

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Julio M. Soto, M.D.,	)	DATE: April 18, 1996
Petitioner,	)	
- v. -	)	Docket No. C-96-104
The Inspector General.	)	Decision No. CR418

DECISION

I dismiss Petitioner's request for a hearing. Petitioner has no right to a hearing because his request for a hearing is untimely. Petitioner has not shown good cause for not having made his request timely.

I. Background

On May 17, 1991, the Inspector General (I.G.) sent a notice to Petitioner advising Petitioner that he was being excluded from participating in Medicare and other federally funded health care programs, including Medicaid. I.G. Ex. 2.<sup>1</sup> Petitioner did not request a hearing to challenge the exclusion until January 26, 1996. In his request for a hearing, Petitioner averred that he did not receive a copy of the I.G.'s notice of exclusion until January 16, 1996.

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<sup>1</sup> The I.G. submitted five exhibits (I.G. Exs. 1 - 5) to support her motion to dismiss Petitioner's request for a hearing. Petitioner submitted an affidavit from Petitioner and an affidavit from Petitioner's wife, Alice Soto, in opposition to the motion. Petitioner did not designate these affidavits as exhibits. I am designating the affidavit of Petitioner as P. Ex. 1, and the affidavit of Petitioner's wife as P. Ex. 2. I am receiving into evidence I.G. Exs. 1 - 5 and P. Exs. 1, 2 on the issues of whether the I.G. provided Petitioner with notice of his exclusion, and whether Petitioner established good cause for not requesting a hearing timely.

The I.G. moved to dismiss Petitioner's hearing request on the grounds that Petitioner did not request a hearing timely and that Petitioner has not demonstrated good cause for failing to make his request timely. Petitioner opposed the motion.

## II. Issues, findings of fact and conclusions of law

There are two issues in this case. First, is Petitioner entitled to a hearing? Second, if Petitioner is not entitled to a hearing because he did not make a timely request for a hearing, has he established good cause for not making a timely request? In concluding that Petitioner has not established any basis to be given a hearing, I make the following findings of fact and conclusions of law (Findings). I discuss my findings in detail, below.

1. Petitioner would be entitled to a hearing if he had made a request for a hearing within 60 days of his receipt of the I.G.'s notice of exclusion.
2. An excluded individual is presumed to have received a notice of exclusion that is delivered to the excluded individual's address.
3. Petitioner received the I.G.'s notice of exclusion on May 25, 1991.
4. Petitioner did not make a request for a hearing within 60 days of his receipt of the I.G.'s notice of exclusion and, therefore, is not entitled to a hearing in this case.
5. Petitioner has not shown good cause for failing to make a timely request for a hearing in this case.

## III. Discussion

### A. The circumstances under which Petitioner would be entitled to a hearing (Finding 1)

The I.G. excluded Petitioner pursuant to section 1128(b)(4) of the Social Security Act (Act). An individual who is excluded under any of the subsections of section 1128 of the Act has a right to an administrative hearing to challenge the I.G.'s authority to impose the exclusion and the length of the exclusion. Act, section 1128(f); see Act, section 205(b).

However, the right to a hearing is conditioned on the excluded individual making a timely request for a hearing after receiving notice of the I.G.'s exclusion determination. An excluded individual or entity who fails to request a hearing timely loses the right to a hearing. Under the regulations which were in effect in 1991, when Petitioner was excluded, an administrative law judge may dismiss a request for hearing that is not made by an individual within 60 days from receipt by the individual of the I.G.'s notice letter. 42 C.F.R. §§ 498.40(a), 498.70(c).<sup>2</sup>

B. The presumption that an excluded individual has received a notice of exclusion that is delivered to that individual's address (Finding 2)

The Act imposes on the I.G. the duty to provide an excluded individual with "reasonable notice" of that person's exclusion. Act, section 1128(f). The duty to provide an individual with reasonable notice of an exclusion is not a duty to serve that individual personally with the notice of exclusion. It is a duty to take reasonable steps to assure that the notice is delivered to the excluded individual. That duty is discharged by sending the notice in the United States mail to the excluded individual's mailing address. Sunil R. Lahiri, M.D., DAB CR296, at 16 (1993); Charles K. Angelo, Jr., M.D., DAB CR290, at 13 (1993); see Louis W. DeInnocentes, Jr., M.D., DAB CR247, at 36 - 40 (1992).

