Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Ishtiaq A. Malik, M.D.
Docket No. A-19-77
Decision No. 2962
August 1, 2019

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DISMISSAL

Ishtiaq A. Malik, M.D., (Petitioner) appeals the dismissal of his request for an Administrative Law Judge (ALJ) hearing to contest his 17-year exclusion from participation in Medicare, Medicaid and all federal health care programs. *Ishtiaq A. Malik, M.D.*, Dismissal, ALJ Ruling No. 2019-5 (Apr. 3, 2019) (Ruling). The ALJ granted the Inspector General's (I.G.'s) motion to dismiss the request for hearing as untimely. We affirm the dismissal for the reasons stated below.

Legal Background

The I.G. may exclude an individual from participating in federal health care programs under section 1128(b)(7) of the Social Security Act (Act)[1] if the individual has committed an act described in section 1128A of the Act. *Accord* 42 C.F.R. § 1001.901 (2015).[2] The acts described in section 1128A include knowingly presenting, or causing to be presented, false or fraudulent claims to federal health care programs. Act § 1128A(a)(1). An individual excluded under section 1128 is "entitled to reasonable notice and opportunity for a hearing thereon[.]" Act § 1128(f)(1). An individual to be excluded under section 1128(b)(7) is entitled to an ALJ hearing before the exclusion takes effect, unless the health or safety of individuals receiving services warrants the exclusion taking effect earlier. Act § 1128(f)(2); 42 C.F.R. §§ 1001.901, 1001.2003(a), (c).

[1] The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

[2] We refer to the regulations in effect when the I.G. excluded Petitioner. *See Robert Hadley Gross*, DAB No. 2807, at 2 n.3 (2017), *appeal docketed*, No. 17-801 (D.D.C. Sept. 22, 2017) (noting that the ALJ properly applied the version of the regulations in effect when Petitioner was excluded). The Office of Inspector General published a final rule on January 12, 2017, which amended the regulations relating to exclusions effective February 13, 2017 (82 Fed. Reg. 4100).

The I.G. regulations set out specific notice and appeal procedures to implement exclusions based on section 1128(b)(7) of the Act and 42 C.F.R. § 1001.901. 42 C.F.R. §§ 1001.2001 – 1001.2003. The I.G. first sends the individual a "notice of intent to exclude" (NOI), which states the basis for the proposed exclusion and gives the individual 30 days to submit evidence or written argument about the exclusion. *Id.* § 1001.2001(a). If the I.G. decides to proceed, the I.G. next sends a "notice of proposal to exclude" to the individual. *Id.* § 1001.2003(a). The individual must file a written request for an ALJ hearing no later than 60 days after the individual receives the notice to contest the proposed exclusion. *Id.* §§ 1001.2003(a), 1005.2(c).[3] 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. *Id.* § 1005.2(c). If the individual does not make a timely written request for a hearing, the I.G. will send a "notice of exclusion" (NOE) to the individual, and the exclusion becomes effective 20 days from the date of the NOE. *Id.* §§ 1001.2003(b)(1), 1001.2002.

An ALJ "will dismiss a hearing request" when it "is not filed in a timely manner." 42 C.F.R. § 1005.2(e)(1).

Case Background[4]

By NOI dated September 3, 2014, the I.G. advised Petitioner that the I.G. intended to propose to exclude Petitioner from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(7). I.G. Ex. 2. The I.G. stated that the potential exclusion was based on evidence that, between January 1, 2006 and December 31, 2010, Petitioner knowingly presented false or fraudulent claims to Medicare, Medicaid, TRICARE, and the Federal Employees Health Benefits Program. *Id.* at 1. The same facts, the I.G. stated, "also formed the basis for the civil action that resulted in a judgment against [Petitioner] in *United States of America, et al. v. Ishtiaq A. Malik, M.D., et al.*, Civ. A. No. 12-1234 (RLW) (D.D.C.)." *Id.* The NOI advised Petitioner that if he wished to submit evidence or argument about whether the exclusion was warranted, he should do so within 30 days of his receipt of the NOI. *Id.* at 3. The I.G. e-mailed the NOI to Petitioner's (then) attorney, Ronald L. Schwartz, and mailed the NOI via first-class, certified mail to Petitioner at his last known address-of-record: 10801 Lockwood Drive, Unit 140, Silver Spring, Maryland. I.G. Exs. 2, 3; P. Ex. 2; I.G. Response at 5.

