Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
John T. Clardy, M.D.,	DATE: May 20, 1992
Petitioner,	Docket No. C-92-023
- v. -	Decision No. CR199
The Inspector General.	

DECISION

By letter dated February 26, 1991, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare and State health care programs for two years, pursuant to section 1156 of the Social Security Act (Act), 42 U.S.C. § 1320c-5. The I.G. advised Petitioner that the exclusion was based upon the recommendation of the Medical Society of Virginia Review Organization, the designated peer review organization for the State of Virginia (PRO).

The I.G. determined that Petitioner grossly and flagrantly violated the obligations imposed upon him under section 1156(a) of the Act, by providing care which failed to meet professionally recognized standards of health care, and by not providing care economically and only when and to the extent medically necessary. The I.G. also determined that Petitioner demonstrated a lack of ability to substantially comply with the obligations imposed upon him by section 1156(a) of the Act.

Petitioner sought administrative review of his exclusion, and the case was assigned to me for a hearing and decision.

Based on the evidence of record, the parties' arguments, and the applicable law and regulations, I am dismissing Petitioner's request for a hearing because it was not timely filed and Petitioner has not shown "good cause" for his failure to file a timely hearing request.

PROCEDURAL BACKGROUND

On February 26, 1991, the I.G. issued a notice determination (Notice), informing Petitioner that he was being excluded from participation in Medicare and State health care programs for a period of two years. The Notice advised Petitioner that, if he desired a hearing before an Administrative Law Judge (ALJ), he must file a written hearing request within 60 days from receipt of the Notice. By letter dated October 30, 1991, Petitioner requested a hearing to contest the I.G.'s determination.

I scheduled a prehearing conference to take place in this case on January 6, 1992, and, prior to that conference, the I.G. submitted a motion to dismiss this case. The I.G. alleged that Petitioner's request for a hearing in this case was untimely and that Petitioner has not shown "good cause" for extending the time for filing a hearing request. The I.G. also submitted five exhibits in support of his motion to dismiss.

During the January 6, 1992 prehearing conference, I established a briefing schedule, providing Petitioner an opportunity to respond to the I.G.'s motion to dismiss and providing the I.G. an opportunity to reply to Petitioner. During that conference, Petitioner stipulated to the authenticity of the five exhibits submitted by the I.G. in support of his motion to dismiss.[1]

On January 29, 1992, the Secretary of the Department of Health and Human Services (the Secretary) promulgated new regulations containing procedural and substantive provisions affecting exclusion cases. By letter dated

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[1] Throughout this proceeding, Petitioner has not contested either the authenticity or the truth of the contents of the five exhibits submitted by the I.G. in support of his motion to dismiss. I am therefore admitting these five exhibits into evidence, and I will refer to them as I.G. Ex. (number/page). Other references to the record will be cited in this decision as follows:

I.G. Brief	I.G. Br. (page)
Petitioner Response Brief	P. Br. (page)
I.G. Reply Brief	I.G. R. Br. (page)

February 18, 1992, I instructed both parties to address the issue of what, if any, effect these regulations have on the outcome of the I.G.'s motion to dismiss.

ISSUES

The issues in this case are:

1. Whether the new regulations promulgated on January 29, 1992 govern the disposition of this case.

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

3. If Petitioner's request was not timely and if the regulations adopted prior to January 29, 1992 apply to this case, whether Petitioner has shown "good cause" for allowing his hearing request to be received out of time.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

1. In a letter dated February 26, 1991, the I.G. notified Petitioner that he was being excluded from participation in the Medicare and State health care programs and that, if Petitioner wanted a hearing regarding his exclusion, he must file a request within 60 days of the receipt of the I.G.'s notice. I.G. Ex. 1.

2. Petitioner entered into a settlement agreement with the I.G. on March 12, 1991. I.G. Ex. 2.

3. Petitioner acknowledged receipt of the February 26, 1991 exclusion determination in the March 12, 1991 settlement agreement, and he expressly stated that he understood his right to appeal that determination. I.G. Ex. 2.

