Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Shirley A. Jones,	)	Date: February 8, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-06-618
	)	Decision No. CR1564
The Inspector General.	)	
	)	

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion to Dismiss, as untimely filed, the Request for Hearing filed on August 8, 2006 by Petitioner *pro se* Shirley A. Jones. The I.G.'s Motion is based on the terms of 42 C.F.R. §§ 1001.2007(b) and 1005.2(c). As I explain below, I find that the Request for Hearing was not timely filed, and for that reason I grant the I.G.'s Motion to Dismiss.

I. Procedural Background

On July 31, 2002, the I.G. wrote to Petitioner at the place of her incarceration, the Federal Medical Center at Fort Worth, Texas. The letter notified Petitioner of the I.G.'s determination to exclude her from Medicare, Medicaid, and all federal health care programs for a period of 40 years. The I.G.'s letter relied on the authority of section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a), and asserted that the predicate for the I.G.'s action was Petitioner's conviction in the United States District Court for the District of New Mexico of a criminal offense related to the delivery of an item or service under the Medicaid program.

Petitioner requested a hearing in an undated letter postmarked August 8, 2006, and received by the Civil Remedies Division on August 15, 2006. The envelope's return address and inmate identification number provided by Petitioner in her Request for Hearing are the same as the address and inmate identification number to which the I.G.'s notice letter of July 31, 2002 was sent.

I convened a prehearing conference with the parties by telephone on September 14, 2006, pursuant to 42 C.F.R. § 1005.6. The details of that conference and a summary of the matters discussed appear in my Order of September 18, 2006. Since the span of time between the I.G.'s notice letter and Petitioner's hearing request suggested the issue of its timeliness within the terms of 42 C.F.R. § 1005.2(c), I established a schedule for the I.G.'s submission of a Motion to Dismiss, and for briefing on that Motion. That cycle of motion practice and briefing is now closed.

The closing of this record has not been without complication. The Order of December 11, 2006 established an amended schedule for the filing of the parties' final briefs. By the terms of that schedule and Order, Petitioner was obliged to file her final brief on or before January 5, 2007, or to file by that date a notice of her intent not to file a final brief. Petitioner filed neither brief nor notice. Receiving nothing from Petitioner, on January 18, 2007, I ordered the record in this case closed effective January 10, 2007.

The January 18, 2007 Order prompted counsel for the I.G. to advise the Civil Remedies Division that she had received three documents from Petitioner of which the Civil Remedies Division was not aware. Those documents are now part of the evidentiary record in this case, marked and admitted as ALJ Exs. 1-3. I emphasize that Petitioner filed none of these three documents with the Civil Remedies Division. Details of the nature and contents of each all appear in my Order of January 25, 2007, which also held this record open through February 2, 2007 for the reasons therein recited. The record in this case closed on February 2, 2007, under the circumstances noted in my Order of February 2, 2007.[1]

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[1] My Order of January 25, 2007 stated that the Civil Remedies Division "will attempt to locate Petitioner, and will maintain records of its attempts." In her Request for Hearing and brief, Petitioner had provided the name and address of a Celestine Davis in Zachary, Louisiana, and indicated that she could receive mail at this alternate address. On January 22, 2007, my office therefore attempted to contact Ms. Davis to inquire as to the whereabouts of Petitioner. My office called Directory Assistance for Zachary, Louisiana, and was told that two listings existed for "Celestine Davis." The first listing was nonpublished, and the second listing was a telephone number associated with an address

The record on which I decide this case is made up of seven exhibits. Petitioner raised no objection to the three exhibits proffered by the I.G., and I have admitted them as I.G. Exs. 1-3. Petitioner attached her own affidavit to her brief (P. Resp.): I have marked it P. Ex. 1 and have admitted it with that designation. My Order of January 25, 2007 identified and admitted *ex mero motu* ALJ Exs. 1-3.

II. Issue

The 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 terms of 42 C.F.R. § 1005.2(e)(1) to dismiss it.

