

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Luis Perez-Perez,

Petitioner

v.

The Inspector General.

Docket No. C-10-220

Decision No. CR2144

Date: June 10, 2010

**DECISION**

Petitioner, Luis Perez-Perez, submitted several documents to the Civil Remedies Division (CRD) of the Departmental Appeals Board (DAB) seeking review of the determination of the Inspector General (I.G.) to exclude him for five (5) years from participation in Medicare, Medicaid, and all federal health care programs under section 1128(a)(3) of the Social Security Act (Act). The I.G. moved to dismiss. For the reasons discussed below, the Motion to Dismiss is granted.

**I. Background**

In a letter dated September 30, 2009, the I.G. notified Petitioner that Petitioner was excluded from participation in Medicare, Medicaid, and other federally-funded health care programs for a period of 5 years. The exclusion was based on Petitioner's felony conviction of conspiracy to commit honest services mail fraud in connection with medical licensing examinations of the Board of Medical Examiners of Puerto Rico. With the notice letter, the I.G. advised Petitioner that he could appeal if he filed a written request for a hearing before an administrative law judge (ALJ) within 60 days of receipt of the notice letter. I.G. Ex. 1 at 3.

On December 9, 2009, sixty-nine (69) days after the date of the notice letter, Petitioner mailed, via Express Mail, documents relating to the I.G. exclusion to CRD. The documents included the following: (1) a letter from the I.G. dated September 30, 2009, excluding Petitioner from participation in the Medicare, Medicaid, and all Federal health care programs for five (5) years; (2) a letter from the U.S. Office of Personnel Management (OPM) dated November 2, 2009, proposing to debar Petitioner from participating in the Federal Employees Health Benefits Program (FEHBP); and (3) an undated letter from Assistant United States Attorney (AUSA) Jose A. Ruiz-Santiago, describing Petitioner's cooperation and assistance to the United States Attorney's Office. In his letter, AUSA Ruiz-Santiago also recommended that Dr. Perez not be excluded from participation in the Medicare program. The matter was docketed and assigned to me on January 5, 2010 for hearing, related proceedings, and a decision. A letter was issued to the parties on January 7, 2010, acknowledging receipt of the information and notifying the parties that a prehearing conference had been set for January 27, 2010, at 10:30 a.m. Eastern Time.

The prehearing conference was conducted as scheduled. Present during the telephone prehearing conference was Ernesto Hernandez, Legal Counsel for Dr. Perez-Perez, Tamara T. Forys, representing the I.G., and with me was Terrah A. Dews, CRD's Deputy Division Director. During the conference, I informed the parties that review of the case raised two threshold jurisdictional issues. First, the documents in my file did not include Petitioner's request for hearing in the case. As noted above, Petitioner provided a letter from AUSA Ruiz-Santiago who, according to Petitioner's attorney, was not acting as legal counsel for Dr. Perez at the time the undated letter was prepared. Petitioner's Counsel indicated that Dr. Perez had not submitted any additional information or a letter requesting a hearing with the information he provided to the DAB. Thus, this case presents a legal question as to whether Petitioner filed a valid request for hearing. The second issue relates to whether the information that Petitioner submitted, if it is determined to be a valid hearing request, was filed within the time frame that the applicable regulations dictate.

I informed the parties that the two threshold jurisdictional issues must be addressed first, so that I may determine if I have jurisdiction to address the merits of the case. The I.G. filed a Motion to Dismiss on February 18, 2010, accompanied by four exhibits (I.G. Exs. 1-4). After receiving leave of court for an extension of time to file a response, Petitioner filed an Opposition to the I.G.'s Motion to Dismiss on March 11, 2010, accompanied by three exhibits (Pet. Exs. 1-3). On March 16, 2010, the I.G. sought leave of court to file a Reply to Petitioner's Opposition, and the Motion was granted. On March 31, 2010, the I.G. filed a Reply to Petitioner's Brief in Opposition to the I.G.'s Motion to Dismiss. In the absence of any objection, I admit into the record I.G. Exs. 1-4 and Pet. Exs. 1-3. On April 14, 2010, I issued an Order Closing the Record in this matter.

