Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: August 25, 2009
Gary Grossman,	
Petitioner,	Civil Remedies CR1943 App. Div. Docket No. A-09-97
	Decision No. 2267
- v. -	
Inspector General.	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Gary Grossman (Petitioner) appeals the May 4, 2009 decision of Administrative Law Judge (ALJ) Steven T. Kessel granting the Inspector General's (I.G.) motion to dismiss Petitioner's request for a hearing on his exclusion from federal health care programs for 15 years pursuant to section 1128(a)(1) of the Social Security Act (Act). Gary Grossman, DAB CR1943 (2009) (ALJ Decision). The ALJ granted the I.G.'s motion to dismiss under 42 C.F.R. § 1005.2(e)(1) because Petitioner's request for a hearing on his exclusion was not filed until January 9, 2009, more than 60 days after he received the I.G.'s September 28,

2001 letter notifying him of the exclusion.[1] Petitioner argues on appeal that the ALJ erred in concluding that he had not filed a timely appeal. We conclude that the ALJ did not err in that conclusion, and we uphold the dismissal.

Applicable Law

Section 1128(a)(1) of the Act (42 U.S.C. § 1320a-7(a)(1)) requires the Secretary of Health and Human Services to exclude from participation in Medicare, Medicaid, and all federal health care programs any individual who "has been convicted of a criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program." An exclusion imposed under section 1128(a) shall be for a minimum period of five years. Act, § 1128(c)(3)(B). The governing regulations provide that a request for hearing on an exclusion "must be filed within 60 days after the notice . . . is received . . ." and that "[t]he ALJ will dismiss a hearing request where . . . (1) The petitioner's or the respondent's hearing request is not filed in a timely manner . . . ." 42 C.F.R. §§ 1005.2(c), 1005.2(e)(1). The regulations also establish a presumption that an excluded individual received the exclusion notice within five days after the date of the notice "unless there is a reasonable showing to the contrary." 42 C.F.R. § 1005.2(c).

Standard of Review

The Board's standard of review for an ALJ decision upholding an exclusion imposed by the I.G. is set by regulation. We review to determine whether the decision is erroneous as to a disputed issue of law and whether the decision is supported by substantial evidence in the record as a whole as to any disputed issues of fact. 42 C.F.R. § 1005.21(h).

[1] The ALJ noted that the date on the hearing request was 2008 rather than 2009 but concluded that was a typographical error since the request referred to alleged receipt of the notice in November 2008. ALJ Decision at 1.

Background[2]

1. Facts

On January 25, 2001, Petitioner, a pharmacist, was sentenced in a criminal case brought against him by the State of New York. I.G. Ex. 6; P. Ex. 5. Attorney Alexander Bateman (Attorney Bateman) represented Petitioner in the criminal proceeding and in a subsequent disciplinary proceeding before the Office of Professional Discipline for the State Education Department for the University of the State of New York (State disciplinary proceeding). I.G. Exs. 6, 7; P. Ex. 8. In February 2001, Petitioner and his spouse sold their home in Dix Hills, New York, and Mrs. Grossman purchased a new home for them in North Woodmere, New York, where they have resided since the purchase. P. Exs. 1-3, 7 (Declaration of Gary Grossman), 9 (Declaration of Bea Grossman). In a letter dated September 28, 2001, the I.G. notified Petitioner that it was excluding him from the Medicare program for a minimum period of 15 years pursuant to section 1128(a)(1) of the Act due to his conviction of a criminal offense related to the delivery of an item or service under the Medicaid program. I.G. Ex. 1. The notice letter was addressed to Petitioner at his Dix Hills address and indicated that a copy of the letter was sent to Attorney Bateman in Mineola, New York. Id. It is the I.G.'s policy to place notice letters in the mail on the day they are dated. I.G. Ex. 5 at 2 (Declaration of Maureen Byer). The notice letter addressed to Petitioner was not returned to the I.G.'s office. Id. at 2.

