Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Michael J. Garofalo,	)	Date: December 17, 2009
Petitioner,	)	
- v. -	)	Docket No. C-09-455
	)	Decision No. CR2046
The Inspector General.	)	

DECISION

This matter is before me on the Inspector's General's (I.G.'s) Motion to Dismiss for Untimeliness , and arises from the I.G.'s determination to exclude Petitioner *pro se* Michael J. Garofalo (Petitioner) from participation in Medicare, Medicaid, and all federal health care programs for a period of five years pursuant to section 1128(a)(1) of the Social Security Act (Act). 42 U.S.C. § 1320a-7(a)(1). As I explain below, I find that Petitioner's request for hearing was not timely filed as required by 42 C.F.R. §§ 1001.2007(b) and 1005.2(c), and for that reason I grant the I.G.'s Motion to Dismiss.

I. Procedural Background

On February 27, 2009, the I.G. notified Petitioner that he was to be excluded from Medicare, Medicaid, and all federal health care programs for the minimum mandatory period of five years. The I.G.'s notice informed Petitioner of his appeal rights, advised him that a request for hearing was required to be made in writing within 60 days of his receiving the exclusion letter, and provided Petitioner with the address to which his request should be sent. Petitioner's request for hearing was filed *pro se* by letter dated and sent via FedEx on May 18, 2009.

I convened a prehearing conference by telephone on July 1, 2009, during which the timeliness of Petitioner's request for hearing was explicitly discussed. The I.G. stated his intention to seek the dismissal of the request for hearing as untimely. By Order of the same date I established a briefing schedule by which the parties could submit their

positions and exhibits. In compliance with that schedule, the I.G. filed the Motion to Dismiss for Untimeliness on July 31, 2009 (I.G. Br.) with I.G. Exhibits 1 and 2 (I.G. Exs. 1, 2) attached.

By e-mail correspondence sent August 20, 2009, Petitioner requested an extension of time in which to file his Answer Brief: Petitioner represented that he had "just received" the I.G.'s filing and required additional time in order "to adequately pose my response." I convened a telephone conference with the parties on August 20, 2009, in order to discuss Petitioner's request and his asserted delay in his receipt of the I.G.'s filing. I granted Petitioner an extension of time until September 21, 2009 to file his Answer Brief and also reminded Petitioner that he should file as exhibits any documentary evidence in support of his arguments. The August 20, 2009 conference is memorialized in my Order of that date.

Petitioner filed his Answer Brief – styled "The Petitioner Pro Se's Brief, Countering the Motion to Dismiss for Untimeliness" – on August 31, 2009 (P. Ans. Br.). The I.G. filed a Reply Brief on October 6, 2009 (I.G. Reply) and Petitioner filed a response brief – styled "The Petitioner Pro Se's Reply Brief to the I.G.'s Brief for Motion to Dismiss" – on October 13, 2009 (P. Resp.).

Following my review of Petitioner's October 13, 2009 filing, I undertook to extend Petitioner a final opportunity to make a factual record that might preserve his appeal in the face of the I.G.'s Motion. My Amended Supplemental Order of October 20, 2009 explained that his appeal was vulnerable in the absence of a reasonable showing that the I.G.'s notice letter was not delivered to him in a timely fashion, and offered him until November 10, 2009 to submit any evidence in support of such a showing. Petitioner filed nothing whatsoever in response, and on November 16, 2009, I ordered the record in this case closed for all purposes, including calculation of the period set out at 42 C.F.R. § 1005.20(c).

I.G. Exhibits 1 and 2 are admitted in the absence of objection. For reasons explained below, I also admit as ALJ Ex. 1 the FedEx mailer by which Petitioner submitted his request for hearing. Petitioner has proffered no proposed exhibits.

II. Issue

The sole issue before me is whether Petitioner's request for hearing was timely filed, in compliance with the terms of 42 C.F.R. §§ 1001.2007(b) and 1005.2(c). If the request was not timely filed, I am obliged by the mandatory terms of 42 C.F.R. § 1005.2(e)(1) to dismiss it.

The record before me requires that this issue be resolved against Petitioner. I find his request for hearing was filed untimely, 14 days past the deadline established by regulation. Petitioner's argument that he did not receive the I.G.'s notice letter until March 18, 2009 is unavailing here in the face of settled precedent establishing a strong presumption of its receipt in due course, and in the absence of any evidence whatsoever in support of a reasonable showing to the contrary. 42 C.F.R. § 1005.2(e)(1) requires that the request for hearing be dismissed.

III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the exclusion from participation in Medicare, Medicaid, and all federal health care programs of any individual or entity convicted of a criminal offense related to the delivery of an item or service under title XVIII of the Act (the Medicare program) or any state health care program. The terms of section 1128(a)(1) are restated in similar language at 42 C.F.R. § 1001.1501(a)(1). This mandatory exclusion must be imposed for a minimum of five years. Act § 1128(c)(3)(B); 42 U.S.C. § 1320a-7c(3)(b).

