

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Allan L. Silverstein, M.D.
Docket No. A-18-66
Decision No. 2908
November 7, 2018

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE ORDER**

Allan L. Silverstein, M.D. (Petitioner) appeals a March 14, 2018 order, issued by the Administrative Law Judge (ALJ), denying his motion to vacate the ALJ's November 2, 2017 dismissal of his July 31, 2017 request for hearing. *Allan L. Silverstein, M.D.*, Docket No. C-17-985 (March 14, 2018). Finding no error or abuse of discretion by the ALJ, we affirm the denial of the motion to vacate.

Background

On February 8, 2017, Noridian Healthcare Solutions (Noridian), a Centers for Medicare & Medicaid Services (CMS) Medicare Administrative Contractor, notified Petitioner that his Medicare billing privileges had been revoked on the grounds that his California medical license had expired and that he had submitted Medicare claims for services performed after his license had expired. CMS Ex. 3.

In response to the February 8, 2017 revocation notice, Petitioner sent Noridian a "plan of correction" that Noridian rejected as failing to meet federal requirements. CMS Exs. 4-6. Petitioner also filed a request for reconsideration of the initial revocation determination, a request that Noridian denied in a reconsidered determination dated June 6, 2017. CMS Exs. 7-9.

On July 31, 2017, Petitioner requested a hearing before an administrative law judge, stating that the reconsidered determination was "inconsistent with the facts." The hearing request was filed electronically by Petitioner's lawyer using the Departmental Appeals Board's electronic filing system, called DAB E-File.

(In order to use DAB E-File, a party or the party's representative must register to use the system and provide an e-mail address to which the system will send notices of party filings and case-related documents issued by the ALJ. "Instructions" for using DAB E-File, posted on the system's website, state that "[w]hen a party has filed its request for

hearing via DAB E-File, the [Departmental Appeals Board's Civil Remedies Division (CRD)] will use that system to issue and serve upon the party any notice, order, ruling, or decision" issued by the ALJ. *Using the Departmental Appeals Board Electronic Filing System ('DAB E-File') For Cases Before the Civil Remedies Division*, available at https://dab.efile.hhs.gov/appeals/to_crd_instructions?locale=en ("E-Filing Instructions"). The instructions further explain that whenever a party files, or an administrative law judge issues, a case-related document by uploading it to DAB E-File, the system automatically emails a notice of the filing or issuance to all parties (or their representatives) if they (or their representatives) have registered to use that system and consented to accept electronic service in the case. *Id.* (para. 6). The email notice of an uploaded document contains a webpage link that takes the addressee to DAB E-File's login screen and then to the relevant appeal's docket page, from where the new filing or issuance can be viewed and downloaded. *Id.*

On August 11, 2017, eleven days after Petitioner filed his hearing request, the ALJ issued an "Acknowledgment and Prehearing Order," which the CRD served on the parties that same day by uploading it to DAB E-File. The Prehearing Order established deadlines for the parties to file "pre-hearing exchanges" (i.e., proposed evidence and a pre-hearing brief) – CMS, by September 15, 2017, and Petitioner, by October 6, 2017. In addition, the Prehearing Order warned that the ALJ might "impose sanctions" on a party that failed to comply with its directives. The Prehearing Order further advised the parties that the proceeding before the ALJ would be governed by procedures in 42 C.F.R. Part 498, as "supplement[ed]" by the Civil Remedies Division Procedures. Those procedures, which are posted on the DAB's website, state in relevant part that a party using DAB E-File "must accept electronic service of all case-related documents"; that DAB E-File notifies a party by email when a document or group of documents has been uploaded to the electronic docket of that party's case; and that "[p]arties are responsible for ensuring that automatic e-mail notices from DAB E-File are not blocked by spam or other filters." Civil Remedies Division Procedures (eff. March 28, 2016), § 6.a.iv (available at <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-alj/procedures/index.html>).

CMS timely filed (via DAB E-File) its pre-hearing exchange along with a motion for summary judgment. Petitioner did not, however, file a prehearing exchange, nor did he ask the ALJ to extend the filing deadline for that submission or respond to the motion for summary judgment.

