Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Anthony J. Conti
(O.I. File Number 4-04-40105-9),

Petitioner

v.

The Inspector General.

Docket No. C-11-646

Decision No. CR2477

Date: December 14, 2011

DECISION

This matter is before me on the Inspector General's (I.G.'s) motion to dismiss for untimely filing of Petitioner's hearing request. It arises in the context of the I.G.'s determination to exclude Petitioner, Anthony J. Conti, 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 must grant the I.G.'s motion to dismiss. 42 C.F.R. § 1005.2(e)(1).

I. Procedural Background

By letter dated November 28, 2008 (notice letter), the I.G. notified Petitioner that he was to be excluded from Medicare, Medicaid, and all federal health care programs for a period of five years. This notice letter was mailed to Petitioner at 7903 Innisbrook Court, Prospect, Kentucky, the address at which he currently resides. Petitioner's Hearing Request (P. Hearing Request). The notice letter advised Petitioner of his appeal rights and that a request for hearing had to be made in writing within 60 days of his receipt of

the notice letter. The notice letter also provided Petitioner with the address to which his request should be mailed. I.G. Exhibit (Ex.) 1. Petitioner requested a hearing by letter dated July 22, 2011, sent by U.S. Mail and postmarked July 25, 2011, approximately two-and-a-half-years after the date on the notice letter.

I convened a prehearing conference by telephone on August 16, 2011. During the conference, the timeliness of Petitioner's request for hearing was discussed. Counsel for the I.G. stated her intention to seek dismissal of the request for hearing as untimely. I established a briefing schedule for the parties to submit their positions and exhibits.

The I.G. filed a motion to dismiss and supporting brief-in-chief (I.G. Br.), accompanied by five exhibits. Petitioner filed an answer brief (P. Br.), accompanied by two exhibits and a copy of I.G. Ex. 2. Both parties submitted reply briefs (I.G. and P. Reply). All briefing is now complete, and the record in this case closed for purposes of 42 C.F.R. § 1005.20(c) on November 15, 2011. All proffered exhibits are admitted to this evidentiary record. Petitioner's objection to I.G. Ex. 2 is overruled.[1]

II. Issue

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

[1] I.G. Ex. 2 is the written Declaration of Peter Clark, given under penalty of perjury on August 24, 2011. Mr. Clark is the Director, Exclusions Staff (East), Office of Inspector General, United States Department of Health and Human Services. Mr. Clark declares that he was hired into his position as the Director on October 24, 2010. His Declaration describes the policies and practices of his office, in effect at all times relevant to this appeal, regarding notification of individuals, such as Petitioner, excluded by the I.G. from participation in Medicare, Medicaid, and other federal health care programs. Petitioner argues that Mr. Clark cannot attest to whether Petitioner's exclusion letter was sent or returned in 2008 because Mr. Clark was not in this position in 2008. Thus, Petitioner asks that Mr. Clark's testimony be "rejected" because he "simply was not there in 2008." P. Br. at 2. I disagree. The Declaration asserts not only a general familiarity with his office's procedures, but also references Mr. Clark's specific familiarity with Petitioner's case file in the official records of his office. Mr. Clark's assertions are more than sufficient to support my finding that his Declaration is not "unreliable" as that term is used in 42 C.F.R. § 1005.17. *See Ahmed Abouelhoda*, DAB CR2365, at 2 n.1 (2011).

III. Controlling Statutes and Regulations

Section 1128(a) of the Act, 42 U.S.C. § 1320a-7(a), requires the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any individual or entity convicted of certain classes of criminal offenses. The terms of section 1128(a) are restated in similar language at 42 C.F.R. § 1001.101. This mandatory exclusion must be imposed for a minimum of five years. Act § 1128(c)(3)(B), 42 U.S.C. § 1320a-7(c)(3)(B). If aggravating factors are present, the period of exclusion may be enhanced beyond five years. 42 C.F.R. § 1001.102(b).