4. According to the terms of the settlement agreement, Petitioner agreed not to seek an appeal of his exclusion and he agreed to post a notice in his office stating that he does not participate in the Medicare and State health

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[2] Some of my statements in the sections preceding these formal findings and conclusions are also findings of fact and conclusions of law (FFCL). To the extent that they are not repeated here, they were not in controversy.

care programs. In return, the I.G. agreed not to publish notice of Petitioner's exclusion in the newspaper, pursuant to 42 C.F.R. § 1004.100(d). The I.G. also agreed that the notice posted in Petitioner's office would not explicitly state that Petitioner was excluded. I.G. Ex. 2.

5. The March 12, 1991 settlement agreement was signed by Petitioner's attorney. I.G. Ex. 2.

6. On the second page of the March 12, 1991 settlement agreement, was a signed statement by Petitioner, in which he stated that he had reviewed the contents of the settlement agreement and that he concurred with it. I.G. Ex. 2.

7. By letter dated October 30, 1991, Petitioner alleged that he did not enter into the March 12, 1991 agreement freely and requested a hearing before an ALJ. I.G. Ex. 3.

8. The regulations concerning time limitations for filing appeals of exclusions determinations, to be codified at 42 C.F.R. § 1005.2(c), promulgated at 57 Fed. Reg. 3298, 3350 on January 29, 1992, were not intended to apply retroactively to appeals of I.G. exclusion determinations that were pending before ALJs at the time the regulations were promulgated.

9. The relevant federal regulations at 42 C.F.R. § 498.40(a)(2) provide that an affected party or his legal representative must file a request for a hearing in writing 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 ALJ to whom the case is assigned may extend the time for filing the hearing request.

10. More than 60 days elapsed from the time Petitioner received the exclusion Notice until the time he filed a request for a hearing before an ALJ. FFCL 3, 7.

11. Petitioner's request for a hearing before an ALJ was not filed timely. FFCL 10.

12. Petitioner admitted that his request for a hearing was not filed timely. I.G. Ex. 3.

13. According to the applicable regulations, "good cause" occurs where unusual or unavoidable factors beyond a party's control prevent him from filing in a timely fashion. See 20 C.F.R. § 404.911.

14. Petitioner began being treated for depression and anxiety on May 10, 1991. I.G. Ex. 4.

15. Petitioner's assertion that he was suffering from depression and anxiety for which he received treatment beginning on May 10, 1991, taken as true, is not "good cause" for untimely filing.

16. Even if the I.G. violated requirements for notice by entering into the March 12, 1991 settlement agreement, this would not constitute "good cause" for untimely filing.

17. Petitioner has not shown "good cause" for submitting a late request for a hearing before an ALJ. FFCL 14-17.

18. Petitioner is not entitled to a hearing before an ALJ because he failed to file a timely request; and he has failed to demonstrate "good cause" for filing a late request. FFCL 11-12.

DISCUSSION

I. The New Regulations Promulgated on January 29, 1992 Do Not Govern The Disposition Of This Case.

This case involves a request for a hearing before an ALJ to contest an exclusion imposed on Petitioner pursuant to section 1156 of the Act. Implementing regulations adopted by the Secretary prior to January 29, 1992 provide, at 42 C.F.R. § 498.40(a)(2), that, in order to be entitled to a hearing, a party requesting a 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 ALJ to whom the case is assigned may extend the time for filing the hearing request.

New implementing regulations, published by the Secretary on January 29, 1992, also provide that in order to be entitled to a hearing, a party requesting a hearing must file the request within 60 days after the exclusion Notice is received by the affected party. However, absent from the new regulations is any provision allowing the ALJ to extend the time for filing the hearing request for "good cause shown" or for any other reason. 42 C.F.R. § 1005.2(c), 57 Fed. Reg. 3298, 3350 (January 29, 1992). According to the I.G., since the new regulations do not expressly provide for an extension of the 60 day appeal period based on "good cause," the ALJ lacks the authority to consider a hearing request not filed within

the 60 day time limitation. Thus, the first question to be decided in this case is whether 42 C.F.R. § 1005.2(c), if given the effect urged by the I.G., applies to this case.