On October 17, 2017, the ALJ issued an "Order to Show Cause," which CRD uploaded to DAB E-File the same day. If Petitioner wished to pursue the case, the show-cause order instructed him (1) to show "good cause" for his failure to file his pre-hearing exchange by the applicable deadline and (2) to file either (a) a prehearing brief and response to

CMS's summary judgment motion or (b) a statement that he did not dispute the facts asserted in CMS's summary judgment motion and that he consented to a decision "based upon the written record of all documents previously submitted." The show-cause order further advised Petitioner that his case would be dismissed for "abandonment" if he failed to show good cause or comply with the order's other instructions. The show-cause order required a response from Petitioner within 10 days.

On November 2, 2017, after the deadline to respond to the show-cause order had passed without word from the Petitioner, the ALJ issued, and CRD uploaded to DAB E-File, an order finding that Petitioner had abandoned his request for hearing and dismissing it pursuant to 42 C.F.R. § 498.69.¹ The dismissal order advised Petitioner that he could seek to have the dismissal vacated under 42 C.F.R. § 498.72, which permits an ALJ to vacate a dismissal if a party files a request for that relief within 60 days from receipt of the notice of dismissal and shows "good cause" for granting the request.

On February 16, 2018, Petitioner filed a motion with the ALJ, making two requests. First, he asked the ALJ to vacate the dismissal of his hearing request, asserting that his request was timely because his lawyer did not "receive" notice of the November 2, 2017 dismissal order until February 14, 2018. Second, Petitioner asked the ALJ to rule on CMS's summary judgment motion.

In support of his motion to vacate the dismissal, Petitioner submitted a declaration by his lawyer, who stated:

On July 31, 2017, I filed a Request for Administrative Law Judge Hearing using the DAB E-file System. Not having received email confirmation of the filing and a docket number, on August 7, 2017, I called [C.V.] of the Civil Remedies Division ("CDR"). [C.V.] told me I should speak to [J.J.²], and that he would give [J.J.] a message to call me. On August 7, 2017, [J.J.] called me and told me this case had been docketed and was assigned to Administrative Law Judge, Leslie Weyn (hereinafter "ALJ"). [J.J.] further told me I would be receiving email notices from the ALJ instructing the parties on how to proceed.

¹ Section 498.69 authorizes an administrative law judge to find a request for hearing "abandoned," and to dismiss it for that reason, if the party that requested the hearing "[f]ails to respond, within 10 days after the ALJ sends a 'show cause' notice, with a showing of good cause." 42 C.F.R. § 498.69(a), (b)(2).

² J.J. is the Director of the Departmental Appeals Board's Civil Remedies Division.

On February 14, 2018, I received an email from Petitioner asking whether I had heard anything about the case. On that date, I logged onto the DAB E-File System and for the first time discovered that the case had been “Closed”. In clicking on the Docket Number, I was shocked to find numerous documents had been filed including, but not limited to, an Acknowledgment and Pre-Hearing Order filed August 11, 2017, a CMS Prehearing Brief and Motion for Summary Judgment filed September 13, 2017, an Order to Show Cause re dismissal filed October 17, 2017 and Dismissal filed November 2, 2017.

In preparation for filing the Request for Administrative Law Judge Hearing, I read and relied on the online guide entitled “Using the Departmental Appeals Board Electronic Filing System (‘DAB E-File’) For Cases Before the Civil Remedies Division”. Under the heading “**How CRD Will Use the E-Filing System**”, the guide reads in pertinent part “When CRD issues a document via DAB E-File, the document is posted to the relevant appeal’s docket sheet. **Simultaneously, an e-mail is sent to all parties, or parties’ representatives, notifying them of the document’s issuance.**” . . .

I check my email regularly and use Microsoft Outlook. From the date of the filing of the Request for ALJ Hearing to the present, no emails from the DAB E-File System were received in my inbox. I check the “Junk E-mail” folder periodically and never found any emails from the DAB E-File System. On February 15, 2018, I called [J.J.] again and asked him whether he could check if there was any problems with the DAB E-Files System sending emails to my email address. [J.J.] called back and said he did not find any problems, but would activate the DAB E-File system to allow me to file a motion. I have called IT professional to determine why I have not been receiving notifications from the E-File System.

Although all parties to this proceeding also had my telephone number, fax number and mailing address, I received no other contact regarding whether there was an intention to abandon this appeal. . . .

* * *

Neither I nor my client ever intended to abandon this appeal.