The I.G. is charged with effecting exclusions based on sections 1128(a) and 1128(c)(3)(B) of the Act. *See* 42 C.F.R. § 1001.1001. If the I.G. determines that a conviction constitutes a proper predicate for exclusion, he must send notice of his intent to exclude to the affected individual or entity. The affected party is permitted to respond to the notice of intent with "documentary evidence and written argument concerning whether the exclusion is warranted and any related issues." 42 C.F.R. § 1001.2001(a).

If the I.G. remains convinced 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 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 § 1001.2002 to file a request for such a hearing.

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

> The request for a hearing will be made in writing to the DAB; signed by the petitioner . . . 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 § . . . 1001.2002 . . . . For purposes of this section, the date of receipt of the notice letter will be presumed 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 . . . hearing request is not filed in a timely manner; . . .

The ALJ may not extend the 60-day deadline. 42 C.F.R. § 1005.2(e)(1). A tardy or dilatory petitioner can gain relief only by negating the presumption of regular delivery through a "reasonable showing" that the I.G.'s notice of exclusion 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 has been 7903 Innisbrook Court, Prospect, Kentucky. I.G. Ex. 1; P. Hearing Request.

2. The I.G. mailed notice of Petitioner's exclusion from Medicare, Medicaid, and all federal health programs, pursuant to section 1128(a)(1) of the Act, to Petitioner's mailing address on November 28, 2008. I.G. Ex. 1.

3. Based on the 60-day period for filing a hearing request, and including another five days for receipt, Petitioner had until February 2, 2009, to file his hearing request. I.G. Ex. 1; I.G. Br. at 3; 42 C.F.R. §§ 1005.2(c); 1005.12.

4. Petitioner filed his request for hearing, dated July 22, 2011, on July 25, 2011.

5. Petitioner has failed to make a reasonable showing that he did not receive the I.G.'s notice letter on or before five days after the date of the notice letter. 42 C.F.R. § 1005.2(c).

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

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

V. Discussion

Petitioner has not made a reasonable showing that he did not receive the notice letter within a five-day period after its mailing on November 28, 2008. My decision applies principles long established in the jurisprudence of this forum. As I discussed in *Jane Masaazi*, DAB CR2264 (2010), the first principle is the presumption of the receipt, within five days, of exclusion notices mailed pursuant to 42 C.F.R. § 1001.2002. This principle is established by regulation at 42 C.F.R. § 1005.2(c), and is acknowledged by the Board in *Kenneth Schrager,* DAB No. 2366 (2011) and *Gary Grossman*, DAB No. 2267 (2009). In the context of this case, that presumption is invoked by I.G. Ex. 2, the

declaration of Peter Clark. Mr. Clark, the Director of the I.G.'s Exclusion Staff (East), asserts that the policy and practice of his office is to notify individuals of their exclusion on the last working day of the month and to send the notice of exclusion letters out on the day they are dated. The date on the letter reflects the date it is placed in the mail. If the letter is returned as undelivered, staff attempts to find another address. If a new address is obtained, staff will send the original letter to the new address, noting the date the letter was sent to the new address. If a letter is not returned to the office, it is presumed that the notice of exclusion letter was delivered within five days. Mr. Clark's review of the case file in Petitioner's case determined that the November 28, 2008 notice letter addressed to Petitioner was not returned. Thus, the policy and practice of Mr. Clark's office would presume the letter was received within five days of the date the letter was mailed. Petitioner's mailing address has not changed from the notice letter to date (and is 7903 Innisbrook Court, Prospect, Kentucky). I.G. Ex. 1; P. Reply. Therefore, the presumption established by 42 C.F.R. § 1005.2(c) – that Petitioner's receipt of the I.G.'s November 28, 2008 notice letter occurred not later than five days after the date of that notice letter – establishes February 2, 2009 as the latest date for filing a hearing request. As noted, this presumption of receipt has been specifically acknowledged and endorsed by the Board. Although Petitioner urges that exclusion letters should be sent by certified mail, a certified mailing is not required by section 1128(f) of the Act or by 42 C.F.R. § 1001.2002. *George P. Rowell, M.D.,* DAB CR974 (2002); *Ronald J. Crisp,* DAB CR724 (2000).

