Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Kenneth Schrager
Docket No. A-11-31
Decision No. 2366
March 15, 2011

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Kenneth Schrager (Petitioner), appearing pro se, appeals the November 9, 2010 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes. *Kenneth Schrager*, DAB CR2279 (2010) (ALJ Decision). The ALJ granted the Inspector General's (I.G.) motion to dismiss Petitioner's May 27, 2010 request for a hearing on Petitioner's exclusion from Medicare, Medicaid and all federal health care programs for a minimum period of 20 years under section 1128(a)(1) of the Social Security Act (Act).[1] The ALJ determined that she was required to dismiss the hearing request pursuant to the regulations at 42 C.F.R. Part 1005 because it was not timely filed in response to the May 31, 2001 notice to Petitioner of the exclusion.

Petitioner contends on appeal, as he argued before the ALJ, that he did not receive the May 31, 2001 exclusion notice. Consequently, Petitioner avers, the ALJ erred in determining that the hearing request was untimely. For the reasons explained below, we conclude that the ALJ did not err in that determination. We therefore uphold the dismissal.

Applicable Law

Section 1128(a)(1) of the Act requires the Secretary of Health and Human Services to exclude from participation in Medicare, Medicaid, and all federal health care programs any individual who "has been convicted of a criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program." An exclusion imposed under section 1128(a) shall be for a minimum period of five years. Act, § 1128(c)(3)(B). Section 1001.102(b) of the regulations sets forth multiple factors that "may be considered to be aggravating and a basis for lengthening the period of exclusion."

The governing regulations provide that a request for a hearing to appeal an exclusion "must be filed within 60 days after the notice . . . is received . . ." and that the "ALJ will dismiss a hearing request where . . . (1) The petitioner's or the respondent's hearing

[1] The current version of the Act can be found at http://www.socialsecurity.gov/OP_ Home/ssact/ssact.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

request is not filed in a timely manner . . . ." 42 C.F.R. §§ 1005.2(c), 1005.2(e)(1). The regulations also establish a presumption that an excluded individual received the exclusion notice five days after the date of the notice "unless there is a reasonable showing to the contrary." 42 C.F.R. § 1005.2(c).

Background[2]

In a notice dated May 31, 2001 and addressed to Petitioner at the Federal Correctional Institution at Otisville, New York, (Otisville), the I.G. stated that Petitioner was being excluded from participation in the Medicare, Medicaid, and all federal health care programs for a minimum period of 20 years pursuant to section 1128(a)(1) of the Act. I.G. Ex. 1. The notice stated that the exclusion was due to Petitioner's conviction in federal court of a criminal offense related to the delivery of an item or service under the Medicare program, and it identified several aggravating factors relating to the length of the exclusion. *Id*. The notice was addressed as follows:

> Kenneth J. Schrager, M.D.
> FCI Otisville, #48575-054
> P.O. Box 600
> Otisville, NY 10963

Id. The evidence of record shows, and the parties do not dispute, that the post office box for Otisville staff is "P.O. Box 600," and that the post office box for Otisville inmates is "P.O. Box 1000." P. Ex. 1; P. Ex. 2, at 4; P. Ex. 3. The evidence further shows, and the parties do not dispute, that it is the I.G.'s policy to place notice letters in the mail on the day they are dated. I.G. Ex. 3, at 2 (Declaration of Maureen R. Byer).

It is also not disputed that Petitioner did not file his hearing request until May 27, 2010, nearly nine years after the date of the I.G. notice. I.G. Ex. 2.

The ALJ Decision

The ALJ determined that she was required to dismiss Petitioner's May 27, 2010 hearing request pursuant to section 1005.2(e)(1) because it was not timely filed. The ALJ found that the I.G. issued the notice of exclusion to Petitioner on May 31, 2001. Pursuant to section 1005.2(c), Petitioner therefore was presumed to have received the notice on June 5, 2001. Accordingly, the ALJ determined, the hearing request was due on or before August 6, 2001. Because Petitioner did not file his hearing request until May 27, 2010, the ALJ concluded that the appeal was untimely.

In reaching this conclusion, the ALJ determined that Petitioner had not made a reasonable showing to rebut the presumption of receipt at section 1005.2(c). With respect to Petitioner's claim that he never received the May 31, 2001 notice, the ALJ held, "such

[2] The facts stated in this section are all taken from the ALJ's undisputed findings of fact or from other undisputed evidence of record as needed to provide background and are not intended to be findings of fact made by the Board.

assertions of non-receipt are insufficient to overcome the regulatory presumption." ALJ Decision at 3, *citing Gary Grossman*, DAB No. 2267, at 5-6 (2009). Further, the ALJ noted that Petitioner initially argued that he had not received the May 2001 notice because he was living in a halfway house when the notice was issued and Otisville had not forwarded his mail. *Id*. at 3, *citing* P. Ex. 5, at 1. Based on Petitioner's subsequent review of evidence submitted by the I.G., however, Petitioner later conceded that he was living in Otisville throughout the relevant period. *Id.* at 3, *citing* I.G. Ex. 4 (July 2010 Affidavit of Arthur Buchanan, Correctional Systems Officer of Inmate Records, Otisville); P. Ex. 7 (Declaration of Kenneth Schrager).

