

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of: )  
 ) Date: January 22, 2008  
Nick Lee Soto, )  
 )  
Petitioner, ) Docket No. C-07-744  
 ) Decision No. CR1728  
-v.- )  
 )  
The Inspector General. )  
\_\_\_\_\_ )

**DECISION**

Petitioner's request for a hearing is dismissed because it was untimely filed.

**I. Background**

The Inspector General (I.G.) notified Petitioner by letter dated April 30, 2007, that he was being excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(4) of the Social Security Act (the Act). The I.G. cited as a basis for the exclusion that Petitioner's registered nurse license had been revoked, suspended, or otherwise lost or was surrendered while a formal disciplinary proceeding was pending before the Board of Nurse Examiners for the State of Texas for reasons bearing upon Petitioner's professional competence, professional performance, or financial integrity. Petitioner requested a hearing by a letter dated September 10, 2007.

The case was assigned to me for hearing and decision on October 5, 2007. On October 25, 2007, I convened a prehearing conference by telephone, the substance of which is set forth in my order dated October 29, 2007. During the prehearing conference, counsel for the I.G. asserted that Petitioner's request for hearing was not timely filed and that it must be dismissed. The I.G. requested an opportunity to file a motion to dismiss before any further case development. I established the briefing schedule set forth in my order dated October 29, 2007.

The I.G. filed its motion to dismiss with supporting brief and I.G. exhibits (I.G. Ex.) 1 through 6. Petitioner was to file any response to the motion to dismiss on or before January 4, 2008, with any supporting evidence. Petitioner filed no response and the I.G. motion is uncontested and I.G. Exs. 1 through 6 are admitted.

## **II. Discussion**

### **A. Findings of Fact**

1. The I.G. notified Petitioner by letter dated April 30, 2007, that he was being excluded from Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(4) of the Act. I.G. Ex. 1.
2. Petitioner received the I.G. notice of exclusion on May 9, 2007. I.G. Ex. 5.
3. Petitioner's request for hearing is dated September 10, 2007. I.G. Ex. 2.

### **B. Conclusions of Law**

1. Petitioner's request for hearing was not filed within 60 days of his receipt of the I.G. notice of exclusion and it is, therefore, untimely.
2. An untimely request for hearing must be dismissed. 42 C.F.R. § 1005.2(e)(1).
3. Dismissal of Petitioner's request for hearing is required.

### **C. Issues**

Whether Petitioner's request for hearing must be dismissed because it was not filed timely.

### **D. Analysis**

The I.G. notified Petitioner by letter dated April 30, 2007, that he was being excluded from Medicare, Medicaid, and all federal health care programs pursuant to section 1128(b)(4) of the Act. Petitioner is incarcerated in the State of Texas penal system. The notice was mailed to Petitioner at a Texas Department of Corrections address in Tennessee Colony, Texas. I.G. Ex. 1. The I.G. has presented an affidavit from a Mail Room Supervisor in the Texas Department of Corrections who attests that the I.G. notice was received and logged in at the prison mail-room on May 8, 2007, and that it was delivered to Petitioner on May 9, 2007. I.G. Ex. 5. Petitioner's request for hearing is dated September 10, 2007. I.G. Ex. 2.

The regulations are clear that a request for hearing must be filed in writing within 60 days after the notice of exclusion is provided. 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). In this case, the I.G. has presented evidence which shows delivery actually occurred on May 9, 2007, and that date controls the running of the 60-day period in which Petitioner could request a hearing. There is no dispute that the I.G. notice letter included an attachment that advised Petitioner of his right to file a request for hearing within 60 days and the regulatory requirements to accomplish the filing. Because the I.G. notice was actually delivered to Petitioner on May 9, 2007, Petitioner had until July 9, 2007\* to file his request for hearing.

The regulations are clear that I “will dismiss” a hearing request where a petitioner’s hearing request is not timely filed. 42 C.F.R. § 1005.2(e)(1). The I.G. asserts, and I agree, that 42 C.F.R. § 1005.2(e)(1) gives me no discretion to waive a late filing or to grant an extension of time in which to file a request for hearing.

Accordingly, Petitioner’s request for hearing must be dismissed.

### **III. Conclusion**

For the foregoing reasons, Petitioner’s request for hearing dated September 10, 2007, is dismissed.

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/s/  
Keith W. Sickendick  
Administrative Law Judge

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\* The 60<sup>th</sup> day was actually July 8, 2007, but that was a Sunday. Thus, Petitioner had until the next business day to timely file his request for hearing. 42 C.F.R. § 1005.12(a).