005.2(e)(1)

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[1] I.G. Ex. 2 is the written Declaration of Peter P. Clark, given under penalty of perjury on January 21, 2011. Mr. Clark is Exclusions Director, Office of Investigations, Office of the Inspector General, United States Department of Health and Human Services. His Declaration describes the policies and practices of his Office, in effect at all times relevant to this appeal, in mailing notice-of-exclusion letters to persons such as Petitioner. Petitioner objects to Mr. Clark's declaration because it "does not state when he was hired . . . or how long he has even been employed there." P. Answer Brief (P. Ans. Br.) at 5. This is a caviling objection and it borders on quibbling: the Declaration asserts not only a general familiarity with his Office's procedures since January 1, 2005, but also asserts specific familiarity with the official records of his Office in this case. Mr. Clark's assertions are more than sufficient to support this finding that his Declaration is not "unreliable" as that term is used in 42 C.F.R. § 1005.17.

require that I dismiss his request for hearing.

III. Controlling Statutes and Regulations

Section 1128(a) of the Act, 42 U.S.C. § 1320a-7(a), requires the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any individual or entity convicted of certain classes of criminal offenses. The terms of section 1128(a) are restated in similar language at 42 C.F.R. § 1001.101. This mandatory exclusion must be imposed for a minimum of five years. Act § 1128(c)(3)(B), 42 U.S.C. § 1320a-7(c)(3)(b). If aggravating factors are present, the period of exclusion may be enhanced beyond five years. 42 C.F.R. § 1001.102(b).

The I.G. is charged with effecting exclusions based on sections 1128(a) and 1128(c)(3)(B) of the Act. *See* 42 C.F.R. § 1001.1001. If the I.G. determines that a conviction constitutes a proper predicate for exclusion, he must send notice of his intent to exclude to the affected individual or entity. The affected party is permitted to respond to this notice of intent with "documentary evidence and written argument concerning whether the exclusion is warranted and any related issues." 42 C.F.R. § 1001.2001(a).

If the I.G. remains convinced that exclusion is warranted, he must send written notice of his final decision to exclude to the affected individual or entity, and must in that notice provide detailed information on a number of points, including the appeal rights of the excluded party. 42 C.F.R. § 1001.2002; *see also* Act § 1128(c), 42 U.S.C. § 1320a-7(c). The individual or entity to be excluded may appeal the exclusion by filing a request for hearing before an Administrative Law Judge (ALJ). 42 C.F.R. § 1001.2007. That regulation establishes a time limit for the filing of a request for hearing. Specifically, 42 C.F.R. § 1001.2007(b) provides that:

> The excluded individual or entity has 60 days from the receipt of notice of exclusion provided for in [section] 1001.2002 to file a request for such a hearing.

This filing time limit is reiterated in the regulations governing the conduct of an excluded party's appeal before the ALJ that appear at 42 C.F.R. §§ 1005.1-1005.23. The 60-day deadline is repeated at 42 C.F.R. § 1005.2(c):

> The request for hearing will be made in writing to the DAB; signed by the petitioner . . . or by his or her attorney; and sent by certified mail. The request must be filed within 60 days after the notice, provided in accordance with [section] 1001.2002 . . . is received by the petitioner or respondent. For purposes of this section, the date of receipt of the notice letter will be presumed to be 5 days after the date of such notice unless there is a reasonable showing to the contrary.

The regulation at 42 C.F.R. § 1005.2(e) directs that:

> The ALJ will dismiss a hearing request where—
>
> (1) The petitioner's or the respondent's hearing request is not filed in a timely manner.

The ALJ may not extend the 60-day filing deadline. 42 C.F.R. § 1005.2(e)(1). A tardy or dilatory petitioner can gain relief only by negating the presumption of regular delivery through a "reasonable showing" that the I.G.'s notice-of-exclusion letter was not received as presumed by 42 C.F.R. § 1005.2(c).

IV. Findings of Fact and Conclusions of Law

I find and conclude that:

1. The I.G. first mailed a letter giving notice of the proposed exclusion of Petitioner from Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(3) of the Act to Petitioner at 33-17 60th Street, Apartment 1, Woodside, New York 11377, on August 31, 2005. I.G. Exs. 1, 2.

2. The I.G. mailed a copy of the August 31, 2005 notice-of-exclusion letter to Petitioner's counsel, Gary Burgoon, Esquire, Lifshutz & Lifshut (*sic*) P.C., 501 Fifth Avenue, Suite 506, New York, NY 10017, on August 11, 2010. I.G. Exs. 1, 3, 4.

3. The I.G.'s August 11, 2010 mailing to Petitioner's counsel included a printed document headed "Please read carefully and retain; it contains important information about your exclusion." This document satisfied the requirements of 42 C.F.R. § 1001.2002(c). I.G. Exs. 3 at 5; 4 at paragraph 4.

