

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Civil Remedies Division**

Lawrence G. Lyons
(OI File No.: L-06-40196-9),

Petitioner

v.

The Inspector General.

Docket No. C-17-452

ALJ Ruling No. 2018-3

Date: November 22, 2017

RULING ON MOTION TO DISMISS

Petitioner, Lawrence G. Lyons, requested a hearing to contest the determination by the Inspector General (I.G.) to exclude him from participation in federal health care programs under section 1128(a)(1) of the Social Security Act. The I.G. has moved to dismiss, arguing that the appeal is untimely. For the reasons explained below, I grant the I.G.'s motion and dismiss Petitioner's appeal.

I. Background

In a notice letter ("Notice" or "Notice letter") dated June 29, 2007,¹ the I.G. advised Petitioner that he was excluded from participation in Medicare, Medicaid, and all federal health care programs for a minimum period of 25 years. The I.G. stated that Petitioner was excluded because he had been convicted of a criminal offense in the Superior Court of California related to the delivery of an item or service under Medicare or a State health care program. Petitioner mailed his hearing request to my office on March 9, 2017, where it was subsequently received on March 13, 2017. Petitioner's request, while dated

¹ In fact, the I.G. made numerous earlier efforts to deliver the notice to Petitioner beginning in November 2006, to several residential addresses associated with Petitioner, as well as to his criminal defense attorney; June 29, 2007 is the latest date and thus the most favorable to Petitioner. *See* I.G. Br. at 2.

February 21, 2017, was postmarked March 9, 2017. Documents are considered filed on the date they are mailed. 42 C.F.R. § 1005.11(a)(4). Accordingly, I find Petitioner filed his request for hearing on March 9, 2017.

The I.G. filed a motion to dismiss with accompanying brief (I.G. Br.), accompanied by eight exhibits (I.G. Exs. 1-8). Petitioner filed a response (P. Br.) with one attachment, the 2004 plea agreement (Plea) that was not marked as an exhibit. The I.G. filed his reply on September 29, 2017.

II. Petitioner's Request for Hearing is Untimely.

The regulations governing these proceedings clearly mandate an excluded 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 I must dismiss a hearing request that is not filed in a timely manner. *See* 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).

On June 29, 2007, the I.G. sent the Notice to Petitioner at three different addresses. First, he mailed the Notice to Petitioner at 1004 Sparkling Amber Court, Las Vegas, NV 89144-1666. I.G. Exs. 1 and 4. That Notice letter was forwarded to 2764 Vista Del Oro, Carlsbad, CA 92009. I.G. Ex. 4. The I.G. also mailed a copy of the Notice to Petitioner at 10944 Napa Ridge Drive, Las Vegas, NV 89144-4015. I.G. Ex. 7. Finally, the I.G. also sent a copy of the Notice to Ward Clay, Esq., identified as Petitioner's counsel in the sentencing documents associated with his criminal case. I.G. Exs. 1, 3, and 7.

Under the controlling regulations, I presume that Petitioner received the I.G.'s Notice letter by July 5, 2007.² Since the sixtieth day thereafter (September 3, 2007) fell on a federal holiday (Labor Day), Petitioner's hearing request was due to be filed no later than September 4, 2007. 42 C.F.R. § 1005.12(a). He filed his hearing request over nine years late. In his response, Petitioner acknowledged that his request was untimely. P. Br. at 1.

Petitioner does not deny that the I.G.'s Notice letter was delivered to his addresses of record. Instead, he claims he only periodically stayed at these addresses, as he was frequently living and working out of town. *Id.* Regarding the Vista del Oro address, however, Petitioner conceded that he periodically stayed at that address during the relevant period in order to spend time with his young children. *Id.* To explain his apparent failure to receive the Notice, Petitioner asserts alternately that (1) it was possible

² July 4, 2007 was the fifth day after mailing but also a national holiday falling on a Wednesday. The fifth mailing day therefore fell on Thursday, July 5, 2007. 42 C.F.R. § 1005.12(a).

his wife, who was living at the Vista del Oro address, may have purposefully discarded mail addressed to him, or (2) he was unable to respond to the Notice because of diminished mental health. *Id.*

Taking the first theory, Petitioner does not actually assert his wife discarded the Notice – only that it would not have been out of character for her to do so given her attitude towards him at the time. Petitioner’s vague assertion that he may not have received the Notice at the Vista del Oro address is not sufficient to demonstrate that Petitioner did not in fact receive it. As the I.G. correctly observes, his duty to provide reasonable notice is met by use of the U.S. mail, and a presumption of delivery exists which Petitioner bears the burden of rebutting. I.G. Br. at 3-4. In order to do so, Petitioner must demonstrate facts that call the actual delivery of the Notice into question; that burden cannot be met by speculation, which is all Petitioner provides here. *Id.* at 4, *citing Shirley A. Jones*, DAB CR1564 (2007). Accordingly, I have no basis to conclude Petitioner did not receive the Notice.

Petitioner’s other explanation – that his mental health had deteriorated from a harrowing prison experience and various hardships that befell his family – deserves and receives my sympathy. However, Petitioner does not argue he was so incapacitated that he was functionally incapable of receiving the Notice – instead, he admits he was working and contributing to household bills and expenses at the Vista del Oro address. P. Br. at 1. Petitioner’s plea is essentially an attempt to show good cause for his extremely untimely filing. Even if I were to fully credit Petitioner’s narrative about the efforts he has made to overcome the adversity in his life, the governing regulations simply do not permit me to accept his late filing, even upon a showing of good cause. 42 C.F.R. § 1005.2(e)(1).

Ultimately, I have no discretion in this matter. I find Petitioner’s request for hearing to be untimely, and that Petitioner has failed to demonstrate he did not receive the I.G.’s Notice within the presumptive period of time following mailing. I therefore dismiss Petitioner’s hearing request pursuant to 42 C.F.R. § 1005.2(e)(1).

/s/
BILL THOMAS
Administrative Law Judge