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[3] As noted by the ALJ, the text of section 1005.2(c) "appears to contain a significant typographical error." Ruling at 3 n.2. Section 1005.2(c) provides that the hearing request must "be filed within 60 days after the notice, provided in accordance with § 1001.2002, § 1001.203 . . . , is received by the petitioner or respondent." "There is no section 1001.203," and it appears "the drafters intended to cite section *1001.2003*." Ruling at 3 n.2 (emphasis in Ruling).

[4] The facts stated in this section are drawn from the record before the ALJ and are undisputed unless otherwise indicated.

On September 30, 2014, Petitioner hired new counsel, Barry Coburn and the firm of Coburn & Greenbaum, PLLC. P. Ex. 3. Attorney Coburn notified counsel to the I.G. that Petitioner had hired him. P. Ex. 3; I.G. Ex. 4. Attorney Coburn subsequently had several discussions with I.G. counsel, including an in-person meeting with I.G. counsel and others from Mr. Coburn's firm. I.G. Ex. 6. On December 1, 2014, Attorney Coburn submitted to the I.G. a written response to the NOI on Petitioner's behalf. I.G. Exs. 7, 8.

On January 20, 2015, Petitioner e-mailed Attorney Coburn a message stating: "As you know I am relocating to Pakistan and do want want [sic] to pursue any further any of my cases any further [sic]." P. Ex. 6. Attorney Coburn responded the same day: "Ishtiaq – I think you meant your note to say that you do <u>not</u> want to pursue your cases any further. Could you confirm?" P. Ex. 7 (emphasis in original). Petitioner says that he and Attorney Coburn spoke by telephone later that day. There is no evidence in the record about that conversation, but Petitioner says that during the call he "confirmed the termination of the attorney-client relationship[.]" Request for Review (RR) at 3.

By notice dated February 4, 2015, the I.G. proposed to exclude Petitioner from participating in Medicare, Medicaid and all federal health care programs for 17 years pursuant to section 1128(b)(7) of the Act. I.G. Ex. 9. The notice stated that if Petitioner disagreed with the action, he could "request a hearing before an administrative law judge (ALJ)." *Id.* at 5. "To request a hearing," the notice provided, "you must file a request under the procedures set forth at 42 C.F.R. Part 1005 within 60 days of your receipt of this letter." *Id.*

On February 5, 2015, I.G. counsel e-mailed Attorney Coburn a copy of the notice of proposal to exclude, which was addressed to Petitioner at his address-of-record on Lockwood Drive in Silver Spring, Maryland. I.G. Ex. 10. In the e-mail message, I.G. counsel asked whether to send the original notice of proposal to exclude to Attorney Coburn or directly to Dr. Malik. *Id.* at 1. Attorney Coburn responded by e-mail: "Original to our attention would be good." I.G. Ex. 11. Two minutes later, Attorney Coburn forwarded I.G. counsel's e-mail to Petitioner with the following message:

> Ishtiaq - This just came in. Is there a time today or tomorrow when we can get on the phone and discuss? I know you've instructed us not to do any more work on anything, but I think it might well be in your interest to contest this. Hoping we can discuss soon. If we don't, then we'll of course comply with your instruction to do nothing. Best, Barry

P. Ex. 11, at 2.

The next day, February 6, 2015, Attorney Coburn e-mailed the following message to Petitioner, again under the subject line, "Notice of Proposed Exclusion - Ishtiaq A. Malik, M.D.":

> Dr. Malik – I'm following up on my calls to you this morning, which I made when I did not hear back from you in response to the email I sent you yesterday. I am confirming your instruction to me just now to take no further action on your behalf in any matter, and to refrain from responding in any way to the HHS Notice of Proposed Exclusion that I forwarded to you yesterday. As I'm sure you know, this course of action - which is against our advice - will inevitably result in an order of exclusion being granted.