The I.G. is charged with effecting exclusions based on sections 1128(a)(1) and 1128(c)(3)(B) of the Act. *See* 42 C.F.R. § 1001.1001. If the I.G. determines that exclusion is warranted, he must send written notice of his final decision to exclude to the affected individual or entity, and must in that notice provide detailed information on a number of points, including the appeal rights of the excluded party. 42 C.F.R. § 1001.2002; *see also* Act §1128(c), 42 U.S.C. § 1320a-7(c).

The individual or entity to be excluded may appeal the exclusion by filing a request for hearing before an administrative law judge (ALJ). 42 C.F.R. § 1001.2007. That regulation establishes a clear time limit for the filing of a request for hearing. Specifically, 42 C.F.R. § 1001.2007(b) provides that:

> The excluded individual or entity has 60 days from the receipt of notice of exclusion provided for in [section] 1001.2002 to file a request for such a hearing.

This filing time limit is reiterated in the regulations governing the conduct of an excluded party's appeal before the ALJ, which appear at 42 C.F.R. § 1005.1 through 1005.23. The 60-day deadline is found at 42 C.F.R. § 1005.2(c):

> The request for hearing will be made in writing to the DAB; signed by the petitioner or respondent, or by his or her attorney; and sent by certified

> mail. The request must be filed within 60 days after the notice, provided in accordance with [section] 1001.2002 . . ., is received by the petitioner or respondent. For purposes of this section, the date of receipt of the notice letter will be presume to be 5 days after the date of such notice unless there is a reasonable showing to the contrary.

The regulation at 42 C.F.R. § 1005.2(e) directs that:

> The ALJ will dismiss a hearing request where –
>
> (1) The petitioner's or the respondent's hearing request is not filed in a timely manner.

Finally, the ALJ may not extend the 60-day filing deadline. 42 C.F.R. § 1005.2(e)(1). A tardy or dilatory petitioner can gain relief only by negating the presumption of receipt through a "reasonable showing" that the I.G.'s notice letter was not received as presumed by 42 C.F.R. § 1005.2(c).

IV. Findings of Fact and Conclusions of Law

I find and conclude that:

1. At all relevant times, Petitioner's mailing address was and is 859 Phillips Road, Warminster, PA 18971. Request for hearing, at 1; I.G. Ex. 1, at 1; I.G. Ex. 2, at 1; Order of August 20, 2009.

2. The I.G. mailed notice of Petitioner's proposed exclusion from Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Act to Petitioner's mailing address on February 27, 2009. I.G. Ex. 1.

3. Petitioner is presumed to have received the I.G.'s February 27, 2009 notice of his exclusion not later than March 4, 2009. I.G. Ex. 1; 42 C.F.R. § 1005.2(c).

4. Petitioner has failed to make a reasonable showing that he did not receive the I.G.'s notice on or before March 4, 2009. 42 C.F.R. § 1005.2(c).

5. Petitioner filed his request for hearing on May 18, 2009. Request for hearing at 1; I.G. Ex. 2; ALJ Ex. 1.

6. Petitioner's request for hearing was not timely filed. 42 C.F.R. §§ 1001.2007(b) and 1005.2(c).

7. Petitioner's request for hearing must be dismissed. 42 C.F.R. § 1005.2(e)(1).

V. Discussion

My ruling on the I.G.'s Motion to Dismiss relies on four points long established in the jurisprudence of this forum.

The first point is the presumption of the receipt, within five days, of exclusion notices mailed pursuant to 42 C.F.R. § 1001.2002. This point is established by regulation and is approved by the Departmental Appeals Board (Board). *See* 42 C.F.R. § 1005.2(c); *Sharon R. Anderson, D.P.M.*, DAB No. 1795 (2001). In the matter now before me there is no suggestion that the I.G.'s notice letter was returned as undelivered: in fact, Petitioner acknowledged having received the February 27, 2009 notice letter when he attached a copy of it to his request for hearing. Hence, the mailing address to which the I.G.'s letter was sent is shown to be valid at the critical time. The presumption established by 42 C.F.R. § 1005.2(c) – that Petitioner's receipt of the notice letter not later than five days after the mailing date of the I.G.'s notice of exclusion – establishes March 4, 2009 as the latest date from which the 60-day filing period could be calculated.

The second point is found in the terms of 42 C.F.R. § 1005.11(a)(4): "Papers are considered filed when they are mailed." A copy of the FedEx mailer Petitioner used to send his request for hearing to DAB has been marked and admitted into the record as ALJ Ex. 1. It shows that Petitioner sent his request for hearing on May 18, 2009. The second point proves the filing date of Petitioner's request for hearing to be May 18, 2009. ALJ Ex. 1.

The third point is a simple calculation based on the application of the first two points. It provides that if a request for hearing is to be timely filed pursuant to 42 C.F.R. § 1001.2007(b), it must be mailed not more than 65 days after the date of the notice letter to which it responds, and the only relief available from that time limit demands a "reasonable showing to the contrary" of the presumption set out at 42 C.F.R. § 1005.2(c). Given that Petitioner's request for hearing was filed May 18, 2009, 79 days after the date of the notice letter, it was not timely within the meaning of the 65-day period calculated according to the third point, *in the absence of Petitioner's "reasonable showing to the contrary" of the presumption of regular delivery and timely receipt*.

