Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Patrick McGriff, D.O.,

Petitioner,

v.

Centers for Medicare & Medicaid Services,

Respondent.

Docket No. C-16-32

ALJ Ruling No. 2016-6

Date: December 31, 2015

DISMISSAL

The Centers for Medicare & Medicaid Services (CMS), through its administrative contractor, CGS Administrators, LLC (CGS), revoked the Medicare enrollment and billing privileges of Patrick McGriff, D.O. (Dr. McGriff or Petitioner). Dr. McGriff requested reconsideration of the revocation. However, CGS rejected Petitioner's reconsideration request as untimely and did not issue a reconsidered determination. Dr. McGriff then requested a hearing before an Administrative Law Judge (ALJ). Because ALJs only have jurisdiction to review reconsidered determinations involving the revocation of a Medicare provider or supplier, a provider or supplier has no right to ALJ review when CMS or a CMS administrative contractor has not issued a reconsidered determination. Therefore, in the absence of a reconsidered determination, I dismiss Petitioner's request for hearing.

I. Case Background and Procedural History

Dr. McGriff is a physician licensed to practice in Ohio. In a July 14, 2014 initial determination, CGS informed Dr. McGriff that it was revoking his Medicare enrollment and billing privileges, effective August 13, 2014. As the grounds for revocation, CGS cited 42 C.F.R. § 424.535(a)(12) and stated that the Ohio Department of Job and Family

Services had terminated Petitioner's Medicaid provider agreement effective March 24, 2011. The letter informed Petitioner of his right to request reconsideration within 60 calendar days of the postmark date. Request for Hearing, Additional Document A.

On July 24, 2015, Petitioner, through his attorney, requested reconsideration of CGS's initial determination. Petitioner acknowledged that the notice of revocation was postmarked on July 14, 2014, but alleged that he did not receive the notice until July 22, 2015, and that "[i]t likely failed to reach him because it was not properly addressed." Petitioner claimed that the post office box to which the letter was sent was an incorrect address since neither he nor his employer maintained an address at that location. Request for Hearing, Additional Document B.

On August 26, 2015, CGS sent a letter to Petitioner titled "Returned Reconsideration Request." CGS informed Petitioner that his request for reconsideration was received on July 24, 2015. CGS stated that it could not process Petitioner's reconsideration request because more than 60 days had passed since the date of the original determination. Request for Hearing, Additional Document C.

Petitioner requested a hearing on October 15, 2015. Petitioner sought review of CGS's actions and asserted that CGS disregarded the regulations at 42 C.F.R. §§ 424.545 and 498.22. Specifically, Petitioner noted that CGS incorrectly counted Dr. McGriff's 60-day period to file a reconsideration request from the date of the revocation notice rather than from the date Dr. McGriff received the revocation notice. Petitioner indicated that the regulations establish a presumption that the revocation notice was received five days after the date on the notice, unless there is showing that it was received later than that.[1]

On October 22, 2015, I issued an Acknowledgment and Order to Show Cause (Order). My Order noted that CGS rejected Petitioner's reconsideration request as untimely.

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[1] I agree with Petitioner that CGS incorrectly stated the regulatory standard for timely filing a reconsideration request. Petitioner had 60 days to file the reconsideration request following receipt of the initial determination. 42 C.F.R. § 498.22(b)(3). However, as Petitioner noted, the regulations also establish a presumption of receipt of the initial determination five days after the date on the notice and that Petitioner filed the reconsideration request a year after CGS issued the initial determination. Although Petitioner asserted to CGS that he received the initial determination late because it was sent to an incorrect address (Request for Hearing, Additional Document B), CGS apparently did not consider this a sufficient showing under section 498.22(b)(3) to overcome the presumption of receipt within five days of the date of the initial determination. CGS did not actually discuss this issue in the notice rejecting the reconsideration request. *See* Request for Hearing, Additional Document C. As explained below, because I do not have authority to review the rejection of a reconsideration request due to untimeliness, the deficiencies that may exist in CGS's notice rejecting the reconsideration request are not before me.

Citing *Karthik Ramaswamy*, DAB No. 2563 (2014) (en banc), *aff'd*, *Ramaswamy v. Burwell*, 83 F. Supp. 3d 846 (E.D. MO 2015), I ordered Petitioner to show cause why I should not dismiss his hearing request on the grounds that he was not entitled to ALJ review of a CMS contractor's decision to dismiss or reject an untimely reconsideration request.

In accordance with the deadlines established in my Order, Petitioner filed a response in which he argued that his reconsideration request was timely filed. CMS replied that Petitioner has no right to an ALJ hearing in the absence of a reconsidered determination; CMS urged dismissal of Petitioner's hearing request. CMS also addressed the merits of Petitioner's argument related to service of the initial determination, arguing that CGS properly mailed it to the address of Dr. McGriff's employer.