The second principle is found in 42 C.F.R. § 1005.11(a)(4) which states: "Papers are considered filed when they are mailed." The postmark on the envelope Petitioner mailed his request for hearing in is July 25, 2011. This second principle establishes the filing date of Petitioner's request for hearing to be July 25, 2011.

The third principle is simply a calculation based on the first two principles. If a request for hearing is to be considered timely filed pursuant to 42 C.F.R. § 1001.2007(b), it must be filed not more than 65 days after the date of the notice letter to which it responds. 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). Petitioner was thus required to file his request for hearing no later than February 2, 2009. 42 C.F.R. §§ 1001.2007(b), 1005.2(c), 1005.12. Petitioner's July 25, 2011 request for hearing was filed approximately two-and-a-half years after the date of the notice letter.

The fourth principle is the well-established notion 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. *Kenneth Schrager,* DAB No. 2366, at 4; *Gary Grossman*, DAB No. 2267, at 8; *Jane Masaazi,* DAB CR2264, at 6. To prevail against it, Petitioner must rebut the presumption of regular delivery through a "reasonable showing" based on articulated facts shown by real evidence, and not on

speculation and unsupported or self-serving assertions. As I discuss below, Petitioner has failed to do so here.

Petitioner contends that he did not receive the I.G.'s November 28, 2008 notice letter. To support this argument, Petitioner submits the declaration of his wife, Victoria Conti (P. Ex. 1). In her declaration, Ms. Conti states that she was the one collecting the mail at the time in question, that she would have noticed mail from a government agency (given that they were in the midst of legal proceedings at the time), and that she would have promptly given such a letter to their attorney and a response would have been filed immediately. In his hearing request, his answer to the I.G.'s brief, and his reply, Petitioner echoes his wife's declaration and states that he was never late with responses during the legal proceedings leading to the conviction upon which his exclusion is based, and thus would have filed a timely hearing request had he received the notice letter. Petitioner also argues that the post office does not deliver every piece of mail to the correct recipient, implying that the notice letter could have been received by someone else and not forwarded on to him or that it might otherwise have been lost. Petitioner submits as alleged evidence of this copies of what appear to be two undated postcard type solicitations (copied and filed on one sheet of paper as P. Ex. 2) addressed to two of his neighbors (neighbors who share the same last name), at 7091 and 70091 Innisbrook Court respectively. Petitioner states he received them "recently."[2] P. Br. at 2.

On this record, Petitioner has failed to make a reasonable showing to the contrary of his presumed receipt of the I.G.'s November 28, 2008 notice letter not later than five days after its mailing. The Board has held that a sworn statement by a petitioner alone is insufficient to rebut the regulation's presumption of receipt of a notice letter, absent sufficient explanation or corroborating evidence. *Kenneth Schrager,* DAB No. 2366, at 4. Ms. Conti's declaration denying receipt of the notice letter is inherently unreliable, as it is self-serving and without corroboration, as are Petitioner's echoing statements. Petitioner's statements, and his wife's declaration, are thus insufficient to rebut the presumption that the I.G.'s notice letter was received not later than five days after its mailing. Further, Petitioner's hypotheses explaining non-receipt, that the post office may have lost the notice letter or that a neighbor may have received the letter and not forwarded it to him or returned it to the post office, are highly speculative and self-serving. Petitioner has not explained why the notice letter would not have been brought to him by a neighbor or returned to postal authorities if received in error, or offered any serious reason to believe that delivery errors occurred at exactly the time necessary to affect this case. Petitioner does not explain why the I.G. received nothing from postal authorities showing the notice letter was undeliverable. The copies of the recent mailings Petitioner received from his neighbors were not sent during the relevant time and thus have no relevance to this proceeding. Petitioner has not shown that there is a pattern of

