DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	)	
	)	
John Vanderhorst,	)	DATE: MAY 19, 1989
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-93
	)	
The Inspector General.	)	DECISION CR 27
	)	

DECISION

This case is before me on Petitioner's request for a hearing challenging his exclusion from participation as a provider in the Medicare and Medicaid programs. I am dismissing the request because it was not timely filed and I do not have good cause to allow a late filing.

By letter dated July 29, 1985, the Inspector General ("I.G.") notified Petitioner that he was being suspended from participation in these programs for twenty years, pursuant to Section 1128(a) of the Social Security Act, 42 U.S.C. 1320a-7(a).1/ The reason provided for Petitioner's exclusion was his conviction in federal court of an offense related to his participation in the Medicare program. Petitioner requested a hearing by submitting a Petition for Modification of Ineligibility Determination, postmarked February 1, 1989, protesting the length of his exclusion.

On April 21, 1989, the I.G. moved to dismiss the Petitioner's hearing request, arguing that it was not timely filed, and that Petitioner had not shown good cause for the untimely filing. On or about April 25, 1989, Petitioner submitted to the I.G. a motion to dismiss his hearing request without prejudice. This motion to dismiss without prejudice was not received by me until May 9,

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1/ The term "exclusion" is currently used to describe the same action as the term "suspension" did in 1985.

1989. On May 2, 1989, the I.G. filed his response to Petitioner's Motion to Dismiss, objecting to the dismissal being without prejudice and asserting that the case should be dismissed with prejudice.

ISSUES

1. Whether Petitioner's hearing request was timely filed.

2. Whether Petitioner had "good cause" for not timely filing his request for hearing.

3. Whether dismissal of Petitioner's hearing request should be with or without prejudice.

APPLICABLE LAWS AND REGULATIONS

1. Section 1128 of the Social Security Act: As of the date of Petitioner's suspension, Section 1128(a) of the Social Security Act, 42 U.S.C. 1320a-7(a), required the Secretary of Health and Human Services (the Secretary) to suspend from participation in the Medicare and Medicaid programs any physician or other individual who had been convicted of a criminal offense related to that person's participation in the delivery of medical care or services under titles XVIII (Medicare), XIX (Medicaid), or XX (block grants to states) of the Act. The law did not prescribe a minimum suspension. The law was revised in August 1987 to require a minimum exclusion from participation in the Medicare and State health care programs (including Medicaid) of five years for any individual or entity "convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program," Pub. L. 100-93 (August 18, 1987), 42 U.S.C. 1320(a)(1) and (c)(3)(B).2/

Both the law in effect as of the date of Petitioner's exclusion and the current law provide that an excluded individual is entitled to an administrative hearing as to the exclusion. The law in effect as of Petitioner's

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2/ Many of the preexisting statute's provisions were retained without significant change as part of the revised statute. For purposes of simplicity, this decision will cite to the revised statute, except where specifically noted.

exclusion provided at 42 U.S.C. 1320a-7(e) that an excluded individual is entitled to a hearing "to the same extent as is provided in section 205(b) of the Social Security Act." Virtually identical language is contained in the 1987 revision at 42 U.S.C. 1320a-7(f)(1). Section 205(b)(1) of the Social Security Act, 42 U.S.C. 405(b)(1), provides that a person entitled to an administrative hearing by virtue of an adverse decision shall be given reasonable notice and opportunity to be heard, and provides further that the hearing decision shall be based "on evidence adduced at the hearing." The statute specified that in order to be entitled to a hearing, a party requesting a hearing must file the request within 60 days from the date the exclusion notice is received.

2. Part 498 of 42 C.F.R.: Regulations adopted by the Secretary implementing the law similarly require, at 42 C.F.R. 498.40(a)(2), that the party requesting the hearing must file the request within 60 days from receipt of the exclusion notice. However, 42 C.F.R. 498.40(c)(2) provides that "for good cause shown," the administrative law judge to whom the case is assigned may extend the time for filing the hearing request.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On July 29, 1985, Petitioner was incarcerated at the U.S. Federal Prison Camp, Terre Haute, Indiana.

2. On July 29, 1985, the I.G. sent written notice to Petitioner, pursuant to 42 U.S.C. 1320a-7(c) and 42 C.F.R. 1001.123, advising him that he would be suspended from participating in the Medicare and Medicaid programs. I.G. Ex. 1.3/

3. The notice was received by Petitioner at the Federal Prison Camp in Terre Haute, Indiana.

4. Petitioner's request for hearing, styled "Petition for Modification of Ineligibility Determination," was postmarked February 1, 1989.

3/ Exhibits and the prehearing conference order will be cited as follows:

I.G.'s Exhibit	I.G. Ex.
Prehearing Order	P.H.O.

5. Petitioner had been released from incarceration for approximately 18 months when he filed his request for hearing.

6. Petitioner's hearing request was not filed within 60 days from Petitioner's receipt of the notice of suspension and Petitioner has not shown good cause for an extension of the filing deadline.

