

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Athanasios Mastrokostas  
(O.I. File No. 2-03-40227-9),

Petitioner

v.

The Inspector General  
Department of Health and Human Services.

Docket No. C-11-112

Decision No. CR2313

Date: January 24, 2011

**DECISION**

The request for hearing of Petitioner, Athanasios Mastrokostas, is dismissed pursuant to 42 C.F.R. § 1005.2(e)(1).

**I. Background**

The Inspector General (I.G.) notified Petitioner by letter dated August 31, 2005, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of thirteen years pursuant to section 1128(a)(4) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(4)). The I.G. cited as the basis for Petitioner's exclusion his felony conviction in the Kings County Supreme Court, State of New York, of a criminal offense related to the unlawful, manufacture, distribution, prescription, or dispensing of a controlled substance. The I.G. further notified Petitioner that his period of exclusion was extended to thirteen years based on two aggravating factors. I.G. Exhibit (I.G. Ex.) 1.

On November 22, 2010, the Secretary of Health and Human Services (the Secretary), received a letter from Petitioner in which he requested that Secretary Sebelius reduce his period of exclusion to five years. The request was treated as a request for hearing and forwarded to the Departmental Appeals Board (DAB) for assignment to an administrative law judge (ALJ). On December 15, 2010, I convened a prehearing conference by telephone, the substance of which is memorialized in my order dated December 16, 2010. During the prehearing conference, the I.G. asserted that I have no jurisdiction as Petitioner's request for hearing was not timely filed. Petitioner did not deny that his request for hearing was not filed within sixty days of his receipt of the I.G. notice that he was being excluded. Accordingly, I set a briefing schedule to permit resolution of the jurisdictional issue raised by the I.G.

On January 4, 2011, the I.G. filed a motion to dismiss the request for hearing on grounds that the request for hearing was not timely filed. The I.G. also filed I.G. Exs. 1 through 6. On January 10, 2011, Petitioner filed his brief in opposition to the I.G.'s motion to dismiss (P. Br.) with Petitioner's Exhibit (P. Ex.) 1. On January 19, 2011, the I.G. filed a motion for leave to file a reply brief with the reply brief attached. The I.G.'s motion is granted, and the I.G. reply brief is accepted. No objections have been made to any of the offered exhibits and I.G. Exs. 1 through 6 and P. Ex. 1 are admitted as evidence.

## **II. Discussion**

### **A. Applicable Law**

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's rights to a hearing by an ALJ and judicial review of the final action of the Secretary. The Secretary has provided by regulation that an excluded individual or entity must request a hearing in writing to the DAB, signed by the petitioner or counsel, within sixty days after receiving the notice of exclusion. The regulation also provides that receipt of the notice of exclusion is presumed to be five days after the date on the notice, unless there is a reasonable showing to the contrary. 42 C.F.R. § 1005.2(c). I am required to dismiss a request for hearing that is not filed timely. 42 C.F.R. § 1005.2(e)(1).

### **B. Issue**

Whether Petitioner's request for hearing must be dismissed because it was not filed timely.

### **C. Findings of Fact, Conclusions of Law, and Analysis**

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

**1. Petitioner's request for hearing was not filed timely.**

**2. Petitioner's request for hearing must be dismissed.**

Petitioner does not deny that the I.G. notice of exclusion was dated August 31, 2005. He also does not dispute that he received the notice of exclusion by not later than September 6, 2005.<sup>1</sup> Petitioner does not deny that the I.G.'s notice letter had an attachment that advised him of his right to file a request for hearing within sixty days of receipt of the notice. Petitioner does not deny that his request for hearing had to be mailed not later than November 7, 2005<sup>2</sup> to be timely. There is also no dispute that Petitioner did not file a request for hearing before November 7, 2005.<sup>3</sup>

Petitioner states in his response to the motion to dismiss, that when he received the notice of exclusion he sent it to his attorney who advised Petitioner to wait until the end of the minimum five-year period of exclusion to request that the period of exclusion be reduced. The evidence supports Petitioner's assertion as it shows that Petitioner made two requests to the I.G. for a reduction of the exclusion to five years, the first dated September 11, 2009 and the second July 8, 2010. Both requests were denied by the I.G. I.G. Exs. 3-6.