On February 4, 2004, Attorney Bateman's firm served Petitioner with a summons and complaint in a civil proceeding seeking payment for services rendered to Petitioner in connection with the criminal charge and related matters. P. Ex. 6. Petitioner's address on the summons is the North Woodmere address to which he had moved in February 2001. Id. at 1. Paragraph 2 in the complaint states that "upon information and belief" Petitioner resided at the Dix Hills address. Id. at 3. The Complaint states that Attorney Bateman's firm commenced representing Petitioner in or about March 2000 and continued to represent him until in or about November 2001. Id. at 3-4. The

[2] The facts stated in this section are all taken from the ALJ's findings of fact or from other evidence of record as needed to provide background and are not intended to be findings of fact made by the Board.

Complaint also states "Between July 1, 2000 and November 1, 2001, invoices, reflecting an unpaid charge accrued regarding the services provided to Grossman, were rendered." Id. at 4. The Complaint then lists six invoices with dates as early as November 1, 2000 and as late as July 1, 2001. Id.

2. The ALJ Decision

The ALJ concluded that Petitioner had not made the reasonable showing required to overcome the presumption that he had received the exclusion notice within five days of its mailing. ALJ Decision at 1, 3, 5. The ALJ further concluded that even if it took several weeks for the United States Postal Service (Postal Service) to forward the notice to Petitioner's new address, it was reasonable to infer that his hearing request was not timely filed since the request was not filed until approximately seven years after the regulatory time period had expired. Id. at 3. In reaching his conclusions, the ALJ accepted as fact Petitioner's assertion that he had moved from the Dix Hills address to the North Woodmere address in February 2001. Id. However, the ALJ concluded that this was not in and of itself sufficient to overcome the presumption of delivery because Petitioner had not explained why the Postal Service would not have forwarded the notice, and the Postal Service had not returned the notice to the I.G. Id.

The ALJ also concluded that Petitioner had actually received the notice from two sources, directly from the I.G. and via Attorney Bateman, thus providing additional grounds for finding the hearing request untimely. Id. In reaching this conclusion, the ALJ noted that while the regulations require the I.G. to send the exclusion notice "to the affected individual or entity," they do not prescribe where the notice must be sent or through whom and, therefore, do not preclude notification through the excluded individual's counsel. Id., citing 42 C.F.R. § 1001.2002(a). Absent such direction, the ALJ concluded, "Notice is effective so long as the notice is ultimately received by the affected individual or entity." [3] Id. at 3-4.

[3] While Petitioner disputes on appeal that Attorney Bateman forwarded the exclusion notice to him, he does not dispute the ALJ's legal conclusion that notice received by him through his attorney would be effective. In any event, the I.G. sent the notice to Petitioner directly as well as through his attorney.

The ALJ also concluded that it was reasonable to infer that Attorney Bateman communicated to Petitioner about the notice the attorney had received "more or less contemporaneously with his receipt of that document." Id. at 4. The ALJ found not credible Petitioner's assertions that he no longer had a relationship with Attorney Bateman at the time the exclusion notice was sent and that Attorney Bateman had not mailed the notice to him or advised him that he received it. Id. The ALJ noted that the civil complaint filed against Petitioner by Attorney Bateman's law firm, evidence submitted by Petitioner himself, states that the firm represented him until November 2001, several weeks after the I.G. sent the notice. Id., citing P. Ex. 6, at 4. The ALJ acknowledged that the civil complaint did not seek damages for services rendered after June 2001 but found that fact not inconsistent with a continuing attorney-client relationship for the next several months. Id. The ALJ also relied on the I.G.'s exhibit indicating that Attorney Bateman represented Petitioner until at least October 10, 2001 in the State disciplinary proceeding, which is after the date the I.G. sent the notice letter. Id., citing I.G. Ex. 7.