## II. Issues

The two threshold jurisdictional issues are as follows:

- 1) Did Petitioner file a valid request for hearing pursuant to 42 C.F.R. §1005.2(c); and
- 2) Did Petitioner file a timely request for hearing pursuant to 42 C.F.R. §1005.2(e)(1)?

## III. Discussion

### *A. Petitioner did not file a valid request for hearing pursuant to 42 C.F.R. §1005.2(c).*

Section 1128(a)(3) of the Act requires that the Secretary exclude an individual who has been convicted under federal or state law of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. 42 C.F.R. § 1001.101(c). For an individual who has been excluded pursuant to the statute to appeal the exclusion, the individual must file a signed written request for hearing with the DAB. 42 C.F.R. §1005.2(c).

As previously noted, Petitioner submitted only the following to the DAB: (1) a letter from the I.G. dated September 30, 2009, excluding Petitioner from participation in the Medicare, Medicaid, and all Federal health care programs for five (5) years; (2) a letter from OPM dated November 2, 2009, proposing to debar Petitioner from participating in the FEHBP; and (3) an undated letter from the AUSA, describing Petitioner's cooperation and assistance to the United States Attorney's Office. The I.G. persuasively argues and Petitioner does not refute that Petitioner's submission did not include a signed written request for hearing and therefore is not a valid hearing request pursuant to the regulations.

Petitioner argues that the letter he received from CRD acknowledging receipt of his submission misled him into believing that due process was being acknowledged by the Department of Health and Human Services. Pet. Opp. at 4. Petitioner contends that the acknowledgment letter provides him with good cause for missing the deadline to request review under 20 C.F.R. §404.911. However, Petitioner's reliance on this regulation is misplaced, as that section only applies to Social Security Administration cases involving federal old-age, survivors, and disability insurance. Thus, Petitioner did not file a valid request for hearing pursuant to 42 C.F.R. §1005.2(c).

***B. Petitioner did not file a timely request for hearing pursuant to 42 C.F.R. §1005.2(e)(1).***

Even if I were to accept the documents that Petitioner submitted as a valid hearing request, Petitioner's case must still be dismissed, because the documents were not submitted timely. The regulations governing these proceedings grant me virtually no discretion. 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 \*3-4 (D. N.J. 2008).

Petitioner is presumed to have received the notice letter by October 4, 2009 and had until December 4, 2009 to file a valid request for hearing. Petitioner's only defense would be that he did not receive the notice letter or that he received it late. Petitioner makes no such contention and is thus presumed to have received the notice by October 4, 2009. Because the documents Petitioner submitted were not filed within 60 days of receipt of the notice letter, the hearing request is not timely and must be dismissed pursuant to 42 C.F.R. §1005.2(e)(1).

In his Opposition, Petitioner does not respond to the threshold issues of whether the request for hearing is valid and, if so, whether it is timely. Rather, Petitioner attempts to collaterally attack his conviction, which the regulations do not permit.

When the exclusion is based on the existence of a criminal conviction . . . where the facts were adjudicated and a final decision was made, the basis for the underlying conviction . . . is not reviewable and the individual or entity may not collaterally attack it, either on substantive or procedural grounds, in this appeal.

42 C.F.R. § 1001.2007(d); *Joann Fletcher Cash*, DAB No. 1725 (2000).

Petitioner also argues that he is being denied an opportunity to be heard. None of the arguments that Petitioner advances directly address the threshold jurisdictional issues that I must consider and decide in this case.

**IV. Conclusion**

Based on my review of all of the evidence submitted in this case, I find that Petitioner did not file a valid request for hearing, and, even if it is assumed he did file a valid request, that request was not timely filed. Therefore, the I.G.'s Motion to Dismiss is granted, and Petitioner's case must be dismissed. Because Petitioner did not file a timely request for hearing, I do not have jurisdiction to address the merits of the case.

/s/  
Alfonso J. Montaña  
Administrative Law Judge