Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

MedStar Health, Inc.
Docket No. A-16-6
Decision No. 2684
April 8, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE RULING

An Administrative Law Judge (ALJ) dismissed a request for hearing filed by Christian Shults, M.D. (Dr. Shults), a physician, challenging the determination by Novitas Solutions, Inc. (Novitas), a Medicare administrative contractor, of the effective date of his enrollment with a division of MedStar Health, Inc. (MedStar). *Christian Shults, M.D.*, ALJ Ruling No. 15-3019 (ALJ Ruling). The ALJ ruled that the request for hearing was untimely and that there was no good cause to extend the time for filing the request. Petitioner MedStar appeals the ALJ's ruling.[1] For the reasons set forth below, we affirm the ALJ Ruling.

Relevant Legal Authority

Title XVIII of the Social Security Act (the Act) governs the healthcare program for the aged and disabled known as Medicare. To receive payment for covered Medicare items or services, a supplier must be enrolled in Medicare, which requires the submission of an enrollment application. 42 C.F.R. §§ 424.505, 424.510(d)(1).

The effective date of a Medicare supplier's enrollment is an initial determination for which the supplier may ask for reconsideration by a contractor hearing officer, i.e., a reconsidered determination. 42 C.F.R. §§ 498.3(b)(15), 498.22(a).

If the supplier is dissatisfied with the reconsidered determination, the supplier may request a hearing before an ALJ. Act § 1866(j), (h)(1); 42 C.F.R. § 498.3(b)(15); 42 C.F.R. § 498.5(l).

[1] Dr. Shults was nominally the petitioner before the ALJ, although the record indicates that MedStar filed the request on his behalf. *See, e.g.*, Request for Hearing; Order to Show Cause. Accordingly, all references to "Petitioner" in citations to the record below are to Dr. Shults and will be denoted as such (i.e., "Dr. Shults" or "Petitioner Shults"). Before the Board, MedStar is the named petitioner. We will refer to "Petitioner" in citations to the parties' submissions at the Board level.

A request for an ALJ hearing must be filed within 60 days of the supplier's receipt of the reconsidered determination. Act §§ 1866(h)(1), 205(b); 42 C.F.R. § 498.40(a)(2). The date of receipt by the supplier of notice of the reconsidered determination is presumed to be five days after the date on the notice unless there is a showing that it was, in fact, received earlier or later. 42 C.F.R. § 498.22(b)(3).

The ALJ may extend the time for filing a hearing request for good cause. 42 C.F.R. § 498.40(c). An ALJ may dismiss a hearing request where the request was not timely filed and the time for filing was not extended. 42 C.F.R. § 498.70(c).

Factual and Procedural Background[2]

In October 2014, Novitas determined the effective date of Dr. Shults's reassignment of Medicare benefits to MedStar. Pet. Ex. 1. Dr. Shults timely requested reconsideration, and Novitas issued a reconsidered determination dated February 2, 2015. *Id*. Dr. Shults was presumed to have received notice of the reconsidered determination within five days of the date the reconsidered determination was issued. 42 C.F.R. § 498.22(b)(3). Dr. Shults had 60 days from receipt of notice to request a hearing before the ALJ. 42 C.F.R. § 498.40(a)(2). The presumed date of receipt of the reconsidered determination was February 7, 2015, and the filing deadline was April 8, 2015. *See* ALJ Ruling at 2.

Dr. Shults filed an appeal dated June 12, 2015. ALJ Ruling at 1. On June 30, 2015, the ALJ ordered Dr. Shults to show cause why the ALJ "should not dismiss his request for hearing by either explaining why his request for hearing is not untimely or explaining what good cause [he] had for filing his request out of time . . . ." *See* Order to Show Cause at 2.

Dr. Shults filed a response to the ALJ's Order, contending that he did not receive notice of the reconsidered determination within the five-day period in which he was presumed to have received notice. In his letter response Dr. Shults stated:

> We request the right to appeal the "decision letter" dated February 2, 2015 beyond the 60 day deadline because the letter was not received via US mail; rather this letter was received via fax on May 19, 2015.

Letter in response to Order to Show Cause. Dr. Shults argued that the date of enrollment should be January 1, 2014, and asked that the deadline for filing a request for hearing be "waived." He stated, in pertinent part:

[2] The factual information in this section, unless otherwise indicated, is drawn from the ALJ Ruling and the record and is presented to provide a context for the discussion of the issues raised on appeal.

> No other development letter relative to the application submitted in January had been received and thus we are asking that the 60 day appeal limit imposed by Novitas be waived and the original effective date requested be honored. [. . .] Further, [Dr. Shults] did, in good faith, render excellent care to Medicare beneficiaries from January to May 16, 2014 and should be held harmless as a result.

