

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Joel G. Bailey, OD,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-585

ALJ Ruling No. 2016-13

Date: July 1, 2016

ORDER OF DISMISSAL

I dismiss the hearing request of Petitioner, Joel G. Bailey, OD, because it was untimely and Petitioner did not establish good cause to extend the time for filing. 42 C.F.R. §§ 498.40(a)(2), (c); 498.70(c).

I. Background and Procedural History

Petitioner is an optometrist. On December 14, 2015, Palmetto GBA (Palmetto), a Medicare administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), issued a determination revoking Petitioner's Medicare enrollment and billing privileges effective December 18, 2014. Petitioner timely requested reconsideration of that determination, and on March 4, 2016, Palmetto issued a reconsidered determination upholding the revocation of Petitioner's enrollment and billing privileges. The reconsidered determination notified Petitioner that if he disagreed with the determination, he could request review by an administrative law judge (ALJ) by filing an appeal within 60 calendar days after the date of receipt of the determination.

On May 20, 2016, Petitioner filed, by certified mail, a request for hearing dated May 11, 2016. See <https://tools.usps.com/go/TrackConfirmAction!input.action> (tracking #

70150640000364430423, last visited June 28, 2016). Petitioner appended several documents to his request for hearing, including an April 1, 2015 Interim Order of Reinstatement from the South Carolina State Board of Examiners in Optometry and letters from other professionals that were dated May 11 and 17, 2016. The Civil Remedies Division received Petitioner's request for hearing on May 23, 2016.

An initial review of Petitioner's submissions raised questions about the timeliness of his hearing request. I issued an order on June 2, 2016, directing Petitioner to show cause why the hearing request should not be dismissed as untimely. I explained that if Petitioner had not filed his hearing request within 60 days of receipt of the reconsidered determination, he must show good cause as to why I should extend the time for filing the request. 42 C.F.R. § 498.40(c).

On June 16, 2016, Petitioner responded to my Order to Show Cause. Petitioner stated the following in his response: "I was waiting on information with referral letters that I thought would help with the appeal. They were late when I realized it was past the deadline to submit my next appeal." CMS filed a reply to Petitioner's response on June 27, 2016.

II. Issues

The general issue here is whether I should dismiss Petitioner's hearing request. The specific issues that I must decide are whether Petitioner's hearing request was untimely and, if so, whether Petitioner had good cause to file the request after the deadline.

III. Analysis

A supplier dissatisfied with a reconsidered determination "is entitled to a hearing before an ALJ."¹ 42 C.F.R. § 498.5(l)(2). The procedures to request a hearing are found in 42 C.F.R. § 498.40. In order to exercise the right to a hearing, a supplier must file its request for hearing in writing no later than 60 days from the date that it receives a reconsidered determination. 42 C.F.R. § 498.40(a)(2). Receipt of the notice of a reconsidered determination is presumed to be five days after the date of notice unless shown otherwise. *Id.*; 42 C.F.R. § 498.22(b)(3). A supplier may request that an ALJ extend the date to file a hearing request; however, the supplier must show good cause in order for the ALJ to grant such a request. 42 C.F.R. § 498.40(c). If a hearing request is

¹ A "supplier" furnishes services under Medicare, and the term "supplier" applies to physicians and non-physician practitioners and facilities that are not included within the definition of the phrase "provider of services." 42 U.S.C. § 1395x(d). Petitioner is a supplier.

untimely and there is no good cause to extend the filing date, then an ALJ may dismiss the hearing request. 42 C.F.R. § 498.70(c).

A. Petitioner filed an untimely hearing request.

The reconsidered determination is dated March 4, 2016. Under the regulations, I presume that Petitioner received the determination on Wednesday, March 9, 2016. 42 C.F.R. § 498.40(a)(2); *see* 42 C.F.R. 498.22(b)(3). Petitioner had 60 days, until May 9, 2016, to file a hearing request.² 42 C.F.R §§ 498.40(a)(2). Petitioner filed his hearing request on May 20, 2016. Consequently, I find that Petitioner’s hearing request was untimely.

