

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

Maximum Hospice and Palliative Care
Docket No. A-18-51
Decision No. 2898
September 25, 2018

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

Maximum Hospice and Palliative Care (Petitioner) requests review of the Order Denying Petitioner's Motion to Vacate Dismissal (Order) issued by an administrative law judge (ALJ). *Maximum Hospice and Palliative Care*, Docket No. C-17-968 (March 22, 2018). The ALJ denied Petitioner's request to vacate the dismissal for abandonment of its request for hearing because Petitioner did not establish good cause, as required by 42 C.F.R. § 498.72.

As we explain below, we affirm the ALJ's Order.

Legal Background

The regulations under Part 498 permit an ALJ to dismiss a request for hearing if the party that requested the hearing has since abandoned its request. 42 C.F.R. § 498.69(a). An ALJ may conclude that a party has abandoned its request for hearing if the party fails to appear at a prehearing conference or hearing without previously having shown good cause for not appearing and then fails to respond to the ALJ's "show cause" notice within ten days with a showing of good cause. *Id.* § 498.69(b). An ALJ may conclude that a party has failed to appear if the party does not file required documents or exhibits. *Axion Healthcare Servs., LLC*, DAB No. 2783, at 3 (2017) (citing, e.g., *Osceola Nursing & Rehab. Ctr.*, DAB No. 1708 (1999)).

Once an ALJ has dismissed a request for hearing, a party may request that the ALJ vacate the dismissal within sixty days upon a showing of good cause. 42 C.F.R. § 498.72.

Case Background¹

The Centers for Medicare & Medicaid Services (CMS) terminated Petitioner's participation in the Medicare program as a hospice provider after a re-certification survey found noncompliance with several Conditions of Participation. CMS Ex. 1, at 4; *see also* 42 C.F.R. Part 418. Petitioner, acting through its administrator, requested an ALJ hearing. Petitioner's Request for Hearing. On August 7, 2017, the ALJ issued an Acknowledgment and Prehearing Order (Prehearing Order) establishing the timeline for the parties to submit their prehearing exchanges, which would consist of a brief addressing all issues of law and fact, a list of proposed exhibits, all proposed exhibits, and a list of proposed witnesses. Prehearing Order at 3. The Prehearing Order required that Petitioner submit its prehearing exchange by December 11, 2017. *Id.* The Prehearing Order specified that the parties were required to submit all documents electronically through DAB E-file. *Id.* at 2. The Prehearing Order incorporated by reference the Civil Remedies Division Procedures (CRDP). *Id.* The CRDP provided, among other information, instructions for participating via DAB E-file and for requesting an extension of time to file a submission. CRDP at 4-8, 10-11. The Prehearing Order also provided the name and contact information of the staff attorney assigned to the case. Prehearing Order at 1.

On December 12, 2017, the ALJ issued an Order to Show Cause (OSC), noting that Petitioner had not submitted its prehearing exchange, as required by the Prehearing Order, or responded to CMS's Motion for Summary Judgment. OSC at 1. The ALJ stated that "Petitioner's failure to comply with [the] Prehearing Order suggests that Petitioner may have abandoned its hearing request" and noted that she could dismiss Petitioner's request for hearing for abandonment if Petitioner "fail[ed] to respond **within 10 days** to a 'show cause' notice with a showing of good cause for its failure to meet deadlines." *Id.* (citing 42 C.F.R. § 498.69(b)(2)). The ALJ then ordered Petitioner to show cause "**no later than December 22, 2017**" why its request for hearing should not be dismissed. *Id.* The ALJ warned that, "[s]hould Petitioner fail to comply with this Order or fail to show good cause, I will dismiss this case for abandonment." *Id.* at 2. The ALJ also, again, provided the contact information for the staff attorney assisting her with the case. *Id.*

On December 28, 2017, the ALJ dismissed Petitioner's request for hearing (Dismissal), citing 42 C.F.R. § 498.69 and *Osceola*, concluding that Petitioner had abandoned its request when it failed to respond to the OSC. Dismissal at 1.

¹ We make no new findings of fact. We draw all facts stated here from the ALJ's Order and Dismissal as well as from the record before the ALJ. Unless otherwise indicated, the facts stated are undisputed.

