Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Wayne E. Tasker & Associates, Inc.
(PTAN: 36946802; NPI: 1295974319),

Petitioner,

- v. -

Centers for Medicare & Medicaid Services.

Docket No. C-15-60

ALJ Ruling No. 2015-12

Date: March 30, 2015

DISMISSAL

The Centers for Medicare & Medicaid Services (CMS), through an administrative contractor, Cahaba Government Benefit Administrators, LLC (Cahaba), revoked the Medicare billing privileges of Wayne E. Tasker & Associates, Inc. (Petitioner). Petitioner sought a hearing to dispute the revocation; however, CMS moved for dismissal. For the reasons set forth below, I dismiss Petitioner's request for hearing.

I. Background and Procedural History

Petitioner is a corporate entity that provides mental health treatment to Medicare beneficiaries in nursing homes through independent contractors. In an October 17, 2013 initial determination, Cahaba informed Petitioner that it was revoking Petitioner's Medicare billing privileges effective September 25, 2013, because Petitioner allegedly abused its billing privileges. CMS Exhibit (CMS Ex.) 6. Petitioner timely requested reconsideration and, on February 11, 2014, Cahaba issued an unfavorable reconsidered determination. CMS Exs. 7, 8.

Counsel for Petitioner sent a letter dated September 28, 2014, and postmarked October 1, 2014, to the Civil Remedies Division (CRD) of the Departmental Appeals Board (DAB),

in which counsel stated: "I have been retained by [Petitioner.] I did not find any provider appeal on the website. Please search your paper records for this appeal. The provider's submission is appended hereto." Attached to this letter was a February 25, 2014 letter signed by Petitioner's President, Wayne Tasker, purporting to appeal the reconsidered determination. The CRD Director administratively assigned this case to me. On October 23, 2014, I issued an Acknowledgment and Pre-hearing Order (Pre-Hearing Order), in which I acknowledged that the CRD received Petitioner's February 25, 2014 request for an Administrative Law Judge (ALJ) hearing on October 7, 2014.

On November 24, 2014, CMS moved for dismissal of Petitioner's hearing request on the ground that it was untimely filed. CMS also submitted nine proposed exhibits (CMS Exs. 1-9) and argued, in the alternative, that if I were to reach the merits of the case, I should decide this case on the written record and uphold CMS's revocation of Petitioner's Medicare billing privileges.

On December 15, 2014, Petitioner filed a response to CMS's motion to dismiss (P. Response). As part of its response, Petitioner requested an additional 30 days to search for supporting information that may reflect timely filing of its hearing request. On December 17, 2014, I granted Petitioner an extension until January 15, 2015, to file its pre-hearing exchange and also to submit all evidence showing that it timely filed its hearing request.

On January 15, 2015, Petitioner filed a supplement to its earlier response to CMS's motion (P. Supp.), accompanied by three exhibits (P. Supp. Exs. 1-3). Petitioner also filed a prehearing brief, accompanied by an exhibit list indicating that Petitioner was submitting four exhibits; however, Petitioner actually only submitted three exhibits (P. Exs. 1-3). On January 29, 2015, CMS filed a response to Petitioner's supplement and pre-hearing brief (CMS Response). On February 2, 2015, Petitioner filed a reply.

Because of the disputed nature of Petitioner's filing of its hearing request, I requested that the CRD Director provide a declaration detailing any and all searches conducted by her or her staff, and the results of any such searches, to determine whether CRD received Petitioner's February 25, 2014 hearing request prior to receiving a copy of that request on October 7, 2014. February 18, 2015 Order. The February 18, 2015 Order permitted the parties to file a response or objection to the declaration. The CRD Director filed a declaration on February 27, 2015 (CRD Director Declaration). Neither party filed any response or objection to the CRD Director Declaration.

II. Issue

Whether Petitioner's hearing request should be dismissed as untimely and, if so, did Petitioner show that there was good cause for the untimely request.

