Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jane Masaazi
(O.I. File Number 2-06-40582-9),

Petitioner

v.

The Inspector General.

Docket No. C-10-712

Decision No. CR2264

Date: October 7, 2010

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion to Dismiss and arises from the I.G.'s determination to exclude Petitioner Jane Masaazi from participation in Medicare, Medicaid, and all federal health care programs, for a period of ten years pursuant to section 1128(a)(1) of the Social Security Act (Act). 42 U.S.C. § 1320a-7(a)(1). 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

On June 29, 2007, the I.G. notified Petitioner that she was to be excluded from Medicare, Medicaid, and all other federal health care programs for a period of ten years. The I.G.'s notice letter informed Petitioner of her appeal rights, advising her that a request for hearing had to be made in writing within 60 days of her receiving the exclusion letter, and providing Petitioner with the address to which her request should be mailed. Petitioner requested review of the exclusion by letter dated May 17, 2010, which letter was sent via FedEx on May 18, 2010.

I convened a prehearing conference by telephone on June 3, 2010. During the telephone conference the timeliness of Petitioner's request for hearing was discussed, and counsel for the I.G. stated his intention to seek the dismissal of the request for hearing as untimely. I established a briefing schedule by which the parties could submit their positions and exhibits. In compliance with that schedule, the I.G. filed the Motion to Dismiss, a Brief-in-Chief in support of the Motion (I.G. Br.), and four proposed I.G. Exhibits (I.G. Exs. 1-4) on June 23, 2010.[1] Petitioner filed her pleadings in opposition to the I.G.'s Motion, including her opening brief (P. Ans. Br.), and eight proposed Petitioner's Exhibits (P. Exs. 1-8) on July 29, 2010. The I.G. filed a Reply Brief (I.G. Reply) on August 23, 2010. By electronic correspondence on August 31, 2009, Petitioner requested an extension of time in which to file her response, and her request was granted by an extension of time until September 20, 2010. Petitioner filed her response (P. Resp.) on September 8, 2010.

All briefing is now complete, and the record in this case closed on September 9, 2010. The evidentiary record before me on which I decide the issues contains the parties' pleadings and the admitted exhibits, I.G. Exs. 1-4[2] and P. Exs. 1-8. I also admit as ALJ Ex. 1 the FedEx mailer by which Petitioner submitted her request for hearing.

II. Issue

The sole legal issue 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.

The record before me requires that this issue be resolved against Petitioner. I find her request for hearing was filed untimely, over two years and ten months past the deadline

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[1] The I.G. initially filed the Motion to Dismiss on June 18, 2010 with I.G. Exs. 1-4. But by electronic correspondence on June 21, 2010 counsel for the I.G. asked that I disregard the June 18 filing stating that counsel noticed a series of clerical errors in the submission and that a substitute filing was forthcoming. As noted above, on June 23, 2010 the I.G. filed the substitute Motion, supporting brief, and exhibits. However, the June 18 filing remains in the record as filed, although I only rely on the June 23, 2010 filing for this decision.

[2] Petitioner objects to I.G. Ex. 4, the declaration of the Director of the I.G.'s Exclusion Staff. The basis of Petitioner's objection is that the declaration was not signed before a notary public. P. Ans. Br. at 9. The declaration is not notarized but is signed and dated by the declarant. On the reasoning set out in *George P. Rowell, M.D.*, DAB CR974 (2002) and *Ronald J. Crisp, M.D.*, DAB CR724 (2000), and in the absence of any evidence impugning the authenticity of I.G. Ex. 4, it is admitted.

established by regulation. Petitioner's argument that she did not receive the I.G.'s notice letter until April 2, 2010 is unavailing here in the face of settled precedent establishing a strong presumption of its receipt in due course, and in the absence of any evidence to support a reasonable showing to the contrary, 42 C.F.R. § 1005.2(e)(1) requires that the request for hearing be dismissed.

III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any individual or entity convicted of a criminal offense related to the delivery of an item or service under title XVIII of the Act (the Medicare program) or any state health care program. The terms of section 1128(a)(1) are restated in similar language at 42 C.F.R. § 1001.1501(a)(1). This mandatory exclusion must be imposed for a minimum of five years. Act § 1128(c)(3)(B); 42 U.S.C. § 1320a-7c(3)(b). If aggravating factors are present, the period of exclusion may be lengthened beyond five years. 42 C.F.R. § 1001.102(b).

The I.G. is charged with effecting exclusions based on sections 1128(a)(1) 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 the exclusion, he must send notice of his intent to exclude 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.

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 sets limits on the issues that may be considered on appeal and establishes requirements for the hearing request's content. It also establishes a discrete 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 found 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 respondent, 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.

Finally, 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 receipt through a "reasonable showing" that the I.G.'s notice 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. At all relevant times, Petitioner's mailing address was 81-59 Commonwealth Boulevard, Bellrose, New York 11426. P. Ex. 1, paragraphs 1-3; I.G. Exs. 1, 2.