In opting to require the I.G. to provide an excluded individual with reasonable notice of his or her exclusion, Congress made a policy decision that it would be inappropriate to impose on the I.G. the more demanding burden of obtaining personal service on the excluded individual. The overriding purpose of the exclusion law is to protect federally funded health care programs and their beneficiaries and recipients from untrustworthy individuals. It might frustrate the purpose of the law to impose a personal service requirement on the I.G., because in some cases, clever or lucky individuals could avoid an exclusion by evading personal service, or by being unavailable to be served. Lahiri at 17; DeInnocentes at 38 - 39.

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<sup>2</sup> Regulations which became effective in 1992, and which apply to exclusions imposed after the regulations became effective, also give an excluded individual 60 days from receipt of the I.G.'s notice to request a hearing. 42 C.F.R. § 1005.2(c).

Delivery of a notice of exclusion to an excluded individual's address is all but conclusive evidence that the individual received the notice. Lahiri at 14 - 15. Conceivably, there might be a circumstance where an excluded individual proves that he or she did not receive a notice, despite it having been delivered to his or her address. For example, an excluded individual might prove that the person who physically received the notice destroyed it without advising the excluded person that the notice was received. But the burden lies on the excluded individual to prove the existence of an extraordinary event to rebut the heavy presumption of receipt that follows from the fact of delivery of a notice to the excluded individual's address. Id.

A simple denial by an excluded individual that he or she received a notice, in the face of proof that the notice was delivered to that individual's address, will not suffice to overcome the presumption of receipt that flows from proof of delivery of a notice. If the presumption could be overcome merely by the excluded individual denying receipt of the notice, then the presumption of receipt would be meaningless. In most circumstances where an excluded individual denies receipt of an exclusion notice despite proof of delivery of the notice to that individual's address, the I.G. would be unable to adduce evidence that would rebut the denial of receipt.

C. Petitioner's receipt of the I.G.'s exclusion notice and his failure to request a hearing timely (Findings 3, 4)

I find that Petitioner received the I.G.'s exclusion notice on May 25, 1991. I base my conclusion on: (1) the presumption of receipt that results from the I.G. having proved that the notice was delivered to Petitioner's address on May 25, 1991 and (2) Petitioner's failure to overcome the presumption of receipt. Petitioner had 60 days from May 25, 1991 to request a hearing in this case. He failed to exercise his right to request a hearing within the 60-day period.

The I.G. sent the notice of exclusion to Petitioner on May 17, 1991. The I.G. sent the notice to Petitioner's address. The address on the notice, 124 Scarsdale Road, Crestwood, New York 10707, is an address to which notices were sent to Petitioner by the I.G., the New York State Department of Social Services, and the Commissioner of Education of the State of New York. I.G. Exs. 1, 2, 4, 5. Petitioner has not denied that the 124 Scarsdale Road address was an address at which he received mail in 1991. Indeed, the I.G. had previously sent Petitioner a notice

of the I.G.'s intent to impose an exclusion at the 124 Scarsdale Road mailing address, and Petitioner does not deny having received this previous notice. I.G. Ex. 1.

The I.G. sent the notice of the exclusion to Petitioner's address by certified mail, return receipt requested. I.G. Ex. 3. An individual at Petitioner's address signed for the notice on May 25, 1991, thus proving delivery of the notice to Petitioner's address on that date. Id.

Petitioner avers that neither he, his wife, nor their children signed the return receipt for the notice. P. Exs. 1, 2. Both Petitioner and Petitioner's wife deny seeing the notice until years after the date of the notice. Id. Petitioner argues that his January 26, 1996 hearing request is timely, based on his contention that he did not see the I.G.'s notice of exclusion until years after it was delivered to his address.

For purposes of this decision, I accept as true the assertions by Petitioner and his wife that neither of them nor any of their children signed the return receipt for the notice. But the fact that someone other than Petitioner, his wife, or their children may have signed the return receipt does not vitiate the proof, in the form of the return receipt, that the notice was delivered to Petitioner's address on May 25, 1991.