P. Ex. 11, at 1.

By NOE dated May 11, 2015, the I.G. excluded Petitioner from Medicare, Medicaid and all federal health care programs for a period of 17 years. I.G. Ex. 1. The NOE stated that Petitioner's exclusion would be "effective 20 days from the date of this letter." *Id.* at 1. I.G. counsel e-mailed a copy of the NOE to Attorney Coburn the same day and asked whether he would accept service of the original NOE on behalf of Petitioner. I.G. Ex. 13. Attorney Coburn responded: "I do not believe we are authorized to accept service." I.G. Ex. 14. I.G. counsel responded: "We will send the notice to Dr. Malik directly at the address listed therein (which is the most recent we have on file), unless you are aware of an alternate address that he is currently using for purposes of receiving his mail." I.G. Ex. 15. The I.G. then sent the original NOE to Petitioner at the Lockwood Drive address-of-record via certified U.S. mail. *See id.* Attorney Coburn forwarded the NOE to Petitioner via e-mail, and Petitioner acknowledges receiving a copy of the NOE from Attorney Coburn. P. Ex. 16; RR at 4-5. Petitioner says that he never received the NOE sent to the Lockwood Drive address because he had sold his medical practice there three months earlier and had returned to Pakistan. RR at 5.

On November 23, 2018, more than three years after his exclusion became effective, Petitioner filed a written request for an ALJ hearing, seeking a reduction of the 17-year period of his exclusion.

ALJ Proceedings and Ruling

The I.G. moved to dismiss Petitioner's hearing request as untimely pursuant to 42 C.F.R. § 1005.2(e)(1). Opposing the I.G.'s motion, Petitioner argued that Attorney Coburn had not forwarded the notice of proposal to exclude to Petitioner in February 2015, and Petitioner did not understand from Attorney Coburn's communications that this was a new notice and not the NOI. Petitioner said that he did not learn about the notice of proposal to exclude until September 2018, after he inquired about his case through his U.S. Senator's office.

Ruling on the I.G.'s motion, the ALJ stated that, "[b]y statute and regulation," an individual subject to exclusion under section 1128(b)(7) "*must* request a hearing within 60 days after he receives notice that the IG proposes to exclude him from program participation." Ruling at 3 (citing Act §§ 205(b), 1128(f)(l); 42 C.F.R. §§ 1001.2003(a), 1005.2) (ALJ's emphasis). "When an individual is represented by an attorney," the ALJ continued, the I.G. "may serve notice on the attorney and the presumption is that the individual received the notice." *Id.* (citing *Peter D. Barran, M.D.*, DAB No. 1776 at 4 (2001); *Gary Grossman*, DAB No. 2267 at 5, 9-10 (2009)).

On review of the record evidence, the ALJ concluded "that, on February 5, 2015, Petitioner Malik received notice of his proposed exclusion." Ruling at 5. In reaching this conclusion, the ALJ found Petitioner's claim that Attorney Coburn did not forward the notice of proposal to exclude to Petitioner as an attachment to the February 5, 2015 e-mail to be "highly unlikely." *Id.* The ALJ also rejected Petitioner's claim that he did not understand Attorney Coburn's February 5 and 6 e-mails as referring to a new notice and not the NOI. The ALJ found "this claim not credible for several compelling reasons," which we discuss below. *Id.* Because "the regulations include no good-cause exceptions for untimely filing," the ALJ concluded, "Petitioner's hearing request must be dismissed pursuant to 42 C.F.R. § 1005.2(e)(1) because it was not timely filed." *Id.* at 3.

