Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Sunil R. Lahiri, M.D.,	DATE: December 14, 1993
Petitioner	Docket No. C-93-036
- v. -	Decision No. CR296
The Inspector General	

DECISION

This case is before me on a motion to dismiss filed by the Inspector General (I.G.). For the reasons discussed below, I grant the motion and dismiss Petitioner's request for a hearing on his exclusion from federally funded health care programs.

The background of this case was described in detail in my July 23, 1993 Confirmation of Ruling of Necessity of Conducting an in-person hearing (Confirmation). While I incorporate that Confirmation here by reference, for the sake of completeness and clarity, I repeat some of the relevant background here.

By letter dated August 12, 1992 (Notice) Petitioner was excluded for 10 years from participation in Medicare and State health care programs pursuant to the authority contained in section 1156 of the Social Security Act (Act). However, Petitioner did not file a request for hearing until December 29, 1992. Petitioner contends that he did not receive notice that he had been excluded until December 22, 1992, when that information was revealed to him in conjunction with another case, Docket No. C-92-088.

On January 21, 1993, the I.G. filed a motion to dismiss Petitioner's request for hearing, contending that the request was not timely filed. Petitioner filed a response to the I.G.'s motion to dismiss, in which Petitioner swore in an affidavit that he did not receive

the I.G.'s August 12 letter. On March 4, 1993, I issued a Ruling which stated, in part, that the parties had provided me with insufficient information to resolve the issue of whether Petitioner had received, within the meaning of 42 C.F.R. § 1005.2(c), the I.G.'s August 12, 1992 letter notifying him of his exclusion. Accordingly, I found that there was a dispute of material fact as to whether Petitioner had received the I.G.'s August 12, 1992 letter notifying him of his exclusion, and I held in abeyance the I.G.'s motion to dismiss pending the submission of further information from both parties.

On March 12, 1993, the I.G. submitted a Supplemental Memorandum (I.G.'s Supplemental Memorandum) in support of his motion to dismiss. Attached to the I.G.'s Supplemental Memorandum was an affidavit, executed on March 8, 1993, of a former employee of Petitioner (L.P.) On March 25, 1993, Petitioner submitted an affidavit which contradicted some of the assertions contained in the affidavit of L.P. In response, on April 7, 1993, the I.G. filed a second affidavit from L.P.[1]

By Order dated April 15, 1993, at Petitioner's request, I stayed this case to allow Petitioner time to replace his attorney. On April 22, 1993, Indra Lahiri, Esq. entered an appearance on behalf of Petitioner. I subsequently removed the Stay on April 29, 1993.

On April 30, 1993, Petitioner filed a Supplemental Memorandum in Opposition to the I.G.'s Motion to Dismiss (Petitioner's Supplemental Memorandum). Contained in Petitioner's Supplemental Memorandum was a declaration from another employee of Petitioner (P.W.).[2] This

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[1] Copies of these affidavits were received into evidence at the August 11, 1993 hearing and are contained in the record as follows: L.P.'s March 8, 1993 affidavit, attached to the I.G.'s supplemental memorandum, was received into evidence as I.G. Ex. 4. Petitioner's affidavit, submitted in conjunction with his March 25, 1992 opposition to the I.G.'s motion to dismiss, was received into evidence as P. Ex. 1. L.P.'s second affidavit (executed on April 6, 1993 and filed on April 7, 1993) was received into evidence as I.G. Ex. 6.

[2] A copy of this document was received into evidence at the August 11, 1993 hearing and can be found in the record as P. Ex. 6. Although the heading states that it is a supplemental declaration of P.W., it is the only declaration from P.W. that Petitioner offered into evidence. The term supplemental in the heading refers to

affidavit contradicted some of the facts contained in the affidavits submitted by the I.G. Upon receipt of Petitioner's Supplemental Memorandum, the I.G. requested leave to file an answer. Petitioner did not object, and I granted the I.G.'s request. On May 7, 1993, the I.G. filed a Second Supplemental Declaration of L.P.

I conducted another prehearing conference on June 22, 1993. At the conference, I informed the parties that there were disputed issues of material fact with regard to the pending Motion to Dismiss. I further informed the parties that the credibility of the various affiants had become a key issue. Because I had not been able to assess the credibility of the affiants, I did not have a sufficient basis to determine whether Petitioner had made a reasonable showing, within the meaning of 42 C.F.R. § 1005.2(c), that he did not receive the Notice informing him of his exclusion. Absent such a determination, I would not dismiss this case. Accordingly, I held in abeyance my ruling on the motion to dismiss and scheduled an in-person hearing in this case.[3]

At a July 26, 1993 prehearing conference, Petitioner moved for a continuance of this hearing and the hearing in Docket No. C-92-088, another case in which Petitioner was contesting an exclusion. At a July 30, 1993 prehearing conference, I denied Petitioner's motion for continuance and scheduled the hearing to begin on August 4, 1993. In a Ruling dated August 2, 1993, I confirmed my July 30 oral ruling.[4]

Because Petitioner and his counsel indicated that they would not appear at the August 4, 1993 hearing, I conducted another prehearing conference, this one on

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the fact that the affidavit was originally filed as a supplement in conjunction with Petitioner's April 30, 1993 supplemental memorandum to the I.G.'s motion to dismiss.

[3] My oral ruling on the necessity of an in-person hearing in this case occurred at the June 22, 1993 telephone conference. On July 23, 1993, I confirmed in writing my oral ruling.

[4] The parties' submission of motions, briefs and arguments in this case prior to the hearing was chronicled in both my July 23, 1993 Confirmation of the Necessity for an In-Person Hearing and my August 4, 1993 Confirmation of Ruling Denying Petitioner's Motion for Continuance.

August 4, 1993. At the August 4, 1993 prehearing conference, counsel for Petitioner agreed to appear at an in-person hearing in San Francisco on August 11, 1993. The events of the conference were confirmed in my Ruling and Order of August 11, 1993. Petitioner's counsel stated that, for medical reasons, his client would not be able to be present at the in-person hearing, but that he would not be calling his client to testify even if he was medically cleared to appear. Also, Petitioner's counsel waived the right of his client to be present at the in-person hearing. Counsel for the I.G. agreed not to call Petitioner as a witness. On August 11, 1993, I conducted an in-person hearing in this case in San Francisco, California.