Petitioner implies that he was unaware of the requirement to file a request for hearing within sixty days. Petitioner argues that the I.G. notice was not clear regarding the time limit for requesting a hearing. P. Br. at 1-2. Petitioner's arguments are not credible and without merit.<sup>4</sup> Petitioner indicates in his request for hearing that he previously had a

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<sup>1</sup> The fifth day after the I.G.'s August 31, 2005 notice falls on September 5, 2005, which was a legal holiday that the federal government observed. The delivery of the I.G. notice is presumed to have occurred the next business day, which is September 6, 2005. 42 C.F.R. § 1005.12(b).

<sup>2</sup> Because the sixtieth day following the presumed receipt of the I.G. notice fell on Saturday, November 5, 2005, Petitioner had until the next business day, Monday, November 7, 2005, to file his request for an ALJ hearing. 42 C.F.R. § 1005.12(a).

<sup>3</sup> I infer that the Petitioner's undated request to Secretary Sebelius was not submitted before November 7, 2005, as Secretary Sebelius was appointed Secretary after that date.

<sup>4</sup> Petitioner also argues that the I.G. notices are unclear as to when he could file a request for reinstatement. P. Br. at 2. However, whether or not the language in the I.G. notices related to reinstatement is clear or not does not negatively impact my conclusion that the language that advised Petitioner of his right to request a hearing in writing within sixty days is clear and unequivocal.

license to practice pharmacy in the State of New York. Considering the facts that Petitioner was a licensed pharmacist, the complexity of his letter to the I.G. (I.G. Ex. 5), the complexity of his request for hearing, and his ability to participation in the prehearing conference, I find Petitioner to be of at least average intelligence or higher and capable of understanding the I.G. notice. The I.G.'s August 31, 2005 notice of exclusion specifically states that Petitioner's appeal rights are set forth in the enclosure to the notice. The enclosure to the I.G. notice clearly states:

If you disagree with this action, you may request a hearing before an administrative law judge in accordance with 42 CFR 1001.2007. Such a request must be made in writing within 60 days of your receiving the OIG's letter of exclusion . . . .

I.G. Ex. 1, at 2-3. The language is clear and unequivocal and I infer that Petitioner had the ability to understand the language given his level of intelligence. Neither Petitioner nor his counsel may credibly argue that the requirement to request a hearing in writing within sixty days of receipt of the notice of exclusion was not clearly stated and understandable. Rather, Petitioner admits that a tactical judgment was made by him and counsel to not file a request for hearing but to seek other relief near to the end of the first five years of the period of exclusion.

Petitioner asserts that he sent a letter to the Office of Personnel Management (OPM), regarding an OPM notice of debarment, and he argues that letter should be treated as his request for hearing. P. Br. at 2-3; P. Ex. 1. The OPM letter offered as evidence by Petitioner is dated December 2, 2007 and refers to Petitioner's November 14, 2005 letter contesting the OPM notice dated October 20, 2005 that proposed to debar Petitioner. P. Ex. 1. Even if I considered Petitioner's November 14, 2005 letter to OPM as his request for a hearing, it is untimely as it was dated after the November 7, 2005 deadline for requesting a hearing. Furthermore, the August 31, 2005 I.G. notice of exclusion clearly advised Petitioner that a request for hearing had to be mailed to the Civil Remedies Division of the DAB. The requirement to file the request for hearing with the DAB was a matter within Petitioner's ability to comprehend. Thus, Petitioner's suggestion that he was unaware that a request for hearing had to be filed with the DAB and not OPM is not credible.

Petitioner has failed to show that he sent a written request for a hearing to the DAB within sixty days of his receipt of the August 31, 2005 notice of exclusion. I have no authority to extend the period to request a hearing even for good cause or to waive the late filing. Accordingly, I must dismiss the request for hearing pursuant to 42 C.F.R. § 1005.2(e)(1).