Declaration of Mark A. Brodka (attached to Pet.’s Feb. 16, 2018 motion) (emphasis in original, paragraph numbers omitted).

On March 14, 2018, the ALJ issued an order (served on the parties via DAB E-File) denying Petitioner's motion to vacate. After noting that Petitioner had filed the motion more than 60 days after November 2, 2017, the day that the CRD served the dismissal order on the parties via DAB E-File, the ALJ addressed the assertion by his lawyer that he never received email notice of the dismissal from DAB E-File and was thus was unaware of it until February 14, 2018:

Even accepting as true all of counsel's statements, I nevertheless find that Petitioner received the dismissal order on November 2, 2017. As Mr. Brodka filed Petitioner's hearing request by DAB E-File, I infer that Mr. Brodka created a DAB E-File account prior to filing the request. Mr. Brodka does not dispute that the email address associated with his account and listed on all my orders, mbrodka@mabrolaw.com, is his email address. As the person who filed the hearing request, Mr. Brodka had access to the case from the outset, and his declaration makes clear that he continued to have access to the case through February 16, 2018. Based on the foregoing, I infer that the DAB E-File system automatically emailed notifications about all electronic filings in the case, including notification of the dismissal order on November 2, 2017, to Mr. Brodka at his mbrodka@mabrolaw.com email address.

In his declaration, Mr. Brodka attempts to cast doubt on this inference, but his declaration falls short. Although he states clearly enough that he did not receive any DAB E-File notifications in his inbox, he goes on to assert vaguely that he "check[s] the 'Junk E-mail' folder periodically" without specifying how frequently he checks that folder. This leaves open the possibility, clearly contemplated in Civil Remedies Division Procedures § 6.a.iv., that the DAB E-File notifications were filtered to Mr. Brodka's "Junk E-mail" folder. This in turn raises the possibility that Microsoft Outlook deleted DAB E-File notification emails from Mr. Brodka's "Junk E-mail" folder automatically *before* he checked that folder. Thus, the fact that Mr. Brodka "never found any emails from the DAB E-File System" in his "Junk E-mail" folder does not mean that he never received any DAB E-File notification emails in that folder.

In sum, Mr. Brodka's declaration does not convince me that DAB E-File suffered a fundamental breakdown in sending notification emails to his email address. As Petitioner has presented no other evidence that his counsel did not receive the November 2, 2017 DAB E-File notification email concerning the issuance of my dismissal order, I find that Petitioner received my dismissal order on November 2, 2017. . . .

Order Denying Motion to Vacate at 2-3 (*italics in original*).

Having found that Petitioner's lawyer had received DAB E-File's emailed notice of the dismissal order on November 2, 2017, the ALJ concluded that she lacked the authority to vacate the dismissal under 42 C.F.R. § 498.72 because Petitioner did not file the motion to vacate within 60 days after receiving notice of the dismissal. *Id.* at 3.

Petitioner then filed a timely request for review, asking the Board to vacate the dismissal and remand the case "for a hearing of the [motion for summary judgment]" or, alternatively, to "rule on the merits of the [Motion for Summary Judgment] based on the submitted record." May 10, 2018 Request for Review (RR) at 3.³

Analysis

The Board reviews the denial of a motion to vacate a dismissal under an abuse of discretion standard. *Axion Healthcare Servs., LLC*, DAB No. 2783, at 4 (2017). The Board reviews any factual finding supporting the ALJ's exercise of discretion to determine whether the finding is supported by substantial evidence. *Id.*

Petitioner asserts three "exceptions" to the ALJ's March 14, 2018 order denying his motion to vacate the dismissal. First, he contends that the ALJ's March 14, 2018 order incorrectly states that CMS opposed the motion to vacate. RR at 3-4. However, the ALJ did not misstate any facts. She accurately noted that, while CMS's lawyer had informally advised Petitioner's lawyer that CMS opposed the motion, CMS did not file a brief to that effect. Order Denying Motion to Vacate at 1; *see also* RR at 3-4; CMS Response to Appellant's Request for Review (Response Br.) at 9. Any misunderstanding by the ALJ about CMS's position would have been immaterial in any event. As our discussion below indicates, the validity of the challenged order, which CMS now defends, depends on whether the ALJ made a supportable finding about when Petitioner received notice that his hearing request had been dismissed, not on whether CMS opposed the motion to vacate while it was pending before the ALJ. The ALJ had the authority to deny that motion if the regulatory conditions for granting it were not satisfied, regardless of CMS's position.

