

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jose Maria De Leon, Jr.
(O.I. File No. 6-09-40032-9),

Petitioner

v.

The Inspector General.

Docket No. C-11-813

Decision No. CR2454

Date: October 21, 2011

DECISION

The request for hearing of Petitioner, Jose Maria De Leon, Jr., is dismissed pursuant to 42 C.F.R. § 1005.2(e)(1), because it was not timely filed.

I. Background

The Inspector General (I.G.) notified Petitioner by letter dated June 30, 2011, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of five years pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)). The I.G. cited as the basis for Petitioner's exclusion his conviction in the District Court of Cameron County, Texas, 445th Judicial District, of an offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner requested a hearing by an undated letter with a postmark of September 21, 2011. On September 28, 2011, the case was assigned to me for hearing and decision, and an acknowledgement letter was sent to the parties setting this case for a prehearing conference. On October 5, 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 submitted I.G. exhibits (I.G. Ex.) 1 and 2 with its motion. On October 12, 2011, Petitioner filed his brief in opposition to the I.G.'s motion to dismiss (P. Br.). Petitioner has not objected to I.G. Exs. 1 and 2 and they are admitted.

On October 17, 2011, I convened a prehearing conference by telephone. During the prehearing conference, the I.G. again asserted that I have no jurisdiction as Petitioner's request for hearing was not timely filed and dismissal is required. Petitioner admitted that he did not file the request for hearing within sixty days after he received the I.G. notice of exclusion. I explained to Petitioner that I am required by 42 C.F.R. § 1005.2(e)(1) to dismiss a request for hearing that is not timely filed and that this decision would follow.

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 administrative law judge (ALJ) and judicial review of the final action of the Secretary of the United States Department of Health and Human Services (Secretary). The Secretary has provided by regulation that an excluded individual or entity must submit a request for hearing in writing to the Departmental Appeals Board (the Board), signed by the petitioner or counsel, within sixty days after receipt of 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 June 30, 2011. Petitioner does not deny that he received the notice letter and its attachment that advised him of his right to request a hearing before an administrative law judge and that he must request a hearing, if desired, within sixty days of receipt of the notice. Petitioner does not deny that he did not mail his request for hearing until September 21, 2011, as indicated by the postmark on the envelope in which the request for hearing was received at the Board. Petitioner states in his request for hearing that he received the I.G.'s notice "a couple of weeks" after the date of the notice. Although Petitioner does not disclose the date on which the notice of exclusion was actually received, Petitioner admitted in his response to the I.G. motion to dismiss that he failed to file the request for hearing within sixty days of his receipt of the notice of exclusion. Petitioner confirmed during the prehearing conference that he admitted in his response to the motion to dismiss that he failed to file the request for hearing within sixty days after he received the I.G. notice of exclusion.

The regulation requires that a request for hearing be filed within sixty days after receipt of the notice of exclusion. 42 C.F.R. § 1005.2(c). The regulation requires that I dismiss a request for hearing that is not filed in a timely manner. 42 C.F.R. § 1005.2(e)(1). Because Petitioner's request for hearing was not filed within sixty days of his receipt of the notice of exclusion, the request was not filed in a timely manner, and it must be dismissed.

III. Conclusion

For the foregoing reasons, Petitioner's request for hearing is dismissed.

/s/
Keith W. Sickendick
Administrative Law Judge