Standard of Review

The Board's standard of review on a disputed issue of law is whether the ALJ's dismissal is erroneous. The standard of review on a disputed issue of fact is whether the ALJ's dismissal is supported by substantial evidence on the whole record. *E.g. Cathy Statler*, DAB No. 2241, at 8 (2009) (affirming ALJ decision dismissing hearing request as untimely, citing 42 C.F.R. § 1005.21(h)), *aff'd, Statler v. Sec'y of Health & Human Servs.*, No. 7:09-CV-00387, 2011 WL 972584 (W.D. Va. Mar. 16, 2011).

Discussion

1. Petitioner's arguments on appeal

Petitioner contests the ALJ's conclusion that he "received sufficient notice of the proposed exclusion" on February 5, 2015 to trigger the period for requesting an ALJ hearing. RR at 1. Petitioner asserts that "the I.G. did not provide proper service of the [notice of proposal to exclude][.]" *Id.* at 10. Petitioner further alleges that he terminated the attorney-client relationship with Attorney Coburn on January 20, 2015; Attorney Coburn was not authorized to accept service of the February 4, 2015 notice of proposal to exclude on Petitioner's behalf; Attorney Coburn did not forward the notice of proposal to exclude to Petitioner as an attachment to the February 5, 2015 e-mail or by hard copy;

and Petitioner "did not understand," based on Attorney Coburn's e-mail messages or phone call with Petitioner on February 5 and 6, "that this was a new document with time sensitivity[.]"[5] *Id.* at 2-4, 12. Consequently, Petitioner argues, sufficient evidence exists to overcome the presumption that he received the notice of proposal to exclude. *Id.* at 11. Petitioner also argues that the ALJ made an erroneous "secondary finding that the eventual Notice of Exclusion (NOE), dated May 11, 2015, could equally serve as sufficient notice given its complete omission of any information relating to a right to appeal (or a time frame for doing so)." *Id.* at 1. "[B]ecause the [notice of proposal to exclude] was not properly served by the I.G. and I did not receive notice of my appeal rights (through the [notice of proposal to exclude] or any other document) until September 24, 2018," Petitioner asserts, his "request for hearing was timely filed." *Id.* at 11.

2. The I.G. provided Petitioner reasonable notice of his proposed exclusion.

Pursuant to section 1128(f)(1) and (2) of the Act, the I.G. had a duty to provide Petitioner, prior to his exclusion taking effect, "reasonable notice and opportunity for a hearing . . . to the same extent as is provided in section 205(b)." Section 205(b), which establishes hearing rights for applicants for Social Security benefits, also uses the wording "reasonable notice and opportunity for a hearing." The language of the statutes does not, however, specify the manner by which the individual must be notified. The Board has previously explained that the words "reasonable notice" "refer to giving the individual such notice as is reasonably calculated to reach him in adequate time for him to request a hearing, notify him what the proceeding is about, and inform him how he is to go about requesting a hearing." *Samuel W. Chang, M.D.,* DAB No. 1198, at 14 (1990).

The Board previously has recognized that the I.G. may provide reasonable notice to an individual of his exclusion by sending the notice to the individual's attorney. *Peter D. Barran, M.D.*, DAB No. 1776, at 3-4 (2001) (sustaining dismissal of hearing request as untimely where I.G. sent Petitioner's counsel the exclusion letter and Petitioner made an unsubstantiated, self-serving claim that counsel did not forward the notice to him); *see also Gary Grossman*, DAB No. 2267, at 4-5, 9-10 (2009) (sustaining dismissal of hearing request as untimely where substantial evidence and reasonable inferences supported ALJ finding that counsel to whom I.G. had sent notice was representing Petitioner and that