I have considered the arguments, the applicable evidence and the law. I conclude that the I.G. has proven that Petitioner received the Notice on or about August 21, 1992. I further conclude that Petitioner has failed to make a reasonable showing, within the meaning of 42 C.F.R. § 1005.2(c), that he did not receive the Notice on or about August 21, 1992. Therefore, Petitioner's request for hearing was filed more than 60 days from the date he received the Notice. Accordingly, I dismiss Petitioner's request for hearing in this case.

ISSUE

The issues in this case are whether:

1. Petitioner was provided with reasonable notice of his exclusion in accordance with 42 C.F.R. § 1005.2; and

2. Petitioner has made a reasonable showing, within the meaning of 42 C.F.R. § 1005.2, that he did not receive the I.G.'s August 12, 1992 letter (Notice) informing him of his exclusion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a doctor specializing in oncology whose main business address and medical practice at all times relevant to this case was the Medical Oncology Center

located at 525 34th Street, Bakersfield, California 93301. P. Ex. 5; I.G. Ex. 1; Tr. 40.[5]

2. At all relevant times, Petitioner was the sole physician working at the Medical Oncology Center located at 525 34th Street, Bakersfield, California 93301. Tr. 40.

3. On April 24, 1992, California Medical Review, Inc., (CMRI) the peer review organization (PRO) for the State of California, sent a letter to Petitioner informing him that CMRI had recommended to the I.G. that Petitioner be excluded for a period of 10 years from the Medicare and State health care programs as defined in section 1128(h) of the Act. I.G. Ex. 3.

4. CMRI's April 24, 1992 letter advised Petitioner that, within 30 days of his receipt of the letter, he could submit any additional materials he felt would affect CMRI's 10-year exclusion recommendation. I.G. Ex. 3.

5. CMRI's April 24, 1992 letter further informed Petitioner that the I.G. is required by law to determine, within 120 days of the CMRI's recommendation, whether to exclude him. I.G. Ex. 3.

6. Petitioner received CMRI's April 24, 1992 letter. I.G. Ex. 1.

7. On May 25, 1992, Petitioner submitted additional materials to CMRI in response to CMRI's April 24, 1992 letter. I.G. Ex. 1.

8. By letter dated August 12, 1992 (Notice), the I.G. informed Petitioner that the I.G. had accepted the

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[5] I use the following abbreviations when citing the parties' exhibits and post-hearing briefs and my findings of fact and conclusions of law:

I.G.'s Exhibit	I.G. Ex. (number at page)
Petitioner's Exhibit	P. Ex. (number at page)
Petitioner's Brief	P. Br. (page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Reply Brief	I.G. R. Br. (page)
My Findings and Conclusions	Finding (number)

recommendation of CMRI and had decided to exclude him and directed the State also to exclude him for a period of 10 years. I.G. Ex. 2.

9. The Notice was correctly addressed and mailed to Petitioner's business address on August 12, 1992, as certified mail article number 964365, return receipt requested. I.G. Ex. 1, 2.

10. From October 1989 until September 1992, L.P. was employed by Petitioner as an insurance billing clerk in his main office. Tr. 28.

11. L.P.'s duties included the signing of Petitioner's insurance claim forms; the billing of private insurance companies and Medi-Cal; completing employees' time cards and telephoning the employees' hours to the payroll company; ordering of and receiving office supplies; making bank deposits for the office; setting up lunch breaks for the office staff; accepting faxes for Petitioner; and receiving mail for Petitioner when the receptionist was not present. Tr. 32 - 33.

12. During August 1992, five employees worked in Petitioner's main office -- two billing clerks, two medical assistants and a lab technician. Tr. 37.

13. Petitioner's wife was L.P.'s direct supervisor during all times relevant to this case. Tr. 67.

14. At any time when Petitioner's wife was not present in the office, L.P. was in charge of the other front office employees, meaning the receptionist and the other billing clerk. Tr. 33.

15. During the entire month of August 1992, the individual who worked as Petitioner's receptionist was on medical leave of absence. Tr. 37; I.G. Ex. 6.

16. During the entire month of August 1992, L.P. and another billing clerk had the responsibility of covering the front desk in Petitioner's office, where the mail was received. Tr. 37.

17. No one employee in Petitioner's main office had sole responsibility for receiving mail. Tr. 33 - 34, 80, 142.

18. If Petitioner's wife was not in the office, the person receiving the mail would bring it directly to L.P. Tr. 33 - 34, 80, 142.

19. No written or oral policy existed in Petitioner's office regarding which of Petitioner's employees was authorized to receive certified mail or when the employees could receive certified mail. Tr. 34 - 36, 67 - 69, 130 - 133; I.G. Ex. 6.

20. There is no evidence in the record from which I can conclude that Petitioner's office ever posted a policy in the reception area that informed delivery persons that only specified employees were authorized to receive certified mail. Tr. 67 - 70.

21. At all times relevant to this case, the usual and customary practice for receiving mail in Petitioner's main office was for the employee who was at the front desk when the mailman entered to accept the mail. Tr. 34, 58 - 60.

22. L.P. received the mail at Petitioner's main office approximately 70 percent of the days on which she worked. Tr. 65.

23. L.P. frequently accepted certified mail on behalf of Petitioner. Tr. 35 - 36; I.G. Ex. 4, 6.

24. At no time was L.P. ever told not to receive certified mail unless she obtained specific permission from Petitioner or his wife. Tr. 36; I.G. Ex. 4, 6.

25. At no time was L.P. ever instructed by Petitioner or his wife not to accept mail. Tr. 69; I.G. Ex. 6.

26. Upon receipt of certified mail, L.P. would automatically place it on either Petitioner's desk or his wife's desk. Tr. 78.

27. On August 21, 1992, L.P. initialed the return receipt card and accepted certified mail article number 964365 on behalf of Petitioner. I.G. Ex. 2; Tr. 38 - 39; I.G. Ex. 6.