The ALJ also determined that the undisputed fact that the May 31, 2001 notice was incorrectly addressed to Petitioner at P.O. Box 600, the post office box for Otisville staff, rather than P.O. Box 1000, the post office box for Otisville inmates, was insufficient to overcome the presumption of receipt. The ALJ found that the error was "minor" and that evidence proffered by the I.G. was sufficient to show that "any inmate mail addressed to 'P.O. Box 600' would have been forwarded to the inmate, so long as the inmate was properly identified." ALJ Decision at 3, *citing* I.G. Ex. 6, at 2 (September 2010 Buchanan Affidavit). Further supporting the presumption of receipt, the ALJ pointed to the declaration of the Director of the Exclusions Staff for the I.G. Office of Investigations, confirming that the notice was not returned to the I.G. *Id. citing* I.G. Ex. 3, at 2 (Byer Declaration). Finally, the ALJ rejected Petitioner's contention that the prison mail delivery system was inherently unreliable because inmates processed the mail. The ALJ was unwilling to recognize such a broad exception to the presumption of receipt "when applied to prison inmates." ALJ Decision at 3. Moreover, the ALJ found, the assertion was not supported because the evidence showed that Otisville staff, not inmates, processed the mail and that it was Otisville policy to deliver mail to the inmate population within 24 hours of receipt. ALJ Decision at 3-4, *citing* P. Ex. 2, at 4; I.G. Ex. 7, at 2.

Standard of Review

Our standard of review on a disputed issue of law is whether the ALJ decision is erroneous. 42 C.F.R. § 1005.21(h). Our standard of review on a disputed issue of fact is whether the ALJ decision is supported by substantial evidence on the whole record. *Id.*

Analysis

The issue before the Board is whether the ALJ erred in dismissing Petitioner's request for a hearing on his exclusion as untimely. As noted, the governing regulations provide that a request for hearing on an exclusion "must be filed within 60 days after" the excluded individual received the notice and that the "ALJ will dismiss a hearing request" when it is "not filed in a timely manner." 42 C.F.R. §§ 1005.2(c), 1005.2(e)(1) (emphases added). Accordingly, the ALJ was required to dismiss Petitioner's hearing request if it was not timely filed. The regulations also establish a presumption that an excluded individual

received the notice 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 dispute in this appeal is whether Petitioner made the "reasonable showing" needed to rebut the presumption that he received the notice five days after May 31, 2001. As summarized above, the ALJ determined on review of the arguments and evidence that Petitioner failed to make this showing.

Petitioner maintains on appeal to the Board that he never received the notice and that it was sent to the wrong address. Petitioner argues that the July 2010 Buchanan Affidavit "says nothing at all about the exclusion letter supposedly mailed to [Petitioner] at Otisville in May, 2001" but merely describes "policies in effect at that time." P. Br. at 1. Petitioner contends that the affidavit incorrectly suggests that all mail delivered to Otisville is either returned or delivered. Petitioner asserts that he is "certain that some mail is lost." *Id.* Petitioner argues that neither the Buchanan affidavit nor the Byer declaration constitute evidence that Petitioner's notice was mailed and forwarded. P. Reply at 2. In addition, Petitioner states, there are no copies of the notice in the files of his former attorney, even though he alleges that "HHS usually sends" copies of exclusion notices to an excluded individual's attorney. *Id.* Moreover, Petitioner avers, it is impossible to rebut the presumption of delivery because it requires proof of an event that never occurred.

Petitioner's arguments do not provide grounds for reversal of the ALJ Decision. A presumption of receipt such as that established at section 1005.2 reflects the well-recognized principle that it is "both reasonable and legally sound" for parties in litigation to consider certain legal documents sent through a regular mail system and in the course of litigation to have been received by a date certain. 57 Fed. Reg. 3298, 3320 (1992), *citing* Fed. R. Civ. P. 6(e). At the same time, the regulation takes into account the possibility of exceptions, providing that a recipient of an exclusion notice can rebut the presumption that he received it five days after the notice date by making a "reasonable showing to the contrary." 42 C.F.R. § 1005.2(c).

Consistent with federal court decisions addressing an analogous regulatory standard, the Board previously has held that a sworn statement by a petitioner alone is insufficient to rebut the regulatory presumption that the notice was received five days after the date on the notice. DAB No. 2267; *see also McCall v. Bowen*, 832 F.2d 862, 864 (5th Cir. 1987); *Pettway ex rel. Pettway v. Barnhart*, 233 F.Supp.2d 1354, 1356 (S.D. Ala. 2002) (sworn statements denying receipt did not constitute "reasonable showing" by Social Security claimants sufficient to rebut the presumption of receipt of Social Security determination five days after the date on the notice pursuant to Social Security regulations). Indeed, the rebuttable presumption would serve little purpose if an affidavit denying receipt constituted a reasonable showing that timely receipt had not occurred. The presumption of delivery may, however, be rebutted when a petitioner's statement denying receipt is accompanied by sufficient explanation and corroborating evidence. For example, in *Letantia Bussell, M.D.*, DAB No. 2196, at 8 (2008), which involved the analogous

