

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

NBM Healthcare, Inc.
Docket No. A-12-61
Decision No. 2477
September 27, 2012

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

NBM Healthcare, Inc. (“NBM” or “Petitioner”) appeals the February 10, 2012 decision of Administrative Law Judge (ALJ) Joseph Grow, *NBM Healthcare, Inc.*, CR2500 (2012) (ALJ Decision). In that decision, the ALJ denied NBM’s motion to reconsider a previous order dismissing this case issued by ALJ Steven T. Kessel on November 23, 2011 (November 23 Order). ALJ Kessel dismissed NBM’s hearing request because he found that NBM had abandoned its appeal within the specific terms of 42 C.F.R. § 498.69(b)(2) by failing to file a pre-hearing exchange and subsequently failing to respond to an order to “Show Cause.” In denying NBM’s motion for reconsideration, ALJ Grow found that NBM had not demonstrated good cause pursuant to 42 C.F.R. § 498.72 for vacating the November 23 Order.¹

For the reasons discussed below, we find that the ALJ did not abuse his discretion in denying Petitioner’s motion to vacate the dismissal of its hearing request, and we affirm the ALJ Decision.

Applicable Law

An ALJ may vacate a dismissal of a request for hearing if a party files a request to vacate within 60 days from receipt of the dismissal notice, and the party shows good cause for vacating the dismissal. Section 498.72. The applicable regulations do not define “good cause.”

Factual Background

On June 17, 2011, the Centers for Medicare and Medicaid Services (CMS) issued a decision upholding the revocation of NBM’s Medicare enrollment and billing privileges by a CMS contractor. On August 11, 2011, NBM filed a request for a hearing challenging CMS’s decision. The case was assigned to ALJ Kessel, who promptly issued

¹ Because ALJ Kessel subsequently left the Civil Remedies Division of the Departmental Appeals Board, this matter was transferred to ALJ Grow upon receipt of Petitioner’s motion.

an Acknowledgment and Initial Pre-Hearing Order on August 15, 2011. That order required CMS to file its pre-hearing exchange and provide a copy to NBM no later than September 14, 2011. That order also required NBM to file its pre-hearing exchange and provide a copy to CMS no later than October 19, 2011. Although CMS complied with ALJ Kessel's scheduling order, NBM did not file the requisite submission. As a result, ALJ Kessel issued a "show cause" order on November 1, 2011, which afforded NBM 10 days to file an explanation showing good cause for its failure to follow his August 15, 2011 scheduling order. However, NBM did not respond to the ALJ's show cause order. On November 23, 2011, ALJ Kessel dismissed NBM's hearing request for abandonment pursuant to section 498.69(b)(2).

On January 27, 2012, NBM filed a Motion to Reconsider Order Dismissing Case (Motion) along with three exhibits, including NBM's Voluntary Withdrawal of Appeal (P. Ex. 2) and an affidavit from James Casey, Vice-President of NBM Healthcare. NBM's primary argument before ALJ Grow was that its prior counsel "did not keep the Petitioner's officers apprised of the status of this Case." Motion at ¶ 3. For example, NBM argued that its "officers did not know about the deadline for a pre-hearing exchange, did not know that [its prior counsel] had failed to file a pre-hearing exchange, have not seen CMS' pre-hearing exchange, did not know that the Court had issued a show cause order, and did not know that [its prior counsel] had failed to respond to the show cause order."² *Id.* NBM further claimed that its "officers did not know of [ALJ Kessel's November 23] Order until December 8, [2011], when a copy of the Order [was] forwarded to them by email," and "[t]his notice came in the midst of an enormous, multi-state transaction that was consuming the attention of each of [NBM]'s officers, followed by an equally daunting transition period that is ongoing, which has prevented the officers from focusing on this Case." *Id.* Finally, NBM's Vice-President stated in his affidavit that, "[b]ecause of the transaction, [NBM's] officers did not have time to focus on the notification. . . . [NBM] has retained new counsel, has put in place a mechanism for routine updates on this Case, and will not, ever, allow another deadline to pass without the Court's permission." P. Ex. 3, at 2.

ALJ Decision

ALJ Grow denied NBM's motion for reconsideration. Specifically, the ALJ found that NBM failed to show good cause for vacating the dismissal pursuant to section 498.72 for three separate reasons. First, the ALJ found the failure of NBM's former legal counsel to keep NBM's officers apprised of the status of the case does not constitute good cause. ALJ Decision at 3. Second, the ALJ rejected "Petitioner's explanation that it did not

² NBM also contended that "subsequent to the filing of" ALJ Kessel's November 23 Order dismissing the hearing request, NBM's prior counsel filed a Voluntary Withdrawal of Appeal. Motion at ¶ 2, *citing* P. Ex. 2. NBM further claimed that its "officers did not know that [its prior counsel] had filed the Voluntary Withdrawal of Appeal, and did not authorize the filing of the same." Motion at ¶ 3.

learn of the Order Dismissing Case until December 8, 2011, and “[t]his notice came in the midst of an enormous, multi-state transaction that was consuming the attention of each of Petitioner’s officers . . . which has prevented the officers from focusing on this Case.”” *Id.* Finally, the ALJ found “Petitioner’s statement that it ‘has retained new counsel, has put in place a mechanism for routine updates on this Case, and will not, ever, allow another deadline to pass’ is not sufficient to establish good cause either.” *Id.* In summary, the ALJ observed: “The circumstances Petitioner has presented, while regrettable, were not beyond its ability to control and do not establish the good cause necessary to vacate ALJ Kessel’s dismissal.” *Id.*

Standard of Review

The Board reviews a disputed finding of fact to determine whether the finding is supported by substantial evidence on the record as a whole, and a disputed conclusion of law to determine whether it is erroneous. *See Guidelines - Appellate Review of Decisions of Administrative Law Judges Affecting a Provider’s Participation in the Medicare and Medicaid Programs* at: <http://www.hhs.gov/dab/divisions/appellate/guidelines/prov.html>. The Board reviews an ALJ’s finding about “good cause” to determine whether the ALJ abused his or her discretion. *Kids Med (Delta Medical Branch)*, DAB No. 2471, at 4 (2012); *Chateau Nursing and Rehabilitation Center*, DAB No. 2427, at 6 (2011) (and cases cited therein).