28. Subsequent to receiving the Notice, L.P. placed it either on Petitioner's wife's desk or on Petitioner's desk. I.G. Ex. 6.

29. L.P. did not know that certified mail article number 964365 was the Notice when she signed for it. Tr. 75.

30. After giving three weeks' notice, L.P. left Petitioner's employ on September 3, 1992, because her husband was being transferred to Slidell, Louisiana. Tr. 41.

31. L.P. was not emotionally upset about her husband being transferred and having to move. Tr. 62 - 63; 86 - 88.

32. On or about September 6, 1992, L.P. discovered that Petitioner was withholding her last paycheck because of a dispute involving vacation pay. Tr. 42.

33. L.P. complained to the California Labor Board regarding the wage dispute and the same day the case was settled. Tr. 42.

34. L.P. subsequently received the wages that had been in dispute and the dispute was resolved to her satisfaction. Tr. 42 - 43.

35. At the time L.P. accepted and signed for certified mail article number 964365 (Notice), she was on good terms with Petitioner and his wife and was not aware that she had a wage dispute with Petitioner. Tr. 43, 86; I.G. Ex. 6.

36. Petitioner handled the wage dispute with L.P. in a very gracious and pleasant manner. Tr. 43.

37. L.P.'s wage dispute with Petitioner and his wife was the only dispute she had with them. Tr. 66 - 67.

38. L.P. did not have any ill feelings toward Petitioner because of the wage dispute. Tr. 43 - 44; I.G. Ex. 6.

39. During L.P.'s tenure of employment, she never received any complaints about her work from either Petitioner or his wife. Tr. 50.

40. L.P. was never told by Petitioner or his wife at any time during her employ that she was not following the customary office procedures or practices. Tr. 84.

41. L.P. was never reprimanded by Petitioner or his wife for accepting certified mail when she was not authorized to do so. Tr. 84.

42. L.P. received approximately five merit raises during the almost three years she was employed by Petitioner. The most recent of these was in July of 1992. Tr. 83.

43. During August of 1992, L.P. was not aware that there was an ongoing case between Petitioner and the I.G., nor was she aware that Petitioner had been sanctioned by the I.G. Tr. 56, 82.

44. L.P. has no bias against Petitioner which would affect the credibility of her testimony in this case. Findings 10, 29 - 43.

45. L.P.'s demeanor while testifying under oath at these proceedings and her lack of personal stake in the outcome of this case are such that I find her to be a credible witness. Findings 29 - 44.

46. L.P. gave clear, concise, and detailed testimony, such that I find her to be a credible witness. Tr. 26 - 92; Findings 21 - 45.

47. Some time after L.P. left Petitioner's employ, Petitioner instituted a policy that any of his employees who signed for certified mail had to first obtain permission from Petitioner or his wife before doing so. Tr. 53.

48. P.W. is currently employed by Petitioner as a medical assistant (unlicensed). She has been employed in this capacity since 1979. Tr. 94, 138.

49. P.W. had no responsibility with regard to the acceptance of mail at Petitioner's office. Tr. 49 - 50.

50. During all times relevant to this case, P.W. did not have responsibility with regard to any clerical duties in Petitioner's office that did not involve patients. Tr. 44, 84.

51. During all times relevant to this case, P.W. did not have any duties with regard to the receipt of Petitioner's mail.
Tr. 47.

52. During August of 1992, P.W. did not accept mail at Petitioner's main office. Tr. 49.

53. During August of 1992, no employee of Petitioner was under instructions to inform P.W. of the receipt of any certified mail. Tr. 49.

54. During August 1992, L.P. was P.W.'s timekeeper. Tr. 162.

55. L.P. had a wider scope of office responsibilities than P.W. I.G. Ex. 4, 6; Findings 11, 14, 21, 22, 48 - 54.

56. Petitioner had no written office policy regarding the receipt or acceptance of certified mail. Tr. 98.

57. P.W.'s assertion that Petitioner's office had an oral policy that Petitioner's wife was the only person who could accept or sign for certified mail is not credible. Tr. 101; Findings 17 - 26, 49 - 53.

58. P.W. has known since 1988 that Petitioner had stopped billing Medicare for reimbursement. Tr. 103.

59. At all relevant times, P.W. was aware that Petitioner had been excluded from Medicare. Tr. 103.

60. In addition to his main office, at all relevant times, Petitioner had additional offices located at 3801 River Boulevard in Bakersfield, California and at 4545 Stockdale Highway, Bakersfield, California. Tr. 29.

61. At all relevant times, Petitioner's River Boulevard office was open only on Tuesdays and Wednesdays from 2:00 p.m. until 7:00 p.m. Tr. 30.

62. At all relevant times, Petitioner's Stockdale office was open Monday through Thursday from 5:00 p.m. until the last patient was seen, usually between 10:00 p.m. and 2:00 a.m. Tr. 30.

63. During August 1992, P.W. worked at two of Petitioner's offices, Stockdale and 34th Street. Tr. 105 - 106.

64. P.W. worked primarily at Petitioner's Stockdale office. Tr. 145.

65. L.P. worked only at Petitioner's 34th Street office.

66. P.W. stated that L.P. was upset about moving, but did not state that it affected L.P.'s quality of work in any way. Tr. 102.

67. P.W. gave vague and evasive answers when she was questioned regarding the actual hours she was present in Petitioner's main office. Tr. 105 - 108.

68. P.W.'s vague and evasive answers regarding the actual hours she was present in Petitioner's main office are indicative of a lack of credibility. Finding 67.

69. P.W. asserted that Petitioner's office had problems with fraudulent mail scams in the early 1980's, during which time office personnel had signed for items, and this had, in turn, caused Petitioner's office to be billed for those items. Tr. 110 - 116.

70. P.W.'s assertion is not credible that concern over fraudulent mail scams led to a policy whereby either Petitioner or his wife had to give their specific approval for the acceptance of certified mail on each and every occasion. Tr. 110 - 116; Finding 69.