Id.

The ALJ Ruling

The ALJ considered two arguments in Dr. Shults's response to his order to show cause: 1) that Dr. Shults, in fact, "*did* request a hearing within 60 days of receiving the reconsidered determination because Dr. Shults did not receive it until May 19, 2015," and 2) that "even if his request for hearing is late, he had good cause to file untimely because he received the reconsidered determination later than he should have and responded promptly." ALJ Ruling at 2 (emphasis in original).

The ALJ rejected both arguments. He found that Novitas issued its reconsidered determination, which informed Dr. Shults of his appeal rights and the 60-day deadline for filing an appeal, on February 2, 2015. *Id*. The ALJ further found that Dr. Shults filed his request for hearing on June 12, 2015. *Id*. The ALJ reasoned that the regulatory presumption that Dr. Shults had received notice of the reconsidered determination within five days of its issuance applied in this case, and, therefore, Dr. Shults "must rebut that presumption in order to establish that his request for hearing is timely." *Id*. The ALJ concluded that Dr. Shults had failed to rebut the presumption because Dr. Shults did not submit "an affidavit or declaration from either officials responsible for processing his mail, his billers, or from Petitioner [Dr. Shults] himself," and that "[a]bsent a sworn statement or other proof upon which I can fairly rely to rebut the presumption that Petitioner [Dr. Shults] received the reconsidered determination on or before February 7, 2015, I cannot conclude that he did."[3] *Id.* (Citation omitted.)

The ALJ also found that Dr. Shults failed to show good cause for filing his hearing request late. *Id*. at 3. He noted that Dr. Shults "relies on the same rationale . . . in attempting to show that he submitted a timely hearing request. That is, he argues he did not receive the reconsidered determination until Novitas apparently sent it by facsimile . . . on May 19, 2015." *Id.* The ALJ considered Dr. Shults's contention that he "'responded immediately'" to the facsimile copy and submitted his hearing request

[3] We read this statement by the ALJ to mean that he could not conclude, due to lack of evidence, that Dr. Shults did ***not*** receive the reconsidered determination on or before February 7, 2015. This reading is consistent with the reasoning the ALJ employed here and elsewhere in the decision, as well as with the conclusion he reached.

"roughly 25 days after Novitas sent it . . . ." *Id*., citing letter in response to Order to Show Cause at 1. However, the ALJ rejected this argument, and concluded that Dr. Shults had not shown that "some factor outside of his control caused him to file his hearing request beyond the 60 days the regulations provide." *Id*., citing *Hillcrest Healthcare, L.L.C.*, DAB CR976 (2002), aff'd, DAB No. 1879 (2003). The ALJ reasoned that Dr. Shults "has not shown, via evidence such as a sworn statement or affidavit, that he did ***not*** receive the reconsidered determination on or before February 7, 2015. I cannot rely on . . . unsworn arguments alone." *Id*., citing *Experts Are Us, Inc.*, DAB No. 2452, at 19 (2012) (emphasis added). The ALJ, having found that the request for hearing was untimely filed and without good cause, dismissed the request for hearing. *Id*. Petitioner's timely request for review followed.

Petitioner's Arguments

In its Request for Review (RR), Petitioner first asks the Board to admit and consider new evidence in the form of an affidavit of a MedStar official attesting to the timing of Dr. Shults's receipt of the reconsidered determination. Petitioner states:

> Included in this request for review by the Board is a sworn affidavit signed by [A.W.] Assistant Vice President of Finance, Systems & Practice Support for MedStar Physicians Billing Services, attesting to late receipt of Novitas' decision dated February 2, 2015.

RR at 2. Petitioner contends that Board guidelines permit the admission of additional evidence into the record if the Board considers the additional evidence to be relevant and material to an issue before the Board. In addition, Petitioner contends, the guidelines provide that the "Board will consider whether the party proffering the evidence has shown good cause for not producing the evidence during proceedings before the ALJ." *Id*. at 2, n.1 (citing *Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs, Development of the Record on Appeal, paragraph (g)*).

