

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

Rollington Ferguson, M.D.
Docket No. A-19-18
Decision No. 2949
June 20, 2019

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

Rollington Ferguson, M.D. (Petitioner) appeals a September 24, 2018 ruling by an Administrative Law Judge (ALJ) dismissing his request for a hearing. *Rollington Ferguson*, Ruling Dismissing Request for Hearing, Docket No. C-18-1227 (ALJ Ruling). Petitioner filed the hearing request in response to certain actions taken by the Centers for Medicare & Medicaid Services (CMS) relating to his Medicare enrollment. The ALJ determined that Petitioner did not have a right to a hearing because CMS did not issue a reconsidered determination. We concur with that reasoning and therefore affirm the dismissal of Petitioner’s hearing request.

Legal Background

Regulations in 42 C.F.R. Part 498 govern the administrative appeal rights of physicians (and other Medicare “suppliers”) who receive certain adverse Medicare determinations issued by CMS. *See* 42 C.F.R. §§ 498.3(a), 498.5. Under those regulations, a physician may appeal an initial determination setting the effective date of Medicare billing privileges by first requesting that CMS “reconsider” the initial determination. *See* 42 C.F.R. §§ 498.3(b)(15), 498.5(l)(1); *Victor Alvarez, M.D.*, DAB No. 2325, at 3, 5 (2010).

In general, a reconsideration request must be filed with CMS within 60 days from receipt of the notice of initial determination. 42 C.F.R. § 498.22(b)(3). If CMS then makes a “reconsidered determination,” it mails a notice of that determination to the affected party. *Id.* § 498.25(a)(1). If the reconsidered determination is adverse, the notice “specifies the conditions or requirements of law or regulations that the affected party fails to meet and informs the party of its right to a hearing.” *Id.* § 498.25(a)(3). A supplier dissatisfied with CMS’s reconsidered determination may then request a hearing before an administrative law judge. *Id.* §§ 498.5(l)(2), 498.40(a).

An administrative law judge may dismiss a hearing request when the requesting party “is not a proper party or does not otherwise have a right to a hearing.” *Id.* § 498.70(b). A party whose hearing request is dismissed by the ALJ may appeal the dismissal order to the Board. *Id.* § 498.80.

Case Background¹

By letter dated February 1, 2018, Noridian Healthcare Solutions, a CMS contractor, notified Petitioner that his application to revalidate his Medicare enrollment had been approved. ALJ Ruling at 1; CMS Ex. 1, at 2. The letter stated that Petitioner’s enrollment was effective December 31, 1992. CMS Ex. 1, at 2. The letter also advised Petitioner that he could dispute the determination’s effective date by filing a request for reconsideration within 60 calendar days of the letter’s postmark date. *Id.* at 3.

On March 12, 2018, Noridian received a reconsideration request from Petitioner.² Request for Hearing, Att. B at 1. The contractor did not issue a reconsidered determination or otherwise consider the substance of the reconsideration request. Instead, on April 4, 2018, the contractor notified Petitioner that it was returning the reconsideration request because it was not dated. Request for Hearing, Att. B. Sometime after April 4, 2018, Petitioner filed a second request for reconsideration, but, on May 29, 2018, Noridian rejected that request as untimely. *Id.*, Att. A.

Petitioner then filed a request for hearing, contending that Noridian had erroneously rejected his reconsideration requests. Based on the following analysis, the ALJ held that Petitioner had no right to a hearing and accordingly dismissed his hearing request under 42 C.F.R. § 498.70(b):

The undisputed facts show that the contractor never processed a reconsideration request from Petitioner. I must dismiss this case, as there is no reconsidered determination.

Petitioner doesn’t deny that the contractor did not process his two reconsideration requests and that, consequently, there is no reconsidered determination. His argument, essentially, is that the contractor erred in

¹ The information in this section is drawn from the ALJ Ruling and the record before the ALJ. Unless we indicate otherwise, the facts that we recite are undisputed.

