

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)
Yolanda Lewis,) Date: September 23, 2008
Petitioner,) Docket No. C-08-384
-v.-) Decision No. CR1844
The Inspector General.)

DECISION

Petitioner, Yolanda Lewis, failed to file her request for hearing before an administrative law judge (ALJ) in a timely manner. Accordingly, the request for hearing is dismissed pursuant to 42 C.F.R. § 1005.2(e)(1).

Petitioner is excluded from participation in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(b)(4)(A) of the Social Security Act (the Act) (42 U.S.C. § 1320a-7(b)(4)(A)), effective January 19, 2006, because her license to provide health care as a nurse in the State of Mississippi was revoked by the Mississippi State Board of Nursing, for reasons bearing upon her professional competence, professional performance, or her financial integrity. There is a proper basis for exclusion. Petitioner's exclusion for not less than the period during which her state license is revoked is required by the Act.¹ Act § 1128(c)(3)(E) (42 U.S.C. § 1320a-7(c)(3)(E)).

¹ Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

I. Background

The Inspector General for the Department of Health and Human Services (the I.G.) notified Petitioner by letter dated December 30, 2005, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(4) of the Act for not less than the period that her license is revoked, suspended, or otherwise lost or surrendered. I.G. Exhibit (I.G. Ex.) 7; Petitioner Exhibit (P. Ex.) 4.

Petitioner requested a hearing by letter dated April 4, 2008. The case was assigned to me for hearing and decision on April 16, 2008. On May 5, 2008, I convened a prehearing telephonic conference, the substance of which is memorialized in my Order dated May 6, 2008. The I.G. alleged that Petitioner's request for hearing was untimely filed and that it must be dismissed. I established a briefing schedule for an I.G. motion to dismiss and also granted the I.G. leave to file an alternate motion for summary judgment.

On June 13, 2008,² the I.G. filed a motion to dismiss or, in the alternative, for summary affirmance, which I construe to be a request for summary judgment, with a supporting brief, and exhibits 1 through 10. Petitioner filed her response to the motions on July 3, 2008 (P. Response), with exhibits 1 through 9. The I.G. advised me by letter dated July 30, 2008, that the I.G. elected not to file a reply brief. No objection has been made to the admissibility of any of the proposed exhibits and I.G. Exs. 1 through 10, and P. Exs. 1 through 9, are admitted.

II. Discussion

A. Findings of Fact

The following findings of fact are based upon the uncontested and undisputed assertions of fact in the pleadings and the exhibits admitted. Citations may be found in the analysis section of this decision if not included here.

1. The I.G. notified Petitioner by letter dated December 30, 2005, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(4) of the Act, for a period of not less than the period during which her state license is revoked. I.G. Ex. 7.

² The I.G. motion for leave to file out-of-time is granted. Petitioner did not oppose the motion and the I.G. stated good cause for filing seven days out-of-time.

2. Petitioner's April 4, 2008 request for hearing was not filed within 60 days of the presumed receipt of the December 30, 2005 I.G. notice of exclusion.
3. Petitioner's nursing license was revoked by the Mississippi State Board of Nursing on September 8, 2005. I.G. Ex. 9.
4. Revocation of Petitioner's nursing license was for reasons bearing upon her professional competence. I.G. Exs. 8, 9.

B. Conclusions of Law

1. Petitioner did not rebut the presumption that she received the December 30, 2005 I.G. notice of exclusion five days from the date of the notice.
2. Petitioner's April 4, 2008 request for hearing was not timely filed within 60 days of receipt of the December 30, 2005 I.G. notice of exclusion.
3. Dismissal of the request for hearing is required.
4. There is a basis for Petitioner's exclusion pursuant to section 1128(b)(4)(A) of the Act.
5. Pursuant to section 1128(c)(3)(E) of the Act, the minimum period of exclusion under section 1128(b)(4) is not less than the period during which Petitioner's state license is revoked, suspended, or surrendered and is presumptively reasonable. *See also* 42 C.F.R. § 1001.501(b)(1).