The fourth point is the precedent-established rule that "a reasonable showing to the contrary" of the presumption of timely receipt must be made through demonstration of articulated facts calling the presumed delivery of the notice directly into question, and not by mere speculation or self-serving denials of receipt. *Alan K. Mitchell, M.D.*, CR1614

(2007); *Andrew M. Perez*, DAB CR1371 (2005); *Dulal Bhattacharjee, M.D.,* CR1107 (2003); *George P. Rowell, M.D.*, DAB CR974 (2002); *Peter D. Farr, M.D.*, DAB CR909 (2002); *Sunil R. Lahiri, M.D*., DAB CR296 (1993). Here, Petitioner protests that he did not receive the I.G.'s notice of exclusion until March 18, 2009, 14 days after the presumed delivery. P. Br. at 2. Petitioner further asserts that "[t]he letter of appeal was typed, reviewed by counsel and was delivered by May 18, 2009 within the 60 day period." *Id.* However, Petitioner fails to offer evidence of any delay in his receipt of the I.G.'s notice letter, or any reasonable explanation of how any such delay might have occurred. Although he asserts that his request for hearing was "typed [and] reviewed by counsel," (P. Ans. Br. at 2) he fails to explain why the process of typing and review took two months, and fails to seize the fairly obvious opportunity to obtain and submit evidence from "counsel," or from collateral sources that could verify the fact of "counsel's" involvement, when and where it took place, and what advice "counsel" had to give about meeting the filing deadline. Petitioner has, to be blunt, made absolutely no attempt at a "reasonable showing to the contrary" of the presumption of regular delivery and timely receipt.

Now, there are decisions of this forum where petitioners have been successful in providing evidence to establish a "reasonable showing to the contrary." For example, the petitioner in *Mira Tomasevic*, M.D., DAB CR17 (1989), was able to show that he had not resided at the address to which the notice letter was mailed; the petitioner in *Sean M. Maquire*, M.D. DAB CR837 (2001) provided evidence that the mailing address where the notice was sent was not the petitioner's at the relevant time; in *Jerold Morgan, M.D*., DAB CR768 (2001) the presumption of timely delivery had been rebutted by evidence that the notice letter was sent to an address no longer used by the petitioner; and, in *Julie M. Soto, M.D*, DAB CR418 (1996) the petitioner was able to show that a third party had interfered with or destroyed the notice letter which the ALJ determined constituted a "reasonable showing."

Petitioner complains that correspondence to him in this case has been delayed, including my Order of July 1, 2009. In both his briefs, Petitioner makes assertions of delay but provides no evidence to support these assertions. Instead he cavils that the I.G. is not obliged to prove through evidence in the form of a certified mail receipt that the notice

letter was received in a timely manner. That argument has been offered before, and has failed each time. *Mark K. Mileski*, DAB CR1174 (2004); *George P. Rowell, M.D.,* DAB CR974; *Ronald J. Crisp, M.D.,* DAB CR724 (2000). The reasons for the argument's

fundamental bankruptcy are well-explained in *Crisp*, and they are particularly suited to evaluating the proven facts and unsupported denials before me in this case.

In applying the four points noted above I have been guided by a fifth point. Board decisions have reminded ALJs that *pro se* petitioners are to be accorded some extra measure of consideration in developing a complete record. *Louis Mathews*, DAB No. 1574 (1996); *Edward J. Petrus, Jr. M.D.*, DAB No. 1264 (1991). I have endeavored to meet that obligation by directing Petitioner toward the development of facts that might support his position. During the prehearing conference on July 1, 2009, Petitioner was told that the timeliness of his request for hearing was an issue and that the I.G. would file a motion to dismiss based on that alleged untimeliness. Petitioner was afforded two cycles of briefing – until October 13, 2009 – to file evidence in support of his assertions. He filed nothing beyond self-serving and unsupported denials of timely receipt. On October 20, 2009, I issued the Amended Supplemental Order specifically advising Petitioner that he had failed to make a "reasonable showing," that his appeal was vulnerable to dismissal, and that he was being offered a final opportunity to submit evidence in support of any "reasonable showing" that might save his appeal. In response, Petitioner submitted nothing of any sort whatsoever.

Petitioner's request for hearing, filed as it was on May 18, 2009, was untimely. The terms of 42 C.F.R. § 1005.2(c) establish the presumptive date of Petitioner's receipt of the I.G.'s February 27, 2009 notice letter as not later than March 4, 2009. That presumption has not been rebutted by a reasonable showing to the contrary. The period established by 42 C.F.R. § §1001.2007(b) and 1005.2(c) for filing Petitioner's request for hearing expired on May 4, 2009. Petitioner's request for hearing must be dismissed pursuant to the authority of 42 C.F.R. § 1005.2(e)(1).

VI. Conclusion

For the reasons set forth above, I grant the I.G.'s Motion to Dismiss for Untimeliness. The request for hearing filed by Petitioner on May 18, 2009 must be, and it is, DISMISSED.

/s/

Richard J. Smith
Administrative Law Judge