

The Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the case of:)	
)	
Tan D. Nguyen,)	Date: January 8, 2010
)	
Petitioner,)	
)	
- v. -)	Docket No. C-10-24
)	Decision No. CR2053
The Inspector General.)	

DECISION

Petitioner, Tan D. Nguyen, asks review of the Inspector General’s (I.G.’s) determination to exclude him for five years from participation in the Medicare, Medicaid, and all federal health care programs under section 1128(a)(4) of the Social Security Act. The I.G. has moved for dismissal, arguing that the appeal is untimely. I am not convinced that Petitioner’s appeal is untimely; however, I dismiss his hearing request pursuant to 42 C.F.R. § 1005.2(e)(4) because it fails to raise any issue that I may properly address.

Discussion

Petitioner’s hearing request fails to raise an issue that may properly be addressed in a hearing.¹

Petitioner was a California podiatrist who, on January 10, 2008, pled guilty to one felony count of prescribing an unlawful controlled substance, in violation of section 1153(a) of the Health and Safety Code of California. I.G. Ex. 1.

In a letter dated June 30, 2009, the I.G. advised Petitioner that, based on his felony conviction, he was excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of 5 years. CMS Ex. 4. With the notice letter, the I.G. sent Petitioner an explanation of his appeal rights: he was entitled

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

to a hearing before an administrative law judge if he filed a written request for review within sixty days after receipt of the notice. CMS Ex. 1, at 3.

Thereafter, Petitioner, who is not represented by counsel and is obviously confused by the entire appeals process, sent out a series of letters requesting a waiver under 42 C.F.R. § 1001.1801(b), which authorizes the I.G. to waive certain exclusions. Petitioner sent one such letter, dated August 4, 2009, to the Office of Inspector General. On August 11, 2009, the I.G. responded, explaining that he could waive exclusion only “upon the request of the administrator of the federal health care program.” Not unreasonably, Petitioner assumed that “administrator of the federal health care program” referred to a federal official, and, on September 3, 2009, he sent his waiver request to the Medicare Administrator at the Centers for Medicare and Medicaid Services. In a September 22, 2009 letter, a customer services representative for the Centers for Medicare and Medicaid Services told Petitioner (not wholly accurately) that his waiver request should be sent to the Departmental Appeals Board. Thereafter, Petitioner submitted his waiver request to us in a letter dated September 29, 2009, postmarked October 2, 2009.²

The I.G. moves to dismiss under 42 C.F.R. § 1001.2007(b), arguing that Petitioner’s request is untimely.³ Assuming five days for delivery of its notice letter, the I.G. asserts that Petitioner’s request should have been filed on or before September 3, 2009.

By itself, a hearing request dated September 29, 2009, would be considered untimely. However, twice prior to the 60-day deadline, Petitioner sent essentially the same request for relief to offices within the Department of Health and Human Services, although he did not address those requests to the Departmental Appeals Board. To the extent that Petitioner’s waiver request can be considered a request for hearing at all, I consider it timely, based on those earlier submissions.

Nevertheless, Petitioner’s request must be dismissed because he raises no issues that are reviewable in this forum. He requests a waiver under 42 C.F.R. § 1001.1801(b). That regulation authorizes the I.G. to grant or deny a state health care program’s request that exclusion be waived “if the individual . . . is the sole community physician or the sole source of essential specialized services in a community.” So a *state* health care official must present the request to the I.G. But “the decision to grant, deny, or rescind a request for a waiver is not subject to administrative or judicial review.” 42 C.F.R.

² Petitioner sent his argument via electronic mail to I.G. counsel, who forwarded it to the Civil Remedies Division. Accompanying Petitioner’s argument are his September 3, 2009 letter to the Medicare Administrator and the September 22, 2009 response. Petitioner attached to his hearing request the August 4, 2009 letter to the I.G. and the I.G.’s August 11, 2009 response.

³ With his motion and brief, the I.G. submits four exhibits (I.G. Exs. 1-4).

