

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Linda Marie Bonner
(OI File No.: 7-13-40210-9),

Petitioner

v.

The Inspector General.

Docket No. C-17-18

Decision No. CR4796

Date: February 21, 2017

DECISION

Petitioner, Linda Marie Bonner, requested a hearing to contest the Inspector General's (I.G.'s) determination to exclude her from participation in the Medicare, Medicaid, and all federal health care programs under section 1128(a)(1) of the Social Security Act. The I.G. has moved to dismiss, arguing that the appeal is untimely. I agree and dismiss Petitioner's appeal.

1. Petitioner's hearing request must be dismissed pursuant to 42 C.F.R. § 1005.2(e)(1), because it was not timely filed.¹

In a letter dated June 30, 2016, the I.G. advised Petitioner that she was excluded from participation in Medicare, Medicaid, and all federal health care programs for five years. The I.G. stated that Petitioner was excluded because she had been convicted, in the District Court of Wyandotte County, Kansas, of a criminal offense related to the delivery of an item or service under Medicare or a State health care program. Petitioner filed her hearing request on September 19, 2016 (received in the Civil Remedies Division on

¹ My findings of fact/conclusions of law appear as headings in bold italic type.

September 28, 2016). Although the request is dated September 15 (9-15-16), it is postmarked September 19. Documents are considered filed on the date they are mailed. 42 C.F.R. § 1005.11(a)(4).

The I.G. filed a motion to dismiss and informal brief (I.G. Br.), accompanied by six exhibits (I.G. Exs. 1-6). Petitioner filed an informal brief (P. Br.) with one attachment (att.) that was not marked as an exhibit. The I.G. waived any reply.

The regulations governing these proceedings grant me virtually no discretion. An aggrieved party *must* request a hearing within sixty days after receiving notice of the exclusion. 42 C.F.R. § 1001.2007(b). The date of receipt is presumed to be 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 regulations do not include a good-cause exception for untimely filing; they provide that the administrative law judge *will* dismiss a hearing request that is not filed in a timely manner. 42 C.F.R. § 1005.2(e)(1); *John Maiorano, R. Ph., v. Thompson*, Civil Action No. 04-2279, 2008 WL 304899, at *6 (D.N.J. Feb. 1, 2008).

In this case, I presume that Petitioner received the I.G.'s notice letter on July 5, 2016. Since the sixtieth day thereafter (September 3, 2016) fell on a Saturday and the following Monday was a federal holiday (Labor Day), Petitioner's hearing request was due no later than September 6, 2016. 42 C.F.R. § 1005.12(a). She filed her hearing request approximately two weeks late.

Petitioner does not deny that the I.G.'s notice letter was delivered to her address. P. Br. Att. Instead, she explains that her husband has dementia and hides the mail. *Id.* Under a different regulatory scheme, I might find that Petitioner's explanation establishes good cause for her late filing. However, as explained above, 42 C.F.R. § 1005.2(e)(1) does not permit me to accept a late filing, even upon a showing of good cause.

I therefore have no discretion here, and I dismiss Petitioner's hearing request pursuant to 42 C.F.R. § 1005.2(e)(1).

2. Even if I could consider the merits of Petitioner's hearing request, I would find that the I.G. was required to exclude her for at least five years.

Petitioner's hearing request objected to the five-year exclusion imposed by the I.G. as unreasonable. In this section I explain that, just as the regulations require that I dismiss Petitioner's untimely hearing request, the statute and regulations would also require me to affirm the five-year exclusion imposed by the I.G.

Section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)) provides:

(a) Mandatory exclusion.

The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1320a-7b(f) of this title):

(1) Conviction of program-related crimes

Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under [Medicare] or under any State health care program.

The I.G. presented evidence that Petitioner pled no contest to one count of making a false claim to the Kansas Medicaid program and one count of theft. I.G. Ex. 2. The I.G.'s evidence shows that, in the course of the investigation of Petitioner's conduct, Petitioner admitted that she had filed false time sheets in support of claims for reimbursement from the Kansas Medicaid program. I.G. Ex. 2. The I.G. also offered evidence that the Kansas court accepted Petitioner's plea and sentenced her, among other things, to pay \$21,261.91 in restitution to the Kansas Medicaid program. I.G. Exs. 2, 3.

The I.G.'s evidence shows that Petitioner was convicted of a criminal offense related to the delivery of an item or service under a state health care program, within the meaning of section 1128(a)(1). An individual is "convicted" when, among other things, a court accepts the individual's *nolo contendere* (no contest) plea. Act, section 1128(i) (42 U.S.C. § 1320a-7(i)). The Kansas Medicaid program is a state health care program. 42 C.F.R. § 1001.2 (definition of *State health care program*). Convictions for filing false Medicaid claims are convictions for criminal offenses "related to the delivery of an item or service" under a state health care program. *See, e.g., Clemenceau Theophilus Acquaye*, DAB No. 2745 at 5 (2016). Further, court-ordered restitution to a state Medicaid program establishes a rebuttable presumption that the underlying offense was related to the delivery of an item or service under the program. *See, e.g., Johnnelle Johnson Bing*, DAB CR1938 at 6 (2009) (citing *Alexander Nepomuceno Jamias*, DAB CR1480 (2006)), *aff'd*, *Johnnelle Johnson Bing*, DAB No. 2251 (2009).

Petitioner admits that she was convicted of a criminal offense, but does not agree that the I.G. was required to exclude her. P. Br. However, Petitioner offers no explanation or argument in support of her position. Nor did she offer any documentary evidence or witness testimony. Thus, there is nothing of record to rebut the I.G.'s evidence.

By statute, an individual who has been convicted of a program-related crime (such as submitting false claims to Medicaid) must be excluded for a minimum period of five years. Act, section 1128(c)(3)(B) (42 U.S.C. § 1320a-7(c)(3)(B)). Neither the I.G. nor an administrative law judge has discretion to decline to exclude such an individual or to exclude such an individual for less than five years.

Thus, even if Petitioner had filed her hearing request timely and I could address the merits of her case, I would conclude that she must be excluded from participation in Medicare, Medicaid, and all federal health care programs for five years.

/s/
Leslie A. Weyn
Administrative Law Judge