Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Borger I Enterprises, LLC, d/b/a
Caprock Nursing & Rehabilitation
Docket No. A-15-8
Decision No. 2618
February 18, 2015

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE RULING

At issue in this appeal is whether the Administrative Law Judge (ALJ) properly dismissed a request for hearing filed by Borger I Enterprises, LLC (Petitioner). The ALJ dismissed the hearing request because he found that it had been untimely filed and that Petitioner did not show "good cause" to extend the filing deadline. *Borger I Enterprises, LLC, d/b/a Caprock Nursing & Rehabilitation*, ALJ Ruling 2014-38 (2014) (Order of Dismissal). For the reasons set forth below, we affirm the ALJ's dismissal of Petitioner's request for hearing.

Background

The essential facts are undisputed. Petitioner operates a skilled nursing facility. In April 2013, it filed an application to enroll in the Medicare program. In approving the application, the Centers for Medicare & Medicaid Services (CMS) decided that the effective date of Petitioner's enrollment was May 29, 2013. Petitioner asked CMS to reconsider that decision, believing that it was entitled to an earlier effective date. In a letter dated December 10, 2013, CMS denied Petitioner's request for reconsideration and affirmed its prior decision to make Petitioner's Medicare enrollment effective on May 29, 2013. Dissatisfied with that "reconsidered determination," Petitioner filed a request for hearing. The hearing request is dated May 12, 2014, and the Civil Remedies Division of the Departmental Appeals Board received the request on June 9, 2014.

A health care provider dissatisfied with a reconsidered determination "is entitled to a hearing before an ALJ." 42 C.F.R. § 498.5(l)(2). The procedures for requesting a hearing are found in 42 C.F.R. § 498.40. Section 498.40(a)(2) provides that a hearing request must be filed within 60 days of the affected party's receipt of the appealable determination "unless that period is extended in accordance with paragraph (c) of [section 498.40]." Section 498.40(b) states that a hearing request must "[i]dentify the specific

issues and "[s]pecify the basis for contending that [CMS's] findings [of fact] and conclusions [of law] are incorrect." And section 498.40(c) permits the administrative law judge to extend the 60-day filing period specified in section 498.40(a)(2) if the affected party shows "good cause" for the extension. A different section of the regulations authorizes an administrative law judge to dismiss a hearing request if the "affected party did not file [that] hearing request timely and the time for filing has not been extended." *Id.* § 498.70(c).

ALJ Decision

Upon initial review, the ALJ determined – and Petitioner does not dispute – that it filed its hearing request more than three months after the 60-day deadline specified in section 498.40(a)(2).[*] *See* June 13, 2014 Acknowledgment and Order to Show Cause at 2. The ALJ gave Petitioner an opportunity to show good cause to extend the deadline. *Id.* In response, Petitioner asserted that "immediately" after receiving CMS's reconsidered determination, it "began to reach[ ] out to all parties involved" (including CMS and its contractor) in order "to determine what actually happened" and resolve the dispute. *See* June 14, 2014 letter from C. Slimmer to ALJ. Petitioner also alleged that it worked with its member of Congress to facilitate a resolution. *Id.* "As for [its] failure to request a hearing" within 60 days after receiving the reconsidered determination, Petitioner stated:

> . . . [T]his was simply a mistake on our part. We respectfully request that our intentions be considered here. We were not trying to delay anything; on the contrary, we were working diligently to try and get a resolution from CMS . . . . Although not binding in this matter, Texas case law provides that consideration should be given when the 'failure . . . was not intentional or the result of conscious indifference but was the result of a mistake or an accident.' We simply misunderstood the letter's request and believed that we were in fact appealing the decision by working directly with CMS.

Id. Petitioner also alleged that it faced a "substantial forfeiture" (the loss of $250,000) in the event that its hearing request was dismissed. *Id.*

The ALJ was unpersuaded. He found that CMS's reconsidered determination "explicitly" advised Petitioner of its administrative appeal rights, "clearly" stated the 60-day filing deadline, specified the address where the hearing request should be filed, and "provided Petitioner with the name, phone number, and email address of a contact person could call" if it had any questions. Order of Dismissal at 5. The ALJ further found that Petitioner had failed to explain "why it disregarded this clear notice of its further appeal rights." *Id.* Based on these findings, the ALJ concluded that Petitioner had not shown good cause to extend the missed filing deadline. *Id.* at 5-6. Petitioner then filed this appeal, asserting that it "should get a hearing on the merits of the dispute."