Analysis

The only issue before the Board is whether the ALJ erred in dismissing Petitioner's request for a hearing on his exclusion as untimely. The governing regulations provide that a request for hearing on an exclusion "must be filed within 60 days after the notice . . . is received . . .," and that "[t]he ALJ will dismiss a hearing request where . . . (1) The petitioner's or the respondent's hearing request is not filed in a timely manner . . . ." 42 C.F.R. §§ 1005.2(c), 1005.2(e)(1). (emphasis added) Accordingly, the ALJ was required to dismiss Petitioner's hearing request if it was not timely filed. The regulations also establish a presumption that an excluded individual received the exclusion notice within five days after the date of the notice "unless there is a reasonable showing to the contrary." 42 C.F.R. § 1005.2(c).

There is no dispute that Petitioner did not file his hearing request until January 9, 2009, approximately seven years after the date on the I.G. notice, September 28, 2001. There also is no dispute that the I.G., consistent with its stated policy, sent the exclusion notice to Petitioner, with a copy to his then attorney, on the date on the notice. I.G. Ex. 5 at 2. The dispute here is whether Petitioner made the "reasonable showing" needed to rebut the presumption that he received the notice within five days after September 28, 2001, or, assuming several

weeks were needed to forward the notice to Petitioner's new address, whether he still failed to file his hearing request within 60 days of receiving the notice.

We conclude that the ALJ did not err in deciding that Petitioner failed to file his hearing request within 60 days of receipt, even assuming it took the Postal Service more than five days to forward the I.G. notice. Accordingly, we uphold the ALJ Decision dismissing Petitioner's hearing request as untimely.

On appeal, Petitioner challenges only the inferences the ALJ drew from the evidence and the credibility determinations he made. Notice of Appeal (NA) at 2. Petitioner does not argue that the ALJ's inferences were unreasonable, only that they are not the only reasonable inferences that could be drawn from the facts. Id. at 5. Similarly, Petitioner acknowledges that evidence relied upon by the ALJ "conflicts with Appellant's contentions that the attorney client relationship had effectively ended earlier." NA at 7. However, Petitioner argues that the ALJ decided the case on CMS's motion for summary judgment and, therefore, should have drawn all inferences in Petitioner's favor, that is, that the Postal Service did not forward the I.G.'s notice to him and that Attorney Bateman did not communicate with Petitioner about the copy of the notice he received. NA at 6-8. (Petitioner does not dispute that Attorney Bateman in fact received the copy.) Petitioner also argues that even though his statement that his relationship with Attorney Bateman had ended by the summer of 2001 is contradicted by a statement in one of Petitioner's own exhibits, as well as an I.G. exhibit, the ALJ should have resolved the conflicting evidence in his favor rather than finding Petitioner's statement not credible. Id.

We find no merit in these arguments.

Petitioner's procedural argument is based on a critical misstatement of fact. The ALJ did not decide this case on summary judgment but, rather, on a motion to dismiss. Since there was no summary judgment motion, the evidentiary standards for summary judgment that Petitioner cites on appeal do not apply. On a motion to dismiss, the ALJ was not required to draw inferences regarding the forwarding of the notice or attorney-client communications regarding that notice in Petitioner's favor or to resolve in Petitioner's favor any legitimate dispute as to when Attorney Bateman ceased representing Petitioner. The inferences the ALJ drew (and the credibility determination he made) were not for the purpose of deciding the merits of a case,

as in summary judgment, but, rather, for the purpose of deciding whether Petitioner had timely perfected his hearing right. Petitioner has cited no authority for applying summary judgment standards to such a determination.

In any event, Petitioner has given us no colorable ground for questioning whether the ALJ's inferences are reasonable, especially since Petitioner has not even alleged they are unreasonable. Similarly, we find no basis for questioning the ALJ's credibility determinations since Petitioner acknowledges that the ALJ cited two exhibits, one of which Petitioner submitted, that contradict Petitioner's assertions that his attorney-client relationship with Attorney Bateman ended before the I.G. sent the exclusion notice. RR at 6, 7.

