Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Kenneth Schrager
(OI File No.: 2-00-40651-9),

Petitioner

v.

The Inspector General.

Docket No. C-10-738

Decision No. CR2279

Date: November 9, 2010

DECISION

Petitioner, Kenneth Schrager, asks review of the Inspector General's (I.G.'s) May 31, 2001 determination to exclude him, for a minimum period of twenty years, from participation in the Medicare, Medicaid, and all federal health care programs, as provided for in section 1128(a)(1) of the Social Security Act. The I.G. has moved to dismiss, arguing that the appeal is untimely. I agree and dismiss Petitioner's appeal.

Petitioner's hearing request must be dismissed pursuant to 42 C.F.R. § 1005.2(e)(1), because it was not timely filed.[1]

Procedural history. In a letter dated May 31, 2001, the I.G. advised Petitioner that, based on his conviction "of a criminal offense related to the delivery of an item or service under the Medicare program," he was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of twenty years. I.G. Ex. 1. With the notice letter, the I.G. sent Petitioner an explanation of his appeal rights: he was entitled to a hearing before an administrative law judge (ALJ) if he filed a written request for review

[1] I make this one finding of fact/conclusion of law.

within sixty days after receipt of the notice. I.G. Ex. 1, at 3. Petitioner filed his hearing request nine years later, on May 27, 2010 (received in the Civil Remedies Division on June 1, 2010).[2]

The appeal was initially assigned to ALJ Alfonso J. Montano, who held a prehearing conference, at which the parties agreed to address initially the threshold issue of the appeal's timeliness. Judge Montano then set a briefing schedule. When Judge Montano left the Civil Remedies Division, the matter was reassigned to me.

The I.G. filed his motion to dismiss (I.G. Br.), accompanied by four exhibits (I.G. Exs. 1-4), and Petitioner filed a response (P. Br.) with seven exhibits (P. Exs. 1-7). The I.G. filed a reply brief (I.G. Reply) with two additional exhibits (I.G. Exs. 5-6). Petitioner then filed a sur-reply (P. Sur-reply), and the I.G. filed a response to the sur-reply (I.G. Response) with two additional exhibits (I.G. Exs. 7-8).

Discussion. An aggrieved party *must* request a hearing within sixty days after receiving notice of the exclusion. 42 C.F.R. § 1001.2007(b). The date of receipt is presumed to be five days after the date of the notice, unless there is a reasonable showing to the contrary. 42 C.F.R. § 1005.2(c). The regulations include no good-cause exceptions for untimely filing, providing that the ALJ *will* dismiss a hearing request that is not filed in a timely manner. 42 C.F.R. § 1005.2(e)(1); *John Maiorano, R. Ph., v. Thompson*, Civil Action No. 04-2279, 2008 WL 304899, at *6 (D. N.J. 2008).

Petitioner has admitted that he knew he would be excluded – his attorneys told him so – but claims that he thought that the exclusion would be for five years rather than twenty. P. Ex. 5 at 1. He does not dispute that, consistent with its policy and practice, the I.G. mailed notice of the twenty-year exclusion to him on May 31, 2001. The I.G. sent the notice to the Federal Correctional Institution (FCI) in Otisville, New York, where Petitioner was incarcerated. I.G. Ex. 3, at 2 (Byer Decl. ¶¶ 4, 7). So, based on the regulatory presumption, we assume that Petitioner received it on June 5, 2001. Since the sixtieth day thereafter fell on a Saturday, his hearing request was due on or before August 6, 2001. 42 C.F.R. § 1005.12(a). But he did not file his request until May 27, *2010*, nine years after the date of the notice.

Petitioner, however, denies receiving the notice and claims that he first learned of his exclusion in March 2010, after his medical license was reinstated. He then contacted the I.G., who responded on April 9, 2010, sending him a copy of the notice letter.

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[2] Prior to filing his hearing request, Petitioner sent the I.G. a letter, dated March 29, 2010, asking him to reconsider the exclusion. P. Ex. 5. If timely, the document would likely have been sufficient to preserve his appeal rights, but, obviously, it too was submitted well after the filing deadline had passed.

