

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Natalya Zvereva,
(OI File No.: H-11-40211-9),

Petitioner

v.

The Inspector General.

Docket No. C-13-228

ALJ Ruling No. 2013-05

Date: March 5, 2013

ORDER OF DISMISSAL

I dismiss Petitioner's untimely request for hearing. *See* 42 C.F.R. § 1005.2(e)(1).

I. Background

By letter dated August 31, 2011, the Office of the Inspector General (I.G.) for the Department of Health and Human Services notified Petitioner that she was being excluded from participation in the Medicare and Medicaid programs, as well as other Federal health care programs defined in 42 U.S.C. § 1320a-7b(f). The exclusion notice indicated that the basis for the exclusion was due to her conviction in the Superior Court of California, County of Los Angeles of a criminal offense related to the delivery of an item or service under the Medicare or a State health care program, including the performance of management or administrative services relating to the delivery of items or services under any such program. The exclusion notice further stated that the exclusion would become effective 20 days from the date of the letter.

On December 18, 2012, Petitioner, represented by counsel, filed a request for hearing with the Departmental Appeals Board, Civil Remedies Division. On January 3, 2013, I

issued an Order to Show Cause directing the Petitioner to show cause why her request for hearing should not be dismissed on the basis that it fails to raise an issue that is within my jurisdiction to adjudicate. *See* 42 C.F.R. § 1005.2(e)(4). Further, I directed Petitioner to show cause why her request for hearing should not be dismissed because it was not timely filed. *See* 42 C.F.R. §§ 1005.2(c) and (e)(1). Petitioner filed a timely response (P. Resp.), which included a Declaration of Alaleh Kamran (Petitioner's counsel), and exhibits A and B. I granted the I.G. an opportunity to reply to Petitioner's response, which the I.G. did on February 11, 2013.

II. Discussion

The issues before me are whether Petitioner's request for hearing was timely filed and whether the request raises an issue that is within my jurisdiction to adjudicate. Because Petitioner neither argues that she did not receive the I.G.'s exclusion notice letter nor denies that her appeal was filed more than a year after the filing deadline, I find Petitioner's request for hearing was untimely filed. I do not dismiss the request for hearing based on a failure to raise an issue over which I have jurisdiction because Petitioner did so in response to the Order to Show Cause and I will treat that as an amendment of the request for hearing.

Section 1128(a) of the Social Security Act requires the exclusion from participation in Medicare, Medicaid and other Federal health care programs of any individual or entity convicted of certain classes of criminal offenses. 42 U.S.C. § 1320a-7(a). If the I.G. determines that a conviction constitutes a proper basis for exclusion, he must send notice of the decision to exclude to the affected individual or entity. 42 U.S.C. § 1320a-7(c); 42 C.F.R. § 1001.2002(a). The exclusion notice must include information on the appeal rights of the excluded party. 42 C.F.R. § 1001.2002(a)(6).

The regulations provide that an excluded individual has 60 days from the receipt of the notice of exclusion to file a request for a hearing. 42 C.F.R. §§ 1001.2007(b), 1005.2(c). The regulations further provide that "the date of receipt of the notice letter [is] presumed to be five days after the date of such notice unless there is a reasonable showing to the contrary." 42 C.F.R. § 1005.2(c). The regulations do not provide an administrative law judge with the authority to extend the 60-day filing deadline, but only allow a petitioner to make a "reasonable showing" to rebut the presumption that he or she received the exclusion notice more than five days after the date of the notice. *Id.* If the request for hearing is untimely filed, the regulations require an administrative law judge to dismiss the request for hearing. 42 C.F.R. § 1005.2(e)(1).

In this case, Petitioner does not assert that she did not receive the exclusion notice or that she did not receive the notice within the five-day delivery period presumed by the regulations. The exclusion notice indicates that the I.G. sent it to Petitioner's address on August 31, 2011, and that a copy was sent to Petitioner's then counsel, Robert Yousefian,

Esquire. Request for Hearing, Notice Letter at 3, 4. The I.G.'s notice of intent to exclude and a debarment notice from the Office of Personnel Management were also sent to Petitioner at the same address stated in the I.G.'s exclusion notice. Request for Hearing, Supporting Documents at 3, 4. Petitioner does not contend that she received any of the notices in an untimely manner. In addition, the exclusion notice expressly notified Petitioner that if she disagreed with the action, then she could request a hearing before an administrative law judge and that "such request must be made in writing within 60 days of your receiving the OIG's letter of exclusion" Request for Hearing, Notice Letter at 5. Accordingly, Petitioner has made no reasonable showing that she did not receive the notice within the presumed five days of the date on the exclusion notice. Rather, Petitioner appears to have only decided to seek review of the I.G.'s exclusion following the post-conviction dismissal of her criminal plea. P. Resp. at 2. Therefore, based on the date of the I.G.'s exclusion notice and the regulatory presumption of receipt within five days of that date, Petitioner's request for hearing was due on November 4, 2011. However, Petitioner's request for hearing was not filed until December 18, 2012, more than a year after the filing deadline.

Petitioner contends in her response to my Order to Show Cause that her former counsel failed to request the hearing and, for that reason, Petitioner should now be able to file an untimely request. P. Resp. at 2-3. Petitioner's argument is an attempt to show good cause for a late filing of the request. However, as previously stated, the regulations do not provide a good cause exception to the requirement that Petitioner file a timely request for hearing, *see* 42 C.F.R. §§ 1001.2007(b), 1005.2(b), and an administrative law judge must follow federal regulations, such as 42 C.F.R. § 1005.2(e)(1), which mandates dismissal of an untimely request for hearing. *See* 42 C.F.R. § 1005.4(c)(1). Further, even if Petitioner could obtain relief by showing good cause for untimely filing, the negligence of counsel cannot provide such a basis. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34 (1962) (finding that there is no merit to the argument that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on petitioner). Accordingly, I must dismiss the Petitioner's hearing request as untimely.

The Order to Show Cause also directed Petitioner to show why Petitioner's hearing request should not be dismissed for failure to raise an issue that may be properly addressed at a hearing. Petitioner's request for hearing did not state any facts or law related to the I.G.'s decision to exclude with which Petitioner disagreed. *See* 42 C.F.R. § 1005.2(d). However, in her response to the Order to Show Cause, Petitioner states that the exclusion under 42 U.S.C. § 1320a-7(a)(1) is erroneous and argues that she should instead have been subject to a permissive exclusion under 42 U.S.C. § 1320a-7(b)(1)(A). Although I have no authority to review the I.G.'s discretionary decision related to the imposition of a permissive exclusion, *see* 42 C.F.R. § 1005.4(c)(5), I do have jurisdiction to adjudicate a dispute as to whether the stated basis for an exclusion exists. 42 C.F.R. § 1001.2007(a)(1)(i). Accordingly, I find that Petitioner raised an issue that may be