III. Analysis

A provider or supplier dissatisfied with a reconsidered determination "is entitled to a hearing before an ALJ." 42 C.F.R. § 498.5(*l*)(2); *see also* 42 U.S.C. § 1395cc(j)(8). However, in order for a provider or supplier to exercise the right to a hearing, a provider or supplier must file its request for hearing no later than 60 days from the date that it receives a reconsidered determination from CMS, unless the appeal period is extended for good cause shown. 42 C.F.R. § 498.40(a)(2), (c)(2). Receipt of the notice of a reconsidered determination is presumed to be five days after the date of notice unless shown otherwise. *Id.*; 42 C.F.R. § 498.22(b)(3). If a provider or supplier seeks an extension of time to file a hearing request, the provider or supplier must "file with the ALJ a written request for extension of time stating the reasons why the [hearing] request was not filed timely"; however, the provider or supplier must show good cause in order for the ALJ to grant such a request. *Id.* § 498.40(c). If a hearing request is untimely and there is no good cause to extend the filing date, then an ALJ may dismiss the hearing request on motion of a party. *Id.* § 498.70(c).

A. Petitioner is not entitled to a hearing because it did not file a timely hearing request.

In this case, Cahaba issued its reconsidered determination on February 11, 2014. CMS Ex. 8. Under the regulations, I presume that Petitioner received the reconsidered determination on February 18, 2014, unless Petitioner is able to show otherwise.[1] Petitioner had 60 days, until April 21, 2014, in which to file a hearing request. *See* 42 C.F.R. § 498.40(a)(2). On October 7, 2014, well after the regulatory filing deadline had passed, the CRD received Petitioner's counsel's letter dated September 28, 2014, accompanied by Mr. Tasker's February 25, 2014 letter purportedly requesting a hearing.

Petitioner acknowledges that there is "a timeline for filing," but claims that there is no requirement that a hearing request be filed by registered or certified mail, or that it be sent via a method requiring proof of delivery. P. Response at 1, 2. Petitioner states that it mailed its hearing request by regular mail and used this method of mailing for all its communications with CMS, carriers, and reviewers. Petitioner asserts, moreover, that the reconsidered determination, which was included with its hearing request, contained all the relevant information pertaining to its appeal. P. Response at 1-2. Petitioner argues that I should show leniency for its "facially valid, though unsophisticated" hearing request because it was pro se at the time it filed its appeal. P. Response at 2. According to Petitioner, "[t]his is not a case where the Appellant is asking for an extension of the

[1] Five calendar days following the reconsidered determination fell on Sunday, February 16, 2014. The following day was Monday, February 17, which was a legal holiday. Accordingly, I presume that Petitioner received the determination on Tuesday, February 18, 2014. Civil Remedies Division Procedures § 6 (eff. 2009).

filing period, but simply a demand that the timely filing be recognized even where, as here, DAB did not docket or notate the appeal in a timely fashion." P. Response at 3. Petitioner further argues that there would be no prejudice to either party if its appeal were allowed to proceed. P. Response at 3. Petitioner advanced similar arguments when submitting exhibits to support its response to the motion to dismiss. P. Supp. at 1.

Based on my review of the record, I conclude that Petitioner has failed to establish that it filed a timely hearing request. As I discuss below, Petitioner has provided absolutely no evidence to corroborate its claim that it sent its February 25, 2014 hearing request prior to when it was enclosed with Petitioner's counsel's September 28, 2014 letter.[2]

An examination of Petitioner's hearing request dated February 25, 2014, shows that an addressee is conspicuously absent. The letter, which was written by Petitioner's President, Wayne Tasker, merely states, as a salutation, "To Whom it May Concern." Thus, on the face of the letter itself, there is no indication that the letter was addressed to the CRD. Even if this letter was intended for the CRD, I have no way of knowing if Petitioner properly addressed the letter; Petitioner could have sent this letter anywhere because the intended recipient is unknown.