The I.G. argues that the Secretary intended the new regulations to apply to cases which were pending at the date of the regulations' publication. According to the I.G., application of 42 C.F.R. § 1005.2(c) to this case is a lawful prospective application intended by the Secretary because it would not cause Petitioner to lose any existing substantive rights and it would not result in "manifest injustice". I.G. R. Br. 3-7.

In opposition, Petitioner contends that the new regulations should be applied prospectively absent express legislative intent that they be applied retroactively. Petitioner also argues that, even if the new regulations' procedural aspects are to be applied retroactively, they cannot be applied to deny a preexisting right or privilege. P. Br. 1-2.

It has been held generally that administrative rules should not be applied retroactively unless their language specifically requires that application. Bowen v. Georgetown University Hospital et al., 488 U.S. 204 (1988). It is also a generally accepted principle of law that where retroactive application of a law would impose greater liabilities and affect substantive rights, then the law should be prospective only. United States v. Murphy, 937 F. 2d 1032 (6th Cir. 1991). Absent a specific instruction in the Act or regulations directing that they apply to pending cases, I must conclude that the Secretary did not intend that the regulations be applied retroactively in a manner that would strip parties of previously vested rights or privileges.

The I.G. argues that Part 1005 of the new regulations provides for procedural mechanisms for an affected party to appeal a determination made by the I.G. According to the I.G., Petitioner has not lost any "substantive" right under the new regulations because 42 C.F.R. § 1005.2(c) "provides merely for a change in procedure in filing a hearing request". I.G. R. Br. 4.

I recognize that the regulations at issue address the mechanics of properly filing a hearing request. While these regulations operate to govern a procedural aspect of the hearing process, it should not be forgotten that their application to a case is also determinative of the threshold question of whether a party will be granted the opportunity for a hearing at all. Thus, while these

regulations have a procedural component, they must also be characterized as "substantive" regulations insofar as they govern whether a party will be granted a hearing in a case.

Under both the previous and the new regulatory schemes, an excluded person or entity has a right to a hearing if a request is timely filed. Under both regulatory schemes, an excluded person or entity who has failed to file a hearing request in the 60 day time limit is no longer entitled to a hearing. The only difference in the two regulatory schemes is that the new regulations no longer expressly authorize an ALJ to exercise his discretion to consider late hearing requests. Therefore, the new regulations do not take away any existing right to a hearing because an excluded person or entity does not have a right to a hearing after the expiration of the 60 day time limit under either regulatory scheme.

While the new regulations as interpreted by the I.G. do not deprive an excluded person or entity of an existing right to a hearing, they do operate to deprive him of the possibility of a hearing. Under the previous regulations, an excluded person or entity who had lost his right to a hearing because he failed to file a hearing request within the requisite 60 day time period nevertheless still would have the opportunity for a hearing if the ALJ found "good cause" for his failure to file a timely hearing request. Under the new regulations, there is no such provision for the ALJ to provide a hearing after the requisite 60 day time period expires. An excluded person or entity who files a late hearing request is substantially disadvantaged by the new regulations because there is no provision for allowing him a hearing even if he can show extenuating circumstances for his failure to file a timely hearing request. Thus, 42 C.F.R. § 1005.2(c), if given the effect urged by the I.G., would dramatically and profoundly alter the opportunity for a full hearing on the I.G.'s exclusion determination. This regulation, as interpreted by the I.G., imposes a substantial "liability" within the meaning of United States v. Murphy.[3]

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[3] The new regulations do not provide the opportunity to have a late hearing request considered under the I.G.'s interpretation of 42 C.F.R. § 1005.2(c). However, it is arguable that an ALJ has inherent discretionary authority to consider late hearing requests upon the showing of good cause under 42 C.F.R. § 1005.2(c) even though that provision does not expressly

Application of 42 C.F.R. § 1005.2(c) in this case to deprive Petitioner of a previously existing provision providing him the opportunity to have a late hearing request considered would contravene the standards set forth in Bowen v. Georgetown University Hospital and United States v. Murphy. There is nothing in the Act or the regulations which can be interpreted as a directive to apply them in a way which would produce such a result. Such an application would create manifest injustice and would be an unlawful retroactive application of the new regulations. Charles J. Barranco, M.D., DAB CR187 (1992).[4] Accordingly, I conclude that 42 C.F.R. § 1005.2(c), as interpreted by the I.G., does not apply to this case.

