Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Tasmina Sheikh, M.D., P.A.,
(NPI: 1659376150),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-104

ALJ Ruling No. 2013-17

Date: July 31, 2013

DISMISSAL

Petitioner, Tasmina Sheikh, M.D., P.A., is a psychiatrist who participated in the Medicare program. The Centers for Medicare & Medicaid Services (CMS) revoked her Medicare enrollment, citing abuse of billing privileges. Petitioner appealed and her appeal was assigned to me.

On November 14, 2012, I issued an acknowledgment and prehearing order directing the parties to file their respective prehearing exchanges. On December 19, 2012, CMS timely filed its prehearing exchange by electronic filing. Pursuant to my order, Petitioner was to file her exchange no later than January 23, 2013. Petitioner did not file her exchange nor request an extension of time for filing.

I issued an order on February 6, 2013, suggesting that Petitioner's failure to file her submissions as ordered might indicate that she had abandoned her request for hearing. 42 C.F.R. § 498.69. If she did not intend to abandon her request, I directed her to file, no later than February 19, 2013, her exchange and a written statement showing good cause why I should not dismiss this case pursuant to 42 C.F.R. § 498.69(b).

Petitioner, who is represented by counsel, thereafter submitted her exchange with a letter dated February 19, 2013. In that letter she said that she had "meritorious defenses" and suggested that she had not timely filed her submissions because the facts of her case "are quite involved from an accounting point of view." She also claimed that she needed "significant time and analysis," given "the nature of the accounting and the thousands of pages that were submitted to CMS for the audit, together with the fact that much of the audit findings were not provided to the Petitioner until CMS filed its Prehearing Brief (which contained some detail in its exhibits). . . ."

CMS asks that the appeal be dismissed, arguing that Petitioner fails to show good cause for the untimely filing. I agree and, for the reasons set forth below, dismiss pursuant to 42 C.F.R. § 498.69(b).[1]

Petitioner does not claim that any factor beyond her ability to control – or any outside factor at all – prevented her from responding timely to my order. Rather, she effectively admits that she decided to disregard my deadlines and establish her own, without notice to CMS or to me. I do not consider this good cause. Moreover, I find disingenuous Petitioner's suggestion that she was unaware of the case against her until after she received CMS's submission.

I may dismiss a hearing request if the party who requested a hearing abandons it. 42 C.F.R. § 498.69. The request is abandoned if the party does not file submissions as ordered and (in responding to an order to show cause) does not show good cause for the untimely filing. 42 C.F.R. § 498.69(b); *Osceola Nursing and Rehabilitation Center*, DAB No. 1708 at 11-12 (1999). The regulations do not define good cause but leave that determination to the Administrative Law Judge (ALJ). For the most part, the ALJs who handle Part 498 appeals have been guided by the Social Security Administration's (SSA's) regulatory definition of good cause: circumstances beyond a party's ability to control.[2] *See, e.g., Oak Park Healthcare Center*, DAB CR1917 (2009); *The Heritage Center*, DAB CR1219 (2004); *Hillcrest Healthcare, L.L.C.*, DAB CR976 (2002), *aff'd* DAB No. 1879 (2003); *Hammonds Lane Center, et al.*, DAB CR913, *aff'd* DAB No. 1853 (2002); *Glen Rose Medical Center*, DAB CR918 (2002), *aff'd* DAB No. 1852

---

[1] Petitioner may move to vacate this dismissal. However, an ALJ may vacate a dismissal only if the party files its request to that effect within 60 days from receipt of the notice of dismissal and shows good cause for vacating. 42 C.F.R § 498.72.

[2] Under SSA's regulations, the ALJ considers: 1) the circumstances that kept the affected party from making the request on time; 2) whether any SSA action misled him; 3) whether the affected party understood the requirements for filing; and 4) whether the affected party had any physical, mental, educational, or linguistic limitation that prevented him from filing a timely request or from understanding or knowing about the need to file a timely request for review. 20 C.F.R. § 404.911.

(2002); *Parkview Care Center*, DAB CR785 (2001); *Hospicio San Martin*, DAB CR387 (1995), *aff'd* DAB No. 1554 (1996); 20 C.F.R. §§ 404.911, 404.933(c). In fact, as far as I can determine, this is the only standard articulated by any adjudicator in a Part 498 case.

For its part, the Departmental Appeals Board "has never attempted to provide an authoritative or complete definition of the term. . . ." *Hillcrest Healthcare, L.L.C.*, DAB No. 1879 at 5 (2003). Certainly, the Board has consistently supported dismissal when it found that a party did not show good cause under "any reasonable definition of that term." *See, e.g.*, *Brookside*, DAB No. 2094 at 6 (2007). Otherwise, it has not articulated any definition, but adjudicates case-by-case.

