Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Gary Grossman,	)	Date: May 4, 2009
Petitioner,	)	
- v. -	)	Docket No. C-09-227
	)	Decision No. CR1943
The Inspector General.	)	

DECISION DISMISSING REQUEST FOR HEARING

I dismiss the hearing request of Petitioner, Gary Grossman. I find that Petitioner received notice of the Inspector General's (I.G.) determination to exclude him from participating in Medicare and other federally funded health care programs more than 60 days before the date when Petitioner filed his hearing request. Therefore, and as a matter of law, I must dismiss Petitioner's request.

I. Introduction

On September 28, 2001 the I.G. mailed a notice to Petitioner informing Petitioner that he was being excluded from participating in Medicare and other federally funded health care programs for a period of 15 years. Petitioner did not request a hearing until January 9, 2009,[*] more than seven years after the mailing date of the exclusion notice.

I was assigned to hear and decide the case. The I.G. moved to dismiss Petitioner's hearing request on the ground that Petitioner filed it untimely. Petitioner opposed the motion. I granted leave to the I.G. to file a reply brief. I also granted Petitioner leave to file a surreply. The I.G. filed seven exhibits, which he identified as I.G. Ex. 1 – I.G. Ex.

[*] The hearing request is dated January 9, 2008, but that appears to be a typographical error as the request itself references the alleged receipt of the notice in November 2008.

7, in support of his motion. Petitioner filed six exhibits which he identified as P. Ex. 1 – P. Ex. 6. Additionally, Petitioner filed three declarations consisting of declarations signed by Petitioner on March 28 and April 17, 2009, and a declaration signed by his wife. I identify Petitioner's March 28, 2009 declaration as P. Ex. 7, his April 17, 2009 declaration as P. Ex. 8, and his wife's declaration as P. Ex. 9. I receive all of these exhibits into the record.

II. Issue, findings of fact and conclusions of law

A. Issue

The single issue that I hear and decide in this case is whether I must dismiss Petitioner's hearing request.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision. I set forth each Finding below as a separate heading.

1. I must dismiss a hearing request that is not timely filed.

Hearings in cases involving the I.G. are governed by regulations at 42 C.F.R. Part 1005. These regulations provide that an individual who is the subject of an adverse determination by the I.G. is entitled to a hearing before an administrative law judge, only if he or she files a hearing request within 60 days after receiving notice of the I.G.'s determination. 42 C.F.R. § 1005.2(c). The date of receipt of the notice is presumed to be five days after the date of the notice absent proof to the contrary by the individual who is the addressee. *Id.*

The regulations direct an administrative law judge to dismiss any hearing request that is untimely filed by stating that the judge "will" dismiss any untimely request. 42 C.F.R. § 1005.2(e)(1). An administrative law judge has no discretion to grant a hearing in the case where the hearing request is untimely.

2. Petitioner did not overcome the presumption that he received the I.G.'s notice 65 days after it was mailed to him.

It is undisputed that the I.G. mailed a notice of exclusion to Petitioner at what the I.G. believed was Petitioner's home address on September 28, 2001. Petitioner is presumed to have received that notice within five days of its mailing, or by October 3, 2001. Any hearing request filed by him more than 60 days after October 3, 2001 is presumptively untimely. Petitioner's hearing request, which he filed more than seven years after the

I.G. mailed his notice of exclusion to Petitioner, is therefore, presumptively late and I must dismiss that request unless Petitioner provides proof overcoming the presumption of an untimely request.

Petitioner asserts that he did not receive the I.G.'s 2001 notice. Petitioner contends that the I.G. sent the notice to a residence which Petitioner had sold and moved from approximately eight months prior to the date when the notice was mailed. Petitioner's brief in opposition to the I.G.'s motion at 1; P. Ex. 1-P. Ex. 3. According to Petitioner, he did not learn of the I.G.'s exclusion determination until "I was working with counsel to obtain restoration of my license as a pharmacist." P. Ex. 7, at 2. Petitioner gives no date as to precisely when that event occurred but asserts that his attorney did not receive an actual copy of the exclusion notice until after November 19, 2008. *Id.*

There is no reason for me to doubt Petitioner's contention that he had sold his residence and moved away from it months prior to the date when the I.G. mailed his exclusion notice to that address. However, the fact that Petitioner had sold his residence and moved by the time that the I.G. mailed the exclusion notice is not, in and of itself, sufficient to overcome the presumption of delivery. Petitioner has not explained why the notice would not have been forwarded to him by the United States Postal Service. The I.G. never received a return from the Postal Service stating that the notice was returned as undelivered. I.G. Ex. 5, at 2. The reasonable inference that I draw from this is that the notice was forwarded in the normal course of business to Petitioner's new residence. Even if forwarding did not take place for several weeks after the September 28, 2001 notice was mailed it is entirely reasonable that I infer that Petitioner's hearing request, filed by him more than seven years later, was untimely.