Analysis

On appeal before us, NBM challenges the ALJ’s determination that it failed to establish good cause for vacating the dismissal of its hearing request. NBM argues that it had established good cause for vacating the dismissal of its hearing request. P. Br. at 2. NBM contends that “the ALJ equated ‘good cause’ with ‘circumstances beyond a party’s control.’” *Id.* NBM argues that its prior counsel had informed its officers, including Vice-President Casey, that “she was in the midst of fruitful negotiations with CMS [and] [t]hen, without warning, on December 8, Petitioner was presented not only with a November 23 Order dismissing the case for failure to respond to various ALJ orders, but that Petitioner’s own counsel, without authorization, had filed a motion to dismiss the case that same day.” *Id.* NBM contends that this event was more than a simple miscommunication between NBM and its then counsel; it “was a circumstance beyond the Petitioner’s reasonable control” which constitutes “good cause” to vacate the dismissal. *Id.* at 2-3. We disagree.

As the ALJ correctly stated, a “definition of ‘good cause’ does not exist in the applicable regulations, and the [Board] ‘has never attempted to provide an authoritative or complete definition of the term ‘good cause’” ALJ Decision at 3, quoting *Hillcrest Healthcare, L.L.C.*, DAB No. 1879, at 5 (2003). Here, there is no need for us to decide exactly the

scope of an ALJ's discretion under section 498.72 because we agree with the ALJ that the facts of this case do not show good cause under "any reasonable definition of that term." ALJ Decision at 3; *see also Brookside Rehabilitation and Care Center*, DAB No. 2094, at 7 n.7 (2007).

NBM's argument that good cause exists because its former legal counsel failed to keep NBM's corporate officers apprised of the status of the case is not supported by the evidence in this case. In support of its argument, NBM relies solely on the affidavit of its Vice-President, Mr. Casey. P. Ex. 3. However, Mr. Casey's affidavit does not support this proposition. Nowhere in the affidavit does it state that NBM's former counsel failed to keep its officers apprised of the status of the case. Instead, Mr. Casey's affidavit states that:

I reviewed the [November 23] Order and the Withdrawal and was, quite frankly, stunned to find out that: There was a deadline for a pre-hearing exchange, that CMS had filed a pre-hearing exchange, that [NBM's former counsel] had failed to file a pre-hearing exchange, that the Court had issued a show cause order, that [its former counsel] had failed to respond to the show cause order, that [its former counsel] had filed a Voluntary Withdrawal of Appeal.

Id. at 2. In other words, the affidavit merely says only that Mr. Casey did not know about certain facts related to the status of the case, not that his attorney never communicated with him about the status of the case. Nor does Mr. Casey attest that NBM's other corporate officers all were unaware of the case status and subsequent events. Mr. Casey also does not represent in his affidavit that no corporate officer had authorized NBM's former counsel to withdraw its case before the ALJ. The evidence in the record is insufficient to support NBM's argument that all of its corporate officers were unaware of the events in this case and thus does not demonstrate good cause to vacate the dismissal of its hearing request.

Mr. Casey's affidavit also states that:

Being put at ease [that its former counsel was making progress in settlement discussions with CMS], NBM's officers, who work with several home health agencies across the nation, turned to another matter; the sale of multiple home health care agencies in Texas, Michigan, and Tennessee. That transaction involved constant work on the part of NBM's officers, particularly in the month of December. . . . *Because of the transaction, NBM's officers did not have time to focus on the notification.* The deal eventually closed, and now NBM's officers are engaged in a transition period that is also requiring almost all of our time and attention.

Id. (emphasis added).

Although it is not entirely clear to what Mr. Casey is referring when he says “notification,” it is reasonable to infer that he was referring either to ALJ Kessel’s scheduling order dated August 15, 2011 that required NBM to file its pre-hearing exchange and provide a copy to CMS no later than October 19, 2011, or to his November 23 Order dismissing the case. Either way, Mr. Casey’s statement clearly demonstrates that NBM’s officers chose to give a higher priority to handling the sale of multiple home health agencies than “to focus[ing]” on its appeal of CMS’s revocation of its Medicare enrollment and billing privileges at issue before ALJ Kessel at the time. We agree with the ALJ that, under any reasonable definition of “good cause,” NBM’s explanation that it “did not have time to focus on the [ALJ’s] notification” does not constitute good cause for vacating the dismissal of its hearing request.

Parties have a responsibility to follow an ALJ’s scheduling order, as well as to respond to an order to show cause, and in this case, NBM’s failure to do so resulted in ALJ Kessel’s dismissal of the appeal for abandonment. The fact that NBM has retained different counsel and now has purportedly established a “mechanism for routine updates on this Case” and “will not, ever, allow another deadline to pass without the Court’s permission” is simply not relevant to the issue of whether good cause existed for vacating the dismissal of its hearing request.

Conclusion

For the reasons stated above, we find that the ALJ did not abuse his discretion in denying NBM’s motion to vacate the dismissal of its hearing request, and we affirm the dismissal.

/s/

Judith A. Ballard

/s/

Sheila Ann Hegy

/s/

Stephen M. Godek
Presiding Board Member