C. Issues

The Secretary of the Department of Health and Human Services (the Secretary) has by regulation limited my scope of review to the following issues:

Whether Petitioner's request for hearing was timely filed;

Whether there is a basis for the imposition of the exclusion; and,

Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1); 42 C.F.R. § 1005.2(c).

D. Law Applicable

Petitioner's right to a hearing by an ALJ and judicial review of the final action of the Secretary is provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)). Pursuant to 42 C.F.R. § 1005.2(c), a request for hearing must be filed within 60 days of the date on which the notice of exclusion is received by the person to be excluded. The regulation establishes the rebuttable presumption that the date of receipt is five days after the date of the notice unless there is a reasonable showing to the contrary. *Id.* A request for hearing that is not filed timely must be dismissed. 42 C.F.R. § 1005.2(e)(1).

Pursuant to section 1128(b)(4)(A) of the Act, the Secretary may exclude from participation in Medicare, Medicaid, and all federal health care programs, any individual whose license to provide health care is revoked or suspended by any state licensing authority for reasons bearing upon the individual's professional competence, professional performance, or financial integrity. *See also* 42 C.F.R. § 1001.501(a)(1).

There is no issue regarding the duration of the exclusion, as section 1128(c)(3)(E) of the Act specifies that the exclusion shall not be less than the period during which her state license to provide health care is revoked, suspended, or surrendered. *See also* 42 C.F.R. § 1001.501(b)(1). The Secretary's regulations provide that the I.G. will consider a request for reinstatement only after the individual obtains a valid license in the state where the individual's license was originally surrendered. 42 C.F.R. § 1001.501(b)(4).

The standard of proof is a preponderance of the evidence and there may be no collateral attack of the conviction that is the basis for the exclusion. 42 C.F.R. § 1001.2007(c) and (d). Petitioner bears the burden of proof and persuasion on any affirmative defenses or mitigating factors and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b) and (c).

E. Analysis

1. Petitioner has not rebutted the presumption of receipt of the I.G. notice of exclusion and dismissal of the request for hearing is required.

There is no dispute that the I.G. notice of exclusion was dated December 30, 2005, or that it included advice to Petitioner of the right to request a hearing within 60 days of receipt of the notice. I.G. Ex. 7; P. Ex. 4. Pursuant to 42 C.F.R. § 1005.2(c), Petitioner is presumed to have received the I.G. notice five days after the date on the I.G. notice, or January 4, 2006 in this case. There is also no question that Petitioner did not request a hearing until she did so by letter dated April 4, 2008, obviously more than 60 days after the I.G. notice of exclusion should have been received. Pursuant to 42 C.F.R. § 1005.2(e)(1), a request for hearing that is not timely filed must be dismissed. The

regulations grant me no discretion to waive a late filing or to extend the time for filing. In this case, however, Petitioner argues that she did not receive the I.G. notice of exclusion and the issue is whether Petitioner has rebutted the presumption of receipt of the notice. I conclude that she has not rebutted the presumption and dismissal is required.

The I.G. sent Petitioner a letter dated October 3, 2005, to an address in Meridian, Mississippi. The letter advised Petitioner that the I.G. was considering excluding her from participation pursuant to section 1128(b)(4) of the Act. I.G. Ex. 1, at 1-2. A copy of the face of the envelope reflects that on October 7, 2005, the United States Postal Service (USPS) marked the envelope “return to sender,” “moved left no address,” and “unable to forward.” I.G. Ex. 2, at 1. On October 17, 2005, the I.G. discovered an address for Petitioner in Brockton, Massachusetts. I.G. Ex. 3. The I.G. sent Petitioner a letter dated October 17, 2005 at the Brockton, Massachusetts address advising her that the I.G. was considering excluding her from participation pursuant to section 1128(b)(4). I.G. Ex. 4. Petitioner responded to the October 17, 2005 I.G. letter by an undated letter received by the I.G. on November 16, 2005. I.G. Ex. 5. Petitioner does not deny that she received the I.G. letter dated October 17, 2005 or that she responded. Petitioner asserts, however, that she received no further correspondence from the I.G. and assumed the matter had been resolved. P. Response at 3-4.