II. Petitioner's Request For A Hearing Was Untimely Filed.

Having concluded that the prior regulations govern this case, I must now apply these regulations to the facts of this case. As I stated above, the applicable regulations require that a party requesting a hearing must file the request within 60 days from receipt of the exclusion Notice. 42 C.F.R. § 498.40(a)(2).

The undisputed facts are that on February 26, 1991, the I.G. issued a Notice advising Petitioner that he was being excluded from participation in the Medicare and State health care programs for two years. I.G. Ex. 1. The undisputed facts also establish that, in a letter to the Office of the I.G. dated March 12, 1991, Petitioner acknowledged receipt of the I.G.'s February 26, 1991 Notice. I.G. Ex. 2. While the exact date Petitioner received the Notice has not been established, it is reasonable to infer that Petitioner had received the Notice by March 12, 1991.

Petitioner did not file a hearing request until October 30, 1991, more than 60 days after he received the Notice

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confer that authority. Since I have decided that the pertinent section of the regulations adopted on January 29, 1992 does not apply to this case, I need not decide whether the I.G.'s interpretation of the new regulations is correct.

[4] The decision in Barranco provides a thorough analysis of the Supreme Court's decision in Bowen v. Georgetown University, United States v. Murphy and related cases, in the context of the applicability of the new regulations to pending cases.

of exclusion. In that letter, Petitioner admits that his hearing request was untimely, and he offers an explanation for why his request was not filed within the requisite 60 day period. I.G. Ex. 3. The undisputed material facts therefore establish that Petitioner did not timely file his hearing request.

III. Petitioner Has Not Shown "Good Cause" For The Untimely Filing Of His Hearing Request.

Since Petitioner did not file his hearing request within the 60 day limitations period required by regulation, he is not entitled to a hearing before an ALJ. However, the applicable regulations establish circumstances where a petitioner may be granted a hearing, even though there is no right to one. The regulations provide that for "good cause shown" the ALJ to whom the case is assigned may extend the time for filing the hearing request. 42 C.F.R. 498.40(c)(2).

While Petitioner has not disputed that his request for a hearing was untimely filed, he contends that he had "good cause" for doing so. The question before me is whether "good cause" exists in this case to justify a discretionary grant of a hearing before an ALJ.

The undisputed facts establish that the I.G. fully advised Petitioner of his appeal rights in his February 26, 1991 Notice letter. The Notice letter specifically stated that, to be effective, a hearing request must be made within 60 days of receipt of the exclusion Notice. I.G. Ex. 1. Petitioner reacted to this Notice by retaining the services of an attorney, Louis W. Kershner, to represent him. After discussions between Petitioner's attorney and Mr. Ronald Ritchie, a program analyst with the Office of the I.G., Petitioner entered into a settlement agreement with the I.G. on March 12, 1991. I.G. Ex. 2.

The March 12, 1991 settlement agreement expressly stated that Petitioner understood his right to appeal the I.G.'s exclusion determination. The settlement agreement also indicated that Petitioner agreed not to seek an appeal of his exclusion and that he would post a notice in his office stating that he does not participate in the Medicare and State health care programs. According to the terms of the settlement agreement, the notice posted in Petitioner's office would not state that he was excluded from participation. In return, the I.G. agreed not to publish notice of Petitioner's exclusion in the newspaper pursuant to 42 C.F.R. § 1004.100(d). I.G. Ex. 2.

The March 12, 1991 settlement agreement was signed by Petitioner's attorney. Petitioner also attached a signed statement in which he represented that he had reviewed the contents of the settlement agreement and that he concurred with it. I.G. Ex. 2.