II. Discussion

Certain cases adjudicated under the procedural regulations in 42 C.F.R. part 498 include a request for reconsideration as the first step in the appeal process. *See* 42 C.F.R. § 498.5. When the regulations require this additional level of appeal, the provider or supplier must file a reconsideration request within 60 days from receipt of the notice of initial determination, unless CMS or a CMS administrative contractor determines there is "good cause" for extending the deadline. 42 C.F.R. §§ 498.5(l)(1); 498.22. If CMS (or its contractor) receives a properly-filed request for reconsideration, it issues a "reconsidered determination, affirming or modifying the initial determination and the findings on which it was based." 42 C.F.R. § 498.24(c). If an initial determination is not reconsidered, then the initial determination is "binding." 42 C.F.R. § 498.20(b)(1). It is only after a provider or supplier has received a reconsidered determination from CMS that the provider or supplier is entitled to a hearing before an ALJ. *Karthik Ramaswamy, M.D.*, DAB No. 2563, at 7 (2014).

In response to my Order, Petitioner argues that *Ramaswamy* incorrectly stated that ALJs do not have jurisdiction to review a CMS contractor's dismissal of a reconsideration request. Further, Petitioner asserts that this holding was dictum. Petitioner also argues that, as noted by the dissent in *Ramaswamy*, the part 498 regulations do not explicitly authorize CMS or its contractor to dismiss a request for reconsideration, particularly in a situation where the wrong standard was applied to determine timeliness and the request was filed timely.

CMS replied that *Ramaswamy* did in fact hold that ALJs only have jurisdiction to review reconsidered determinations when the regulations require reconsideration as the first level of appeal.

I agree with CMS that *Ramaswamy* did address an ALJ's jurisdiction when CMS or a CMS contractor rejects a reconsideration request as untimely. *Ramaswamy*, consistent with previous administrative decisions (*Better Health Ambulance*, DAB No. 2475 at 4 (2012); *Denise A. Hardy, D.P.M.*, DAB No. 2464 at 4 (2012); *Hiva Vakil, M.D.*, DAB

No. 2460 at 5 (2012)), held that ALJs only have jurisdiction to review reconsidered determinations, and the rejection of an untimely reconsideration request is not a reconsidered determination. Further, a federal district court affirmed the final agency decision in *Ramaswamy*. *See Ramaswamy v. Burwell*, 83 F. Supp.3d 846, 854 (E.D. Mo. 2015). The district court provided a lengthy analysis related to an ALJ's jurisdiction. The federal district court stated the following:

> As explained in the preceding paragraphs, the [Department of Health and Human Services] regulations create a system of appellate rights and procedures regarding enrollment determinations. These procedures, as interpreted by the ALJ and DAB, require a reconsidered determination before any review of a[] [CMS] contractor's initial determination can occur. Both the ALJ and DAB found that [the CMS contractor] did not issue a reconsidered determination; instead it dismissed Ramaswamy's request as untimely.
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> According to Ramaswamy, the ALJ's and DAB's interpretation is improper. Specifically, Ramaswamy contends that "[a] supplier has a ***'right to reconsideration'*** to the extent that he 'files a written request . . . ***[w]ithin 60 days from receipt*** of the notice of initial determination . . . . Because [the CMS contractor] failed to address the merits of [Ramaswamy's] request for reconsideration in its response, [the CMS contractor] effectively denied [Ramaswamy's] right to reconsideration as explicitly required by 42 C.F.R. § 498.22." Further, by interpreting the regulations as depriving them of the authority to review [the CMS contractor's] actions absent a reconsidered determination, the ALJ and DAB effectively made a nullity of the right to reconsideration established under the regulations.
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> Ramaswamy fails to show that the ALJ's and DAB's interpretation of the applicable regulations is not entitled to deference. The regulations establish a detailed set of procedures for enrollment, which includes procedures to be followed for exercising appeal rights. The ALJ and DAB found that this detailed scheme is exclusive—that if the regulations do not explicitly establish a right to appeal in a particular situation, no right to appeal exists in that situation. While this may not be the only possible interpretation of the

> regulations and while it may in certain situations be unfair, it is not plainly erroneous or inconsistent with the regulations.

Ramaswamy v. Burwell, 83 F. Supp.3d 846, 854 (E.D. Mo. 2015) (emphasis in original) (internal citations omitted).

In the present matter, there is no dispute that CGS issued an initial determination to Dr. McGriff on July 14, 2014, revoking his Medicare enrollment and billing privileges. Petitioner acknowledges receipt of the initial determination, "which was postmarked July 14, 2014, but not in fact received until later – July 22, 2015." Request for Hearing, Additional Document B at 1. The parties further agree that CGS rejected the reconsideration request as untimely and never issued a reconsidered determination. Request for Hearing, Additional Document C.

A request for reconsideration that a CMS contractor rejects or dismisses does not constitute a "reconsidered determination" that entitles the affected party to request an ALJ hearing. *See* 42 C.F.R. §§ 498.24, 498.5(l)(2); *see also Ramaswamy*, DAB No. 2563 at 7. Because there is no reconsidered determination in this case, Petitioner has no right to an ALJ hearing. Further, in the absence of a reconsidered determination, the initial revocation determination became binding and, therefore, administratively final. *See* 42 C.F.R. § 498.20(b).

III. Conclusion

Because CMS rejected Petitioner's request for reconsideration for untimeliness and did not issue a reconsidered determination in this case, Petitioner has no right to hearing before an ALJ. Therefore, I dismiss Petitioner's request for hearing. 42 C.F.R. § 498.70(b).

/s/
Scott Anderson
Administrative Law Judge