Furthermore, when the Board conducts a substantial evidence review, as it is doing here with respect to the ALJ's evidentiary findings, its role is not to re-weigh the evidence or to substitute its evaluation of the evidence for that of the ALJ. E.g. Life Care Center at Bardstown, DAB No. 2233, at 10 (2009) (citing cases). In that regard, we note that in his decision, the ALJ carefully discusses the facts, which are essentially undisputed, and his reasons for drawing the inferences he drew from those facts. Petitioner has pointed to no inconsistency between the ALJ's inferences and the evidence, and we see none. Notably, Petitioner does not challenge on appeal the ALJ's conclusion that there is no contradiction between the dates on the invoices listed in the civil complaint (the latest date being July 1, 2001) and the statement elsewhere in the complaint, on which the ALJ relied, that the attorney-client relationship continued until November 2001. While the ALJ does not give a detailed explanation of why there is no contradiction, we agree with that conclusion. It is entirely plausible that Attorney Bateman was still representing Petitioner after the July invoice date but did not perform services he considered billable during that time period or simply chose not to bill for services for which he could have billed. It is also possible (and Petitioner does not state otherwise) that Petitioner paid the firm prior to the date the complaint was filed for any services provided by Attorney Bateman during months after July. In any event, it was up to Petitioner to make on appeal any arguments challenging the ALJ's conclusion, and he did not do so.

Finally, we note record facts, or omissions, that the ALJ did not discuss but that further support our conclusion. The I.G. stated in its response to the appeal that while Petitioner filed

two declarations, he never contended that he failed to ask the Postal Service to forward mail to his new address, and Petitioner does not reply to this statement.[4] I.G. Response at 6. Petitioner's failure to reply to the I.G.'s statement tends to further undercut his challenge to the ALJ's inference that the Postal Service would have forwarded his mail in the ordinary course of business.

Petitioner cites an alternative inference that the ALJ could have drawn - that the Postal Service did not forward the notice or delivered it to the wrong address "which we all know from our own experiences at home or the office is not an infrequent occurrence." NA at 5. Petitioner's preferred inference is highly speculative and self-serving. We note in this regard that Petitioner attempts to distinguish ALJ decisions finding speculative or self-serving denials of receipt insufficient to rebut the presumption of receipt. Id. at 5 (citations omitted).[5] Petitioner argues that his denial is not self-serving or insufficient because he submitted "supporting evidence that he had moved, that the I.G. had mailed the notice to an old . . . address and both he and his wife declared that he had not actually received the notice." Id. at 6. Petitioner's statement ignores the fact that the ALJ credited Petitioner's evidence on the first two factual issues, the move and the

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[4] The Board staff attorney assigned to this case on appeal asked Petitioner's attorney whether Petitioner intended to request an opportunity to file a reply brief but received no response. See 42 C.F.R. § 1005.21(c)(stating that the Board may permit the filing of a reply brief).

[5] We make no finding as to whether Petitioner's characterizations of the holdings in those decisions are entirely accurate and note that ALJ decisions do not bind the Board or other ALJs. Petitioner does not rely on, or cite, the Board decision in Mark K. Mileski, DAB No. 1945 (2004), which reversed Mark K. Mileski, CR1174 (2004), one of the ALJ decisions cited by Petitioner. The Board decision in Mileski rested on facts, and evidence submitted to support them, that are clearly distinguishable from those in this case. For example, the I.G. there, unlike here, did not submit a declaration attesting to the I.G.'s normal mailing procedures or providing evidentiary support for the I.G.'s assertion that the notice had not been returned as undeliverable. Accordingly, the Board decision in Mileski would not support Petitioner even if he had cited and relied on that decision.

outdated address on the notice, but found the declarations not credible as they related to the third factual issue, Petitioner's assertion (echoed in his spouse's declaration) that Petitioner had not actually received the notice.

