

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

KCI Home Medical, Inc.
(PTAN: 6114560001),

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-874

Decision No. CR2245

Date: September 20, 2010

DECISION DISMISSING APPEAL FOR CAUSE

For the reasons set forth below, I deny Petitioner's request for a hearing before an Administrative Law Judge (ALJ). I find that Petitioner 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). I therefore dismiss this case pursuant to 42 C.F.R. § 498.70(c). Petitioner does not have a right to an ALJ hearing to review the Medicare contractor's December 27, 2009, reconsideration decision.

I. Background

On December 27, 2009, the Medicare contractor upheld the revocation of Petitioner's supplier number. The contractor's reconsideration decision explained that the request for hearing must be filed no later than 60 days from the date of receipt of the decision. 42 C.F.R. § 498.40(a).

If a request for hearing is not filed within 60 days, the affected party may request an extension of time to file. 42 C.F.R. § 498.40(c)(1). If good cause is shown, the ALJ may extend the time for filing the request for hearing. 42 C.F.R. § 498.40(c)(2). If, however,

the ALJ determines that good cause is not established, the ALJ may, upon his or her own motion, dismiss the untimely request for hearing for cause. 42 C.F.R. § 498.70(c).

As examined more fully below, Petitioner did not file a request for an ALJ hearing within the prescribed 60 days. Instead, on July 27, 2010, Petitioner filed a request for an ALJ hearing, acknowledging that it is “beyond the 60 day appeal” period. Hearing Request (H.R.) Petitioner proffered as cause for late filing that it did not fully understand the basis of the revocation until after the December 27, 2009 reconsideration decision was issued and that it did not appeal further at the time because the location was closed. The apparent trigger for the belated appeal, however, is that the contractor informed Petitioner that one of the consequences of the revocation of one location is the denial of enrollment for a new location. Specifically, on July 22, 2010 the contractor returned Petitioner’s application for enrollment of a new location because “[o]ne or more of the individuals listed on the application submitted is affiliated with a revoked supplier” and consequently the re-enrollment bar must expire before a new application can be accepted for processing. H.R.; see 42 C.F.R. § 424.535(b) and (c).

On August 23, 2010, I issued an Order to Show Cause (Order) why I should not dismiss the case. I explained that I was unable to determine from the hearing request whether Petitioner disputes the July 22, 2010 returned application for enrollment of a new location and/or the December 27, 2009 reconsideration. I directed that if Petitioner seeks review of the December 27, 2009 contractor reconsideration, Petitioner must show cause why I should determine that good cause exists for a delay of approximately 147 days in filing its request.

On August 31, 2010, Petitioner responded to my Order presenting argument as to why I should find good cause for its belated appeal of the December 27, 2009 reconsideration decision. (P. Resp.) Petitioner also indicated that it did not seek to appeal the July 22, 2010 returned application for enrollment for a new location. *Id.* I also provided the Centers for Medicare & Medicaid Services (CMS) an opportunity to reply. On September 13, 2010, CMS filed its reply contesting Petitioner’s assertion of good cause.

II. Issues

1. Whether Petitioner filed a timely request for hearing in accordance with 42 C.F.R. § 498.40(a); and, if not,
2. Whether Petitioner has demonstrated good cause for extending the time to file a request for hearing under 42 C.F.R. § 498.40(c)(2).

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

I make two combined findings of fact and conclusions of law to support my decision in this case. I set forth each below as a separate heading followed by my supporting discussion.

A. Petitioner did not submit a request for an ALJ hearing within 60 days of receipt of the December 27, 2009 reconsideration decision and therefore failed to timely file in accordance with 42 C.F.R. § 498.40(a).

Petitioner's right to a hearing is governed by the provisions of 42 C.F.R. Part 498. Section 498.40(a)(2) of 42 C.F.R. expressly provides that:

[an] affected party or its legal representative or other authorized official must file the request [for hearing] in writing within 60 days from receipt of the notice of initial, reconsidered, or revised determination unless that period is extended in accordance with paragraph (c) of this section.

The contractor issued its reconsideration decision on December 27, 2009.¹ Therefore, Petitioner was required to file any request for hearing no later than March 2, 2010. 42 C.F.R. § 498.40(a)(2).

As noted, Petitioner did not submit its request for hearing until July 27, 2010, 147 days after the time for filing expired. H.R. Petitioner expressly acknowledged that it was filing past the regulatory deadline. H.R.

Therefore, I conclude that Petitioner did not submit a timely request for hearing.

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

I may extend the time for filing the request "for good cause shown." 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] 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).

¹ The date of receipt is presumed to be five days after the date on the notice, unless a showing exists that it was, in fact, received earlier or later. 42 C.F.R. §§ 498.40(a)(2), 498.22(b)(3). Petitioner does not contend that the decision was received at a later date.

In response to my Order, Petitioner contends that “[h]ad the [Medicare contractor] provided the true reason from the beginning as to why our number was being revoked, we could have been allowed more time to resolve the issue by submitting a correctly signed surety bond during the appeals process.” P. Resp. at 1. Petitioner asserts: “We didn’t know the root cause of the problem - an invalid signature - until we heard from the Hearing Officer with an unfavorable hearing decision. By this time, we had closed the location and didn’t see the need to pursue another hearing as the surety bond was to be cancelled.” *Id.* at 2.

While I do not attempt a single comprehensive definition of what constitutes good cause, it cannot be merely the choice not to appeal, later regretted. Any issue about the clarity of the grounds for the revocation that remained after the reconsideration decision could have formed part of a timely appeal, but KCI has not shown that it was affirmatively misled in some way that precluded its making a timely appeal.

KCI does not deny that the reconsideration decision explained the steps required to perfect an appeal. In its reply, CMS properly notes that KCI was responsible for knowing the legal consequences of its choice not to appeal, and given the scale of the enterprise as described in its own submission, had the resources to make an informed decision. KCI cannot now avoid the consequences of that decision.

I conclude that Petitioner has not demonstrated good cause to extend the time for filing its request for hearing.

III. 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