

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jeffrey Carvalho,
(OI File No. H-13-42848-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-1121

ALJ Ruling No. 2014-41

Date: August 19, 2014

ORDER OF DISMISSAL AND FOR SANCTIONS

I dismiss the request for hearing filed by Petitioner, Jeffrey Carvalho, because Petitioner has abandoned it. I also impose a sanction on Petitioner's attorney, John L. Calcagni III, based on his failure to comply with my orders and for committing misconduct that has interfered with the speedy conduct of this proceeding.

I. Background and Procedural History

On May 2, 2014, Mr. Calcagni requested a hearing to dispute the Inspector General (I.G.) of the Department of Health and Human Services' determination to exclude Petitioner from participation in Medicare, Medicaid, and all federal healthcare programs. On May 20, 2014, the Director of the Civil Remedies Division (CRD) sent Mr. Calcagni a letter acknowledging receipt of Petitioner's request for hearing and advising Mr. Calcagni that I scheduled a telephonic prehearing conference for June 11, 2014 at 10:00 a.m. Eastern Time. The letter warned that I could dismiss Petitioner's hearing request for abandonment without further action if Mr. Calcagni failed to provide a contact number for the conference by June 6, 2014.

By June 10, 2014, Mr. Calcagni had not yet provided my office with a telephone number. The CRD staff attorney assigned to assist me with this case, Ernest McNealey, sent an email to Mr. Calcagni to confirm that the telephone number appearing on his letterhead (from the request for hearing) was the number where he could be reached for the conference. On June 10, 2014, Mr. Calcagni responded by email that Mr. McNealey had the correct phone number.

On June 11, 2014 at 10:00 a.m., Mr. McNealey attempted to initiate the conference by calling counsel for the parties. Mr. McNealey called the I.G.'s counsel, who was prepared for the conference call. Mr. McNealey next called Mr. Calcagni; however, the paralegal who answered placed Mr. McNealey on a brief hold and then said she would tell Mr. Calcagni that Mr. McNealey called but that Mr. Calcagni was currently unavailable. Mr. McNealey informed the paralegal that I was waiting to commence a conference call, and Mr. McNealey provided his telephone number and said he would call back in five minutes. During the second attempt to reach Mr. Calcagni, the same paralegal answered the phone and stated that Mr. Calcagni was in court. Mr. McNealey told the paralegal that he would contact Mr. Calcagni at a later date. The prehearing conference had to be cancelled.

Shortly thereafter, Mr. Calcagni's paralegal called Mr. McNealey. The paralegal indicated that Mr. Calcagni was not listed in the firm's internal system as counsel for Petitioner and theorized that Mr. Calcagni may have filed the hearing request only to accommodate Petitioner's statutory deadline for filing without intending to actually represent him in this matter.

On June 16, 2014, I ordered Petitioner to show cause why I should not dismiss his request for hearing due to abandonment or impose sanctions for his counsel's absence at the pre-hearing conference. 42 C.F.R. § 1005.2(e)(3). Because the paralegal's statements called into question whether Mr. Calcagni would continue to act in Petitioner's best interests, I directed that Petitioner should be sent a copy of my Order to Show Cause. CRD sent Petitioner the order by U.S. Mail.

Due to an administrative error, Mr. Calcagni was listed as a participant in the Departmental Appeals Board's E-file system and may not have received the Order to Show Cause. On July 23, 2014, Mr. McNealey, at my direction, emailed a copy of the Order to Show Cause to Mr. Calcagni (a courtesy copy of the email was sent to I.G. counsel) indicating that he must reply within 10 days of receipt. Mr. McNealey received a read receipt from that email on July 23, 2014. Neither Mr. Calcagni nor Petitioner filed a response to the Order to Show Cause.

II. Discussion

A. Dismissal

I have a regulatory duty to hold at least one prehearing conference in exclusion cases. 42 C.F.R. § 1005.6(a). Petitioner has frustrated my efforts to hold such a conference. Petitioner, neither personally nor through counsel, has explained why he failed to appear for the scheduled prehearing conference. The regulations require that I dismiss a request for a hearing that has been abandoned. 42 C.F.R. § 1005.2(e)(3). Based on the history of this case, summarized above, I must conclude that Petitioner has abandoned this case. Accordingly, I dismiss Petitioner's request for hearing. Dismissal is final and not subject to further review. *See Ivette Hernandez-Ramirez*, ALJ Ruling 2013-8, at 3 n.1 (HHS CRD Apr. 25, 2013).

B. Sanction

Based on the history of this case, I conclude that Mr. Calcagni is subject to sanctions. As an initial matter, there is no doubt that Mr. Calcagni entered his appearance before this tribunal as counsel for Petitioner. The request for hearing that Mr. Calcagni signed and filed was on Mr. Calcagni's letterhead and expressly stated that "[t]his office represents Mr. Jeffrey Carvalho" and that I should "accept this letter as Mr. Carvalho's official notice of appeal or request for hearing." Although the letter acknowledging receipt of the hearing request informed Mr. Calcagni of the scheduled prehearing conference and directed him to contact Mr. McNealey prior to the conference, Mr. Calcagni failed to comply with either directive. Even after I issued an Order to Show Cause, Mr. Calcagni failed to respond to it. As stated in the Order to Show Cause, Petitioner was to inform this tribunal if he no longer wished to pursue his case. Mr. Calcagni should have at least complied with this final requirement, rather than force me to determine that Petitioner had abandoned the hearing request.

An administrative law judge may sanction an attorney for "failing to comply with an order or procedure" or "for other misconduct that interferes with the speedy, orderly or fair conduct of the hearing." 42 C.F.R. § 1005.14(a). Mr. Calcagni failed to comply with the notice setting the prehearing conference, both by failing to contact Mr. McNealey before the conference and failing to appear for the conference. Further, Mr. Calcagni failed to comply with the Order to Show Cause when he did not respond to it. Therefore, there is no doubt that Mr. Calcagni failed to comply with my orders and engaged in misconduct that interfered with the speedy conduct of the proceeding.

The sanction that an administrative law judge imposes "will reasonably relate to the severity and nature of the failure or misconduct." 42 C.F.R. § 1005.14(a). In the present matter, Mr. Calcagni has conducted himself with a cavalier attitude toward his obligations as counsel in this proceeding, resulting in this tribunal wasting time and effort