Further, Petitioner did not submit a declaration or affidavit from any individual who allegedly mailed or witnessed the mailing of the hearing request to CRD. Although the hearing request was signed by Petitioner's President, Wayne Tasker, Petitioner did not submit a declaration or affidavit from Mr. Tasker stating that Mr. Tasker had personal knowledge that the hearing request was mailed at an earlier date. In fact, Petitioner submitted nothing to show that Mr. Tasker mailed the hearing request himself on or around February 25, 2014, that Mr. Tasker knew who purportedly mailed it if he did not mail it, or that he knew the date the hearing request was purportedly mailed. The only statements in the record regarding when the hearing request was filed are from

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[2] CMS counsel cites *Professional Home Care, Inc*., 2010 WL7342941 at 1-2 (2010) for the proposition that the burden of showing that a filing was actually sent to the DAB is on the party that purports to have mailed the filing. CMS Response at 3. Although I agree with counsel's position, her citation to an unpublished Medicare Appeals Council case is perplexing. While it is true that the Council is an appellate adjudicatory body within the DAB, its jurisdiction does not include provider and supplier enrollment appeals (42 C.F.R. Part 424) or cases adjudicated under the provisions of 42 C.F.R. Part 498. *See* 42 C.F.R. §§ 400.202 (definition of *Departmental Appeals Board*), 498.5(*l*)(3). Further, even if the Council had jurisdiction over provider and supplier enrollment appeals, the Secretary of Health and Human Services has expressly declined to make Council decisions precedential. 74 Fed. Reg. 65,296, 65,327 (Dec. 9, 2009). At the least, if counsel believed that citation to a Council decision was necessary, then counsel should have parenthetically stated why the decision, related to a different regulatory scheme, was relevant to the case at bar.

Petitioner's counsel. However, Petitioner's counsel was not employed by Petitioner as its legal representative in this case at the time it purportedly mailed its hearing request in February 2014. P. Response at 1. Thus, Petitioner's counsel can claim no contemporaneous knowledge on this issue. She is unable to even state at what earlier date the hearing request was purportedly mailed to the CRD.

It is significant that even after being given additional time to search its records, Petitioner failed to produce any evidence to corroborate its assertion that it timely mailed its hearing request within 60 days after receipt of the reconsidered determination. Petitioner did not provide a United States Postal Service certified mail receipt, return receipt, certificate of mailing, postal tracking number, receipt for postage, or any other document that would support its claim that it mailed its hearing request on or around February 25, 2014. Petitioner offered no documentary evidence that showed whether it mailed its appeal at an earlier date than when it was forwarded to the CRD by its counsel with her September 28, 2014 letter. The documents Petitioner submitted, which are related to a recoupment action pending before Cahaba (P. Supp. Exs. 2-3), do not provide evidence that Petitioner submitted its hearing request in this case timely. Petitioner produced no evidence that would even suggest that it started the appeal process at an earlier time.

The February 11, 2014 reconsidered determination explicitly advised Petitioner of its right to request a hearing from that determination. In unambiguous language, the reconsidered determination states that Petitioner had 60 days from receipt of the determination to request a hearing and provides the address of the CRD:

> **FURTHER APPEAL RIGHTS: ADMINISTRATIVE LAW JUDGE (ALJ)**
>
> If you are satisfied with this decision, you do not need to take further action. If you believe that this determination is not correct, you may request a final ALJ review. To do this, you must file your appeal within 60 calendar days after the date of receipt of this decision by writing to the following address:
>
> Department of Health and Human Services
> Departmental Appeal Board
> Civil Remedies Division, Mail Stop 6132
> 330 Independence Avenue, S.W.
> Cohen Building, Room G-644
> Washington, D.C. 20201
> Attn: CMS Enrollment Appeal

CMS Ex. 8, at 2. The reconsidered determination also gave Petitioner the option to file its appeal electronically via DAB E-File at https://dab.efile.hhs.gov. CMS Ex. 8, at 2.