³ The request for review is titled "Appeal of Order Denying Petitioner's Motion to Reconsider and Vacate Dismissal for Abandonment and for Hearing of Agency's Motion for Summary Judgment on the Merits Based on Submitted Record."

Next, Petitioner contends that the “ALJ’s conclusion that Petitioner received [her] dismissal order on November 2, 2017, is based on speculation that is not supported by substantial evidence[,]” and that “[d]epriving [him] of a substantive due process right should not be based on speculation.” RR at 5. “Accepting as true all of the facts stated in the Attorney’s declaration,” says Petitioner, “leads to the conclusion that [he] first received actual notice of the order of dismissal on February 14, 2018.” *Id.*

Contrary to Petitioner’s belief, the ALJ did not base her ruling on speculation. Rather, she held that certain facts and evidence – including details about how DAB E-File “automatically” and “instantaneously” notifies parties or their representatives by email that a document has been uploaded to a case’s electronic docket; a docket entry confirming that CRD uploaded the dismissal order to the electronic docket of Petitioner’s case on November 2, 2017; the undisputed fact that Petitioner’s lawyer had a DAB E-File account linked to that docket as of November 2, 2017; and the fact that the email address identified by the lawyer as his own is the address associated with the lawyer’s DAB E-File account – warranted a rebuttable presumption that Petitioner’s lawyer received notice of the ALJ’s dismissal order on November 2, 2017. That presumption (or “inference,” as the ALJ called it) is not unreasonable. *See American Boat Co. v. Unknown Sunken Barge*, 418 F.3d 910, 913-14 (8th Cir. 2005) (holding that court clerk’s docket entry indicating that a case-related document had been emailed to the parties created a rebuttable presumption that the document had been received by the addressee).

The ALJ also held that the lawyer’s sworn statement that he did not receive notice of the dismissal (or any other previously uploaded case-related document) from DAB E-File was insufficient to overcome the presumption because he failed to exclude the possibility that his email program (Microsoft Outlook) blocked the notice from appearing in the program’s “inbox.” We do not find that conclusion unreasonable. DAB E-File’s instructions, which Petitioner’s lawyer admits to having reviewed when he filed the request for hearing, alert a party to the possibility that the system’s email notifications might be blocked as “spam” or other unwanted communication. In his declaration, Petitioner’s lawyer did not say that he configured his email program to ensure that it did not block or divert the delivery of notifications from DAB E-File. While he said that he “periodically” checked his email account’s “junk” folder for blocked or filtered messages, he did not say how often he did that or how often Microsoft Outlook purged the junk folder. And while the lawyer stated that he consulted with an “IT professional to determine why I have not been receiving notifications from the E-File System,” he did not say what, if anything, he learned from that consultation. Petitioner’s lawyer also acknowledged that, in response to his inquiry, the CRD Director (J.J.) informed him on

February 15, 2018 that DAB E-File had received no indication (such as delivery-error messages sent to DAB E-File by Petitioner's email program) of malfunctions in transmitting automatic notifications to the lawyer's email address.⁴

In light of these statements and omissions, we agree with the ALJ that it is possible (not merely speculative) that Petitioner's lawyer received DAB E-File's notice of dismissal on November 2, 2017 but that the message was routed by his email program to a junk folder and deleted before he saw it. Petitioner does not dispute that possibility in his request for review, nor does he contend that the ALJ erred or abused her discretion in requiring more than his lawyer's bare denials of receipt. Such denials carry little weight given the lawyer's manifest lack of diligence. DAB E-File's instructions state that when a party files a request for hearing using that system, the party consents to electronic service of case-related documents (including the ALJ's rulings and orders) via that system.⁵ E-Filing Instructions (para. 7). The instructions also state (as the CRD Procedures do) that system users, be they parties or their representatives, "are responsible for ensuring that e-mail from DAB E-File (notifications@dab.efile.hhs.gov) is not blocked by spam or other filters." *Id.*, "Problems with E-mail Delivery." In addition, the instructions advise users that a party will be "deemed to have received" documents served by CRD using DAB E-File "[a]bsent notice to CRD of circumstances that precluded or delayed e-mail delivery[.]" *Id.*, "Date of Receipt of CRD Documents." Collectively these instructions obligate party representatives to take reasonable steps to verify that DAB E-File is reliably delivering notices of document uploads. *Parvin Shafa MD Inc.*, DAB No. 2846, at 7 (2018) (noting that the appellant was "responsible to ensure that she was able to receive e-mail notifications from the system reliably at the e-mail address with which she registered"). Such steps were not taken in this case. In his declaration, Petitioner's lawyer states that after speaking with a CRD employee on August 7, 2017 and being told to expect further emailed communication from the ALJ about the next steps in the case (an expectation he should have already had from reading DAB E-File's instructions, which advise parties that an ALJ will be in contact with them "promptly