On February 26, 2018, Petitioner, now represented by counsel, requested that the ALJ vacate the dismissal. Petitioner’s Request to Vacate Dismissal Order (Motion). Petitioner stated that, “[d]ue to certain personal issues of Petitioner’s sole owner and administrator, . . . , including his obligation to care for his sick mother, and because [the administrator] was unable to hire counsel to represent Petitioner in this matter prior to December 22, 2017, Petitioner was unable to respond to [the ALJ’s] order by such deadline.” *Id.* ¶ 3. Petitioner argued that “dismissal is a ‘harsh remedy’ that is ‘appropriate only in extreme circumstances’ and therefore . . . should be a ‘remedy of last resort.’” *Id.* ¶ 7 (quoting *Osceola*). Petitioner further asserted that its failure to respond was “not a result [of] willful failure, nor was it the result of the Petitioner’s bad faith” but rather was “due to personal matters outside of [the administrator’s] control and Petitioner was not able to engage legal counsel to adequately represent its interests.” *Id.* ¶ 10. Therefore, Petitioner requested that the ALJ vacate the dismissal. *Id.* ¶ 12.

CMS opposed Petitioner’s Motion, arguing that neither Petitioner’s administrator’s personal issues nor his failure to obtain counsel demonstrated good cause to vacate the dismissal. CMS’s Response to Petitioner’s Motion to Vacate Dismissal at 6-9. CMS further argued that whether Petitioner’s conduct was willful or in bad faith was irrelevant because the ALJ had dismissed the request for hearing pursuant to section 498.69, not as a sanction pursuant to section 1128A(c)(4) of the Social Security Act. *Id.* at 10-11.

ALJ Order

The ALJ ultimately denied Petitioner’s Motion. Order. The ALJ reasoned that Petitioner must demonstrate good cause for the failures that led the ALJ to conclude that Petitioner had abandoned its request for hearing. *Id.* at 1. The ALJ acknowledged that the Departmental Appeals Board (Board) has not defined “good cause” and declined to attempt to define the term herself, concluding that, “under any reasonable definition of that term, Petitioner . . . failed to demonstrate good cause to vacate the dismissal.” *Id.*

With respect to Petitioner’s assertions that its administrator had “personal issues” and that he was unable to hire counsel, the ALJ noted that Petitioner failed to submit any evidence to support its assertions, such as an affidavit or a declaration from Petitioner’s administrator. *Id.* at 2. The ALJ further reasoned that, even accepting Petitioner’s assertions as true, Petitioner did not demonstrate why he was prevented from requesting an extension or contacting the ALJ’s office. *Id.*

The ALJ also rejected Petitioner’s argument that dismissal was a “harsh sanction” where Petitioner did not act willfully or in bad faith because such an argument was premised on dismissal as a sanction pursuant to section 1128A(c)(4) of the Social Security Act.² *Id.* at

² Petitioner does not pursue this argument before the Board.

3-4. In this case, though, the ALJ had dismissed Petitioner’s request for hearing pursuant to the regulation at 42 C.F.R. § 498.69. *Id.* at 3. Therefore, the ALJ concluded that Petitioner had not shown good cause to vacate the dismissal and denied Petitioner’s Motion. *Id.* at 4.

Standard of Review

The Board reviews disputed issues of law to determine “whether the ALJ decision is erroneous.” *Consol. Cmty. Res., Inc.*, DAB No. 2676, at 3 (2016). With respect to issues of fact, the Board reviews to determine “whether the ALJ decision is supported by substantial evidence on the record as a whole.” *Id.*

“The standard of review for an ALJ’s exercise of discretion to dismiss a hearing request where such dismissal is committed by regulation to the discretion of the ALJ is whether the discretion has been abused.” *Id.* (quoting *High Tech Home Health, Inc.*, DAB No. 2105, at 7-8 (2007), *appeal dismissed*, *High Tech Home Health, Inc. v. Dep’t of Health & Human Servs.*, No. 9:07-CV-80940 (S.D. Fla. Aug. 15, 2008) (internal quotation marks omitted)). The Board also reviews denials of motions to vacate such dismissals under the abuse of discretion standard. *Axion* at 4.³

Analysis

As the ALJ correctly recognized, Order at 1, the Part 498 regulations do not define “good cause” and the Board has not attempted to craft an authoritative definition. *See, e.g., Axion* at 4 (declining to define the term “good cause” but concluding, as it had in prior cases, that “no reasonable definition of ‘good cause’ encompasses the lapses” for which the petitioner was responsible (citing *Brookside Rehab. & Care Ctr.*, DAB No. 2094, at 7 n.7 (2007), *appeal dismissed*, No. 07-1739 (4th Cir. Mar. 4, 2008)). Here, again, we conclude that Petitioner has failed to establish good cause under any reasonable definition of that term and, therefore, that the ALJ did not abuse her discretion in declining to vacate the dismissal order.