2. The I.G. mailed notice of the proposed exclusion of Petitioner from Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Act to Petitioner's mailing address on June 29, 2007. I.G. Ex. 2.

3. Petitioner is presumed to have received the I.G.'s June 29, 2007 notice of her exclusion not later than July 5, 2007. I.G. Ex. 2; 42 C.F.R. § 1005.2(c).

4. Petitioner has failed to make a reasonable showing that she did not receive the I.G.'s notice on or before July 5, 2007. 42 C.F.R. § 1005.2(c).

5. Petitioner filed her request for hearing dated May 17, 2010 on May 18, 2010. Request for Hearing at 1; I.G. Ex. 3; ALJ Ex. 1.

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

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

V. Discussion

My ruling on the I.G.'s Motion to Dismiss applies principles long established in the jurisprudence of this forum.

The first principle is the presumption of the receipt, within five days, of exclusion notices mailed pursuant to 42 C.F.R. § 1001.2002. This principle is established by regulation at 42 C.F.R. § 1005.2(c), and is acknowledged by the Departmental Appeals Board (Board) in *Sharon R. Anderson, D.P.M.*, DAB No. 1795 (2001). In the context of this case, that presumption is invoked by I.G. Ex. 4, the declaration of the Director of the I.G.'s Exclusions Staff, M. Byer, who asserts that her office's regular practice in conducting its official business is to mail exclusion letters on the day they are dated, and that the exclusion letter sent to Petitioner was not returned as undelivered. I.G. Ex. 4, paragraphs 1, 4, 7. There is no dispute that the mailing address to which the I.G.'s letter was sent, 81-59 Commonwealth Boulevard, Bellrose, New York 11426, was valid at the critical time at issue. P. Ans. Br. at 4; P. Ex. 1, paragraphs 1-3. Therefore, the presumption established by 42 C.F.R. § 1005.2(c) — that Petitioner's receipt of the I.G.'s June 29, 2007 notice letter occurred not later than five days after the date of that notice letter — establishes July 5, 2007[3] as the latest date from which the 60-day filing period could be calculated. As noted, this presumption of receipt has been specifically acknowledged and endorsed by the Board in *Sharon Anderson, D.P.M.*, DAB No. 1795. A certified mailing is not required by section 1128(f) of the Act or by 42 C.F.R. § 1001.2002, and Petitioner's arguments based on the absence from this case of proof of mailing through formal certifications have been considered and are rejected here for the reasons they have been rejected before. *George P. Rowell, M.D.*, DAB CR974; *Ronald J. Crisp, M.D.*, DAB CR724.

The second principle is found in 42 C.F.R. § 1005.11(a)(4) which states: "Papers are considered filed when they are mailed." A copy of the FedEx mailer Petitioner used to mail her request to DAB has been marked and entered into the record as ALJ Ex. 1, and establishes that Petitioner mailed her request for hearing on May 18, 2010. The second principle establishes the filing date of Petitioner's request for hearing to be that of May 18, 2010. *See* ALJ Ex. 1.

The third principle is simply a calculation based on the first two principles: if a request for hearing is to be timely pursuant to 42 C.F.R. § 1001.2007(b), it must be filed not more

[3] Because the Fourth of July holiday precluded the delivery of mail on Wednesday, July 4, 2007, the five days for mailing would then fall on the following business day, Thursday, July 5, 2007.

than 65 days after the date of the notice letter to which it responds. The only relief available from that time limit demands a "reasonable showing to the contrary" of the presumption set out at 42 C.F.R. § 1005.2(c). Petitioner was required to file her request for hearing not later than September 4, 2007.[4] 42 C.F.R. §§ 1001.2007(b), 1005.2(c), 1005.12. There is no dispute that Petitioner's request for hearing was dated May 17, 2010 and was filed on May 18, 2010, over two years and ten months after the date of the notice letter. Request for Hearing at 1; I.G. Ex. 3; ALJ Ex. 1.

The fourth principle is the well-established notion that "a reasonable showing to the contrary" of the presumption of timely receipt must be made through demonstration of articulated facts calling the presumed delivery of the notice directly into question, and not by mere speculation or self-serving denials of receipt. *Alan K. Mitchell, M.D.*, CR1614 (2007); *Andrew M. Perez*, DAB CR1371 (2005); *Dulal Bhattacharjee, M.D.*, CR1107 (2003); *George P. Rowell, M.D.*, DAB CR974; *Peter D. Farr, M.D.*, DAB CR909 (2002); *Sunil R. Lahiri, M.D.*, DAB CR296 (1993). To prevail against it, Petitioner must rebut the presumption of regular delivery through a "reasonable showing" based on articulated facts shown by real evidence, and not on speculation and unsupported or self-serving assertions. As I shall discuss below, Petitioner has failed to do so here. Although Petitioner states in her affidavit that she did not receive the notice of exclusion, she has offered nothing more than her own unsupported speculation in an attempt to rebut the presumed delivery of notice. On this record, Petitioner has failed to make "a reasonable showing to the contrary" of her presumed receipt of the I.G.'s notice letter not later than July 5, 2007.