Second, Petitioner contends that the Board should overturn the ALJ Ruling "for good cause." RR at 3. Petitioner argues that "[t]he Board should accept [A.W.'s] sworn affidavit as proof of untimely receipt of Novitas' reconsideration – a factor beyond MedStar's control that prevented it from filing a timely hearing request." *Id.* Petitioner states that "MedStar only had the opportunity to present such an affidavit at the ALJ level and it would have done so had it known that the affidavit was required to establish untimely receipt." *Id*. Petitioner also contends, as it contended below, that the fax copy of the reconsidered determination constitutes "substantial evidence at the ALJ level that its untimely filing was due to late receipt of the reconsideration decision from Novitas." *Id*. Petitioner further contends that its explanation for late filing satisfies the ALJ's show cause order, arguing that "[n]either the regulations governing an ALJ nor the ALJ's Order

to Show Cause specifically require submission of a sworn affidavit to prove late receipt of a decision," and that instead, "the Order simply requests the petitioner to 'show cause why' the appeal should not be dismissed by 'either explaining why this request for hearing is not untimely or explaining what good cause Petitioner had for filing his request for hearing out of time.'" *Id*. (citation omitted). Petitioner asserts here, as it asserted before the ALJ, that--

> MedStar submitted a copy of Novitas' reconsideration decision dated February 2, 2015, which clearly bears the fax stamp across the top of the page showing the date of receipt by MedStar as May 19, 2015 and explained in its cover letter that the decision had been received late from Novitas via fax.

RR at 2. Petitioner "believed, in good faith, that its submission was sufficient to prove late receipt of the reconsideration decision and that it had satisfied the ALJ's Order." RR at 3. Petitioner argues that, "in the alternative, MedStar contends that its submission of the faxed reconsideration decision from Novitas with a time stamp showing receipt on May 19, 2015 rebuts the presumption of timely receipt and establishes good cause for untimely filing of the hearing request." *Id*.[4]

Standard of Review

The standard of review for disputed issues of fact is whether the ALJ decision is supported by substantial evidence on the record as a whole. The standard of review on a disputed issue of law is whether the ALJ decision is erroneous. *See Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program* (*Guidelines*), available at http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html

"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." *High Tech Home Health, Inc.*, DAB No. 2105, at 7-8 (2007), *aff'd*, *High Tech Home Health, Inc. v. Leavitt*, Civ. No. 07-80940 (S.D. Fla. Aug. 15, 2008). In addition, the Board reviews an ALJ's finding about "good cause" under section 498.40(c)(2) to determine whether the ALJ abused his or her discretion. *Kids Med (Delta Medical Branch*), DAB No. 2471, at 4 (2012).

[4] The Board notes Petitioner's additional arguments concerning the effective date of enrollment, but the only matter now before the Board is the ALJ's dismissal of the request for hearing for untimeliness.

Analysis

As discussed below, Petitioner's arguments on appeal have no merit. As a preliminary matter, we address the admissibility of A.W.'s affidavit, Petitioner having introduced it for the first time at the Board level.[5] Next we address whether the ALJ erred in concluding that Petitioner did not timely file its hearing request. Finally, we address whether the ALJ abused his discretion in ruling that Petitioner filed the hearing request late without good cause and in dismissing Petitioner's hearing request.

1. *New evidence is not admissible in this appeal.*

The applicable regulations establish that the Board may not accept new evidence in provider or supplier enrollment appeals. Title 42 C.F.R. § 498.86(a) provides:

> *Except for provider or supplier enrollment appeals*, the Board may admit evidence into the record in addition to the evidence introduced at the ALJ hearing (or the documents considered by the ALJ if the hearing was waived) if the Board considers that the additional evidence is relevant and material to an issue before it.

Emphasis added.

Thus, the regulations expressly except provider and supplier enrollment appeals from the general rule authorizing the Board to admit additional evidence that the Board finds is relevant and material. Petitioner argues that the Board's guidelines support its introduction of A.W.'s affidavit. *See* RR at 2 n.1. However, Petitioner cites to the guidelines inapplicable to this case. The guidelines applicable here are titled Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program. These guidelines by their own terms apply to requests for review by a provider or supplier "dissatisfied with a determination related to the denial or revocation of Medicare billing privileges made by [CMS] or one of its contractors after reconsideration of an initial determination." Consistent with the regulations, these guidelines affirmatively prohibit the introduction of new evidence in provider or supplier enrollment cases. *See* Development Of The Record On Appeal, paragraph (f) (stating "The Board may not admit evidence into the record in addition to the evidence introduced at the ALJ hearing or in addition to the documents considered by the ALJ if the hearing was waived. *See* 42 C.F.R. § 498.86(a)).

Accordingly, we deny Petitioner's request to introduce A.W.'s affidavit into the record before the Board.

[5] In addition to A.W.'s affidavit (Petitioner Exhibit 9), Petitioner submitted other exhibits with its request for review that were previously submitted to the ALJ.

