

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	DATE: January 28, 1992
Nelson Ramirez-Gonzalez,)	
M.D.,)	
)	
Petitioner,)	Docket No. C-92-011
)	Decision No. CR175
- v.-)	
)	
The Inspector General.)	

DECISION

This case is before me for decision on the Inspector General's motion for a dismissal of Petitioner's request for a hearing for lack of timely filing. Based on the parties' arguments, I conclude that Petitioner neither is entitled to a hearing nor has he established good cause for not filing timely his request for a hearing. Therefore, I dismiss his hearing request.

By letter dated August 9, 1991, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare program, and any State health care program (such as Medicaid), as defined in section 1128(h) of the Social Security Act (Act)¹. The I.G.'s notice informed Petitioner that his exclusion resulted from his State conviction for a criminal offense related to the delivery of an item or service under Medicare. The I.G. further informed Petitioner that section 1128(a)(1) of the Act requires that individuals convicted of such program-related offenses be excluded for a minimum period of five years. The I.G. told Petitioner that he was being excluded for the mandatory

¹ "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-financed health care programs, including Medicaid. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

minimum five year period under section 1128(c)(3)(B) of the Act.

Petitioner requested a hearing in a letter dated October 10, 1991, and the case was assigned to me for hearing and decision. At the November 15, 1991 Prehearing Conference, the I.G. stated that Petitioner's appeal should be dismissed because the request for appeal was not filed within the 60 days required by 42 U.S.C. 1320a-7(d) and 42 C.F.R. 498.70(c).

I have considered the parties' briefs, the undisputed material facts, and the law. I conclude that there are no disputed questions of material fact that would require an evidentiary hearing. I further conclude that the I.G. has shown that Petitioner has filed his notice of appeal late and has further shown that Petitioner has not demonstrated good cause for his untimely filing. I accordingly enter summary disposition in favor of the I.G. and dismiss Petitioner's appeal.

ISSUE

The issue in this case is whether there is good cause for Petitioner's untimely filing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In a letter dated August 9, 1991, the I.G. notified Petitioner that he was being excluded from participation in 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

2. A return receipt signed by the Petitioner shows that Petitioner received the I.G.'s notice of exclusion on August 10, 1991. I.G. Ex. 2.

² The I.G. submitted three exhibits in support of his motion to dismiss. They will be referred to as I.G. Ex. (number) at (page). Petitioner submitted a brief but no exhibits. Petitioner's brief will be referred to as P.Br. (page). The I.G.'s brief and reply will be referred to as I.G. Br. (page) and I.G. Reply (page), respectively. For the purposes of this decision, I admit all exhibits into evidence.

3. By letter dated October 10, 1991, Petitioner requested a hearing. I.G. Ex. 3.

4. Section 1128(f) of the Social Security Act (Act) provides for reasonable notice and opportunity for a hearing to the same extent as provided in section 205(b) of the Act. Section 205(b) of the Act provides that an adversely affected party may, within 60 days from the receipt of the notice (of exclusion), file a request for a hearing.

5. The relevant federal regulations at 42 C.F.R. 498.40 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 notice of determination, unless that period is extended in accordance with 42 C.F.R. 498.40(c) of this section.

6. At no time did Petitioner request an extension of time for filing his request for a hearing.

7. A period of 61 days elapsed between August 10, 1991 and October 10, 1991.

8. Petitioner's request for a hearing was untimely filed. I.G. Exs. 2, 3; FFCL 1 - 7.

9. Petitioner has admitted his request for a hearing was untimely filed. P.Br. 2 - 3.

10. According to the applicable regulations, good cause occurs where unusual or unavoidable factors beyond a party's control prevent him from filing in timely fashion, or where the party could not have known of the need to file timely. See 20 C.F.R. 404.911.

11. Petitioner's attorney's assertion that his heavy workload caused him to file untimely, taken as true, is not good cause for untimely filing. FFCL 1 - 10; P.Br. 3 - 6; I.G. Br. 2 - 3.

12. There is no issue as to any material fact and summary disposition is appropriate.

ANALYSIS

The I.G. has moved for summary disposition of Petitioner's request for a hearing. The I.G. contends that there is no material fact in dispute, that Petitioner's request was filed out of time, and that

there is no good cause for allowing Petitioner's untimely request.

By Petitioner's own admission, his request for a hearing was untimely filed. This is corroborated by the documents submitted by the I.G. in connection with the motion to dismiss. A signed and dated return receipt submitted by the I.G. indicates that Petitioner received the notice of exclusion on August 10, 1991. I.G. Ex. 2. Petitioner has not disputed that it is his signature that appears on the return receipt. Petitioner's letter requesting a hearing is dated October 10, 1991, indicating a lapse of sixty-one days between his request for a hearing and his receipt of the I.G.'s notice of exclusion. I.G. Ex. 3. Therefore, Petitioner's request was filed outside of the sixty day deadline imposed by section 205(b) of the Act and 42 C.F.R. 498.40, and Petitioner is not entitled to a hearing. Petitioner did not request an extension of time for filing his request for a hearing. P. Br. 3.