⁴ Petitioner does not allege that his lawyer did not receive DAB E-File's email notice of the order denying his motion to vacate or indicate that he had modified his email program in some fashion to ensure that he received it.

⁵ A party that wishes to file and receive service of documents by regular (postal) mail must ask the ALJ for a "waiver" of the electronic filing requirement. CRD Procedures § 6.b. Petitioner did not ask for such a waiver.

after” the hearing request is filed⁶), he allowed six months to pass before checking the case’s docket or contacting the CRD to learn about case developments – and then only after his client asked him for the case’s status. No explanation has been offered for this apparent lack of diligence.

Based on the analysis in the preceding three paragraphs, we sustain the ALJ’s finding that Petitioner received notice of the ALJ’s order of dismissal on November 2, 2017.⁷ We also affirm the ALJ’s finding that Petitioner’s motion to vacate, filed on February 16, 2018, was untimely under 42 C.F.R. § 498.72 because it was filed more than 60 days after his receipt of the notice of dismissal.

Notwithstanding the untimeliness of his motion to vacate, Petitioner contends (in his third “exception”) that the dismissal should be vacated because: (1) he “did not in any way contribute” to a delay in the proceedings; (2) any delay “occasioned by any error of [his] Attorney cannot be characterized as intentional”; (3) “CMS suffered no prejudice” from the delay; (4) his attorney “moved for relief from dismissal as soon as possible” without opposition from CMS; (5) the ALJ “failed to consider lesser sanctions” than dismissal as a remedy for missed filing deadlines; (6) he never “intended” to abandon his hearing rights; and (7) “public policy strongly favors” that his case be decided on the merits. RR at 7-8.

These points amount to an allegation that “good cause” exists to vacate the dismissal. However, the ALJ did not deny the motion to vacate on that ground. Instead, she denied the motion solely because it was untimely. The ALJ committed no error in that regard (and Petitioner does not contend otherwise). Title 42 C.F.R. § 498.72 states that an ALJ “may vacate any dismissal of a request for hearing if a party files a request to that effect within 60 days and shows good cause for vacating the dismissal.” The regulation plainly requires that both stated conditions – timely filing of a request to vacate, and a showing of “good cause” – be met before the ALJ may vacate a dismissal. Because she justifiably found that Petitioner’s motion to vacate was untimely, she correctly concluded that she had no authority to grant the sought-after relief. And for the same reason, there was no need for the ALJ (and there is no need for us) to decide whether Petitioner made the good-cause showing required by section 498.72.

⁶ See E-Filing Instructions, “CRD’s Acknowledgment and Docketing of the Appeal” (stating that “[p]romptly after” the electronic filing of a request for hearing, the CRD will assign a docket number to the hearing request (if it deems the request acceptable), notify the parties (via DAB E-File) of the appeal’s docket number, and attach to that electronic notice an Acknowledgment Order or letter from the ALJ informing the parties about (among other things) the next steps in the case, such as the schedule for submitting evidence and legal argument).

⁷ In general, a party is deemed to have notice of facts or events about which the party’s lawyer has notice. See *Bryant H. Hudson, III, M.D.*, DAB No. 2442, at 6 n.5 (2012); *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 92 (1990). Petitioner does not ask us to depart from that general rule in this case.

Conclusion

Based on the foregoing analysis, we affirm the ALJ's March 14, 2018 ruling denying the motion to vacate the dismissal of Petitioner's request for hearing.

_____/s/
Christopher S. Randolph

_____/s/
Constance B. Tobias

_____/s/
Susan S. Yim
Presiding Board Member