Moreover, the evidence produced by the I.G. shows that Petitioner actually received the September 28, 2001 notice from *two* sources, directly from the I.G., but also via his then-attorney.

The I.G. is not required to send an exclusion notice to an individual at that individual's home address. The regulation governing sending of notices requires that a notice be sent by the I.G. to an affected individual or entity but it does not direct specifically where the notice must be sent. Notice is effective so long as the notice is ultimately received by the affected individual or entity. The governing regulation provides that:

> [I]f the I.G. determines that the exclusion is warranted, it will send a written notice of this decision to the affected individual or entity.

42 C.F.R. § 1001.2002(a). Where the notice is sent or through whom is irrelevant so long as the affected individual ultimately receives it. Thus, the regulation permits the I.G. to send notice to an affected individual or entity via that individual's or entity's

representative or attorney. Indeed, in the case of a corporation or business entity other than an individual, it would generally be impractical to send the notice to anyone other than an agent or representative of that entity.

I conclude that Petitioner actually received the September 28, 2001 notice twice, via a copy sent to his former residence by the I.G. and forwarded to him, but also via a copy that was sent to his then-attorney. The I.G. not only sent the September 28, 2001 notice to Petitioner at what he thought was Petitioner's home address but he sent another copy of the notice to Petitioner via Alexander Bateman, Esq., the attorney who was representing him at that time. I.G. Ex. 1, at 2; I.G. Ex. 6-I.G. Ex.7. It is reasonable that I infer that Petitioner's attorney communicated the September 28, 2001 notice to Petitioner more or less contemporaneously with his receipt of that document.

Petitioner asserts that he never received a copy of the notice from his then-attorney. In fact, according to Petitioner, by July 2001, before the I.G. sent his notice letter to Petitioner and Mr. Bateman, Petitioner's relationship with Mr. Bateman had deteriorated to the point where his attorney was no longer communicating with him. As proof for this assertion of non-communication, Petitioner offers a copy of a civil lawsuit for unpaid legal fees filed in January 2004 against Petitioner by Mr. Bateman's law firm. P. Ex. 6.

I find not to be credible Petitioner's assertion that he no longer had a relationship with Mr. Bateman as of September 28, 2001, when the I.G. sent his notice to Petitioner via Mr. Bateman. Nor do I find to be credible Petitioner's contention that Mr. Bateman never forwarded to him the I.G.'s notice of exclusion. The evidence offered by the parties – including evidence offered by Petitioner – shows that Mr. Bateman was still representing Petitioner as of September 28, 2001. The civil complaint filed by Mr. Bateman's firm against Petitioner states that it represented him until *November 2001*, several weeks after the I.G. sent the notice letter to Petitioner and Mr. Bateman. P. Ex. 6, at 4. It is true that elsewhere the complaint seeks damages for services provided only through June 2001. But, the fact that the law firm did not sue for services provided after June is not inconsistent with a continuing attorney-client relationship for several months after that date.

Furthermore the I.G. produced evidence that Mr. Bateman represented Petitioner until at least October 2001. On October 10, 2001 the Office of Professional Discipline of the State Education Department/The University of the State of New York sent to Petitioner a notice of action concerning Petitioner's pharmacy license with a copy to Mr. Bateman. I.G. Ex. 7, at 1. The inference that I draw from this document is that Mr. Bateman continued to represent Petitioner as of October 10, 2001, a date after the mailing of the I.G.'s September 28, 2001 notice.

3. I dismiss Petitioner's hearing request because he did not file it timely.

The facts support my conclusion that Petitioner did not file a hearing request within 60 days of his having received the I.G.'s notice of his exclusion. Consequently, I must dismiss Petitioner's request.

/s/
Steven T. Kessel
Administrative Law Judge