2. *The ALJ's conclusion that Petitioner's hearing request was not timely filed is supported by substantial evidence and free of legal error.*

The ALJ ordered Dr. Shults to show cause why the ALJ "should not dismiss his request for hearing by either explaining why his request for hearing is not untimely or explaining what good cause [he] had for filing his request out of time . . . ." Order to Show Cause at 2. Petitioner's response to the show cause order, signed by an individual who identified herself as "Authorized Official," states that the February 2, 2015 reconsidered determination "was not received via US mail, rather this letter was received via fax on May 19, 2015[.]" Letter in response to Order to Show Cause. In support of that assertion, the authorized official cited to Petitioner's Exhibit 1, a copy of the reconsidered determination showing a fax date stamp of May 19, 2015. The authorized official also stated that when Novitas faxed Petitioner a "development letter" on June 13, 2014, Petitioner responded on the same day. *Id*., citing P. Exs. 4 and 5.

We agree with the ALJ that Petitioner failed to provide sufficient proof to rebut the regulatory presumption. The copy of the reconsidered determination Novitas faxed to Petitioner on May 19, 2015 proves only that – a copy was faxed to Petitioner on that date. It does not prove that Petitioner did not ***first*** receive the reconsidered determination from Novitas by mail within five days after February 2, 2015. Nor does Petitioner's immediate response to an earlier communication from Novitas prove that Petitioner filed its hearing request on time – that is, within 60 days after the date of presumed receipt of the reconsidered determination by mail. In the absence of any other evidence, the mere assertion that Petitioner did not receive the reconsidered determination by U.S. mail, made by an "authorized official" not claiming any personal knowledge of the situation, is not probative evidence of the fact asserted.[6] Since Petitioner failed to establish when it actually received notice of the February 2, 2015 reconsideration determination, the ALJ properly applied the regulatory presumption to conclude that Petitioner's June 12, 2015 hearing request was not timely filed.

3. *The ALJ did not abuse his discretion in finding that there was no good cause for extending the time for filing Petitioner's hearing request and in dismissing the untimely hearing request.*

The regulations provide that an ALJ may extend the deadline for filing an untimely request for hearing for good cause shown. *See* 42 C.F.R. § 498.40(c)(2). In addition, an ALJ may dismiss an untimely request for hearing. *See* 42 C.F.R. § 498.70(c). We have stated that where regulations are written to permit an ALJ action (i.e., where the ALJ "may" take certain actions), the ALJ action is an exercise of discretion and that we

[6] We need not consider whether, as the ALJ Ruling seems to suggest, an unsworn statement is never acceptable, since the ALJ could reasonably have rejected the unsworn statement for the reason stated here.

review it as such. *See KKNJ, Inc. d/b/a/ Tobacco Hut 12*, DAB No. 2678, at 7 (2016) (*citing Meridian Nursing & Rehab at Shrewsbury*, DAB No. 2504, at 8 (2013), *aff'd Meridian Nursing & Rehab at Shrewsbury v. Ctrs. for Medicare & Medicaid Servs.*, 555 F. App'x 177 (3rd Cir. 2014)). Accordingly, the Board reviews the ALJ's denial of Petitioner's request to extend the time for filing a hearing request in this case and his dismissal of the untimely hearing request for abuse of discretion.

Petitioner's argument that good cause existed for extending the time for filing the hearing request relies on the same rationale as his argument that he submitted a timely hearing request. The applicable regulations do not define "good cause," and the Board has not attempted to provide an authoritative or complete definition of the term. *See NBM Healthcare, Inc.*, DAB No. 2477, at 3-4 (2012). However, the ALJ reasoned that Petitioner could only show good cause by establishing that a circumstance beyond Petitioner's control caused the delay in filing until after the deadline. ALJ Ruling at 3. We need not determine whether the ALJ was correct since we find that Petitioner did not show good cause "under any reasonable definition of the term." *See NBM Healthcare, Inc.* at 3 (citations omitted). Petitioner suggests that Novitas faxed the reconsidered determination to Petitioner on May 19, 2015 in response to an inquiry by Petitioner regarding the status of its reconsideration request; however, Petitioner's only explanation for making such an inquiry was that it never received the reconsidered determination by U.S. mail. *See* letter in response to Order to Show Cause; *see also* RR at 1-2 ("Novitas issued a reconsideration decision dated February 2, 2015. However, MedStar did not receive this letter until Novitas faxed it to MedStar on May 19, 2015, more than one month after the deadline to file a timely request for hearing . . . . Again, receipt of this notice from Novitas only resulted from MedStar contacting Novitas regarding the status of the appeal."). In view of this explanation, that the hearing request was filed within 25 days of receipt of the faxed reconsidered determination is not a basis for finding good cause since, as we discussed above, the ALJ properly concluded that Petitioner failed to rebut the presumption of receipt of the reconsidered determination by U.S. mail five days after the date of the reconsidered determination. Accordingly, we conclude that the ALJ did not abuse his discretion in finding that there was no good cause for extending the filing deadline and in dismissing Petitioner's hearing request as untimely.

Conclusion

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

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Christopher S. Randolph
Presiding Board Member