² The parties do not dispute that Petitioner filed his reconsideration request in order to challenge the effective date, as Noridian had advised Petitioner he could do. We note that Petitioner’s hearing request expressed concern that Petitioner’s billing privileges were deactivated, leading to nonpayment of claims for the period January 20-February 12, 2018 (Request for Hearing at 1), but a deactivation of billing privileges is not subject to ALJ or Board review. *Decatur Health Imaging, LLC*, DAB No. 2805, at 10 (2017).

failing to process his requests. I have no authority to address Petitioner's complaints about the contractor's actions. My authority to hear and decide any case involving a challenge to an effective Medicare participation date arises only from the reconsidered determination. Nothing in the regulations governing these cases authorizes me to look behind a contractor's decision not to process a reconsideration request and to decide that the contractor ought to have processed it.

ALJ Ruling at 2.

Petitioner then timely filed this appeal.

Standard of Review

The standard of review for disputed issues of fact is whether the ALJ ruling is supported by substantial evidence on the record as a whole. The standard of review for disputed issues of law is whether the ALJ ruling is erroneous. *Guidelines - Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program (Guidelines)* at <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/enrollment/index.html>.

Analysis

As he did before the ALJ, Petitioner contends in his request for review that Noridian improperly dismissed his reconsideration requests. However, Petitioner does not question the legality of the ALJ's holding (in ALJ Ruling at 2) that he had "no authority to address [the] complaints about [Noridian's] actions."

The ALJ's decision to dismiss Petitioner's request for hearing for lack of jurisdiction is consistent with the governing regulations and Board precedent. An ALJ may dismiss a hearing request if the appellant "is not a proper party or does not otherwise have a right to a hearing." 42 C.F.R. § 498.70(b). Physicians and other suppliers have a right to a hearing before an ALJ if they are "dissatisfied with a reconsidered determination." *Id.* § 498.5(1)(2). The Board has held that "the regulations plainly require that CMS or one of its contractors issue a 'reconsidered determination' before the affected party is entitled to request a hearing before an ALJ." *Capital District Behavioral Health Psychologists, PLLC*, DAB No. 2866, at 4 (2018); *Hiva Vakil, M.D.*, DAB No. 2460, at 5 (2012). The absence of a reconsidered determination thus renders Noridian's initial determination, dated February 1, 2018, binding and administratively final. 42 C.F.R. § 498.20(b). *See also Haissam Elzaim, M.D.*, DAB No. 2501 (2013) (holding that the physician had no

right to ALJ review of a revocation where he argued that the reconsideration request was improperly dismissed as untimely); *Better Health Ambulance*, DAB No. 2475 (2012) (same).

Moreover, Petitioner is not entitled to appeal Noridian's decision to dismiss his requests for reconsideration. *Karthik Ramaswamy, M.D.*, DAB No. 2563, at 7 (2014), *aff'd*, *Ramaswamy v. Burwell*, 83 F. Supp. 3d 846 (E.D. Mo. 2015). In *Ramaswamy*, the Board explained the limitations on its jurisdiction to hear appeals regarding the dismissal of a reconsideration request in the following way:

The regulations set out which contractor actions and determinations are reviewable. They do not provide for further review from a contractor dismissal of a reconsideration request as untimely. For us to entertain arguments that [the CMS contractor] applied erroneous standards, made erroneous findings, or reached erroneous conclusions in dismissing this reconsideration request would amount to reviewing the dismissal, which we, like the ALJ, have no authority to do.

Id.; accord *Capital District Behavioral Health* at 4-5. Here, like the petitioners in *Ramaswamy* and *Capital District Behavioral Health*, Petitioner objects to, and seeks relief from, the dismissal of his reconsideration requests. However, because the dismissal of a reconsideration request is not subject to review, and a supplier has no right to ALJ review in the absence of a reconsidered determination, as the Board held in those cases, neither the ALJ nor the Board has the authority to review Noridian's dismissal of Petitioner's reconsideration requests.

Conclusion

For the reasons stated above, we affirm the ALJ's ruling dismissing Petitioner's request for hearing.

/s/
Susan S. Yim

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member