While Petitioner has not disputed that his request for a hearing was untimely filed, he argues he had good cause for doing so. Petitioner's attorney states that his unusually busy trial and work schedule and other commitments prevented him from acting in a timely manner to file a hearing request on his client's behalf. P.Br. 3 - 4. Petitioner argues that the his delay in filing the request for hearing was not intentional and should be excused as it would not prejudice the I.G. in any way. P.Br. 6.

Petitioner states that he had a telephone conversation with an unnamed Assistant Regional Counsel of the Department of Health and Human Services and that he informed that Assistant Regional Counsel that Petitioner's conviction was on appeal in the Eleventh Circuit. Petitioner states that filing for an extension of time under 42 C.F.R. section 498.40(c) "would have only delayed the proceeding since the Administrative Judge would have to set a hearing on the request for an extension and consider the arguments made in connection therewith." P.Br. 3.

The I.G. argues that Petitioner has not demonstrated good cause for his untimely filing because Petitioner has not shown that he was unable to file a request for a hearing. The I.G. states that Petitioner's workload is not good cause for his late pleading. The I.G. has cited the "excusable neglect" standard of Rule 4(a) of the Federal Rules of Appellate procedure as support for his position. I.G. Reply 1. The I.G. argues that excusable neglect is

not meant to cover the excuse that the lawyer is too busy, as this excuse could be honestly used in almost every case. Lastly, the I.G. argues that Petitioner was put on notice of the 60 day deadline because it was explicitly stated in the letter of exclusion. Moreover, Petitioner had the option to request an extension pursuant to 42 C.F.R. section 498.40(c) and chose not to do so.

I find that Petitioner has not shown good cause for his untimely filing. Even if Petitioner's attorney had a heavy workload, it is simply not a good reason to excuse an untimely request for a hearing. To allow heavy workload to be used as good cause would effectively render meaningless all filing deadlines. The I.G.'s letter of exclusion gives Petitioner the complete address and instructions for filing his request for a hearing. I.G. Ex. 3. All that was needed was for Petitioner to send a brief written letter in accordance with 42 C.F.R. 498.40(b) to the address given in the notice of exclusion. I find it unpersuasive that the heavy workload of Petitioner's attorney prevented him from writing or dictating a brief letter to request a hearing.

I also find unpersuasive Petitioner's contention that he did not request an extension of time under 42 C.F.R. 498.40(c) because doing so would only have delayed the proceeding. P.Br. 3. The logic of Petitioner's assertion that he did not request an extension, because to do so would have delayed the hearing in this case, escapes me. Petitioner was on notice of the 60 day deadline for filing his request. However, he would have me believe that he chose to file his request outside the deadline rather than request an extension of time. Moreover, Petitioner's assertion that requesting an extension would delay the process by creating another hearing is without merit. There are many ways in which I could have dealt with a request for an extension, almost all of them not involving any meaningful delay. For example, it would have been within my discretion as the presiding ALJ to have the Petitioner submit a written request for an extension and have the I.G. respond, to have a telephone conference where the Petitioner requested an extension and the I.G. responded, or to have granted an extension without hearing any formal argument from the parties.

A finding of good cause for an untimely filing of a hearing request can be made for many reasons, including any situation where a party is physically unable to respond or where a party can show that he never received the notice of exclusion. See David L. Golden, M.D.,

DAB CR55 (1989). It is apparent that what is contemplated by the regulations is 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 could not have known of the need to file timely or was prevented from filing timely by forces outside the control of the party. See 20 C.F.R. Section 404.911.

In this case, Petitioner has not presented any evidence or made any argument that would allow me to conclude that he could not have known of the need to file timely or that forces beyond his control contributed to his untimely filing. Petitioner's counsel simply states that he was too busy to meet the deadline and that requesting an extension would have caused substantial delay in his case. I find both of these contentions unpersuasive, and accordingly dismiss Petitioner's request for a hearing as untimely filed.

In deciding that Petitioner should not be granted a hearing, I have considered the fact that his request was untimely by only one day. Arguably, I should show some lenience here inasmuch as the request was filed "only" one day late. However, I would be rendering meaningless the regulatory deadline for filing the request if I were to grant Petitioner a hearing in the absence of some showing of good cause for not timely filing a hearing request. Therefore, I have no choice but to dismiss Petitioner's request in this case.

CONCLUSION

Petitioner has not met his burden in that he has not shown good cause for untimely filing his request for a hearing. Petitioner has admitted, and the evidence has shown, that his request for a hearing was not filed on time. However, Petitioner has not proffered any persuasive reason, argument, or evidence that would allow me to conclude that either forces beyond his control would not allow him to timely file or that circumstances were such that he could not have known of the need to

file timely. I therefore dismiss Petitioner's request for a hearing and enter summary disposition in favor of the I.G.

/s/

Steven T. Kessel
Administrative Law Judge