

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JONATHAN ADAMS, PH.D.,)
)
 Petitioner,)
)
 vs.) Case No. 09-2135
)
 DEPARTMENT OF MANAGEMENT)
 SERVICES, DIVISION OF STATE)
 GROUP INSURANCE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER OF DISMISSAL

This case is before the undersigned based upon the Motion to Dismiss filed by Respondent on April 21, 2009, and the response to the Order to Show Cause filed by Petitioner on April 27, 2009. No hearing is necessary.

APPEARANCES

For Petitioner: Jonathan Adams, Ph.D., pro se
Post Office Box 1388
Tallahassee, Florida 32302

For Respondent: Sonja P. Mathews, Esquire
Department of Management Services
Office of the General Counsel
4050 Esplanade Way, Suite 260
Tallahassee, Florida 32399

ISSUE

The issue is whether Petitioner's request for hearing should be dismissed as untimely.

PRELIMINARY STATEMENT

On April 21, 2009, the Department of Management Services, Division of State Group Insurance (DSGI), referred this matter to the Division of Administrative Hearings (DOAH). The referral included Petitioner's letter requesting a formal hearing concerning the denial of an insurance claim as well as a Motion to Dismiss filed by Respondent.

On April 23, 2009, the undersigned issued an Order to Show Cause directing Petitioner to "show cause in writing as to why his request for hearing should not be dismissed as untimely." Petitioner filed a response to the Order to Show Cause on April 27, 2009. For purposes of ruling on Respondent's Motion to Dismiss, the response is treated as a proposed amended request for hearing, and all well-pled allegations in the response are accepted as true.

Due consideration has been given to the legal argument in the Motion to Dismiss and in Petitioner's response to the Order to Show Cause. No hearing is necessary to rule on the Motion to Dismiss. See Fla. Admin. Code R. 28-106.204(1).

All statutory references in this Recommended Order are to the 2008 version of the Florida Statutes.

FINDINGS OF FACT

1. In a letter dated January 29, 2009,^{1/} DSGI informed Petitioner that his Level II appeal was denied. The appeal

concerned Blue Cross and Blue Shield of Florida's denial of coverage for a Magnetic Resonance Imaging Spectrography procedure that Petitioner underwent in July 2008.

2. The letter informed Petitioner of his right to request an administrative hearing on the denial of his appeal, and also informed Petitioner that the request must be filed with DSGI within 21 days of his receipt of the letter.

3. Copies of Florida Administrative Code Rules 28-106.201 and 28-106.301 were attached to the letter, as was an "informational page" that stated in pertinent part:

Your request (petition) for a formal hearing **must** be in writing. We recommend you send your request by certified mail so you will have proof of the date the Department of Management Services (DMS) receives it. You lose your right to a hearing if we do not receive your request on time. (Bold in original and underlining added).

* * *

If you dispute the facts we used in our decision, state them in your written request for a hearing. Your request must meet the requirements of rule 28-106.201, Florida Administrative Code.

4. Petitioner received the letter denying his appeal on February 9, 2009.

5. The 21-day period for requesting a hearing on that decision expired on March 2, 2009.

6. Petitioner requested a hearing on the denial of his appeal through a letter dated March 1, 2009. The letter stated in pertinent part:

I am writing in protest of the decision rendered against a health insurance claim I submitted in July of 2008 by DSGI. I believe that the decision to DENY my health insurance is improper, the reasons for which actually encourage further health risks by limiting my health care options to only procedures that are inherently dangerous by promoting the spread of cancer.

I am writing to request a formal hearing....

7. Petitioner mailed this letter to DSGI. The postmark date on the envelope in which the letter was mailed was March 5, 2009, which is after the applicable filing deadline.

8. Petitioner's request for hearing was received by DSGI on March 9, 2009 (seven days after the deadline), and was filed with the Clerk of the Department of Management Services on March 10, 2009 (eight days after the deadline).

9. Petitioner's request for hearing was untimely because it was filed more than 21 days after he received the letter denying his Level II appeal.

10. The Order to Show Cause issued on April 23, 2009, gave Petitioner an opportunity to explain why his untimely petition should not be dismissed.

11. The letter filed by Petitioner in response to the Order to Show Cause stated in pertinent part:

I apologize for missing the 21 day deadline to file a request for hearing. I do not waive my rights.

1. I cannot afford legal representation in this matter. I received the letter dated January 29 from the Department of Management Services [and] I was led to believe that a full and complete response -- one that was equal to the five-page letter I received -- was necessary. Because of the amount of information I felt that I was required to assemble, and demands on my life circumstances I [was] unable to file in a timely manner.

12. The response to the Order to Show Cause also articulates what Petitioner believes to be the merit of his case,^{2/} which he argues "outweighs dismissal because of procedural technicalities."

CONCLUSIONS OF LAW

13. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

14. Florida Administrative Code Rule 60P-1.004 provides in pertinent part:

Any party whose substantial interests have been or will be determined by a decision or intended decision of the Division of State Group Insurance and who desires to contest the agency's decision or intended decision shall submit a petition for an administrative hearing that complies with Rule 28-106.201, F.A.C., if there is a dispute of material fact, or Rule 28-106.301, F.A.C., if there is no dispute of material fact. The petition must be

received by the agency clerk of the Department within twenty-one (21) calendar days after notice of the decision or intended decision is received by the party. The clerk's address is Office of General Counsel, Department of Management Services, 4050 Esplanade Way, Tallahassee, FL 32399-0949. Proceedings shall be conducted pursuant to Chapter 120, Florida Statutes, and Rule Chapter 28-106. (Emphasis supplied).