4. Petitioner filed his request for hearing on December 3, 2010.

5. Petitioner's request for hearing was not filed in a timely manner. 42 C.F.R. §§ 1001.2007(b), 1005.2(c).

6. Petitioner's request for hearing must be dismissed. 42 C.F.R. § 1005.2(e)(1).

V. Discussion

As to the events surrounding the I.G.'s actions and Petitioner's circumstances in 2005, the record before me is simply inconclusive. Each side of this appeal offers arguments while overlooking or avoiding a candid discussion of certain factual gaps in its position. For that reason I do not rely on the first mailing of the I.G.'s notice-of-exclusion letter on August 31, 2005 as the event by which the 60-day appeal deadline established by 42 C.F.R. §§ 1001.2007(b) and 1005.2(c) is to be measured.

Instead, and in explicit reliance on the reasoning and analysis explained by Administrative Law Judge (ALJ) C. C. Hughes in *Samuel E. Kilgore, R.Ph.*, DAB CR1513 (2006), I rely on the receipt of a copy of that notice-of-exclusion letter by Petitioner's counsel not later than August 17, 2010, which copy the I.G. mailed to Petitioner's counsel on August 11, 2010, as the event initiating the 60-day appeal period. On that date, Petitioner and his counsel were made aware of all the information required to be conveyed to them by 42 C.F.R. § 1001.2002. That they took no action in response until six weeks after the expiration of the 60-day appeal period is abundantly clear on this record, and their inaction requires the dismissal of Petitioner's request for hearing.

The turbid early record in this case proves very little, but parts of it do demand some discussion lest it appear that one or another of Petitioner's arguments has been overlooked. One of his arguments, unadorned by any evidence, is that the I.G. failed to send Petitioner the notice of intent to exclude required by 42 C.F.R. § 1001.2001(a). *See* P. Ans. Br. at 2-4. Now, a copy of that notice-of-intent letter has been proffered as I.G. Ex. 5, and its date and the Woodside address on it (the same address that appears on the I.G.'s notice-of-exclusion) would seem to contradict Petitioner's charge that it was never sent. But I need not decide whether the notice-of-intent letter was sent, for even if it had not been, that would not invalidate the I.G.'s subsequent actions and would not provide Petitioner with a defense to this exclusion. *Brian Bacardi, D.P.M.*, DAB No. 1724 (2000).

Another of Petitioner's arguments concerns his addresses during relevant times, and this argument is made more interesting by what Petitioner declines to say about them. He comes very close to denying that the Woodside address was ever a valid one for him, or whether it is even now: "Additionally, neither the Inspector General nor Mr. Peter Clark in his declaration . . . has ever stated in where they received Petitioner's address from or how they came to know or believe that they had the correct address before sending out the exclusion notice." P. Response Brief at 1.[2] He does not explain how this position co-exists with his argument involving the notice-of-intent letter. In any case, however, neither Petitioner's Declaration, P. Ex. 2, nor the Declaration of his sister, P. Ex. 3, elucidates where he was living before he moved in with her in January 2005 or where he went when he moved out in January 2006. Neither Declaration explicitly discusses

[2] That assertion is true as far as it goes, and it is also true that the question was not raised until Petitioner filed his Response Brief (the last brief in this case) and that the I.G. has had no opportunity to answer it. But the question of Petitioner's address is further obscured by the record of another address apparently in Petitioner's name — this one at 85 East 10th Street in Manhattan — in the I.G.'s files. P. Ex. 1 at 1; I.G. Ex. 5 at 2. No explanation of this address has been offered by either side, but it was Petitioner's official address on file with the Board of Regents of the University of the State of New York when it suspended his pharmacy license No. 049782 at its meeting on February 12-13, 2007. See www.regents.nysed.gov/Summaries/0207summary.htm; see FED. R. EVID. 201(c) and 902(5). The matter may be intriguing, but it is irrelevant to this decision.

whether Petitioner received mail — forwarded or not — at his sister's address. Neither Declaration sheds light on any of the myriad details connected to a temporary change of domicile, such as the disposition of clothing, personal effects, and furniture, the forwarding of mail, the arrangements made concerning utilities and services, and the accommodation of any roommates, family, or companions who may have been living in the premises vacated by Petitioner — and thus potentially dealing with mail delivered there. Even if their Declarations are accepted fully at face value, Petitioner and his sister still fall short of a candid or helpful description of the situation. However, I need not decide whether the Woodside address was ever Petitioner's valid mailing address, nor whether mail addressed to him at the Woodside address ever reached him there or anywhere else. The basis of my decision renders these questions irrelevant.

Petitioner's claim of some level of psychological impairment during 2004 and 2005 is both similarly flawed and similarly irrelevant. That he was treated for chemical dependence between March 2004 and September 2005 is established by P. Ex. 4. But that very document portrays Petitioner as a regimen-compliant outpatient, "consistent in attendance," who "maintained abstinence as demonstrated by negative urine drug screens and breathalyzer tests" and whose course of treatment was marked by "active engagement in self-help meetings and sponsor utilization." Significantly, P. Ex. 4 reveals that by September 2005 — that is, by the month following the I.G.'s notice-of-exclusion letter, and with another month still remaining before the presumptive appeal deadline — Petitioner had discontinued all prescribed psychotropic medications and was reporting no further mental health concerns. Petitioner does not explain why, given his disavowal of the Woodside mailing address and his categorical denial of actual receipt of the I.G.'s notice-of-exclusion letter, his mental capacity to understand and respond to that letter might be relevant. Petitioner does not explain how the very limited impairment revealed by P. Ex. 4 would have reduced his capacity to understand and react to the notice-of-exclusion letter if he had received it. But again, these are questions that I need not resolve, because Petitioner's mental state in 2004 and 2005 is beside the point in light of his counsel's intervention in 2010.