The I.G. has established the mailing of the notice of exclusion dated June 29, 2007 to Petitioner's address at 81-59 Commonwealth Boulevard, Bellrose, New York 11426 (I.G. Ex. 2), the same address where Petitioner concedes she was residing during the critical time at issue. The notice was not returned as undeliverable. I.G. Ex. 4, paragraph 7. Significantly, that is the same address to which the I.G.'s preliminary exclusion correspondence was sent on January 16, 2007 without incident and was successfully delivered.[5] I.G. Exs. 1, 2, 4; P. Ans. Br. at 8; P. Ex. 1, paragraphs 1, 2, 4.

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[4] The sixtieth day fell on September 2, 2007, but that being a Sunday and the following day being the Labor Day holiday, the filing date for Petitioner's request for hearing was therefore Tuesday, September 4, 2007.

[5] Petitioner was initially notified of the I.G.'s intent to exclude her from program participation based on her conviction in the Nassau County First District Court of the State of New York, by letter dated January 17, 2007. That letter notified Petitioner of the impact of the exclusion and provided her opportunity to submit information and supporting documents for consideration by the I.G. before the I.G. made a final determination to exclude Petitioner. I.G. Ex. 1.

Petitioner does not dispute receipt of the I.G.'s intent-to-exclude notice, but does dispute having received the notice of exclusion dated June 29, 2007. P. Ans. Br. at 1-2; P. Ex. 1, paragraphs 4, 5. According to Petitioner, she first learned of the existence of the notice letter on or about April 2, 2010 when advised by her attorney that a March 31, 2010 correspondence from the I.G. exclusion staff included a copy of the notice letter. P. Ans. Br. at 3; P. Ex. 1, paragraph 7. Petitioner admits that she has resided at the Commonwealth Boulevard mailing address since March 1981, and specifically admits she was residing at that address from January 16, 2007 up to and including July 5, 2007. P. Ex. 1, paragraphs 1, 2, 3. Petitioner offers several hypotheses that she claims might explain her asserted non-receipt of the I.G.'s notice letter: her asserted non-receipt may be attributable, she says, to the asserted-but-unproven possibility that some unidentified neighbor received the notice and then failed to return it to postal authorities; or, she says, to the asserted-but-unproven fact that different mail carriers in her neighborhood over the years could have made asserted-but-unrecorded errors that resulted in the delivery of mail to asserted-but-unidentified incorrect addresses and not to the intended addressee. P. Ans. Br. at 6; P. Ex. 1, paragraphs 14, 16. However, I find Petitioner's assertions to be highly speculative and essentially self-serving. There is nothing in the evidence before me that explains how or why Petitioner should not be presumed to have received her mail in normal fashion at her residential address during June or July of 2007. Petitioner has not explained why the notice would not have been brought to her or returned to postal authorities by neighbors if those neighbors received it in error; much less has she offered any serious reason to believe that delivery errors occurred at exactly the time necessary to affect this case. She does not explain why the I.G. received nothing from postal authorities showing that the notice letter was returned as undelivered. She does not explain how the concatenation of possible mishaps on which she relies to plead non-receipt of the I.G.'s notice letter *did not* prevent the successful delivery of the I.G.'s letter of January 16, 2007. Petitioner simply has given me no colorable basis to form even a passing doubt at odds with the presumed regular delivery of the notice letter.

Those deficiencies are fatal shortcomings in her effort to make a "reasonable showing to the contrary" required to rebut the presumption created by 42 C.F.R. § 1005.2(c). Such a "reasonable showing to the contrary" requires facts. However, here Petitioner offers only the speculation that incompetent mail carriers or unconcerned neighbors might have prevented her receipt of the I.G. notice letter. Nothing else of probative value appears or is even hinted at in Petitioner's affidavit, and Petitioner's affidavit offers nothing beyond what has been rejected in *George P. Rowell, M.D.*, DAB CR974, and *Sunil R. Lahiri, M.D.*, DAB CR296. Her unsupported denial of receipt is inherently unreliable and is extrinsically without a single factual indicator of corroboration or credibility. Petitioner's affidavit is insufficient to rebut the presumption that the I.G.'s notice letter was received not later than July 5, 2007.

In sum, Petitioner's request for hearing, filed as it was on May 18, 2010, was out-of-time by nearly three years. The terms of 42 C.F.R. § 1005.2(c) establish the presumptive date

of Petitioner's receipt of the I.G.'s June 29, 2007 notice letter as not later than July 5, 2007. *Sharon Anderson*, DAB No. 1795. That presumption has not been rebutted by a reasonable showing to the contrary. 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 September 4, 2007. The regulations and the unvarying decisions of this forum deny an ALJ the authority to extend the filing period. Petitioner's request for hearing is untimely 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 Jane Masaazi on May 18, 2010 must be, and it is, DISMISSED.

/s/
Richard J. Smith
Administrative Law Judge