The I.G. sent Petitioner a letter dated December 30, 2005, at the same address that appeared on the I.G. letter dated October 17, 2005. I.G. Exs. 7; 10, at 2-3. The I.G. has no record that the December 30, 2005 notice was returned to the I.G. by the USPS as undeliverable or not delivered. I.G. Ex. 10, at 2. The December 30, 2005 letter advised Petitioner that she was being excluded pursuant to section 1128(a)(4) of the Act. Petitioner offers no explanation for why she might not have received the I.G. letter dated December 30, 2005. Thus, I conclude that Petitioner has failed to rebut the presumption that she received the December 30, 2005 letter on the fifth day after the date on the letter, or about January 4, 2006. The presumed receipt on January 4, 2006 triggered the running of the 60-day period for filing an appeal. Accordingly, Petitioner’s request for hearing dated April 4, 2008 was clearly untimely and must be dismissed.

Even if I reviewed this case as Petitioner requests, I would conclude that there is a basis for her exclusion.

2. Summary judgment is appropriate in this case.

Pursuant to section 1128(f) of the Act, a person subject to exclusion has a right to reasonable notice and an opportunity for a hearing. The right to hearing before an ALJ is accorded to a sanctioned party by 42 C.F.R. § 1005.2 and the rights of both the sanctioned party and the I.G. to participate in a hearing are specified in 42 C.F.R. § 1005.3. Either or both parties may choose to waive appearance at an oral hearing and to submit only

documentary evidence and written argument for my consideration. 42 C.F.R. § 1005.6(b)(5). An ALJ may also resolve a case, in whole or in part, by summary judgment. 42 C.F.R. § 1005.4(b)(12). Summary judgment is appropriate and no hearing is required where either: there are no disputed issues of material fact and the only questions that must be decided involve application of law to the undisputed facts; or, the moving party must prevail as a matter of law even if all disputed facts are resolved in favor of the party against whom the motion is made. A party opposing summary judgment must allege facts which, if true, would refute the facts relied upon by the moving party. *See, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Medical Clinic*, DAB No. 1763 (2001); *Everett Rehabilitation and Medical Center*, DAB No. 1628, at 3 (1997) (in-person hearing required where non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also New Millennium CMHC, Inc.*, DAB CR672 (2000); *New Life Plus Center, CMHC*, DAB CR700 (2000).

There are no genuine issues of material fact in dispute in this case and summary judgment is appropriate. Petitioner does not dispute that her license was revoked by the Mississippi State Board of Nursing, but rather argues that she did not have proper notice of that proceeding and that the decision of the Board of Nursing was based on errors of fact. P. Response at 6. However, pursuant to 42 C.F.R. § 1001.2007, I may not review the decision of the Mississippi State Board of Nursing on either substantive or procedural grounds. Thus, the only issue is whether the revocation of the Petitioner's nursing license by the Mississippi State Board of Nursing is a basis for Petitioner's exclusion from participation in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(4) of the Act.

3. There is a basis for Petitioner's exclusion pursuant to section 1128(b)(4)(A) of the Act.

The I.G. cites section 1128(b)(4)(A) of the Act as the basis for Petitioner's mandatory exclusion. I.G. Ex. 1, at 1; I.G. Brief at 2-3. Section 1128(b)(4)(A) provides:

(b) PERMISSIVE EXCLUSION. – The Secretary may exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):

* * * *

(4) LICENSE REVOCATION OR SUSPENSION. – ANY INDIVIDUAL OR ENTITY –

(A) whose license to provide health care has been revoked or suspended by any State licensing authority, or who otherwise lost such a