This issue must be resolved against Petitioner. Her Request for Hearing was filed almost four years later than the deadline for doing so established by regulation. She has failed here to make a reasonable showing that she did not receive the I.G.'s July 31, 2002 notice letter at the place of her incarceration in due course. In particular, she has failed to make a reasonable showing that her illness while incarcerated had the effect of functionally negating her receipt of the notice letter. In the absence of such a showing, her Request for Hearing must 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 (Medicare) or any State health care program. This mandatory exclusion must be imposed for a minimum of five years whenever one of the four classes of predicate convictions set out in section 1128(a) of the Act is established. Section 1128(c)(3)(B) of the Act; 42 U.S.C. § 1128(c)(3)(B).

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in Baton Rouge, Louisiana. When my office called the number, there was an automated message stating that it was temporarily disconnected. Additionally, my office looked at online telephone directories and obtained a telephone number for a "Celestine Davis" in Baton Rouge, Louisiana. Calling this number (a different one from the one previously called) also resulted in an automated message that stated that it "is disconnected or is no longer in service."

The Office of Inspector General is charged with effecting exclusions based on sections 1128(a) and 1128(c)(3)(B) of the Act. *See* 42 C.F.R. § 1001.101. If the I.G. determines that a conviction constitutes a proper predicate for the exclusion, he must send notice of his decision to exclude to the affected individual or entity, and must in that notice provide detailed information on several important points, including the appeal rights of the party to be excluded. 42 C.F.R. § 1001.2002; *see also* section 1128(c) of the Act, 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 sets certain requirements in the hearing request's content. It also establishes a discrete time limit for the filing of a request for hearing. 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 § 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, which appear at 42 C.F.R. §§ 1005.1-1005.23. The 60-day deadline appears at 42 C.F.R. § 1005.2(c):

> The request for a 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 §§ 1001.2002, 1001.203 or 1003.109, 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.

Finally, 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. A tardy or dilatory petitioner can gain relief only by negating the presumption of receipt through a reasonable showing that the notice letter was not received as presumed by 42 C.F.R. § 1005.2(c).

IV. Findings and Conclusions

I find and conclude as follows:

1. The I.G. mailed notice of the proposed exclusion of Petitioner from Medicare, Medicaid, and all other federal health programs pursuant to section 1128(a)(1) of the Act to Petitioner at the place of her incarceration by letter on July 31, 2002. I.G. Ex. 1.

2. Petitioner received the I.G.'s notice letter of July 31, 2002 not later than August 6, 2002. I.G. Exs. 1, 2; 42 C.F.R. § 1005.2(c).

3. Petitioner mailed her Request for Hearing on or about August 8, 2006, from the place of her incarceration. I.G. Ex. 3; Petitioner's Request for Hearing.

4. The address and inmate number to which the I.G.'s notice letter of July 31, 2002 was sent are identical to the return address and inmate number given by Petitioner in her August 8, 2006 Request for Hearing. I.G. Exs. 1, 3; Petitioner's Request for Hearing.

5. Petitioner has failed to make a reasonable showing that she did not receive the I.G.'s notice letter of July 31, 2002, on or before August 5, 2002. P. Ex. 1; 42 C.F.R. § 1005.2(c).

6. Petitioner's Request for Hearing was not timely filed and must be dismissed. 42 C.F.R. §§ 1001.2007(b), 1005.2(c), and 1005.2(e)(1).

V. Discussion

My ruling on the I.G.'s Motion to Dismiss relies on four principles well recognized in the jurisprudence of this forum. The first principle is the presumption in favor of the regular delivery within five days of exclusion notices sent pursuant to 42 C.F.R. § 1001.2002; this principle is established by 42 C.F.R. § 1005.2(c) and is endorsed in *Sharon R. Anderson, D.P.M.*, DAB No. 1795 (2001). The second principle is the precedent-established rule that "a reasonable showing to the contrary" of that presumption must be made through demonstration of facts calling the presumed delivery of the notice directly into question, and not by mere speculation or self-serving denials of receipt. *Andrew M. Perez*, DAB CR1371 (2005); *George P. Rowell, M.D.*, DAB CR974 (2002); *Peter D. Farr, M.D.*, DAB CR909 (2002); *Sunil R. Lahiri, M.D.*, DAB CR296 (1993). The third principle, established by regulation and repeatedly acknowledged by decision, is that the ALJ is without jurisdiction to consider an untimely-filed hearing request, because the ALJ has not the authority to extend the filing deadline and cannot entertain a showing of good