71. P.W. gave vague answers when questioned regarding the existence and execution of a policy that required Petitioner's employees to obtain prior approval from Petitioner or his wife before accepting certified mail on Petitioner's behalf. Tr. 121 - 133.

72. P.W. was not able to state how she became aware of a policy regarding obtaining Petitioner's or his wife's approval before accepting certified mail. Tr. 121 - 122.

73. P.W.'s responsibilities and duties in working for Petitioner are such that she not is not aware of all of the policies regarding the receipt of mail that were in effect in August of 1992. Findings 48 - 56; Tr. 151.

74. P.W.'s testimony under oath at these proceedings indicates less understanding, awareness, and knowledge of Petitioner's office practices, including those involving the receipt of certified mail, than that displayed by L.P. Findings 10 - 23, 48 - 56, 63 - 65; Tr. 93 - 156.

75. L.P.'s responsibilities and duties in working for Petitioner and her testimony at these proceedings indicate that she was more knowledgeable than P.W. regarding policies in effect in August 1992 related to the receipt of mail in Petitioner's front office. Findings 10 - 23, 48 - 55; Tr. 26 - 92; 159 - 165.

76. P.W., as a current employee working for Petitioner, has a discernible interest in the outcome of these proceedings. Tr. 128 - 129; Finding 48.

77. P.W. does not want to see Petitioner excluded, even if there was a legitimate basis for the I.G. to do so. Tr. 154 - 55.

78. While testifying before me under oath at the hearing, P.W. appeared at times hesitant, agitated, aggravated, and argumentative. Tr. 105 - 156.

79. P.W.'s demeanor while testifying under oath before me at these proceedings is such that she is not a credible witness. Finding 78.

80. P.W.'s testimony before me at these proceedings is such that I find her to be not credible. Findings 57, 66 - 74, 76 - 79.

81. Petitioner's statement that he personally did not receive the Notice does not refute the evidence that the Notice was received by his employee at his office within the scope of her employment. P. Ex. 5; Findings 1 - 80.

82. Actual authority is created by conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account. Restatement of Agency 2d § 26.

83. Principals are liable for the acts of their agents when their agents act within the scope of their actual or apparent authority. Tryco Trucking, Inc., v. Belk Stores Services, Inc., 634 F. Supp. 1327 (W.D. N.C. 1986).

84. Apparent authority arises when a principal places an agent in a position that the agent has certain powers that the agent may not possess and a third person holds the reasonable belief that the agent was acting within the scope of this authority and changes his position in reliance on the agent's act. Under these circumstances, the principal is estopped to deny that the agent's act was not authorized. Masuda v. Kawasaki Dockyard Co., 328 F.2d 662, 664 - 665 (2d Cir. 1964); E.F. Hutton Group, Inc., v. U.S. Postal Service, 723 F. Supp. 951, at 959 (S.D.N.Y. 1989); Restatement of Agency 2d § 27.

85. When determining whether an agent has the apparent authority to act, the key inquiry is whether the principal has voluntarily placed the agent in a situation such that a person of ordinary prudence, conversant with general business practice, would be justified in believing that the agent had the authority to perform the act in question. Newark Branch, N.A.A.C.P. v. Township of West Orange, N.J., 786 F. Supp. 408 (D. N.J. 1992); Restatement of Agency 2d § 27.

86. In August 1992, L.P. had the actual authority to receive and accept both certified and regular mail, on behalf of Petitioner. Findings 10 - 29, 39 - 41, 45, 46.

87. In August 1992, L.P. had the actual authority to receive and accept the Notice (certified mail article number 964365) on behalf of Petitioner. Finding 86.

88. In August 1992, L.P. had the apparent authority to receive and accept both certified and regular mail, on behalf of Petitioner. Findings 10 - 29, 39 - 41, 45, 46.

89. In August 1992, L.P. had the apparent authority to receive the Notice (certified mail article number 964365) on behalf of Petitioner. Finding 88.

90. A determination to exclude a health care practitioner under the Act shall be in effect at such time and upon such reasonable notice to the public and practitioner involved as may be specified in regulations. Act, Section 1156(b)(2); 1156(b)(4) 1128(c).

91. The I.G. is obligated to give written notice to the person excluded the determination to exclude, including the basis for the exclusion and its length and effective date. 42 C.F.R. § 1001.2002.

92. The person excluded is entitled to appeal the I.G.'s exclusion determination in accordance with part 1005 of the regulations. 42 C.F.R. § 1004.130.

93. Part 1005 regulations provide that the date of receipt of a notice of exclusion is presumed to be five days after the date of the notice of exclusion unless there is a reasonable showing to the contrary. 42 C.F.R. § 1005.2(c).

94. Formerly, 42 C.F.R. § 498.40(c), provided a "good cause" exception to allow a party to obtain an extension of the 60 days within which a hearing must be requested. 42 C.F.R. § 498.40 (1989).

95. On January 29, 1992, regulations were published which eliminated the "good cause" exception for untimely filing of a hearing request. 42 C.F.R. § 1005.2 (1992).

96. The regulations published on January 29, 1992 are controlling in this case, as these regulations were in effect during August 1992, when the I.G. sent the Notice to Petitioner, and in December 1992, when Petitioner requested a hearing.

97. Petitioner's assertion that L.P. was authorized to receive certified mail only by obtaining the approval of Petitioner or Petitioner's wife on a case-by-case basis is not relevant to the issue of whether Petitioner has made a reasonable showing that he did not receive the notice within the meaning of 42 C.F.R. § 1005.2.

98. Petitioner's assertion that L.P. was authorized to receive certified mail only by obtaining the approval of Petitioner or Petitioner's wife on a case-by-case basis is not relevant to the issue of whether L.P. had the

apparent authority to receive the Notice on behalf of Petitioner. Findings 85, 86, 90; P. Ex. 1, 5.

99. Petitioner's hearing request must be filed within 60 days after he receives the Notice. 42 C.F.R. § 1005.2(c).

100. Correctly addressed certified mail is presumed to be received by the person to whom it is addressed. Federal Deposit Insurance Corporation v. Schaffer, 731 F. 2d 1134, 1137, n.6 (4th Cir. 1984).