B. Petitioner did not establish good cause for extending the regulatory deadline for filing his hearing request.

If a supplier establishes that there was good cause to extend the filing date for a hearing request, then an ALJ may accept an otherwise untimely hearing request. 42 C.F.R. § 498.40(c). The regulations do not define what constitutes “good cause” to extend the filing deadline, and the Departmental Appeals Board “has never attempted to provide an authoritative or complete definition of the term ‘good cause’ in section 498.40(c)(2).” *Brookside Rehab. & Care Ctr.*, DAB No. 2094 at 7 n.7 (2007) (citing *Glen Rose Med. Ctr. Nursing Home*, DAB No. 1852 at 7 n.5 (2002)). Rather, an adjudicator must consider the relevant circumstances of each case to determine whether there is “good cause” to extend the filing deadline. *See NBM Healthcare, Inc.*, DAB No. 2477 at 3-4 (2012) (“[T]he facts of this case do not show good cause under ‘any reasonable definition of that term.’”).

In his response to the Order to Show Cause, Petitioner explained that he filed an untimely hearing request because he was “waiting on information with referral letters that [he] thought would help with the appeal.” Petitioner’s reason for failing to file a timely hearing request does not constitute good cause to extend the filing deadline. Dismissal of a hearing request is appropriate where the reconsidered determination clearly explained the filing requirements and deadlines, the petitioner did not claim that “it reasonably misunderstood what steps it needed to take to exercise its right to a hearing,” and “the only reason for the late filing was that Petitioner was hoping . . . to achieve a satisfactory resolution by means other than a formal hearing before an administrative law judge.” *Borger I Enterprises, LLC*, DAB No. 2618 at 4 (2015); *see also Vanguard Vascular & Vein, PLLC*, DAB No. 2523 at 3-4 (2013) (upholding the dismissal of an untimely

² The 60-day deadline fell on a Sunday; the first business day following the deadline was Monday, May 9, 2016.

hearing request when the reconsidered determination explained in “unambiguous and conspicuous language” that the petitioners had 60 days from their receipt of the reconsidered determination to request a hearing before an ALJ).

Here, the reconsidered determination clearly instructed Petitioner that, if he disagreed with the determination, he “must file [an] appeal within 60 calendar days after the date of receipt of this decision by writing to the following address. . . .” The determination also provided the postal address for Petitioner to file his request by mail and an alternative electronic filing address and instructions for Petitioner to file his hearing request electronically. In addition, the determination included the office (“Provider Contact Center”) and telephone number to call if Petitioner had any questions. Petitioner does not deny that he was provided clear notice of his right to appeal and detailed instructions for submitting his request or that he understood those instructions.

Furthermore, Petitioner’s delay in exercising his appeal rights because he was attempting to obtain evidence “[he] thought would help with the appeal” does not constitute good cause for extending the filing deadline.³ *Borger I Enterprises*, DAB No. 2618 at 3-4. Nothing prevented Petitioner from exercising his formal appeal rights while simultaneously obtaining evidence that he thought would resolve the matter in his favor. While the reconsidered determination instructed Petitioner to include specific identifying information and a copy of the decision being appealed, it did not instruct Petitioner that he needed to submit any evidence, such as the documents and reference letters that were appended to his request for hearing. Accordingly, Petitioner “must bear the consequences of focusing [his] time and energy on advocacy tactics other than preparing and filing a timely hearing request.” *Id.* at 4.

³ CMS contends in its response that Petitioner was obligated to submit the documents that were appended to his request for hearing with his request for reconsideration. CMS Reply at 2. CMS further argues that “[n]otwithstanding his untimely filed appeal, the documents themselves would not even be admissible unless Petitioner could separately establish that he had good cause for submitting them for the first time at the ALJ level.” CMS Reply at 2, citing 42 C.F.R. § 498.56(e)(1),(2)(ii). Because I have determined that good cause has not been established for extending the filing deadline, I need not reach this issue. However, I note that the bases cited in the reconsidered determination revoking enrollment were 42 C.F.R. § 424.535(a)(1) (noncompliance) and 42 C.F.R. § 424.535(a)(9) (failure to report). The documents submitted in conjunction with the untimely request for hearing do not appear to be relevant to either of the listed bases for revocation.

Because Petitioner has made no showing of good cause for filing his hearing request 11 days after the expiration of the 60-day deadline for doing so, I cannot extend the filing deadline for the hearing request based on good cause.

IV. Conclusion

Petitioner filed an untimely request for hearing and did not show that an extension of the filing deadline is warranted based on good cause. Therefore, I dismiss Petitioner's hearing request.

/s/
Leslie C. Rogall
Administrative Law Judge