[2] There is no postmark on either of the two solicitations filed as P. Ex. 2.

problems with his receipt of mail. Petitioner has given me no colorable basis to form even a passing doubt at odds with the presumed regular delivery of the notice letter. I note that the I.G. has filed exhibits reflecting that Petitioner was aware that he was on the I.G.'s exclusion list in the summer of 2010. Specifically, on July 13, 2010, Petitioner's counsel wrote the I.G. a letter in which the attorney noted that "[w]e have discovered that Mr. Conti is listed as an excluded individual on the OIG web site for such exclusions." Counsel further stated that Petitioner had not received "final notification that such a listing was to occur." She asked that Petitioner's name be removed. Petitioner was copied on the letter. I.G. Ex. 4. On September 8, 2010, Petitioner's counsel again wrote to the I.G. asking that Petitioner's name be removed from the exclusion list. Petitioner was copied on the letter. I.G. Ex. 5. Petitioner's counsel did not assert that Petitioner did not receive notice of his exclusion in 2008, merely that he did not know "such a listing was to occur." I.G. Ex. 4, at 2.

Counsel's letters do not prove whether Petitioner received notice of his exclusion within five days of the notice letter's mailing. Petitioner did not draft the letters and, even if the letters had explicitly stated that Petitioner did not receive his notice letter, the argument would fail for the reasons discussed above. What the letters do reflect, however, is that Petitioner had notice of his exclusion in July 2010 (by receiving a copy of his counsel's letter) and could have requested a copy of his notice letter and appealed his exclusion at that time. Instead, Petitioner apparently waited one year to request a copy of his notice letter from the I.G. and file his hearing request. P. Hearing Request. The Board has held that constructive notice is insufficient to commence the 60-day appeal period. *Mark K. Mileski*, DAB No. 1945 (2004). Thus, Petitioner's dilatory behavior in response to learning that he was on an exclusion list does not preclude, on the grounds of timeliness from July 2010, his argument that he did not receive his notice letter. However, had Petitioner actually not received his notice letter within five days of November 28, 2008, it is unclear to me why he or his counsel did not request a copy of the notice letter in July 2010. I could infer from this failure that Petitioner already knew about his exclusion in July 2010 based on his timely receipt of the November 28, 2008 notice letter. I decline to make this inference, however, as it is not necessary to my decision in the case.

Petitioner also asserts that the I.G. is basing his five-year exclusion on his plea to a one-count misdemeanor, resulting in only a $100 fine and $300 in court costs, thus suggesting that his exclusion is disproportionate to his conviction. As Petitioner's hearing request is untimely, I cannot consider this argument or any other argument regarding the merits of his case.

In sum, Petitioner's request for hearing, filed as it was on July 25, 2011, is out of time by approximately two-and-a-half-years. The terms of 42 C.F.R. § 1005.2(c) establish the presumptive date of Petitioner's receipt of the I.G.'s November 28, 2008 notice letter as five days after the date of the notice letter. That presumption has not been rebutted by a reasonable showing to the contrary. The period for filing Petitioner's request for hearing

established by 42 C.F.R. §§ 1001.2007(b) and 1005.2(c) thus expired on February 2, 2009. The regulations and the unvarying decisions of this forum deny an ALJ the authority to extend the filing period. Petitioner's request for hearing is untimely and it must be dismissed. 42 C.F.R. § 1005.2(e)(1).

V. Conclusion

For the reasons set forth above, I grant the I.G.'s motion to dismiss. The request for hearing filed by Petitioner Anthony J. Conti on July 25, 2011 must be, and it is, DISMISSED.

/s/
Richard J. Smith
Administrative Law Judge