

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jacques Losman, M.D.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-964

Decision No. CR2270

Date: October 15, 2010

DECISION DISMISSING APPEAL FOR CAUSE

For the reasons set forth below, I find that Petitioner, Jacques Losman, M.D., failed to file a timely request for a hearing or establish good cause to extend the time for such filing. 42 C.F.R. § 498.40(c). Petitioner therefore does not have a right to an Administrative Law Judge (ALJ) hearing to review the Medicare contractor's April 6, 2010 reconsideration decision. I therefore dismiss this case pursuant to 42 C.F.R. § 498.70(c).

I. Background

Petitioner was notified by letter dated July 22, 2009 that his billing privileges were revoked effective June 12, 2009 through September 11, 2009 and a one year re-enrollment bar had been imposed. Petitioner requested reconsideration and Highmark Medicare Services, a CMS contractor, issued a reconsideration decision on April 6, 2010. The contractor upheld the decision to revoke Petitioner's billing privileges for three months and to impose a one year re-enrollment bar. The contractor's reconsideration decision letter explained that appeal rights can be found at 42 C.F.R. 498 and advised

Petitioner of his right to appeal within 60 calendar days after the date of receipt of the decision. By letter dated August 26, 2010, Petitioner filed an appeal and request for hearing before an Administrative Law Judge (ALJ).

Per 42 C.F.R. § 498.40(a)(2), Petitioner “must file the request [for hearing] in writing within 60 days from receipt of the notice of initial, reconsidered, or revised determination.” Pursuant to 42 C.F.R. § 498.40(c), if the request for hearing was not filed within 60 days, the affected party must show good cause as to why I should extend the time for filing a request for hearing. Accordingly, by Order to Show Cause dated September 9, 2010, I directed Petitioner to show cause why this case should not be dismissed as untimely.

Petitioner’s representative responded by letter dated September 20, 2010. CMS submitted a reply to Petitioner’s response on September 27, 2010.

II. Issue

The issue in this case is whether, pursuant to 42 C.F.R. § 498.40(c), Petitioner has shown good cause for me to extend the time for filing his request for hearing beyond 60 days and not dismiss the case as untimely under 42 C.F.R. § 498.70(c).

III. Findings of Fact, Conclusions of Law, and Supporting Discussion

My findings of fact and conclusions of law are set out as separate headings followed by supporting discussion.

A. Petitioner’s hearing request is untimely.

Petitioner alleges that he received the reconsideration decision on April 7, 2010. The hearing request was required to be filed within 60 days of receipt of the reconsideration decision under the authorities cited above. The number of days between the date of receipt of the reconsideration decision (April 7, 2010) and the date of the request for hearing (August 26, 2010) is 141 days.

It follows that Petitioner’s hearing request was filed 81 days late. Petitioner does not deny that the request was untimely, and I find it undeniable on this record.

B. Petitioner has not demonstrated good cause to extend the time for filing that 42 C.F.R. § 498.40(c)(2) provides.

Petitioner's attorney responded to my Order to Show Cause, stating reasons why Petitioner's appeal should proceed. Petitioner's attorney offers the following reasons why the hearing request was untimely and Petitioner's appeal should not be dismissed:

- (1) Petitioner received the reconsideration decision on April 7, 2010 and indicated to his counsel that he wanted to appeal the decision. Petitioner's counsel claims that Petitioner "was, at no time equivocal about wanting to appeal. . ." and "[i]t was clearly my responsibility to file the appeal, and I neglected to do so"; and
- (2) It would be unfair to deny Petitioner's right to a hearing because of the "clear mistake" by his counsel; and
- (3) Petitioner "has a meritorious defense to the one year bar of re-enrollment. . . and it was arbitrary and capricious for Highmark Medical Services to impose a one year re-enrollment bar under the circumstances of this case."

Petitioner's letter dated September 20, 2010, at 1-2. Petitioner also enclosed a Certification of Joseph M. Gorrell, Esq. in support of Petitioner's response. In addition to the reasons listed above, Petitioner's counsel states in the Certification that "[i]t was my responsibility to file the appeal. . . . It is not clear to me, at this time, why I did not do so, but it was clearly my responsibility to ensure that the appeal was filed." Certification of Joseph M. Gorrell, Esq., ¶ 3. Petitioner's counsel requests that Petitioner's "right to appeal not be lost due to the inadvertence of . . . his legal counsel." *Id.* ¶ 4.

"For good cause shown, the ALJ may extend the time for filing the request for hearing." 42 C.F.R. 498.40(c)(2). A definition of "good cause" does not exist in the applicable regulations, and the "[Departmental Appeals] Board [(Board)] has never attempted to provide an authoritative or complete definition of the term 'good cause' in section 498.40(c)(2)." *Hillcrest Healthcare, L.L.C.*, DAB No. 1879, at 5 (2003).

While the Board has never precisely defined the term "good cause," it is clear to me that the "inadvertence" or inexplicable negligence of Petitioner's legal counsel cannot be a basis for a good cause determination. Petitioner has failed to demonstrate good cause for filing his hearing request almost three months after the due date under any reasonable meaning of "good cause." The admission that Petitioner's counsel made a "clear mistake" is not sufficient to demonstrate good cause for such an untimely appeal.

I conclude that Petitioner has not demonstrated good cause to grant an extension of time for filing his request for hearing.

IV. Conclusion

Petitioner did not timely file a request for hearing, and I do not find good cause to justify extending the time for filing. I therefore, on my own motion, dismiss this case for cause. 42 C.F.R. § 498.70(c).

/s/

Leslie A. Sussan
Board Member