

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Better Health Ambulance
Docket No. A-12-100
Decision No. 2475
September 14, 2012

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

Better Health Ambulance (BHA) appeals the May 4, 2012 decision of Administrative Law Judge (ALJ) Joseph Grow dismissing BHA's request for a hearing. *Better Health Ambulance*, DAB CR2536 (2012) (ALJ Decision). The ALJ determined BHA did not have a right to a hearing because BHA failed to timely request reconsideration of the Centers for Medicare and Medicaid Services' (CMS's) initial determination to revoke BHA's Medicare billing privileges and did not establish "good cause" to extend the filing deadline. We conclude BHA was not entitled to a hearing because CMS never made a reconsidered determination. Therefore, we affirm the ALJ's dismissal of BHA's hearing request, but on a different legal basis.

Statutory and Regulatory Background

CMS or its agent may revoke a supplier's Medicare billing privileges and the corresponding supplier agreement if CMS or its agent determines upon on-site review that the supplier is "no longer operational to furnish Medicare covered items or services," has failed to satisfy Medicare enrollment requirements, or has failed to furnish covered items or services as required by statute or regulation. 42 C.F.R. § 424.535(a)(5)(ii). The decision to revoke a supplier's Medicare enrollment is an "initial determination" that is subject to the review procedures set forth in 42 C.F.R. Part 498. *Id.* § 498.3(a)(1), (b)(17). Under those procedures, a supplier "dissatisfied with an initial determination or revised initial determination related to the denial or revocation of Medicare billing privileges" may request reconsideration by filing a request for reconsideration within 60 days from receipt of the notice of initial determination, unless CMS or its agent determines there is "good cause" for extending the deadline. *Id.* §§ 498.5(1)(1), 498.22. A supplier "dissatisfied with a reconsidered determination . . . is entitled to a hearing before an ALJ." *Id.* § 498.5(1)(2). If a supplier does not request and receive reconsideration of an initial determination, then the initial determination is "binding." *Id.* § 498.20(b).

An ALJ may dismiss a hearing request “for cause” in three situations: when a previous determination of the same issues with the same parties has become final through “*res judicata*”; when the requesting party “is not a proper party or does not otherwise have a right to a hearing”; and when the requesting party “did not file a hearing request timely and the time for filing has not been extended.” 42 C.F.R. § 498.70(a)-(c).

Case Background¹

BHA is a supplier of ambulance services in Puerto Rico. On August 26, 2010, inspectors from a Zone Program Integrity Contractor conducted an on-site review at BHA’s listed business address. The inspectors did not locate a business office for BHA or observe any employees or activity involving ambulances. ALJ Decision at 1; CMS Exs. 3, 11. Based on this review, by letter dated September 30, 2010, First Coast Service Options, Inc. (First Coast), a Medicare Administrative Contractor that had previously approved BHA’s enrollment as a supplier in the Medicare program, notified BHA that it was revoking BHA’s Medicare billing number pursuant to 42 C.F.R. § 424.535(a)(5). First Coast explained that if BHA disagreed with the revocation decision, BHA could submit a corrective action plan within 30 days from the date of the letter, appeal the determination by filing a written request for reconsideration within 60 days from the date of the letter, or both.² ALJ Decision at 1-2; CMS Ex. 4, at 1-2.

On July 10, 2011, 284 days after the date of First Coast’s revocation letter, Dennis Aponte Rosario sent First Coast a letter requesting reconsideration of the revocation decision. ALJ Decision at 2. Mr. Aponte Rosario explained he had recently acquired BHA and first learned about its Medicare enrollment revocation when he tried to notify CMS about the ownership change. CMS Ex. 8, at 1. He asserted that the revocation was a “wrong decision based on incomplete data or a confusion of providers.” *Id.* at 2. Mr. Aponte Rosario contended that, instead of inspecting BHA’s premises, the inspectors had mistakenly inspected Health Care Ambulance Corp., which, he asserted, was an entirely separate ambulance company located in a different building at the same business address as BHA. *Id.* at 2-3.

¹ Background information is drawn from the ALJ Decision and the record before him and is not intended to substitute for his findings.

² As indicated above, the regulations actually require that a request for reconsideration be filed within 60 days of *receipt* of the initial determination, and provide a five-day presumption of receipt. 42 C.F.R. § 498.22(b)(3). However, BHA does not cite the discrepancy between the regulations and the text of the letter, and the discrepancy is not relevant to our decision.

In a letter dated August 18, 2011, First Coast notified Mr. Aponte Rosario that it had received his request for reconsideration and would issue a new decision based on the existing evidence in the case and any additional evidence he submitted within seven days of the date of the letter. ALJ Decision at 2; CMS Ex. 9. First Coast did not receive any further evidence. On September 14, 2011, First Coast dismissed Mr. Aponte Rosario's request for reconsideration on the grounds that the request was not filed within 60 days of the revocation letter and good cause did not exist for allowing late filing. ALJ Decision at 2; CMS Ex. 10.

