

**Department of Health and Human Services  
DEPARTMENTAL APPEALS BOARD  
Appellate Division**

Kris Durschmidt  
Docket No. A-10-108  
Decision No. 2345  
November 19, 2010

**FINAL DECISION ON REVIEW OF  
ADMINISTRATIVE LAW JUDGE DECISION**

Kris Durschmidt (Petitioner) appeals the August 20, 2010 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes dismissing Petitioner's request for hearing as untimely. *Kris Durschmidt*, DAB CR2224 (2010) (ALJ Decision). Ms. Durschmidt sought to challenge her exclusion from participation in Medicare, Medicaid, and all federal health care programs imposed by the Inspector General (I.G.) under section 1128(b)(4) of the Social Security Act.<sup>1</sup> For the reason discussed below, we affirm the ALJ Decision.

**Background**

Petitioner was notified by letter dated December 31, 2009 that she was excluded beginning 20 days after the date of the letter and remaining in effect until reinstatement by the I.G. I.G. Ex. 1. The letter stated that the basis for exclusion was that Petitioner's license to practice as a nursing assistant in Arizona was revoked while a disciplinary proceeding was pending for reasons bearing on professional competence, professional performance, or financial integrity. *Id.* at 1. Enclosed with the notice was information about appeal rights, explaining that, if she disagreed with the exclusion, Petitioner had to request a hearing before an ALJ "in writing within 60 days" of her receipt of the I.G.'s letter of exclusion. *Id.* at 3.

By letter dated April 17, 2010, postmarked April 27, 2010, and received by the ALJ's office on May 3, 2010, Petitioner sought to challenge her exclusion. Hearing Request

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<sup>1</sup> The current version of the Social Security Act can be found at [http://www.socialsecurity.gov/OP\\_Home/ssact/ssact.htm](http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm). Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

(HR). The I.G. moved to dismiss the appeal as untimely filed under the applicable regulations. I.G. Informal Br. at 6-7. The I.G.'s motion was accompanied by exhibits, including the November 14, 2007 state licensing board order on which the exclusion was based referencing "unprofessional conduct" by Petitioner. I.G. Ex. 2, at 5. Petitioner filed a response brief and the I.G. filed a reply. The ALJ made a single finding of fact/conclusion of law that "*Petitioner's hearing request must be dismissed pursuant to 42 C.F.R. § 1005.2(e)(1), because it was not timely filed.*" ALJ Decision at 1 (footnote omitted; emphasis in original). This appeal followed.

### **Analysis**

The regulations governing appeals from I.G. exclusions provide that the hearing request "must be filed within 60 days after the notice . . . is received by the petitioner . . ." 42 C.F.R. § 1005.2(c). Further, the regulation states that, for purposes of the section on timely filing, "the date of receipt of the notice will be presumed to be 5 days after the date of such notice unless there is a reasonable showing to the contrary." *Id.* An ALJ "will dismiss a hearing request" where it "is not filed in a timely manner." 42 C.F.R. § 1005.2(e)(1).

Pursuant to section 1005.2(c), the ALJ presumed that Petitioner received the exclusion notice on January 5, 2010, which would make the hearing request due on March 8, 2010. ALJ Decision at 2. Petitioner did not deny below, and makes no argument on appeal contradicting, the finding that she timely received the I.G.'s exclusion letter nor has she made any showing of a different receipt date. ALJ Decision at 2.

The ALJ states that she has "virtually no discretion" where a hearing request is filed after the 60-day deadline, because the regulations do not include a good-cause exception to excuse untimely filing. ALJ Decision at 2, citing *Maiorano, R.Ph. v. Thompson*, Civ. Action No. 04-2279, 2008 WL 304899 (D.N.J. Feb. 1, 2008).

Ms. Durschmidt argues on appeal that an opportunity for good cause showings should be added if it does not exist. Appeal at 1. The regulatory choice to have no good cause exception, given the relatively long 60-day appeal period, has already been made, however, and we are bound by it.

Even had an opportunity to show good cause been available, moreover, Ms. Durschmidt offers no colorable basis to claim it here. Her only explanation for not acting within 60 days of receiving the I.G.'s exclusion notice was that she did not read it until several days before her hearing request and then she needed to obtain the documents which she included with her hearing request. HR at 1. Not reading an official notice for more than 3 months hardly constitutes good cause for failing to appeal timely.

Ms. Durschmidt makes a number of other contentions in her appeal. Given her failure to appeal her exclusion timely, her arguments on the merits are not properly before us. In

any case, they are without merit. Most amount to collateral attacks on the fairness of the state license proceedings, which may not be considered on appeal of a derivative exclusion. *See, e.g., Marvin L. Gibbs, Jr., M.D.*, DAB No. 2279 (2009). Ms. Durschmidt also argues that the I.G. was 2 ½ years late in excluding her, presumably because the state licensing action took place in 2007. Appeal at 1-2. The Board has held that we do not have the authority to review the timing of the I.G.'s decision to impose an exclusion where the I.G. has a legal basis to exclude. *Kailash C. Singhvi, M.D.*, DAB No. 2138 (2007). Finally, she alleges that her exclusion is somehow discriminatory or unconstitutional in that she is singled out for exclusion due to her political beliefs. Appeal at 3-5. The Board has previously held that its scope of review under the regulations does not extend to equal protection claims. *See, e.g., Lee G. Balos*, DAB No. 1541 (1995).

### **Conclusion**

For the reasons explained above, we affirm the ALJ Decision.

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/s/  
Judith A. Ballard

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/s/  
Stephen M. Godek

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/s/  
Leslie A. Sussan  
Presiding Board Member