By themselves, such assertions of non-receipt are insufficient to overcome the regulatory presumption. To rebut that presumption, Petitioner must make a "reasonable showing" that he did not receive the notice. *Gary Grossman*, DAB No. 2267 at 5-6 (2009). Here, Petitioner initially claimed that he did not receive the notice because he was residing in a half-way house at the time the I.G. mailed it to his former prison residence. According to Petitioner, the prison did not forward his mail. P. Ex. 5, at 1. In fact, the record establishes that Petitioner resided at the Federal Correctional Institution (FCI) – Otisville from December 4, 2000 until September 4, 2001. He did not transfer to a half-way house until September 4, 2001. I.G. Ex. 4. After reviewing an affidavit from Arthur Buchanan, Correctional Systems Officer in Otisville's Inmate Records Department (I.G. Ex. 4), Petitioner conceded that he was still in the Otisville prison when the I.G. sent his notice letter there. P. Ex. 7, at 2-3 (Schrager Decl. ¶ 11).

Petitioner nevertheless cites, as sufficient to establish the requisite "reasonable showing," two additional issues surrounding delivery of the notice.[3] First, although he concedes that the letter was correctly sent to "FCI Otisville" and included Petitioner's inmate register number, he complains that the I.G. addressed it to "P.O. Box 600" – the delivery address for staff mail – rather than "P.O. Box 1000" – the delivery address for inmate mail. P. Ex. 1; P. Ex. 2, at 4; P. Ex. 3. Second, Petitioner claims that inmates, whom he describes as "inherently unreliable," were charged with the actual mail delivery.

I consider the minor address error insufficient to establish a reasonable showing of non-delivery. According to Officer Buchanan, any inmate mail addressed to "P.O. Box 600" would have been forwarded to the inmate, so long as the inmate was properly identified. If the inmate were not properly identified, the mail would have been returned to the sender. I.G. Ex. 6, at 2 (Buchanan Decl. ¶¶ 8, 9). Maureen R. Byer, Director of the Exclusions Staff for the I.G.'s Office of Investigations, confirms that the notice was not returned to the I.G. I.G. Ex. 3, at 2 (Byer Decl. ¶ 7).

Petitioner's complaints about the inherent unreliability of prison mail delivery also fail to overcome the presumption of receipt. First, Petitioner's position effectively turns on its head the presumption of timely receipt, when applied to prison inmates, asking that I presume non-delivery based on a prison's internal systems for mail delivery. I am unwilling to carve out such an exception to the regulation. Moreover, Petitioner's

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[3] Petitioner points to the evidentiary standards for summary judgment, and argues that I should make no credibility determinations here and should draw all factual inferences in his favor. Because a motion to dismiss is before me, I am not deciding the merits of this case; instead, I am deciding whether Petitioner timely perfected his hearing rights. Summary judgment standards therefore do not apply. *Grossman*, DAB 2267 at 6-7. In any event, as the above discussion shows, Petitioner has not presented evidence sufficient to establish a dispute over a material fact, so he would fail even under summary judgment standards. *See Illinois Knights Templar*, DAB No. 2274 at 3-4 (2009).

assertion is not supported. According to the prison's orientation materials, incoming mail is delivered to the inmate population within twenty-four hours of receipt. P. Ex. 2, at 4. Officer Buchanan explains the mail delivery system at Otisville – staff, not inmates: sort the incoming mail; inspect it as necessary; transport it to the appropriate housing units; and deliver it directly to the addressee. I.G. Ex. 7, at 2 (Buchanan Decl. ¶¶ 8, 9, 10).

Thus, Petitioner has not made a "reasonable showing" of non-delivery. I therefore have no discretion and must dismiss his hearing request pursuant to 42 C.F.R. § 1005.2(e)(1).

/s/
Carolyn Cozad Hughes
Administrative Law Judge