And it is the intervention of Petitioner's counsel in August 2010 that forms the basis of my decision. In early August 2010 Petitioner's counsel telephoned the I.G. and requested a copy of the August 31, 2005 notice-of-exclusion letter. I.G. Exs. 3; 4 at paragraphs 2-4. A copy of that notice-of-exclusion letter was sent to Petitioner's counsel on August 11, 2010, and that mailing included a printed document bearing the heading "Please read carefully and retain; it contains important information about your exclusion." I.G. Exs. 3 at 5; 4 at paragraph 4. That mailing was not returned as undeliverable. I.G. Ex. 4 at paragraph 5. Petitioner acknowledges requesting and receiving that mailing. P. Ans. Br. at 4. And thus, whether the terms of 42 C.F.R. § 1005.2(c) or the terms of 42 C.F.R. § 1005.12(c) are used to calculate the presumptive date of Petitioner's counsel's receipt of the I.G.'s August 11, 2010 mailing, the latest presumptive date of receipt is August 17, 2010.

This intervention by Petitioner's counsel and the I.G.'s response to it are the factors that

bring this case squarely within the reasoning and analysis of *Samuel E. Kilgore, R.Ph.*, DAB CR1513. In that case the I.G. originally mailed a notice-of-exclusion letter to Kilgore in August 2001. Kilgore claimed to have learned of his exclusion much later, in 2004 or 2005. In the spring of 2005 Kilgore communicated with the I.G., denied having received the original mailing, and requested a copy of the notice-of-exclusion letter. The I.G. complied with Kilgore's request and sent him a copy of the August 2001 letter in late May 2005. Kilgore filed a request for hearing to contest his exclusion in February 2006.

After surveying the evidence surrounding Kilgore's address at the time of the original mailing, the ALJ found that none of it established conclusively whether the address to which it had been sent was valid or not. For that reason the ALJ declined to assess the timeliness of Kilgore's request for hearing in terms of the 2001 mailing of the notice-of-exclusion letter. What the ALJ did, however, is precisely what I do in this situation: she assessed the timeliness of Kilgore's request for hearing in terms of his receipt of the copy of the I.G.'s notice-of-exclusion letter sent to him at his request in May 2005. She had little difficulty in determining that his February 2006 request for hearing was untimely, and dismissed it pursuant to 42 C.F.R. § 1005.2(e)(1). Here, I assess the timeliness of Petitioner's request for hearing in terms of his counsel's receipt of the copy of the I.G.'s notice-of-exclusion letter not later than August 17, 2010. I have no difficulty in finding that, although made fully aware of the nature of the exclusion and the 60-day deadline for filing a request for hearing, Petitioner and his counsel took no action toward filing such a request for hearing until December 3, 2010. That request for hearing was untimely by a margin of more than six weeks, and the terms of 42 C.F.R. § 1005.2(e)(1) require its dismissal.

Without attempting to resolve the factual questions of Petitioner's actual connection to the Woodside address, his actual access to mail delivered there between September 2005 and January 2006, or his actual mental condition between September 2005 and February 2006 — and thus without resolving any of the factual questions upon which the presumption established by 42 C.F.R. § 1005.2(c) and the "reasonable showing to the contrary" depend — I find and conclude that Petitioner and his counsel received a second full and effective notice of his exclusion by the I.G.'s mailing of August 11, 2010. The terms of 42 C.F.R. §§ 1005.2(c) and 1005.12(c) establish the presumptive date of Petitioner's receipt of the I.G.'s August 11, 2010 mailing as not later than August 17, 2010. The 60-day period for filing Petitioner's request for hearing established by 42 C.F.R. §§ 1001.2007(b) and 1005.2(c) thus expired on October 18, 2010. The regulations and the unvarying decisions of this forum deny an ALJ the authority to extend the filing period. *Kris Durschmidt*, DAB No. 2345 (2010); *Cathy Statler*, DAB No. 2241 (2009); *John Maiorano, R.Ph.*, DAB CR1113 (2003), *aff'd*, *John Maiorano, R.Ph., v. Thompson*, Civil Action No. 04-2279, 2008 WL 304899, at *3-4 (D.N.J. 2008). Petitioner's request for hearing was not filed in a timely manner and it must be dismissed. 42 C.F.R. § 1005.2(e)(1).

VI. Conclusion

For the reasons set forth above, I grant the I.G.'s motion to dismiss. The request for hearing filed by Petitioner Ahmed Abouelhoda on December 3, 2010 must be, and it is, DISMISSED.

/s/
Richard J. Smith
Administrative Law Judge