

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Paul R. Clark d/b/a Clark Orthopedics Company,  
(PTAN: 0561800001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-686

Decision No. CR2276

Date: October 27, 2010

**DECISION DISMISSING REQUEST FOR HEARING  
WITHOUT PREJUDICE**

By letter dated April 30, 2010, Petitioner requested an ALJ hearing on the Medicare contractor's revocation of Petitioner's durable medical equipment, prosthetics, orthotics and supplies (DMEPOS) Medicare billing privileges and two-year bar on reenrollment as a supplier. On May 12, 2010, I acknowledged receipt of Petitioner's request and set up a briefing schedule. In that Order, I emphasized that time is of the essence in this case. *See* 42 C.F.R. § 498.79.

Subsequent communications from the parties indicated that the Centers for Medicare and Medicaid Services (CMS) and the Medicare contractor were working with Petitioner to waive the reenrollment bar and reinstate Petitioner upon filing of a reenrollment application. In order to accommodate these efforts, I issued additional rulings providing time for the parties to come to a resolution. *See* Order Granting Extension dated June 21, 2010; Ruling On Motion To Dismiss and Order Setting Further Proceedings dated July 22, 2010. CMS complied with my Order to file its exchange and Petitioner was directed to file his exchange by August 26, 2010 but did not do so. On September 2, 2010, I therefore issued an Order to Show Cause within 10 days as to why I should not dismiss

the request for abandonment. On September 13, 2010, Petitioner requested an extension of time which I again granted, allowing Petitioner until September 30, 2010 to show cause.

The parties then indicated that the contractor was processing Petitioner's application but had yet to make a final determination. On October 6, 2010, I stayed this case for two weeks to allow the contractor to process Petitioner's application. Finally, on October 20, 2010, I notified the parties that unless I heard good cause why I should not close this case, I would dismiss without prejudice the following week.

CMS did not object to dismissal without prejudice. In an October 22, 2010 email communication with my office, however, Petitioner stated that he preferred to keep his appeal "still active and extended until a decision is made by the contractor."

This case has languished for a significant period of time without active development. The delays are not all attributable to one party and have, in the end, resulted in an agreed process to resolve the dispute. I encourage the parties to continue with the agreed reinstatement process, but I do not see that a purpose is served by maintaining indefinitely on the docket an appeal that is not being actively pursued. I understand Petitioner's concerns that his position not be prejudiced in the event that the reinstatement process breaks down or results in an unfavorable outcome. I conclude, however, that those concerns can be effectively met by issuing this dismissal without prejudice.

I am authorized to dismiss a request for a hearing that has been abandoned. I may consider a request for hearing to be abandoned if the party requesting a hearing fails to respond within 10 days to a "show cause" notice with a showing of good cause. 42 C.F.R. § 498.69(b)(2). I am unable to find good cause to keep this appeal open at this time when Petitioner is not seeking to go forward and develop the record for a final decision.

I emphasize that I am dismissing this case without prejudice. The effect of a dismissal without prejudice is that Petitioner may file to reopen the appeal at any time if the result of the current reinstatement process is adverse. Therefore, if Petitioner's reenrollment application is denied, he can refile his request for an ALJ hearing. I may also vacate a dismissal if either party so requests within 60 days after receipt of the dismissal and shows good cause for vacating it. 42 C.F.R. § 498.72.

/s/

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Leslie A. Sussan  
Board Member