15. Florida Administrative Code Rule 28-106.111(4)

provides:

Any person who receives written notice of an agency decision and who fails to file a written request for a hearing within 21 days waives the right to request a hearing on such matters. This provision does not eliminate the availability of equitable tolling as a defense.

16. A request for hearing is "filed" when it is received by the agency clerk, not when it is mailed by the petitioner. See Fla. Admin. Code R. 28-106.103 (last sentence) and 28-106.104(1); Watson v. Brevard County Clerk, 937 So. 2d 1264, 1266 (Fla. 5th DCA 2006).

17. Section 120.569(2)(c), Florida Statutes, provides that a request for hearing "shall be dismissed if . . . has been untimely filed." (Emphasis supplied).

18. Petitioner does not dispute that his request for hearing was untimely filed. Indeed, in his response to the Order to Show Cause, he candidly "apologize[s] for missing the 21-day deadline to file a request for hearing."

19. Nevertheless, Petitioner argues that his request for hearing should not be dismissed on this "technicality" because of the merit of his case. The law does not support Petitioner's argument.

20. It is well-settled that dismissal of an untimely request for hearing is mandatory based upon Section 120.569(2)(c), Florida Statutes, and that "excusable neglect" cannot save an untimely request for hearing. See, e.g., Aleong v. Dept. of Business & Professional Reg., 963 So. 2d 799, 801 (Fla. 4th DCA 2007); Patz v. Dept. of Health, 864 So. 2d 79, 80 (Fla. 3d DCA 2003); Whiting v. Dept. of Law Enforcement, 849 So. 2d 1149, 1151 (Fla. 5th DCA 2003); Cann v. Dept. of Children & Family Servs., 813 So. 2d 237, 239 (Fla. 2d DCA 2000).

21. The case cited by Petitioner interpreting and applying the doctrine of excusable neglect to preserve a potentially meritorious claim is distinguishable because it arose under the federal Bankruptcy Act, not Chapter 120, Florida Statutes. See Pioneer Investment Services Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380 (1993) (holding that an attorney's failure to timely file a proof of claim in a bankruptcy proceeding may constitute "excusable neglect" within the meaning of Bankruptcy Rule 9006(b)(1)).

22. Thus, even if the facts alleged in the response to the Order to Show Cause constitute excusable neglect (and it is

unlikely that they would), those facts would not save Petitioner's untimely request for hearing from dismissal.

23. The doctrine of "equitable tolling" may save an untimely request for hearing. See § 120.569(2)(c), Fla. Stat.; Fla. Admin. Code R. 28-106.111(4); Cann, 813 So. 2d at 239.

24. Equitable tolling applies only when the petitioner "has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." Machules v. Dept. of Administration, 523 So. 2d 1132, 1134 (Fla. 1988).

25. Petitioner has not alleged any facts that, if proven, might implicate the equitable tolling doctrine.

26. The fact that Petitioner is representing himself is not a basis to apply the doctrine of equitable tolling. See Jancyn Manufacturing Corp. v. Dept. of Health, 742 So. 2d 473, 476 (Fla. 1st DCA 1999) (lack of legal representation does not excuse inaction that results in an untimely petition for hearing)

27. Likewise, the facts that Petitioner had other demands in his life and that he assumed that he needed to file a "full and complete" request for hearing are not bases to apply the doctrine of equitable tolling. Petitioner did not allege in his response to the Order to Show Cause that DSGI was in any way

responsible for these issues, and there is nothing else in the case file that in any way suggests that DSGI misled Petitioner regarding the procedure or timeframe for requesting a hearing. To the contrary, the documents attached to Petitioner's response to the Order to Show Cause reflect that DSGI clearly advised Petitioner of the timeframe and procedure for requesting a hearing as well as the consequences for failure to timely request a hearing.

28. Simply put, there is nothing extraordinary about Petitioner's failure to timely file his request for hearing. Rather, as was the case in Environmental Resource Associates of Florida, Inc. v. Department of General Services, 624 So. 2d 330, 331 (Fla. 1st DCA 1993), "the problem in this case is the too ordinary occurrence of a [party] failing to meet a filing deadline."

29. In sum, Petitioner's request for hearing must be dismissed because it was filed with the Department more than 21 days after Petitioner received the letter denying his Level II appeal.

30. The defect in Petitioner's request for hearing -- its untimeliness -- cannot be cured and, therefore, dismissal of the request for hearing with prejudice is appropriate. See § 120.569(2)(c), Fla. Stat. ("Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely

amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured.").

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that DSGI issue a final order dismissing Petitioner's request for hearing.

DONE AND ENTERED this 5th day of May, 2009, in Tallahassee, Leon County, Florida.



T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of May, 2009.

ENDNOTES

^{1/} The letter was actually dated January 29, 2008, but is clear from the context of the letter and the other documents in the case file that 2008 was a scrivener's error.

^{2/} No findings are made concerning the alleged merit of Petitioner's case in light of the procedural posture of this

case. However, it is noted that if this case were to have gone to hearing, the issue would not have been whether Petitioner needed the medical procedure at issue, but rather whether the procedure met the insurance plan's definition of an "experimental or investigational procedure" that is excluded from coverage.

COPIES FURNISHED:

Sonja P. Mathews, Esquire
Department of Management Services
Office of the General Counsel
4050 Esplanade Way, Suite 260
Tallahassee, Florida 32399

Jonathan Adams, Ph.D.
Post Office Box 1388
Tallahassee, Florida 32302

John Brenneis, General Counsel
Department of Management Services
4050 Esplanade Way
Tallahassee, Florida 32399-0950

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.