101. Neither the regulations or the Act require personal service of a notice of exclusion upon the individual who has been excluded. 42 C.F.R. § 1005; 42 C.F.R. § 1001.2002; Act, section 1156(b)(2).

102. Petitioner has failed to make a sufficient showing to rebut the presumption that the Notice was delivered to his business address and signed for by his employee. Findings 1 - 101.

103. Petitioner has failed to make a reasonable showing, pursuant to 42 C.F.R. § 1005.2(c), that he did not receive the Notice. Findings 1 - 102.

104. Petitioner received the Notice on August 21, 1992, when it was delivered to his correct business address and signed for by his employee. Findings 8 - 10, 26 - 28, 81 - 103; 42 C.F.R. § 1005.2.

105. Petitioner had until October 20, 1992 to file a request for a hearing. 42 C.F.R. § 1005(c); Finding 27.

106. Petitioner did not request a hearing until December 29, 1992. P. Ex. 2.

107. Petitioner was provided reasonable notice by the I.G. of his exclusion yet failed to timely request a hearing or make a reasonable showing that he did not receive the Notice. Findings 1 - 106.

108. Petitioner's request for hearing must be dismissed. Findings 1 - 107; 42 C.F.R. § 1005.2(e)(1).

RATIONALE

The parties to this case do not disagree that, on August 12, 1992, the I.G. sent the Notice to Petitioner informing him that pursuant to CMRI's recommendation, he had been excluded for a period of ten years, from

participation in Medicare and any State health care program as defined in section 1128(h) of the Act. Nor do the parties disagree that the I.G. sent this Notice to Petitioner's business address by certified mail, return receipt requested, article number 964365. Lastly, the parties do not dispute that, on August 21, 1992, L.P., who was employed by Petitioner at that time, accepted delivery of the Notice and placed her initials on the return receipt card which accompanied the Notice.

The regulations provide that an excluded party must file a request for hearing within 60 days after the party receives the notice letter, unless there is a reasonable showing to the contrary that the request for hearing is timely filed. 42 C.F.R. § 1005.2(c).

Petitioner argues that he never "received" the Notice and thus for some time was unaware that he had been excluded. Petitioner contends that the 60 day time period during which he could request a hearing did not begin until December 22, 1992, the time he contends he first became aware of his exclusion.[6]

Additionally, Petitioner contends that L.P. was not authorized to receive certified mail on his behalf and that, in receiving the Notice, L.P. violated his office policy by not obtaining specific approval from himself or his wife to sign for the Notice.

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[6] Petitioner claims that the first time he became aware of his exclusion in this case was in the context of another case, Docket No. C-92-088. On December 22, 1992, in the context of proceedings involving Petitioner's exclusion under section 1128(b)(6)(B) of the Act, Docket No. C-92-088, the I.G. informed me that a separate exclusion had been imposed upon Petitioner pursuant to section 1156 of the Act. The I.G. stated that, on August 12, 1992, the I.G. had informed Petitioner of his exclusion pursuant to section 1156 by mailing him the Notice. Also on December 22, 1992, I had my office fax a copy of the Notice to Petitioner's counsel. Petitioner claims that the first time he became aware of the Notice informing him that he was excluded under section 1156 of the Act was when he received the Notice via fax on December 22, 1992. On December 29, 1992, Petitioner requested a hearing to contest his August 12, 1992 exclusion in this case, and the case was assigned to me as Docket No. C-93-036. These events were chronicled in my March 4, 1993 Ruling and mentioned in my July 23, 1993 Ruling.

Furthermore, Petitioner contends that even though the Notice was delivered to his business address, until December 22, 1992, he never personally received it and so did not know about the I.G.'s determination to exclude him and his accompanying right to request a hearing. Petitioner avers that, when he requested a hearing in this case on December 29, 1992, he did so just seven days after he received the Notice. Accordingly, Petitioner contends he timely requested a hearing within 60 days after he received the Notice, in accordance with 42 C.F.R. § 1005.2(c).

Counsel for the I.G. argues that Petitioner "received" the Notice on August 21, 1992, and thus Petitioner's request for hearing filed on December 29, 1992, is untimely as it was filed more than 60 days after Petitioner received the Notice.

For the following reasons, I find that the I.G. has shown that Petitioner received the Notice on August 21, 1992. I further find that Petitioner has failed to make a reasonable showing that he did not receive the Notice and that his request for hearing was filed untimely.

I. Petitioner was provided reasonable notice of his exclusion.

Section 1156(b)(4) of the Act provides that any person who is dissatisfied with an exclusion determination under the Act shall be entitled to reasonable notice and opportunity for a hearing as provided for in section 205(b) of the Act. An exclusion determination by the I.G. shall be in effect on the same date and in the same manner as an exclusion that arises under section 1128(c) of the Act. Act, Section 1156(b)(2). Section 1128(c) states that an exclusion shall be in effect at such time and upon such reasonable notice to the public and to the individual or entity excluded as may be specified by implementing regulations. Section 1001.2002 of the regulations sets forth the provisions that the notice must contain and its effective date. A person dissatisfied by the exclusion determination is entitled to an appeal of such sanction in accordance with part 1005 of the regulations. 42 C.F.R. § 1004.130. A request for hearing must be filed within 60 days after receipt of the notice. 42 C.F.R. § 1005.2(c). The date of receipt of the notice will be 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).

A. The I.G. has established a presumption that Petitioner received the Notice.

On August 12, 1992, the I.G. sent the Notice by certified mail to Petitioner's place of business. Findings 8, 9. There is no dispute that the Notice was mailed and correctly addressed to Petitioner's main office. The I.G. has therefore established a strong presumption that Petitioner received the Notice. Federal Deposit Insurance Corporation v. Schaffer, 731 F. 2d 1134, 1137 (4th Cir. 1984); E.F. Hutton Group, Inc. v. U.S. Postal Service, 723 F. Supp 951 (S.D.N.Y. 1989). This presumption in and of itself could arguably be sufficient to establish that Petitioner received the Notice. As will be discussed below, Petitioner has failed to rebut this presumption of receipt. He does not refute the evidence that the Notice was mailed to his place of business.

