

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

William Luper, M.D.  
(NPI: 1104988906),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-582

Decision No. CR2221

Date: August 18, 2010

**DECISION DISMISSING REQUEST FOR HEARING**

I dismiss the hearing request of Petitioner, William Luper, M.D. Petitioner did not request reconsideration of the Centers for Medicare & Medicaid Services (CMS) decision to revoke Petitioner's billing privileges, and thus there is no reconsideration determination for me to review.

**I. Background**

Petitioner is a pathologist. At the time of the revocation of his Medicare provider number, Petitioner was a member of J.S. Wilkenfeld, M.D. & Associates, a pathology practice group in Houston, Texas.

By letter dated June 15, 2009, pursuant to 42 C.F.R. § 424.535, CMS notified all eligible Medicare providers, including Petitioner, that they must verify the accuracy of their enrollment information by submitting a completed CMS 855 application within 60 days from the date of that notice to avoid revocation of Medicare billing privileges. CMS Exhibit (Ex.) 1, at 1. Petitioner alleges that the third-party billing service that his practice group used did not receive this notice. Petitioner's Brief (P. Br.) at 2.

By letter dated October 8, 2009, CMS notified Petitioner that his Medicare provider number was currently in the revocation process. CMS Ex. 2. In that letter, CMS requested Petitioner to submit a revalidation request within 30 days of the date of the letter to avoid revocation. *Id.* According to Petitioner, his billing service submitted the revalidation materials (CMS 855I and 855R applications) to TrailBlazer Health Enterprises, LLC (TrailBlazer), a Medicare contractor. P. Br. at 2. CMS states that it did not receive these materials until November 17, 2009. CMS Br. at 6; CMS Ex. 4 (letter dated Nov. 20, 2009, from CMS to Petitioner, acknowledging that CMS received Petitioner's materials on Nov. 17, 2009). Petitioner maintains that on November 12, 2009, his billing service received a telephone call from CMS regarding the revalidation materials and requesting additional information. P. Br. at 2. According to Petitioner, November 17, 2009 appears to be the date TrailBlazer received the supplemental information requested in that telephone call. *Id.* at 3.

By letter dated November 25, 2009, TrailBlazer notified Petitioner that his Medicare provider number has been revoked effective November 7, 2009. CMS Ex. 5. It stated:

According to the *Federal Register* (42 CFR § 424.515) information, requested from a provider as part of the revalidation process, must be received within 60 calendar days after the date TrailBlazer Health Enterprises<sup>®</sup> notified the provider of the need to revalidate. If the provider fails to do so, TrailBlazer<sup>SM</sup> should revoke the provider's billing privileges using existing revocation procedures. An application CMS 855I and R was requested on June 15, 2009. The requested information was not received within the allotted time frame.

*Id.* The letter lists the following options for the Petitioner: (1) correct the noncompliance by submitting a Correction Action Plan (CAP) within 30 days after the postmark date of the letter, with evidence that Petitioner is in compliance with the Medicare requirements; and/or (2) request reconsideration of the determination to revoke Petitioner's billing privileges within 60 days after the postmark date of the letter. *Id.*

Petitioner, by his billing service, submitted a CAP with new CMS 855I and 855R application forms in December 2009. Hearing Request Letter, dated Mar. 19, 2010 (HR). In response, TrailBlazer notified Petitioner that he submitted expired versions of the CMS application forms and required Petitioner to re-submit the information on current forms. HR. Petitioner missed the deadline to submit these forms, as well as the deadline to submit a request for reconsideration of the determination to revoke his Medicare billing privileges. HR.

By letter dated March 19, 2010, Petitioner requested a hearing before an administrative law judge (ALJ). HR. I was assigned to hear the case as a member of the Departmental Appeals Board (Board) pursuant to 42 C.F.R. § 498.44. I issued an initial order on April

7, 2010, setting the briefing schedule of the parties. CMS filed a motion for summary disposition dated May 7, 2010, accompanied by exhibits 1 through 9. During this time period, Petitioner left J.S. Wilkenfeld, M.D. & Associates, and his new attorney was granted an extension to file a response to CMS's motion. Order Granting Extension, issued May 21, 2010. Petitioner filed his response to CMS's motion dated June 30, 2010 with one exhibit. Having received no objections, I admit all exhibits.

## **II. Issue, findings of fact and conclusions of law**

### **A. Issue**

The issue in this case is whether I may dismiss Petitioner's hearing request.

### **B. Findings of fact and conclusions of law**

I make findings of fact and conclusions of law to support my decision which are set forth below as numbered headings.

#### ***1. I dismiss Petitioner's hearing request for cause because he did not request reconsideration.***

My determination of whether to dismiss Petitioner's request for hearing rests on the chain of events that occurred after November 25, 2009, the date of the letter notifying Petitioner of the revocation of his billing privileges (revocation notice).

Pursuant to 42 C.F.R. § 498.5(1)(1), "an existing provider . . . dissatisfied with an initial determination . . . related to the denial or revocation of Medicare billing privileges may request reconsideration." Then, pursuant to subsection (2) of that same regulation, the provider "dissatisfied with a reconsidered determination under paragraph (1)(1) of this section . . . is entitled to a hearing before an ALJ."

As stated above, in the revocation notice, Petitioner was advised that he had the opportunity to request reconsideration "within 60 calendar days of the postmark date of this letter." CMS Ex. 5. At that time, Petitioner, through his billing services, submitted only a CAP consisting of CMS 855I and 855R application forms. The Board stated the following in *DMS Imaging, Inc.*, DAB No. 2313, at 5 (2010): "Neither the Social Security Act nor the implementing regulations provide for administrative review of a contractor's refusal to reinstate a supplier's billing privileges on the basis of a CAP." Thus, I have no authority to review the refusal of the contractor to reinstate Petitioner's billing privileges. *See id.* at 8 ("The hearing officer conducting the reconsideration (and the ALJ on appeal of the hearing officer decision) are limited to reviewing the basis for revocation set out in the initial notice, not the merits of any contractor decision that corrective action under a CAP was unacceptable.") .

Petitioner could have also sought reconsideration at that time or at the time the CAP was denied, so long as the request for reconsideration was within 60 days from receipt of the notice of revocation. 42 C.F.R. 498.22. Petitioner did not request reconsideration from the contractor at any time.

The regulations provide, in pertinent part, as follows:

On his or her own motion, or on the motion of a party to the hearing, the ALJ may dismiss a hearing request either entirely or as to any stated issue, under any of the following circumstances:

(a) *Res judicata*. There has been a previous determination or decision with respect to the right of the same affected party on the same facts and law pertinent to the same issue or issues which has become final . . . without judicial consideration, because the affected party did not timely request reconsideration . . . with respect to that determination or decision.

42 C.F.R. § 498.70. Because Petitioner did not request reconsideration and thus there is no reconsideration determination for me to review, pursuant to 42 C.F.R. § 498.70(a), I have the authority to dismiss Petitioner's request for hearing for cause.

### **III. Conclusion**

For the foregoing reasons, I dismiss Petitioner's request for hearing.

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/s/  
Leslie A. Sussan  
Board Member