In any event, applying SSA's definition has made eminently good sense. SSA's regulations derive from the same statutory authority as the section 498 regulations – section 205(b) of the Social Security Act. The SSA definition has been subject to notice-and-comment rulemaking. It has been the most widely-employed definition of "good cause" in the context of a section 205(b) hearing. If an ALJ correctly applies the "good cause" definition long employed by the largest administrative review body in the country (and probably in the world), he/she can hardly be found to have abused his/her discretion or acted arbitrarily. If anything, an adjudicator could justifiably hold Medicare providers and suppliers to a more stringent standard than that set forth in the SSA regulation. *See Cary Health and Rehabilitation*, DAB No. 1771 at 21, n.5 (2001) (finding "considerably more justification" for holding the affected party to the rules, and "considerably less justification" for such a party's inaction in response to federal notices where that affected party is not an individual or a program beneficiary, but a provider/supplier who hopes to participate in federal programs).

ALJ's began applying SSA's "good cause" definition to Part 498 cases in the absence of any alternative. In recent years, however, CMS has published regulations governing hearings in benefit appeals under Medicare Parts A and B. 42 C.F.R. § 405.1000 *et seq.* While those regulations do not specifically define "good cause," they provide guidance for determining whether good cause exists and offer examples. 42 C.F.R. § 1014(c)(3); 42 C.F.R. § 405.942(b)(2) and (3). The CMS regulations borrow heavily from the SSA regulations, but they are more stringent, reflecting the view that providers and suppliers (and potential providers and suppliers) should understand program requirements. The CMS regulations thus omit the instruction that the ALJ consider whether the affected party understood the legal requirements. *Compare* 42 C.F.R. § 405.942(b)(2) *with* 20 C.F.R. § 404.911(a). Similarly, both sets of regulations include the same examples of good cause (serious illness, death, records destroyed, etc.), except that the CMS regulations omit the three SSA examples that relate generally to a party's understanding

of program requirements.[3] 20 C.F.R. 404.911(b)(4), (5), and (9); 42 C.F.R. § 405.942(b)(3).

Arguably, it makes more sense to apply the CMS standard in this case involving a Medicare supplier. However, even under the more generous SSA standard, Petitioner has not shown good cause for late filing. She has not established that any factor beyond her control prevented her from responding to my order. She does not claim that she was unaware of or misunderstood the deadline; she does not point to some excusable error that prevented her from responding. Instead, she justifies her inaction by characterizing the case as too complicated for timely response and suggesting that CMS's findings were new to her.

In fact, CMS has presented a fairly simple, straight-forward case. Nothing in its short brief (7 pages) and 8 relatively small exhibits is new or surprising, and Petitioner does not point to any specific audit finding, submission, or argument that CMS raised for the first time before this tribunal.[4] CMS's case is based on complaints from two Medicare beneficiaries and a subsequent audit of Petitioner's *own records*, to which she has obviously always had access. *See* CMS Ex. 7 at 2 (Duran Decl. ¶ 12). Nor is there anything very complicated about the auditor's techniques. From Petitioner's electronic claims data,[5] the auditor counted the number of hours Petitioner billed the program per day for a period of time, and documented her findings on a spreadsheet. CMS Ex. 6; CMS Ex. 7 at 1 (Duran Decl. ¶ 7).

The audit occurred back in June 2011. CMS Ex. 7 at 1 (Duran Decl. ¶ 4). As early as October 4, 2011, if not earlier, Petitioner was represented by counsel. CMS Ex. 4. She requested reconsideration on January 27, 2012. CMS Ex. 2. CMS denied her request for reconsideration on September 10, 2012. CMS has added no new issues. Petitioner has thus had ample time to prepare her defenses and timely file her submissions. Because she

---

[3] 1) Although she tried very hard, the party did not find necessary information within the time allotted; 2) The party asked the agency for additional information and then sought review within specified time frames after receiving that information; and 3) Because of unusual or unavoidable circumstances, the party could not have known of the need to file timely.

[4] The regulations frown on new submissions and specifically preclude a provider or supplier from submitting new evidence in these proceedings, absent a showing of good cause. 42 C.F.R. § 498.56(e); *see* Acknowledgment and Prehearing Order at 5 (¶ 6).

[5] Although Petitioner refers to "thousands of pages submitted to CMS for audit," Medicare claims can only be submitted electronically. CMS Ex. 7 at 1 (Duran Decl. ¶ 8).

failed to do so and has not demonstrated good cause for that failure, I dismiss her hearing request pursuant to 42 C.F.R. § 498.69(b).

/s/

Carolyn Cozad Hughes
Administrative Law Judge