cause for late filing. 42 C.F.R. § 1005.2(e)(1); *Lynette Mae Rohar*, DAB CR1382 (2005); *Andrew M. Perez*, DAB CR1371; *Patricia Ann Petrak*, DAB CR1172 (2004); *John F. Pitts, R.Ph.*, DAB CR820 (2001); *Clifford M. Sonnie, M.D.*, DAB CR732 (2001). The fourth principle is the distillation of the first three, and may be summarized thus: if it is to be timely, the filing of a hearing request pursuant to 42 C.F.R. § 1001.2007(b) must occur not more than 65 days after the date of the notice letter to which it responds, and the only relief available from that time limit demands a "reasonable showing" that the notice letter was not timely received.

This case continues a discussion of that second principle begun by Administrative Law Judge Keith W. Sickendick, in *Andrew J. Goodrow*, DAB CR881 (2002). In that case, Goodrow filed his request for hearing well outside the presumptive 65-day time limit established by 42 C.F.R. §§ 1001.2007(b) and 1005.2(c). Given the effect of 42 C.F.R. § 1005.2(e)(1), Goodrow's only hope of avoiding dismissal lay in showing that his serious psychological illness at the time he was presumed to have received the I.G.'s notice letter functionally negated his receipt of the letter. Although the facts of that case did not support Goodrow's claim of functional non-receipt, ALJ Sickendick was quite prepared to accept Goodrow's underlying theory:

> I can envision a set of facts where a petitioner may be found not to have received notice of intent to exclude due to mental impairment so severe as to have deprived the petitioner of the ability to understand the nature of the proceedings and the petitioner's rights.

Andrew J. Goodrow, DAB CR881, at 4.

ALJ Sickendick's observation was, and remains, perfectly consistent with other discussions in this forum of the operation of 42 C.F.R. §§ 1001.2007(b), 1005.2(c), and 1005.2(e)(1). Simply put, the law of this forum holds that a petitioner may not be excused from missing the filing deadline, provided that the presumption of receipt in due course remains intact. That presumption has been held rebutted by evidence that a petitioner had not lived at the address to which the notice letter was sent for a considerable time, *Mira Tomasevic, M.D.*, DAB CR17 (1989), and *Sean M. Maguire, M.D.*, DAB CR837 (2001). It has been held rebutted by evidence of a petitioner's parallel or collateral activity in corresponding with government agencies in ways that suggested circumstantially that he had not received the notice letter. *Mark K. Mileski*, DAB No. 1945 (2004). It has been suggested in *dicta* that proof of a third party's interference with the notice letter could constitute a "reasonable showing" in rebuttal of the presumption. *Julio M. Soto, M.D.*, DAB CR418 (1996). But in every case in which the presumption has been argued inapplicable, the issue has been one of fact, and the

resolution of the issue has depended on the fact-finder's evaluation of the particular contents of the petitioner's proffer of evidence as a "reasonable showing to the contrary" of the presumption.

Petitioner has failed to make a "reasonable showing to the contrary" of the presumption that she received the I.G.'s notice letter in due course. My evaluation of the facts Petitioner proffers here leaves me unconvinced that she was unable to understand or act in response to the I.G.'s letter at the time she is presumed to have received it, and equally-unconvinced that she remained so incapacitated for the next three years and 10 months.

I find that the notice letter was correctly addressed to Petitioner. I.G. Ex. 1; P. Request for Hearing, at 1. I find that the notice letter was not returned to the I.G. as undelivered or undeliverable. I.G. Ex. 2. Petitioner appears to admit that the letter was physically delivered to her. P. Ex. 1, at 5, 7-8. Thus, the presumption of the letter's physical delivery to Petitioner is unchallenged, and I find that the letter was delivered to Petitioner not later than August 6, 2002.