Accordingly, Petitioner did not file a request for a hearing during the 60 day period following receipt of the exclusion Notice. Instead, he filed his request on October 30, 1991, approximately six months after the expiration of the 60 day limitations period. Petitioner's October 30, 1991 letter enclosed a letter dated October 16, 1991, from Rochelle P. Jackson, M.D. (This document was also submitted as I.G. Ex. 4.)

Dr. Jackson indicated that she began to provide psychotherapy to Petitioner on May 10, 1991. In addition, she stated:

> Some of the major issues of treatment have been feelings of depression and anxiety, exacerbated by the decision by the State of Virginia Medical Review Organization that he be sanctioned. [Petitioner] described a state of demor[a]lization and a paralyzing fear of the public humiliation he would feel if this information were to appear in the newspapers.
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> It is my opinion that all of these factors contributed to his decision not to appeal the SVMRO decision, even though he insisted that the decision was unjustified. As these emotional "road blocks" have gradually abated, he has been able to mobilize his resources and resume a more assertive posture.

I.G. Ex. 4.

Petitioner argues that he was delayed in filing his hearing request because of the circumstances of his medical condition, as described by Dr. Jackson's letter. He avers that, due to the nature of his medical condition, he did not freely enter the March 12, 1991 settlement agreement. I.G. Ex. 3.

Petitioner also argues that the settlement agreement itself is contrary to the notice requirements established by the I.G.'s regulation and is therefore an invalid and nonbinding agreement. Petitioner contends that, due to the illegal nature of the settlement agreement, he entered into it under "duress" and he was "unduly influenced." Petitioner argues that "good cause" exists for his failure to file a hearing request on time, in

view of the fact that the settlement agreement is invalid and unenforceable. P. Br. 7-11.

The I.G. does not dispute the truthfulness of the contents of Dr. Jackson's letter describing Petitioner's medical condition. Instead, the I.G. avers that the reasons advanced by Petitioner for failing to file a timely hearing request do not rise to the level of "good cause." According to the I.G., there are no equities which militate in favor of granting Petitioner a hearing before an ALJ.

I agree with the I.G. The regulations do not define "good cause". The regulations governing Social Security disability hearings, which are also conducted pursuant to 42 U.S.C. § 205(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) and include circumstances such as serious illness, receiving incorrect information about when and how to request review, and the destruction of important records. The examples set forth in these regulations are not inclusive of all of the circumstances which would qualify for a "good cause" exemption. However, a review of these examples reveals a commonality to them. All of these examples describe circumstances where a party would have filed a timely hearing request, but for an intervening event beyond the party's control.

Thus, a finding of "good cause" for an untimely filing can be made for many reasons. The regulations contemplate that "good cause" is shown where a party missed a deadline through no fault of his own and under circumstances which prevented the party from filing timely. The regulations contemplate unusual or unavoidable circumstances where the party was prevented from filing timely for reasons outside of the control of the party. Nelson Ramirez-Gonzalez, M.D., DAB CR175 (1992).

In this case, there is no persuasive evidence which would lead me to conclude that Petitioner did not file a timely hearing request due to forces beyond his control. On the contrary, the weight of the evidence establishes that Petitioner was very much in control of events. Petitioner was fully aware of his appeal rights, and he so stated in the March 12, 1991 settlement agreement. He had the benefit of the assistance of independent legal counsel, retained by him to protect his interests. Rather than choosing to exercise his appeal rights, he affirmatively chose to resolve the matter through

settlement. Petitioner's settlement agreement with the I.G. evinces an affirmative decision by Petitioner to waive his right to a hearing, in return for the I.G.'s agreement not to publish notice of Petitioner's exclusion. The agreement was signed by Petitioner's attorney, and Petitioner stated that he concurred with it and he also signed it.

Petitioner argues that he was suffering form depression and anxiety which were aggravated by his exclusion. He contends that his psychological condition constituted a "serious illness" which prevented him from filing an appeal. P. Br. 6.

