

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Paresh R. Patel
(OI File No. H-15-40019-9),

Petitioner,

v.

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

Docket No. C-17-344

Decision No. CR4874

Date: June 26, 2017

DECISION

The request for hearing of Petitioner, Paresh R. Patel, is dismissed pursuant to 42 C.F.R. § 1005.2(e)(1)¹ because it was not timely filed.

I. Background

The Inspector General, United States Department of Health and Human Services (I.G.) notified Petitioner by letter dated April 29, 2016, 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)(1) of the Social Security Act (the Act) (42 U.S.C. § 1320a-7(a)) as the basis for Petitioner's exclusion and stated that the exclusion was based on his conviction in the Middlesex County Superior Court of the State of New Jersey, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. I.G. Exhibit (Ex.) 1. Petitioner

* References are to the 2016 revision of the Code of Federal Regulations (C.F.R.) in effect at the time of the agency action, unless otherwise stated.

filed a request for hearing on January 26, 2017, the postmark date on the envelope bearing the request. 42 C.F.R. § 1005.11(a)(4). The case was assigned to me for hearing and decision on February 16, 2017. A prehearing conference was convened on March 2, 2017. The substance of the prehearing conference is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence dated March 3, 2017 (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 ¶ 5.

The I.G. filed a motion to dismiss on April 3, 2017 (I.G. Br.) with I.G. Exs. 1 and 2. On May 3, 2017, Petitioner filed a response to the I.G. motion (P. Br.) with Petitioner's Exhibits (P. Exs.) 1 through 7. The I.G. moved for leave to file a reply on May 12, 2017, 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. Exs. 1 and 2 and P. Exs. 1 through 7 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, that is, within 60 days of receipt of the notice of exclusion. 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 29, 2016, 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 29, 2016 notice was received by Petitioner five days later on Wednesday, May 4, 2016. Petitioner has not presented any evidence that he received the notice of exclusion after May 4, 2016. 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 Sunday, July 3, 2016, a weekend and the day before a federal holiday. Therefore, the deadline for Petitioner to file his request for hearing was the next business day, Tuesday, July 5, 2016. 42 C.F.R. § 1005.12(a).

There is no dispute that Petitioner filed his request for hearing by mail on January 26, 2017, the postmark date on the envelope bearing the request for hearing. 42 C.F.R. § 1005.11(a)(4). To be timely filed, Petitioner's request for hearing had to be filed not later than July 5, 2016, but he did not file the request for hearing until January 26, 2017, which was 204 days late. Petitioner does not dispute that he received the April 29, 2016 notice of exclusion, but he does not admit when. Petitioner also does not dispute that he failed to request a hearing within 60 days of his receipt of the notice of exclusion. P. Br. at 3. Because Petitioner's request for hearing was 204 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 29, 2016 notice of exclusion not more than 60 days prior to January 26, 2017, the date he mailed the request for hearing. Petitioner would need to show that he received the notice of exclusion on or after December 5, 2016. Petitioner has failed to make the required showing.

Accordingly, I conclude that I have no discretion but must dismiss Petitioner's request for hearing pursuant to 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