However, the record contains additional evidence which I conclude supports the I.G.'s contention that Petitioner received the Notice. The Notice was sent by certified mail and signed for on August 21, 1992 by Petitioner's employee, L.P., whose initials appear on the return receipt. I.G. Ex. 2; Findings 8 - 10, 27, 28. Although Petitioner argues that L.P.'s account of the events should be discounted because she does not specifically recall signing for the Notice, L.P. gave credible testimony in which she stated unequivocally that the initials on the return receipt were hers. There is no dispute that the article which accompanied the return receipt was the Notice. Therefore, L.P.'s lack of recollection of the specific article that accompanied the return receipt does not detract from the fact that she signed for receipt of the Notice. Accordingly, L.P.'s testimony not only further supports the presumption that Petitioner received the Notice on August 21, 1992, but also confirms that the Notice was received at Petitioner's office.

B. The I.G. has established that Petitioner received actual notice of his exclusion on August 21, 1992.

Petitioner contends that there is no evidence that, even if L.P. received the Notice, she gave it to Petitioner or to his wife. However, the I.G. is not obligated under the regulations to personally serve Petitioner, only to provide "reasonable notice." 42 C.F.R. § 1004.130; 42 C.F.R. § 1005.2. CMRI's April 24, 1992 letter and Petitioner's May 25, 1992 response to it show that Petitioner was already on notice of the probability that

the I.G. would accept the PRO's recommendation that he be excluded. Accordingly, the I.G.'s obligation to inform Petitioner of a final determination is analogous to Rule 5(b) of the Federal Rules of Civil Procedure. Rule 5(b) pertains to the ability to complete service upon mailing where a party has already been served with notice of the nature and type of action initiated against him.

In this case, the I.G. discharged the notice obligations when the I.G. mailed the Notice to Petitioner, and would have discharged the obligation even if the I.G. had sent the Notice uncertified via ordinary mail.[7] Louis W. DeInnocentes, Jr., M.D., DAB CR247 (1992); Charles K. Angelo, Jr. M.D., DAB CR290 (1993); Fed. R. Civ. P. 5(b). To rebut the presumption of delivery of the Notice, Petitioner would have to establish that the Notice was not delivered, perhaps by showing that it was either incorrectly addressed or not placed in the mail. Petitioner does not allege that either of these events occurred in this case.

Petitioner's principal contention to refute the "reasonable notice" requirement of the Act and the implementing regulations is that he did not personally receive the Notice. Such argument is unpersuasive. Neither the Act or the regulations require that

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[7] In the case of Mira Tomasevic, M.D., DAB CR17 at 11 -12 (1989), Judge Steven T. Kessel distinguished between the notice requirement relating to the effective date of an exclusion (he used the term "suspension") and a petitioner's right to request a hearing on such exclusion. For purposes of an excluded party requesting a hearing, Judge Kessel suggested that actual receipt of the notice of exclusion is required to trigger the 60 day period within which a hearing request must be filed under 42 C.F.R. § 498.40(a)(2). A similar requirement exists under 42 C.F.R. § 1005.2(c). However, Judge Kessel indicated in a footnote that "actual receipt" could be shown through the operation of a presumption that receipt occurs within five days of the date of the notice unless shown otherwise. The presumption that Judge Kessel alluded to in the former regulations at 42 C.F.R. § 498.22(b)(3) is contained in the existing regulations also at 42 C.F.R. § 1005.2(c). Judge Kessel concluded that the petitioner satisfactorily rebutted the presumption of receipt by showing that she did not reside at the address where the notice was mailed and in fact was no longer living in the United States. Here, Petitioner has made no showing that the Notice was not received at his place of business.

Petitioner be served personally with the Notice. Congress elected specifically to impose on the I.G. the less stringent duty to provide "reasonable notice" to the practitioner. To construe the regulations and the Act as requiring personal service on Petitioner would hamper the Secretary's ability to take remedial action to protect federally funded health care programs. DeInnocentes at 38 - 39. Furthermore, it would frustrate the purpose of the statute, harm the integrity of the federally funded programs, and potentially jeopardize the well-being of Medicare beneficiaries if clever or lucky excluded petitioners were able to avoid sanctions by evading or being unavailable for personal service. DeInnocentes at 38 - 39; Angelo. This is precisely the result that would occur if I were to construe the Act or the regulations to require personal service on excluded persons.

As a practical matter, short of personal service, there is little more the I.G. could have done to ensure that Petitioner received the Notice.[8] The I.G. has established that the Notice was properly addressed and delivered by certified mail to Petitioner's main office. In addition, the I.G. has established that the Notice was received by L.P. on August 21, 1992. Petitioner has offered nothing which would contradict the strong presumption of receipt of the properly addressed Notice, nor the actual receipt of the Notice by L.P.

In this case, it is apparent that L.P. either gave the Notice directly to Petitioner or his wife, or in their absence placed it on one of their desks. There is no evidence that she either threw the Notice away or destroyed it. Absent personal service, reasonable notice is established by evidence that the Notice was delivered to Petitioner's place of business. This can be shown by a return receipt signed by Petitioner or his agent, or failure by Petitioner to rebut the presumption of receipt arising from mailing of the notice to his place of business. Neither the statute nor the regulations require the I.G. to demonstrate that the Notice once received at Petitioner's place of business actually came into the hands of Petitioner.

Accordingly, I find that the I.G. provided reasonable notice to Petitioner. I further conclude that Petitioner

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[8] While Petitioner has offered a sworn affidavit stating that he never "received" the Notice, such a statement is self-serving and is not enough to rebut the evidence that the Notice was received by Petitioner's employee in the ordinary course of business. P. Ex. 1.

received the Notice on August 21, 1992, the date L.P. signed for the Notice.

