

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Kris Durschmidt
(OI File No.: L-08-40143-9),

Petitioner

v.

The Inspector General.

Docket No. C-10-675

Decision No. CR2224

Date: August 20, 2010

DECISION

Petitioner, Kris Durschmidt, asks review of 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(b)(4) 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.

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 December 31, 2009, the I.G. advised Petitioner that, because the State of Arizona revoked her license to practice as a nursing assistant for reasons bearing on her professional competence, professional performance, or financial integrity, she was excluded from participation in Medicare, Medicaid, and all federal health care programs. With the notice letter, the I.G. sent Petitioner an explanation of her appeal rights: she was entitled to a hearing before an administrative law judge (ALJ) if she filed a written request for review within sixty days after receiving the notice. CMS Ex. 1 at 3.

¹ I make this one finding of fact/conclusion of law.

Petitioner filed her hearing request on April 27, 2010 (received in the Civil Remedies Division on May 3, 2010). Although the request is dated April 17, it is postmarked April 27. 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, accompanied by six exhibits (I.G. Exs. 1-6). Petitioner filed a response with five attachments and ten exhibits (P. Exs. 1-10). The I.G. submitted a reply brief.

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 ALJ *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, we presume that Petitioner received the notice on January 5, 2010. Since the sixtieth day thereafter fell on a Saturday, her hearing request was due no later than March 8, 2010. 42 C.F.R. § 1005.12(a). She filed her hearing request more than seven weeks too late.

Petitioner does not deny that she timely received the I.G.'s notice letter. Instead, she points out that, by electronic mail sent on April 10, 2010, she asked the I.G. to take her name off the exclusion list. P. Br. at 6; P. Ex. 4 at 1-3. Even if I accepted this correspondence as a hearing request (which it plainly is not), Petitioner submitted it well after the March 8 deadline.

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

/s/
Carolyn Cozad Hughes
Administrative Law Judge