[5] Petitioner also argues at length that Attorney Coburn's communications were intentionally deceptive and malicious. RR at 6-10. We see no evidence in the record that the communications were deceptive or malicious. As discussed below, moreover, we conclude that substantial evidence on the record supports the ALJ's determination as to the lack of credibility of Petitioner's claims about Attorney Coburn's communications.

attorney forwarded the notice to Petitioner). In addition, the Board held in *Barran*, where an individual has received a notice of an I.G. action through the individual's attorney, the I.G. may "reasonably rely on the same manner of delivery" absent actual notice to the I.G. "of a change in Petitioner's circumstances relative to counsel." *Barran* at 3-4.

We conclude that the I.G. in this matter provided Petitioner reasonable notice of his proposed exclusion and opportunity for a hearing. In light of I.G. counsel's discussions and meeting with Attorney Coburn concerning Petitioner's pending exclusion, the response to the NOI that Attorney Coburn filed on behalf of Petitioner in December 2014, and the absence of any notice from either Petitioner or Attorney Coburn of a change in the status of their attorney-client relationship,[6] the I.G. appropriately sent a copy of the notice of proposal to exclude to Attorney Coburn in February 2015, reasonably calculating that Attorney Coburn would advise Petitioner of the I.G.'s action. I.G. counsel also took the judicious step of asking Attorney Coburn whether to send the original notice of proposal to exclude to him or to Petitioner at his address-of-record (on Lockwood Drive in Silver Spring, Maryland). The I.G. had no reason to question Attorney Coburn's response, that Attorney Coburn would accept service of the notice of proposal to exclude on Petitioner's behalf, and no reason not to presume that Attorney Coburn would forward the document to Petitioner.

3. *The ALJ's conclusion that Petitioner received notice of his proposed exclusion on February 5, 2015, is supported by substantial evidence on the whole record and free from legal error.*

When the Board evaluates whether an ALJ's factual findings are supported by substantial evidence on the whole record, "its role is not to re-weigh the evidence or to substitute its evaluation of the evidence for that of the ALJ." *Grossman* at 7 (citation omitted). The Board "generally accord[s] considerable deference to an ALJ's judgment when it depends on weighing the evidence presented and assessing the credibility of witnesses . . . ." *Barry D. Garfinkel, M.D.*, DAB No. 1572, at 6 (1996) (citing *The Hanlester Network, et al.*, DAB No. 1275, at 51 (1991)), *aff'd*, *Garfinkel v. Shalala*, No. 3-96-604 (D. Minn. June 25, 1997). The ALJ's findings must, however, be "supported by reliable, credible evidence in the record and inferences reasonably drawn from that evidence." *Id.*

We conclude that substantial evidence and inferences reasonably drawn from that evidence support the ALJ's determination here, that Petitioner received notice of his proposed exclusion on February 5, 2015, and that Petitioner's claim not to understand that Attorney Coburn's communications referred to a new I.G. notice, not the September 2014 NOI, is not credible. The February 5 e-mail from Attorney Coburn to Petitioner,

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[6] For purposes of evaluating whether the I.G. provided Petitioner reasonable notice of his proposed exclusion, we need not and do not resolve the question whether Petitioner in fact terminated Attorney Coburn's authority to receive information about Petitioner's exclusion from the I.G. on January 20, 2015, as Petitioner alleges.

which forwarded I.G. counsel's e-mail from earlier that morning, bears the unambiguous subject line: "Notice of Proposed Exclusion - Ishtiaq A. Malik, M.D." P. Ex. 11, at 2. As the ALJ explained, the text of the I.G.'s February 5 e-mail, which appears directly below Attorney Coburn's message, "explicitly refers to the 'copy of the Notice of Proposed Exclusion addressed to Dr. Malik.'" Ruling at 5 (citing P. Ex. 11, at 2). Furthermore, Attorney Coburn's e-mail message describes the notice of proposal to exclude as a new action taken by the I.G. and one from which Petitioner had an opportunity to appeal: "Ishtiaq - *This just came in* . . . I think it might well be *in your interest to contest this*." P. Ex. 11, at 2 (emphasis added). Moreover, the ALJ reasonably inferred, "Petitioner well knew . . . that his exclusion was pending" and "should have been expecting the IG's decision" based on the September 3, 2014 NOI and Attorney Coburn's December 2014 submission to the I.G. on Petitioner's behalf. Ruling at 5.