The reconsidered determination thus gave Petitioner clear instructions regarding the filing requirements and deadlines. However, despite these instructions, Petitioner submitted a hearing request by mail that was received by the CRD in October 2014, more than five months after its filing deadline had passed.

Petitioner argues that there is no requirement that it had to send its hearing request by a method showing proof of delivery, such as registered or certified mail. It is true that the 42 C.F.R. Part 498 regulations governing the filing of a hearing request in provider and supplier enrollment cases do not require proof of mailing or the use of a trackable mail delivery method, such as certified mail. 42 C.F.R. § 498.40(a)(2). The use of regular mail to send a hearing request is permissible. Civil Remedies Division Procedures ¶ 5 ("Submissions may be made by U.S. mail or an express delivery service, but courier or messenger deliveries will not be accepted . . . . Written material is considered filed when placed in the U.S. mail or with an express delivery service, such as FedEx."). However, if a provider uses this method, it will be deprived of having any proof of mailing and/or proof of delivery. *Cf. Sherye Epps*, DAB CR2215 at 12 (2010) ("Petitioner could have taken measures within her own control to establish the date of receipt of her voluntary termination form (such as using certified mailing) and simply failed to do so.").

Although Petitioner claims that it used regular mail when it communicated with CMS, carriers, and reviewers, it is noteworthy that Petitioner did not use regular mail in all instances when it communicated with Cahaba. When Petitioner's President, Wayne Tasker, filed the October 22, 2013 letter requesting reconsideration after receiving the notice of revocation of Medicare billing privileges, he sent the letter to Cahaba via U.S. Express Mail, which had a tracking number. CMS Ex. 7. Further, Mr. Tasker addressed the request for reconsideration to Cahaba GBA, listed Cahaba's mailing address, and stated "Attn: TeRrie Benison Senior Provider Enrollment Specialist." CMS Ex. 7. Thus, unlike Petitioner's hearing request, Petitioner's request for reconsideration not only contained detailed addressee information, but was sent by Express Mail and able to be tracked.

Instead of providing evidence that Petitioner timely mailed its hearing request, Petitioner blames the DAB for "not docket[ing] or notat[ing] the appeal in a timely fashion." P. Response at 3. According to Petitioner, after it retained counsel, its counsel "made a request that the previously filed matter be timely docketed and the clerk did so." P. Response at 2. However, CRD's action to docket this case in October 2014 does not indicate that the CRD failed to docket this case in February 2014.

Contrary to Petitioner's assertions, however, I find that the declaration of the CRD Director is proof that Petitioner's hearing request was not received by the CRD prior to the CRD's receipt of a copy of the hearing request with Petitioner's counsel's September 28, 2014 letter. The CRD Director stated:

On October 7, 2014, the Civil Remedies Division received a letter dated September 28, 2014 from . . . counsel for Wayne E. Tasker and Associates, Inc. In her letter, [counsel] noted that she did not find any provider appeal on the Departmental Appeals Board's website and requested that the Civil Remedies Division search its paper records for her client's request for hearing, a copy of which she enclosed with her letter. The enclosed request for hearing was a letter dated February 25, 2014 from Dr. Wayne Tasker, President of Wayne E. Tasker and Associates, Inc. The February 25, 2014 request for hearing, which was not addressed and included a salutation of "To Whom it May Concern," requested "to appeal the letter from Cahaba dated 2-11-14 which demands revocation of the provider as of that date."

On or about October 7, 2014, I searched the Civil Remedies Division's electronic case management database, electronic filing system, electronic mail logs, paper and electronic docketing logs, and paper and electronic correspondence files. I did not find any record of prior receipt of Dr. Tasker's February 25, 2014 request for hearing.