We find no error in the ALJ's credibility determination. Absent from Petitioner's declaration (and his spouse's) is any explanation of why the Postal Service would not have forwarded the exclusion notice to him. See P. Exs. 7, 9. The ALJ relied on the lack of any such explanation, in addition to the fact that the notice had not been returned to the I.G., as supporting an inference that the Postal Service had forwarded the notice to Petitioner at his new address. ALJ Decision at 3. In addition, Petitioner himself acknowledges on appeal that his own Exhibit 6 contains a statement that "conflicts with Appellant's contentions [in his declaration] that the attorney client relationship had effectively ended earlier." NA at 7. Petitioner also acknowledges on appeal that the letter from the State disciplinary proceeding in I.G. Exhibit 7, which is dated October 10, 2001, conflicts with his assertion that his relationship with Attorney Bateman ended in the summer of 2001. NA at 7. These admissions support the ALJ's determination that Petitioner's assertions that he did not receive the exclusion notice through Attorney Bateman were not credible. The ALJ also found Petitioner's declaration that he did not learn of the I.G.'s exclusion determination until he "`was working with counsel to obtain restoration of my license as a pharmacist'" lacking in that Petitioner gave no date as to precisely when that event occurred. ALJ Decision at 3, citing P. Ex. 7, at 2. We agree that this vagueness undercuts the credibility of Petitioner's declaration. See Peter D. Barran, M.D., DAB No. 1776 (2001)(finding "vague and wholly unsubstantiated" the petitioner's contention that his attorney did not forward the I.G.'s exclusion notice to him and upholding dismissal of request for hearing filed 10 years late).

We also find noteworthy the fact that the Summons served with the civil complaint filed against Petitioner by Attorney Bateman's law firm was addressed to Petitioner's North Woodmere address, the address to which he moved in February 2001. P. Ex. 6, at 1. This suggests that Attorney Bateman's firm (and presumably Attorney Bateman) was aware of Petitioner's change of address and, thus, had the information necessary to forward mail to him. Although this exhibit does not conclusively establish that Attorney Bateman was aware of the new address in September 2001, since the summons is dated February 4, 2004, the invoices for unpaid legal services listed in the civil complaint include

one dated July 1, 2001, approximately five months after Petitioner moved to his new address. Petitioner does not claim that he did not receive the July 1, 2001 invoice at his new address. Indeed, Petitioner does not actually assert that Attorney Bateman did not know his new address or correspond with him at that address.[6]

Substantial evidence in the record supports the ALJ's conclusions, contrary to Petitioner's assertions, that Attorney Bateman was still representing Petitioner in September 2001 when the I.G. notice was sent and that Attorney Bateman forwarded to Petitioner the copy of the notice that the I.G. sent to him. ALJ Decision at 4.

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[6] Petitioner does assert that the presence of his old address in one paragraph of the civil complaint - contrasting with the use of his new address on the summons - "raise[s] a question as to whether Mr. Bateman's firm send [sic] the Notice . . . to his old address, if it was sent at all." NA at 7, citing P. Ex. 6 at 3, P. Ex. 8, ¶ 7. However, this is not an unequivocal statement that the attorney did not know Petitioner's new address or correspond with him there. Also, the address on the summons determines whether service of process is effected and, thus, reasonably merits greater evidentiary weight than the address in a paragraph of the complaint.

Conclusion

For the reasons stated above we uphold the ALJ's decision to dismiss Petitioner's hearing request for untimely filing; the decision is supported by substantial evidence in the record and contains no material legal error. However, we modify, as follows, the ALJ finding of fact stated in heading II.B.2. so that it more accurately reflects the ALJ's actual findings within his discussion: "Petitioner did not show that he filed his hearing request on the I.G. exclusion notice within 60 days of receiving the notice."

/s/
Judith A. Ballard

/s/
Stephen M. Godek

/s/
Sheila Ann Hegy
Presiding Board Member