I accept Dr. Jackson's statements that Petitioner suffered from depression and anxiety. I also accept that Petitioner was influenced in making the decision to enter into a settlement agreement with the I.G. by the fear of public humiliation he would feel if his exclusion appeared in the newspapers. However, Dr. Jackson says nothing which would lead to the conclusion that Petitioner's mental condition was so incapacitating that it prevented him from taking control of his affairs at the time he received the exclusion Notice. There is nothing in Dr. Jackson's report which suggests that Petitioner lacked the mental competency to understand the nature and effect of his decision not to appeal the exclusion determination. In fact, there is no evidence that Petitioner was even receiving psychiatric treatment at the time he entered into the settlement agreement. Dr. Jackson did not begin treating Petitioner until May 10, 1991, more than two months after the settlement agreement was executed.

The evidence overwhelmingly establishes that Petitioner was cognizant of his hearing rights and that he freely chose not to exercise them. Instead, Petitioner, acting on the advice of counsel, waived his right to a hearing because he perceived that this decision was in his best interest. I do not accept Petitioner's contention that he suffered from a mental disorder which incapacitated him to the degree that he should be excused from filing a timely request for a hearing. While Petitioner's subsequent hearing request indicates that his perception of what was in his best interest had changed, this does not amount to "good cause" for extending the 60 day time limitation.

I am also not persuaded by Petitioner's arguments that his delay in filing the hearing request is justified because the settlement agreement between Petitioner and the I.G. is legally defective. Petitioner's arguments

that the settlement agreement is invalid and not binding on the parties raises questions which are extraneous to the central question before me. The issue before me is whether Petitioner has shown "good cause" for his delay in filing a hearing request. The issue is not whether the settlement agreement between the I.G. and Petitioner should be set aside.

Petitioner voluntarily entered into an agreement in which he affirmatively chose to waive his hearing rights in exchange for a benefit conferred on him by the I.G. He then allowed the 60 day time limitation period to expire without making any attempts to file a hearing request or to rescind his agreement not to appeal. Had Petitioner filed a hearing request within the 60 day time limitation period, his arguments regarding the legal enforceability of the settlement agreement arguably could have some relevance to a determination of whether he is entitled to a hearing. However, in this case, Petitioner chose not to file a hearing request in the 60 day time period. Once the 60 day period expired, he lost his right to a hearing before an ALJ. The issue of whether the March 12, 1991 agreement is legally enforceable is moot, because Petitioner lost his right to a hearing by operation of the regulations after the 60 day period expired. Petitioner did not exercise his right to request a hearing in a timely fashion, and he cannot take advantage of the alleged illegality of the settlement agreement to excuse him for his delay in filing a hearing request.

Petitioner also asserts that "if he is otherwise to be denied an evidentiary hearing on the merits of his exclusion, that such a denial can only be accomplished after an evidentiary hearing as to 'good cause'". P. Br. 11. This statement implies that Petitioner believes that he is entitled to an evidentiary hearing on the issue of "good cause". The regulations confer no such right on Petitioner. They merely provide that the ALJ "may" extend the time for filing the hearing request for "good cause." This language is permissive, rather than mandatory. While the regulations provide the ALJ with the authority to consider a late hearing request, this authority is totally discretionary. The ALJ is under no obligation to even consider late hearing requests. In view of this, Petitioner is no way entitled to an evidentiary hearing on the issue of "good cause", as he suggests.

Furthermore, there is no need to develop the record further on the issue of "good cause" through an evidentiary hearing, as Petitioner suggests. I have concluded, based on the undisputed material facts in the

record before me, that Petitioner has failed to show "good cause" for his failure to file a timely hearing request. Since there are no genuine issues of material fact which would require the submission of additional evidence, there is no need for an evidentiary hearing.

CONCLUSION

Petitioner has admitted, and the evidence has shown, that his request for a hearing before an ALJ was not filed on time. In addition, Petitioner has not proffered any persuasive reason, argument, or evidence that meets his burden to show that there is "good cause" to excuse his late filing. I therefore grant the I.G.'s motion to dismiss this case and enter summary disposition in favor of the I.G.

/s/

Charles E. Stratton
Administrative Law Judge