presumption of receipt at section 498.22(b)(3), the Board held that evidence in the case record that mail had been returned was sufficient to substantiate the petitioner's assertion that she never received it. *See also Chiappa v. Califano*, 480 F.Supp. 856 (S.D.N.Y.1979) (on appeal of Social Security determination plaintiff provided evidence that he had temporarily moved and that the determination notice was forwarded to his new address; affidavit of railroad clerk who delivered the notice supported the alleged delayed date of receipt at the forwarding address; plaintiff filed his complaint within five days of his alleged receipt of the notice, showing a diligent exercise of rights).

Here, in contrast, Petitioner failed to provide a sufficient explanation or to produce corroborating evidence to support his statements denying receipt of the May 31, 2001 exclusion notice. As explained in the ALJ Decision, two of Petitioner's alternative explanations for why he did not receive the notice – that he was not living in Otisville at the time the notice was mailed, and that the mail was processed by (inherently unreliable) prison inmates – were belied by evidence proffered by the I.G. in response to Petitioner's contentions. ALJ Decision at 3-4.

Furthermore, the ALJ Decision includes a detailed explanation why the ALJ rejected Petitioner's contention that the notice of exclusion was incorrectly addressed and therefore never delivered to him. After discussing the evidence submitted by the parties, the ALJ concluded that the address error, directing the notice to P.O. Box 600, not P.O. Box 1000, was "minor" and insufficient to establish a reasonable showing of non-delivery. ALJ Decision at 3.

We find no basis for disturbing this conclusion. The undisputed evidence shows that the exclusion notice was addressed using Petitioner's correct name and inmate number, and that it was directed to Otisville using the correct city, state and zip code. Furthermore, the September 2010 Buchanan affidavit constitutes substantial evidence that at the time of Petitioner's incarceration, mail addressed to a prison inmate at P.O. Box 600 would be delivered to the inmate identified on the letter. I.G. Ex. 6, at 2. From this and other evidence submitted by the I.G. confirming that the exclusion notice was sent in the ordinary course of I.G. business and was not returned, the ALJ reasonably inferred that the May 2001 exclusion notice would have been timely delivered to Petitioner, notwithstanding the incorrect post office box number in the address. We see no error in this inference. Accordingly, we sustain the ALJ's determination that Petitioner failed to make a reasonable showing that he did not receive the exclusion notice on June 5, 2001. Finally, we note that Petitioner also asserted in his appeal to the Board that "until recently" he had "no incentive to investigate" his exclusion, that the New York State Department of Education has determined that Petitioner "deserved another chance to practice medicine and restored [his] license," and that he has repaid the order of restitution entered against him at the time of his 2000 conviction. P. Br. at 2. Petitioner

submits documentation to support these contentions.[3] Petitioner acknowledges that these statements and documents "may have little relevance to the very narrow decision made by the ALJ." *Id*. Petitioner further states that he fully accepts responsibility for his past actions, that he is merely requesting the opportunity to present evidence to show that the term of his exclusion was excessive, and that he has been unable to accept numerous teaching positions because of the exclusion. P. Br. at 3; P. Reply at 3.

These contentions essentially ask the Board to consider granting Petitioner equitable relief. As Petitioner appears to understand, such authority is beyond the scope of our review. The ALJ and the Board are bound by all applicable regulations. *Barry D. Garfinkel*, DAB No. 1572 (1996). As explained above, sections 1005.2(c) and 1005.2(e)(1) required the ALJ to dismiss Petitioner's hearing request if it was not filed within 60 days after Petitioner received the exclusion notice and Petitioner failed to make a "reasonable showing" to rebut the presumption that he received the notice within five days after it was issued. Section 1005.21(h), in turn, limits our review to an evaluation of whether the ALJ Decision was free of legal errors and supported by substantial evidence on the whole record. The regulations do not permit an ALJ or the Board to excuse a petitioner's failure to meet the regulatory filing requirements based on equitable grounds.

We conclude that the ALJ did not err in deciding that Petitioner failed to file his hearing request within 60 days of receipt. Accordingly, we uphold the ALJ Decision dismissing Petitioner's hearing request as untimely.

Conclusion

For the reasons stated above, we uphold the ALJ's decision to dismiss Petitioner's hearing request for untimely filing. The decision is supported by substantial evidence in the record and contains no legal error.

/s/
Sheila Ann Hegy

/s/
Constance B. Tobias

/s/
Stephen M. Godek
Presiding Board Member

[3] Section 1005.21(f) of the regulations provides for the consideration of additional evidence "[i]f any party demonstrates to the satisfaction of the DAB that additional evidence not presented at such hearing is relevant and material and that there were reasonable grounds for the failure to adduce such evidence at such hearing . . . ." In this case we do not consider the additional evidence because, as we discuss above, it is not material to the question before us. Moreover, Petitioner does not allege any reasonable grounds for the failure to adduce the documents below.