

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

William Wytttenbach, M.D.
(OI File No. H-15-41629-9),

Petitioner,

v.

The Inspector General,
U.S. Department of Health and Human Services.

Docket No. C-16-156

Decision No. CR4561

Date: March 30, 2016

DECISION

The request for hearing of Petitioner, William Wytttenbach, M.D., is dismissed pursuant to 42 C.F.R. § 1005.2(e)(1),¹ because it was untimely filed.

I. Background

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated August 31, 2015, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs, effective September 20, 2015. The I.G. cited section 1128(b)(4) of the Social Security Act (the Act) (42 U.S.C. § 1320a-7(b)(4)) as the basis for Petitioner's exclusion citing the fact that Petitioner's license to practice medicine in the State of Kentucky had been revoked, suspended, or otherwise lost while a formal disciplinary action was pending before the Kentucky Board

¹ References are to the 2014 revision of the Code of Federal Regulations (C.F.R.) in effect at the time of the agency action, unless otherwise stated.

of Medical Licensure related to Petitioner's professional performance, professional competence, or financial integrity. The I.G. also advised Petitioner that he was excluded until such time as he regains his medical license in Kentucky and is reinstated by the I.G. Exhibit (Ex.) 1.

Petitioner filed a request for hearing (RFH) on December 4, 2015. The case was assigned to me for hearing and decision on December 8, 2015. A prehearing conference was convened on January 6, 2016. The substance of the prehearing conference is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence dated January 6, 2016 (Prehearing Order). During the prehearing conference, the I.G. requested to file a motion to dismiss prior to case development. I set a briefing schedule for a motion to dismiss by the I.G. Prehearing Order ¶ 5.

The I.G. filed a motion to dismiss and supporting memorandum on February 5, 2016, with I.G. Exhibit (Ex.) 1. On March 5, 2016, Petitioner filed a response to the I.G. motion (P. Response). Petitioner did not object to I.G. Ex. 1 and it is admitted as evidence.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's rights to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of the United States Department of Health and Human Services (Secretary). The Secretary has provided by regulation that an excluded individual has the right to request a hearing before an ALJ. 42 C.F.R. §§ 1001.2007(a)(1), 1005.2(a). The regulations require that a request for hearing be in writing and be filed not more than 60 days from the date of receipt of the notice of exclusion. 42 C.F.R. §§ 1001.2007(b), 1005.2(c). The notice of exclusion is presumed to be received five days after the date on the notice, unless there is a reasonable showing to the contrary. 42 C.F.R. § 1005.2(c). I am required to dismiss a request for hearing that is not filed timely. 42 C.F.R. § 1005.2(e)(1). The regulations grant me no discretion to waive a late filing or to extend the time for filing.

B. Issue

Whether Petitioner's request for hearing must be dismissed because it was not timely filed?

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

- 1. Petitioner's request for hearing was not timely filed.**
- 2. Petitioner's request for hearing must be dismissed pursuant to 42 C.F.R. § 1005.2(e)(1).**

There is no dispute that the I.G. mailed Petitioner a letter dated August 31, 2015, notifying Petitioner of his exclusion from Medicare, Medicaid, and all federal health care programs. I.G. Ex. 1. Pursuant to 42 C.F.R. § 1005.2(c), there is a rebuttable presumption that the August 31, 2015 notice was received by Petitioner on Saturday, September 5, 2015. As discussed hereafter, Petitioner has not presented credible evidence or argued that he received the notice of exclusion after September 5, 2015. Pursuant to 42 C.F.R. §§ 1001.2007(b) and 1005.2(c), Petitioner had 60 days to file his request for hearing. The 60th day after Petitioner's presumed receipt of the notice of exclusion fell on Wednesday, November 4, 2015.

There is no dispute that Petitioner filed his request for hearing using the Departmental Appeals Board Electronic Filing System (DAB E-File) on December 4, 2015. Petitioner's request for hearing had to be filed not later than November 4, 2015, but he did not file the request for hearing until December 4, 2015, which was 30 days late. Because Petitioner's request for hearing was 30 days late, the I.G. has moved that this case be dismissed.

The regulations grant me no discretion to extend the time for filing a request for hearing or to excuse the late filing of a request for hearing. I am required to dismiss a hearing request that is not timely filed. 42 C.F.R. § 1005.2(e)(1). Petitioner's only possible defense to the motion to dismiss is a showing that he received the August 31, 2015 notice of exclusion not more than 60 days prior to December 4, 2015. Petitioner would need to show that he received the notice of exclusion on or after October 5, 2015. Petitioner has failed to make the required showing. Accordingly, I have no discretion but must dismiss Petitioner's request for hearing.

Petitioner alleges in his request for hearing that the notice of exclusion was sent to him first class mail, not certified mail, and it was not forwarded to him promptly at his new address in Tennessee. He also alleges that he was ill and with limited resources, essentially in "survival mode" and the notice of exclusion was "filed in a box unread." RFH at 3. He argued and presented evidence that he was hospitalized in Knoxville, Tennessee with "severe life threatening" conditions. RFH at 3, 17 (Attachment D). However, according to the copy of the bill he provided his treatment began on November

4, 2015, well after his presumed receipt of the notice of exclusion on September 5, 2015. RFH at 17 (Attachment D). Petitioner does not allege in his request for hearing that he received the notice of exclusion on or after October 5, 2015. In his response to the motion to dismiss, he argues that some of the mail sent to him in Florida and forwarded to Tennessee was “markedly delayed, probably some lost.” P. Response at 2 ¶ 6. Petitioner does not allege that the notice of exclusion, which was addressed to him in Fort Myers (I.G. Ex. 1), was received on or after October 5, 2015. Petitioner did not file any evidence to show the date he actually received the notice of exclusion. Petitioner failed to show that his request for hearing was filed within 60 days of his receipt of the notice of exclusion.

Petitioner advances several arguments about his past medical practice, his financial challenges, his health challenges, the merits of the revocation of his Kentucky medical license, his attempts to have the action against his license overturned, and the fact he finds it necessary to proceed without an attorney. RFH; P. Response. However, none of Petitioner’s arguments may be considered because he failed to show that his request for hearing was timely filed. I am without jurisdiction to review the merits of this case. Therefore, I have no option but to dismiss Petitioner’s request for hearing.

Accordingly, I conclude Petitioner did not timely file a request for hearing and dismissal is required by 42 C.F.R. § 1005.2(e)(1).

III. Conclusion

For the foregoing reasons, Petitioner’s request for hearing is dismissed.

/s/
Keith W. Sickendick
Administrative Law Judge