Attorney Coburn's February 6, 2015 e-mail to Petitioner, the receipt of which Petitioner does not deny, further undercuts Petitioner's claims that Attorney Coburn did not forward the notice of proposal to exclude to Petitioner as an attachment to his February 5 e-mail and that Petitioner could not have understood that Attorney Coburn was referring to "a new document with time sensitivity." RR at 4. As the ALJ observed, the text of the February 6, 2015 e-mail (which bore the same subject line as the February 5 e-mail) confirms that Attorney Coburn sent the notice of proposal to exclude to Petitioner on February 5, 2015. Ruling at 5. Attorney Coburn wrote: "I am confirming your instruction" by telephone "to refrain from responding in any way to the HHS Notice of Proposed Exclusion *that I forwarded to you yesterday*." P. Ex. 11, at 1 (emphasis added). In addition, contrary to Petitioner's allegation, the wording of Attorney Coburn's message plainly conveys that a failure to respond in timely fashion "will inevitably result in an order of exclusion being granted." *Id.* In sum, Petitioner's allegations that Attorney Coburn's communications were unclear or withheld important information are belied by the wording of the e-mails, which, we agree with the ALJ, advised Petitioner of the I.G.'s action on his pending exclusion and "fervently encouraged Petitioner to appeal." Ruling at 5.

Petitioner also mischaracterizes the ALJ's discussion of the May 11, 2015 NOE. The ALJ did not say that the NOE "could equally serve as sufficient notice" to Petitioner of his right to an ALJ hearing, as Petitioner alleges. RR at 1. Indeed, the NOE did not set out any information about appealing the exclusion because the time for Petitioner to appeal had already expired. *See* 42 C.F.R. §§ 1001.2003(b)(1), 1001.2002; I.G. Ex. 1. The ALJ merely observed: "Petitioner concedes that he received the IG's May 11, 2015 notice of exclusion. P. Br. at 7. He did not thereafter contact the IG until filing this appeal more than three and a half years later." Ruling at 5. The ALJ's comment cannot reasonably be read as a finding that Petitioner could have appealed, but did not appeal,

his exclusion based on his receipt of the NOE, as Petitioner appears to read it. Rather, the observation supports the inference reasonably drawn by the ALJ that, despite Attorney Coburn's "efforts to persuade him otherwise," and "understanding that he would be excluded, Petitioner decided not appeal." *Id.* When Petitioner "changed his mind" nearly four years later, he was "too late." *Id.*

Lastly, the ALJ stated, the regulations at 42 C.F.R. Part 1005 "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." Ruling at 3 (emphasis in Ruling) (citing 42 C.F.R. § 1005.2(e)(l); *John Maiorano, R. Ph., v. Thompson.* Civ. A. No. 04-2279 at 6 (D.N.J. 2008); *Boris Sachakov, M.D.,* DAB No. 2707 at 4 (2016); *Kenneth Schrager,* DAB No. 2366 at 3 (2011)). The ALJ's conclusion that section 1005.2(e)(1) requires an ALJ to dismiss an untimely hearing request is correct.

Conclusion

For the reasons stated above, we affirm the ALJ's dismissal of Petitioner's request for an ALJ hearing pursuant to 42 C.F.R. § 1005.2(e)(1).

/s/
Sheila Ann Hegy

/s/
Constance B. Tobias

/s/
Susan S. Yim
Presiding Board Member