Analysis

The Board reviews a disputed finding of fact to determine whether it is supported by substantial evidence on the record as a whole. *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program* (available at http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html). The Board's standard of review concerning a disputed conclusion of law is whether the conclusion is erroneous. *Id.*

Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Under the substantial evidence standard, the Board does not re-weigh the evidence or overturn an ALJ's "choice between two fairly conflicting views" of the evidence; instead, the Board determines whether the contested finding could have been made by a reasonable fact-finder "tak[ing] into account whatever in the record fairly detracts from the weight of the evidence" that the ALJ relied upon. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *see also Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 377 (1998); *Golden Living Center — Frankfort*, DAB No. 2296, at 9-10 (2009), *aff'd, Golden Living Ctr. – Frankfort v. Sec'y of Health & Human Servs.*, 656 F.3d 421 (6th Cir. 2011).

In addition, the Board reviews, for abuse of discretion, an administrative law judge's finding that a party failed to show "good cause" to extend the 60-day filing deadline specified in section 498.40(a)(2). *NBM Healthcare, Inc.*, DAB No. 2477, at 3 (2012).

Applying these standards, we see nothing in the record or the request for review that justifies reversing the dismissal. Petitioner states in its request for review that it was "actively and frequently engaged with CMS, Novitas [CMS's contractor], and [its] Congresswoman's office" in the weeks following its receipt of the reconsidered determination. Petitioner also asserts that its email correspondence with those entities shows that it did not "ignore[ ]" the effective-date issue during the 60-day filing period. But the ALJ expressly found that that correspondence revealed no intent by Petitioner to request a hearing, merely an "attempt to resolve the matter informally with CMS and Novitas." Order of Dismissal at 3-4. Petitioner does not challenge that finding or otherwise contend that its communication with CMS and others constitutes a timely hearing request that meets the content requirements in 42 C.F.R. § 498.40(b). *See Apple Home Health Services, Inc.*, DAB No. 2188, at 4-10 (2008) (rejecting appellant's allegation that its submission to CMS "evidence[d] an intent to request a hearing" or complied with the content requirements for hearing requests).

Moreover, the ALJ did not abuse his discretion in refusing to excuse the late filing. As noted, the ALJ expressly found that the reconsidered determination unambiguously advised Petitioner of its appeal rights, the 60-day deadline for filing a hearing request, and the manner in which to make that request. Petitioner does not challenge that finding, nor does it claim (in its request for review) that it reasonably misunderstood what steps it needed to take to exercise its right to a hearing.

As noted, Petitioner alleged before the ALJ that it mistakenly believed that it was exercising its appeal rights by working directly with CMS and other entities to resolve the dispute. That belief, even if sincere, was unreasonable or negligent given the reconsidered determination's clear instructions about how to request a hearing. *See Vanguard Vascular & Vein, PLLC, et al.*, DAB No. 2523, at 3, 4 (2013) (upholding the dismissal of a hearing request when Petitioner failed to address the ALJ's finding that the "reconsidered determination contained clear, correct information about the operative filing deadline" and agreeing with the ALJ that it was "unreasonable for Petitioners not to follow the clear instructions included in the determination they sought to appeal" (internal quotation marks omitted)).

There being no evidence that misleading instructions or other factors prevented Petitioner from filing a hearing request within 60 days of receiving the reconsidered determination, it appears that the only reason for the late filing was that Petitioner was hoping (in vain, as it turned out) to achieve a satisfactory resolution by means other than a formal hearing before an administrative law judge. However, Petitioner's effort to resolve the dispute informally, no matter how diligent, was not good cause for missing the regulatory filing deadline. "Engaging in informal efforts to resolve a dispute and requesting a hearing are not mutually exclusive alternatives." *Quality Total Care, L.L.C., d/b/a The Crossings*, DAB No. 2242, at 10 (2009) (noting that the Board has held that participation in CMS's informal dispute resolution process "does not, in itself, excuse a failure to timely file" a request for hearing). In other words, nothing prevented Petitioner from timely pursuing its appeal rights while simultaneously trying other ways to persuade CMS to change its mind. Petitioner must bear the consequences of focusing its time and energy on advocacy tactics other than preparing and filing a timely hearing request. *See Nursing Inn of Menlo Park*, DAB No. 1812 (2002) (holding that the facility must bear the consequences of its "conscious decision" to focus on its plan of correction and resurvey rather than to prepare an appeal).

Conclusion

For the reasons set out above, we affirm the ALJ's dismissal of Petitioner's request for hearing.

/s/
Sheila Ann Hegy

/s/
Constance B. Tobias

/s/
Stephen M. Godek
Presiding Board Member