On or about October 7, 2014 . . . [the] Deputy Director of the Civil Remedies Division at that time, also performed an independent search of the Civil Remedies Division's electronic case management database, electronic filing system, electronic mail logs, paper and electronic docketing logs, and paper and electronic correspondence files. [The Deputy Director] reported to me that she did not find any prior record of Dr. Tasker's February 25, 2014 request for hearing.

* * *

On December 16, 2014, [the CRD staff attorney assigned to this case] informed me that there was a pending motion to dismiss Dr. Tasker's request for hearing for untimeliness. [The CRD staff attorney] asked me if administrative support staff of the Civil Remedies Division could perform a search for the February 25, 2014 request for hearing. I decided to perform the search myself. On that same day, I conducted another search of the Civil Remedies Division's electronic case management database, electronic filing system,

> electronic mail logs, paper and electronic docketing logs, and paper and electronic correspondence files. I did not find any record of having received Dr. Tasker's February 25, 2014 letter before October 7, 2014.

CRD Director Declaration ¶¶ 5-7, 9. In the absence of evidence, documentary or testimonial, from Petitioner, this declaration creates further doubt that Petitioner timely submited the hearing request. *Guy R. Seaton*, DAB CR2496 at 5-6 (2012).[3]

B. Petitioner did not allege that good cause exists for me to extend the time for filing its request for hearing; therefore, a good cause analysis is not necessary.

If a provider or supplier establishes that there was good cause to extend the filing date for a hearing request, then an ALJ can accept an otherwise untimely hearing request. 42 C.F.R. § 498.40(c). The regulations do not define what constitutes "good cause" to extend the filing deadline for a hearing request and the Board "has never attempted to provide an authoritative or complete definition of the term 'good cause' in section 498.40(c)(2)." *Brookside Rehab. & Care Ctr.*, DAB No. 2094 at 7 n.7 (2007) (*citing Glen Rose Med. Ctr. Nursing Home*, DAB No. 1852 at 7 n.5 (2002)). Rather, a review of the relevant circumstances of each case is critical to determine whether there is "good cause" to extend the filing deadline. *See NBM Healthcare, Inc.*, DAB No. 2477 at 3 (2012) ("[T]he facts of this case do not show good cause under any reasonable definition of that term."); *see also Quality Total Care, LLC* , DAB No. 2242 at 4-5 n.4 (2009) (same).

In this case, however, Petitioner maintains that it timely filed its hearing request. Petitioner has neither requested an extension of time for filing nor has it alleged that good cause exists for me to extend the time for filing its hearing request. P. Response at 3. In order for me to consider whether there was good cause, Petitioner needed to "file with the ALJ a written request for extension of time stating the reasons why the [hearing] request was not filed timely." 42 C.F.R. § 498.40(c). Petitioner has made no such request; therefore, I do not find it necessary to consider good cause as part of my analysis.

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[3] *Seaton* involved a dismissal under the procedures found in 42 C.F.R. Part 1005. Unlike the Part 498 procedures applicable in this case, the Part 1005 procedures contain a requirement that a request for hearing must be sent by certified mail. 42 C.F.R. § 1005.2(c). My citation of *Seaton* is limited to the DAB's discussion of the relevance of a CRD Director's declaration when determining whether a hearing request was timely filed.

IV. Conclusion

I conclude that Petitioner produced no evidence to establish that it filed an earlier hearing request prior to when a copy of it was sent to the CRD with its counsel's September 28, 2014 letter. Despite being granted extra time to search its records, Petitioner offered nothing to corroborate its assertion that it filed a request for hearing on or about February 25, 2014. The absence of any corroborating evidence, taken together with the CRD Director Declaration, support the conclusion that Petitioner did not file a timely hearing request within 60 days of receipt of Cahaba's February 11, 2014 reconsidered determination. Because Petitioner did not file its hearing request within 60 days of receiving Cahaba's reconsidered determination, and no good cause was asserted to justify an extension of the time for filing, I dismiss Petitioner's hearing request under 42 C.F.R. § 498.70(c).

/s/
Scott Anderson
Administrative Law Judge