³ The ALJ stated in her Order that “[i]t does not appear that the regulations provide Petitioner with a right to appeal to the Departmental Appeals Board (Board) the denial of a motion to vacate a dismissal” but instructed Petitioner on how to file an appeal “[i]f Petitioner takes a different view.” Order at 4. However, the Board has reviewed such denials in a long line of decisions. *See, e.g., Axion* at 4; *Meridian Nursing & Rehab at Shrewsbury*, DAB No. 2504, at 7-8 (2013), *aff’d*, *Meridian Nursing & Rehab at Shrewsbury v. Ctrs. for Medicare & Medicaid Servs.*, 555 Fed. App’x 177 (3d Cir. 2014) (specifically noting, at 555 Fed. Appx. 177, n.1, the Board’s jurisdiction under 42 C.F.R. § 498.80); *NBM Healthcare, Inc.*, DAB No. 2477, at 3 (2012); *see also* CMS Response to Petitioner’s Request for Review at 5 n.1 (citing *Axion* and stating that “the Board has determined it may review such denials”).

Before the Board, Petitioner asserts, as it did before the ALJ, that, “[d]ue to certain personal issues of Petitioner’s sole owner and administrator . . . , including his obligation to care for his sick mother, and because [the administrator] was unable to hire counsel to represent Petitioner in this matter prior to December 22, 2017, Petitioner was unable to respond to [the ALJ’s] order by such deadline.” Petitioner’s Appeal of ALJ Denial of Request to Vacate Dismissal Order (Appeal) ¶ 3; Motion ¶ 3. Petitioner did not elaborate in its Motion to the ALJ, nor does it elaborate now in its appeal to the Board, on the nature of its administrator’s “personal issues,” the extent of “his obligation to care for his sick mother,” or why he “was unable to hire counsel.” *See id.* In denying Petitioner’s request to vacate the dismissal, the ALJ noted that Petitioner had failed to submit any evidence, such as a declaration or affidavit, to support its assertions. Given the complete lack of evidence to support Petitioner’s assertions, we cannot conclude that the ALJ abused her discretion in failing to find good cause to vacate the dismissal order.

But, even taking Petitioner’s general assertions as true, as the ALJ did, we still conclude that the ALJ did not abuse her discretion in denying Petitioner’s Motion. The ALJ’s Prehearing Order afforded Petitioner more than four months to prepare and file its prehearing exchange (or to request an extension of time within which to do so). During those four months, Petitioner did not file its prehearing exchange. Nor did Petitioner request an extension of time to file its prehearing exchange, pursuant to the instructions provided in the CRDP, which accompanied the Prehearing Order. Petitioner did not even, at a minimum, contact the ALJ’s office, although the ALJ’s Prehearing Order clearly provided the name of, and contact information for, the staff attorney assisting the ALJ with the case. Prehearing Order at 1; *see also* Order at 2-3. In light of Petitioner’s failure to notify the ALJ and seek an extension based on the circumstances it asserts prevented it from complying with the ALJ’s orders, we conclude that Petitioner has not shown good cause under any reasonable definition of that term. *See Fairway Med. Clinic & Shadow Creek Med. Clinic*, DAB No. 2811, at 14 (2017) (sustaining ALJ’s dismissal of a request for hearing as untimely where the record did not show petitioners had asked the ALJ for more time to appeal in order to retain an attorney: “The right to counsel . . . does not entitle Petitioners to sit on their appeal rights indefinitely without seeking or receiving an extension.”), *aff’d*, *Murtaza Mussaji, D.O., P.A. v. U.S. Dep’t of Health & Human Servs.*, No. 17-60694, 2018 WL 3546282 (5th Cir. July 23, 2018); *Consol.* at 4 (finding no abuse of discretion in ALJ dismissal for abandonment where petitioner did not file its prehearing exchange by the time stated in the ALJ’s prehearing order or respond to ALJ’s show cause order and did not communicate with ALJ office or seek an extension of time).