I have carefully reviewed the affidavit in which Petitioner describes the illnesses from which she claims to have suffered while incarcerated, and I have done so mindful of her *pro se* status. P. Ex. 1. But the very substantial shortcomings in her version of matters amount to material failures of proof as to the nature, severity, effect, time, and duration of her claimed incapacity.

First, there are absolutely no medical records of any sort before me. Petitioner has described the nature of her illnesses, including what she describes as a brain tumor, diabetes, liver and lung impairments, hypertension, generalized swelling, and what is most likely neuro-sarcoidosis. She has provided documentation of the existence and treatment of none of these alleged impairments. No records of her medications — and only the name of one — are before me. Those records are available to Petitioner: she was during virtually the entire briefing cycle in this case, with the possible exception of its very last days, an inmate at a federal facility operated specifically for incarcerated persons in need of medical care. Their absence from this record permits the factual inference that they would not be helpful to Petitioner if they had been proffered.

Nor has Petitioner submitted evidence from any third-party witnesses to her condition during the 60 days immediately following August 5, 2002. Assuming briefly *arguendo* that the facility's medical records might not be readily available to an inmate, there is no apparent reason for the absence of statements from other inmates, security staff, medical staff, or counselors except the reason I have inferred above: that they would not be helpful to Petitioner if they had been proffered.

The existence of one or more medical conditions is a question of fact entirely distinct from the factual question of a medical condition's severity and the factual question of the effect thereby produced. Petitioner describes the course of her criminal prosecution as having been resolved by guilty plea and sentence after an earlier mistrial based on her sudden episode of apparent decompensation. P. Ex. 1, at 3-4. But the very fact that Petitioner later was able to negotiate a plea agreement, offer a guilty plea acceptable to the court, and appear for sentencing argues irrefutably for her competence at the time of those proceedings. 18 U.S.C. §§ 4241, 4244; FED. R. CRIM. P. 11(b), 32(i). This record does not establish the dates of those proceedings, but Petitioner concedes that she was, in fact, competent then. P. Resp., at 2. Thus, the last point at which the effect of her illnesses can be objectively assessed shows that she was not incapacitated to a degree which would functionally negate her receipt of the I.G.'s letter.

Moreover, just as nothing about the factual existence of the alleged illnesses has been shown, and just as nothing about the factual effect of any of those alleged illnesses has been shown, nothing factual has been shown about the time or times of their onset, or about the factual duration of any of them. It is impossible to draw any conclusions about Petitioner's capacity at any given time during the 46 months between her receipt of the I.G.'s letter and the date she mailed her Request for Hearing. She admits that the letter was in her possession during that time (P. Ex. 1, at 7-8), but that admission means that unless she has proven her incapacity for the first 44 of the entire 46 months, her August 8, 2006 Request for Hearing is untimely. The I.G.'s argument on this point is correct: even assuming that Petitioner experienced periods of incapacity between August 2002 and August 2006, the only way that the August 8, 2006 Request can be timely is if her *incapacity remained uninterrupted* between August 5, 2002 and June 9, 2006. I.G. Rep. Br. at 7-8. She has made no such showing.

What is before me is very like what was before ALJ Sickendick in *Goodrow*: a claim of medical incapacity unsupported by any reliable evidence of details obviously important in that context. Petitioner's claim of incapacity is self-serving and unsupported by objective medical evidence which, if extant, would easily have been obtained. She has not proffered evidence from third parties, expert or non-expert. The evidence Petitioner has offered in support of her claim is inexact as to the temporal span or functional severity and effect of her illnesses at any given time. Taken in all, the evidence fails to show that Petitioner was incapacitated by illness at any time between August 5, 2002 and June 9, 2006 in a way that functionally negated her receipt of the I.G.'s notice letter. I find as a matter of fact that Petitioner has failed to make a reasonable showing that she did not receive the I.G.'s notice letter of July 31, 2002, on or before August 5, 2002.

VI. Conclusion

For all of the reasons set forth above, I grant the I.G.'s Motion to Dismiss. Pursuant to 42 C.F.R. § 1005.2(e)(1), the Request for Hearing filed by Petitioner *pro se* Shirley A. Jones on August 8, 2006 must be, and it is, DISMISSED.

/s/
Richard J. Smith
Administrative Law Judge