

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Chimezie Osondu,
(OI File No. 6-08-40209-9),

Petitioner,

v.

The Inspector General

Docket No. C-17-404

ALJ Ruling No. 2017-20

Date: June 14, 2017

DISMISSAL

More than six years after the Inspector General (IG) mailed the notice letter, Petitioner, Chimezie Osondu, appealed his 17-year exclusion from participation in Medicare, Medicaid, and all federal health care programs.

For the reasons discussed below, I dismiss his appeal as untimely filed.

Background

In a letter dated June 30, 2010, the IG advised Petitioner that, based on his conviction “of a criminal offense related to the delivery of an item or service under the Medicare or a State health care program” he was excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of 17 years. With the notice letter, the IG sent Petitioner an explanation of his appeal rights: he was entitled to a hearing before an administrative law judge if he filed a written request for review within 60 days after receipt of the notice. IG Exhibit (Ex.) 1.

Petitioner filed his hearing request more than six years later, well after the filing deadline had passed. His appeal is dated February 9, 2017, but the Civil Remedies Division did not receive it until February 27, 2017.

The IG moves to dismiss Petitioner's hearing request because it is untimely.

Discussion

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

The regulations governing these appeals provide that an aggrieved party *must* request a hearing within 60 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 at 6 (D. N.J. 2008).

The IG sent the June 30, 2010 notice letter to Petitioner at the Federal Correctional Institution (FCI) in El Reno, Oklahoma, where he was then incarcerated. IG Ex. 1; IG Ex. 4; IG Ex. 5 at 2 (Clark Decl. ¶ 8). Based on the regulatory presumption, we assume that Petitioner received the notice on July 6 (July 5 was a federal holiday). Since the 60th day thereafter fell on a Saturday, his hearing request was due on or before September 6, 2010. 42 C.F.R. § 1005.12(a). But Petitioner did not file his hearing request until February 9, 2017 (or later), more than six years after the date of the notice.²

Petitioner denies receiving the notice while incarcerated. He was in prison from September 2009 until sometime in 2013, and on supervised release until October 2016. Hearing Request (February 9, 2017). Two months later, on December 8, 2016, he called the IG offices to inquire about his exclusion. IG staff sent him a copy of the notice letter on December 9. IG Ex. 5 at 2 (Clark Decl. ¶ 9). Petitioner claims that he received the notice sometime thereafter (although he does not specify exactly when).

By itself, Petitioner's assertion of non-receipt is insufficient to overcome the regulatory presumption. To rebut that presumption, Petitioner must make a "reasonable showing"

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

² The Civil Remedies Division did not receive the appeal until February 27, 2017. Unfortunately, staff of the Civil Remedies Division did not save the mailing envelope so I have no way of knowing exactly when Petitioner mailed his request.

that he did not receive the notice. *Kenneth Schrager*, DAB No. 2366 at 4-5 (2011); *Gary Grossman*, DAB No. 2267 at 5-6 (2009). Petitioner does not claim that the IG sent the notice to the wrong address; he was, in fact, living at the Federal Correctional Institution (FCI) El Reno at the time. Peter P. Clark, Director, Exclusions Staff of the Office of the Inspector General, confirms that the notice was not returned to the IG. IG Ex. 5 at 2 (Clark Decl. ¶ 8).

I note also that Petitioner knew that he had been excluded, which is why he called the office of the IG in December 2016. Petitioner Submission at 1 (May 5, 2007); IG Ex. 5 at 2 (Clark Decl. ¶ 9). He does not explain how he knew.

Because Petitioner has not made a “reasonable showing” of non-delivery, I have no discretion and must dismiss his hearing request pursuant to 42 C.F.R. § 1005.2(e)(i). Petitioner’s hearing request is therefore dismissed.

_____/s/_____
Carolyn Cozad Hughes
Administrative Law Judge