II. Petitioner has failed to make a reasonable showing that he did not receive the Notice.

The regulations provide that Petitioner may rebut the presumption of receipt by making a "reasonable showing to the contrary." 42 C.F.R. § 1005.2(c). To that end, Petitioner alleges that, even if L.P. accepted the Notice, she was not authorized to receive certified mail without explicit permission from either himself or his wife. In addition, he alleges that, prior to December 22, 1992, he never personally received the Notice and was therefore unaware of his exclusion. As I have found above, the regulations do not require that Petitioner be personally served.

A. L.P. had actual authority to receive the Notice on behalf of Petitioner.

Actual authority is defined as conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account. Restatement of Agency 2d § 26.

From October of 1989 through September 3, 1992, L.P. was employed by Petitioner as an insurance billing clerk in his main office. During her tenure working for Petitioner, L.P.'s duties included receiving mail that was delivered to the office. Findings 10 - 25. During the entire month of August 1992, the individual who worked as Petitioner's receptionist at his main office was on medical leave of absence. Finding 15. During this time, L.P. and another billing clerk had the responsibility of receiving mail that was delivered to the office. Findings 11, 16. Additionally, even when the receptionist was present in the office, L.P. was authorized to receive all types of mail that were delivered to Petitioner's office. Findings 14, 21, 22, 86 -89. L.P. was never told that she was not to receive certified mail unless she obtained specific permission from Petitioner or his wife. Finding 24. Indeed, L.P. received mail at Petitioner's office approximately 70 percent of the days she worked there, including the frequent receipt of certified mail. Finding 22.

L.P. gave persuasive, credible testimony that there was no written or oral policy regarding which of Petitioner's employees could receive certified mail or when the employees could receive certified mail. L.P. stated that the usual and customary practice for receiving all types

of mail in Petitioner's main office was for the employee who was at the front desk to receive the mail, which was then given to Petitioner or his wife. In their absence, the mail was given to L.P. until their return. On August 21, 1992, L.P. accepted and signed for certified mail item 964365, the Notice.

I find that L.P.'s testimony establishes that she had the actual authority to receive all types of mail on behalf of Petitioner at all times relevant to this case. L.P. testified that over the course of her employment in Petitioner's office, she continually received both certified and regular mail addressed to Petitioner and that, over the course of her employment in Petitioner's office, she was never instructed at any time not to receive certified mail on his behalf. Petitioner, despite his contention that L.P. was not authorized to receive certified mail, continued to allow L.P. to receive all types of mail addressed to Petitioner over the entire duration of her employment. L.P. was never reprimanded on any occasion for receiving mail that Petitioner allegedly instructed her not to receive. Reasonably interpreted, Petitioner's conduct led L.P. to believe that she had the authority to receive the mail. Findings 82, 83.

Even if one assumes arguendo that Petitioner did not have knowledge of the workings of the clerical staff, Petitioner's wife was L.P.'s direct supervisor. However, neither Petitioner nor his wife ever instructed L.P. not to receive certified mail. Petitioner attempted to contradict L.P.'s testimony with testimony and several sworn statements from P.W. However, I did not find P.W.'s testimony to be credible or persuasive, while I did find L.P.'s testimony to be credible and persuasive.

P.W. is employed currently by Petitioner and has an interest in Petitioner's financial well-being. Finding 76. Her employment may well be threatened if Petitioner is excluded from Medicare and related State health care programs for ten years. Moreover, P.W.'s demeanor on the witness stand was such that I find her testimony to be not credible. Findings 79, 80.

While P.W. was adamant that Petitioner's office policy required specific approval from Petitioner or his wife before an employee could receive certified mail, P.W. conceded that her responsibilities involved primarily dealing with patients and did not involve any of the clerical aspects of Petitioner's office. Findings 49 - 52, 71 - 75. P.W.'s statement is unconvincing that Petitioner's problems with fraudulent mail scams led him

to institute a policy whereby either Petitioner or his wife had to give their specific approval before an employee could sign for certified mail. Findings 69 - 70. The mailing of unwanted items and charging the recipient for them is unlawful even if the items are not sent by certified mail. The alleged policy regarding certified mail would have no reasonable relationship to this illegal activity. This is especially true when viewed against P.W.'s inability to articulate how she became aware of it. Thus, L.P.'s testimony on her authority to receive certified mail is credible. Based on her demeanor at the hearing and evidence to the contrary, P.W.'s assertions lack credibility.

Despite Petitioner's contentions to the contrary, L.P.'s testimony established that, in accepting the Notice, she was performing her job in accordance with standard office practice and that she had the actual authority to receive not only the Notice but all types of mail on behalf of Petitioner.

B. L.P. had the apparent authority to receive the Notice on behalf of Petitioner.

When determining whether an agent has the apparent authority to act on behalf of the principal, the key inquiry is whether the principal has voluntarily placed the agent in a situation such that a person of ordinary prudence, conversant with general business practice, would be justified in believing that the agent had the authority to perform the act in question. Newark Branch N.A.A.C.P. v. Township of West Orange, N.J., 786 F. Supp. 408 (D. N.J. 1992); Restatement of Agency 2d § 27.

Assuming arguendo that L.P. was violating Petitioner's policy against receiving certified mail, the fact remains that L.P. did receive certified mail on many occasions. Findings 14, 16, 21, 22, 23, 26. Petitioner does not allege that on the other occasions L.P. received certified mail, she did so surreptitiously, without his knowledge. If Petitioner did not want L.P. to receive certified mail, he could have specifically instructed her that she was not allowed to receive certified mail. However, no such instruction was ever given to L.P.[9]

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[9] Even if there had been an office policy in place which forbade L.P. from receiving certified mail, there is no dispute that this policy was not written or posted anywhere in Petitioner's office. Moreover, the existence of such a policy would not have changed the outcome in this case. Petitioner clothed L.P. with the

Finding 23. By allowing L.P. to receive certified mail in the ordinary course of business, Petitioner voluntarily placed her in a situation where a reasonable third person, conversant with ordinary business practices, such as a postal worker delivering the mail to Petitioner's office, would be justified in believing that L.P. had the authority to receive certified mail on behalf of Petitioner. Accordingly, I find that L.P. had the apparent authority to receive the Notice.[10]

C. Petitioner's argument is unpersuasive that he did not personally receive the Notice on August 21, 1992.

Petitioner offered his own affidavit as evidence that he did not receive the Notice. His affidavit is rather narrowly drawn. He does not deny that anyone in his office accepted delivery of the Notice. He denies only that he personally received the Notice. P. Ex. 1. Also, in his affidavit, Petitioner contends that, had he received the Notice, he would have immediately requested a hearing. P. Ex. 1. This contention is supported by a declaration from Petitioner's former attorney, Kenneth Haber. P. Ex. 2. Mr. Haber states that, based on his experience in dealing with Petitioner, he has no doubt that Petitioner would have informed him promptly had Petitioner received the Notice. P. Ex. 2.