BHA then requested a hearing before the ALJ to challenge the revocation. BHA conceded it did not timely request reconsideration of the initial revocation determination, but argued there was good cause for its failure to timely file a request. P. Amended Pre-Hearing Br. at 4. According to BHA, an on-site inspection never occurred at its place of business. BHA maintained that the inspectors instead conducted a review of Health Care Ambulance Corp., so there was no basis for revoking BHA's enrollment. BHA also argued that the initial revocation letter from First Coast referenced Health Care Ambulance Corp. rather than BHA, so the letter was misleading and provided defective notice. *Id.* at 3-5. BHA asserted that, based on these mistakes, it "reasonably believed the notice was sent in error and therefore did not file its reconsideration [request] until July 10, 2011." *Id.* at 4.

CMS moved to dismiss BHA's hearing request, arguing that BHA had failed to show good cause to extend the time for filing its request for reconsideration. CMS Mot. to Dismiss at 2. In the alternative, CMS contended the revocation should be affirmed on the merits because CMS had established an un rebutted, *prima facie* case that BHA's practice location was found to be non-operational. CMS Pre-Hearing Br. at 5-6.

The ALJ granted CMS's motion and dismissed BHA's hearing request, concluding that BHA had not established good cause for untimely filing its request for reconsideration. ALJ Decision at 3. The ALJ rejected BHA's argument that First Coast's revocation letter misled BHA into thinking the letter was actually meant for Health Care Ambulance Corp. and so could be ignored. The ALJ noted that the letter was addressed to BHA and referred to BHA's Medicare enrollment and billing numbers. *Id.* The ALJ also determined BHA could have raised its contention that the inspectors assessed the premises of another ambulance company within the 60-day period for requesting reconsideration. *Id.* BHA timely appealed to the Board.³

³ On July 5, 2012, the Presiding Board Member granted BHA's request for an extension of time to file a request for review for good cause shown. CMS asserted no objection to the extension until August 20, 2012, when it filed its brief opposing BHA's request for review. Opp. Br. at 1-2. We find no reason to disturb the Presiding Board Member's ruling.

Standard of Review

Our standard of review on a disputed issue of fact is whether the ALJ's decision is supported by substantial evidence in the record as a whole. Our standard of review on a disputed issue of law is whether the ALJ's decision is erroneous. See Departmental Appeals Board, *Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program (Guidelines)*, at <http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html>.

Analysis

On appeal, BHA challenges the ALJ's conclusion that it did not show good cause to extend the deadline for filing a request for reconsideration. According to BHA, evidence establishes that its practice site was never inspected, so First Coast did not have authority to revoke BHA's Medicare billing privileges. BHA maintains that "a revocation not grounded in law or in fact can never be waived by a party," so the ALJ should have concluded there was good cause for excusing BHA's untimely reconsideration request and allowed BHA to challenge its revocation on the merits rather than dismissing its request for a hearing. RR at 4.

BHA's argument is understandable since the ALJ Decision addressed as the issue before him whether First Coast correctly determined that BHA had not shown good cause for its untimely filing. ALJ Decision at 3-4. However, the regulations do not authorize this inquiry by an ALJ. As discussed above, section 498.5(1)(2) specifies that a supplier "dissatisfied with a reconsidered determination . . . is entitled to a hearing before an ALJ." 42 C.F.R. § 498.5(1)(2) (emphasis added). Thus, as the Board explained in two recent decisions that post-date the ALJ Decision, under the regulations "only reconsidered determinations related to the denial or revocation of billing privileges are eligible for ALJ review." *Denise A. Hardy, D.P.M.*, DAB No. 2464, at 4 (2012); cf. *Hiva Vakil, M.D.*, DAB No. 2460, at 5 (2012) (noting that "the regulations plainly require that CMS or one of its contractors issue a 'reconsidered determination' before the affected party is entitled to request a hearing before an ALJ"). Here, First Coast never issued a reconsidered determination. Instead, it dismissed BHA's request for reconsideration as untimely. In the absence of a reconsidered determination from First Coast, the initial revocation determination became binding. See 42 C.F.R. § 498.20(b).⁴

⁴ In light of the binding nature of First Coast's initial determination, the additional arguments raised by BHA – that its revocation contravenes the Administrative Procedure Act and that First Coast violated established CMS precedent by revoking BHA's Medicare enrollment after a single inspection (RR at 4, 7) – are irrelevant. In any event, BHA makes these arguments for the first time on appeal, and the Board does not consider issues "which could have been presented to the ALJ but were not." See *Guidelines*.

The ALJ's good-cause analysis is harmless error, however, because the ALJ correctly concluded that BHA did not have a right to a hearing. ALJ Decision at 1. BHA was not entitled to a hearing before an ALJ because First Coast did not make a reconsidered determination and only reconsidered determinations may be appealed to an ALJ.

Conclusion

For the foregoing reasons, we affirm the ALJ's dismissal of BHA's hearing request on the ground that BHA had no right to a hearing, but we do so based on the absence of a reconsidered determination from First Coast.

/s/

Leslie A. Sussan

/s/

Constance B. Tobias

/s/

Sheila Ann Hegy
Presiding Board Member