The proof of delivery establishes a presumption that Petitioner received the notice on May 25, 1991. The denial by Petitioner and his wife, without elaboration or explanation, that neither of them saw the notice until years after its delivery is insufficient to overcome this presumption. Petitioner has not offered any evidence of extraordinary circumstances which precluded him from seeing the notice after delivery of the notice to Petitioner's address.

Moreover, Petitioner's denial that he received the notice is not credible. He has offered inconsistent statements as to when he first saw the I.G.'s exclusion notice. Petitioner has not attempted to explain the discrepancies in the various recitations which he has offered, or which have been offered on his behalf, of the date when Petitioner first saw the I.G.'s May 17, 1991 exclusion notice. In his request for a hearing, Petitioner avers that he first saw the May 17, 1991 exclusion notice on January 16, 1996. He asserts that he received a copy of the notice only after making numerous calls to various Medicare offices. However, in his affidavit, Petitioner does not recite when he first saw the I.G.'s exclusion notice, except to say that he "never saw the letter in

question until years . . . [after it was mailed to him]." P. Ex. 1. In her affidavit, Petitioner's wife says that Petitioner first showed her a copy of the I.G.'s exclusion notice in 1995. P. Ex. 2.

D. The absence of good cause for Petitioner's failure to request a hearing timely (Finding 5)

Under regulations which applied when Petitioner received the I.G.'s notice of exclusion, an administrative law judge can extend a deadline for filing a hearing request where the excluded individual establishes good cause for not making the request timely. 42 C.F.R. § 498.40(c).<sup>3</sup>

The term "good cause" is not defined in the regulations. It has been held to mean circumstances beyond an excluded individual's ability to control which prevent that individual from requesting a hearing timely. Hospicio San Martin, DAB 1554, at 5 (1996).<sup>4</sup>

Petitioner has not established the presence of good cause for his failure to timely request a hearing in this case. He has not made any showing that he was prevented from requesting a hearing timely by circumstances that were beyond his ability to control. He has not offered a meaningful explanation for his assertion that he did not see the I.G.'s exclusion notice when it was delivered to his address.

Furthermore, Petitioner's assertion that he did not request a hearing until January 1996, because he was not aware until then that he had been excluded from participating in Medicare is not credible. Even if Petitioner misplaced or did not read the exclusion notice

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<sup>3</sup> Arguably, under the regulations which replaced the Part 498 regulations for cases involving the I.G., and which became effective in 1992, an administrative law judge would not have the authority to extend a deadline for making a hearing request. The current regulations provide that an administrative law judge "will" dismiss a request for a hearing where the request is not made timely. 42 C.F.R. § 1005.2(e)(1).

<sup>4</sup> Although the Hospicio San Martin case involves the Health Care Financing Administration (HCFA), and not the I.G., it is applicable here because the Part 498 regulations continue to govern cases involving HCFA. Hospicio San Martin and this case therefore involve application of the same regulation, 42 C.F.R. § 498.40(c), in analogous circumstances.

which he received on May 25, 1991, he received additional notice of the Medicare exclusion, within a few months from May 25, 1991.

After the I.G. sent the exclusion notice to Petitioner, the New York Department of Social Services advised Petitioner that he was being excluded from participating in the New York Medicaid program. I.G. Ex. 4. The exact date of that notice is unclear, inasmuch as the copy offered by the I.G. as evidence in this case is undated. However, the copy bears the date stamp of the HHS Office of Investigations, New York Field Office, and the date stamped on the copy is September 27, 1991. Id. at 1. From this, I conclude that Petitioner was sent the New York Department of Social Services notice on or before September 27, 1991.

The New York Department of Social Services notice advised Petitioner that:

. . . you have been excluded from participation in the Medicare program by the Office of Inspector General, Department of Health & Human Services.

I.G. Ex. 4 at 1. It advised Petitioner further that:

[t]his determination was made based upon the written notice previously issued to you by the Department of Health & Human Services on 05/17/91.

Id. Petitioner has not denied receiving this additional notice.

#### IV. Conclusion

I conclude that Petitioner did not request a hearing timely, and therefore, is not entitled to a hearing. I conclude also that Petitioner has not established good cause for his failure to request a hearing timely. Therefore, I dismiss Petitioner's request for a hearing.

/s/

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Steven T. Kessel  
Administrative Law Judge