Petitioner received CMRI's April 24, 1992 letter advising him of the I.G.'s obligation to make a final determination within 120 days of CMRI's letter. I.G. Ex. 3. In a letter dated May 25, 1992, Petitioner submitted a response to CMRI's letter. Additionally, at that time Mr. Haber represented Petitioner in another exclusion case, Docket C-92-088. While it is unclear whether Mr. Haber was aware of CMRI's April 24, 1992 letter, it is clear that Petitioner received the letter and acted upon

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apparent authority to receive the Notice and is subject to the consequences of her actions within the scope of such authority. However, since the I.G. met the regulatory requirement of service when the Notice was delivered to Petitioner's place of business, the issue of who can and cannot accept the Notice is moot.

[10] Similarly, Judge Kessel in David L. Golden, M.D., DAB CR55 (1989) concluded that receipt of a notice of exclusion had been established when the individual acted in the capacity of someone who received mail on behalf of Petitioner.

it. Thus, Petitioner was well aware of the likelihood that he might be excluded some time in August, 1992.

Petitioner's contention that he did not receive the Notice prior to December 22, 1992 seems to imply that something happened to it between the time it was received by L.P. and the time she placed it on Petitioner's or Petitioner's wife's desk. However, Petitioner offers no explanation as to how the Notice could have been misdirected. Contrary to Petitioner's assertions, the record shows that L.P. accepted and signed for the Notice and subsequently placed it on either Petitioner's or his wife's desk. Findings 26 - 28. What happened to it at that point is not clear. What is certain is that the disposition of the Notice was governed by Petitioner's usual business practices. Petitioner must bear whatever consequences resulted from the inadequacy of office policies and procedures intended to control receipt of his mail.

Both Petitioner's and Mr. Haber's declarations do not rebut the evidence that the Notice was delivered to Petitioner's office by certified mail and received by his agent, L.P. Nor do the declarations affect the conclusion that the I.G. is not obligated to personally serve Petitioner to ensure that he receives the Notice. Similarly, the I.G. is not obligated to ensure that Petitioner has in place procedures that enable him to receive mail that is delivered to his office. The I.G.'s obligation ends when the Notice is properly delivered to Petitioner's place of business.

It flows from my conclusion (that the I.G. is under no obligation to personally serve Petitioner with the Notice) that the Notice is deemed received the moment it is delivered to Petitioner's place of business unless there is a reasonable showing to the contrary. Petitioner's argument that he never received the Notice misconstrues how the terms "received" and "receipt" are used in 42 C.F.R. § 1005.2(c). Petitioner's allegation that he has to have been personally served to have received the Notice is not sound. Nor would such a contention comport with the regulatory framework, especially in light of the remedial purpose of the Act to protect beneficiaries and recipients from untrustworthy providers. The reasonable notice standard articulated in the statute and regulations provides adequate due process protection to persons subject to exclusions. In balancing the rights of such persons and those receiving medical care from them, Congress chose to require the I.G. to show "reasonable notice" rather than "personal service" of the notices of exclusion.

The regulations in effect prior to 1992 allowed for a "good cause" exception if an excluded person did not submit the request for hearing within 60 days of receipt of the notice of exclusion. The regulations governing this case do not provide any exception once receipt of the notice of exclusion is shown. In short, the regulations impose a more stringent requirement on a petitioner to file the request for hearing within 60 days after receipt of the notice of exclusion. Circumstances that previously would have provided an arguable basis for good cause, such as illness or incapacity of a petitioner, or loss or destruction of the notice can no longer be used to excuse an untimely request for hearing once receipt has been established. While this result may seem unduly harsh, in my judgment the regulations make a clear distinction between what is necessary to establish receipt under the current regulatory framework and what circumstances previously would have excused an untimely request for hearing.

In this case, Petitioner failed to offer sufficient evidence to rebut the presumption of receipt. More than a mere presumption exists in this case, the evidence establishes that the Notice was delivered to Petitioner's place of business on August 21, 1992 and received by his employee, L.P. Petitioner's argument that his employee did not have the authority to receive the Notice is insufficient to make a reasonable showing that he did not receive the Notice. Lastly, the regulations contain no requirement that the I.G. must provide notice by personally serving an excluded petitioner. The I.G. therefore fulfilled its regulatory obligation to provide notice when the correctly addressed Notice was delivered to Petitioner's business address.

III. Petitioner's request for hearing was untimely filed and must be dismissed.

The regulations governing this case provide that an individual must file a request for hearing within 60 days after the letter of notification of the exclusion is received. 42 C.F.R. § 1005.2. The regulations further provide that the date of receipt of the notice 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 record establishes that the Notice was delivered to Petitioner on August 21, 1992. The record further establishes that Petitioner did not file his request for hearing until December 29, 1992. Pursuant to 42 C.F.R. § 1005.2(c), Petitioner had 60 days from receipt of the

Notice to file his request for hearing. Therefore, in accordance with 42 C.F.R. § 1005.2(e)(1), his request for hearing was not timely filed and must be dismissed.

CONCLUSION

Petitioner received the Notice when it was delivered to his place of business on August 21, 1992. Petitioner filed his request for hearing on December 29, 1992. Such request for hearing was not filed within the 60 day time frame set forth in the regulations. Accordingly, I DISMISS Petitioner's request for hearing for his failure to file his request in a timely manner.

/s/

Edward D. Steinman
Administrative Law Judge