7. Petitioner is not entitled to a hearing, and his untimely request should be dismissed with prejudice.

ANALYSIS

A. Petitioner's Entitlement to a Hearing.

As previously noted, both the Petitioner and the I.G. have moved that Petitioner's hearing request be dismissed, and ordinarily I would simply dismiss the case without discussion. However, since the Petitioner has requested that the dismissal be without prejudice to him and the I.G. has objected, insisting upon a dismissal with prejudice, I must consider the threshold issue of whether Petitioner is entitled to a hearing.

The undisputed facts of this case establish that Petitioner did not file his hearing request within the 60 day limitations period established by statute and regulation. The Secretary is therefore under no obligation to grant Petitioner a hearing. However, the Secretary has established circumstances where a petitioner may be granted a hearing, even though he is not entitled to one. The question is whether "good cause" exists in order to justify a discretionary grant of a hearing.

The regulations do not define "good cause." The regulations governing Social Security disability hearings, which are also conducted pursuant to 42 U.S.C. 405(b), do set forth examples of what would constitute "good cause" for missing the filing deadline in Social Security disability cases. These examples are enumerated at 20 C.F.R. 404.911(b)(1)-(9). All of these examples describe circumstances where the party requesting the hearing endeavors in good faith to request a hearing, but nonetheless fails to meet the statutory and regulatory deadline. These examples are not inclusive of all of the circumstances which would qualify for a "good cause" exception.

The I.G. contends that Petitioner's hearing request, filed more than three years after he received the notice of suspension, was not timely filed. The I.G. argues that, consequently, Petitioner is not entitled to a hearing and that I should dismiss the hearing request with prejudice. Petitioner has merely requested a dismissal of the proceeding without prejudice. Based upon the exhibits, pleadings and the applicable regulations, I conclude that the Petitioner's request was not timely filed, that there was no "good cause" which would justify the lateness of filing, and that Petitioner's hearing request should be dismissed with prejudice.

Petitioner was the owner and chief operating officer of Vanderhorst Ambulance Service, Inc. In the Information filed by the United States Attorney for the Northern District of Ohio, Western Division (I.G. Ex. 3), the U.S. Attorney charged that Vanderhorst Ambulance Service, Inc. transported dialysis patients in the Toledo, Ohio area between January 1, 1980 and December 31, 1982, and that Petitioner fraudulently claimed that such patients were "Bed Confined, Moveable by Stretcher Only," when they were not. The U.S. Attorney further alleged that the false Medicare claims fraudulently billed by Petitioner were in the approximate amount of $490,000.00. Under the terms of the Plea Agreement which Petitioner executed on July 6, 1983 (I.G. Ex. 2), Petitioner agreed "not to engage in the business of transporting patients for a fee, that is the Ambulance business, as either an owner or employee for a period of five years from the date of sentencing. . . ."

Petitioner entered a plea of guilty and was convicted of five counts of filing false Medicare claims in violation of 18 U.S.C. 287. As a result of his conviction, he was incarcerated at the Federal Prison Camp located in Terre Haute, Indiana, when he was notified of his exclusion. Petitioner received the I.G.'s notice of suspension shortly after the mailing date of July 29, 1985. He was out of prison for one and one half to two years before his counsel filed his request for hearing, which was postmarked February 1, 1989.

The regulations provide, at 42 C.F.R. 498.40(a)(2), that a party must file a hearing request within 60 days from "receipt of the notice" in order to be entitled to a hearing. Petitioner did not comply with this regulation when he filed his hearing request on February 1, 1989, more than three years after he received the suspension notice from the I.G. Petitioner has acknowledged that he

received the notice of suspension shortly after it was mailed on July 29, 1985 and that he had been out of prison for over a year and a half before he requested the hearing, yet he has offered no reason for the delay, much less "good cause" to justify it. Thus, it is appropriate to grant a motion to dismiss his request for hearing as not being timely filed.

B. Whether the Dismissal Should be With or Without Prejudice.

Petitioner has asked in his motion to dismiss the hearing request that the dismissal should be without prejudice. The I.G. concurs that dismissal is appropriate, but strenuously objects to a dismissal without prejudice, arguing that Petitioner's request for hearing is untimely and further, that there is no good cause for his delay in making the request. Therefore, the I.G. contends, the case should be dismissed with prejudice.

The notice of exclusion which Petitioner received in 1985 from the I.G. specified that Petitioner had 60 days within which to request a hearing. He did not do so. Moreover, he was out of prison for more than a year and a half before he made his request for a hearing to review the exclusion. No request for extension of time for filing his hearing request was made, nor has Petitioner shown good cause for his delay. Indeed, there seems little reason for Petitioner's delay in initiating the hearing request process, particularly since he has not been hindered by his incarceration for quite some time. At this point, even after Petitioner has already been excluded nearly four years, Petitioner still has not decided whether he wants a hearing. Under these circumstances, it is appropriate to dismiss this case with prejudice.

CONCLUSION

Based on the law and record of this proceeding I conclude that Petitioner's hearing request was not timely filed within the requirements of 42 C.F.R. 498.40(a)(2), and that good cause does not exist to excuse the late filing. The I.G.'s motion to dismiss this proceeding with prejudice is therefore granted, and the Petitioner's

motion to dismiss, insofar as he requests dismissal without prejudice, is denied.

/s/

Steven T. Kessel
Administrative Law Judge