Petitioner’s failure to show good cause is compounded by its failure to comply with the ALJ’s OSC, which afforded Petitioner ten days to make such a showing and admonished: **“Should Petitioner fail to comply with this Order or fail to show good cause, I will dismiss this case for abandonment.”** OSC at 2. Despite this clear warning, Petitioner still failed to respond in any way.

Before the Board, Petitioner acknowledges that “[a] definition of ‘good cause’ does not exist in the applicable regulations, and [that] the Board has never attempted to provide an authoritative or complete definition of the term ‘good cause’ with respect to cases of abandonment.” Appeal ¶ 8 (citing *NBM Healthcare, Inc.*, DAB No. 2477, at 3 (2012)). However, Petitioner then asserts that, “in the context of the timeliness of hearing requests, the Board has held that ‘good cause’ means circumstances beyond an entity’s ability to control which prevented it from making a timely request for hearing.” *Id.* ¶ 9 (citing *Hospicio San Martin*, DAB No. 1554 (1996)). Based on this premise, Petitioner then asserts that its failure to respond to the ALJ’s OSC was “due to circumstances beyond Petitioner’s control; specifically Petitioner was unable to attend the hearing due to [its administrator’s] personal matters and Petitioner not being able to engage legal counsel to adequately represent its interests.” *Id.* ¶ 11.

As discussed above, we do not agree that the circumstances cited by Petitioner were beyond its control. Moreover, Petitioner’s argument misconstrues Board precedent pertaining to the issue of “good cause.” In *Hospicio San Martin* the Board stated it “agree[d] that the circumstances described by HSM were not outside HSM’s control” DAB No. 1554, at 5. However, that statement merely addressed the Board’s agreement with the ALJ’s findings of fact and did not constitute adoption of the legal definition of good cause the ALJ applied. The Board did not need to reach that legal issue because, as the Board noted, “HSM did not challenge this definition of good cause in its appeal.” *Id.* In a recent decision upholding an ALJ’s decision that the Petitioner had not shown good cause for the untimely filing of its appeal, the Board reiterated that it “has maintained its holding that it need not provide an authoritative or complete definition of ‘good cause.’” *Day Op of North Nassau, Inc.*, DAB No. 2818, at 7 (2017) (case citations omitted).⁴ The Board has applied the same analysis in the context of motions to vacate. *See, e.g., Burien Nursing & Rehab. Ctr.*, DAB No. 2870, at 5-6 (2018) (concluding that “Petitioner has failed to show ‘good cause’ under *any* reasonable interpretation of the term,” after noting that the Board has never provided a complete definition of the term and rejecting the petitioner’s argument that the ALJ had narrowed the definition); *Axion* at 4.

In this case, Petitioner has merely made unsupported assertions of “personal issues,” including the obligation of its administrator to care for a sick family member, and the inability to obtain counsel, and has done so without any explanation that would show

⁴ In *Day Op*, the petitioner cited “the ALJ’s statement that the term ‘good cause’ ‘has generally and universally been held to constitute a situation beyond a party’s control.’” DAB No. 2818, at 6 n.9. The Board noted, however, that the ALJ “did not state that the Board has limited the definition to such circumstances, and, as we discussed above, it has not.” *Id.* In the appeal before us, the ALJ, like the Board, did not attempt to define “good cause” because she concluded that “under any reasonable definition of that term, Petitioner has failed to demonstrate good cause to vacate the dismissal.” Order at 1.

how such issues affected Petitioner's ability to comply with the ALJ's Prehearing Order. In addition, Petitioner did not contact the ALJ's office to seek an extension of the time the ALJ's order set for the filing in question. These circumstances do not constitute good cause under any reasonable definition of that term. Accordingly, we conclude that the ALJ did not abuse her discretion in denying Petitioner's request to vacate the dismissal.

Conclusion

For the foregoing reasons, we find that the ALJ did not abuse her discretion in denying Petitioner's motion to vacate the dismissal of its hearing request and, thereby, affirm the Order.

_____/s/
Constance B. Tobias

_____/s/
Susan S. Yim

_____/s/
Sheila Ann Hegy
Presiding Board Member